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## Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment

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# Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment†

THOMAS H. ODOM\*  
GREGORY S. FEDER\*\*

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† This article was submitted for publication August 4, 1998. In order to avoid any further delay in publication, several subsequent developments are not fully addressed herein but warrant brief mention here and in footnotes throughout the article. On September 3, 1998, the United States Court of Appeals for the Fourth Circuit invalidated the Act in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), based in part on the theory outlined herein. The United States petitioned for rehearing and suggested rehearing *en banc*. On December 22, 1998, the Fourth Circuit denied the petition. *Condon*, No. 97-2554 (4th Cir. Dec. 22, 1998). The United States filed a petition for a writ of certiorari on March 15, 1999. *Reno v. Condon*, 67 U.S.L.W. 3588 (U.S. Mar. 15, 1999) (No. 98-1464).

On December 3, 1998, the United States Courts of Appeals for the Tenth Circuit upheld the Act in *State of Oklahoma ex. rel Oklahoma Department of Public Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998) [hereinafter "*Oklahoma*"]. The State of Oklahoma filed a timely petition for rehearing with suggestion for rehearing *en banc*. The Tenth Circuit denied rehearing on February 2, 1999. *Oklahoma*, No. 97-6389 (10th Cir. Feb. 2, 1999). The State of Oklahoma sought and the Tenth Circuit granted a stay of the mandate pending the filing of a petition for a writ of certiorari. *Oklahoma*, No. 97-6389 (10th Cir. Feb. 11, 1999). Any petition for a writ of certiorari is due on or before May 3, 1999. See Sup. Ct. R. 13.1.

On December 16, 1998, the United States Court of Appeals for the Seventh Circuit upheld the Act in *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998). The State of Wisconsin filed a timely petition for rehearing with suggestion for rehearing *en banc* which the court denied on February 11, 1999. *Travis*, No. 98-2881 (7th Cir. Feb. 11, 1999). The State of Wisconsin moved for a stay of the mandate pending the filing of a petition for a writ of certiorari which the Seventh Circuit denied on February 19, 1999. *Travis*, No. 98-2881 (7th Cir. Feb. 19, 1999). Circuit Justice Stevens granted the stay on March 31, 1999. *Administration of the Division of Motor Vehicles v. Reno*, No. A-795 (U.S. Mar. 31, 1999). Any petition for a writ of certiorari is due on or before May 12, 1999. See Sup. Ct. R. 13.1.

These decisions create a circuit split that warrants Supreme Court review. The appellate decisions in each of the district court cases discussed herein and other subsequent developments are addressed in a forthcoming article. Thomas H. Odom & Marc R. Baluda, *The Department of Process-Oriented Federalism: Harmonizing the Supreme Court's Tenth Amendment Jurisprudence From Garcia Through Prinz*, 30 URB. LAW. (Summ. 1997) (forthcoming).

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The authors would also like to acknowledge the many attorneys involved in the DPPA litigation who have cooperated with them in developing and presenting arguments to the several Courts of Appeals, especially the Attorneys General and their staffs from the States of Alabama, Idaho, North Carolina, Oklahoma, South Carolina, Wisconsin, and Wyoming. In particular, the authors would like to thank their contact people in each of those offices: John J. Park, Jr. and Laura C. Walker (Alabama), Terry Coffin and Thorpe Orton (Idaho), James P. Smith, Thomas F. Moffitt, and Jeffrey Edwards (North Carolina), James R. Johnson (Oklahoma), Kenneth P. Woodington (South Carolina), Susan Ullman and Alan Lee (Wisconsin), and Jennifer Golden (Wyoming). Several other parties and *amici curiae* in the DPPA cases also cooperated: Jeffrey Jay Bender in the South Carolina litigation, John Deitrich in the Wisconsin litigation, and Anne C. Hayes and Pacific Legal Foundation in the Oklahoma, Alabama, and Wisconsin litigation. The authors would like to similarly acknowledge Deborah R. Douglas of the New York City Law Department who exchanged views with the authors regarding the City's pending Tenth Amendment challenge to other laws.

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I. INTRODUCTION

The constitutionality of the Driver’s Privacy Protection Act of 1994<sup>1</sup> (“DPPA”) is on a fast track for review by the United States Supreme Court. At present, the DPPA is being challenged in five actions around the country.<sup>2</sup> Although State Attorneys General and State legislators initiated the challenges, government watchdogs,<sup>3</sup> public interest groups,<sup>4</sup> and the press<sup>5</sup> have joined the fray as *amici curiae* in support of the challengers. The diversity of the challengers highlights the breadth and importance of the interests involved.

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1. Pub. L. No. 103-322, 108 Stat. 1766, 2099-2102 (codified at 18 U.S.C. §§ 2721-2725) (1994).

2. *Pryor v. Reno*, 998 F. Supp. 1317 (M.D. Ala. 1998), *argued on appeal*, No. 98-6261 (11th Cir. Nov. 30, 1998); *State of North Carolina v. Reno*, No. 5:98-CV-27-BR(3) (E.D.N.C. Sept. 29, 1998), *appeal docketed*, No. 98-2676 (4th Cir. Nov. 17, 1998), *stay granted pending filing and disposition of a petition for a writ of certiorari in Condon v. Reno*, No. 98-2676 (4th Cir. Jan. 28, 1999) [hereinafter *North Carolina*]; *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998), *rev’d*, 163 F.3d 1000 (7th Cir. 1998), *reh’g denied*, No. 98-2881 (7th Cir. Feb. 11, 1999), *stay of issuance of mandate pending filing of a petition for a writ of certiorari denied*, No. 98-2881 (7th Cir. Feb. 19, 1999), *stay of issuance of mandate pending filing of a petition for a writ of certiorari granted sub nom. Administrator of the Division of Motor Vehicles v. Reno*, No. A-795 (U.S. Mar. 31, 1999) (Sevens, Circuit Justice); *State of Oklahoma ex rel. Oklahoma Dep’t of Pub. Safety v. United States*, 994 F. Supp. 1358 (W.D. Okla. 1997), *rev’d*, 161 F.3d 1266 (10th Cir. 1998), *reh’g denied*, No. 97-6389 (10th Cir. Feb. 2, 1999), *stay of issuance of mandate pending filing of a petition for a writ of certiorari granted*, No. 97-6389 (10th Cir. Feb. 11, 1999) [hereinafter *Oklahoma*]; *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997), *aff’d*, 155 F.3d 453 (4th Cir.), *reh’g denied*, No. 97-2554 (4th Cir. Dec. 22, 1998), *petition for cert. filed*, 67 U.S.L.W. 3588 (U.S. Mar. 15, 1999) (No. 98-1464).

3. For example, Better Government Bureau, Inc. participated in the South Carolina and Oklahoma appeals.

4. For example, Pacific Legal Foundation participated in the South Carolina, Oklahoma, and Alabama appeals.

5. For example, in South Carolina’s challenge the following press organizations intervened in the district court and sought to appear on appeal as *amici curiae*: South Carolina Press Association, Virginia Press Association, North Carolina Press Association, West Virginia Press Association, Maryland/Delaware/District of Columbia Press Association, The Newspaper Association of America, and the American Society of Newspaper Editors. *See Condon*, 155 F.3d at 455 n.1.

Challenges to the DPPA raise issues under six constitutional provisions: the Tenth Amendment,<sup>6</sup> section five of the Fourteenth Amendment,<sup>7</sup> the First Amendment,<sup>8</sup> the Eleventh Amendment,<sup>9</sup> the Commerce Clause,<sup>10</sup> and the Guarantee Clause.<sup>11</sup> The first district court decision on the matter, *Condon v. Reno*,<sup>12</sup> established that the DPPA violated the Tenth Amendment and that the Act could not be viewed as an enactment pursuant to Section five of the Fourteenth Amendment. In *State of Oklahoma ex rel. The Oklahoma Department of Public Safety v. United States*,<sup>13</sup> a second district court reached the same conclusion, addressing the Fourteenth Amendment issue. In addition to these bases, the pending cases raise several other bases for striking down the DPPA. In *Pryor v. Reno*,<sup>14</sup> however, a third district court rejected most of these bases and upheld the validity of the DPPA.<sup>15</sup> Subsequently, in *Travis v. Reno*,<sup>16</sup> a fourth district court struck down the DPPA on Tenth Amendment grounds and held that the DPPA could not be saved by the Fourteenth Amendment. In *State of North Carolina v. Reno*,<sup>17</sup> the fifth and final district court summarily held the DPPA unconstitutional on the basis of the *Condon* decision. This division of authority on significant constitutional issues reinforces the view that Supreme Court review will be certain and swift.<sup>18</sup>

6. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

7. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5.

8. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

9. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state." U.S. CONST. amend. XI.

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

11. "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

12. 972 F. Supp. 977 (D.S.C. 1997).

13. 994 F. Supp. 1358 (W.D. Okla. 1997).

14. 998 F. Supp. 1317.

15. *Id.* (On March 13, 1998, the United States District Court for the Middle District of Alabama found the DPPA to be constitutional.).

16. 12 F. Supp. 2d 921.

17. No. 5:98-CV-27-BR(3) (E.D.N.C. Sept. 29, 1998), *appeal docketed*, No. 98-2676 (4th Cir. Nov. 17, 1998) [hereinafter "*North Carolina*"]. The Fourth Circuit held this appeal in abeyance pending its resolution of the pending petition for rehearing in *Condon. North Carolina*, No. 98-2676 (4th Cir. Dec. 7, 1998). The court denied the petition in *Condon. Condon*, No. 97-2554 (4th Cir. Dec. 22, 1998). The Fourth Circuit then issued an order granting a second stay of the appeal, pending the filing and disposition by the United States Supreme Court of a petition for a writ of certiorari in *Condon. North Carolina*, No. 98-2676 (4th Cir. Jan. 28, 1999). The United States filed its petition in *Condon* on March 15, 1999.

18. As this article goes to press, the division in authorities has developed into a split between

The decisions in the DPPA cases and the subsequent appellate briefing hinge on several of the most prominent Supreme Court decisions of the last decade. *Condon*, *Oklahoma*, and *Travis* expressly relied on Tenth Amendment limitations articulated in *Printz v. United States*<sup>19</sup> and *New York v. United States*.<sup>20</sup> An alternative Tenth Amendment analysis<sup>21</sup> derives force from free press and free exercise decisions including *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>22</sup> *Cohen v. Cowles Media Co.*,<sup>23</sup> and *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>24</sup> Any argument regarding whether the DPPA is a valid enactment under section five of the Fourteenth Amendment must address *City of Boerne v. Flores*.<sup>25</sup> An Eleventh Amendment analysis must consider *Seminole Tribe of Florida v. Florida*.<sup>26</sup> A commerce clause challenge relies heavily upon *United States v. Lopez*<sup>27</sup> and, to a lesser extent, upon *Lebron v. National Railroad Passenger Corp.*<sup>28</sup> A guarantee clause argument derives its force from discussion in *New York*<sup>29</sup> and *Gregory v. Ashcroft*.<sup>30</sup> The DPPA litigation presents the vehicle for building upon or retreating from one or more of these recent decisions.

*Condon* and *Oklahoma* are now fully briefed and pending before the United States Courts of Appeals for the Fourth and Tenth Circuits, respectively.<sup>31</sup> The decision in *Pryor* in the State of Alabama's Elev-

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the Fourth Circuit, on one hand, and the Seventh and Tenth Circuits, on the other hand. See *supra* note † and *infra* note 31. The United States has requested Supreme Court review.

19. See *Travis*, 12 F. Supp. 2d at 927-29 (citing *Printz*); *Oklahoma*, 994 F. Supp. at 1361, 1363 (same); *Condon*, 972 F. Supp. at 984-86 (same).

20. See *Travis*, 12 F. Supp. 2d at 926, 928-29 (citing *New York*); *Oklahoma*, 994 F. Supp. at 1361, 1363 (same); *Condon*, 972 F. Supp. at 982-86 (same).

21. See *infra*, discussion in Part V.B.

22. 508 U.S. 520 (1993).

23. 501 U.S. 663 (1991).

24. 494 U.S. 872 (1990).

25. 117 S. Ct. 2157 (1997).

26. 517 U.S. 44 (1996).

27. 514 U.S. 549 (1995).

28. 513 U.S. 374 (1995). *Lebron* may be viewed as the precursor to *Lopez* in that *Lebron* held that, although Congress may be free to define terms and declare their meaning for statutory purposes, its exercise in applying a counterfactual name cannot change the substance of matters for purposes of constitutional analysis. *Lebron*, 513 U.S. at 392.

29. 505 U.S. at 183-86.

30. 501 U.S. 452, 463 (1991).

31. Since the time this article was written, both the Fourth and Tenth Circuits have ruled in those appeals. On September 3, 1998, a divided panel of the Fourth Circuit affirmed and held the DPPA is unconstitutional. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). On October 15, 1998, the United States sought rehearing of the panel decision before the *en banc* Fourth Circuit. On November 2, 1998, South Carolina filed its answer and on November 9, 1998, the Fourth Circuit accepted the *amici curiae's* tendered memorandum in support of South Carolina's position that rehearing was unwarranted. On December 22, 1998, the Fourth Circuit denied the petition

enth Circuit appeal is currently being briefed.<sup>32</sup> The United States appealed to the Seventh Circuit from the district court's decision in *Travis* on July 22, 1998.<sup>33</sup> Finally, one additional case is pending at the trial level in the United States District Court for the Eastern District of North Carolina.<sup>34</sup> Given the importance of the issues involved and the nature of the parties (States and the federal government), the DPPA litigation is prime for the Supreme Court. The number of independent challenges make it extremely unlikely that the constitutional issues will be uniformly resolved without such review.<sup>35</sup>

The DPPA litigation also highlights the conflict between an interest in privacy with respect to information and long-held beliefs in the public good that flows from open records and open government. Concern with appearing to oppose a privacy interest has chilled the political leadership of more than one State from raising a constitutional challenge to the DPPA.

Part II of this article presents an historical background addressing the impetus for the DPPA, its legislative history, and the legal context in

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without issuing any further opinion. The United States filed a petition for a writ of certiorari on March 15, 1999. See 67 U.S.L.W. 3588 (U.S. Mar. 15, 1999) (No. 98-1464).

On December 3, 1998, a panel of the Tenth Circuit reversed and held the DPPA is constitutional. *State of Oklahoma ex rel. Oklahoma Dep't of Public Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998). The State of Oklahoma filed a timely petition for rehearing with suggestion for rehearing *en banc* on January 19, 1999. The Tenth Circuit denied rehearing on February 2, 1999. *Oklahoma*, No. 97-6389 (10th Cir. Feb. 2, 1999).

32. Briefing is now completed and the Eleventh Circuit heard oral argument on November 30, 1998.

33. Briefing is now completed, the Seventh Circuit heard oral argument on November 12, 1998, and the panel issued its decision reversing the district court on December 16, 1998. *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998). The State of Wisconsin filed a petition for rehearing with suggestion for rehearing *en banc* which the Seventh Circuit denied on February 11, 1999. *Travis*, No. 98-2881 (7th Cir. Feb. 11, 1999). The State of Wisconsin moved for a stay of the mandate pending the filing of a petition for a writ of certiorari which the Seventh Circuit denied on February 19, 1999. *Travis*, No. 98-2881 (7th Cir. Feb. 19, 1999). Circuit Justice Stevens granted the stay on March 31, 1999, *Administrator of the Division of Motor Vehicles v. Reno*, No. A-795 (U.S. Mar. 31, 1999) (Stevens, Circuit Justice).

34. That case, *State of North Carolina v. Reno*, No. 5:98-CV-27-BR(3) (E.D.N.C. filed Jan. 13, 1998), has moved forward during the pendency of this article. Based on the panel decision in *Condon*, the district court granted summary judgment to North Carolina in its challenge. See *State of North Carolina v. Reno*, No. 5:98-CV-27-BR(3) (E.D.N.C. Sept. 29, 1998). The Fourth Circuit docketed the United States' appeal on November 17, 1998. The Fourth Circuit held proceedings in abeyance pending a ruling on the rehearing petition in *Condon*. *North Carolina*, No. 98-2676 (4th Cir. Dec. 7, 1998). The court denied the petition in *Condon*. *Condon*, No. 97-2554 (4th Cir. Dec. 22, 1998). Thereafter, the Fourth Circuit granted the United States' motion for a second stay, pending the filing and disposition by the United States Supreme Court of a petition for a writ of certiorari on *Condon*. *North Carolina*, No. 98-2776 (4th Cir. Jan. 28, 1999). The United States filed its petition in *Condon* on March 15, 1999.

35. With the subsequent rulings by panels of the Fourth, Seventh and Tenth Circuits, and the refusal of each of those courts to consider the panel rulings *en banc*, a circuit split currently exists.

which it was enacted. Part III discusses the public policies and historical tradition displaced by the DPPA, with emphasis on the pre-existing law in the States that are now challenging the DPPA. Part IV outlines, summarily, the full range of constitutional issues presented in the DPPA litigation. Part V analyzes the Tenth Amendment issues in greater depth and explains how the DPPA litigation directs attention to the next logical development in process-oriented federalism.

## II. HISTORICAL BACKGROUND

In 1994, Congress enacted the DPPA, which compels States to regulate disclosure of information from their motor vehicle records in accordance with a declared uniform national policy. The DPPA is directed exclusively at the States and does not address records containing any or all of the same information independently compiled by the national government or by private parties.

Part II(A) describes the statutory scheme created by the DPPA. Part II(B) addresses the impetus for enactment of the DPPA, a law directed solely to one specific source of information. Part II(C) summarizes the legislative history of the DPPA's enactment, including testimony alerting Congress that its measure might be underinclusive. Part II(D) discusses the legal context within which Congress legislated, including references to the numerous federal sources of the same information subject to the DPPA which Congress did not address.

### A. *The DPPA Statutory Scheme*

The DPPA establishes a general rule for State disclosure of "personal information"<sup>36</sup> from a "motor vehicle record,"<sup>37</sup> a series of exceptions to that rule, and rules for re-disclosure of information by those authorized to obtain it. The DPPA criminalizes engaging in actions that would circumvent its restrictions, and provides a series of penalties and remedies.

#### 1. GENERAL RULE OF NON-DISCLOSURE

The centerpiece of the DPPA is its general prohibition articulated in the very first subsection of the Act: "[A] State department of motor

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36. This term is defined to mean "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3) (1994).

37. This term is defined to mean "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." *Id.* § 2725(1).

vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record."<sup>38</sup> For purposes of this prohibition to a "person," the DPPA provides that the term "means an individual, organization or entity, but does not include a State or an agency thereof."<sup>39</sup>

## 2. EXCEPTIONS MANDATING DISCLOSURE

The general prohibition on the release of personal information is qualified by a five exceptions which mandate disclosure. Several of the five exceptions contain numerous subparts. The DPPA provides that personal information

shall be disclosed for use in connection with matters of [1] motor vehicle or driver safety and theft, [2] motor vehicle emissions, [3] motor vehicle product alterations, recalls, or advisories, [4] performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and [5] removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49.<sup>40</sup>

The scope of these mandatory disclosure exceptions is subject to several ambiguities.

It is unclear how expansively one should construe the phrase "for use in connection with matters of."<sup>41</sup> This phrase potentially swallows the general prohibition of disclosure and permits anyone to claim entitlement to personal information from motor vehicle records. For example, a criminal desiring access to her victim's personal information could purport to be preparing comments for submission to the Secretary of Transportation regarding bumper safety standards.<sup>42</sup> She could claim that in order to support her comments she needs to contact owners of a particular type of automobile (matching her victim's automobile) in order to survey their experience. The criminal could even assert that she is contacting only a sample of the owners and that she needs only the

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38. 18 U.S.C. § 2721(a) (1994).

39. *Id.* § 2725(2). It was on this basis that the district court in *Pryor* rejected Alabama's Eleventh Amendment argument. *See Pryor v. Reno*, 998 F. Supp. 1317, 1332 (M.D. Ala. 1998).

40. 18 U.S.C. § 2721(b) (flush language) (brackets added).

41. A similar issue arises with respect to the phrase "to carry out the purposes of" the specified federal statutes.

42. *See* 49 U.S.C. § 32502(3) (1994).

same personal information that would permit her to locate intended victim. Faced with such a request, a State could be required to disclose the information. This problem could be mitigated by reading the phrase narrowly.<sup>43</sup> The text of the DPPA, however, provides little guidance to States seeking to administer the general prohibition against disclosure with the mandated disclosure requirements. Moreover, California's formal analysis of the DPPA concluded that the mandatory disclosure provision is not subject to a narrow reading so that the DPPA actually mandates the disclosure of more information than was the case prior to the DPPA.<sup>44</sup>

The mandatory disclosure requirements contain another significant ambiguity. A natural reading of the text suggests that the five exceptions may be defined in the manner suggested by the inserted bracketed numbers which do not appear in the statute.<sup>45</sup> An alternative but less grammatical reading suggests that the language "to carry out the purposes of" the specified statutes modifies all five of the preceding exceptions rather than simply the final one.<sup>46</sup> This alternative reading gathers support from the correlation between the subject matter of the referenced statutory provisions and all five of the exceptions.<sup>47</sup>

43. Traditionally, rules of statutory construction favor narrow readings of exceptions and provisos. See 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.11 (5th ed. 1992 & 1998 Supp.) [hereinafter "SUTHERLAND"]. This rule of construction has been followed in the federal courts. See *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 52 (1955); *Piedmont & Northern Ry. v. Interstate Commerce Comm'n*, 286 U.S. 299, 311-12 (1931); *Spokane & Inland Empire R.R. v. United States*, 241 U.S. 344 (1916).

44. See Attorney General's Opinion No. 95-805, 79 Op. Cal. Att'y Gen. 76, 81 (1996) (concluding the DMV must disclose personal information "to anyone effectuating the purposes of" the specified federal statutes).

45. "Had the modifying phrase been intended to relate to more than its last antecedent, a comma could have been used to set off the modifier from the entire series." *National Sur. Corp. v. Midland Bank*, 551 F.2d 21, 34 (3d Cir. 1977) (citation omitted); see also 2A SUTHERLAND, *supra* note 43, § 47.33 ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.").

46. See 2A SUTHERLAND, *supra* note 43, § 47.26 (modifying words "should be applied to the subjects that seem most properly related by context and applicability") (citing *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803)). The California Attorney General's analysis silently adopts this approach. See Attorney General's Opinion No. 95-805, 79 Op. Cal. Att'y Gen. at 81.

47. Titles I and IV of the Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384, 3384-89, 3400-01, are codified at 15 U.S.C. §§ 1901 note, 2041 note, 18 U.S.C. §§ 553(a), 981(a)(1)(F), 982(a)(5), 2119, 2312, 2313(a), 2322, 19 U.S.C. §§ 1646(b), 1646(b) note & 1646(c), 42 U.S.C. § 3750. Title I provides enhanced penalties for auto theft, targeted law enforcement to curb motor vehicle theft and related violence, and establishes a task force to study State motor vehicle titling programs to combat motor vehicle thefts and fraud. Title IV provides for random inspection of automobiles being exported to determine whether the automobiles were stolen.

Title 49, chapter 301 addresses motor vehicle safety through the imposition of safety standards prescribed by the Secretary of Transportation. 49 U.S.C. §§ 30101-30169. Title 49, chapter 305 establishes the National Motor Vehicle Title Information System which is designed to

One may argue that the exceptions should be construed narrowly under a canon of statutory construction.<sup>48</sup> The narrower reading is the one that limits all five of the exceptions to the context provided by the cross-referenced statutes rather than a reading that broadly exempts disclosure without such additional limiting language. The purpose of reading the mandatory disclosure exceptions in that narrower sense is so that the DPPA as a whole can be harmonized. For example, a narrow reading of the mandatory disclosure for “use in connection with matters of motor vehicle or driver safety and theft”<sup>49</sup> avoids rendering redundant the permissive disclosure for “use in connection with matters of motor vehicle or driver safety and theft” contained in the very same section of the Act.<sup>50</sup>

The fourth mandatory disclosure provision, however, lends no sup-

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facilitate access to information maintained by the States on automobile ownership. 49 U.S.C. §§ 30501-30505. States may receive grants for participating in the system. *Id.* § 30503(c). Title 49, chapter 321 simply provides appropriations and defines terms with respect to information, standards, and requirements addressed in subsequent chapters. 49 U.S.C. §§ 32101-32102. Title 49, chapter 323 establishes a program for the preparation and dissemination of information to consumers regarding crashworthiness, vehicle operating costs, insurance cost, and similar matters. 49 U.S.C. §§ 32301-32309. Title 49, chapter 325 addresses motor vehicle safety through the imposition of safety standards for bumpers as prescribed by the Secretary of Transportation. 49 U.S.C. §§ 32501-32511. Title 49, chapter 327 addresses the integrity of motor vehicle odometers. 49 U.S.C. §§ 32701-32711. Title 49, chapter 329 addresses automobile fuel economy, authorizes the President to prescribe standards for vehicles leased by federal executive agencies, and authorizes the Secretary of Transportation to prescribe standards: setting average fuel economy standards for manufacturers, and relating to vehicles that operate on alternative fuels and incentives to manufacture such vehicles. 49 U.S.C. §§ 32901-32919. Title 49, chapter 331 addresses theft prevention by requiring the Secretary of Transportation to prescribe standards addressing major automobile parts of models subject to high theft rates. 49 U.S.C. §§ 33101-33118. The chapter also establishes the National Stolen Passenger Motor Vehicle Information System which inventories stolen motor vehicle parts and motor vehicles by their vehicle identification number. *Id.* § 33109.

48. *See* note 43 *supra*.

49. 18 U.S.C. § 2721(b) (flush language).

50. *Id.* § 2721(b)(2). A broad reading of the second and third mandatory exceptions would similarly render meaningless permissive exceptions contained within the same section. Both a mandatory and a permissive exception address disclosure for use in connection with “motor vehicle emissions.” *Compare* 18 U.S.C. § 2721 (flush language) *with id.* § 2721(b)(2). Similarly, both a mandatory and a permissive exception address disclosure for use in connection with “motor vehicle product alterations, recalls, or advisories.” *Compare* 18 U.S.C. § 2721 (flush language) *with id.* § 2721(b)(2). Because the limiting language at the end of the fifth and final mandatory exception must modify the terms of that exception under either view, it is largely irrelevant to this analysis. A comparison of the parallel provisions does weakly support the unavoidable narrow reading of the fifth and final mandatory exception. By limiting the mandatory exception “to carry out the purposes of” the specified laws, the permissive exception is not rendered redundant. The parallel permissive disclosure provision addresses disclosure for use in connection with “removal of non-owner records from the original owner records of motor vehicle manufacturers.” 18 U.S.C. § 2721(b)(2). The permissive provision does not purport to limit such disclosures with reference to the purposes of specified federal laws and thus (at least theoretically) permits broader disclosure than the mandatory exception.

port to this line of reasoning. This exception addresses disclosure for use in connection with "performance monitoring of motor vehicles and dealers by motor vehicle manufacturers,"<sup>51</sup> while the parallel permissive exception addresses disclosure for use in connection with "performance monitoring of motor vehicles, motor vehicle parts and dealers."<sup>52</sup> Because of the differences in the language of these provisions, the broader and more natural reading of the mandatory exception would not render the permissive disclosure exception wholly redundant. The permissive disclosure exception expands coverage to reach "motor vehicle parts" and is not limited to monitoring "by motor vehicle manufacturers." While comparison of the fourth mandatory disclosure exception to its parallel permissive disclosure exception does not depend on a narrow construction of the mandatory disclosure provision to avoid redundancy, there is nothing in the comparison to bar a further narrowing construction. Consequently, considering the text of the mandatory disclosure provisions in light of their parallel permissive disclosure provisions supports a narrow construction of the exceptions mandating disclosure.

Viewing the DPPA in its entirety, however, reveals serious problems with a narrow construction of the exceptions mandating disclosure. For example, a narrow reading of the mandatory disclosure provisions with a concomitantly broad reading of the parallel permissive disclosure provisions (so as to give different meaning to each provision) potentially renders meaningless other permissive disclosure provisions. One may broadly read the permissive disclosure provision for "use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers."<sup>53</sup> Doing so, however, leaves little, if any, independent meaning for the exception permitting disclosure "[f]or any other use specifically authorized under the law of the State that holds the record, *if such use is related to the operation of a motor vehicle or public safety.*"<sup>54</sup>

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51. 18 U.S.C. § 2721 (flush language).

52. *Id.* § 2721(b)(2).

53. 18 U.S.C. § 2721(b)(2).

54. *Id.* § 2721(b)(14) (emphasis added). Conceivably one could construe the mandatory disclosure provision to address only disclosures "to carry out the purposes of" the specified federal laws, the permissive (b)(2) exception to address only disclosures under any other federal law, and the permissive (b)(14) exception to address only disclosures under State law. While such a reading gives independent meaning to each of the provisions, it entails writing into (b)(2) "to carry out the purposes of any federal law not previously referenced in this section," as well as

In addition, a narrow reading of the mandatory disclosure provisions may render them meaningless within the framework of the entire DPPA. As noted above, the DPPA only prohibits disclosure of information that is derived, directly or indirectly, from a "motor vehicle record."<sup>55</sup> The DPPA defines a "motor vehicle record" in terms that suggest only official State records are addressed: "'motor vehicle record' means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles."<sup>56</sup> It is difficult to understand how some of the statutes cross-referenced at the end of the final exception mandating disclosure involve any "motor vehicle record" as defined by the DPPA rather than records compiled and maintained by motor vehicle manufacturers, dealers, insurers and other private parties.

For example, title 49, chapter 323, establishes a program for the collection of information to be disseminated to consumers. The Secretary of Transportation is authorized to "require an insurer, or a designated agent of the insurer" to provide information "by make, model, and model year of passenger motor vehicle" with respect to personal injuries and property damage (including repair costs).<sup>57</sup> The Secretary is also authorized to require an insurer to provide actuarial data linking insurance premiums to the risk of personal and property damage.<sup>58</sup> The Secretary may request necessary information "from a department, agency, or instrumentality of the United States Government."<sup>59</sup> No provision appears to be directed to "motor vehicle records" as defined by the DPPA. Indeed, the only provision that seems broad enough to encompass such records is the Secretary's investigative power to "inspect and copy records of any person at reasonable times."<sup>60</sup> It is unlikely, how-

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ignoring the grammar of the mandatory disclosure provisions. While such a construction is possible, it is certainly not obvious.

55. See 18 U.S.C. 2721(a).

56. 18 U.S.C. § 2725(1).

57. 49 U.S.C. § 32303(a)(1).

58. *Id.* § 32030(b).

59. 49 U.S.C. § 32305(a) (emphasis added). A State is not an instrumentality of the United States Government. See *New York*, 505 U.S. at 188 ("State governments are neither regional offices nor administrative agencies of the Federal Government."); see also *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 341 (1968) (holding State-chartered banks are not instrumentalities of the United States); 49 U.S.C. § 32511(c) (separately listing the "United States Government, a State, or a political subdivision of a State"). Moreover, the specific provision authorizing the Secretary to request information only from other parts of the federal government suggests the lack of power to require information from State governments.

60. 49 U.S.C. § 32307(a)(1). Neither the section nor the chapter define the term "person." Title 49 does not contain its own definition of "person" applicable throughout the Title. The public laws that added these provisions contained no such definition. The Dictionary Act, 1 U.S.C. § 1, does provide a definition of "person" for purposes of statutory construction. That definition includes "corporations, companies, associations, firms, partnerships, societies, and joint

ever, that the broad language employed in the inspection provision is sufficiently specific to permissibly extend to State records.<sup>61</sup>

As such, the referenced statutes appear to be mere surplusage if the mandatory disclosure provisions are read as though the referenced statutes modify each of the exceptions. In short, the scope of the mandatory disclosure provisions is ambiguous at best and unconstitutionally vague at worst.<sup>62</sup>

### 3. EXCEPTIONS PERMITTING DISCLOSURE

The general prohibition on the release of personal information is subject to additional exceptions, allowing for ten broad permissible uses, including disclosure for use: (1) by any government agency "in carrying out its functions,"<sup>63</sup> (2) "in connection with matters of motor vehicle or driver safety and theft,"<sup>64</sup> (3) "in the normal course of business by a

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stock companies, as well as individuals." *Id.* Even if that definition was incorporated into 49 U.S.C. § 32307(a)(1), the definition does not include States despite an extensive list of other entities. Under similar circumstances, the Supreme Court interpreted provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, not to apply to the United States despite language sufficiently general to go so far. *See United States v. United Mine Workers*, 330 U.S. 258, 272-73 (1947). The Court's rationale — that express language is required to subject a sovereign to the general terms of a statute — is equally applicable with respect to the Dictionary Act and to States.

61. *See Gregory v. Ashcroft*, 501 U.S. 452, 464, 467 (1991).

A second example further demonstrates the point. Title 49, chapter 325 addresses motor vehicle safety through the imposition of safety standards for bumpers. The Secretary is required "to conduct research" in order to formulate the appropriate standards without any reference to the sources of data she may command. 49 U.S.C. § 32502(g). Manufacturers and distributors are required to certify compliance with the standard. 49 U.S.C. § 32504. The Secretary may require the manufacturer to maintain records and provide reports. 49 U.S.C. § 32505(a)(1)(A)-(B). The Secretary may also request necessary information "from a department, agency, or instrumentality of the United States." *See Gregory*, 501 U.S. at 464, 467. As in the previous example, the only provisions apparently applicable to DPPA-defined "motor vehicle records" are those that permit the Secretary to require "any person" to permit inspection of records, provide written reports, and appear as a witness with such records the Secretary requires. 49 U.S.C. § 32505(b). Here again, one of the statutes referenced after the final mandatory disclosure exception does not seem to reach "motor vehicle records" as defined by the DPPA.

62. The DPPA is a penal statute imposing potential criminal liability. *See* 18 U.S.C. §§ 2722, 2723(a). As such, courts generally require greater clarity. *See* 3 SUTHERLAND, *supra* note 43, § 59.04.

63. 18 U.S.C. § 2721(b)(1).

64. *Id.* § 2721(b)(2). This exception includes disclosure relating to emissions regulations as well as motor vehicle alterations, recalls or advisories. It also permits disclosure for "performance monitoring of motor vehicles" and "motor vehicle parts and dealers." This exception also extends to "motor vehicle market research activities, including survey research." *Id.* In addition, the DPPA contains a separate exception for "any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety." *Id.* § 2721(b)(14). It is unclear what, if anything, the (b)(14) exception adds which is not already encompassed in the (b)(2) exception. Moreover, it is extremely difficult to read the (b)(2) exception narrowly because doing so makes it redundant of the mandatory disclosure exceptions. *See* 18 U.S.C. § 2721(b) (flush language); *supra* notes 45-52.

legitimate business or its agents, employees, or contractors, but only” for very limited purposes,<sup>65</sup> (4) in connection with proceedings before any court, governmental agency, or self-regulatory body,<sup>66</sup> (5) in research activities and in preparation of statistical reports,<sup>67</sup> (6) by insurers in connection with claims investigations, antifraud activities, rating, or underwriting,<sup>68</sup> (7) “in providing notice to the owners of towed or impounded vehicles,”<sup>69</sup> (8) “by any licensed private investigative agency or licensed security service for any purpose permitted” by any of the other enumerated exceptions,<sup>70</sup> (9) “by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver’s license,”<sup>71</sup> and (10) “in connection with the operation of private toll transportation facilities.”<sup>72</sup>

In addition to these exceptions, the DPPA contains three special exceptions that require further analysis. First, the DPPA permits disclosure of personal information for “any other use” provided that the State

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65. *Id.* § 2721(b)(3). The permitted uses are “to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors” and, if the information provided by the individual is incorrect, “to obtain the correct information, but only for the purpose of preventing fraud by, pursuing legal remedies against, or recovering a debt or security interest against, the individual.” *Id.* This exception would appear to permit any legitimately employed individual to obtain personal information about a co-worker under the pretext of acting on his employer’s behalf.

This exemption would appear to permit States to disseminate photographs or digital images to legitimate businesses that sought to verify the accuracy of a purchaser’s identification in connection with the presentation of a check or credit card. In fact, the United States encouraged the development of such a system using information contained in State motor vehicle records. See Robert O’Harrow Jr. & Liz Leyden, *U.S. Helped Fund Photo Database of Driver IDs*, THE WASHINGTON POST, Feb. 18, 1999, at A1.

66. See 18 U.S.C. § 2721(b)(4). This exception specifically permits use of the information in connection with “service of process, *investigation in anticipation of litigation*, and the execution or enforcement of judgments and orders.” *Id.* (emphasis added). By permitting disclosure with respect to potential litigation, the DPPA appears to allow the release of information to anyone who claims to be a tort victim exploring his or her remedies.

67. See *id.* § 2721(b)(5). The personal information obtained under this exception may not be published, redisclosed, or used to contact individuals. *Id.* It would seem that virtually anyone, including criminals of any sort, could claim to be engaged in some sort of research.

68. See *id.* § 2721(b)(6). This exception is available to “any insurer or insurance support organization, or by a *self-insured entity*, or its agents, employees, or contractors.” *Id.* (emphasis added). It is unclear whether use of the undefined term “entity” permits disclosure to any individual, including a potential stalker, who does not carry homeowners’ or tenants’ insurance policies.

69. *Id.* § 2721(b)(7).

70. *Id.* § 2721(b)(8). This exception would appear to permit any criminal employed as a part-time security guard to obtain personal information under the pretext of a job-related inquiry. With respect to the provision for licensed private investigators, it is notable that some States—including Alabama, Colorado, Idaho, Mississippi, and South Dakota—do not require private investigators to have licenses. See Peter Maas, *How Private is Your Life?*, PARADE, Apr. 19, 1998, at 4, 6.

71. 18 U.S.C. § 2721(b)(9).

72. *Id.* § 2721(b)(10).

implements an "opt-out" procedure whereby individuals can choose to avoid disclosure of personal information. This "opt-out" exception explicitly requires State legislative or administrative action for implementation:

For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.<sup>73</sup>

Second, the DPPA permits disclosure for "bulk distribution for surveys, marketing, or solicitations" provided that States adopt an "opt-out" procedure:

For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.<sup>74</sup>

Implementation of these "opt-out" provisions imposes significant administrative and financial burdens on States that adopt them. Moreover, States willing to shoulder these burdens still lose the benefits of a public policy of open disclosure to the extent that individuals choose to opt out.

Third, the DPPA also allows disclosure to any requester provided "the requester demonstrates it has obtained the written consent of the individual to whom the information pertains."<sup>75</sup> The DPPA does not require that such written consent be verified. It would appear that any potential criminal need only forge his victim's consent to comply with the DPPA.

The DPPA also contains a "waiver" procedure that appears to largely duplicate the exemption for disclosure on written authorization. This provision states:

A State motor vehicle department may establish and carry out

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73. *Id.* § 2721(b)(11).

74. *Id.* § 2721(b)(12).

75. *Id.* § 2721(b)(13).

procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.<sup>76</sup>

This apparently redundant waiver provision may serve as more than merely a catch-all provision. Because the waiver provision waives all rights under the entire section, which includes the general prohibition,<sup>77</sup> it raises the possibility of a loophole that could permit circumvention of the redisclosure limitations.

#### 4. LIMITATIONS ON REDISCLOSURE

The DPPA also restricts certain redisclosure of information obtained in accordance with its terms. An authorized recipient of information under the basic "opt-out" provision "may resell or redisclose information for any purpose."<sup>78</sup> An authorized recipient of information under the (b)(12) bulk distribution exception "may resell or redisclose personal information pursuant to subsection (b)(12)" only.<sup>79</sup> Any other authorized recipients of personal information "may resell or redisclose the information only for a use permitted" by the specified exceptions other than exceptions (b)(11) and (b)(12).<sup>80</sup> In order to monitor compliance with the redisclosure restrictions, records of any redisclosure must be maintained for a period of five years.<sup>81</sup>

The restriction on redisclosure indicates that, with one exception, it applies to any authorized recipient which should include not only recipients under the exceptions, but also recipients of personal information under the waiver provision. Because the waiver provision<sup>82</sup> is a separate subsection, however, there is the danger that it might be read in isolation, thereby opening an avenue to unrestricted redisclosure.

#### 5. RELATED PROHIBITED CONDUCT

The DPPA declares that "[i]t shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor

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76. *Id.* § 2721(d).

77. *Id.* § 2721(a).

78. *Id.* § 2721(c).

79. *Id.*

80. *Id.*

81. *See id.* The person making such redisclosure must record each person or entity to which the information was disclosed and "the permitted purpose for which the information will be used."  
*Id.*

82. *Id.* § 2721(d).

vehicle record, for any use not permitted under section 2721(b) of this title.”<sup>83</sup> That prohibition overlooks the permitted disclosure under the waiver provision.<sup>84</sup> The DPPA also criminalizes the making of “false representation[s] to obtain any personal information from an individual’s motor vehicle record.”<sup>85</sup>

## 6. PENALTIES AND REMEDIES

The DPPA imposes a criminal fine on any “person”<sup>86</sup> who knowingly violates its terms. Although a State and its agencies are excluded from the DPPA definition of a “person,” it appears that the definition does not exclude counties, municipalities, and other local governments.<sup>87</sup>

In addition, the DPPA provides for the imposition of civil fines on States:

Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than \$5,000 a day for each day of substantial noncompliance.<sup>88</sup>

Thus, entities entitled to Tenth Amendment protection are subjected to civil (and possibly criminal) fines.

The DPPA also creates a private cause of action for civil liability and establishes the United States district courts as the fora to hear those claims.<sup>89</sup> The court has authority to award a broad range of relief in these actions. The court may award “actual damages, but not less than liquidated damages in the amount of \$2,500.”<sup>90</sup> Upon finding willful or reckless disregard of the law, the court may also award punitive damages without any stated cap.<sup>91</sup> The court may shift the expense of reasonable attorney’s fees and other litigation costs,<sup>92</sup> thereby removing much of the disincentive to bring an action. Finally, the court may order

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83. *Id.* § 2722(a).

84. *Id.* § 2721(d).

85. *Id.* § 2722(b).

86. *See supra* text accompanying note 39 (defining “person”).

87. This failure to exclude local governments from potential criminal liability is significant as local governments benefit from the same Tenth Amendment protections as the State itself. *See* *Printz v. United States*, 117 S. Ct. 2365, 2382 n.15 (1997).

88. 18 U.S.C. § 2723(b) (1994).

89. *Id.* § 2724(a) (“A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.”).

90. *Id.* § 2724(b)(1).

91. *Id.* § 2724(b)(2).

92. *Id.* § 2724(b)(3).

other preliminary and equitable relief as it deems necessary.<sup>93</sup>

From the perspective of State and local governments, the DPPA's penalties and liabilities appear substantial. Avoidance of those penalties and liabilities requires changes in State law and administration, as well as displacement of State public policy. Yet the exceptions to the general rule of nondisclosure appear to open numerous loopholes in the statute. Thus, a cursory review of the DPPA invites an inquiry into its impetus and legislative history.

### B. *The DPPA Was Enacted as an Anti-Stalking Measure*

Congress enacted the DPPA primarily as an anti-stalking measure after the highly-publicized stalking death of actress Rebecca Schaeffer on July 18, 1989.<sup>94</sup> Prosecutors successfully alleged that Robert John Bardo was an obsessed fan who had "stalked" and fatally shot Schaeffer after obtaining her address and other personal information from a private detective.<sup>95</sup> The private detective agency reportedly obtained the information from Schaeffer's motor vehicle records.<sup>96</sup>

In 1990, in response to this stalking and murder, California enacted an anti-stalking law. Under that law, a stalker is someone "who willfully, maliciously and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family."<sup>97</sup> State law thus erected a penalty for stalking itself, rather than

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93. *Id.* § 2724(b)(4).

94. See Bill Loving, *DMV Secrecy: Stalking and Suppression of Speech Rights*, 4 COMM'LAW CONSP'CTUS 203, 203 (1996); James L. Hankins, Comment, *Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon*, 46 OKLA. L. REV. 109, 114, (1993); see also Thomas H. Moore, Comment, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C. L. REV. 1527, 1537 n.96 (1994) ("The federal legislation is primarily aimed at protecting people from stalking and other crimes, since it is believed that the easily availability of home addresses and telephone numbers through public records encourages such crimes."). But see Brief of Appellees at 3-5, 13, *Pryor v. Reno*, No. 98-6261 (11th Cir. argued Nov. 30, 1998) [hereinafter U.S. Alabama Brief] (arguing that the DPPA was primarily intended to regulate direct marketers and other commercial compilers of databases). If the DPPA truly was about direct mail, Congress could have taken the easier route of regulating the direct mailers rather than the States. By not doing so, the DPPA permits direct mailers to obtain name and residential addresses from numerous sources other than DMV records.

95. See Hankins, *supra* note 94, at 114 n.15; see also Loving, *supra* note 94, at 203 (citing Stephen Braun & Charisse Jones, *Victim, Suspect From Different Worlds: Actress' Bright Success Collided With Obsession*, L.A. TIMES, July 23, 1989, at A1, A38).

96. See Loving, *supra* note 94, at 203; Hankins, *supra* note 94, at 114 n.15. Bardo was found guilty of first-degree murder and sentenced to life in prison without parole. See also Loving, *supra* note 94, at 203 (citing Eric Malnic, *Man Who Killed TV Actress Gets Life Without Parole*, L.A. TIMES, Dec. 21, 1991, at B3); Hankins, *supra* note 94, at 114 n.15 (citing Mike Tharp, *In the Mind of a Stalker*, U.S. NEWS & WORLD REPORT, Feb. 17, 1992, at 30). State law thus condemned Bardo's actions and imposed punishment.

97. CAL. PENAL CODE § 646.9 (1998).

requiring police to await until stalkers act upon their threats.

Following California's lead, all fifty States and the District of Columbia enacted anti-stalking statutes by the end of 1993.<sup>98</sup> States had thus developed laws to address this criminal behavior even before Congress had held any hearings on the proposed DPPA.

In 1996, Congress enacted the Federal Anti-Stalking Act, which made it a crime for a stalker to cross State lines in violation of restraining orders with the intent to harass or injure a person.<sup>99</sup> Congress thereby directly regulated the interstate aspect of stalking.<sup>100</sup>

In addition to *direct* regulation of "stalking" and other criminal conduct, Congress attempted to *indirectly* regulate the same conduct by enacting the DPPA. The DPPA, however, allows States to provide personal information to private detective agencies, the very type of intermediary Bardo successfully employed to obtain Schaeffer's address.<sup>101</sup> In light of that and a laundry list of other exceptions, commentators have noted that "the efficacy of such legislation in actually stopping a determined stalker is questionable" so that "[p]romoting such initiatives as 'anti-crime' measures is misleading at best, and fraudulent at worst."<sup>102</sup> "The breadth of the list of enumerated users of the driver information, and the absence of controls over their conduct, makes the restrictions on the access and use of the information ineffective."<sup>103</sup>

### C. *State Motor Vehicle Records were Only One of Many Sources of Similar Information Potentially Subject to Misuse by Criminals*

The DPPA legislative history shows that Congress was advised that State motor vehicle records were only one of many sources of similar

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98. See Hankins, *supra* note 94, at 125 & n.77 (collecting citations); see, e.g., 1992 Ala. Acts 675 (codified at ALA. CODE §§ 13A-6-90 to 13A-6-94 (Supp. 1993)); 1991 N.C. Sess. Laws ch. 804, § 1 (codified at N.C. GEN. STAT. § 14-277.3 (Supp. 1992)); Act of Apr. 20, 1992, ch. 107, 1992 Okla. Sess. Law Serv. 337 (West) (codified at OKLA. STAT. tit. 21, § 1173 (Supp. 1993)); S.C. CODE ANN. § 16-3-1700 (Supp. 1992); Act of Dec. 10, 1993, Wis. Legis. Serv. 96 (West) (codified at WIS. STAT. ANN. § 940.32 (Supp. 1992)).

99. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422, 2655-56 (codified at 18 U.S.C. § 2261A).

100. See *New York v. United States*, 505 U.S. 144, 165 (1992) (noting that the Framers of the Constitution chose a system "in which Congress would exercise its legislative authority directly over individuals rather than over States").

101. See 18 U.S.C. § 2721(b)(8) (1994); see also *Drivers' Privacy Protection Act*, 1994: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, available in 1994 WL 14168013 (Feb. 3, 1994) (statement of David Beatty) [hereinafter *Hearings*].

102. Jane E. Kirtley, *The EU Data Protection Directive and the First Amendment: Why a "Press Exemption" Won't Work*, 80 IOWA L. REV. 639, 644 (1995) [hereinafter *Press Exemption*].

103. Loving, *supra* note 94, at 212.

information potentially subject to misuse by criminals. The testimony before Congress made clear that there was nothing unique about motor vehicle records. Other records contained much of the same information and had been similarly misused to facilitate stalking and other crimes. Therefore, Congress was well-informed that it was the relatively easy access to “government records” that facilitated stalking. For example, Subcommittee hearings demonstrated that “[t]he post office and the DMV will divulge the address of the victim’s hiding place—no questions asked.”<sup>104</sup> Moreover, during the Subcommittee hearings, Congress was advised that:

Even a perfect Driver’s Protection law will not foreclose the possibility of potential abusers and stalkers finding their victims through public records. Policies that allow access to forwarding addresses supplied by the post office, and voter registration records have provided equally fertile sources of address information for offenders. Similar measures are needed to address these problems as well.<sup>105</sup>

Yet Congress responded with a provision imposing upon States the burden to restrict motor vehicle records while ignoring many of the federal sources of the same information.

The primary sponsor of the DPPA made express reference to a book entitled “You Can Find Anyone” that was found in a stalker’s possession.<sup>106</sup> The Senator expressed her concern that the book “spelled out how to do just that using someone’s license plate.”<sup>107</sup> The Senator did not mention, however, that the very same book identified numerous federal sources that supply the same information to potential stalkers.

- “The F.C.C. licenses every form of communication including telephones and computer interface systems. These records and applications are also public. Call or write your nearest office for details.”<sup>108</sup>
- “The F.A.A. regulates and licenses all aspects of aviation including balloons and gliders. If appropriate, check with them. Their records are public.”<sup>109</sup>
- “As a matter of practice, the I.R.S. will provide the ‘date of last return’ on anyone or any business, which includes the address to which the return was sent. All you need to provide is the full name and Social Security Number.”<sup>110</sup>

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104. *Hearings, supra* note 101.

105. *Id.*

106. 139 CONG. REC. S15,762 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer).

107. *Id.*

108. EUGENE FERRARO, *YOU CAN FIND ANYONE* § 4.5, at 76 (10th ed. 1989).

109. *Id.*

110. *Id.* at 77. Federal agencies publicly disseminate Social Security number (“SSN”) information as well. *See infra* notes 132-37 and accompanying text. The Internal Revenue

- The Interstate Commerce Commission “regulate[s] and license[s] all forms of interstate commercial transportation. If your subject is a trucker, or in the trucking or transportation business, you will find them in these records. All records are public and phone searches are accepted.”<sup>111</sup>

The author of “You Can Find Anyone,” also discusses finding individuals through the “Armed Services Locators,” the Civil Service Commission’s Bureau of Retirement and Insurance, and other federal sources.<sup>112</sup>

#### D. *Congress Enacted the DPPA Despite Widespread Dissemination of the Same Information from Numerous Federal Sources*

As the hearing testimony disclosed, the federal government disseminates the same information that the DPPA directs States to keep private. Clearly, the federal government sources of an individual’s residential address are numerous. Indeed, the Information Policy Committee of the National Information Infrastructure Task Force recognized that “[t]he federal system of data protection, though comprehensive, is criticized, however, as a ‘paper tiger’ with significant enforcement and remedial deficiencies.”<sup>113</sup>

Perhaps the most telling and most analogous source of disclosure is the Federal Aviation Administration (“FAA”). A database of the operators of vehicles licensed *by the federal government* (in this case, aircraft) is available on the Internet, providing names, home addresses, and information regarding physical examinations.<sup>114</sup> A related database permits anyone to obtain the name and address of the owner of an airplane simply by providing the “N-number” required to be displayed on the airplane’s tail.<sup>115</sup> This information originates with the FAA and is

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Service itself will disclose the SSN of a former spouse. See RICHARD S. JOHNSON, HOW TO LOCATE ANYONE WHO IS OR HAS BEEN IN THE MILITARY 218 (7th ed. 1996). Moreover, the Internal Revenue Service prints the taxpayer’s SSN on publicly-recorded liens. See Flavio Komuves, *We’ve Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 541 (1998). In this manner, the Internal Revenue Service may serve as a one-stop source of information for someone intent on stalking a former spouse or anyone who is, or ever has been, subject to a government lien.

111. FERRARO, *supra* note 108, at 77.

112. *Id.* at 77-79, 81.

113. INFORMATION POLICY COMMITTEE, NATIONAL INFORMATION INFRASTRUCTURE TASK FORCE, OPTIONS FOR PROMOTING PRIVACY ON THE NATIONAL INFORMATION INFRASTRUCTURE 19 (Apr. 1997 draft), available at <<http://www.iitf.nist.gov/ipc/ipc-pub.html>> (last visited Jan. 31, 1999) [hereinafter “NIITF Draft”].

114. See AVweb, *U.S. Certified Airman Database* (visited Apr. 17, 1998) <<http://www.avweb.com/database/airmen/>>.

115. See AVweb, *U.S. Registered Aircraft Database* (visited Apr. 17, 1998) <<http://www.avweb.com/database/aircraft/>>.

disseminated by a company under contract with the FAA.<sup>116</sup>

Similarly, when individuals register certain boats with the United States Coast Guard, it appears that the federal government discloses the information collected.<sup>117</sup> If the Coast Guard fails to do so, the FCC may disclose the information if the boat owner registers a ship-to-shore radio.<sup>118</sup>

The United States Postal Service remains an easy source of forwarding addresses. Although the Service recently discontinued its disclosure to individuals of a list of all requests to forward mail,<sup>119</sup> it still discloses the information one entry at a time. To obtain a forwarding address, one need only send a letter to the former address with instructions on the envelope not to forward the mail and to provide address correction.<sup>120</sup> Moreover, the Postal Service continues to sell data collected from Change of Address forms to mailing-list firms, direct mailers, and credit bureaus.<sup>121</sup>

In some instances, the United States orders some private parties to disclose residential addresses to other private parties. For example, the federal government routinely mandates disclosure of names and residential addresses to collective bargaining representatives.<sup>122</sup> In that context, the federal government orders the disclosure of less-public information such as home telephone numbers and even Social Security numbers.<sup>123</sup>

The federal government provides virtually no protection for medical and health care records.<sup>124</sup> Consequently, much of this data is acces-

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116. Telephone Interview with Bill Culbertson, Aerodata, Inc. (Mar. 4, 1998); *see also* Condon v. Reno, 155 F.3d 453, 465 n.9 (4th Cir. 1998) (noting the availability of such data on the Internet); CAROLE A. LANE, *NAKED IN CYBERSPACE: HOW TO FIND PERSONAL INFORMATION ONLINE* 160 (1997) ("If you own any type of aircraft, the [FAA] may have sold your name and profile.")

117. *See* LANE, *supra* note 116, at 160.

118. *Id.*

119. *See* Moore, *supra* note 94, at 1537 n.96.

120. *See* JOHNSON, *supra* note 110, at 236.

121. BETH GIVENS, *THE PRIVACY RIGHTS HANDBOOK: HOW TO TAKE CONTROL OF YOUR PERSONAL INFORMATION* 128 (1997).

122. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766-67 (1969); Lear Siegler, Inc. v. NLRB, 890 F.2d 1573, 1580-81 (10th Cir. 1989); Smith & Smith Aircraft Co. v. NLRB, 735 F.2d 1215, 1217 n.1 (10th Cir. 1984). Although the Supreme Court has held that collective bargaining representatives of federal employees may not compel disclosure of names and residential addresses, the Court clearly stated that there was no constitutional bar to such disclosure. *See* United States Department of Defense v. FLRA, 510 U.S. 487, 503 (1994) ("Congress may correct the disparity" in treatment of classes of unions).

123. *See* NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1377-78 (7th Cir. 1991) (Social Security numbers in addition to names and addresses); NLRB v. Burkart Foam, Inc., 848 F.2d 825, 833 (7th Cir. 1988) (telephone numbers in addition to names and addresses); Lucky Markets, Inc., 251 N.L.R.B. 836, 840 (1980) (names, ages, race, sex, and marital status). *See also infra* text accompanying notes 133-37.

124. PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* 308 (1996)

sible.<sup>125</sup> There is no comprehensive federal legislation regarding how employers must treat personal information they collect regarding their employees.<sup>126</sup> Further, there is no federal law addressing data protection specifically in the context of direct marketing.<sup>127</sup>

Ironically enough, in some ways, the federal government is acting

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[hereinafter SCHWARTZ & REIDENBERG]; see also Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 6-7, 39-41 (1997) [hereinafter *Health Care*] (noting broad consensus that medical data protection is insufficient).

125. See Jay Greene, *Your Secret's Out: Your Medical Records—Perhaps Your Most Personal Information—Are Also the Most Vulnerable to Public Scrutiny*, THE ORANGE COUNTY REGISTER (Cal.), Apr. 24, 1996, at C1; see also WAYNE MADSEN, HANDBOOK OF PERSONAL DATA PROTECTION 127-28 (1992) (describing databanks of medical information).

126. SCHWARTZ & REIDENBERG, *supra* note 124, at 350; Patrick J. Murray, Comment, *The Adequacy Standard Under Directive 95/46/EC: Does U.S. Data Protection Meet this Standard?*, 21 FORDHAM INT'L L.J. 932, 988 (1998).

127. SCHWARTZ & REIDENBERG, *supra* note 124, at 308; William J. Fenrich, Note, *Common Law Protection of Individuals' Rights in Personal Information*, 65 FORDHAM L. REV. 951, 962 (1996); see also Jennifer L. Kraus, Note, *On the Regulation of Personal Data Flows in Europe and the United States*, 1993 COLUM. BUS. L. REV. 59, 63 (noting the lack of federal legislation protecting individuals from misuse of information by direct marketers). People can become a record in a database by calling an 800 number, cashing a coupon, filling out a warranty card, subscribing to magazines, or making hotel reservations. Kraus, *supra*, at 62. The Direct Marketing Association has established its own recommendations and guidelines for the protection of personal information, but as mere recommendations for self-regulation, they are not enforceable. *Id.* at 76. The absence of regulation of direct marketers is particularly significant in this context, where the United States has painted the DPPA as an effort to control one source of information for the direct mail industry. See U.S. Alabama Br., *supra* note 94, at 16-18. As discussed below in Part II.B., the DPPA was introduced, promoted, and reported primarily as a response to a highly-publicized stalking death (and, to a lesser extent, other criminal activity). Indeed, following amendment of the proposed DPPA to its current form, the direct marketing industry actually supported the legislation. See PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 102-03 (1995); Joshua B. Sessler, Note & Comment, *Computer Cookie Control: Transaction Generated Information and Privacy Regulation on the Internet*, 5 J.L. & Pol'y 627, 655-56 (1995).

These examples of sectors not subject to data protection limitations rebut the mistaken impression that virtually all collections of data already are regulated by the federal government. See Travis, 163 F.3d at 1005. In fact, the federal government's own studies and scholars in the field generally reject this view. See Joseph I. Rosenbaum, *Privacy on the Internet: Whose Information is it Anyway?*, 38 JURIMETRICS J. 565, 569 & n.6 (1998) (citations omitted); see also SCHWARTZ & REIDENBERG, *supra* note 124, at 215, 382 (federal data protection laws applicable to the private sector address only discrete issues; "existing legal protections tend to focus on access [by the subject of the record] and correction"); Murray, *supra* note 126, at 980, 1013-14 (sectoral approach to legislation results in large gaps); NIITF Draft, *supra* note 113, at i ("[I]nformation privacy policy in the United States consists of various laws, regulations and practices, woven together to produce privacy protection that varies from sector to sector. . . . Sometimes this approach leaves holes in the fabric of privacy protection."). This consensus is not surprising in light of our strong political tradition of resisting limits on information dissemination. See SCHWARTZ & REIDENBERG, *supra* note 124 at 382; Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 500-01 (1995) [hereinafter *Setting Standards*]. Based on that tradition, in the private sector the United States generally favors the free flow of information. See *id.* at 503-06; Murray, *supra* note 126, at 952 n.130. Thus, even viewed as a whole, federal regulation of personal information in the private sector does not aggregate to form a generally applicable law.

to make personal information *more* available. For example, while the Fair Credit Reporting Act ("FCRA")<sup>128</sup> limits information that may be disclosed about individuals, it does not prohibit the disclosure of names, residential addresses, or other personal information. Moreover, the Federal Trade Commission ("FTC"), which is charged with administering the FCRA, specifically excludes such data from its definition of "consumer reports" and permits unrestricted dissemination of this information so long as the data is not linked to credit information through "pre-screening."<sup>129</sup> The "header information" that the FTC permits to be freely disclosed includes "name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof."<sup>130</sup> This FTC policy reversed its 1989 position regarding header information, and now allows this information to be sold without limitation by credit bureaus like Equifax, Experian and TransUnion.<sup>131</sup>

Federal agencies do not limit their disclosures to names and residential addresses. Despite the fact that an individual's Social Security number is often used as proof of permission to access other records, the federal government discloses Social Security numbers with little hesitation.<sup>132</sup> "Since June 1974, the [Department of Veterans' Affairs] has

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128. 15 U.S.C. § 1681a-1681b (1994).

129. See *FTC v. TRW, Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991), *amended*, *FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1 (Jan. 14, 1993). The FTC defines "pre-screening" as "the process whereby TRW, utilizing [c]redit [i]nformation, compiles or edits for a client a list of [c]onsumers who meet specific criteria . . ." 784 F. Supp. at 362.

130. *FTC v. TRW, Inc.*, CIV No. 3-91-CV2661-H at 1 (Jan. 14, 1993). See also JOHNSON, *supra* note 110, at 12-13 (describing a trace using "header information from credit files" to find "Cindy" based only on her maiden name and previous address); *id.* at 136 ("Ninety percent of the time a Social Security trace will provide the most current reported address from the header information of 160 million credit files."); see also Maas, *supra* note 70, at 4 (describing the successful search for a company's former consultant through a credit bureau); Murray, *supra* note 126, at 986 ("the three main credit bureaus together maintain files on nearly ninety percent of American adults"). Moreover, credit reports may be purchased by anyone with a "permissible business purpose." See 15 U.S.C. § 1681b. "The FCRA defines permissible purposes broadly, encompassing employers, landlords, private investigators, and others." NIITF Draft, *supra* note 113, at 41; see Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51, 67 (1995); Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 210-213 (1992) [hereinafter *Fortress or Frontier*].

131. See Leslie L. Byrne, *Who's Selling Your Secrets? Government Units Sell or Give Away Personal Data*, CHRISTIAN SCIENCE MONITOR, June 17, 1997, at 19. Additionally, the federal government is limiting the encryption technology that may be used in the United States which otherwise may have permitted concerned individuals and databank holders to better protect personal information from disclosure. See generally Jaleen Nelson, Comment, *Sledge Hammers and Scalpels: The FBI Digital Wiretap Bill and its Effect on the Free Flow of Information and Privacy*, 41 U.C.L.A. L. REV. 1139 (1994).

132. Armed with a name and Social Security number, anyone may obtain access to records

used Social Security numbers as VA Claim numbers.”<sup>133</sup> Similarly, “[t]he Armed Forces switched from using Service Numbers to using Social Security numbers as a means of identification” in July 1969 (Army and Air Force), July 1972 (Navy and Marine Corps) and October 1974 (Coast Guard).<sup>134</sup> The Department of Defense itself is another source of such information: “The Social Security numbers of many retired officers and warrant officers may be obtained from the Officer’s Registers.”<sup>135</sup>

One need not go any farther than a law library to find a list of individuals’ names and Social Security numbers. For decades, the United States Department of Labor has published the Social Security numbers correlated together with the names of claimants under the Black Lung Benefits Act (the “BLBA”). The Department of Labor assigns each claimant’s Social Security number as its case number, resulting in public disclosure whenever a decision is designated for publication.<sup>136</sup> The United States government also makes a debtor’s Social Security number a matter of public record when it petitions for a writ of garnishment to collect a debt.<sup>137</sup> As a result of all these federal sources of information, it can now be said that “[i]n the United States, a person’s social security number (‘SSN’) has attained the status of a quasi-universal personal identification number.”<sup>138</sup>

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maintained under the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1994), *reprinted in* 1974 U.S.C.C.A.N. 2177. Telephone Interview with Judy Street, FAA Privacy Act Officer (Mar. 9, 1998). *See also* FERRARO, *supra* note 108, at 77.

133. *See* JOHNSON, *supra* note 110, at 89; *see also id.* at 6-7, 87-88, 206-07.

134. *Id.* at 135. Consequently, the name and Social Security number of individuals are published in unit orders, reassignment orders, orders for promotions, awards, and numerous other orders. *See id.* at 138. They are also disclosed in response to Freedom of Information Act requests. *See id.* at 146-47.

135. *Id.* at 81.

136. Comparison of the “OWCP number” in published decisions with the claim filed in several of those cases confirms that practice. The OWCP number reported in *Hite v. Eastern Associated Coal Co.*, 21 Black Lung Rep. (MB) 1-47 (Ben. Rev. Bd. 1997), matches the miner’s Social Security number as reflected in Director’s Exhibit 3 filed therein. Similarly, the OWCP number reported in *Church v. Eastern Associated Coal Co.*, 21 Black Lung Rep. 1-52 (Ben. Rev. Bd. 1997), correlates with the miner’s Social Security number as reflected in Director’s Exhibit 1 filed therein. Finally, the OWCP number reported in *Bates v. Creek Coal Co.*, 20 Black Lung Rep. 1-37 (Ben. Rev. Bd. 1996), matches the miner’s Social Security number shown in Director’s Exhibit 1 filed therein.

137. *See* Komuves, *supra* note 110, at 541 (citing 28 U.S.C. § 3205(b)(1)(A)); *see* George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 525-26 (1990).

138. Komuves, *supra* note 110, at 531. For example, credit bureau records are keyed to Social Security numbers (“SSNs”). *Id.* at 536. Recent changes to federal laws allow SSNs to be used as identifying numbers in the collection of blood donations. *Id.* at 537 (citing 42 U.S.C. § 405(c)(2)(D)(1994)).

Other information frequently used as a means to test authorization to receive data is itself freely disclosed. For example, the National Personnel Records Center, in responding to individuals' Freedom of Information Act requests, provides a person's date of birth.<sup>139</sup> That information is sufficient to permit the person to be located through a computer database.<sup>140</sup> Date of birth information also is publicly available from Selective Service classification records of men who registered for the draft from 1940 to 1975.<sup>141</sup>

The federal government also discloses more information than name, residential address, Social Security number and date of birth. For example, information released from an individual's military records includes: dependents (including name, age, and gender), salary, educational level, and official photographs.<sup>142</sup> However, this information will not be released by the armed forces for those individuals on active duty, in the reserve or National Guard.<sup>143</sup>

As the preceding examples demonstrate, federal limitations on the disclosure of information constitute exceptions rather than the general rule.<sup>144</sup> Moreover, even the few statutes frequently cited as imposing disclosure limitations "similar" to the DPPA generally fail to fulfill that claim. As discussed above,<sup>145</sup> unlike the DPPA, the Fair Credit Reporting Act<sup>146</sup> has been construed by the Federal Trade Commission to permit disclosure of names and addresses.<sup>147</sup> The Bank Secrecy Act<sup>148</sup> does not, by its own terms, prohibit the disclosure of names and addresses;<sup>149</sup> the only restriction on disclosure is that a party to a transaction may not be notified that a "suspicious activity report" has been filed with the government concerning the transaction.<sup>150</sup> Unlike the DPPA, in regulating data maintained by phone companies, the Stored

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139. See JOHNSON, *supra* note 110, at 98, 146-47.

140. See *id.*; see also *id.* at 8-9, 11 (locating "Darrell Schultz" and "Fred Q. Smith").

141. *Id.* at 92.

142. *Id.* at 147. Ironically, Members of Congress may assist their constituents in obtaining this information when federal agencies are not responsive. See *id.* at 215.

143. *Id.* at 147.

144. One author noted that the private sector in the United States is "virtually unregulated" for privacy, with the exception of the credit reporting industry, which is governed by the Fair Credit Reporting Act. COLIN J. BENNETT, IMPLEMENTING PRIVACY CODES OF PRACTICE 8, 42 (1995); see also Rosenbaum, *supra* note 127, at 569 (discussing the United States' sectoral approach).

145. See *supra* notes 128-131 and accompanying text.

146. 15 U.S.C. § 1681b.

147. See also Trubow, *supra* note 137, at 531 (observing the FCRA does not significantly limit the sale or exchange of personal information).

148. 12 U.S.C. §§ 1730d, 1829b, 1951-59 & 31 U.S.C. §§ 1101 *et seq.*

149. See 31 C.F.R. § 103.51; see also SCHWARTZ & REIDENBERG, *supra* note 124, at 262-63 (observing there is no federal regulation of the treatment of personal information by banks and other financial institutions).

150. 31 C.F.R. § 103.21(e).

Wire and Electronic Communications and Transactional Records Access Act<sup>151</sup> does not prohibit the disclosure of names and addresses. The prohibition on unauthorized disclosure covers only the "contents" of stored electronic communications.<sup>152</sup> The "contents" are defined as information concerning the "substance, purport, or meaning of [the] communications."<sup>153</sup> Moreover, in another context, the Federal Communications Commission clarified that customer names, addresses, and telephone numbers are not protected information.<sup>154</sup> The Commission relied, in part, on the general public availability of such information.<sup>155</sup>

The Video Privacy Protection Act ("VPPA") prohibits the disclosure of "personally identifiable information."<sup>156</sup> "Personally identifiable information" is defined as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."<sup>157</sup> As a general rule, this information may not be disclosed by *any* person.<sup>158</sup> The definition of the protected information, however, parallels that of the Fair Credit Reporting Act: names and addresses may be disclosed as long as not pre-sorted or otherwise linked to convey additional information (such as credit history or tapes rented, respectively). In addition to exempting names and addresses from the definition of protected information, the VPPA also *expressly* allows the disclosure of names and addresses, so long as they are not tied to the title, description, or subject matter of the video tapes.<sup>159</sup> Moreover, there is an express exception under which such information, including the subject matter of video rentals, may be released to direct marketers.<sup>160</sup> Thus, even the law upon which the DPPA purportedly was based apparently does not restrict disclosure of names and residential addresses to the same degree as the DPPA.

The Privacy Act<sup>161</sup> does not function as written. "[T]he enforcement, oversight, and scope of the Act are inadequate."<sup>162</sup> Even on its

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151. 18 U.S.C. §§ 2701-11.

152. *Id.* § 2702.

153. *Id.* § 2710(8).

154. See *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order*, CC Docket No. 96-115, DA 98-971 (rel. May 21, 1998).

155. *Id.* at 8.

156. 18 U.S.C. § 2710(b)(1).

157. *Id.* § 2710(a)(3).

158. *Id.* § 2710(a)(4).

159. *Id.* § 2710(b)(2)(D). This express provision purports to place additional limitations on the disclosure of names and addresses but the basis for imposing an "opt-out" provision and other terms appears inconsistent with the definition of "personally identifiable information."

160. *Id.* § 2710(b)(2)(D)(ii) ("however, the subject matter of the materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer").

161. 5 U.S.C. § 552a.

162. Trubow, *supra* note 137, at 530 n.34 (1990) (citation omitted).

face, the "Act is also riddled with broad exceptions that severely limit its usefulness."<sup>163</sup> Like the Privacy Act, few of the laws self-imposed upon the federal government produce general compliance. For example, in 1990, the General Accounting Office reported that only 35% of federal databases containing personal data had been identified in the Federal Register as required.<sup>164</sup> Of the computer systems engaged in "computer matching" of information, very few complied with federal regulations and procedures.<sup>165</sup> Few, if any, of the federal statutes identified by the United States in litigation impose burdens on the disclosure of such common information as names and addresses.

The DPPA did not address any of these federal sources of information. Nor did Congress explain how forcing States to restrict one source of data made sense while the federal government continues to disseminate the same information. In fact, at the Subcommittee hearings, Congress did not even hear from a representative of any State or local government.<sup>166</sup>

### III. THE DPPA ADDRESSES RECORDS HISTORICALLY MAINTAINED BY STATES THAT MOST STATES KEPT OPEN TO PUBLIC INSPECTION BASED ON PUBLIC-POLICY CONSIDERATIONS

Historically, it has been States, rather than the federal government, that have licensed drivers and registered motor vehicles. As a result, States have collected information through those processes and required that their agencies maintain records compiled in the course of such duties.<sup>167</sup> Traditionally, States have determined for themselves the scope and conditions of disclosure of information contained in their records: the overwhelming majority historically have treated motor vehicle records as public records.<sup>168</sup> Indeed, a vast majority of States have long recognized the public good that flows from open records and

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163. *Id.*

164. MADSEN, *supra* note 125, at 109.

165. *Id.*

166. Marshall Rickert, Motor Vehicle Administrator for the State of Maryland, did testify at the hearings. *Hearings, supra* note 101, 1994 WL 14167960 (Feb. 4, 1994). But Rickert expressly prefaced his remarks by explaining that he was testifying in his capacity as First Vice Chairman of the American Association of Motor Vehicle Administrators, a nongovernmental, voluntary organization of individuals. He offered no testimony in his capacity as a State of Maryland official. Although Rickert called for a uniform law, States can and do adopt uniform laws, so it is not evident that his goal would require federal legislation.

167. *See infra* notes 170-173 and accompanying text.

168. *See infra* notes 173-177 and accompanying text. *Cf.* Bruce D. Goldstein, *Confidentiality and the Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185 (1992) (discussing state "laws limiting, to varying degrees, the availability of certain records").

open government.<sup>169</sup>

By enacting the DPPA, Congress attempted to instruct the States as to how they must regulate the dissemination of information from the records States create and maintain through the regulation of their drivers and motor vehicles. In doing so, Congress considered neither the long historical tradition of State regulation in this field nor the important public policies it displaced. Part III(A) discusses the historical tradition of State regulation of motor vehicles and motor vehicle records. Part III(B) examines the public policies served by permitting open access to these records. Part III(C) summarizes the impact of the DPPA upon those State policies.

A. *States Historically have Licensed Drivers and Registered Motor Vehicles, and Maintained Records Associated with Those Functions*

Since the turn of the century State governments consistently have licensed drivers and registered motor vehicles.<sup>170</sup> By 1916, the Supreme Court could characterize the "common" features of such regulation and treat the constitutionality of such regulation as a settled matter.<sup>171</sup> By 1941, the Supreme Court acknowledged such regulation by the States was "universal."<sup>172</sup>

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169. Citizens have an interest in the workings of their government and the basic data of those government operations are official records and documents. Matthew D. Bunker, et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 543 (1993). "Access to government-held information is grounded in the American political ideal of self-government. The Framers of the United States Constitution said self-governing people should be well-informed about the workings of government to make intelligent political choices. In a discussion of the First Amendment, James Madison said: 'The right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right. . . .'" *Id.* at 545 (citing, among other authorities, 6 WRITINGS OF JAMES MADISON 398 (1906), reprinted in Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209, 212 (1952)).

170. See Xenophon P. Huddy, *The Law of Automobiles*, 9 LAW NOTES 147, 148 nn.8 & 12 (1905) (discussing State of New York's motor vehicle registration requirements and State of Missouri's driver's license requirements); Xenophon P. Huddy, *The Motor Car's Status*, 15 YALE L.J. 83, 85 & n.16 (1905) (noting "statutory enactments concerning the registration and licensing of automobiles" and citing Rhode Island's 1904 registration statute); H.B. Brown, *The Status of the Automobile*, 17 YALE L.J. 223, 225 (1908) (explaining that it had already been determined necessary to require automobiles "to be registered or licensed"); *Kane v. State of New Jersey*, 242 U.S. 160, 164 (1916) (upholding the New Jersey Automobile Law of 1908 which "provides in substance that no person . . . shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute"); *Hendrick v. State of Maryland*, 235 U.S. 610, 619 (1915) (upholding Maryland's "comprehensive scheme for licensing and regulating motor vehicles" under its Act effective July 1, 1910).

171. See *Kane*, 242 U.S. at 167 ("The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained.").

172. See *Keitz v. Mealey*, 314 U.S. 33, 36 (1941).

The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by *the States* to insure competence and care on the part of licensees and to protect others using the highway is consonant with due process.<sup>173</sup>

The national government has never sought to create a uniform national system to supplant these long-established State functions, although Congress did consider a national licensing system for commercial drivers. However, that plan was aborted because Congress was advised that the creation of such a system would exceed its authority.<sup>174</sup> Moreover, the licensing of drivers was classified as a traditional State governmental function (when that was the applicable constitutional test) and it continues to receive judicial protection from federal interference.<sup>175</sup>

The laws of the five states challenging the DPPA (Alabama, North Carolina, Oklahoma, South Carolina, and Wisconsin) are demonstrative

173. *Id.* (emphasis added), *overruled on other grounds by* *Perez v. Campbell*, 402 U.S. 638 (1971).

174. A bill was introduced that would have displaced States as the primary licensing authority of commercial motor vehicle drivers. *See* S. 1903, 99th Cong. (1986). Hearings on the bill demonstrated that the consensus favored State issuance and administration of licenses, recognizing "that, traditionally, driver licensing has been a State function." *See* S. Rep. No. 99-411, at 12 (1986). Consequently, Congress abandoned the plan. *See id.* The Secretary of Transportation's own representative explained at hearings on that bill that the contemplated regulations' ability to survive "judicial scrutiny" was problematic because "unnecessary or inappropriate preemption of responsibilities traditionally exercised by the States [was] a concern." Commercial Motor Vehicle Safety Act of 1985: *Hearings on S. 1903 Before the Comm. on Commerce, Science, and Transportation*, 99th Cong. 15, 22 (1986) (statement of Associate Deputy Secretary of Transportation Jennifer L. Dorn).

175. *See* *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (finding that "there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens'") (quoting *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976)). While overruling the *National League of Cities* test, the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), explicitly acknowledged the *Best* holding. *See id.* at 538. Despite the demise of *National League of Cities*, lower courts continue to hold that the Tenth Amendment and federalism concerns preclude federal interference with State licensing of drivers. *E.g.*, *United States v. Snyder*, 852 F.2d 471, 475 & n.3 (9th Cir. 1988) (stating that "*Garcia* does not affect the validity of our reasoning or holding in *Best*"); *United States v. Chalmers*, Nos. AD 092121 & 092122, 1986 WL 12680 at \*3 (D.N.J. Oct. 9, 1986) ("I agree with the Ninth Circuit's holding in *Best* that it would be an unwarranted intrusion on state regulation to suspend a state-created privilege to operate a motor vehicle on the state's highways"). For further discussion of the *Best* decision, see Bernard Schwartz, *National League of Cities Again—R.I.P. or a Ghost That Still Walks?*, 54 *FORDHAM L. REV.* 141, 154 & n.123 (1985) [hereinafter *R.I.P.*]; *see also* Paul J. Hartman & Thomas R. McCoy, *Garcia: The Latest Retreat on the "States' Rights" Front*, *INTERGOVERNMENTAL PERSPECTIVE*, Spr.-Summ. 1985, at 8, 9 (recognizing that under *National League of Cities*, the "[l]icensing of automobile drivers was insulated from congressional control.").

of this "universal" regulation. Each State has laws requiring drivers to be licensed<sup>176</sup> and automobiles to be registered.<sup>177</sup>

While carrying out their registration and licensing functions, States acquire certain information about the individuals who register a motor vehicle or apply for a driver's license. The information collected by the States as an essential part of the process includes names, addresses, dates of birth, physical descriptions, license tags, and the make and models of automobiles.<sup>178</sup> Historically, each State has determined what information it needs to collect through these processes. The States issue licenses and registration certificates reciting much of this information. In addition, the States maintain records of this information.<sup>179</sup>

Historically, each State has determined the conditions under which it would release information from motor vehicle records. A majority of States maintained open records prior to implementation of the DPPA. The leading sponsors of the DPPA observed that motor vehicle records were open to the public in thirty-four States.<sup>180</sup> The Reporters Committee for Freedom of the Press, listed the following thirty-four States which permitted open access to records before enactment of the DPPA: Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa,

176. See Ala. Code § 32-6-1 (1975); N.C. GEN. STAT. § 20-7(a) (1993); OKLA. STAT. tit. 47, § 6-106 (1988); Wis. STAT. §§ 343.05 (1991); S.C. CODE ANN. § 56-1-20 (Law Co-op. 1996); see also N.C. GEN. STAT. § 20-4.1 (1995) (reciprocal agreements with other States recognizing licenses).

177. See ALA. CODE § 32-6-51; N.C. GEN. STAT. § 20-50(a); OKLA. STAT. tit. 47, § 1112; Wis. STAT. § 341.04; S.C. CODE ANN. § 56-3-110; see also N.C. GEN. STAT. § 20-83 (registration by non-residents).

178. For example, in North Carolina, the applicant for a license is required to provide his or her full name, mailing and residential addresses, physical description (including gender, height, eye color, and hair color), date of birth, and Social Security number. See N.C. GEN. STAT. § 20-7(b) (1995); see also ALA. CODE § 32-6-6 (1975) (stating that the contents of a driver's license include color photograph, name, birth date, address, and physical description); OKLA. STAT. tit. 47, § 6-106 (1988) (stating that the contents of a driver's license include full name, date of birth, gender, residence of applicant, whether the applicant is deaf or hearing impaired, license plate number and State of registration of vehicle, and a brief description of applicant); Wis. STAT. § 343.17 (1991) (stating that the contents of a driver's license include color photograph, full name, date of birth, gender, address, and physical description); S.C. CODE ANN. § 56-1-80(3) (1991) ("every application for a driver's license or permit must . . . contain the full name, date of birth, sex, race, and residence address of the applicant and briefly describe the applicant.").

179. E.g., ALA. CODE § 32-6-14 (1975) (requiring maintenance of records of license applications and accident reports); OKLA. STAT. tit. 47, § 6-117 (1988) (maintaining records of license applications, accident reports, court abstracts and moving violations); N.C. GEN. STAT. § 20-26(a) (1993) (maintaining records of all applications for a driver's license); Wis. STAT. § 343.23 (1991) (maintaining records of driver's license information, including every application for a license and every suspension, revocation and cancellation); *id.* § 343.17 (maintaining records of vehicle registration); S.C. CODE ANN. § 56-1-40 (1991) (maintaining records of license applications, accident reports, and abstracts of court records).

180. See 139 Cong. Rec. S15,762 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer); *Hearings, supra* note 101, 1994 WL 14167988 (Feb. 4, 1994) (statement of Rep. Moran).

Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.<sup>181</sup> There is ample authority to support the assertion that a majority of States permitted public access to motor vehicle records.<sup>182</sup> Prior to enactment of the DPPA, the federal courts recognized that motor vehicle records were public records.<sup>183</sup> A closer exami-

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181. See *Federal Judge Vows Quick Decision in Challenge to License Secrecy Law*, THE HERALD (Rock Hill, SC), Sept. 4, 1997, at 8A; see also Dorothy J. Glancy, *Privacy and Intelligent Transportation Technology*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 151, tbl. c (1995) (identifying 27 States providing open access to motor vehicle and driver records).

The Reporters Committee also compiled citations showing that “[a]ll fifty states and the District of Columbia have statutes providing public access to government records.” Bunker, *supra* note 169, at 555. See generally REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, TAPPING OFFICIALS’ SECRETS, THE DOOR TO OPEN GOVERNMENT IN THE 50 STATES AND D.C. (3d ed. 1997) (reproducing, with annotations, the various freedom of information acts and public records laws), available at <<http://www.rcfp.org/tapping/index.cgi>> [hereinafter “REPORTER’S COMMITTEE”]. The States of Louisiana, North Dakota, New Hampshire, and Florida have open records laws written into their constitutions. LA. CONST. art. XII, § 3; N.D. CONST. art. XI, § 6; N.H. CONST. pt. I, art. 8; FLA. CONST. art. I, § 24.

182. *E.g.*, Birmingham News Co. v. Perry, 21 Media L. Rep. (BNA) 2125 (Ala. Cir. Ct. 1993) (compelling Alabama Department of Public Safety to copy and deliver electronic databases to requesting party); Olim v. Mayberry, 524 P.2d 24 (Okla. 1974) (finding that the Department of Public Safety must maintain and release records including driver’s license information as well as moving traffic offenses resulting in convictions and bond forfeitures); McCray v. State, 581 A.2d 45 (Md. Ct. Spec. App. 1990) (affirming conviction on conspiracy to make false entries in public records arising from issuance of fraudulent driver’s licenses); Pressman v. Elgin, 50 A.2d 560, 562 (Md. 1947) (acknowledging that Maryland’s 1943 statute guarantees public access to all records of the Department of Motor Vehicles); Direct Mail Service, Inc. v. Registrar of Motor Vehicles, 5 N.E.2d 545, 546 (Mass. 1937) (“The very object of requiring registration of automobiles is to make readily available to the public at all times accurate information as to their ownership and as to the persons responsible for their operation. There can be no doubt, therefore, that the registrar’s records are fully impressed with the character of public records, and that the public generally has with respect to them all the privileges of examination and use which that status affords.”) (citations omitted); State ex. rel. Beacon Journal Pub. Co. v. Andrews, 358 N.E.2d 565, 568 (Ohio 1976) (“all documents in the possession of the Registrar of Motor Vehicles are public records open to the public”) (emphasis omitted) (internal quotation omitted); Commercial Standard Ins. Co. v. Paul, 245 S.W.2d 775, 778 (Tenn. Ct. App. 1951) (recognizing that “the registration records in the County Clerk’s Office” represented a means to identify the owner of an automobile); Stewart v. Maybury, 3 P.2d 138 (Wash. 1931); Hechler v. Casey, 333 S.E.2d 799, 811 (W.Va. 1985) (stating that individuals’ names and residential addresses “are not ‘personal’ or ‘private’ facts but are public in nature in that they constitute information normally shared with strangers and are ascertainable by reference to many publicly obtainable books and records,” including specifically on “drivers’ licenses and other identification that is routinely shown to strangers”); see also Dunhill v. Director, Dist. of Columbia Dep’t of Transportation, 416 A.2d 244 (D.C. 1980); Phillip E. Hassman, Annotation, *Publication of Address as Well as Name of Person as Invasion of Privacy*, 84 A.L.R.3d 1159 (1978).

183. *E.g.*, United States Dep’t of Health & Human Services v. Federal Labor Relations Authority, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987) (observing that an individual’s name and home address are “a matter of public record in motor vehicle registration and licensing records”); see also Kelly v. City of Sterling Heights, 946 F.2d 895 (table), 1991 WL 207548 (6th Cir. 1991)

nation of the law in the five States challenging the DPPA (Alabama, North Carolina, Oklahoma, Wisconsin, and South Carolina), demonstrates the long history and public policies promoted by this approach.

### 1. ALABAMA

Since 1935, Alabama has enacted specific statutes which treat motor vehicle records as a matter of "public record."<sup>184</sup> Prior to enactment of the DPPA, Alabama law declared:

The director of public safety shall file every application for a license received by him and shall maintain suitable indices thereto. The director of public safety shall also file all accident reports and abstracts of court records of convictions received by him under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the director of public safety upon any application for renewal of license and at other suitable times.<sup>185</sup>

State law further provided: "The director shall upon request furnish any person an abstract of the operating record of any person subject to the provisions of this chapter, which abstract shall also fully designate the . . . name of such person . . ." <sup>186</sup> These provisions were in accord with Alabama's public records law.<sup>187</sup> Thus, Alabama's highest courts have made clear that the legislative policy contemplated broad public access to public records<sup>188</sup> and that the purpose of permitting open access is to

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(finding district court correctly concluded that "information contained on an individual's vehicle registration application, including a residential address is not, in the Court's opinion, of the character entitled to constitutional protection. This is particularly so given the public nature, under Michigan law, of this information.") (unpublished opinion); cf. *Horvath v. Lindenhurst Auto Salvage, Inc.*, 60 F.3d 120, 122 (2d Cir. 1995) (recognizing registration records as a method of proving motor vehicle ownership).

184. See 1935 Ala. Acts No. 331. Before 1935, the right of access to public documents was governed by State common law. "Public writings," however, had been broadly defined by the courts to include such varied items as prisoner records, *Holcombe v. State ex rel. Chandler*, 200 So. 739 (Ala. 1941), real property records, *Randolph v. State*, 2 So. 714 (Ala. 1887), and tax records, *Brewer v. Watson*, 71 Ala. 299 (1887).

185. ALA. CODE § 32-6-14 (1975).

186. ALA. CODE § 32-7-4 (1975).

187. ALA. CODE § 36-12-40 (1975). "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." See *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678, 680 (Ala. 1981) (explaining that "§ 36-12-40 first appeared in the 1923 Code").

188. See *Holcombe*, 200 So. at 746 ("the public generally have the right of a reasonable and free examination of public records required by law to be kept by public officials").

promote open government.<sup>189</sup>

Alabama law also exposes another error in the assertions made by the United States in defending challenges to the DPPA. Contrary to the suggestion of the United States, "Alabama does not and has never trafficked in the commercial sale of public motor vehicle registration records. Any commercial activity involving Alabama driver's license information is only incidental to its release"<sup>190</sup> because the State does not sell its information at a profit; it charges only a nominal administrative fee.<sup>191</sup>

## 2. NORTH CAROLINA

Since 1935, North Carolina has by statute treated motor vehicle records as a matter of "public record."<sup>192</sup> Prior to enactment of the DPPA, North Carolina law provided:

All records of the Division pertaining to application and to drivers' licenses, except the confidential medical report referred to in [N.C. GEN. STAT.] § 20-7, of the current or previous five years *shall be open to public inspection* in accordance with [N.C. GEN. STAT.] § 20-43.1 at any reasonable time during office hours and copies shall be provided pursuant to the provisions of [N.C. GEN. STAT.] § 20-26.<sup>193</sup>

State law further provided: "The division *shall* furnish copies of license records required to be kept by subsection (a) of this section . . . to other persons for uses other than official upon prepayment of the following fees . . . ."<sup>194</sup> These provisions were in accord with North Carolina's public records law, enacted in 1935.<sup>195</sup>

## 3. OKLAHOMA

Oklahoma has long mandated that its motor vehicle records be open

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189. See *Stone*, 404 So. 2d at 681 (recognizing importance of access to public records to citizen knowledge of government affairs); *Holcombe*, 200 So. at 744 ("it is not necessary that the interest be private, capable of sustaining a suit or defense on the personal behalf of the party desiring that inspection; but he has the right of inspection whenever, by reason of his relation to the common interest, he may act in such a suit as the representative of a common or public right").

190. Brief in Support of Plaintiff's Motion for Summary Judgment at 7, *Pryor v. Reno*, 998 F. Supp. 1317 (M.D. Ala. 1998) (CIV. No. CV-97-D-1396-N).

191. Alabama charges only an administrative fee of \$5.75. Ala. Code § 32-7-4. Many federal agencies charge comparable or larger sums to provide addresses. See *JOHNSON*, *supra* note 110, at 17-19 (armed forces each charge fees ranging from \$3.50 to \$5.20).

192. Before 1935, the right of access to such documents was governed by State common law. North Carolina appellate courts had not been called upon to define public records.

193. N.C. GEN. STAT. § 20-27(a) (1993) (emphasis added).

194. *Id.* § 20-26(c) (1993) (emphasis added).

195. See Act of May 2, 1935, ch. 265, § 1, 1935 N.C. Sess. Laws 288 (codified as amended at N.C. GEN. STAT. § 132-1 (1995)).

to public inspection. By 1943, Oklahoma had passed the Oklahoma Open Records Act, which explicitly "made [it] the duty of every public official . . . who [is] required by law to keep public records . . . to keep the same open for public inspection . . . to the citizens and taxpayers of this state . . . ."196

In explaining the purpose of the Oklahoma Open Records Act,<sup>197</sup> the State legislature declared: "The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power. The privacy interests of individuals are adequately protected in the specific exceptions to the [Act] or in the statutes which authorize, create or require the records."<sup>198</sup>

The Oklahoma appellate courts have recognized the State's public policy. In *Tulsa Tribune Co. v. Oklahoma Horse Racing Commission*,<sup>199</sup> the Oklahoma Supreme Court favorably discussed the policy of disclosure while nonetheless finding non-statutory exceptions.<sup>200</sup> The State legislature promptly acted to supersede *Tulsa Tribune* by amending the Open Records Act so as to reinforce the disclosure requirement.<sup>201</sup> Oklahoma appellate courts now recognize the strength and breadth of the statutory provisions.

There is . . . no provision in the Open Records Act which allows a court to balance an individual's interest in having records remain private and the public's interest in having access to the records. The Legislature has determined by statute that the public's interest is greater, except where specific statutory exemption is given.<sup>202</sup>

The Oklahoma Supreme Court itself acknowledged that the amendments "show beyond credible argument to the contrary that the legislature disagreed with our interpretation, in *Tulsa Tribune*, of the Act."<sup>203</sup> The State's highest court explained: "The legislature expressly said that the public policy of the state is 'to ensure and facilitate the public's right of access to and review of government records so they may efficiently and

196. OKLA. STAT. tit. 51, § 24 (1943). To bolster this general provision, Oklahoma explicitly requires the release of any Department of Public Safety Record, including any individual's traffic record. Okla. Stat. tit. 47 § 6-117 (1961).

197. OKLA. STAT. tit. 51, §§ 24A.1-24A.20.

198. OKLA. STAT. tit. 51, § 24A.2.

199. 735 P.2d 548 (Okla. 1986).

200. *Id.* at 555 (explaining that "disclosure of information is to be favored over a finding of exemption").

201. See 1988 Okla. Sess. Laws ch. 187, § 2.

202. State of Oklahoma, ex rel. Oklahoma State Bd. of Med. Licensure and Supervision v. Migliaccio, 917 P.2d 483, 487 (Okla. Ct. App. 1996).

203. City of Lawton v. Moore, 868 P.2d 690, 692 (Okla. 1993).

intelligently exercise their inherent political power.’”<sup>204</sup>

Oklahoma’s public access provisions are guaranteed by its State constitution. Oklahoma does not release its motor vehicle records in bulk. Oklahoma does not sell its records; it charges only a \$3.00 administrative fee for issuing a certified record.<sup>205</sup> That sum is less than the sum charged by many federal agencies to provide addresses.<sup>206</sup> The United States has appealed from a district court decision in which Oklahoma successfully challenged the constitutionality of the DPPA.<sup>207</sup>

#### 4. WISCONSIN

Wisconsin’s very first statutes, enacted in 1849, protected open records and open meetings.<sup>208</sup> The Supreme Court of Wisconsin has explained that its open records policy predates that enactment as section 19.35 “is a statement of the common law rule that public records are open to public inspection.”<sup>209</sup> The State has made clear that “[t]he primary purpose of the open records law is to ensure an informed electorate,”<sup>210</sup> and draws no distinction between motor vehicle records and other records.<sup>211</sup>

Wisconsin recognizes that in specific cases an individual’s interest in privacy in information may outweigh the public interest in disclosure. These determinations are made on a case-by-case basis, “giving much weight to the beneficial public interest in open records.”<sup>212</sup>

Consistent with this balancing approach, the Wisconsin legislature

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204. *Id.* (emphasis omitted).

205. Okla. Stat. tit. 47, § 6-117(G).

206. See JOHNSON, *supra* note 110, at 17-19 (armed forces each charge fees ranging from \$3.50 to \$5.20).

207. The Tenth Circuit reversed the district court’s decision in *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998).

208. Wis. Stat. Ch. 10, §§ 29, 37, 137 (1849). “The original statute requiring constitutional officers to open their records ‘has survived virtually unchanged.’” Bunker, *supra* note 169, at 555 n.101 (quoting prior edition of Robert A. Christensen & David Lucey, *Tapping Officials’ Secrets: The Door to Open Government in Wisconsin*, in REPORTERS COMMITTEE, *supra* note 181, at WI-2). The provision’s citation has changed over time, requiring a careful reading of the caselaw. See 1917 Wis. Laws, ch. 178 § 2 (current version at Wis. STAT. ANN. § 19.35 (West 1996)).

209. State of Wisconsin ex rel. Bilder v. Township of Delavan, 334 N.W.2d 252, 259 (Wis. 1983). Although the case actually makes reference to § 19.21, that cite is to the 1979 code effective at the time of the 1983 decision. The historical notes to the current § 19.35 indicate that it is the successor provision.

210. State of Wisconsin ex rel. Young v. Shaw, 477 N.W.2d 340, 348 (Wis. Ct. App. 1991) (citing Wis. Stat. § 19.35).

211. See also Beckon v. Emery, 153 N.W.2d 501, 503-04 (Wis. 1967) (holding traffic citation records are public records subject to disclosure); Shaw, 477 N.W.2d at 348 (addressing right to inspect accident reports).

212. *Township of Delavan*, 334 N.W.2d at 259; see also Beckon, 153 N.W.2d at 504 (finding that “there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary”); State of Wisconsin ex rel. Youmans v. Owens, 137 N.W.2d

has directed that disclosure of a "record containing personally identifiable information" is not required if it would "[e]ndanger an individual's life or safety."<sup>213</sup> That approach provides protection to individuals reasonably concerned with stalking or other menaces while not eviscerating the State's general policy favoring open records. In passing the DPPA, Congress failed to consider any similarly narrowly-tailored solution that turned on such individualized determinations.

Wisconsin releases motor vehicle records for an administrative fee "at a rate of \$3-4 per record."<sup>214</sup> Such fees only cover the "major share" of compiling the records, not even the cost of photocopying, let alone providing any profit.<sup>215</sup> Many federal agencies charge comparable or larger sums to provide addresses.<sup>216</sup>

Prior to the enactment of the DPPA, any person who registered a car or applied for a driver's license could, at his or her option, require the Wisconsin Department of Transportation ("WISDOT") to keep confidential his or her "personal identifiers" (consisting of name, street address, post-office box number or nine-digit extended zip code) when requested by anyone who seeks the personal information of ten or more people.<sup>217</sup> WISDOT was authorized, however, to disclose such personal information to "law enforcement agencies, insurers, motor vehicle manufacturers and their agents and other persons requesting the information to perform a legally authorized function, even over an individual's request to keep his or her personal identifiers confidential."<sup>218</sup> In reaction to the passage of the DPPA, WISDOT requested that Assembly Bill 338 be introduced in the legislature. That bill would have prohibited WISDOT from disclosing personally identifiable information to all but those specifically authorized to receive the information.<sup>219</sup> Notably, as adopted by the Assembly, the bill provided that the new law would not apply after a court of competent jurisdiction either declared the DPPA invalid, or the DPPA was amended.<sup>220</sup> The Wisconsin Senate took no

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470, 475 (Wis. 1965) ("public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied").

213. WIS. STAT. ANN. § 19.35(1)(2)(a) (West 1996).

214. *Travis*, 12 F. Supp. 2d at 923.

215. See Aff. of Barbara J. Wehrle, Chief, Vehicle Records Section, Division of Motor Vehicles, Wisconsin Department of Transportation, State Plaintiff's Appendix at 107, 115, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998); see also Wis. Stat. § 341.17(6).

216. See JOHNSON, *supra* note 110, at 17-19 (armed forces each charge fees ranging from \$3.50 to \$5.20).

217. Analysis by the Legislative Reference Bureau, 1997 Assembly Bill 338 (introduced May 6, 1997, passed as amended, May 22, 1997).

218. *Id.*

219. 1997 Assembly Bill 338 § 1 (proposing enactment of Wis. Stat. § 85.05(3)).

220. Assembly Substitute Amendment 1 to 1997 Assembly Bill 338 § 1 (introduced May 13, 1997, passed May 22, 1997).

action on the bill, however, and it lapsed.

## 5. SOUTH CAROLINA

South Carolina follows a more narrowly-tailored approach to limiting access to records than does the DPPA. For example, South Carolina's statutes provide that driver's license and motor vehicle records may be released to anyone, as long as the requester verifies his or her name and address, and confirms that the information will not be used for telephone solicitation.<sup>221</sup> The South Carolina statute also contains an "opt-out" provision, by which individuals may choose to prevent the release of their records for purposes of marketing and solicitations.<sup>222</sup> While South Carolina has not traditionally considered motor vehicle and driver's license records to be public records subject to a right of inspection,<sup>223</sup> the DPPA nonetheless would require South Carolina to regulate in a manner different from the system already established by the State. The DPPA thus would "impose appreciable cost and effort on the state department of motor vehicles."<sup>224</sup>

The South Carolina challenge is presented in a unique context. South Carolina did not require motor vehicle records to be open for public inspection. Instead, South Carolina simply has a different system of regulating dissemination of information in motor vehicle records.<sup>225</sup> In some ways, the State's regime may provide protection superior to the DPPA without the added burdens and potential liabilities associated with the DPPA.<sup>226</sup>

### B. *Public Policies Displaced by the DPPA*

As demonstrated by an examination of the pre-DPPA status of the laws in the States now challenging the DPPA, there are strong public policy reasons for the determination by some States to permit open access to State motor vehicle records. There is a long- and well-recog-

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221. S.C. CODE ANN. § 56-3-510 (Cum. Supp. 1998).

222. S.C. CODE ANN. § 56-3-540.

223. See 1965 S.C. Op. Att'y. Gen. 82 (No. 1829).

224. Appellee's Brief at 3, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (No. 97-2554) [hereinafter *South Carolina Br.*].

225. See S.C. CODE ANN. §§ 56-3-510 through 56-3-540 (Cum. Supp. 1988).

226. See *South Carolina Br.*, *supra* note 224, at 3. A suit filed by the State after the Fourth Circuit invalidated the DPPA and enjoined its enforcement in South Carolina further evidences this point. Although a set of digital images from the State's motor vehicle records could be permissibly sold under the DPPA, *see supra* note 65, the State Attorney General brought suit to rescind the sale premised upon broader protections afforded under South Carolina law. See *Condon v. Image Data, LLC*, Civ. Action No. 99-CP-40-0290 (C.P. Richland County Feb. 12, 1999) (denying preliminary injunction).

nized public interest in open government.<sup>227</sup> Public access to government records plays a large part in ensuring open government. Open records allow citizens to monitor the functions of their government directly. Thus, although privacy advocates raise legitimate concerns, there are substantial countervailing interests in open government records.

The accuracy of the information obtained by government has historically prompted third parties to trust this information as a means of verifying assertions by a registered or licensed individual. Most obviously, a State-issued driver's license has become accepted as a common form of identification when cashing checks, using credit cards, or purchasing alcoholic beverages. Officers of State and local governments routinely access State motor vehicle records for law enforcement purposes, to enforce zoned parking restrictions, and for other matters.

In addition, the State and local governments benefit from the availability of this data to many citizen groups. Private citizens in Madison, Wisconsin, used motor vehicle records to identify men searching for prostitutes in order to send the men letters to discourage their patronage.<sup>228</sup> Other citizens used this technique to discourage street-corner drug sales.<sup>229</sup> Until thwarted by the DPPA, a Regional Ozone Coalition planned to use motor vehicle records to identify owners of polluting cars in Ohio and Kentucky to encourage them to clean up their exhaust.<sup>230</sup> Mothers Against Drunk Driving ("MADD") chapters have used information from motor vehicle records to protect children from alcohol abusers.<sup>231</sup> Advocacy groups for the handicapped use the records to discourage illegal parking in parking spaces reserved for the handicapped.<sup>232</sup>

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227. See, e.g., GIVENS, *supra* note 121, at 124 ("Information should flow freely in a democratic society so citizens can keep an eye on what their government is doing."); 66 AM. JUR. 2D, *Records and Recording Laws* § 12, at 349 (1973) ("Good public policy is said to require liberality in the right to examine public records."); cf. Speech of Daniel Webster (Jan. 26, 1930) in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 450 (No. 14) (15th ed. 1980) ("The people's government, made for the people, made by the people, and answerable to the people."). These policies are the impetus behind the Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552).

228. See Dave Zweifel, *Your Right to Know: Law Closing Vehicle/Driver Records Deserves a Challenge*, THE CAPITAL TIMES (Madison, WI), Dec. 16, 1997, at 9A; see also Bruce Landis, *Battle Looms Over Access to Motor Vehicle Files*, THE PROVIDENCE SUNDAY JOURNAL (Providence, RI), Nov. 24, 1996, at B1.

229. See Landis, *supra* note 228, at B1; Joseph Neff, *New Federal Law Set to Close Some State Records*, THE NEWS & OBSERVER (Raleigh, NC), Sept. 1, 1997, at A3.

230. See Ben L. Kaufman, *Privacy Act Blocks Smog Scheme: Coalition Hoped to Send Letter to Owners of Polluting Cars*, THE CINCINNATI ENQUIRER, Sept. 21, 1997, at B1.

231. See Mike Hendricks, *Unrelenting Erosion of our Privacy*, THE KANSAS CITY STAR, Sept. 22, 1997, at B1.

232. See Landis, *supra* note 228, at B1.

State motor vehicle records are also commonly used to verify information by insurance companies in underwriting and claims handling. These records are commonly used to locate parties and witnesses in both civil and criminal proceedings.

Reporters have frequently relied upon motor vehicle records to facilitate their news-gathering and reporting. For example, following allegations that Northwest Airlines pilots had flown while intoxicated, the Minneapolis Star-Tribune searched State motor vehicle records and published a story relating the number of licensed pilots who had been charged with alcohol-related driving offenses.<sup>233</sup> The story prompted changes in Federal Aviation Administration regulations.<sup>234</sup> The Kansas City Star used motor vehicle records to investigate school bus drivers for speeding, driving with suspended licenses, and driving while intoxicated.<sup>235</sup> The Providence (Rhode Island) Journal-Bulletin used motor vehicle records to identify and interview owners of particular automobiles that were being recalled.<sup>236</sup> The Detroit News used motor vehicle records to question whether four State legislators lived in the

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233. See Allen Short, Joe Rigert & Norman Draper, *41 Pilots Lost State Driver's Licenses: Their Alcohol Offenses Over Past 7 Years Included 25 DWI Convictions*, STAR TRIBUNE (Minneapolis, MN), Mar. 25, 1990, at 1A; Randy Furst, *Accused Pilot Involved in '77 Airport Incident Appeared Drunk, Court Documents Say*, STAR TRIBUNE (Minneapolis, MN), Mar. 14, 1990, at 4B; see also Randy Furst, *Fired NWA Crew to Appeal Revocation of Licenses*, STAR TRIBUNE (Minneapolis, MN), Mar. 18, 1990, at 1A (reporting on 1990 incident that triggered investigation of pilots' backgrounds); David Phelps, *Cecchi Takes Blame in Alleged Drinking Case But he says Evidence was Lacking to Ground Crew*, STAR TRIBUNE (Minneapolis, MN), Mar. 21, 1990, at 1D (same); *All 3 Members of Northwest Cockpit Crew are Indicted*, STAR TRIBUNE (Minneapolis, MN), Apr. 5, 1990, at 2B (same); *Moorhead: City Starts Probe of Speak Easy Bar Where NWA Cockpit Crew Allegedly Drank*, STAR TRIBUNE (Minneapolis, MN), Apr. 7, 1990, at 5B (same); Donna Halvorsen, *Flight Crew Trial to Focus on FAA, NWA and Safety*, STAR TRIBUNE (Minneapolis, MN), July 24, 1990, at 3B (same); Doug Grow, *Northwest Pilots Caught in a Hurricane-Force Shift in Attitudes Toward Alcohol*, STAR TRIBUNE (Minneapolis, MN), Aug. 21, 1990, at 1B (same); Randy Furst, *Northwest Crew Found Guilty: 3 Convicted of Flying While Under Influence of Alcohol*, STAR TRIBUNE (Minneapolis, MN), Aug. 21, 1990, at 1A (same); *NWA Pilots Face Trial Monday in N.D.*, STAR TRIBUNE (Minneapolis, MN), Aug. 22, 1990, at 3B (same); Randy Furst, *NWA Crew Conviction Weighs Heavily on Airline Industry*, STAR TRIBUNE (Minneapolis, MN), Aug. 22, 1990, at 3B (describing momentum for legislative or regulatory changes to impose stricter standards on pilot alcohol levels); *Ex-Northwest Pilots Plead Guilty in Fargo*, STAR TRIBUNE (Minneapolis, MN), Aug. 24, 1990, at 3B (reporting on 1990 incident that triggered investigation of pilots' backgrounds); Margaret Zack, *NWA Crew Members get Terms Ranging from 12 to 16 Months*, STAR TRIBUNE (Minneapolis, MN), Oct. 27, 1990, at 1A (same); Tony Kennedy, *Pilot Ruined by Alcohol Rises to Challenge, Finishes Career*, STAR TRIBUNE (Minneapolis, MN), Nov. 7, 1998, at A1 (describing post-conviction life of one of the pilots who gave rise to the investigation); cf. Randy Furst, *Pilot had Several Drinking Arrests, Completed Treatment*, STAR TRIBUNE (Minneapolis, MN), July 14, 1994, at 1B (detailing prior alcohol related arrest record of another pilot more recently accused of flying while intoxicated).

234. See Jane E. Kirtley, *Individual Security vs. Media Access*, THE WASHINGTON POST, Dec. 16, 1997, at A26 [hereinafter *Media Access*].

235. See Hendricks, *supra* note 231, at B1.

236. See Landis, *supra* note 228, at B1.

district they were elected to represent.<sup>237</sup>

Following a review of these many governmental and commercial uses of the data in question, one State found that only three percent of all requests for access to individual records came from individuals.<sup>238</sup>

Moreover, State governments have taken measures to prevent the abuse of personal information obtained through State-maintained drivers' records. In addition to enacting anti-stalking laws,<sup>239</sup> some States have placed restrictions on the permitted uses of motor vehicle records.<sup>240</sup>

### C. The DPPA has Impacted States Differently

Because States had established different public policies regarding the disclosure of motor vehicle information, the DPPA produced different consequences in different States. As noted above, most States considered their motor vehicle records to be public records.

Several States with such laws are challenging the DPPA. Oklahoma, Wisconsin, and North Carolina successfully defended their open records policies in district court.<sup>241</sup> In district court, Alabama lost its challenge to the DPPA's displacement of its open records policy, but

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237. See Ben Burns, *Public Disclosure of Driver Records Should be the Norm*, MICHIGAN CHRONICLE, Oct. 1, 1996, at 7A. While many of the previous uses of information identified in the preceding four paragraphs are arguably permitted under the DPPA, this final example is clearly prohibited. Although press investigation into the eligibility of legislators would seem to represent an interest at the very core of the First Amendment and legitimate governmental concern with maintaining open records, the DPPA would bar the disclosure of the pertinent information for legislative candidates who did not consent to the release of their records.

In similar fashion, the DPPA erects a barrier to press investigation of whether jury pools are fairly selected from those eligible to serve (at least in jurisdictions where the jury pool is selected from all individuals licensed to drive). At least sixteen federal districts supplement jury source lists with lists of licensed drivers. See John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 390-91 (1997) (collecting citations); see also Aff. of David Williams, Senior Programs Specialist, Administrative Office of the United States Courts at 2, *United States v. Ramsey*, No. CRIM. A.93-131 (E.D. Pa. 1993), (identifying thirteen districts that supplement voter registration lists with lists of licensed drivers), cited in Bueker, *supra*, at 391 n.2.

238. See Editorial, *Shutting Down DMV*, PORTLAND OREGONIAN, Mar. 17, 1997, at B8.

239. See *supra* notes 97, 98 and accompanying text.

240. See, e.g., *supra* note 221.

241. *State of North Carolina v. Reno*, No. 5:98-CV-27-BR(3) (E.D.N.C. Sept. 29, 1998), appeal docketed, No. 98-2676 (4th Cir. Nov. 17, 1998), stay granted pending filing and disposition of a petition for a writ of certiorari in *Condon v. Reno*, No. 98-2676 (4th Cir. Jan. 28, 1999); *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998), *reh'g denied*, No. 98-2881 (7th Cir. Feb. 11, 1999), stay of issuance of mandate pending filing of a petition for a writ of certiorari denied, No. 98-2881 (7th Cir. Feb. 19, 1999) stay of issuance of mandate pending filing of a petition for a writ of certiorari granted *sub nom.* Administrator of the Division of Motor Vehicles *v. Reno*, No. A-795 (U.S. Mar. 31, 1999) (Stevens, Circuit Justice); *Oklahoma v. United States*, 994 F. Supp. 1358 (W.D. Okla. 1997), *rev'd*, 161 F.3d 1266 (10th Cir. 1998), *reh'g denied*, No. 97-6389 (10th Cir. Feb. 2, 1999), stay of

its appeal is pending.<sup>242</sup>

South Carolina successfully defended its alternative method of limiting disclosure of information from motor vehicle records in district court.<sup>243</sup> The United States has not accepted that determination as final.<sup>244</sup>

California presents another unique context. California ascertained that the DPPA would require it to disclose *more* information than under State law.<sup>245</sup> In that setting, the DPPA's requirements produce results seemingly at odds with congressional intent.

#### IV. OVERVIEW OF THE CONSTITUTIONAL ISSUES RAISED BY THE DPPA LITIGATION

Challenges to the DPPA raise six constitutional issues. This section discusses each one individually, specifically: the Tenth Amendment,<sup>246</sup> section Five of the Fourteenth Amendment, the First Amendment, the Eleventh Amendment, the Commerce Clause, and the Guarantee Clause.

##### A. *The Tenth Amendment*<sup>247</sup>

The DPPA improperly directs States how to regulate their records. The DPPA does not establish a national system for licensing drivers and registering motor vehicles. Instead, it directs States as to how they must regulate the dissemination of information from State-created and -maintained records obtained in performing those tasks. In short, the national government purports to instruct each State how it must regulate in this field. The United States Supreme Court has held that Congress may not

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*issuance of mandate pending filing of a petition for a writ of certiorari granted*, No. 97-6389 (10th Cir. Feb. 11, 1999).

242. See *Pryor v. Reno*, 998 F. Supp. 1317 (M.D. Ala. 1998), *argued on appeal*, No. 98-6261 (11th Cir. Nov. 30, 1998).

243. See *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997).

244. See *Condon v. Reno*, 155 F.3d 453 (4th Cir.) (affirming the district court), *reh'g denied*, No. 97-2554 (4th Cir. Dec. 22, 1998), *petition for cert. filed*, 67 U.S.L.W. 3588 (U.S. Mar. 15, 1999) (No. 88-1464).

245. See Attorney General's Opinion No. 95-805, 79 Op. Cal. Att'y Gen. 76 (1996); see also *supra* note 44.

246. A more detailed alternative analysis of the Tenth Amendment issues is presented in Part V below.

247. A brief discussion of the Tenth Amendment issues discussed in this Section as well as in Part V(B) below was previously published in Thomas H. Odom, *A Victory for the 10th Amendment: 4th Circuit Strikes Driver's Privacy Act as not Generally Applicable*, FULTON COUNTY DAILY REPORT (Georgia), Oct. 6, 1998, at 7, reprinted from *Going the 10th Amendment's Way: 4th Circuit Reaches Decision on Motor Vehicle Records Law*, LEGAL TIMES, Sept. 28, 1998, at 29 [hereinafter *Victory*].

legislate in this manner, and the DPPA will not likely survive Tenth Amendment review.

The Tenth Amendment to the United States Constitution provides that “[t]he 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.”<sup>248</sup> In *New York v. United States*,<sup>249</sup> the Supreme Court relied on the Tenth Amendment to strike down a statute enacted pursuant to the Commerce Clause.<sup>250</sup> The Supreme Court held that the statute was an example of federal “co-option” of State legislatures, in violation of the Tenth Amendment:

While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation.<sup>251</sup>

In 1997, the Supreme Court reaffirmed this holding in *Printz v. United States*.<sup>252</sup> The Supreme Court relied, in part, on the way that national mandates requiring States to regulate specific areas shift accountability. “By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”<sup>253</sup>

The DPPA suffers from this same defect. The States challenging the DPPA have presented uncontradicted testimony calculating the added expense the States must bear in order to comply with the DPPA’s dictates.<sup>254</sup> Congressional debate fairly branded the DPPA as an

248. U.S. CONST. amend. X.

249. 505 U.S. 144 (1992).

250. *New York*, 505 U.S. at 180, 188.

251. *Id.* at 180 (emphasis in original).

252. 117 S. Ct. 2365, 2382 (1997). “[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people.” *Printz*, 117 S. Ct. at 2377. “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *Id.* (quoting *New York v. United States*, 505 U.S. at 166).

253. *Id.* at 2382.

254. See South Carolina Br., *supra* note 224, at 3; Affidavit of L.N. Hagan, Director, Alabama Department of Public Safety, *Pryor v. Reno*, 998 F. Supp. 1317 (M.D. Ala. 1998) (Civ. Action No. 97-D-1396-N); Affidavit of Barbara J. Wehrle, Chief, Vehicle Records Section, Division of Motor Vehicles, Wisconsin Department of Transportation, State Plaintiff’s Appendix at 107, 115, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998) (No. 97-C-701-C); Affidavit of Carol Howard, Director, Vehicle Registration Section, North Carolina Division of Motor Vehicles, attached as Exhibit 2 to Brief in Opposition to Defendants’ Motion to Dismiss and in Support of

“unfunded mandate.”<sup>255</sup>

The district courts in *Oklahoma* and *Condon* properly relied upon *New York* and *Printz* to resolve the cases before them and find the DPPA unconstitutional. On appeal, the United States asserted that those cases are not controlling. Proponents of the DPPA argue that the DPPA does not “compel the States to enact or administer a federal regulatory problem,”<sup>256</sup> but rather seeks to regulate State conduct in order to address a problem created by State activity.<sup>257</sup> Neither of those assertions withstand analysis.

In fact it is difficult to fathom how the DPPA can be read as anything *other* than a mandate for a State to administer a federal policy regarding disclosure of information from State files. A detailed comparison to the situation in *New York* demonstrates the parallels.

In *New York*, the Supreme Court examined the proper division of authority between the federal government and the States in the context of the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>258</sup> The Act required States either to take ownership of low-level radioactive waste in their borders or else to regulate the waste in accordance with federal instructions. The Court concluded that while Congress has significant power to *encourage* States to undertake certain tasks valued by Congress, “the Constitution does not confer upon Congress the ability to compel the States to do so.”<sup>259</sup> After an extensive analysis of the history and basis for the Tenth Amendment, the Court concluded that the Amendment serves an important purpose of republican government,

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Plaintiff’s Motion for Summary Judgment, *State of North Carolina v. Reno*, Civ. No. 5:98-CV-27-BR3 (E.D.N.C. Sept. 29, 1998).

255. 139 CONG. REC. S15,763 (daily ed. Nov. 16, 1993) (statement of Sen. Hatch) (the DPPA “places unfunded mandates on the States which may result in the States prohibiting all uses of DMV records for any purpose, including legitimate business and press purposes”). The “unfunded mandate” label has limited direct impact because the September 13, 1994, enactment of the DPPA preceded the March 22, 1995 enactment of the Unfunded Mandates Reform Act of 1995 (“UMRA”), Pub. L. No. 104-4, 109 Stat. 48 (1996) (codified at scattered sections of 2 U.S.C.). The UMRA applies only to legislation considered on or after its delayed effective date; it has no impact on unfunded mandates enacted prior to the effective date of the UMRA. Pub. L. No. 104-4, § 110, 109 Stat. at 64; see Tracey A. Kaye, *Show Me the Money: Congressional Limitations on State Tax Sovereignty*, 35 HARV. J. ON LEGIS. 149, 158 (1998). Consequently, even the limited procedural limitations on an “unfunded mandate” imposed by the UMRA were inapplicable to the DPPA.

256. *Printz*, 117 S. Ct. at 2383 (quoting *New York*, 505 U.S. at 188).

257. *E.g.*, Brief of Appellants at 16, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (No. 97-2554) [hereinafter U.S. *Condon Br.*]; Brief of Appellants at 15, *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998) [hereinafter U.S. *Oklahoma Br.*].

258. 42 U.S.C. § 2021b et seq. (1994).

259. *New York v. United States*, 505 U.S. 144, 149 (1992). See Ronald D. Rotunda, *Resurrecting Federalism Under the New Tenth and Fourteenth Amendments*, 29 TEX. TECH. L. REV. 953, 959 (1998) [hereinafter *Resurrecting Federalism*] (“*New York v. United States* says that you cannot single out states for special legislation.”).

specifically, to ensure that the powers of the States remain distinct from those of the federal government.<sup>260</sup> The Court concluded that where the Low-Level Radioactive Waste Policy Amendments Act of 1985 ordered the States to perform certain acts, Congress had exceeded its authority in violation of the Tenth Amendment.<sup>261</sup>

The statute at issue in *New York* presented States with two alternatives: "A state could (1) provide for the disposal of all low-level radioactive waste generated within the state by 1996 or (2) take title to that waste at that time."<sup>262</sup> The DPPA offers parallel alternatives. States can choose between (1) being coerced to enact new laws regarding access to motor vehicle records which permit individuals to "opt out" of the public database, at significant added expense in terms of mailing, data entry, and record keeping,<sup>263</sup> or (2) being coerced to limit disclosures from the State's public records only in compliance with federal policy.<sup>264</sup> As in *New York*, the first alternative is a "command [to] state government to enact state regulation."<sup>265</sup> Yet, it is clear that "Congress itself must legislate in furtherance of federal interests, and may not 'conscript' states to legislate for it."<sup>266</sup>

The second alternative is also beyond the authority of Congress. Just as in *New York* where the States could not be forced to acquire property, likewise States may not be instructed how to regulate public access to property in their custody.<sup>267</sup> *Printz* recognized that this second alternative would have effectively required States "to implement an administrative solution."<sup>268</sup> In *Printz*, the Supreme Court reviewed provisions of the Brady Handgun Violence Prevention Act.<sup>269</sup> Several mechanisms were enacted to prevent persons ineligible to possess a handgun from obtaining one. In States which did not adopt a specific mechanism under the Act, the Act required the chief law enforcement officer ("CLEO") in the county of residence of the gun permit applicant to make a reasonable effort to determine if the applicant's possession of a handgun would violate the law.<sup>270</sup> The Court concluded that the Brady

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260. 505 U.S. at 155-56.

261. *Id.* at 188.

262. The quoted description represents the United States' own characterization of *New York*. U.S. Condon Br., *supra* note 257, at 14; U.S. Oklahoma Br., *supra* note 257, at 12-13.

263. *See* 18 U.S.C. § 2721(d) (1994).

264. *See id.* § 2721(a)-(c) (1994).

265. 505 U.S. at 178.

266. The United States concedes this limitation on Congress. U.S. Condon Br., *supra* note 257, at 14 (quoting *New York*, 505 U.S. at 178); U.S. Oklahoma Br., *supra* note 257, at 13 (quoting *New York*, 505 U.S. at 178).

267. *See New York*, 505 U.S. at 175.

268. *Printz v. United States*, 117 S. Ct. 2365, 2380 (1997).

269. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

270. *Printz*, 117 S. Ct. at 2369.

Act purported to direct State law enforcement officers to participate in the administration of a federal regulatory scheme, in violation of the Tenth Amendment.<sup>271</sup>

Similarly, to comply with the DPPA, States must affirmatively adopt legislative or administrative measures enforcing the Act's disclosure limitations in order to avoid liability for maintaining "a policy or practice of substantial noncompliance" with the DPPA.<sup>272</sup> State officials confronted with a request for information must "administer" the federal program. In *Printz*, the Supreme Court stated that the Framers of the Constitution specifically chose not to have the federal government rule through the States or their officers and concluded that the federal government is constitutionally prohibited from compelling the States to implement, by legislative or executive action, federal regulatory programs.<sup>273</sup>

Indeed, it was the very recognition that States would be required to address the issue legislatively or administratively that prompted Congress to delay the effective date of the DPPA for three years. The Senate sponsors recognized that their bill proposed an effective date 270 days following enactment in order to allow the States sufficient time to develop such responses.<sup>274</sup> Following hearings, Congress determined that the time permitted to States to formulate and implement legislative or administrative responses was too short.<sup>275</sup> States overwhelmingly recognized the mandate to regulate, and many of the new State statutes enacted in the wake of the DPPA expressly recited that the State legislatures were responding to that mandate. The Colorado legislature declared:

The general assembly hereby finds and declares that [its law] is mandated by the provisions of the [DPPA] and that the state may be subject to penalties if legislation to comply with the federal act is not

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271. *Id.* at 2369-70.

272. See 18 U.S.C. § 2723(b) (1994).

273. *Printz*, 117 S. Ct. at 2380.

274. See 139 CONG. REC. S15,764 (daily ed. Nov. 16, 1993) (statement of Sen. Boxer) ("This bill takes a national problem and gives the States broad latitude and nine months to enact a national solution.") (emphasis added); see also *id.* (statement of Sen. Warner) (the bill gives States "room to craft their own specific responses to the regulations").

275. See *Hearings supra* note 101, 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton) (stating that the bill's proposed 270-day delayed effective date—rather than the three-year delayed effective date adopted—provided inadequate time for States to appropriate funds, promulgate legislative and regulatory responses, and implement their new programs); W. Kent Davis, *Drivers' Licenses: Comply with the Provisions of the Federal Driver's Privacy Protection Act; Provide Strict Guidelines for the Release of Personal Information from Drivers' Licenses and Other Records of the Department of Public Safety*, 14 GA. ST. U. L. REV. 196, 197 (1997) ("the enactment of the federal Act was a watershed event for all American states, for it gave them three years to prepare their own regulations") (emphasis added).

enacted on or before September 13, 1997. The general assembly therefore finds that . . . the act *creates a new program or service required by federal law* . . . .<sup>276</sup>

The Wisconsin legislature refused to change its law and, instead, legislators initiated suit to challenge the constitutionality of the DPPA.<sup>277</sup> The sponsor of the legislation designed to bring North Carolina into compliance with the DPPA stated that the General Assembly would not have adopted the DPPA's provisions except for the civil penalties to which State officials and employees would have otherwise been subject.<sup>278</sup>

Even if the DPPA did not commandeer State legislatures to enact new laws, it seems indisputable that the DPPA requires State employees to "administer" the Act. State employees are the ones who receive requests for DMV records; the DPPA does not provide any federal officers to perform these functions.<sup>279</sup> Because the DPPA mandates the disclosure of information in some situations,<sup>280</sup> the State employees may not simply refuse to respond to the request. Instead, the State employees must determine whether the requested information is subject to the DPPA general disclosure prohibition.<sup>281</sup> Next, the State employees must determine whether the requested information is subject to one or more of the DPPA mandatory disclosure exceptions. Even if States may avoid compelled legislative action (thereby foregoing all the permissive disclosure exceptions at the cost of displacing State public policy), the result is that State employees must administer the DPPA for the federal government. *New York* and *Printz* prohibit that result as much as they prohibit Congress from requiring States to legislate. In *New York*, the Court emphatically held that the federal government "may not compel the States to enact *or administer* a federal regulatory program."<sup>282</sup> *Printz* explicitly reaffirmed that principle: "We adhere to that principle today, and conclude categorically, as we have concluded categorically in *New York*: 'The Federal Government may not compel the States to enact *or*

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276. 1997 Colo. Sess. Laws H.B. 97-1348, § 1 (emphasis added).

277. See *supra* notes 218-220 and accompanying text.

278. Affidavit of Senator David W. Hoyle, Chairman, Joint Legislative Transportation Oversight Committee, General Assembly of North Carolina, attached as Exhibit 1 to Brief in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment, *State of North Carolina v. Reno*, Civ. No. 5:98-CV-27-BR3 (E.D.N.C. Sept. 29, 1998).

279. The DPPA thus parallels the provisions of the Brady Act invalidated in *Printz*.

280. See *supra* Part II(A)(2).

281. See *supra* Part II(A)(5).

282. *New York*, 505 U.S. at 188 (emphasis added). The quoted statements reflect the Court's repeated assertion on this point. *E.g., id.* at 176-77 (observing that the two choices permitted under the Act "only underscore[ ] the critical alternative a State lacks: A State may not decline to *administer* the federal program. No matter which path the State chooses, it must follow the direction of Congress.") (emphasis added).

*administer* a federal regulatory program.”<sup>283</sup>

The DPPA thus directly violates the Supreme Court’s clear instructions in *Printz*: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>284</sup>

In defense of the DPPA, it is argued, nonetheless, that the “DPPA regulates the dissemination of information—it does not ‘require States to regulate.’”<sup>285</sup> The plain language of *New York* and *Printz* rejects this defense of the DPPA. Congress did not choose to establish a national system for licensing drivers and registering automobiles. If Congress had done so, it could decide for itself what information assembled from those processes to make public. Instead, Congress left licensing and registration to the States but purported to direct State officials to administer federal policy regarding dissemination of information, and it is this approach that was foreclosed by *Printz*.<sup>286</sup>

The United States also argues for an overly narrow reading of *New York* and *Printz*. The United States asserts that *New York* and *Printz* only “hold that Congress, in addressing a problem *created by private parties*, cannot conscript the states to enforce federal law.”<sup>287</sup> The problem Congress sought to address in the DPPA was stalking, clearly a problem created by private parties. Further, the United States concedes in its brief in *Oklahoma* that prevention of stalking is the goal of the DPPA.<sup>288</sup> In order to battle the problem caused by criminals, Congress

283. *Printz*, 117 S. Ct. at 2383 (quoting *New York*, 505 U.S. at 188) (emphasis added); *accord id.* at 2380; *see id.* at 2372 n.2 (pointing to lack of early federal “statute compelling state executive officers to *administer* federal laws) (emphasis added); *id.* at 2374 n.8 (reviewing the Federalist Papers and noting “the curiousness of Madison’s not mentioning the state executives’ obligation to *administer* federal law,” and reviewing Story’s Commentaries and noting all his examples “involve not state *administration* of federal law, but merely the implementation of duties imposed on state officers by the Constitution itself”) (emphasis added); *id.* at 2381 (explaining that forcing State officers “into *administering* federal law” is not “compatible with this independence and autonomy”) (emphasis added); *id.* (distinguishing cases because they “say[] nothing about whether state executive officers must *administer* federal law”) (emphasis added); *id.* at 2384 (“The federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to *administer* or enforce a federal regulatory program.”) (emphasis added).

284. *Printz*, 117 S. Ct. at 2384.

285. U.S. Condon Br., *supra* note 257, at 17 (quoting *New York v. United States*, 505 U.S. 144, 178); *see also* U.S. Oklahoma Br., *supra* note 257, at 15-16.

286. 117 S. Ct. at 2384.

287. U.S. Condon Br., *supra* note 257, at 8 (emphasis added); *see also* U.S. Oklahoma Br., *supra* note 257, at 8.

288. U.S. Oklahoma Br., *supra* note 257, at 3-4 (noting that the DPPA was a response to “crimes across the country involving stalkers, robbers and other criminals who have used motor vehicle records to locate victims and commit crimes”); *see* U.S. Condon Br., *supra* note 257, at 3-4 (same).

enacted a requirement that States must regulate their dissemination of motor vehicle records in accordance with national law. Thus, the DPPA fits squarely within the prohibition of *New York* and *Printz* as formulated by the United States in the pending litigation.

The United States attempts to avoid *New York* and *Printz* by recharacterizing the source of the harm. The United States asserts that the harm is not caused by criminals, but by the States. The United States claims that "the DPPA responds to a problem created by motor vehicle department disclosures."<sup>289</sup> This semantic sleight-of-hand does not withstand analysis. Alabama, North Carolina, Oklahoma, South Carolina, Wisconsin, and all of the other States criminalize stalking; they do not condone behavior like the stalking death of Rebecca Schaeffer.<sup>290</sup> Moreover, the United States fails to acknowledge that disclosures from federal agencies provide the same information and result in the same misuse by criminals. In the context of testimony on the DPPA, Congress was informed that the federal government itself released names and residential addresses of potential victims.<sup>291</sup>

The argument that States caused the problem addressed by the DPPA is the equivalent of blaming a State for registering an automobile that a criminal subsequently uses in an armed robbery, or blaming the United States Postal Service for the actions of Ted Kaczynski.<sup>292</sup> The only sense in which States "created" the problem is that they did not regulate dissemination of information from their records in the manner Congress now dictates. Yet, if all that is required to permit the national government to dictate to States how they must regulate is a difference in opinion as to the how the State should regulate, *New York* and *Printz* would be so easily circumvented as to be meaningless.<sup>293</sup> Instead, the

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289. U.S. Condon Br., *supra* note 257, at 9; *see also id.* at 13 ("state activity itself is the source of the problem to be regulated"); U.S. Oklahoma Br., *supra* note 257, at 8; *id.* at 12 (same).

290. One is not held liable for superseding conduct of a third party, which includes "those intentional or criminal acts against which no reasonable standard of care would require the defendant to be on guard," including "unforeseeable personal attacks upon the plaintiff." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 44 at 313 (5th ed. 1984). This is because "[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law." *Id.* § 33 at 201.

291. *See supra* Parts II.C. & II.D. and accompanying text.

292. In January of 1998, Theodore Kaczynski, also known as the "Unabomber," pled guilty to federal charges stemming from his eighteen year mail bombing spree that targeted those he considered to be "technocrats." Tamala M. Edwards, *Crazy Is As Crazy Does: Why the Unabomber Agreed to Trade a Guilty Plea for a Life Sentence*, TIME MAG., Feb. 2, 1998, at 66. The bombings killed three people and injured twenty-three. *Id.* As part of his plea bargain Kaczynski accepted a sentence of life in prison without the possibility of appeal or release. *Id.* For a thorough account of the Unabomber's activities, see ROBERT GRAYSMITH, UNABOMBER: A DESIRE TO KILL (1997).

293. Indeed, the harm at issue in *New York* and *Printz* could just as easily have been blamed on

DPPA is directly parallel to the statutes at issue in *New York* and *Printz* in that the “federal statutes addressed problems created by private persons, and required the states to enact or enforce regulations in aid of a federal scheme designed to address these problems.”<sup>294</sup>

The United States acknowledges that the “DPPA regulates the motor vehicle departments.”<sup>295</sup> The United States asserts that “Congress is not barred from regulating state activity.”<sup>296</sup> The United States, however, cites no authority for the proposition that Congress may regulate States directly *and exclusively*. The United States does not, and cannot, assert that the DPPA is a law of general applicability that only incidentally applies to States.<sup>297</sup> The United States concedes that the DPPA is directed to States.<sup>298</sup> Thus, a straightforward application of *Printz* and *New York* can, and should, result in the invalidation of the DPPA under the Tenth Amendment.

One of the fundamental bases for the decisions in *New York* and *Printz* was concern with maintaining accountability for public policy choices.

Throughout *New York*, the Court emphasized the constitutional problems that arise when Congress declines to enact a federal legislative solution and instead commands states to enact a State regulation or enforce a federal scheme. “Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-

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the States. It can be argued that States “created” the problem of radioactive waste disposal and permitting the unauthorized purchase of firearms if one first ignores the primary conduct of private individuals which was the most direct source of those harms.

294. U.S. Condon Br., *supra* note 257, at 13; U.S. Oklahoma Br., *supra* note 257, at 12.

The *Printz* court distinguished many other federal statutes that similarly are not drawn into question by the DPPA litigation.

Some of these [federal laws] are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States’ executive *in the actual administration of a federal program*. . . . Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text.

*Printz*, 117 S. Ct. at 2376.

295. U.S. Condon Br., *supra* note 257, at 9; U.S. Oklahoma Br., *supra* note 257, at 8.

296. U.S. Condon Br., *supra* note 257, at 9; U.S. Oklahoma Br., *supra* note 257, at 8.

297. An alternative Tenth Amendment analysis addressing this issue is set forth below in Part V.

298. U.S. Condon Br., *supra* note 257, at 16 (“DPPA is in every sense regulation of state activity”); *accord* U.S. Oklahoma Br., *supra* note 257, at 15 (same).

empted by federal regulation."<sup>299</sup>

That loss of accountability is evident in the public debate today. State officials are being blamed for closing access to traditionally-open motor vehicle records.

Without public debate and against the will of the legislature, the head of the Bureau of Motor Vehicles has closed down public access to more than 5 million Indiana driver's license records.

The decision by BMV Commissioner Gary Gibson seems a drastic over-reaction to the Driver's Privacy Protection Act passed by Congress in 1994. It will surely thwart the ability of public and press to scrutinize driving records for valuable information on topics like drunk driving, repeat offenders and traffic safety.<sup>300</sup>

As a further example, the State of Wisconsin originally was named a *defendant* in the DPPA challenge.<sup>301</sup> The State then moved for realignment as a plaintiff and filed its own complaint.<sup>302</sup> Government watchdog organizations and citizens alike suffer from the uncertainty of which sovereign to blame as well as from the loss of access to records that permit private investigation of government corruption, fraud, and abuse.<sup>303</sup>

The *Printz* Court recognized the significance of these nonfinancial burdens. "[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."<sup>304</sup> The Court provided several examples of this point:

Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistak-

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299. U.S. Condon Br., *supra* note 257, at 15 n.7 (quoting *New York*, 505 U.S. at 169); U.S. Oklahoma Br., *supra* note 257, at 14 n.7 (same).

300. Editorial, *Bad Law Made Worse*, INDIANAPOLIS STAR, July 7, 1997, at A4; *see also* Katherine Gregg, *Privacy of Motor Vehicle Records Debated*, THE PROVIDENCE JOURNAL-BULLETIN (Providence, RI), Mar. 22, 1997, at A1 ("Now lawmakers in states across the country—including Rhode Island—are debating whether to seal those records off from public scrutiny or keep them open a crack."); Mary Beth Schneider, *Motor Vehicle Chief Cuts Public Access to Driver's Records*, INDIANAPOLIS STAR, July 3, 1997, at D1 ("In effect, the BMV's action closes the records to the public.").

301. *See* Complaint, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998) (No. 97-C-701C).

302. *See* Complaint of Realigned Plaintiffs, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998) (No. 97-C-701C).

303. *See, e.g.*, *R.L. Polk & Co. v. Ryan*, 694 N.E.2d 1027 (Ill. App. Ct.) (suit by commercial purchaser of motor vehicle records against Illinois Secretary of State), *appeal denied*, 705 N.E.2d 449 (Ill. 1998).

304. *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997).

only rejected.<sup>305</sup>

So too, with respect to the DPPA. It will be a State DMV official and not a federal official who stands between the individual requesting motor vehicle records and the delivery of that information. Finally, it will also likely be the DMV official, not a federal official, who will be blamed for any error that causes either mistaken withholding or mistaken release of the information.

Under the foregoing analysis, application of *Printz* and *New York* to invalidate the DPPA would not change Tenth Amendment jurisprudence despite the United States' dire warnings to the contrary. The United States contends that if *New York* and *Printz* are applied according to their terms, so as to hold that the DPPA improperly conscripts State employees into federal service, the "rule would read the Supremacy Clause out of the Constitution and confound the premises of our federal system."<sup>306</sup> That hyperbole misses the point. The Tenth Amendment poses no bar to congressional enactment of a national system of licensing and registration. Congress could even go so far as to occupy the entire field. The Supremacy Clause would then result in preemption of State laws.<sup>307</sup> In contrast, *New York* and *Printz* forbid congressional action that leaves a matter to State regulation and administration, while purporting to direct States how they must go about their tasks and using State officers to administer the program. Such indirect federal action defies the accountability principles fundamental to democratic self-government.

The *Printz* Court rejected the argument that indirect federal action was acceptable as long as federal direction was clear:

It is permissible, the Government asserts, for Congress to command state or local officials to assist in the implementation of federal law so long as "Congress itself devises a clear legislative solution that regulates private conduct" and requires state or local officers to provide only "limited, non-policymaking help in enforcing that law."<sup>308</sup>

The *Printz* Court recognized that State officers were not simply impressed to perform ministerial functions; State officers were forced to make policy decisions regarding the level of resources to divert to the federal program.

It may well satisfy the Act for a CLEO to direct that (a) no background checks will be conducted that divert personnel time from

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305. *Id.* See also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 394-95 (1997) (discussing accountability).

306. U.S. Condon Br., *supra* note 257, at 17; U.S. Oklahoma Br., *supra* note 257, at 16.

307. Of course, federal preemption only follows if Congress has authority to act under the Commerce Clause. See *infra* Part IV(E).

308. 117 S. Ct. at 2380.

pending felony investigations, and (b) no background check will be permitted to consume more than one-half hour of an officer's time. But nothing in the Act *requires* a CLEO to be so parsimonious; diverting at least *some* felony-investigation time, and permitting at least *some* background checks beyond one-half hour would certainly not be *unreasonable*. Is this decision whether to devote maximum "reasonable efforts" or minimum "reasonable efforts" not preeminently a matter of policy?<sup>309</sup>

The DPPA presents the same problem. It is a matter of policy to decide how much time, if any, DMV officials must expend verifying a requesting individual's entitlement to claim an exemption mandating or permitting disclosure. Thus, the DPPA unconstitutionally requires State officials to administer federal law.

### B. Section Five of the Fourteenth Amendment<sup>310</sup>

Legislation properly enacted pursuant to Section Five of the Fourteenth Amendment is not subject to Tenth Amendment limitations.<sup>311</sup> The DPPA's defenders haphazardly argue that Congress had authority to enact the DPPA pursuant to Section Five of the Fourteenth Amendment.<sup>312</sup> That argument does not withstand analysis because pursuant to the Fourteenth Amendment, Congress may enforce only pre-existing constitutional rights. Congress lacks authority to declare new constitutional rights and there is no reasonable expectation of privacy in information contained in motor vehicle records. An overwhelming majority of States have a long tradition of treating motor vehicle records as public records.<sup>313</sup> Moreover, similar information is available from many other

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309. 117 S. Ct. at 2381.

310. A skeletal outline of many of these points with respect to Section Five of the Fourteenth Amendment was previously published in Thomas H. Odom, *A Constitutional Right that Isn't: Driver's Right to Privacy of Home Address is Not Guaranteed*, FULTON COUNTY DAILY REPORT (Georgia), June 19, 1998, at 7, reprinted from *We Can Know Where You Live: No Constitutional Right Permits Federal Driver's Privacy Protection Act to Shield Motor Vehicle Records*, LEGAL TIMES, June 15, 1998, at 25 (reprinted in NEW JERSEY L.J., June 22, 1998, at 24) [hereinafter *Fourteenth Amendment*].

311. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (the substantive provisions of the Fourteenth Amendment "themselves embody significant limitations on state authority"); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) ("principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments" which "were specifically designed as an expansion of federal power and an intrusion on state sovereignty"); *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("when properly exercising its powers under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers").

312. On appeal in the Fourth and Tenth Circuits, the United States asserted that "the DPPA was a valid exercise of Congress's Fourteenth Amendment powers because the statute vindicates drivers' protected interest in privacy." U.S. Condon Br., *supra* note 257, at 7; U.S. Oklahoma Br., *supra* note 257, at 23.

313. See *supra* Part III.

public sources.<sup>314</sup> In addition, the national government maintains open records of similar information when it licenses operators of vehicles and registers vehicles.<sup>315</sup> The DPPA is not proportionate to any limited ends Congress could legitimately address under the Fourteenth Amendment.

Notably, the United States' briefs omitted any reference to the controlling authority on this point: *City of Boerne v. Flores*.<sup>316</sup> The United States' opening briefs did not attempt to distinguish this authority and cited only cases that predate its decision.<sup>317</sup> *City of Boerne* explicitly rejected the same arguments the United States presented with respect to the Religious Freedom Restoration Act as it now presents with respect to the DPPA. The Supreme Court explained:

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. *Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.* It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." <sup>318</sup>

Absent prior authority that names and addresses contained in State motor vehicle records were protected by a federal constitutional right to privacy, the DPPA cannot be said to enforce any such right. If the law were otherwise, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment

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314. See *supra* Parts II(C) & II(D).

315. See *supra* notes 114-16 and accompanying text.

316. 117 S. Ct. 2157 (1997).

317. The Fourth Circuit specifically noted this omission. See *Condon v. Reno*, 155 F.3d 453, 463 n.7 (4th Cir.), *reh'g denied*, No. 97-2554 (4th Cir. Dec. 22, 1998). The United States did not even discuss this controlling precedent in response to the briefs of Alabama and *amicus curiae* Oklahoma. See U.S. Alabama Br., *supra* note 94, at 37-44.

318. *City of Boerne*, 117 S. Ct. at 2164 (emphasis added) (citations omitted). For further discussion of the *City of Boerne* decision, see Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Eighteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998) [hereinafter *Powers of Congress*], and Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998). For additional discussion of the issues addressed in that case, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995), and Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994).

process contained in Article V.”<sup>319</sup> The DPPA does not satisfy the *City of Boerne* standard for several reasons.

As a preliminary matter, it is not settled that there is any constitutional right to privacy entitling one to challenge dissemination of information. Two United States Courts of Appeals—for the Sixth Circuit and for the District of Columbia Circuit—have refused to extend a constitutional right to privacy to require nondisclosure of information. In *J.P. v. DeSanti*,<sup>320</sup> juveniles sought to prevent State officials from disclosing information compiled by probation officers for use in the adjudication of cases against the juveniles. More recently, the District of Columbia in *American Federation of Government Employees v. HUD*,<sup>321</sup> expressed “grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.”<sup>322</sup> Although the court did not need to accept or reject such a right because the case involved the gathering, rather than disclosure, of information,<sup>323</sup> the court quoted approvingly from *DeSanti* and indicated that it would reject the right when and if it had to address the issue.<sup>324</sup> This preliminary matter was not addressed in the DPPA litigation because each of those cases arose in circuits that had previously established precedent recognizing some right. If the Supreme Court reviews the constitutionality of the DPPA, however, the Court may find it necessary to address this issue.

As noted above, the predominant historical tradition throughout an overwhelming majority of the States was that records were publicly available. The sponsors of the DPPA conceded that thirty-four States permitted open access to these records.<sup>325</sup> Most States have permitted such access for decades, if not since the turn of the century.<sup>326</sup> This long and widely-shared history of disclosure should defeat most claims of a reasonable expectation of privacy.<sup>327</sup> Moreover, the Supreme Court has

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319. *City of Boerne*, 117 S. Ct. at 2168.

320. 653 F.2d 1080 (6th Cir. 1981).

321. 118 F.3d 786 (D.C. Cir. 1997).

322. *Id.* at 787-88.

323. *Id.* at 793.

324. *Id.* at 792-93. For a discussion of whether such a privacy right has been recognized, see William Watkins, Jr., *The Driver's Privacy Protection Act: Congress Makes a Wrong Turn*, 49 S.C. L. REV. 983, 1002-03 (1998).

325. See *supra* notes 180-81 and accompanying text.

326. See *supra* note 182.

327. That fact dooms the United States' argument: precedent in the Fourth and Tenth Circuits requires that information fall within an individual's reasonable expectations of confidentiality in order to raise any privacy issue. See *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986). In a footnote, the United States observes that privacy advocates who testified before Congress asserted that the public does have a privacy interest in disclosure from motor vehicle records of names and addresses. See U.S.

found a reduced expectation of privacy due to the pervasive regulation of automobiles, albeit in other contexts.<sup>328</sup>

As hearing testimony on the DPPA made clear, this same “personal information” is available from numerous other sources including many *federal* governmental sources. Congress was advised that the Postal Service handed out forwarding address information.<sup>329</sup> A book on which the DPPA’s chief sponsor relied indicated that the Internal Revenue Service and other federal agencies also disseminate this information.<sup>330</sup> It is perhaps most telling that databases of operators and owners of vehicles licensed *by the federal government* (i.e., aircraft) are available on the Internet.<sup>331</sup> The federal government is also acting to make names and residential addresses more available, by excluding regulation of such information from the Fair Credit Reporting Act.<sup>332</sup> These *federal* sources of the same information should put the final nail in any claim of reasonable expectation of privacy in one’s residential address.

In defense of the DPPA, the United States argues that “individuals only expect to produce their driver’s licenses (like other means of identification) selectively and voluntarily.”<sup>333</sup> The United States cites no authority for that proposition, notwithstanding the fact that the *Travis* court thoroughly rejected it.<sup>334</sup> It is difficult to imagine that a motorist stopped by the police with probable cause reasonably believes that he is free to decline to produce his driver’s license without consequences. In addition, the use of driver’s licenses as identification is so pervasive in every day life as to belie the notion that they are produced only selectively.<sup>335</sup> Moreover, the United States’ assertion is inapposite. The fact

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Condon Br., *supra* note 257, at 25 n.8; U.S. Oklahoma Br., *supra* note 257, at 25 n.8. But the quoted testimony does not support the notion that the public then reasonably believed that this information was not subject to public disclosure. No such reasonable expectation would have been possible in light of historical treatment of motor vehicles in a majority of States.

328. For example, the prerequisites to conduct a search of the automobile are lower. *See California v. Carney*, 471 U.S. 386, 392 (1985) (noting individuals have “reduced expectations of privacy” that derive “from the pervasive regulation of vehicles capable of traveling on the public highways”) (citing *Cady v. Dombrowski*, 413 U.S. 433, 440-41 (1973)); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (finding privacy interests are diminished because “[a]utomobiles . . . are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.”); *see also New York v. Class*, 475 U.S. 106, 113 (1986) (finding “factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the [vehicle identification number]”).

329. *See supra* notes 104-05 and accompanying text.

330. *See supra* notes 106-12 and accompanying text.

331. *See supra* notes 114-16 and accompanying text.

332. *See supra* notes 128-31 and accompanying text.

333. U.S. Condon Br., *supra* note 257, at 23-24; U.S. Oklahoma Br., *supra* note 257, at 22.

334. *Travis v. Reno*, 12 F. Supp. 2d 921, 925 (W.D. Wis. 1998), *rev’d* 163 F.3d 1000 (7th Cir. 1998).

335. Courts have observed that names and residential addresses “appear[ ] on drivers’ licenses

that an individual controls the production of his driver's license does not answer the question of whether the individual reasonably believes that the same information may not be disclosed from the State's motor vehicle records. The overwhelming majority of States have long treated this information as a matter of public record.<sup>336</sup>

The United States also fails to acknowledge that it disseminates the very same information that, in the DPPA litigation, it claims is private. The United States' publication (and release for Internet distribution) of a database of aircraft registrations "is analogous to a requirement that each [aircraft] owner display her name, address and telephone number on her [airplane's tail]."<sup>337</sup> An individual's reasonable expectation of privacy in his residential address cannot be greater when disclosure is made by the State rather than the national government. The federal disclosures thus undermine this argument as well.

Of the few federal cases recognizing a constitutional right to privacy in nondisclosure of information,<sup>338</sup> none addressed motor vehicle records.<sup>339</sup> Rather, all the records involved in those cases contained sub-

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and other identification that is routinely shown to strangers." *Kotulski v. Mt. Hood Community College*, 660 P.2d 1083, 1086 (Or. Ct. App. 1983); *accord Hechler v. Casey*, 333 S.E.2d 799, 811 (W. Va. 1985).

336. The *Condon* district court found that "Walls clearly established, for example, that information that is freely available in public records is not constitutionally protected." 972 F. Supp. at 991 (citing *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990)).

337. See U.S. Condon Br., *supra* note 257, at 24; U.S. Oklahoma Br., *supra* note 257, at 23. See also notes 114-16.

338. The United States asserted in *Condon* that the Fourth Circuit "has repeatedly recognized that the Constitution creates a privacy interest in limiting disclosure of personal information." U.S. Condon Br., *supra* note 257, at 22. However, "the federal government did not and could not produce one case from the Supreme Court or Fourth Circuit finding a violation of privacy based on government dissemination of private information." *Watkins*, *supra* note 324, at 1000. The United States failed to cite the Fourth Circuit's prior statement that that privacy interest does *not* apply to motor vehicle records. See *United States Health and Human Services v. Federal Labor Relations Authority*, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987) (observing that an individual's name and home address "is a matter of public record in motor vehicle registration and licensing records") (citation omitted).

The United States asserted the same of the Tenth Circuit's jurisprudence, U.S. Oklahoma Br., *supra* note 257, at 21, and of the Eleventh Circuit's cases as well, U.S. Alabama Br. *supra* note 94, at 38-39.

339. See *Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir.) (excerpts from personal diary containing "intimate and personal" information such as spouse's "written perceptions of their marriage"), *cert. denied*, 116 S. Ct. 74 (1995); *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 484 (4th Cir. 1992) (medical records of blood donor infected with the HIV virus); *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991) (videotape depicting sexual activity); *Walls v. City of Petersburg*, 895 F.2d 188, 190 (4th Cir. 1990) (background questionnaire for public employment administered by city police inquiring as to family arrest history, individual and spouse's debts, and individual's marital and homosexual relations history); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985) (polygraph control questions which avoided issues related to marriage, sexual and family relations); *Mangels v. Pena*, 789 F.2d 836, 837-38 (10th Cir. 1986) (internal police investigation report of two officers' use of contraband drugs);

stantially less-public information, which have not been traditionally considered a matter of public record.<sup>340</sup>

Moreover, all the cases the United States cited in *Condon* involve initial disclosure of information to the State, not the limitation on the State's power to disclose information it compiled in its public records. The United States acknowledged that these cases are distinguishable on that basis.<sup>341</sup> However, the United States failed to acknowledge that several courts of appeals have specifically recognized that there is no reasonable expectation of privacy with respect to motor vehicle records.<sup>342</sup>

In fact, the Supreme Court has made clear that the Constitution compels no protection of names and addresses. Although the Court held that collective bargaining representatives of federal employees may not compel disclosure of names and residential addresses, the Court clearly indicated that the protection from disclosure rested exclusively on statutory grounds.<sup>343</sup> Realizing that this would lead to a discrepancy between the federal government's mandate for private employers to disclose this information to their employees' collective bargaining representatives<sup>344</sup> and collective bargaining representatives' inability to compel the same information from federal agency employers (at least with respect to employees covered by the Privacy Act), the Supreme Court invited a statutory change to the Privacy Act: "Congress may correct the disparity" in treatment of classes of unions because the only prohibition on disclosure was statutory.<sup>345</sup>

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Taylor v. Best, 746 F.2d 220, 221 (4th Cir. 1984) (family background information sought to facilitate rehabilitation of incarcerated felon); Fadjo v. Coon, 633 F.2d 1172 (11th Cir. 1981) (plaintiff compelled pursuant to subpoena to provide information regarding "the most private details of his life" during criminal investigation); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) (financial disclosure requirements for candidates for political office). Cf. American Federation of Gov't Employees v. HUD, 118 F.3d 786, 791-93 (D.C. Cir. 1997) (expressing doubt that a constitutional right to nondisclosure of personal information exists; but not reaching a conclusion because even if such a right existed, it would not have been violated on the facts of the case).

340. See *James*, 941 F.2d at 1543 (sexual activity); *Katz v. United States*, 389 U.S. 347, 352 (1967) (disclosure of content of telephone conversation in a telephone booth); *Whalen v. Roe*, 429 U.S. 589, 602 (1977) (prescription records); *Sheets*, 45 F.3d at 1388 (personal diary).

341. U.S. *Condon Br.*, *supra* note 257, at 22-23.

342. See *Kelly v. City of Sterling Heights*, 946 F.2d 895 (table), 1991 WL 207548 (6th Cir. 1991); *United States Health and Human Services v. Federal Labor Relations Authority*, 833 F.2d at 1135 n.8.

343. In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994), the Court explained that "[d]isclosure of the home addresses is prohibited by the Privacy Act unless an exception to that Act applies." *Id.* at 498. It then concluded: "Disclosure of the addresses in this case is prohibited 'by law,' the Privacy Act." *Id.* at 502.

344. See *supra* notes 122-23 and accompanying text.

345. *United States Dep't of Defense*, 510 U.S. at 502-03.

Even if some constitutional interest in information privacy were applicable, there is not an absolute right to nondisclosure. The information may be disclosed if the privacy interest is "outweighed by a countervailing government interest."<sup>346</sup> This important qualification reconciles the DPPA's laundry list of exceptions permitting access by private detectives and private security services,<sup>347</sup> tow truck operators,<sup>348</sup> employers,<sup>349</sup> researchers and statisticians,<sup>350</sup> insurance companies,<sup>351</sup> tort victims and witnesses,<sup>352</sup> and others.<sup>353</sup> The list is so long that the only criminals likely to be foreclosed from obtaining the information are those too honest (or too stupid) to lie about their proposed use of the data.

States may also have interests that outweigh privacy,<sup>354</sup> permitting them to maintain a system of open records for the benefit of the public and the press (the two groups not falling within the stated exceptions).<sup>355</sup> States that have open motor vehicle records relied on public policies favoring broad access to records kept by the government. For example, in Alabama, North Carolina, Oklahoma, Wisconsin, and other States, the public policy favoring open records is a means to promote democratic self-government.<sup>356</sup> Individuals and the media are able to use their access to information as a check on government fraud and abuse. The DPPA "curtail[s] access to government-held information that historically has been available and thereby reduce[s] public oversight of the

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346. The United States concedes as much. U.S. Condon Br., *supra* note 257, at 10. The United States recognizes that "[a]n individual's privacy interest in nondisclosure of personal information is in no sense absolute." U.S. Oklahoma Br., *supra* note 257, at 23.

347. *See supra* note 70 and accompanying text.

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

349. *See supra* note 65 and accompanying text.

350. *See supra* note 67 and accompanying text.

351. *See supra* note 68 and accompanying text.

352. *See supra* note 66 and accompanying text.

353. *See supra* notes 63-65 & 70-75 and accompanying text.

354. *See* U.S. Oklahoma Br., *supra* note 257, at 23 ("States plainly can place rational conditions on owning and operating automobiles and can properly use the information they collect related to the ownership and operation of automobiles.").

355. In the DPPA litigation, rather than arguing that the privacy interests protected by the DPPA outweigh the States' interest in open government, the United States ignores the States' interest in guaranteeing that their records are open to public inspection. U.S. Condon Br., *supra* note 257, at 22-23.

356. 66 AM. JUR. 2D, *Records and Recording Laws* § 12 at 349 (1973) ("Good public policy is said to require liberality in the right to examine public records."). *See also* Stone v. Consolidated Pub. Co., 404 So. 2d 678, 681 (Ala. 1981); Holcombe v. State ex rel Chandler, 200 So. 739, 744 (Ala. 1941); City of Lawton v. Moore, 868 P.2d 690, 692 (Okla. 1993); State of Wisconsin ex rel. Young v. Shaw, 477 N.W.2d 340, 348 (Wis. Ct. App. 1991); William McBlief, Note, *Administrative Law—Public Access to Public Records in North Carolina: The Key to Good Government*, 60 N.C. L. REV. 853, 853 (1982); Moore, *supra* note 62 at 1527, 1534.

functioning of government.”<sup>357</sup> Congress did not even consider this weighty interest since the DPPA’s sponsor purported only to “close a loophole in State Law.”<sup>358</sup>

In the pending litigation, the United States failed to identify any legislative precedent for a federal law that closed traditionally-open government records. Instead, the United States cites only to laws involving information gathered by a variety of *private entities*.<sup>359</sup> The DPPA “is the first legislation that limits access to *public* records.”<sup>360</sup> Different

357. *Press Exemption*, *supra* note 102, at 644; *see also* Murray, *supra* note 126, at 952 n.130 (“[A]lthough the United States values informational privacy, it places greater emphasis on the free flow of ideas.”) (citing *Setting Standards* *supra* note 127, at 503-06).

358. 140 CONG. REC. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran).

359. *See* Video Privacy Protection Act, 18 U.S.C. § 2710 (1988); Cable Communications Policy Act, 47 U.S.C. § 551 (1991); Fair Credit Reporting Act, 15 U.S.C. § 1681 (1988); Electronic Communications Privacy Act, 18 U.S.C. § 2702 (1988). The United States conceded these examples involve “information gathered by a variety of *private entities*.” U.S. Condon Br., *supra* note 257, at 12 (emphasis added); U.S. Oklahoma Br., *supra* note 257, at 11 (same). In addition, “they are of little relevance. Even assuming they represent the assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text.” *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997). Moreover, none of these examples restrict disclosure of names and residential addresses to the extent of the DPPA. *See supra* notes 144-66 and accompanying text.

These isolated laws, even when considered cumulatively, do not establish a generally applicable law of data protection. The United States has not adopted an omnibus approach to the protection of personal data. FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 49-50 (1997); SCHWARTZ & REIDENBERG, *supra* note 124, at 7; Murray, *supra* note 126, at 969-70. The United States pursues only an ad hoc, sectoral approach to data protection. SCHWARTZ & REIDENBERG, *supra* note 124, at 7; Michael D. Scott, *United States*, in *DATA TRANSMISSION AND PRIVACY* 487 (D. Campbell & J. Fisher eds. 1994); Murray, *supra* note 126, at 941 & n.53, 945, 969-70. This approach of the federal government is “ad hoc” in that legislation is developed in reaction to particular incidents. *Id.* at 941 n.53. It is “sectoral” in that narrow laws are adopted for specific industries or industrial sectors. *Id.* This regulatory approach follows from the United States’ tradition of limited government, which permits the federal government to regulate its internal information policies extensively while limiting its ability to interfere with private sector collection of information. *See* SCHWARTZ & REIDENBERG, *supra* note 124, at 6, 382; Murray, *supra* note 126, at 970-71. The resulting set of laws has gaps indicative of the ad hoc, sectoral approach. *See* SCHWARTZ & REIDENBERG, *supra* note 124, at 213; Murray, *supra* note 126, at 980. For example, the United States has regulated virtually no data protection in health care, banking and other financial institutions, direct marketing, or with respect to employers’ treatment of workers’ data, thereby creating significant gaps in private sector data protection. SCHWARTZ & REIDENBERG, *supra* note 124, at 154, 262, 308, 350; Murray, *supra* note 126, at 982, 985, 988 n.408, 1013-14; *see also supra* notes 124-27 and accompanying text (medical and health records, employee records, direct marketing); *supra* note 130 and accompanying text (financial institutions). Moreover, American business successfully engages in strong lobbying against increased regulation of data protection in the private sector. *See* Joel R. Reidenberg & Françoise Gamet-Pol, *The Fundamental Role of Privacy and Confidence in the Network*, 30 WAKE FOREST L. REV. 105, 113 (1995) [hereinafter Reidenberg & Gamet-Pol]. The limited and spotty nature of federal legislation bars the claim that States are merely being subject to the same regulation as the private sector. *See infra* note 504.

360. Sessler, *supra* note 127, at 654 (emphasis added); *see also* Murray, *supra* note 126, at 975 n.289 (citing numerous examples of federal statutes throughout the publication which address data

constitutional issues are implicated when Congress regulates private entities as opposed to when it regulates the States directly.<sup>361</sup> Moreover, the policies favoring open government are inapplicable in the private sector.<sup>362</sup>

Even if there were constitutional basis for providing some protection for an individual's residential address, *City of Boerne* made plain that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>363</sup> "Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'"<sup>364</sup>

The "link between motor vehicle records and the isolated actions of unbalanced individuals has not been firmly established" since Congress considered only "anecdotal" evidence.<sup>365</sup> Therefore, the legislative history "leaves unresolved the question of how frequently stalkers and other criminals have used motor vehicle information to locate their victims."<sup>366</sup> One of the lead sponsor's staffers "recalled only twenty incidents where a stalker found his victim through motor vehicle records."<sup>367</sup> This limited number of incidents nationwide strongly suggests that Congress legislated broadly without identifying a sufficient nexus to the harm sought to be alleviated.

The DPPA has all the same indicia that it is not a true remedial or preventative measure as were present in the statute at issue in *City of Boerne*.<sup>368</sup> Specifically, the DPPA lacks "termination dates, geographic restrictions," and "egregious predicates" of intentional State action.<sup>369</sup> When "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or prevent unconstitutional state

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protection, all of which—except the DPPA—apply to the federal government itself or to the public sector).

361. See Barry D. Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 70 ("federal regulation of private conduct raises issues which are different from those involved in federal regulation of state governmental activity"); see also *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) ("the Fourteenth Amendment does not override all principles of federalism").

362. In addition, the United States is incorrect that the laws it cites as examples "regulate the dissemination of this information in much the same way." U.S. Condon Br., *supra* note 257, at 12; accord U.S. Oklahoma Br., *supra* note 257, at 11. The Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994), does not prohibit the dissemination of names and residential addresses. See *supra* notes 128-31 and accompanying text.

363. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997).

364. *Id.* at 2170 (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

365. Loving, *supra* note 94, at 207.

366. *Id.*

367. *Id.*

368. *City of Boerne*, 117 S. Ct. at 2170-71.

369. *Id.*

action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5."<sup>370</sup> The DPPA is vastly overbroad because it does not limit its protection to individuals who are likely subjects of stalking, and does not employ less-burdensome provisions such as simply requiring States to notify an individual when a third party seeks a copy of her motor vehicle information.<sup>371</sup>

In sum, Congress sought to legislate a new right of privacy in the dissemination of information. Without a previously established constitutional right to privacy regarding this information, Congress overstepped its authority to enforce the Fourteenth Amendment. This is inconsistent with *City of Boerne*, and as a result, the DPPA cannot be sustained on the basis of the Fourteenth Amendment.

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370. *Id.*

371. On appeal in *Condon*, the United States made a last-ditch attempt to preserve the entire DPPA based on the district court's acknowledgment that the disclosure of some "medical or disability information" raises privacy concerns. U.S. *Condon Br.*, *supra* note 257, at 25; *see also Condon*, 972 F. Supp. at 991. However, the United States did not raise this issue in its opening brief on appeal in *Oklahoma*. *See* U.S. *Oklahoma Br.*, *supra* note 257. Consequently, it does not appear that it preserved the issue in that case. "Issues not raised in the opening brief are deemed abandoned or waived." *Coleman v. B-G Maintenance Management*, 108 F.3d 1199, 1205 (10th Cir. 1997); *see also State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

The argument that the DPPA may be sustained based on its regulation of certain medical or disability information is undercut by the United States' concession that it does not contest the district Court's determination that limitations on disclosure of specific information, that is, Social Security numbers, are not severable from the remainder of the DPPA. U.S. *Condon Br.*, *supra* note 257, at 25-26. That concession is well-advised in light of the national government's disclosure of this same information. *See supra* notes 123, 129, 132-36 and accompanying text. The same severability analysis dooms the DPPA regardless of whether individuals had a reasonable expectation of privacy in "medical or disability information" contained in motor vehicle records.

The "relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). "Severance is improper if the unconstitutional provision is an integral part of the statutory enactment viewed in its entirety." *Zbaraz v. Hartigan*, 763 F. 2d 1532, 1545 (7th Cir. 1985), *aff'd by equally divided court*, 484 U.S. 171 (1986). *See also, e.g., Scheinburg v. Smith*, 659 F.2d 476 (5th Cir. 1981), *overruled on other grounds*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1986); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997). If the DPPA were to survive containing only the medical information prohibitions, the statute would cease to function as Congress intended. The Act was aimed at stalking, as indicated by its sponsors. *See Loving*, *supra* note 94, at 203; *Hankins*, *supra* note 94, at 114.

Moreover, much, if not all, of the few items of "medical or disability information" contained in motor vehicle records have been subject to the same historical tradition of open records. There is significant agreement that medical data in the private sector is largely unregulated in the United States. *See Health Care*, *supra* note 124, at 6-7; *Murray*, *supra* note 126, at 990 & n.427. As a result, in the overwhelming majority of States, any expectation that this information would be held confidential is entirely unreasonable. In addition, even if this limited information is viewed as falling within a reasonable expectation of privacy which Congress could protect under the Fourteenth Amendment, the entire DPPA cannot be sustained on that basis.

### C. First Amendment

The DPPA's provision of criminal<sup>372</sup> and civil remedies<sup>373</sup> for disclosing information gathered and maintained by the states raises particular concerns for the media, which was omitted in the list of statutory exemptions.<sup>374</sup> While the DPPA contains statutory exemptions for many groups, it noticeably omits any provision for the press. The DPPA's scope is so broad that "it exposes newspapers to criminal prosecutions, injunctions and civil damages for the publication of many stories commonly published."<sup>375</sup> The imposition of criminal penalties or civil damages for publishing information contained in State records but declared by law as confidential, has twice been held unconstitutional by the Supreme Court.<sup>376</sup>

*Landmark Communications v. Virginia*<sup>377</sup> presented to the Supreme Court the question of whether there is a First Amendment privilege for "the publication of truthful information withheld by law from the public domain."<sup>378</sup> The case involved a newspaper article describing a pending State judicial review commission inquiry into the alleged misconduct of a judge. The article identified the judge by name even though the proceedings in question were declared confidential by the Virginia constitution and statutes. The Court held, nonetheless, that the article reported on a matter of public interest, and was therefore protected in order to serve the interests of public scrutiny and discussion of government affairs. Thus, where the subject is a matter of public interest, criminal penalties or civil remedies may be inconsistent with the First Amendment.<sup>379</sup>

The Court in *Landmark Communications* did not address how the information was obtained, but stated: "We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."<sup>380</sup> Thus, one may con-

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372. See 18 U.S.C. § 2723.

373. See *id.* § 2724.

374. See *id.* § 2721(b).

375. Brief of South Carolina Press Association, Virginia Press Association, North Carolina Press Association, West Virginia Press Association, Maryland/Delaware/District of Columbia Press Association, Newspaper Association of America, and American Society of Newspaper Editors at 3, *Condon v. United States*, 155 F.3d 453 (4th Cir. 1998) (No. 97-2554).

376. See *The Florida Star v. B.J.F.*, 491 U.S. 524 (1984); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

377. 435 U.S. 829 (1978).

378. *Id.* at 840.

379. Motor vehicle records are commonly used to report on matters of public interest. See *supra* notes 233-37.

380. 435 U.S. at 837.

clude that, so long as the newspaper legally obtains the information, it may not constitutionally be penalized for subsequently publishing it.

Furthermore, if the personal information is provided to the press by the government, the imposition of penalties upon the press for the publication of that information may be inconsistent with the First Amendment. In *Florida Star v. B.J.F.*,<sup>381</sup> the Court reversed an award of damages to a rape victim whose name was published in a newspaper account of her rape. The Court held that where the press obtains the information from the government—in this case, a police incident report made available to the newspaper, notwithstanding a police duty to prevent the publication of the name—the imposition of sanctions on the press for subsequent publication of the information is inconsistent with the First Amendment.

Even if the DPPA were constitutional under the Tenth or Fourteenth Amendments, it would still raise serious issues under the First Amendment. The very first challenge to the DPPA, based exclusively on First Amendment grounds, was dismissed for lack of standing.<sup>382</sup> In *Condon*, the court dismissed First Amendment claims as moot after resolving the case on Tenth Amendment grounds.<sup>383</sup> In *Travis*, media groups presented a First Amendment claim in the original complaint. When the State of Wisconsin moved for realignment, its complaint specifically omitted the First Amendment claim. The United States moved to dismiss the original plaintiffs for lack of standing and although the district court did not rule on that issue,<sup>384</sup> it nonetheless avoided addressing the First Amendment questions.<sup>385</sup> Until a member of the media actually violates the DPPA or demonstrates with specificity his intent to do so, the standing hurdle may eliminate a First Amendment challenge.

#### D. *The Eleventh Amendment*

In *Pryor v. Reno*,<sup>386</sup> Alabama argued that the DPPA violates the

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381. 491 U.S. 524 (1984).

382. See *Loving v. United States*, 125 F.3d 862 (table) 1997 WL 572147 (10th Cir. Sept. 8, 1997). Although the district court considered the challenge premature and dismissed it without prejudice because the claim was brought before the effective date of the DPPA, the Tenth Circuit affirmed the dismissal on the basis of standing.

383. 972 F. Supp. at 979 n.3. The media associations did not appeal that dismissal and, instead, sought only to participate in the Fourth Circuit as *amici curiae*. See *supra* note 375.

384. The court found that despite “compelling doubts about the standing of the original plaintiffs,” it was not required to address that issue because the State had standing and the Tenth Amendment issue was dispositive. *Travis*, 12 F. Supp. 2d at 923.

385. *Id.* The Seventh Circuit also avoided the issue stating that “this facial attack is not the time or place to explore that subject.” *Travis*, 163 F.3d at 1007.

386. 998 F. Supp. 1317 (M.D. Ala), *argued on appeal*, No. 98-6261 (11th Cir. Nov. 30, 1998).

Eleventh Amendment.<sup>387</sup> The State's ability to even raise an Eleventh Amendment concern follows directly from two recent Supreme Court decisions clarifying the limited scope of congressional power to abrogate Eleventh Amendment immunity. Although Congress has the power to abrogate Eleventh Amendment immunity in legislation enacted pursuant to Section Five of the Fourteenth Amendment,<sup>388</sup> *City of Boerne* made clear that Congress may only enforce already recognized rights under that provision.<sup>389</sup> Thus, the same analysis that demonstrates the DPPA was not a proper exercise of power under Section Five of the Fourteenth Amendment for purposes of avoiding Tenth Amendment limitations<sup>390</sup> also demonstrates that Congress lacked such authority to abrogate Eleventh Amendment immunity. In addition, the Supreme Court made clear in *Seminole Tribe of Florida v. Florida*<sup>391</sup> that when Congress legislates under the Commerce Clause, it has no authority to abrogate Eleventh Amendment immunity.<sup>392</sup> Together, these precedents

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387. *Id.* at 1322, 1331-33.

388. See *Fitzpatrick v. Bitzer*, 427 U.S. 445; see also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58-60 (1996).

389. 117 S. Ct. at 2164.

390. See *supra* Part IV(B).

391. 517 U.S. 44 (1996).

392. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court held that Congress could abrogate Eleventh Amendment immunity when legislating pursuant to its power to regulate commerce among the States. Only four Justices joined the portion of the *Union Gas* opinion holding that Congress had such power. *Id.* at 13-23 (opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.). Justice Scalia, writing for himself and three other members of the Court, repudiated Justice Brennan's analysis. *Id.* at 30-35 (opinion of Scalia, J., concurring in part, joined by Rehnquist, C.J., O'Connor and Kennedy, JJ.). The ninth Justice, Justice White, would have disposed of the case without reaching the issue. Nonetheless, because the other members of the Court addressed the abrogation issue, he offered his own view that Justice Brennan reached the right result although Justice White did "not agree with much of his reasoning." *Id.* at 45, 57 (White, J., concurring in the judgment).

None of the Court's subsequent cases endorsed the view of the Eleventh Amendment articulated by Justice Brennan in *Union Gas*. In fact, several subsequent majority opinions drew into question the continued validity of *Union Gas*.

In *Seminole Tribe*, the Court expressly overruled *Union Gas*. 517 U.S. at 66. The Court's opinion leaves little doubt that Congress lacks authority to unilaterally abrogate Eleventh Amendment immunity through legislation enacted pursuant to any of its Article I powers. See *Powers of Congress*, *supra* note 318, at 168-69. See generally Thomas H. Odom, *The Eleventh Amendment and State Sovereign Immunity after Seminole Tribe of Florida v. Florida*, IMLA Conf., Apr. 1996 (on file with the University of Miami Law Review). Nonetheless, several court of appeals decisions have not read *Seminole Tribe* so broadly and the Supreme Court will address the issue again shortly. See, e.g., *College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd.*, 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 119 S. Ct. 790 (Jan. 8, 1999) (No. 98-149) (argument scheduled for Apr. 20, 1999) (addressing whether Congress may abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment with respect to suits for unfair competition that allege false and misleading advertising); *College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *cert. granted sub nom. Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 790 (Jan. 11, 1999) (No. 98-531) (argument scheduled for Apr. 20, 1999) (addressing

eliminate any claim that the DPPA abrogates Eleventh Amendment immunity. The only issue then is whether the DPPA violates the terms of the Eleventh Amendment.

Alabama argued that the DPPA violated the Eleventh Amendment in two respects. The State argued that the DPPA grants federal district courts jurisdiction to consider damages suits against State employees and agents,<sup>393</sup> which are essentially suits against the State. Alabama also took issue with the DPPA provision authorizing the Attorney General of the United States to levy a civil penalty upon States which do not comply with the DPPA.<sup>394</sup> The district court dismissed both arguments.

The court looked to the definitional section of the DPPA, which declares that "'person' means an individual, organization or entity, but does not include a State or agency thereof."<sup>395</sup> The court thus concluded that the DPPA's authorization for civil actions against a "person" does not, in fact, authorize a suit against a State in violation of the Eleventh Amendment.<sup>396</sup> Second, the court observed that "'the Federal Government can bring suit in federal court against a State,'"<sup>397</sup> rejecting the argument that the Attorney General's imposition upon the State of a civil penalty is unconstitutional.<sup>398</sup>

#### E. *The Commerce Clause*

Application of the DPPA to the States may well exceed the commerce power delegated to Congress. Even under the expansive definition the Supreme Court has applied to the power of Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes,"<sup>399</sup> there remain some areas in which Congress may not regulate. The DPPA may well venture into one of these areas.

"Congress may regulate the use of the channels of interstate com-

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whether Congress may abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment with respect to suits for patent infringement); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (Jan. 25, 1999) (No. 98-791) (addressing whether Congress may abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment with respect to suits under the ADEA).

393. *See* 18 U.S.C. § 2724 (1994). *See supra* notes 39, 89-92 and accompanying text.

394. *See* 18 U.S.C. § 2723(b) (1994) (civil penalty of up to \$5,000 per day). *See supra* note 88 and accompanying text.

395. *Pryor v. Reno*, 998 F. Supp. 1317, 1332 (M.D. Ala. 1998) (quoting 18 U.S.C. § 2725(2) (1994)).

396. *Id.* at 1332-33.

397. *Id.* at 1333 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. at 71 n.14, and citing *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 641-47 (1892)).

398. *See id.*

399. U.S. CONST. art. I, § 8.

merce.”<sup>400</sup> It is also within Congress’ power “to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”<sup>401</sup> Finally, the Supreme Court has held that Congress is empowered to “regulate those activities having a *substantial relation* to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.”<sup>402</sup> Because Congress made no findings that the disclosure of personal information from motor vehicle records substantially affects commerce, and provided no jurisdictional limitation to allow a case-by-case analysis of whether interstate commerce is substantially affected in a particular case, the DPPA appears to suffer from the same defects as the statute in *United States v. Lopez*.<sup>403</sup>

As in *Lopez*, the DPPA neither purports to regulate the channels of interstate commerce, nor attempts to prohibit the transport of a commodity through interstate commerce, nor is it “a regulation by which Congress has sought to protect an instrumentality of interstate commerce.”<sup>404</sup> Rather, as in *Lopez*, the Act challenged “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise.”<sup>405</sup> The DPPA regulates the “release” and not the “sale” of information maintained in motor vehicle records. Even if some direct marketers may access States’ databases, and most direct marketers participate in interstate commerce, the States themselves are not members of that industry. The link to interstate commerce comes only after the release of records from State control, due to the actions of some third parties who market information similar to that contained in driver’s license records. This rationale does not make the States actors in interstate commerce, however.<sup>406</sup> Any rationale finding a substantial effect on interstate com-

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400. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

401. *Id.*

402. *Id.* at 558-59 (emphasis added). “The ‘affecting commerce’ rationale requires that the local activity have a close and substantial relation to interstate commerce.” Matsumoto, *supra* note 361, at 50 n.73. In that context, the “term ‘close and substantial’ calls for a judgmental evaluation of the degree of the impact of the local activity, which requires more than an empirical determination that the local activity does, in fact, affect interstate commerce.” *Id.* (citing Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 CINN. L. REV. 199, 224-26 (1971)).

403. 514 U.S. 549 (1995). One author erroneously cited *Condon*’s challenge to the DPPA as an example of post-*Lopez* challenges based on the Commerce Clause. Melvin R. Faroni, *Printz v. United States: Federalism Revisited or Madison and Hamilton are at it Again*, 30 ARIZ. ST. L.J. 491, 502 n.94 (1998). In fact, *Condon* presented no Commerce Clause challenge, a point made emphatically clear at oral argument before the Fourth Circuit.

404. See *Lopez*, 514 U.S. at 559. *Lopez* dealt with a challenge to 18 U.S.C. § 992(q) (1994), which made it a federal offense “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.” 514 U.S. at 551.

405. 514 U.S. at 561.

406. A resident who wants the privilege of a State driver’s license must apply and agree to be

merce under those circumstances would be far reaching and appear to lack any limiting principle. The lack of any articulable limiting principle that would uphold the DPPA without turning the Commerce Clause into a general police power suggests that the DPPA may not survive scrutiny after *Lopez*.<sup>407</sup>

The DPPA does not contain a jurisdictional element which would ensure that the disclosure in question affects interstate commerce.<sup>408</sup> While Congress is not required to make specific findings in order to legislate,<sup>409</sup> the absence of congressional findings together with the lack of a jurisdictional element leaves the DPPA subject to challenge on Commerce Clause grounds.

The Supreme Court has upheld various types of congressional regulation of intrastate activity on the ground it has a substantial effect on interstate commerce.<sup>410</sup> In the absence of a showing that such a substantial effect does exist, the regulation of State disclosure of personal information maintained in the State's own motor vehicle records raises a significant constitutional question.

#### F. *The Guarantee Clause*

As noted above with respect to the Tenth Amendment, it appears

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subject to various State laws, including the State's open records laws, which may make the information available on his application a matter of public record, depending on the State. That States charge a nominal fee to cover administrative and copying costs cannot be construed to make the States commercial providers of personal information.

407. In fact, *Lopez* may be viewed as simply reaffirming a series of pre-existing cases which had refused to extend statutes to intrastate activities having only an insubstantial effect on interstate commerce. Cf. *Matsumoto*, *supra* note 361, at 58 n.118 (citing as examples *Employees v. Missouri Pub. Health Dep't*, 411 U.S. 279 (1973) (construing the Fair Labor Standards Act as not requiring States to submit to federal court jurisdiction); *Rewis v. United States*, 401 U.S. 808 (1971) (holding that Travel Act penalties, 18 U.S.C. § 1952, did not apply to lottery operation solely because the operation was frequented by out-of-state bettors); *United States v. Bass*, 404 U.S. 336 (1971) (holding that the firearms provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. app. § 1202(a), did not apply to firearms which were not proven to have moved in interstate commerce); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953) (declining to apply federal criminal statute requiring registration of gambling machines to machines with no interstate connection)).

408. See *Lopez*, 514 U.S. at 561-62; see also *United States v. Robinson*, 137 F.3d 652, 655-56 (1st Cir. 1998) (upholding federal law criminalizing possession of child pornography); *United States v. Tocco*, 135 F.3d 116, 123-24 (2d Cir. 1998) (upholding federal arson statute); *United States v. Riley*, 985 F. Supp. 405, 409-10 (S.D.N.Y. 1997) (upholding federal law criminalizing murder committed to improve one's status in organized crime group).

409. See *Lopez* 514 U.S. at 562-63.

410. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown for home consumption); *United States v. Darby*, 312 U.S. 100 (1941) (Fair Labor Standards Act). But see *United States v. Hickman*, 151 F.3d 446 (5th Cir. 1998) (holding that purely local crime spree was "not the sort of economic activity that can legitimately be viewed in the aggregate for traditional economic impact purposes," but nonetheless affirming convictions because of circuit precedent), *vacated pending reh'g en banc*, No. 97-40237 (5th Cir. Jan. 20, 1999).

that the DPPA may violate the Constitution by conscripting the State legislative and administrative processes into federal service.<sup>411</sup> Some of the challenges also contend that this same analysis demonstrates that the DPPA violates the Guarantee Clause,<sup>412</sup> which provides that “[t]he United States shall guarantee to every state in this union a republican form of government . . . .”<sup>413</sup> “By guaranteeing the states a republican form of government, the language of the clause implicitly promises the states sufficient independence to maintain the responsiveness of their governments to the popular will.”<sup>414</sup> “[T]he distinguishing feature” of a republican form of government “is the right of the people to choose their own officers for governmental administration, and pass their own laws.”<sup>415</sup> The DPPA takes away the local control necessary to ensure the responsiveness of the States’ legislatures to the citizenry by overturning the legislatures’ decisions to maintain open records and, instead, requiring the maintenance of records according to federal terms. Ultimately, it is the *local* officials who will bear the brunt of the costs<sup>416</sup> and of public dissatisfaction with the new DPPA policy of closed records.

Traditionally, the courts have hesitated to address Guarantee Clause claims, but there has been a recent trend towards accepting such claims for adjudication.<sup>417</sup> The Supreme Court in *New York*<sup>418</sup> noted that Guarantee Clause claims may be heard, but declined to address the jus-

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411. See *supra* Part IV(A).

412. See, e.g., Original Plaintiff’s Brief in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 44-49, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998) (No. 97-C-701-C); State Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and in Support of State Plaintiffs’ Motion for Summary Judgment at 6-8, 23, *Travis* (No. 97-C-701-C).

413. U.S. Const. art. IV, § 4. “[I]n the guarantee clause the United States promises to secure each of the states the autonomy necessary to maintain a republican form of government.” Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22 (1988).

414. Merritt, *supra* note 413, at 29.

415. *In re Duncan*, 139 U.S. 449, 461 (1891).

416. See *supra* note 254.

417. See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (“some questions raised under the Guarantee Clause are nonjusticiable, where ‘political’ in nature and where there is a clear absence of judicially manageable standards”) (emphasis added); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (case-by-case inquiry needed to determine justiciability); *Bauers v. Heisel*, 361 F.2d 581, 588-89 (3d Cir. 1966) (*en banc*) (suggesting that abrogation of immunity for State judges would violate Guarantee Clause as basis for avoiding such a statutory interpretation), *cert. denied*, 386 U.S. 1021 (1967); *United States v. Downey*, 195 F. Supp. 581, 585 (S.D. Ill. 1961) (Guarantee Clause prohibits federal government from prescribing rules of criminal procedure for State courts). See also *New York v. United States*, 505 U.S. 144, 185 (1992) (citing, *inter alia*, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 398 (2d ed. 1988); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118 & nn. 122-23 (1980); Merritt, *supra* note 413, at 70-78).

418. 505 U.S. 144 (1992).

ticiability issue<sup>419</sup> because it found the issue moot in light of its other rulings. The Court found that the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment. It further found that the other two challenged provisions at issue in the case offered the State a legitimate choice (rather than constituting an unavoidable demand) such that the States retained their ability to set their legislative agenda and remain accountable to their local electorates.<sup>420</sup> By contrast, the DPPA commands States to regulate and administer in accordance with the federal rules or face daily fines.

While the federal government may directly regulate private activity and preempt State regulation of private activity, it may not require States and State officials to serve as the regulators of private activity.

The guarantee clause thus places a modest restraint on congressional power to interfere with state operations. In order to assure states a republican form of government, Congress must leave the states free to define their own franchises; to design their own governmental machinery; to set qualifications and wages for employees who exercise legislative, executive, or judicial power. In addition, Congress cannot compel the states to adopt particular laws, to modify their legislative agendas, or to enforce federal regulatory programs.<sup>421</sup>

Thus, the Guarantee Clause appears to constitute an additional basis for challenging the DPPA.

#### V. ADDITIONAL TENTH AMENDMENT ISSUES RAISED BY THE DPPA LITIGATION: THE NEXT STEP IN DEVELOPMENT OF PROCESS-ORIENTED FEDERALISM

As explained in Part IV(A), a straight-forward application of *Printz*<sup>422</sup> and *New York*<sup>423</sup> demonstrates that the DPPA is invalid under the Tenth Amendment. It may be more intriguing to consider alternative Tenth Amendment analyses brought into focus by some of the arguments the United States raises in an effort to save the DPPA from that fate. Those arguments call for a response which suggests the next step in the development of a process-oriented jurisprudence under the Tenth Amendment. Entirely apart from the DPPA litigation itself, these arguments serve to map the battleground for the next major Tenth Amendment decision.

Part V(A) briefly describes the prior development of a process-ori-

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419. *Id.* at 183-85.

420. *Id.*

421. Merritt, *supra* note 413, at 69.

422. 117 S. Ct. 2365 (1997).

423. 505 U.S. 144 (1992).

ented jurisprudence under the Tenth Amendment. Part V(B) explains, in the context of the DPPA litigation, the next probable step in the development of a process-oriented jurisprudence.

### A. *The Development of Process-Oriented Tenth Amendment Protections*

In 1985, the Supreme Court issued its decision in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>424</sup> Prior to *Garcia*, the controlling authority, *National League of Cities v. Usery*,<sup>425</sup> defined a substantive area of State authority entitled to Tenth Amendment protection.<sup>426</sup> Under *National League of Cities*,<sup>427</sup> in order for a statute to be held unconstitutional, the Court required that: (1) it must regulate "the 'States as States,'"<sup>428</sup> (2) it must "address matters that are indisputably 'attribute[s] of state sovereignty,'"<sup>429</sup> (3) it must "directly impair [the State's] ability 'to structure integral operations in areas of traditional governmental functions,'"<sup>430</sup> and (4) "the nature of the federal interest advanced [must not] be such [as to] justif[y] state submission."<sup>431</sup> While the four-part test and the concept that there are core areas of State autonomy immune from regulation under the Commerce Clause seemed appealing to advocates of federalism, in practice, the test afforded little protection.<sup>432</sup>

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424. 469 U.S. 528 (1985).

425. 426 U.S. 833 (1976). For a review of the background of the *National League of Cities* case and a critical analysis of then-Justice Rehnquist's plurality opinion, see Matsumoto, *supra* note 361, at 62-71.

426. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 362-63 ("The exception carved out from the federal powers pertained exclusively to the immunity of internal state governmental processes."); see also J.M. Balkin, *Ideology and Counter-Ideology from Lochner to Garcia*, 54 UMKC L. REV. 175, 195 (1986) ("[T]he point of *National League of Cities* was that the tenth amendment carved out little islands of state immunity from otherwise permissible federal regulation, when the federal regulation touched upon sensitive areas of state sovereignty."); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 650 (1993). ("[T]he *National League of Cities* approach . . . identified the federalism limit on congressional power as an analogue to Bill of Rights limitations, a trump that invalidates legislation that is within the scope of a power delegated to Congress.").

427. 426 U.S. at 845, 852-54. This test was subsequently clarified in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 287-88 & n.29 (1981). The *Hodel* reformulation is generally cited for the definition of the test. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985).

428. *Hodel*, 452 U.S. at 287 (citing *National League of Cities*, 426 U.S. at 854).

429. *Id.* at 288 (citing *National League of Cities*, 426 U.S. at 845).

430. *Id.* (citing *National League of Cities*, 426 U.S. at 852).

431. *Id.* at 288 n.29 (citing *Fry v. United States*, 421 U.S. 542 (1975), *reaffirmed in National League of Cities*, 426 U.S. at 852-53).

432. No Supreme Court decision applying the *National League of Cities* test invalidated any federal law. All the cases were resolved adversely to the State interest. See *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long*

In *Garcia*, the Court overruled *National League of Cities* and abandoned its four-part test.<sup>433</sup> The Supreme Court explained that State interests “are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>434</sup> The Court declared that “the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.”<sup>435</sup> Because the Court concluded that the political process had not malfunctioned in the context presented by *Garcia*, the Court found it unnecessary “to identify or define what affirmative limits the constitutional structure might impose on federal action affecting States under the commerce clause.”<sup>436</sup> Many commentators asserted that *Garcia* rejected any limitations on congressional power under the Commerce Clause.<sup>437</sup>

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Island R.R., 455 U.S. 678 (1982); *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Virginia Surface and Mining Reclamation Ass’n*, 452 U.S. 264 (1981); see also Rapaczynski, *supra* note 426, at 341 n.3 (noting that none of these decisions were favorable to the State interests at issue); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1325 (1997) (same). For a discussion of the development of the four-part test and the application of each of its prongs in the cases that applied the test, see *R.I.P.*, *supra* note 175, at 144-49, 151-56.

433. See *Garcia*, 469 U.S. at 531, 546-47. For a discussion of the Court’s internal deliberations on overruling *National League of Cities* which draws upon the files of Justice Brennan, see Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1625-34 (1994).

434. *Garcia*, 469 U.S. at 552. Although it was not cited in *Garcia*, *Wickard v. Filburn*, previously had held that effective restraints on congressional exercise of its commerce power “must proceed from political rather than from judicial processes.” Hartman & McCoy, *supra* note 175, at 8 (quoting *Wickard*, 317 U.S. 111, 120 (1942) (emphasis added by Hartman & McCoy)). *Wickard* itself relied upon Chief Justice Marshall’s opinion in *Gibbons v. Ogden*. See 317 U.S. at 120 (citing *Gibbons*, 22 U.S. (9 Wheat.) 1, 197 (1824)). Both *Wickard* and *Gibbons* involved challenges by individuals to the scope of the federal commerce power and so neither presented the same federalism issues addressed in *Garcia*. Moreover, *Wickard* observed that judicial processes had imposed limitations on the commerce power in numerous cases for most of our history up to, and including, 1936. *Id.* at 121-22 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

435. *Garcia*, 469 U.S. at 556.

436. *Id.*

437. See, e.g., *R.I.P.*, *supra* note 175, at 151 (“Under *Garcia* the scope of Congress’ authority over the states under the commerce clause no longer presents any judicial question.”); *id.* at 156 (“*Garcia* holds that it is not for the Court to define the affirmative limits imposed on federal activity under the commerce clause. Instead, it is for Congress alone to define and enforce ‘the limits on Congress’ authority to regulate the States under the Commerce Clause.’”) (footnotes omitted); William A. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720 (1985) (“It is for Congress, not the Court, to measure the scope of the commerce power and the countervailing weight of the tenth amendment. Such protection as the states may have from direct imposition of congressional commands is thus in fact not constitutional and substantive, but merely constitutive and political.”). Some commentators continue to adhere to that view despite the development of a process-oriented jurisprudence that has provided procedural protection for State interests. See, e.g., Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 B.Y.U. L. REV. 329, 343 [hereinafter Rex E. Lee] (asserting that *Garcia* “effectively remov[ed] the constraints imposed by the Tenth Amendment,” and that *Gregory v. Ashcroft* and

A few brave souls predicted that the Court invited the development of process-oriented protections for States in lieu of the substantive protection envisioned in *National League of Cities*.<sup>438</sup> "Rather than abdicating this function [as secondary protector of the States], the [*Garcia*] Court states only that the justification for judicially imposed limitations on congressional action under the commerce power must be process-oriented rather than substantive."<sup>439</sup>

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is *one of process rather than one of result*. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than dictate a 'sacred province of state autonomy.'<sup>440</sup>

*Garcia* thus served as the stimulus for the development of process-oriented justifications for the protection of federalism.<sup>441</sup>

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*New York v. United States* alter that view of *Garcia* "but little"); Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887, 889 (1997) [hereinafter *Tao*] (asserting *Garcia* "rejected judicially enforceable limits upon Congress's use of its commerce power to regulate the States"); Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism"*, 18 HARV. J.L. & PUB. POL'Y 175 (1994) [hereinafter *Etiquette Tips*] (criticizing the post-*Garcia* development of procedural rather than substantive limitations on Congress's power to regulate the States); Merritt, *supra* note 413, at 15 ("*Garcia*'s central assertion that the structure of federal politics protects the autonomy of state governments is simply wishful thinking."); Yoo, *supra* note 432, at 1311 ("*Garcia* announced that [the Court] no longer would examine the constitutionality of federal legislation that threatened to violate the sovereignty of the states").

438. See e.g., Zoe Baird, *State Empowerment After Garcia*, 18 URB. LAW. 491, 492 (1986) (*Garcia* is the foundation for "a more persuasive and lasting constitutional basis for protecting state[s]"); Balkin, *supra* note 426, at 214 ("The Court is now left with the task of developing a theory which explains when and how courts will protect state and local interests where the national political process fails to do so."); Rapaczynski, *supra* note 426, at 359-60 ("[T]he Supreme Court's decision in *Garcia* . . . should be viewed as the last logical step in a long evolution of the sovereignty-based jurisprudence of federalism. . . . [I]ts main thrust is to reject the usefulness of sovereignty-based analysis and to replace it with a focus on the nature of the political process responsible for making the federalism-related decisions."). See generally Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987) [hereinafter *Process-Based Procedural Protections*].

439. *Process-Based Procedural Protections*, *supra* note 438, at 1665.

440. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (emphasis added) (citing *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).

441. Professor John C. Yoo compellingly demonstrates that the process-oriented approach "is at odds with the original understanding of the Constitution and its provisions on federalism and judicial review." Yoo, *supra* note 432, at 1357; see also Van Alstyne, *supra* note 437, at 1727-33. As these and other sources make clear, the convention and ratification debates anticipated judicial intervention to protect the structural safeguards of the Constitution, not merely individual rights.

Having abandoned a rationale set in history which supported judicial review of State assertions under the Tenth Amendment that Congress had abused its commerce power, the Court formulated a new rationale to support judicial review under certain circumstances. H. Jefferson

Powell, *supra* note 426, at 658 (“Justice O’Connor, of course, can defend her process approach as the only law of federalism that is politically feasible in the late-twentieth century—as a type of substitute for the federalism the Anti-Federalists wanted and many of the Federalists promised.”). This new rationale relies upon historical foundations at only the most general level. Justice O’Connor’s observations in *Garcia* and *New York* about the ‘spirit’ of the Tenth Amendment and the federal organization of the Union provide a textual and historical basis for the argument.” *Id.* at 684. The history upon which process-oriented federalism relies is that the Constitution was understood to look to “an indestructible Union, composed of indestructible States” so that “reduction of the state governments to bodies with no independent governmental significance is presumptively contrary to the Constitution.” *Id.* (quoting *New York*, 505 U.S. at 162 (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869))); *see also* Matsumoto, *supra* note 361, at 56 (“Implicit in the constitutional plan is the notion that state governmental processes are to remain free from direct federal intervention in the handling of local problems and concerns.”) (footnote omitted).

Because the process-oriented approach does not rely on historical analysis of specific matters, the debate over how to interpret the historical sources on federal power to commandeer State legislatures, executives, and courts is largely irrelevant. *Compare* Powell, *supra* note 426, at 652-64 (arguing that historical sources presented a “tentative refutation” of any constitutional prohibition on federal commandeering of any branch of State government), with Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 209 (arguing “that history provides no clear affirmative sanction for congressional commandeering,” nor “confirm[s] the Framers’ rejection of such authority,” but that post-ratification history and logic permit commandeering of State executive and judicial branches), and Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that *New York* properly interpreted history as excluding a general federal power to command State legislatures; that *New York* properly interpreted history as permitting a general federal power to command State courts—in terms of the supremacy clause—while recognizing that use of State court judges as inferior federal judges would require Presidential appointment, Senate confirmation, life tenure, and protection from diminishment of salary, but arguing that contrary to *Printz*, there is a general federal power to command State executives), with *Faroni*, *supra* note 403, at 495 (asserting that “all of the historical research indicated that Congress was limited to making recommendations and it was assumed ‘that the States would consent to allowing their officials to assist the Federal Government.’”).

Much of the conflict between the State and federal government in recent decades may be attributed to expansion of the federal government’s commerce power so that it far exceeds any historical basis. *See generally* *United States v. Lopez*, 514 U.S. 549, 585-602 (1995) (Thomas, J., concurring) (examining the common meaning of the term “commerce” at the time of ratification based upon contemporary dictionaries and ratification debates; reviewing development of the Court’s early case law and contrasting the Court’s mid-1930s shift toward more expansive interpretations). Rarely in the past sixty years has the judiciary concerned itself with whether legislation fits within any historical understanding of the national power. *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789 (1995) (*Lopez* “set limits on congressional authority under the Commerce Clause for the first time in almost sixty years”); *supra* note 434; *see also Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring) (reviewing historical view of congressional power to regulate commerce and acknowledging “that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years”); *cf. id.* at 608 (Souter, J., dissenting) (reviewing the 1937 shift to judicial deference to congressional views of the scope of the commerce power and asking whether the Court’s decision “does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago”). Despite the benefits flowing from a sound historical basis for constitutional interpretation, requiring a specific historical basis to justify a process-based limit on national power is difficult to justify without first requiring a specific historical basis either to expand the power sought to be limited or to eliminate judicial review of asserted substantive limits on national power.

Despite the irrelevance of the historical debate on specific matters to the validity of process-oriented jurisprudence generally, a few observations are in order. None of these authors challenging the conclusions of *New York* or *Printz* claim any affirmative textual support for their conclusions. Professor Powell reviewed only very limited sources so that he offers only a "tentative" conclusion. See Powell, *supra* note 426, at 664. Professor Caminker claims only historical ambiguity. See Caminker, *supra*, at 209, 211. While Professor Prakash reviewed a broad range of sources, he concedes that many of those sources could be read as only permitting federal use of State executive officers when States voluntarily agree to do so. See Prakash, *supra*, at 1998. Professor Prakash's reliance on historical discussion of federal power to call forth the "*posse comitatus*," consisting of most citizens, as a basis for "deputizing" State officials, see *id.* at 2004 n.244, ignores the distinction between the capacity in which the individual answers the federal call. Power over a State executive officer in his individual capacity does not imply power over him in his official capacity. See *Printz*, 117 S. Ct. at 2382, 2383 n.17. Were it otherwise, the federal government's power to compel every State Governor to file a personal federal income tax return would dictate a different outcome in *Printz*. Where the authority sought to be commandeered is available to the individual only in his official capacity, a different analysis applies. See *infra* note 507. In addition, Professor Prakash seeks to explain the distinction between no federal power to commandeer State legislatures and federal power to commandeer State executive officers on a notion of legislative sovereignty. See Prakash, *supra*, at 2033-34 ("State legislatures, unlike state executives and judiciaries, were the direct representatives of the people." "State legislatures, then, embodied the states 'in their political capacity.'"). This explanation ignores the development of popular sovereignty—sovereignty residing in the people despite limited delegation to various governmental institutions—that was essential to overcoming objections to the notion that sovereignty could not be divided. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 344-89, 527-32 (Norton Library ed. 1972) (tracing the pre-Constitution development of shifts from theories of parliamentary or legislative sovereignty to theories of popular sovereignty); James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 1, 1787), in II *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 448-53 (Merrill Jensen ed. 1976) (stating that the Constitution did not divide sovereignty between the States and the federal government, but that sovereignty resided in the people). Professor Prakash's alternative explanation for the distinction is recognition of the practical difficulties in commanding and coercing a multimember body. See Prakash, *supra*, at 2033-34. He does not explain how that distinction accounts for the fact that some States lack a unitary executive, permitting direct election of the attorney general, treasurer, or other officers, in addition to the appointed executive officials (*e.g.*, tax collectors, law enforcement officers). Thus, the interpretation of historical sources regarding federal power to conscript elements of State governments has not yet yielded a complete and satisfactory account. In addition, much of the support for Professor Prakash's argument requires acceptance of a definition of "magistracy" that includes all State judicial *and* executive officers, while excluding the legislature. It is far from clear whether this definition is necessarily correct.

"Magistracy" is defined as follows:

This term may have a more or less extensive signification according to the use and connection in which it occurs. In its widest sense it includes the whole body of public functionaries, whether their offices be legislative, judicial, executive, or administrative. In a more restricted (and more usual) meaning, it denotes the class of officers who are charged with the application and execution of the laws. In a still more confined use, it designates the body of judicial officers of the lowest rank, and more especially those who have jurisdiction for the trial and punishment of petty misdemeanors or the preliminary steps of a criminal prosecution, such as police judges and justices of the peace. The term also denotes the office of a magistrate.

BLACK'S LAW DICTIONARY 951 (6th ed. 1990); see also 9 OXFORD ENGLISH DICTIONARY 188 (2d ed. 1989) (providing a similarly broad range of definitions); cf. Caminker, *supra*, at 216 ("at the time of the Founding, the distinctions between judges and executive magistrates, and between judicial and executive functions, were quite blurred"). In light of the range of the possible mean-

The Supreme Court reaffirmed *Garcia's* process approach in *South Carolina v. Baker*,<sup>442</sup> despite ultimately concluding that under the circumstances there presented Congress could directly regulate the States. The *Baker* court rejected a claim that section 310 of the Tax Equity and Fiscal Responsibility Act of 1982<sup>443</sup> violated the Tenth Amendment, but in doing so acknowledged that defective operation of the political process—including situations where States were “singled out” and “politically isolated”—would require a different result:

It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Rather, South Carolina argues that the political process failed here because § 310(b)(1) was “imposed by the vote of an uninformed Congress relying upon incomplete information.” But nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation. Where, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.<sup>444</sup>

In *Baker*, the Court also considered and rejected a different Tenth Amendment argument presented by an intervenor, the National Governors' Association (“NGA”). NGA argued that section 310 was “invalid because it commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme.”<sup>445</sup> The Court rejected that argument but expressly reserved judgment on whether the viability of a Tenth Amendment basis for finding “some limits on Congress' power to compel States to regulate on behalf of federal interests” either “survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia*.”<sup>446</sup> The Court avoided addressing those questions on the basis of two independent rationales. First, the Court characterized section 310 as a law that did not commandeer the State in any meaningful manner: “That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace

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ings attributed to this term, much more research is required with respect to its common meaning at the time of the ratification before accepting Professor Prakash's interpretation of the historical sources.

442. 485 U.S. 505 (1988).

443. Pub. L. No. 97-248, 96 Stat. 596 (codified as 26 U.S.C. § 103(j)(1) (1982)).

444. 485 U.S. at 512-13 (footnote and citations omitted).

445. *Id.* at 513.

446. *Id.*

that presents no constitutional defect."<sup>447</sup> Second, the Court classified section 310 as a law of general applicability:

Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations. Accordingly, the Federal Government has directly imposed the same registration requirement on itself that it has effectively imposed on States.<sup>448</sup>

Thus, *Garcia* and *Baker* may be read as establishing a rule to govern only when the federal law at issue is found to be (or conceded by the parties to be) one of general applicability which has only incidental application to the States, while acknowledging that a different result must follow if a law targets States for a unique burden.<sup>449</sup>

Process-oriented jurisprudence seeks to develop "an elaboration of judicial standards, the justification of which does not rely on the desirability of specific substantive results but rests instead on the identification of some defects in the political process that prevent it from operating in accordance with the function assigned to it in the Constitution."<sup>450</sup> Several of the process-oriented limitations advocated by commentators were adopted by the Supreme Court.<sup>451</sup>

447. *Id.* at 514-15.

448. *Id.* at 526-27 (citation omitted).

449. *See Printz*, 117 S. Ct. at 2383; *New York*, 505 U.S. at 160.

450. Rapaczynski, *supra* note 426, at 365.

451. Simultaneous with the Supreme Court's development of process-oriented jurisprudence, however, courts have rejected constitutional challenges based on a substantive, rather than process-oriented rationale despite the fact that a process-oriented approach may have invalidated the federal law at issue.

For example, in 1996, Congress enacted both § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Pub. L. No. 104-193, 110 Stat. 2105, 2275 (1996) (codified at 8 U.S.C. § 1644); Pub. L. No. 104-208, § 642, 110 Stat. 3009, 3009-546, at 3009-707 (1996) (codified at 8 U.S.C. § 1373). The impetus for these laws was congressional interest in increasing resources for internal enforcement of immigration laws, including deportation of excludable aliens. Sections 434 and 642 established a federal policy permitting any State or local government employee to freely report suspicions regarding an individual's immigration status. The City of New York brought an action for declaratory and injunctive relief against the United States, challenging the constitutionality of sections 434 and 642. These sections preempted a City ordinance prohibiting City employees from furnishing information about the immigration status of aliens directly to Immigration and Naturalization Service ("INS") officials except in accord with City policy. *See City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997), *argued on appeal*, No. 97-6182 (2d Cir. June 11, 1998).

The federal laws served to displace State and local government rules and policies that limited individual employees' discretion to report information directly to the INS. New York City's Executive Order 124 provides that "[n]o City officer or employee shall transmit information respecting any alien to federal immigration authorities" unless (1) disclosure is "required by law" or (2) the alien in question has given authorization or (3) the alien is suspected of having committed a crime. City of New York, Executive Order No. 124, City Policy Concerning Aliens

Commentators argued that *Garcia*'s reliance on the national political process supported adoption of a clear statement requirement such as the one the Supreme Court recognized to govern Eleventh Amendment

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§ 2(a) (Aug. 7, 1989). In addition, Executive Order 124 requires City agencies to designate officials responsible for making case-by-case disclosure determinations. *Id.* § 2(b). New York City adopted that policy of limiting and channeling the reporting of information after finding that the public at large was endangered by the undocumented immigrants' under-utilization of City services. For example, the City concluded that the failure to seek medical treatment fostered the spread of communicable diseases and the failure to report crime left unapprehended criminals who would prey on citizens. *See id.* at 3 (statement of basis and purpose); Brief of Appellant at 9-11, *City of New York v. United States* (2d Cir. argued June 11, 1998) (No. 97-6182).

Congress, the States, and local government may have different views regarding the weighing of these competing policy interests. The supremacy clause ensures that the federal government's views may prevail, even if the federal regulation thwarts contrary State and local policies. In order to do so, however, the federal law must pass constitutional muster. Under *Printz* and *New York*, this means that the federal law must neither "commandeer" State and local officials to administer or enforce the federal law, nor otherwise require the State or local government "to implement an administrative solution." *Printz*, 117 S. Ct. 2380 (quoting *New York*, 505 U.S. at 175-76).

In the case of sections 434 and 642, as with the DPPA, Congress did not promulgate a law that passes constitutional muster. Although Congress has criminalized illegal entry into the United States, it has not criminalized continued presence after an individual gains entry. Moreover, Congress has not enacted a law requiring anyone who has information about undocumented immigrants to report the information to the INS. Instead of taking these direct measures, Congress sought to open communications with line workers in the delivery of State and local governmental services, thereby by-passing the authority of those employees' supervisors.

The district court rejected the City's argument that sections 434 and 642 violate the Tenth Amendment. *See City of New York*, 971 F. Supp. at 794-97. The district court noted that the City argued that "by interfering with core functions of city government, by means of a statute directed only at states and localities and not at private individuals, the United States has violated principles of federalism and the Tenth Amendment." *Id.* at 797. The court rejected that argument, which it considered as a "substantive analysis of the Tenth Amendment" inconsistent with *Garcia*. *Id.* at 797-98. Although the district court recognized that the Supreme Court followed *Garcia* with cases striking down statutes under the Tenth Amendment (*New York* and *Printz*), the district court concluded that those cases did not "reviv[e] ] a substantive analysis under the Tenth Amendment." *Id.* at 798.

While the district court correctly concluded that current Supreme Court jurisprudence eschews a substantive analysis of Tenth Amendment issues, it overlooked the fact that a process-oriented approach consistent with *Garcia* shows that Sections 434 and 642 are unconstitutional. By placing emphasis on the process failure—the fact that Sections 434 and 642 single out State and local governments for a unique burden—rather than declaring a particular area off limits to national regulation, the challenge, now pending before the United States Court of Appeals for the Second Circuit, fits squarely within the judicial role preserved in *Garcia*. *See City of New York v. United States*, No. 97-6182 (2d Cir. argued June 11, 1998).

At least one commentator has argued that broad congressional power over immigration limits the force of the Tenth Amendment in that area. *See Allison B. Feld, Section 434 of the Welfare Act: Does the Federal Immigration Power Collide with the Tenth Amendment?*, 63 BROOK. L. REV. 551 (1997). Feld's suggestion that courts should balance the federal interest against the intrusion of the law which targets State and local governments, however, is irreconcilable with *Printz*'s statement that only laws of general applicability should balance the federal and State interests.

analysis.<sup>452</sup> During the same Term the Supreme Court decided *Garcia*, it adopted the clear statement requirement in the Eleventh Amendment context in *Atascadero State Hospital v. Scanlon*.<sup>453</sup> If Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.”<sup>454</sup> Commentators noted that “to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests.”<sup>455</sup> In sum, a clear statement requirement was precisely the type of process-oriented protection contemplated by *Garcia*. In *Gregory v. Ashcroft*,<sup>456</sup> the Supreme Court embraced that approach as an outgrowth of *Garcia*:

We are constrained in our ability to consider the limits that the state-federal balance places on Congress’ powers under the Commerce Clause. See *Garcia*. But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.<sup>457</sup>

This clear statement requirement was the first step in the Supreme Court’s identification of process-oriented protections under the Tenth Amendment. “Such a system ensures fair notice to states when legislation affecting their interests is proposed” so that “states have the opportunity to oppose undesirable legislation before it becomes law.”<sup>458</sup>

Last Term, the Supreme Court reaffirmed and clarified the *Gregory*

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452. See, e.g., Baird, *supra* note 438, at 516; *Process-Based Procedural Protection*, *supra* note 438, at 1676-77; Rapaczynski, *supra* note 426, at 418-19.

453. 473 U.S. 234 (1985).

454. *Id.* at 242.

455. TRIBE, *supra* note 417, § 6-25, at 480. “A rule like the clear statement requirement is therefore essential: Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance.” Russell Chapin, *Harmonizing Federal Preemption Doctrine with Garcia’s Cession of State and Local Interests to the Political Process*, 23 URB. LAW. 45, 58 (1991) (quoting TRIBE, *supra*, and citing *Process-Based Procedural Protections*, *supra*, note 438); see also Hartman & McCoy, *supra* note 175, at 11 (arguing that *Garcia* only cedes “to Congress the ultimate power to adjust federal-state relationships where Congress speaks absolutely unambiguously”). If States are aware that their interests will be affected by pending legislation, they are enabled to politically mobilize in order to protect their interests. Without a “clear statement,” States may be unable to identify threats to their interests before enactment, and the national political process may fail to consider the proposed legislation’s impact on States.

456. 501 U.S. 452 (1991).

457. *Id.* at 464 (citation omitted).

458. *Process-Based Procedural Protections*, *supra* note 438, at 1685.

clear statement requirement in *Pennsylvania Department of Corrections v. Yeskey*.<sup>459</sup> *Gregory* contained language which could support the view that the required statement demanded specific statutory enumeration of State activities and programs subject to the federal law<sup>460</sup> as well as an alternative view that a broad provision addressing “all” or “any” State activities and programs was sufficient.<sup>461</sup> *Yeskey* clarified that *Gregory* is satisfied by broad statutory language that unambiguously encompasses States; no enumeration of specific State programs is required; and, congressional intent to reach any specific State program need not be demonstrated.<sup>462</sup> Because *Yeskey* reaffirmed that the statute must unam-

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459. 118 S. Ct. 1952 (1998). For further discussion of the *Yeskey* decision, see Thomas H. Odom, *The Supreme Court Revisits the Clear Statement Requirement in Tenth Amendment Jurisprudence*, 39 MUNICIPAL LAW. 20 (Sept./Oct. 1998) [hereinafter *Court Revisits*].

460. See Bruce Dayton Livingston, *Gregory v. Ashcroft: The Supreme Court Announces a New Rule of Statutory Construction in Deference to Constitutionally Recognized Principles of Federalism*, 11 ST. LOUIS U. PUB. L. REV. 243, 244-45 (1992) (arguing *Gregory* “requires more than a plain statement of congressional intent to preempt state law by making legislation specifically applicable to the states;” rather it “also requires explicit mention of the particular results of applying the underlying statute to the states in what the Court deems to be constitutionally significant instances”) (footnote omitted); Deanna L. Ruddock, Note, *Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations*, 70 N.C. L. REV. 1563, 1589 (1992) (*Gregory* “now requir[es] a clear expression of legislative intent not only to determine whether the statute applies to the states, but also to determine to whom the statute applies”); see also *Torcasio v. Murray*, 57 F.3d 1340, 1346 & n.5 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) (interpreting *Gregory* to require the ADA to specifically mention State prisons before the statute would apply in that context).

461. See Michael P. Lee, *How Clear is “Clear”? A Lenient Interpretation of the Gregory v. Ashcroft Clear Statement Rule*, 65 U. CHI. L. REV. 255 (1998) [hereinafter Michael P. Lee] (arguing *Gregory* does not require an enumeration of specific State programs and activities); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1024 (9th Cir. 1997) (holding the ADA had sufficiently clear statutory language despite no specific reference to State prisons and explicitly rejecting *Torcasio*), cert. denied, 118 S. Ct. 2340 (1998); *Yeskey v. Pennsylvania Dep’t of Corrections*, 118 F.3d 168, 174 (3d Cir. 1997) (same), aff’d, 118 S. Ct. 1952 (1998).

462. This clarification follows from the following observations. The Supreme Court stated that:

The situation here is not comparable to that in *Gregory*. There, although the ADEA plainly covered state employees, it contained an exception for “‘appointee[s] on the policymaking level’” which made it impossible for us to “conclude that the statute plainly cover[ed] appointed state judges.” Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.

*Yeskey*, 118 S. Ct. at 1954 (quoting *Gregory*, 501 U.S. at 467). The statutory language that plainly covers State institutions was the ADA’s general anti-discrimination provision with respect to exclusion from, or denial of, the benefits of “the services, programs, or activities of a public entity” in conjunction with the statutory definition of “public entity.” *Id.* (quoting 42 U.S.C. § 12132). A “public entity” is “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” *Id.* at 1954-55 (quoting 42 U.S.C. § 12131(1)(B)). The Court also assumed both that the ADA did not expressly refer to prisons and that this omission indicated Congress did not contemplate that application of the ADA. *Id.* at 1955. The Court held that those assumptions did not dictate a different result as long as the statutory text was unambiguous. *Id.* at 1956. It is thus evident that *Gregory* is satisfied by broad statutory language that unambiguously encompasses States; no enumeration of specific State pro-

biguously indicate to States they will be covered by the statute, the process-oriented rationale continues to be satisfied.<sup>463</sup>

Commentators also asserted that even under *Garcia*, the federal government would not be permitted to require State legislatures to enact laws or follow a dictated federal agenda.

[T]here are some state governmental functions so directly related to the federalist concern with preventing tyranny that they present rather easy cases for judicial intervention . . . . [F]or example, federal interference with the agenda of the highest state legislative . . . organs is likely to undermine the overall autonomy of the political processes in the states . . . .<sup>464</sup>

A careful reading of *Garcia* shows that it did not displace precedent holding that a "congressional *command* based on the commerce power would be unconstitutional."<sup>465</sup> As noted above, the Supreme Court took this second step in developing a process-oriented Tenth Amendment jurisprudence in *New York v. United States*.<sup>466</sup> Thus, *Printz v. United States*<sup>467</sup> broke little new ground, holding that Congress could commandeer officials of a State's executive branch no more so than it could the State's legislature.<sup>468</sup> While *New York* and *Printz* may be seen to rest on a pre-*Garcia* limitation on commanding or "commandeering" the States, it is more fruitful to identify the process-failure that justifies judicial invalidation of congressional efforts to commandeer the States so as to present a unified, principled view of the Tenth Amendment jurisprudence.

Little attention has been paid to the process-oriented justification for *New York* and *Printz*.<sup>469</sup> The DPPA litigation shines a spotlight on

grams is required, and congressional intent to reach any specific State program need not be demonstrated.

463. Of course, requiring enumeration would provide an increased level of protection for States in the national political process. Moreover, in other contexts greater specificity such as enumeration may be required. To the extent spending power jurisprudence is premised on contract theory, states may legitimately demand that the federal government identify which state programs are subject to limitation. See *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

464. Rapaczynski, *supra* note 426, at 415-16; accord *Process-Based Procedural Protections*, *supra* note 438, at 1664 n.37.

465. *Process-Based Procedural Protections*, *supra* note 438, at 1664 n.37 (discussing *Coyle v. Smith*, 221 U.S. 559 (1911)) (emphasis added).

466. See *supra* Part IV(A). But cf. *Watkins*, *supra* note 324, at 996 (suggesting the *New York* line of cases heralds a return to *National League of Cities*).

467. 117 S. Ct. 2365 (1997).

468. Even prior to the *Printz* decision, scholars recognized that *New York* extended beyond dictates directed to State legislatures. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.10, at 170 (5th ed. 1995) (stating *New York* "prevents Congress from making the state governments, or the subdivisions or branches thereof, instruments for the carrying out of congressional dictates").

469. At least one commentator has asserted that *New York*'s distinction "between targeted and

the underlying process-failure. Each argument that the DPPA survives *New York* and *Printz* rests on a cramped reading of those decisions. The logical response to each of those arguments reconciles the Tenth Amendment cases and points the way to the next step in the development of process-oriented jurisprudence.

### B. *Alternative Tenth Amendment Analyses*

In defense of the DPPA, it is argued that the DPPA does not require States to regulate individuals on behalf of Congress. Based on that assertion, the United States maintains that the DPPA automatically passes scrutiny under the Tenth Amendment. This argument is flawed for several reasons. First, even if the DPPA was considered to be a law of general applicability that applies only incidentally to States, such laws are still subject to Tenth Amendment review. Second, because the DPPA cannot be considered a law of general applicability that applies only incidentally to States, it falls within the process-oriented justification for *New York* and *Printz*. A Supreme Court holding adjusting either of these alternative analyses would greatly clarify Tenth Amendment jurisprudence.

#### I. LAWS OF GENERAL APPLICABILITY THAT APPLY ONLY INCIDENTALLY TO STATES ARE SUBJECT TO TENTH AMENDMENT REVIEW

The *Garcia* Court contemplated that where the political process failed to protect the special and specific position of the States in the federal system, judicial imposition of limits would be appropriate. The facts of *Garcia* did not, however, require the Court “to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.”<sup>470</sup> *Printz* makes clear that the Constitution requires the burden from application of a law of general applicability on a State to be balanced against the federal interests.<sup>471</sup> In *Printz*, the Court noted that “such a ‘balancing’ analysis [was] inappropriate,”<sup>472</sup> because the purpose of the Brady Act was

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general laws” lacked any “doctrinal or theoretical justifications to explain why the distinction made a difference.” Yoo, *supra* note 432, at 1344-45. For a *pre-New York* recognition that the distinction was significant, without proposing a process-oriented explanation, see *R.I.P.*, *supra* note 175, at 161-63.

470. *Garcia*, 469 U.S. at 556.

471. See *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (“Assuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.”). In the *Pryor* appeal, the United States ignored this language and asserted: “Alabama wrongly suggests that *Garcia* and *Baker* require a ‘balancing test.’” U.S. Alabama Br., *supra* note 94, at 26 n.7.

472. *Printz*, 117 S. Ct. at 2383.

“to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.”<sup>473</sup> In short, no balancing was appropriate in *Printz* because the challenged provisions of the Brady Act were not laws of general applicability.

Even if the DPPA could be characterized as a law of general applicability, it would necessarily fail any such balancing test as any federal interest in preventing stalking is already directly addressed.<sup>474</sup> Moreover, the weight of the federal interest appears slight due to the numerous federal sources of the same information addressed by the DPPA. By contrast, requiring the States to administer a federal program without federal funding imposes a heavy burden on the States in addition to displacing policies long held by a majority of States.<sup>475</sup>

The Supreme Court has not applied this balancing approach to strike down any statute since *Garcia* laid the groundwork for a new Tenth Amendment jurisprudence.<sup>476</sup> If the Supreme Court somehow characterized the DPPA as a law of general applicability, it would present a prime opportunity for the Supreme Court to demonstrate that the balancing test exists in practice, and not merely in theory. The only hurdle to such a development is the obvious fact that the DPPA is *not* a law of general applicability.

## 2. THE NEXT STEP: ADDRESSING LAWS THAT SINGLE OUT STATES

In defending the DPPA, the United States invites confusion by mischaracterizing the *Printz* decision's explanation of the balancing test under *Garcia*.<sup>477</sup> The United States fails to understand that *Garcia* and

473. *Id.*

474. See 18 U.S.C. § 2261A (1994).

475. See, e.g., *Oklahoma v. United States*, 994 F. Supp. 1358, 1362 (W.D. Okla. 1997), *rev'd*, 161 F.3d 1266 (10th Cir. 1998), *reh'g denied*, No. 97-6389 (10th Cir. Feb. 2, 1999), *stay pending petition for a writ of certiorari issued*, No. 97-6389 (10th Cir. Feb. 11, 1999); *Travis v. Reno*, 12 F. Supp. 2d 921, 928 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998), *reh'g denied*, No. 98-2881 (7th Cir. Feb. 11, 1999), *stay pending petition for a writ of certiorari denied*, No. 98-2881 (7th Cir. Feb. 19, 1999), *stay of issuance of mandate pending filing of petition for a writ of certiorari granted sub nom. Administrator of the Division of Motor Vehicles v. Reno*, No. A-795 (U.S. Mar. 31, 1999).

476. In *Fraternal Order of Police, Lodge 3 v. Baltimore City Police Dep't*, Civ. No. B-92-1066, slip op. at 69 (D. Md. Oct. 30, 1996), Judge Black noted that the Supreme Court has provided little guidance on how to perform a *Garcia* balancing test. In spite of evidence that the Fair Labor Standards Act had been applied to the States and local governments due to a failures in the national political process, the court declined to attempt *Garcia* balancing. *Id.* On appeal, the United States Court of Appeals for the Fourth Circuit did not address the constitutional issues. Instead, the court simply treated any constitutional challenge as foreclosed by *Garcia*. *Id.*, No. 92-1066-B (4th Cir. Sept. 23, 1998), *reh'g denied*, No. 92-1066-B (4th Cir. Feb. 5, 1999). Any petition for a writ of certiorari in that case is due on or before May 6, 1999. See Sup. Ct. R. 13.1.

477. See U.S. Condon Br., *supra* note 257, at 18-19; U.S. Oklahoma Br., *supra* note 257, at 17-18.

the other cases it cites<sup>478</sup> analyzed challenges to statutes that were (or were conceded to be by the parties) of general applicability rather than directed solely to States.<sup>479</sup> Three out of the four district courts to rule on the subject properly recognized that distinction.<sup>480</sup> While the United

478. See *South Carolina v. Baker*, 485 U.S. 505 (1988); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

In *Printz*, the Supreme Court distinguished its decisions in *Hodel*, and *FERC v. Mississippi*, 456 U.S. 742 (1982).

[We] have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. . . . In *Hodel*, we . . . concluded that the Surface Mining Control and Reclamation Act did not present the problem because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field . . . . In *FERC*, we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978, to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."

117 S. Ct. at 2380 (citations omitted).

In *EEOC v. Wyoming*, the Court approved the extension of the Age Discrimination in Employment Act ("ADEA") to include State and local governments. Applying the now-overruled *National League of Cities/Hodel* test, the Court balanced the federal interest against the State interest as sovereign and concluded the State interest was sufficiently low as to allow the law to pass constitutional muster. The Court specifically concluded that the State's compliance with the federal act did "not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'" 460 U.S. at 239. Although the Court upheld the ADEA as a proper exercise of Congress' Commerce Clause power, it arguably could have upheld the ADEA as a law of general applicability because after the 1974 amendments at issue, the ADEA applied to private employers having at least twenty workers, and federal, State, and local governments. See 460 U.S. at 233 n.5.

Finally, *South Carolina v. Baker*, 485 U.S. 505 (1988), is also easily distinguished. In *Baker*, the Court held only that the federal government could impose upon States substantially the same obligation imposed on private issuers of bonds (that is, the Court viewed the provision at issue as a law of general applicability): "Because § 310 aims to address the tax evasion concerns posed generally by unregistered bonds, it covers not only state bonds but also bonds issued by the United States and private corporations." *Id.* at 510. See *supra* notes 442-49 and accompanying text. As discussed in Part V.B.1, *supra*, the DPPA may not be viewed as such a law of general applicability, and is not saved by the analysis of *Baker*.

479. In certain cases, the parties have failed to argue that a statute is not generally applicable. It is thus true that "the statute at issue in *Garcia* was passed solely to subject states to federal minimum wage and hour laws, which had been applied to private employers almost three decades before." Yoo, *supra* note 432, at 1348. Yet, in *Garcia*, no party argued that the separately enacted FLSA amendments should be viewed as anything other than a law of general applicability from which States should be excluded by virtue of the Tenth Amendment.

480. See *Condon v. United States*, 972 F. Supp. 977 (D.S.C. 1997) (distinguishing DPPA from cases the Supreme Court has viewed as involving statutes of general applicability), *aff'd*, 155 F.3d 453 (4th Cir.), *reh'g denied*, No. 97-2554 (4th Cir. Dec. 22, 1998) *petition for cert. filed*, 67 U.S.L.W. 3588 (U.S. Mar. 15, 1999) (No. 98-1464); *Oklahoma v. United States*, 994 F. Supp. 1358 (W.D. Okla. 1997) (same), *rev'd*, 161 F.3d 1266 (10th Cir. 1998), *reh'g denied*, No. 97-6389 (10th Cir. Feb. 2, 1999), *stay pending petition for certiorari issued*, No. 97-6389 (10th Cir. Feb. 11, 1999); *Pryor v. Reno*, 998 F. Supp. 1317 (M.D. Ala. 1998) (addressing DPPA within the framework of cases the Supreme Court has viewed as involving statutes of general applicability),

States asserts that it takes issue with this distinction, its argument underscores the correctness of the district courts' approach.

Statutes that apply *in the same way* to state activity and private activity, by their nature, do not conscript the states into regulating an activity on Congress's behalf. Statutes that act upon states and private entities alike plainly regulate conduct directly and do not require states to implement a federal program—the impermissible command at issue in *New York* and *Printz*.<sup>481</sup>

Here, the DPPA does not “apply in the same way” to States (who exclusively license drivers and register motor vehicles) and to private activity which has no counterpart. Consequently, the DPPA is not a statute that acts upon States and private entities alike.<sup>482</sup> As such, the premise of the United States' argument that the DPPA does not “regulate conduct directly” fails and it appears, instead, that the Act regulates *States*, thereby violating *New York* and *Printz*.<sup>483</sup> The DPPA is not saved by the fact that it “regulates private parties seeking to obtain information,”<sup>484</sup> because the DPPA does not “apply in the same way” to such individuals. The fact that the Brady Act applied to handgun sellers and prospective handgun purchasers did not prevent the Supreme Court from holding in *Printz* that the Brady Act violated the Tenth Amendment.

Upon recognizing its strategic error, the United States backpedaled and presented an additional, different argument on reply in *Condon*. The United States now seems to suggest that unless a law is a “commandeering” under *New York* and *Printz*, the law raises no Tenth Amendment issue. That approach ignores the Supreme Court's statement that even laws of general applicability are subject to a balancing test under

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*argued on appeal*, No. 98-6261 (11th Cir. Nov. 30, 1998); *Travis v. Reno*, 12 F. Supp.2d 921 (W.D. Wis.) (distinguishing DPPA from cases the Supreme Court has viewed as involving statutes of general applicability), *rev'd*, 163 F.3d 1000 (7th Cir. 1998), *reh'g denied*, No. 98-2881 (7th Cir. Feb. 11, 1999), *stay pending petition for a writ of certiorari denied*, No. 98-2881 (7th Cir. Feb. 19, 1999). *Stay of issuance of mandate pending filing of a writ of certiorari granted sub nom. Administrator of the Division of Motor Vehicles v. Reno*, No. A-795 (U.S. Mar. 31, 1999) (Stevens, Circuit Justice).

481. U.S. *Condon Br.*, *supra* note 257, at 19 (emphasis added); *see also* U.S. *Oklahoma Br.*, *supra* note 257, at 18.

482. At least one of the few publications to consider the issue recognized the DPPA is not a law of general applicability, but rather, singles out States for a unique burden:

The DPPA is not a statute prohibiting private persons from disclosing information and applying the same prohibition to the states. Nor does the DPPA regulate the many private companies that routinely buy and sell personal information for direct marketing and other purposes. The DPPA's title and its provisions are clearly aimed at the states—and the states alone.

Watkins, *supra* note 324, at 994.

483. *See supra* note 100.

484. U.S. *Condon Br.*, *supra* note 257, at 20-21; U.S. *Oklahoma Br.*, *supra* note 257, at 20.

*Garcia* and *Baker*.<sup>485</sup> The existence of such a test precludes the argument that if a law is not a commandeering, it is constitutional as a matter of law. The United States makes a more fundamental error. It ignores the fact that even if a law does not compel States to regulate on behalf of Congress, that fact alone does not establish that the law is one of general applicability that applies only incidentally to States.

This argument that any non-commandeering statute is one of general applicability was previously advanced by the United States in *Printz* as a basis for limiting the scope of *New York* in the same manner that the United States now seeks to distinguish both those decisions.

[The Petitioners cite] this Court's observation in *New York* that the statute then before it did not involve Congress's "subject[ing] a State to the same legislation applicable to private parties." 505 U.S. at 160. From that sentence, they infer that *any* federal statutory obligation falling particularly on state or local officials is unconstitutional. That argument, however, misapprehends the Court's concerns in *New York*, and it does not explain *why* constitutional principles of federalism are not implicated when the States are subjected to generally applicable legislation.

What is significant for constitutional purposes about a statute of general application is that such an enactment, by its nature, *cannot* constitute a directive to the States to formulate state policy in response to a federal command. Rather, by such a provision, the States (along with private parties) are required to adhere to a clearly articulated federal policy.<sup>486</sup>

The Supreme Court declined to adopt that narrow reading of *New York* in the *Printz* decision. Nonetheless, in the DPPA cases, the United States repeats the same argument.

When the Supreme Court has discussed laws of general applicability in other contexts, it has not addressed the distinction between commandeering and direct regulation of individuals. Rather, the constitutionally significant feature is precisely what the United States concedes, that such laws apply "in the same way" to constitutionally-protected entities or activities as well as to the population at large.<sup>487</sup> When such broadly applicable laws are applied to protected entities or activities they may be upheld as long as such applications are merely

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485. See *Printz*, 117 S. Ct. at 2383.

486. Brief for the United States at 23, *Printz v. United States*, 117 S. Ct. 2365 (1997) (Nos. 95-1478 & 95-1503), available in 1996 WL 595005.

487. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (upholding application of promissory estoppel to press because that law imposes similar burdens on everyone); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-80 (1990) (upholding application of prohibition of drug use to religiously inspired peyote use because that law imposes similar burdens on everyone).

“incidental effects.”<sup>488</sup> *Printz* itself followed this distinction by pointing to “the *incidental* application to the States of a federal law of general applicability.”<sup>489</sup> Even if the DPPA is not viewed as a “commandeering” of States, the DPPA cannot be characterized as a law that imposes similar burdens broadly that only “incidentally” apply to States.<sup>490</sup> Rather, the States are singled out for a unique burden. The text and history of the DPPA show that the imposition of that unique burden was intentional rather than incidental.

Laws that single out constitutionally-protected entities and activities are subject to heightened standards of review.<sup>491</sup> Thus, in *Minneapolis*

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488. *Cohen*, 501 U.S. at 669; *Smith*, 494 U.S. at 878.

489. *Printz*, 117 S. Ct. at 2383 (emphasis added).

490. There is no omnibus legislation applicable to federal, State and business holders of personal information, although the original proposals for the Privacy Act contemplated application to the private sector. *Fortress or Frontier*, *supra* note 130, at 209 n.67 (citing S. REP. NO. 1183, 93d Cong., 2d Sess. 14 (1974)). “Instead, legal protection is accorded exclusively through privacy rights created on an ad hoc basis . . .” *Id.* at 208. Even when aggregated, the industry specific development of privacy protection has resulted in “strikingly limited legal protection” one author described as “haphazard.” *Id.* at 219; see JOY FISHER, *Preface*, in DATA TRANSMISSION AND PRIVACY, *supra* note 359, at viii; U.S. DEPARTMENT OF COMMERCE, PRIVACY AND THE NII: SAFEGUARDING TELECOMMUNICATIONS-RELATED PERSONAL INFORMATION Part I.D (Oct. 23, 1995), available at <<http://www.ntia.doc.gov/ntiahome/privwhitepaper.html>> (last visited Feb. 22, 1999) (“The United States currently has no omnibus privacy law that covers the private sector’s acquisition, disclosure, and use of TRPI. Instead, American privacy law comprises a welter of Federal and state statutes and regulations that regulate the collection and dissemination of different types of personal information in different ways, depending on how it is acquired, by whom, and how it will be used. Although these laws provide some level of privacy protection, they are not comprehensive in the sense that they do not apply uniformly to all service providers.”); National Telecommunications and Information Administration, *Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications-Related Personal Information*, 59 Fed. Reg. 6842, 6843 ¶ 7 (1994); *supra* note 359.

One might view this piecemeal, ad hoc approach to personal information protection as support for the view that it would be exceptionally difficult for Congress to address personal information protection concerns in an omnibus statute that imposes relatively similar burdens on the federal government, on States, and throughout the multiple segments of private sector. On the other hand, the piecemeal approach has been criticized by European officials as “an obviously erratic [system of] regulation full of contradictions, characterized by a fortuitous and totally unbalanced choice of its subjects.” Spiros Simitis, *New Trends in National and International Data Protection Law* in RECENT DEVELOPMENTS IN DATA PRIVACY LAW 22 (J. Dumortier ed. 1992), quoted in Robert Gellman, *Fragmented, Incomplete, and Discontinuous: The Failure of Federal Privacy Regulatory Proposals and Institutions*, 6 Software L.J. 199, 201 (1993).

The European Union required only twenty pages for the EU Data Protection Directive. See Council Directive 95/46/EC, 1995 O.J. (L 281/31). Moreover, countries outside the EU have adopted its approach. Personal information protection laws generally take an omnibus approach; the United States is the exception where piecemeal legislation is promulgated on a sector-by-sector basis and in an entirely ad hoc manner. See SCHWARTZ & REIDENBERG, *supra* note 124, at 5-17; Gellman, *supra*, at 202 (citing DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 305 (1989)); Murray, *supra* note 126, at 941.

491. Under *Garcia*, judicial review is not proper unless there is evidence of “possible failings in the national political process.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The support upon which the Court constructed *Garcia*’s process-oriented approach has

been significantly undermined in the 34 years since the theories were first expounded. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 794-99 (1995) (listing campaign financing, pork-barrel legislation, and buck-passing as ways in which the political process has changed); Friedman, *supra* note 305, at 362 ("the Court's claim that state interests were adequately protected in the political process was highly idealized and likely bad political science"). The authorities upon which *Garcia* relied predated significant developments in national political process. See *Garcia*, 469 U.S. at 551 n.11, 554 n.18 (citing JESSEE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982)).

For example, Professor Wechsler based his conclusion, in part, on the ability of States to influence selection of members of the House of Representatives via control of voter qualifications and redistricting. Wechsler, *supra*, at 548-52. Among the tools available to States when he wrote in 1954 was the poll tax, abolition of which he thought faced no prospect of success. *Id.* at 549. Poll taxes in federal elections were prohibited by the Twenty-Fourth Amendment, ratified in 1964. In 1966, the Supreme Court held poll taxes were unconstitutional in State elections, overruling its prior contrary precedent. See *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), overruling *Breedlove v. Suttles*, 302 U.S. 277 (1937). Professor Wechsler also pointed to the significance of State delineation of election districts for members of the House. Wechsler, *supra*, at 550-52. When he wrote in 1954, States were not constrained by federal enforcement of the equal representation principle later adopted in *Baker v. Carr*, 369 U.S. 186 (1962), and *Gray v. Sanders*, 372 U.S. 368 (1963). See Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 860-68 (1979). Thus, "contrary to Wechsler, it may not be true today that [the interests of States as States] are represented adequately." Tushnet, *supra* note 433, at 1635; see also Yoo, *supra* note 432, at 1321 (noting the Supreme Court "federalized control over the composition of the electorate, and presidential elections evolved into a plebiscitary primary system"). Professor Wechsler wrote of a mindset resulting from these mechanisms in which national programs were "regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, *supra*, at 544. But "the sweeping federal environmental, economic, welfare and entitlement laws of the 1960s and 1970s replaced it with a mindset that seeks federal answers first." Yoo, *supra* note 432, at 1321. Nonetheless, until the Court reconsiders this underlying premise of *Garcia*, it remains the law of the land.

In this changed political climate, the States are subject to being singled out to their detriment, as happened when Congress passed the DPPA. When this happens, the political process has failed. While each State would appear to be fairly well organized, and even have some remaining indirect influence on the selection of Senators and Representatives in Congress, modern political realities are such that the States are quite weak in the national political arena. As Professor Yoo observes, the very fact that States have bonded together into national lobbying groups undercuts the notion that mere representation in Congress serves to protect the interests of the States. Yoo, *supra* note 432, at 1400. The Court recognized in *New York v. United States*, 504 U.S. 144 (1992), that even State elected officials may not always have the State's best interests in mind:

Indeed, the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting

*olis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court held that a tax which “singled out the press for special treatment” was not merely a law of “general applicability . . . to all businesses” and instead, placed “a heavier burden of justification” on the government.<sup>492</sup> When the press is singled out, “the political constraints that prevent a legislature from passing crippling [laws] of general applicability are weakened, and the threat of burdensome [laws] becomes acute.”<sup>493</sup>

Laws that single out religion are similarly subject to the highest level of scrutiny. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>494</sup> the Supreme Court unanimously agreed with that proposition.<sup>495</sup> Justice Kennedy’s opinion for the Court explained that “the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.”<sup>496</sup> “Official action that targets reli-

responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution’s intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

*Id.* at 182-83. In the facts underlying *New York*, public officials representing New York lent their support to the Act’s enactment—specifically a Deputy Commissioner of the New York Energy Office and Sen. Patrick Moynihan. Nevertheless,

[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state government as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

*Id.* at 181. See *Resurrecting Federalism*, *supra* note 259, at 958 (“Congress cannot impose special burdens that single out the states.”). In the case of the DPPA, no State officials participated in the legislative process. See *supra* note 166 and accompanying text. Thus, if there was a process failure justifying judicial intervention in *New York*, a fortiori judicial intervention is appropriate with respect to the DPPA.

492. 460 U.S. 575, 582-83 (1983).

493. *Id.* at 585; see also *Cohen*, 501 U.S. at 670 (law at issue “does not target or single out the press”); Srikanth Srinivasen, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization for the Supreme Court’s Jurisprudence*, 12 CONST. COMMENTARY 401, 401 (1995) (“laws that aim at speech or that in most applications affect expressive activities will always raise a First Amendment issue”).

494. 508 U.S. 520 (1993).

495. See also David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U.L. Rev. 201, 207 (1997) (“the Justices agreed that a city’s ordinances forbidding animal sacrifices were directed unconstitutionally at behavior only when the behavior was engaged in for religious reasons”).

496. 508 U.S. at 524. One commentator has explained: “General applicability analysis invokes underinclusiveness—where religious exercise is burdened while non-religious behavior threatening similar legitimate interests of government is not. The category used by the underinclusive law is too narrow, even if a legitimate interest of government is satisfied. Of course, the narrow categorization also indicates that the object of the law was to burden religion.” Bogen, *supra* note 495, at 209 (footnotes omitted).

gious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”<sup>497</sup> Justice Kennedy observed that the laws were not generally applicable because they were substantially (and not inconsequentially) underinclusive for the governmental interests identified in support of the laws.<sup>498</sup> Other sources of the same harm were not covered by the laws. As a result, the prohibition “only against conduct motivated by religious belief” gave “every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself” and that “precise evil is what the requirement of general applicability is designed to prevent.”<sup>499</sup>

The Supreme Court’s Tenth Amendment cases support this distinction between laws that intentionally impose a different burden on States, and laws that apply “in the same way” to everyone so that they have only incidental application to the States. As noted above, *Garcia* con-

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497. 508 U.S. at 534. Justice Scalia concurred in this explanation: “the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.” *Id.* at 557 (Scalia, J., concurring).

498. *Id.* at 543 (Kennedy, J.). The same consideration demonstrated that the laws were not neutral: “careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.” *Id.* at 536. In addition, Justice Kennedy found “significant evidence of the ordinances’ improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends.” *Id.* at 538. Thus, overinclusiveness also served to demonstrate the laws were invalid, although Justice Kennedy termed this flaw a lack of neutrality, rather than a lack of generality. Justice O’Connor agreed that both underinclusiveness and overinclusiveness demonstrated invalidity. Government “may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.” *Id.* at 578 (O’Connor, J., concurring).

499. *Id.* at 545-46 (Kennedy, J.). At least one other commentator has observed the parallel between *Printz* and several of the Court’s First Amendment decisions. In analyzing the views of Justice Scalia, author of the *Printz* decision, Professor Caminker observes:

Indeed, the precise language and structure of Justice Scalia’s argument call to mind his First Amendment jurisprudence. He distinguishes doctrinally between generally applicable regulations that incidentally burden free speech or religious exercise, which receive no special scrutiny, and regulations whose very object is to burden speech or religious activity, which receive strict scrutiny. This distinction is not based on a concern about lawmakers’ subjective motives; rather, Justice Scalia simply interprets the First Amendment to establish a right to be free of regulations whose object is to suppress speech or religious practice. Justice Scalia might analogously understand state sovereignty to entail a right to be free from laws that target that very sovereignty, but not from laws that incidentally interfere with internal functions. Certainly, the former category, in which states are truly regulated ‘as states’ rather than as a subset of employers or proprietors or anything else, bespeaks a greater and more visible federal insensitivity to state sovereignty than does the latter.

Caminker, *supra* note 441, at 246-47 (footnotes omitted).

templates the development of process-oriented limitations.<sup>500</sup> By placing emphasis on the process failure (*i.e.*, the fact that the DPPA singles out States for a unique burden) rather than declaring a particular substantive area off-limits to federal regulation, challenges to the DPPA fit squarely within the judicial role preserved in *Garcia*.

Under the Supreme Court's jurisprudence and *Garcia's* process-oriented approach, a true law of general applicability would be one that forbids all persons, including private parties, States, and federal agencies, from disseminating to a third party a non-consenting individual's address or other identifying information. Congress did not consider such a proposal for good reason. A bill proposing such a law of general applicability would meet resistance from a broad range of interests, including those who rely on credit reporting information, insurance companies, and businesses of every variety. It is unlikely that a general law of this nature would have the necessary support to pass Congress. Congress avoided such opposition by framing a law that left States politically isolated in the national political process. Such evidence that States were "singled out in a way that left [them] politically isolated" is precisely the type of process-oriented flaw that dooms a statute even under *Baker*.<sup>501</sup>

Legislation enacted pursuant to such a "divide-and-conquer" approach is subject to heightened scrutiny. Moreover, the scant federal legislation regarding disclosure of information<sup>502</sup> does not compound to form a law of general applicability.<sup>503</sup> Few areas are addressed while federal agencies themselves freely disseminate the information addressed by the DPPA.

The process-oriented justification for *New York* and *Printz* is that the disputed legislation singled out States for a unique burden. The cases themselves provide a textual foundation for such reading.<sup>504</sup> In *New York*, the Court made reference to this point: "this is not a case in

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500. *Garcia*, 469 U.S. at 554.

501. 485 U.S. at 513.

502. See *supra* notes 144-66 and accompanying text.

503. See *supra* note 359.

504. Justice Blackmun's initial draft opinion in *Garcia* explicitly laid a foundation for the positions articulated in the final, published opinions in *New York* and *Printz*. Professor Tushnet observes that the process-oriented approach led Justice Blackmun "to propose 'a requirement that Congress not attempt to single out the States for special burdens or otherwise discriminate against them.'" See Tushnet, *supra* note 433, at 1629 (citation omitted). In doing so, Justice Blackmun identified the same problem with such laws as is discussed above. "Where federal regulations affect private parties as well as the states, '[t]he constitutional mechanisms for safeguarding the role of the States are unlikely to be at risk,' because 'the outcome will reflect not only the States' own interests, but the interests of all those who are similarly situated. In those circumstances, the structural features of the Constitution designed to protect the States can be trusted to have served their purpose.'" *Id.* (citing Justice Blackmun, 2d Draft of Opinion in *Garcia v. San Antonio*

which Congress has subjected a State to the same legislation applicable to private parties.”<sup>505</sup> In *Printz*, the Court found that “it [was] the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.”<sup>506</sup> In an accompanying footnote, the Court addressed the dissent’s assertion that Congress could have placed reporting obligations on the States’ police officers if Congress had legislated generally so that those requirements fell only incidentally upon States’ officers.<sup>507</sup> The Court adopted

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*Metro. Transit Auth.* (June 13, 1984), in *Brennan Papers*, Box 666, file 5 (on file with the Library of Congress)).

As Bruce LaPierre explained:

When a regulation applies to both state and private activity, the political checks on Congress’ power to regulate private activity provide vicarious protection for state interests and make Congress politically accountable. Consider, for example, a hypothetical amendment to the FLSA establishing a minimum wage of fifty dollars per hour. If such a requirement was established for state and local governments as employers, they would argue that it imposed a destructive burden on their function of providing public services and that judicial intervention was required to protect state autonomy. Nevertheless, there would be no need for judicial action in these circumstances; the political process is entirely adequate to deal with this threat to state interests. No statute establishing a fifty dollars per hour minimum wage would be enacted because the FLSA also applies to private employers, and the affected private interests would prevent the establishment of a minimum wage that would destroy both private enterprise and state government.

The interests of state government are not protected because congressmen are concerned about the abstract state interest in retaining political authority to control the conditions of public employment or about the more concrete matters of increased costs of employment and of providing governmental services. Instead, these state interests are protected because they are included in the representation of private interests. There is simply no practical danger that the minimum wage will ever be set at a level high enough to impair significantly the conduct of state and local government as long as the same requirements apply to private activity. Since national authority is limited and Congress is politically accountable by virtue of the application of the minimum wage to private employers, the application of the minimum wage to state and local government employers is the decision of a national majority. There is then no need or justification for judicial intervention to protect state autonomy.

La Pierre, *supra* note 491, at 1000-01 (citations omitted).

Thus, where the law is one of general applicability, State interests are vicariously protected by private actors. But where the States are singled out for a unique burden, they are isolated in the political process. In such a case, judicial intervention is appropriate.

505. *New York v. United States*, 505 U.S. 144, 160 (1992).

506. 117 S. Ct. 2365, 2383 (1997) (emphasis in original).

507. *Id.* at 2383 n.17. Justice Scalia noted:

The dissent observes that ‘Congress could require private persons . . . to provide arms merchants with relevant information about a prospective purchaser’s fitness to own a weapon,’ and that ‘the burden on police officers [imposed by the Brady Act] would be permissible if a similar burden were also imposed on private parties *with access to relevant data.*’

*Id.* (emphasis added). The Court went on to say that “the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible” because the Act required CLEOs “to provide information that belongs to the State and is available to them

that suggestion as “undoubtedly true” but explained that the Brady Act imposed additional burdens on States officers for which there was no private-sector counterpart.<sup>508</sup> That dialogue demonstrates that the Brady Act was not one that merely subjected States to the same obligations as private parties. That reading naturally follows from the issue in *Printz*.

The law at issue in *Printz* applied to private individuals. It simply did not apply to them in the same way that it applied to State and local officials:

The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 *et seq.*, establishes a detailed federal scheme governing the distribution of firearms. *It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or have been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).*<sup>509</sup>

The 1993 amendments, the Brady Act, similarly imposed obligations on private individuals.

Under the interim provisions, *a firearms dealer who proposes to transfer a handgun* must first: (1) receive from the transferee a statement . . . (2) verify the identity of the transferee . . . and (3) provide the “chief law enforcement officer” (CLEO) of the transferee’s residence with notice of the contents (and a copy) of the Brady Form . . . . With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal.<sup>510</sup>

Adopting this reading of *Printz*, in which it is clear that the statute there at issue applied to private individuals but imposed additional burdens on States, demonstrates that the protection of State interests reaches the broader set of laws that single out States rather than the narrower set of

only in their official capacity.” *Id.* The information addressed by the DPPA is likewise solely in the possession of the States and there can be no analogous regulation of private parties. Thus it “posits the impossible” to suggest that the DPPA does anything but target the States for separate regulation.

508. *Id.*

509. *Id.* at 2368 (emphasis added).

510. *Id.* at 2368-69 (emphasis added).

laws that “commandeer” States.<sup>511</sup>

The prohibition on laws that target State and local governments predated both *New York* and *Printz*. *South Carolina v. Baker*,<sup>512</sup> on which the United States places so much weight in the DPPA litigation,<sup>513</sup> actually supports a prohibition on laws that target State and local governments. *Baker* held only that State and local governments are not “immune from a *nondiscriminatory* federal tax.”<sup>514</sup> The Court thus expressly reaffirmed the holding in a much earlier case also captioned as *New York v. United States*.<sup>515</sup> In that case, the State of New York challenged a federal tax on the sale of mineral water as applied to the State’s sale of its own bottled water. The Supreme Court upheld the tax in an opinion by Justice Frankfurter<sup>516</sup> on the ground that federal taxation of

511. It is irrelevant to this analysis whether individual States actually support the legislation or participate in the process that produces the legislation that targets State or local governments. In *New York*, for example, it was clear that New York favored the later challenged legislation. See *New York*, 505 U.S. at 188-94 (White, J., concurring in part); *supra* note 491; see also Powell, *supra* note 426, at 637; Yoo, *supra* note 432, at 1349. The role of the individual State (or even all of the States for that matter) in formulating the later-challenged legislation is irrelevant because the constitutional structure seeks to prevent a State’s surrender of its long-term interest in autonomy for short-term benefits. *Id.* at 1400-03; *supra* note 491.

Professor Caminker suggests that Justice Scalia, author of *Printz*, may endorse this analysis:

It is conceivable that Justice Scalia would adhere to *Garcia*’s conclusion that generally applicable regulations should not receive special judicial scrutiny. Although Justice Scalia surely recognizes that generally applicable laws can impose the same type of burden on state executives as state-targeted commandeering statutes, his focus [in *Printz*] on the ‘whole object of the law’ suggests that only laws that *particularly* target state executives violate the ‘very principle of separate state sovereignty’ he has constructed. *On this view, the states’ sovereign status provides them with a right not to be singled out by Congress on the basis of their statehood, and nothing more.*

Caminker, *supra* note 441, at 246 (footnote omitted) (emphasis added). Professor Caminker further notes that in applying that analysis Justice Scalia focuses on the “object of the law” rather than the subjective motives of lawmakers. *Id.*; see *supra* note 499.

512. 485 U.S. 505 (1988).

513. See Reply Brief for the Appellants at 3-6, 8-10, *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (No. 97-2554) (arguing, for the first time on reply, that *Baker* constituted controlling authority); Reply Brief for the Appellant at 3-7, 10-11, *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998) (No. 97-6389) (same).

514. 485 U.S. at 524 (emphasis added).

515. 326 U.S. 572 (1946). For further discussion of this decision and the non-discrimination principle in intergovernmental tax immunity, see Caminker, *supra* note 441, at 246-47, Matsumoto, *supra* note 361, at 68-70, 73, *R.I.P.*, *supra* note 175, at 158-62, and John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445, 480-82 (1996-97). See also Harvard Law Review Association, *The Supreme Court, 1987 Term—Leading Cases—Intergovernmental Tax Immunity*, 102 HARV. L. REV. 222, 229 n.53 (1987) (stating, after *Baker*: “The Court most likely would not leave matters to the political process if Congress were to use its powers to discriminate against states.”) (citing *New York*, 326 U.S. 572).

516. Only Justice Rutledge joined in Justice Frankfurter’s opinion announcing the judgment of the Court. A plurality of the Court endorsed additional limitations on federal power.

State governmental activities was valid as long as the federal tax was non-discriminatory. In order to pass this test, Justice Frankfurter explained that the tax must not target States in either of two ways. First, the tax must apply to both State and private enterprises of a similar nature. “[F]or Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.”<sup>517</sup> Second, the tax may not be imposed exclusively on property

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517. 326 U.S. at 575-76. See also *id.* at 581 (“If in its wisdom a State engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State’s sale of its mineral waters has relation to its conservation policy.”); *id.* at 584-85 (Rutledge, J., concurring) (“For the present I assent to the limitation against discrimination, which I take to mean that state functions may not be singled out for taxation when others performing them are not taxed or for special burdens when they are.”).

This first type of non-discrimination appears to completely address Professor Tushnet’s concern that a prohibition of laws targeting States proposed an adoption of a “governmental/proprietary” distinction such as that rejected for intergovernmental tax immunity purposes. See Tushnet, *supra* note 433 at 1638-39. The prohibition on imposing a tax or burden on States while not imposing a tax on private entities engaged in the same activities does not call for any classification of the burdened State activity. Professor Tushnet also suggests that “almost no governmental function is performed only by governments,” due to the trend to contract out services previously performed by the State, so that such a nondiscrimination rule “would then actually impose no limits on Congress’ power.” *Id.* at 1639. Again, in the context of the first prong of the non-discrimination rule addressed in *New York*, Professor Tushnet’s argument actually lends further weight to the non-discrimination provision. If, as a general matter, States are not the only entities engaged in an activity, then a law directed only at the State when engaged in that activity shows that they have been singled out. For example, the fact that numerous federal agencies and private companies are permitted to disclose residential addresses and other information reinforces the discrimination reflected in selecting only States for regulation in this regard.

Professor Tushnet’s final argument for rejecting nondiscrimination fares no better. He asserts:

Consider an express preemption provision in its typical form, stating that “no State may impose a requirement” inconsistent with the prescribed federal standards. Such a provision “singles the states out” for special treatment. It bars them from doing something—imposing a regulatory requirement—that no private entity is barred from doing (because, of course, no private entity has the legal capacity to impose such requirements).

*Id.* at 1639. This very example illustrates one of the important exceptions to Professor Tushnet’s assertion that “almost no governmental function is performed only by governments” so that such a nondiscrimination rule “would then actually impose no limits on Congress’ power.” *Id.* Moreover, it is not at all clear that the example is correct in its conclusion. Under the Supremacy Clause, the federal and State judiciaries are required to accept federal law pursuant to the Constitution in lieu of contrary State law. Congress need not include a legislative directive to States in order to accomplish that end. There is a fundamental difference between requiring State judges to adhere to the Supremacy Clause and instructing State legislatures that they may not legislate. See *Printz*, 117 S. Ct. at 2381; Prakash, *supra* note 441, at 2007-32; see also Tushnet, *supra* note 433 at 1642 n.111 (acknowledging “possible distinctions between national commands to state courts and national commands to state legislatures”) (citing Prakash *supra* note 441). Because the federal law will be enforced by the judiciary, the congressional command directed to the State legislatures is of no (or very little) legal effect. In light of that fact, it is unlikely States would bother to

or activities that are unique to State governments.<sup>518</sup> “But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State.”<sup>519</sup> The rest of the Court unanimously supported these limitations and differed only with respect to whether the federal taxing power was subject to additional restrictions.<sup>520</sup>

Although the Supreme Court in *Baker*<sup>521</sup> subsequently cast aside some of the broader limitations articulated by the plurality in *New York*, the *Baker* court explicitly left intact the narrower non-discrimination protection.<sup>522</sup> The bar against a tax imposed exclusively upon States

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challenge the federal directive. The fact that States may not find it an effective use of resources to challenge federal legislation with little practical impact, however, does not provide a basis for assuming that the States have no legal basis for such a challenge when an egregious case arises. With that premise removed, it is not immediately apparent how a directive to the States not to pass contrary laws on some issue could survive scrutiny under *Printz* and *New York*.

518. Justice Frankfurter explained:

There are, of course, State activities and State-owned properties that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State.

*New York v. United States*, 326 U.S. 572, 582 (1946).

519. *Id.*

520. The plurality opinion concurred that a federal tax levied only against an activity conducted by a State, and not against a similar activity conducted by a private corporation, would be unconstitutional: “Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government.” 326 U.S. at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.). The plurality, however, went further, rejecting the non-discrimination principle as the sole limit on congressional taxing power and suggesting that the federal taxing power did not permit a tax that unduly interferes with the performance of the States’ governmental functions. *Id.* at 587-88.

Justice Rutledge, in a separate concurring opinion, sought to impose a rule of construction parallel to that later adopted in *Gregory*. “[B]efore a federal tax can be applied to activities carried on directly by the states, the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue.” *Id.* at 585 (Rutledge, J., concurring).

The dissent adopted the narrowest view of the federal taxing power, arguing that the tax in question exceeded congressional power. They proposed that no State activity was subject to federal tax: “A state’s project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit.” *Id.* at 591 (Douglas, J., dissenting, joined by Black, J.).

521. 485 U.S. 505 (1988).

522. The Court stated: “Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations.” *Baker*, 485 U.S. at 526-27. The Court then explicitly relied on the premise that “a nondiscriminatory federal tax on the interest earned on state bonds does not violate the intergovernmental tax immunity doctrine” to uphold the challenged legislation. *Id.* at 527; *see also* NATIONAL ASSOCIATION OF BOND LAWYERS, FUNDAMENTALS OF MUNICIPAL BOND LAW § 2, at 7 (1998)

when private corporations engaged in the same activity are left untaxed, is simply a restatement of the bar against laws that target or single out States. Authorities subsequent to *Baker* continue to recognize the non-discrimination limit on federal taxing power.<sup>523</sup>

If the Supreme Court finds that the DPPA does not require the States to legislate or to administer the Act on behalf of the federal government, it may clarify that singling out States for special burdens is equally prohibited by *New York* and *Printz*. If the Court declines to read its precedents to bar laws targeting States for a unique burden, the Court would be required to recognize a new class of Tenth Amendment cases. This new class would consist of laws neither requiring States to administer programs for Congress nor generally applicable laws that only incidentally apply to States. If the Court took the approach of recognizing this new class of cases, it would be required to formulate appropriate standards and safeguards to address such cases. Thus initially, any resolution of the DPPA litigation other than a straightforward application of *New York* and *Printz*, promises to break new ground.

## VI. CONCLUSION

Litigation challenging the DPPA has taken the form of direct challenges between the dual sovereigns of our federal system: State governments are bringing actions directly against the United States. The serious constitutional issues raised in these challenges highlight the importance of these cases to the development of doctrine in several emerging areas. The Supreme Court's recent decisions in *Printz*, *City of Boerne*, and *Lopez* come into play. In addition, there is already a division among the courts which have ruled on the constitutionality of the DPPA and a "circuit split" may soon follow.<sup>524</sup> All of these factors indicate that the Supreme Court may soon consider the constitutionality of the DPPA. When it does so, it may hold the DPPA unconstitutional based on a relatively straightforward application of its recent precedents. Or, the Court may take the next logical step in its development of process-oriented jurisprudence.

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(noting that the "Court found that the immunity doctrine would only apply if a state were taxed directly and in a discriminatory fashion").

523. See *supra* note 515.

524. As this article goes to press, it appears that the circuit split has come to fruition. See *supra* note 18. The appellate decisions creating the circuit split are addressed in Thomas H. Odom & Marc R. Baluda, *The Development of Process-Oriented Federalism: Harmonizing the Supreme Court's Tenth Amendment Jurisprudence From Garcia Through Printz*, 30 URB. LAW. \_\_\_\_ (Summ. 1999) (forthcoming).