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Reno v. Condon: The Supreme Court Takes a Right Turn in Its Tenth Amendment Jurisprudence by Upholding the Constitutionality of the Driver's Privacy Protection Act

Cover Page Footnote

J.D. Candidate, 2001, Fordham University School of Law. This Comment is dedicated to my parents, Richard W. and Marie Cosgrove for everything, my Aunt Marion who made attending law school possible, and Aunt Brenda, Aunt Judy, Aunt Gail, Uncle Paul, Uncle Tom, Michael, Sean, Karen, and Terry for all their guidance and support. I also wish to thank Professor Charles M. Whelan, S.J., for his assistance through the writing and editorial process.

COMMENT

RENO V. CONDON: THE SUPREME COURT TAKES A RIGHT TURN IN ITS TENTH AMENDMENT JURISPRUDENCE BY UPHOLDING THE CONSTITUTIONALITY OF THE DRIVER'S PRIVACY PROTECTION ACT

*Richard T. Cosgrove**

INTRODUCTION

The Supreme Court rendered a unanimous decision in *Reno v. Condon*¹ on January 12, 2000. Reversing the Fourth Circuit's decision in *Condon v. Reno*,² the Supreme Court held that the Driver's Privacy Protection Act³ ("DPPA") was a constitutional exercise of Congress's Commerce Clause powers and did not violate the principles of federalism embodied in the Tenth Amendment.⁴

The DPPA provides that state departments of motor vehicles ("DMVs"), and their officers, employees, and contractors "shall not knowingly disclose or otherwise make available to any person or

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1. 120 S. Ct. 666 (2000). This decision settled a circuit split over the constitutionality of the Driver's Privacy Protection Act ("DPPA"). The Fourth and Eleventh Circuits had held that the DPPA was unconstitutional because it violated the limitations that the Tenth Amendment imposes on Congress's exercise of its Commerce Clause powers. *See Pryor v. Reno*, 171 F.3d 1281, 1284-85, 1288 (11th Cir. 1999), *vacated*, 120 S. Ct. 929 (2000); *Condon v. Reno*, 155 F.3d 453, 460-63 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000). The Seventh and Tenth Circuits had held that the DPPA was constitutional because it was a valid exercise of the Commerce Clause powers and did not violate the Tenth Amendment. *See Travis v. Reno*, 163 F.3d 1000, 1001-02 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000); *Oklahoma ex rel. Oklahoma Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998), *cert. denied*, 120 S. Ct. 930 (2000).

2. 155 F.3d 453 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

3. *See* 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998).

4. *See Reno*, 120 S. Ct. at 668. For a more detailed explanation of the Court's holding, see *infra* Part IV.

entity personal information about any individual obtained by the department [of motor vehicles] in connection with a motor vehicle record.”⁵ This prohibition is subject to numerous mandatory and discretionary exceptions.⁶ Although the DPPA principally regulates the commercial activity of DMVs, the DPPA also regulates the circumstances in which parties who have obtained personal information from DMVs may redisclose such information to third parties.⁷ Because the DPPA does not apply to states and private parties in the same way, many commentators and courts concluded that the DPPA was not a law of general applicability.⁸ Laws of general applicability apply equally to private entities and the states.

To comply with the DPPA, some DMVs were forced to change, at a substantial financial cost, the way they sold and disseminated drivers’ personal information.⁹ States that fail to conform to the DPPA’s requirements by engaging in a pattern of substantial non-compliance are penalized.¹⁰ Because the DPPA has the practical effect of

5. 18 U.S.C. § 2721(a) (1994).

6. *See id.* § 2721(b) (Supp. IV 1998).

7. *See id.* § 2721(c) (providing that “[a]n authorized recipient of personal information . . . may resell or redisclose the information only for” certain permitted uses).

8. *See Pryor v. Reno*, 171 F.3d 1281, 1288 (11th Cir. 1999) (emphasizing that “[t]he DPPA is not a law of general applicability”), *vacated*, 120 S. Ct. 929 (2000); *Condon v. Reno*, 155 F.3d 453, 456 (4th Cir. 1998) (holding that the DPPA “for all intents and purposes” applies solely to states and, therefore, is not generally applicable), *rev’d*, 120 S. Ct. 666 (2000); Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver’s Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism under the Tenth Amendment*, 53 U. Miami L. Rev. 71, 155 (1998) (describing the DPPA as not generally applicable because it “does not ‘apply in the same way’ to States . . . and to private activity”); *see also* Robert C. Lind & Natalie B. Eckart, *The Constitutionality of the Driver’s Privacy Protection Act*, 17 Comm. Law. 18, 19-20 (1999) (noting that most courts determined that the DPPA is not generally applicable). *But see* *Travis v. Reno*, 163 F.3d 1000, 1005-06 (7th Cir. 1998) (stating that even though the DPPA primarily effects the states, the sale and dissemination of personal information by private parties is regulated in other federal statutes), *cert. denied*, 120 S. Ct. 931 (2000); Stephen G. Hartzell-Jordan, Note, *Condon v. Reno and the Driver’s Privacy Protection Act: Was Garcia a Bump in the Road to States’ Rights?*, 78 N.C. L. Rev. 217, 248 (1999) (discussing how, facially, the DPPA applies solely to States; but “on a second level, the statute does apply equally to private and public entities”).

9. Although most states had to change the way they sold and disseminated drivers’ personal information, eight states already had more restrictive laws in place before Congress enacted the DPPA and, therefore, did not have to make any changes. *See* Angela R. Karras, Note, *The Constitutionality of the Driver’s Privacy Protection Act: A Fork in the Information Access Road*, 52 Fed. Comm. L.J. 125, 133 (1999); *see also* Oliver J. Kim, Note, *The Driver’s Privacy Protection Act: On the Fast Track to National Harmony or Commercial Chaos?*, 84 Minn. L. Rev. 223, 243 (1999) (noting that a few states, such as Hawaii, Arkansas, and Alaska, had already enacted privacy legislation that was stricter than the DPPA, but that most States had little or no privacy protection legislation in place at the time the DPPA was enacted).

10. *See* 18 U.S.C. § 2723(b) (1994); *Pryor*, 171 F.3d at 1283 (noting that the DPPA penalizes states that do not comply with the DPPA); *Condon*, 155 F.3d at 457 (recognizing that through the imposition of fines on state DMVs that are found to

regulating DMVs in a manner that forces them to change the way they operate in an area traditionally regulated by the states, the DPPA implicates the constitutional principles of federalism embodied in the Tenth Amendment.

In general, principles of federalism govern what the federal government can require the states to do.¹¹ These principles are essential to the tripartite governmental structure of the United States¹² because they ensure a governmental system of dual sovereignty in which the states remain viable political entities, thereby protecting the people from a potentially tyrannous federal government.¹³ The principles of federalism impose restrictions on Congress's exercise of its enumerated powers.¹⁴ For example, the principles of federalism embodied in the Tenth Amendment impose substantive limitations on Commerce Clause legislation that upsets

have a practice or policy of substantial noncompliance, the DPPA will cause the states to incur costs and expend effort to comply with the statute); *see also* Odom & Feder, *supra* note 8, at 87-88 (stating that in order for the states to avoid the imposition of severe penalties for substantial noncompliance with the DPPA, they must make changes in the state law and its administration).

11. *See* Dennis M. Cariello, Note, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 *Fordham Urb. L.J.* 1493, 1550 (1999) (noting that “[m]uch of federalism jurisprudence deals with infringements on ‘state’s rights’ by the national government”). *But see* *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783-85, 802 (1995) (holding that an Arkansas Constitutional provision preventing individuals who had previously served in Congress for a specified number of terms from appearing on the ballot was unconstitutional because the power to add Congressional qualifications was not reserved to the states by the Tenth Amendment); *id.* at 841 (Kennedy, J., concurring) (“That the States may not invade the sphere of federal sovereignty is as incontestable . . . as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.”).

12. The Framers created a tripartite governmental structure by splitting the atom of sovereignty between the federal government, the state governments, and the people. *See Alden v. Maine*, 119 S. Ct. 2240, 2287-88 (1999) (Souter, J., dissenting). The Framers reduced the probability that one group could implement its own political agenda by further diffusing sovereignty through the division of the federal powers between the executive, legislative, and judicial branches, “and institutionalizing methods that allow each branch to check the others.” Martin H. Redish, *The Constitution as Political Structure* 4 (1995).

13. *See* Redish, *supra* note 12, at 4 (“[I]n establishing their complex structure, the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power.” This fear is evidenced by the fact that “the Framers [chose] to rely on a number of different structural devices [such as dividing sovereignty between the state and federal governments] to check what they assumed to be the natural and inherent tendency of government to proceed toward tyranny”).

14. *See Alden*, 119 S. Ct. at 2246-47 (demonstrating the important role federalism plays in the Court’s Eleventh Amendment jurisprudence); *City of Boerne v. Flores*, 521 U.S. 507, 516, 536 (1997) (detailing the important role that federalism plays in the Court’s interpretation of Congress’s power under the Enforcement Clause); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (stating that the principles of federalism limit Congress’s Commerce Clause powers).

the balance of power between the states and the federal government.¹⁵ Examples of such laws include those that conscript state executive officers to implement federal regulations,¹⁶ commandeer the state legislature in an attempt to coerce the state into enacting legislation that the federal government deems appropriate,¹⁷ and, it appears, determine the qualifications of state judges.¹⁸

In *Condon*, the Fourth Circuit confronted difficult issues implicating the constitutional principles of federalism when deciding whether the DPPA impermissibly intruded upon state sovereignty in violation of the Tenth Amendment.¹⁹ The Fourth Circuit held that the DPPA was unconstitutional because it exceeded the limits that the Tenth Amendment principles of federalism impose on Congress's exercise of its regulatory power under the Commerce Clause.²⁰

15. See *Printz v. United States*, 521 U.S. 898, 925-33 (1997); *New York v. United States*, 505 U.S. 144, 174-83 (1992).

16. See *Printz*, 521 U.S. at 925-33.

17. See *New York*, 505 U.S. at 174-83.

18. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The *Gregory* Court held that the principles of federalism created a rebuttable interpretational presumption that the terms of the Age Discrimination in Employment Act of 1967 did not encompass state judges. See *id.* at 460-61. The Court articulated this clear statement rule because the Court's earlier federalism jurisprudence enunciated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which declared that the political process was the states' primary protection against intrusive exercises of Congress's Commerce Clause powers, counseled the Court to require Congress to unequivocally declare its intent to apply federal regulations in an intrusive manner. See *Gregory*, 501 U.S. at 464. The Court, therefore, did not have to decide whether the Tenth Amendment prohibited Congress from determining the qualifications of state judges, but the Court's opinion intimated that this type of legislation would be unconstitutional. See *id.* at 463-64; see also Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1458-59 (1995) (noting that the *Gregory* decision was significant because it "marked the beginning of the Tenth Amendment's rehabilitation" of federalism, not because of the clear statement rule it articulated); Jack W. Campbell, IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 816 (1998) (stating that the *Gregory* Court's clear statement rule "increases Congress's political accountability by forcing it to state explicitly a decision to erode state authority and reduce the benefits of federalism"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 903-05 (1994) (stating that the *Gregory* Court "suffered a relapse" by relying on the principles of federalism to create an interpretational presumption instead of applying regular principles of statutory interpretation to reach the same conclusion).

19. See *Condon v. Reno*, 155 F.3d 453, 460-63 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

20. See *id.* at 457, 463. Although the Fourth Circuit also held that the DPPA was not a valid exercise of Congress's power under section 5 of the Fourteenth Amendment ("Enforcement Clause"), see *id.* at 465, the Supreme Court did not address this holding. See *Reno v. Condon*, 120 S. Ct. 666, 671 n.2 (2000) (stating that although the United States argued below that the DPPA was a valid exercise of Congress's Enforcement Clause powers, the United States did not raise the issue in the "petition for certiorari . . . [or] briefs to this Court . . . and, at oral argument, the Solicitor General expressly disavowed any reliance on it"). Specifically, the Supreme Court declined to address whether the privacy interest that the DPPA enforces—the privacy interest a driver has in personal information, such as his or her name, address,

According to the Fourth Circuit, the DPPA violated the Tenth Amendment by forcing the states to administer a federal regulatory program,²¹ an impermissible result under the Supreme Court's current Tenth Amendment jurisprudence as set forth in *New York v. United States*²² and *Printz v. United States*.²³ The Fourth Circuit also held, in the alternative, that the Commerce Clause does not provide a constitutional basis for the DPPA even under the *Garcia v. San Antonio Metropolitan Transit Authority*²⁴ line of cases²⁵ because the DPPA is not generally applicable.²⁶ According to the Fourth Circuit's interpretation of the *Garcia* line in light of *New York* and *Printz*, "Congress may regulate the conduct of the States [only] through laws of general applicability."²⁷ Subsequent to the Fourth Circuit's decision, the Supreme Court granted the United States's petition for certiorari on May 17, 1999.²⁸

The Supreme Court reversed the Fourth Circuit's decision and upheld the constitutionality of the DPPA as a valid exercise of Congress's Commerce Clause powers that did not violate the Tenth Amendment.²⁹ The Court held that the DPPA did not run afoul of the anti-commandeering principles of federalism enunciated in *New York* and *Printz*.³⁰ Instead of relying on *New York* and *Printz*, however, the Supreme Court upheld the DPPA by relying on *South Carolina v. Baker*,³¹ a case in the *Garcia* line that addressed Congress's power to remove the tax exempt status of bearer bonds.³² In *Baker*, the Court upheld the constitutionality of Congressional legislation that effectively required the states to implement a variety of legislative and administrative changes in order to continue issuing tax exempt bonds, despite South Carolina's argument that these requirements forced the states to administer a federal regulatory

phone number, social security number, and medical history—is a right guaranteed by the term "liberty" in section 1 of the Fourteenth Amendment and, therefore, a permissible target of Congress's Enforcement Clause powers. *See Condon*, 155 F.3d at 463-65; *see also* *City of Boerne v. Flores*, 521 U.S. 507, 518-20, 536 (1997) (providing the framework for determining whether Enforcement Clause legislation passes constitutional muster).

21. *See Condon*, 155 F.3d at 460.

22. 505 U.S. 144 (1992).

23. 521 U.S. 898 (1997).

24. 469 U.S. 528 (1985).

25. The *Garcia* line of cases, which includes *South Carolina v. Baker*, 485 U.S. 505 (1988), allows Congress to regulate the states as states. *See infra* notes 120-57. These cases all involved laws that were generally applicable. *See supra* note 8 and accompanying text.

26. *See Condon*, 155 F.3d at 461-63.

27. *Id.* at 462.

28. *See Reno v. Condon*, 119 S. Ct. 1753 (1999).

29. *See Reno v. Condon*, 120 S. Ct. 666, 672 (2000).

30. *See id.* at 668.

31. 485 U.S. 505 (1988).

32. *See Reno*, 120 S. Ct. at 672.

program in violation of the Tenth Amendment.³³ The *Baker* Court stated that this type of “administering” is an inevitable and innocuous result of federal regulation.³⁴ The *Reno* Court’s opinion, however, neither clearly explains why the Court relied on *Baker*, nor addresses the Fourth Circuit’s extremely narrow reading of *Garcia* in light of *New York* and *Printz*.³⁵ In fact, the Court’s decision does not mention *Garcia* even once.

The *Reno* Court expressly reserved for later judicial determination whether general applicability is a constitutional requirement for Congressional Commerce Clause legislation that applies to the states as states.³⁶ The Court found that it need not address this issue because the DPPA regulates “the universe of entities” that supply motor vehicle information and, therefore, is a law of general applicability.³⁷ The Court’s opinion does not relate the significance of its finding that the DPPA is a law of general applicability to the determination that *Baker* governed the instant case, rather than *New York* and *Printz*. The Court’s opinion also fails to state why, or if, general applicability is of constitutional significance.³⁸

This Comment analyzes the Supreme Court’s decision in *Reno* by scrutinizing the DPPA, the recent Supreme Court cases that establish Tenth Amendment restrictions on Congress’s Commerce Clause powers, the Fourth Circuit’s opinion, and the Supreme Court’s decision reversing the Fourth Circuit. This analysis will demonstrate that the Supreme Court missed an opportunity to stabilize its Tenth Amendment jurisprudence³⁹ because the Court failed to acknowledge

33. See *Baker*, 485 U.S. at 513-15.

34. See *id.*; see also *Reno*, 120 S. Ct. at 672 (describing the Court’s holding in *Baker*).

35. See *Reno*, 120 S. Ct. at 671-72.

36. See *id.* at 672.

37. See *id.*

38. See *id.*

39. The Supreme Court’s Tenth Amendment jurisprudence as it relates to substantive limitations on Congress’s powers is currently in a state of flux. See *Bednar & Eskridge*, *supra* note 18, at 1447. In fact, the Court’s “federalism jurisprudence might . . . be described as ‘a mess.’” *Id.* The Court has not yet fashioned a workable framework for determining what types of Congressional Commerce Clause legislation targeting the states as states violates the Tenth Amendment, as evidenced by the many reversals and complete turnarounds in this area. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *Redish*, *supra* note 12, at 23 (noting that to say “the Supreme Court’s efforts to develop a principled, coherent approach to its role as the constitutional arbiter of inter-federal disputes have been less than successful is surely a significant understatement”); Paul J. Mishkin, *The Current Understanding of the Tenth Amendment*, in *Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics* 149, 150 (Harry N. Scheiber & Amy Toro eds., 1992) (demonstrating the Court’s inability to provide a workable rationale to determine when, and in what manner, the federal government can regulate the

that its recent decisions reveal that the *Garcia* line of cases and *New York* and *Printz* are not two distinct lines of Tenth Amendment jurisprudence.⁴⁰ This Comment argues that *New York* and *Printz* are examples of the substantive restrictions discussed in *Garcia* that are necessary to protect the states from a defect in the national political process.⁴¹ *New York* and *Printz*, two Supreme Court cases invalidating Commerce Clause legislation on substantive Tenth Amendment grounds, noted that the challenged legislation was generally applicable, but focused on whether the legislation in question led to diminished political accountability for state and federal governments.⁴² This Comment contends that legislation that diminishes political accountability causes a defect in the political process that triggers substantive Tenth Amendment protections under *Garcia*.⁴³ Furthermore, this Comment argues that diminished political accountability occurs when the federal government forces states to engage in “uniquely sovereign activities,” activities in which only the states as states can engage.⁴⁴

This Comment also argues that recent Supreme Court cases demonstrate that general applicability is not a constitutional prerequisite for Congress to regulate the states as states under the Commerce Clause. Because the Court’s Tenth Amendment inquiry focuses on whether Congressional Commerce Clause legislation diminishes political accountability by forcing the states as states to engage in “uniquely sovereign activities,” the determination that a law is generally applicable is merely one indicator of constitutionality. Generally applicable legislation, by its nature, never forces states to engage in “uniquely sovereign activities” because private entities, by definition, cannot engage in sovereign activities. Congressional Commerce Clause legislation that does not regulate both the states and private entities in the same statute does not always target “uniquely sovereign activities,” and, therefore, may pass constitutional muster.

Part I of this Comment describes the legislative history of the DPPA and its many controversial characteristics. Part II briefly examines Congress’s regulatory power under the Commerce Clause

states as states under the Commerce Clause without violating the Tenth Amendment, by discussing the many recent reversals in this area); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 Vand. L. Rev. 1623, 1623 (1994) [hereinafter Tushnet, *Why the Court*] (stating that “[w]e are now in the midst of a confused era for federalism doctrine”).

40. See *infra* Part V.

41. See *infra* notes 293-318 and accompanying text.

42. See *Printz v. United States*, 521 U.S. 898, 915-16, 920 (1997) (noting that the challenged legislation was not generally applicable, but focusing on the fact that the statute diminished political accountability by commandeering the states to regulate third parties); *New York v. United States*, 505 U.S. 144, 168-69 (1992) (same).

43. See *infra* Part V.

44. See *infra* Part V.

and then examines, through detailed analysis of recent Supreme Court decisions, the Tenth Amendment restrictions that the principles of federalism impose on Congress's Commerce Clause powers. Part III analyzes the Fourth Circuit's opinion in *Condon* in order to demonstrate why it does not comport with the recent Supreme Court cases construing the meaning of the Tenth Amendment. Part IV describes the reasoning that the Supreme Court employed in *Reno* to reverse the Fourth Circuit's decision and uphold the constitutionality of the DPPA as a valid exercise of Congress's Commerce Clause powers. Finally, Part V explains why, in light of the recent Court cases, the *Reno* Court was correct in reversing the Fourth Circuit's decision in *Condon*. Part V also argues that the Court missed an opportunity to stabilize its Tenth Amendment jurisprudence by failing to embrace a reconceptualization of *Garcia*, *New York*, and *Printz*.

I. THE DPPA

This part analyzes the legislative history of the DPPA by recounting Congress's reasons for enacting privacy legislation regulating the sale and dissemination of drivers' personal information. It then describes the DPPA's provisions and discusses why many courts and commentators viewed the Act as unconstitutional.

On July 18, 1989, Rebecca Schaeffer, an actress on the popular television sitcom "My Sister Sam," was murdered on the doorstep of her home by Robert Bardo.⁴⁵ Bardo, an obsessed fan, obtained Schaeffer's address from the California DMV for five dollars.⁴⁶ Although Schaeffer had taken steps to ensure that her address and phone number were not publicly known, Bardo obtained from the DMV the personal information about Schaeffer that provided him with the opportunity to kill her.⁴⁷ Schaeffer's murder drew public

45. See Odom & Feder, *supra* note 8, at 88; Darrell Dawsey & Eric Malnic, *Actress Rebecca Schaeffer Fatally Shot at Apartment*, L.A. Times, July 19, 1989, at 1 (describing the tragic murder of the young actress); see also Hartzell-Jordan, *supra* note 8, at 217 (recounting the events surrounding the tragic murder of Rebecca Schaeffer); Rachel F. Preiser, Note, *Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver's Privacy Protection Act Constitutional Under the Tenth Amendment?*, 98 Mich. L. Rev. 514, 514 (1999) (describing the tragic events leading up to) the murder of Rebecca Schaeffer to explain Congress's motive for enacting the DPPA).

46. See Kim, *supra* note 9, at 223; see also Lind & Eckart, *supra* note 8, at 18 ("Rebecca Schaeffer was killed by an obsessed fan [who]... was able to locate Schaeffer's home after he hired a private investigator who obtained the actress's address by accessing her California motor vehicle record..."); Tracey Wilkinson, *Murder Suspect's 'Obsession' Foretold in Studio Visit*, L.A. Times, Aug. 2, 1989, pt. II, at 1 (describing how Bardo, after unsuccessfully attempting to meet Schaeffer at the television studio, hired a private detective who obtained Schaeffer's address).

47. See Brief for Petitioners at 5, *Reno v. Condon*, 120 S. Ct. 666 (2000) (No. 98-1464), available in 1999 WL 513843 (discussing the "threats to privacy and personal safety from disclosure of personal information held in state DMV records" by noting the "murder of actress Rebecca Schaeffer, who had taken pains to ensure that her

attention to the ease with which stalkers, robbers, and murderers could obtain sensitive personal information from a variety of sources, including DMVs.⁴⁸

State DMVs do not release the type of personal information Bardo obtained about Schaeffer for free. Instead, they sell it to both businesses and individuals at a substantial profit.⁴⁹ For example, the New York DMV collected \$17 million in fees in one year from the sale of drivers' personal information.⁵⁰ The Wisconsin DMV raises approximately \$8 million in revenue annually from these sales.⁵¹ As the states have discovered, "the personal information contained in state DMV records has considerable commercial value . . . [because the information sold] is used extensively to support the direct-marketing efforts of businesses."⁵²

After Schaeffer's highly publicized murder, Congress and the states responded quickly to the public outcry over stalking and the ease with which criminals could obtain personal information about their victims.⁵³ State legislatures focused their energies on enacting a variety of criminal anti-stalking laws.⁵⁴ Congress, on the other hand, conducted hearings on Schaeffer's murder and similar incidents of criminals using state motor vehicle records to harm victims.⁵⁵ After determining that the commercial use of drivers' personal information by the DMVs created serious privacy and safety concerns, Congress, pursuant to its Commerce Clause and Enforcement Clause powers, passed the DPPA in 1994.⁵⁶

address and phone number were not publicly listed").

48. See *id.* at 4-5; Wilkinson, *supra* note 46.

49. See *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000); Brief for Petitioners at 3-4, *Condon* (No. 98-1464).

50. See *Protecting Driver Privacy: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 103d Cong. (1994) (testimony of Janlori Goldman, Director of the American Civil Liberties Union's Privacy and Technology Project), available in 1994 WL 212813 at *6.

51. See *Reno v. Condon*, 120 S. Ct. 666, 668 (2000); *Travis*, 163 F.3d at 1002; see also Brief for Petitioners at 4, *Condon* (No. 98-1464) (noting that the Wisconsin Department of Transportation earns \$8 million per year from selling drivers' personal information).

52. Brief for Petitioners at 4, *Condon* (No. 98-1464).

53. See *id.* at 5; see also Odom & Feder, *supra* note 8, at 88-89 (discussing how both federal and state anti-stalking legislation was enacted following the murder of Rebecca Schaeffer); Kim, *supra* note 9, at 224 ("Shocked by the relative ease with which Bardo obtained Schaeffer's home address," legislators in California enacted information privacy measures and Congress enacted the DPPA).

54. See Odom & Feder, *supra* note 8, at 88-89 (noting that in response to Schaeffer's murder, California enacted criminal laws penalizing stalking itself and that by 1993, the other 49 States had followed California's lead by enacting laws to penalize the act of stalking).

55. See Brief for Petitioners at 4-5, *Condon* (No. 98-1464).

56. See *id.* at 3-8; see also Recent Cases, 112 Harv. L. Rev. 1100, 1100 (1998) ("Congress enacted the DPPA to discourage the 'active commerce' in and 'easy availability' of personal information obtained via motor vehicle records.").

The DPPA generally prohibits “a State department of motor vehicles, and any officer, employee, or contractor, thereof . . . [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.”⁵⁷ The statutory definition of “personal information” includes an individual’s name, address, telephone number, driver’s identification number, social security number, medical and disability information, and photograph.⁵⁸

To ensure substantial compliance with this general prohibition, the DPPA imposes both criminal and civil penalties on individuals who impermissibly obtain drivers’ personal information. Under certain circumstances, DMVs and their employees may also be subject to penalties if they release information in violation of the Act.⁵⁹ The DPPA imposes a criminal fine upon any person, including a DMV worker, who knowingly discloses or obtains personal information from a motor vehicle record.⁶⁰ The DPPA also fines “[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance . . . not more than \$5,000 a day for each day of substantial noncompliance.”⁶¹ Section 2724 of the DPPA grants a private cause of action against any individual who knowingly obtains, uses, or discloses a driver’s personal information for purposes not permitted by section 2721(b).⁶² Section 2721(b) of the DPPA sets forth mandatory exceptions that require state DMVs to disclose personal information for use in connection with matters of motor

57. 18 U.S.C. § 2721(a) (1994); *see also* Odom & Feder, *supra* note 8, at 77-78 (calling this prohibition the Act’s “centerpiece”).

58. *See* 18 U.S.C. § 2725(3). This definition, however, does not include the driver’s zip code, accident record, driving violations, or whether the driver’s license has been revoked or suspended. *See id.*; *see also* Karras, *supra* note 9, at 132 (discussing which pieces of information about an individual are encompassed by the statutory term “personal information”).

59. *See* 18 U.S.C. §§ 2723, 2724; *see also* *Reno v. Condon*, 120 S. Ct. 666, 670, 672 (2000) (stating that the DPPA imposes fines and penalties on DMVs and DMV employees that “hang over the States as a potential punishment should they fail to comply with the Act”); *Pryor v. Reno*, 171 F.3d 1281, 1283 (11th Cir. 1999) (noting the substantial penalties the DPPA imposes on DMVs and DMV workers), *vacated*, 120 S. Ct. 929 (2000); *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998) (discussing the fact that the DMVs must comply with the DPPA or face substantial penalties), *cert. denied*, 120 S. Ct. 931 (2000). *See generally* Odom & Feder, *supra* note 8, at 87-88 (describing the potential penalties and remedies that the DPPA provides).

60. *See* 18 U.S.C. § 2723(a); *supra* note 59.

61. 18 U.S.C. § 2723(b); *see supra* note 59.

62. *See* 18 U.S.C. § 2724(a). Because the DPPA allows drivers to bring suit against individuals but not against states, the Act does not raise potential Eleventh Amendment concerns. *See Pryor v. Reno*, 998 F. Supp. 1317, 1331-33 (M.D. Ala. 1998), *rev’d*, 171 F.3d 1281 (11th Cir. 1999); Karras, *supra* note 9, at 140-42; *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (describing state immunity under the Eleventh Amendment). An in-depth discussion of the Eleventh Amendment is beyond the scope of this Comment.

vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring [of cars and car dealers] . . . to carry out the purposes of . . . the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act . . . [and] the Clean Air Act.⁶³

The DPPA also provides discretionary exemptions that permit DMVs to disclose drivers' personal information under certain circumstances.⁶⁴ For example, these exceptions permit disclosure for use by the courts and law enforcement agencies;⁶⁵ in connection with car and driver safety;⁶⁶ by a business, though only if the information is used to verify the accuracy of incorrect information given by the individual, to prevent fraud by the individual, or to pursue legal remedies against the individual;⁶⁷ in connection with a legal proceeding in federal, state, or local courts;⁶⁸ in research and statistical reports only if the personal information "is not published, redisclosed, or used to contact individuals,"⁶⁹ in connection with insurance claim investigation, anti-fraud activities, rating, and underwriting;⁷⁰ "in providing notice to the owners of towed or impounded vehicles;"⁷¹ by a licensed private investigator or security service for a permissible purpose under the DPPA;⁷² and for use "by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49."⁷³ Although the DPPA also originally permitted states to disclose

63. 18 U.S.C. § 2721(b) (1994 & Supp. IV 1998) (citations omitted); *see also Reno*, 120 S. Ct. at 669 (recognizing that "[t]he DPPA's prohibition of nonconsensual disclosures [of personal information] is also subject to a number of statutory exceptions" enumerated in Section 2721(b)); *Condon v. Reno*, 155 F.3d. 453, 456 (4th Cir. 1998) (stating that section 2721(b) "specifies a list of exceptions when personal information contained in a State motor vehicle record may be obtained and used"), *rev'd*, 120 S. Ct. 666 (2000); *Odom & Feder*, *supra* note 8, at 78 (discussing the mandatory exceptions to the DPPA provided by section 2721(b), which require DMVs to disclose a driver's personal information under certain circumstances).

64. *See* 18 U.S.C. § 2721(b)(1)-(14) (1994 & Supp. III 1997); *see also Pryor*, 171 F.3d at 1283 (iterating some of the circumstances under which the DPPA permits DMVs to disclose a driver's personal information); *Travis*, 163 F.3d at 1002 (same); *Karras*, *supra* note 9, at 129-32 (same); *Odom & Feder*, *supra* note 8, at 83-86 (same).

65. *See* 18 U.S.C. § 2721(b)(1).

66. *See id.* § 2721(b)(2).

67. *See id.* § 2721(b)(3).

68. *See id.* § 2721(b)(4).

69. *See id.* § 2721(b)(5).

70. *See id.* § 2721(b)(6).

71. *See id.* § 2721(b)(7).

72. *See id.* § 2721(b)(8). Even if the DPPA was in effect prior to Schaeffer's death, Bardo could probably still have obtained her personal information from the DMV, however, because this permissible disclosure provision allows DMVs to provide information to private detective agencies. *See Odom & Feder*, *supra* note 8, at 89 ("The DPPA . . . allows States to provide personal information to private detective agencies, the very type of intermediary Bardo successfully employed to obtain Schaeffer's address.").

73. *See* 18 U.S.C. § 2721(b)(9).

a driver's information to anyone for any reason if they allowed drivers to prohibit such disclosure by opting out,⁷⁴ in 1999, Congress amended the DPPA to permit states to disclose drivers' personal information only if the DMVs affirmatively receive a driver's consent to do so through the use of an opt-in provision.⁷⁵ Under the amended DPPA, therefore, states can only disclose a drivers' personal information for any purpose if they receive an individual's affirmative consent to do so.⁷⁶

Courts and commentators criticized the DPPA for intruding into an area that the states have traditionally regulated.⁷⁷ Critics of the DPPA

74. See 18 U.S.C. § 2721(b)(11).

75. See Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350(c), reprinted in 1999 U.S.C.C.A.N. 986, 1025. When the Supreme Court granted certiorari in *Condon*, the DPPA contained the opt-out requirement which allowed DMVs to disclose drivers' personal information to anyone if they provided drivers an opportunity to prevent such disclosures by opting out. See 18 U.S.C. § 2721(b)(11); *Reno v. Condon*, 120 S. Ct. 666, 669 (2000); see also Karras, *supra* note 9, at 131 (stating that "[t]he 'opt-out' choice constitute[d] one final and crucial provision of section 2721" because it allowed states to disclose a driver's personal information to any person or entity if the states gave drivers written notice allowing them the opportunity to prevent such disclosure). Congress "changed this 'opt-out' alternative to an 'opt-in' requirement." *Reno*, 120 S. Ct. at 669. The amended DPPA "opt-in" provision requires states to "obtain a driver's affirmative consent to disclose the driver's personal information." *Id.*; see also Act of Oct. 9, 1999, § 350(c)-(e) (stating that the opt-in requirement requires states to get a driver's affirmative consent to sell and disseminate personal information for any reason).

These amendments made compliance with the DPPA a prerequisite for receiving federal funding for the state Departments of Transportation ("DOTs") but provided that the amendments would not go into effect in South Carolina, Wisconsin, or Oklahoma until the decision in *Reno*. See Act of Oct. 9, 1999, § 350(a)-(b), (f), (g), reprinted in 1999 U.S.C.C.A.N. 986, 1025-26. This exercise of Congress's Spending Clause powers apparently responded to language in *New York* and O'Connor's concurring opinion in *Printz*, which suggested that the Supreme Court would uphold the legislation invalidated in those cases if compliance were conditioned on the receipt of federal funds. See *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (noting that Congress could have achieved the goals of the invalidated legislation by conditioning the receipt of federal funds on compliance with its provisions); *New York v. United States*, 505 U.S. 144, 167 (1992) (noting that Congress could have validly enacted the challenged legislation under the Spending Clause); see also *Kansas v. United States*, 24 F. Supp. 2d 1192, 1200 (D. Kan. 1998) ("[T]he Supreme Court in *New York* and *Printz* held that the statutes at issue in those cases were unconstitutional even though it specifically recognized that both statutes could have been lawfully passed pursuant to Congress's Spending Clause power."). This apparent inconsistency between Congress's authority under the Spending and Commerce Clauses is justified because legislation passed pursuant to the Commerce Clause does not always provide states a true choice as to whether or not to administer a federal program. See *Kansas*, 24 F. Supp. 2d at 1199-1200; *infra* notes 317-25 and accompanying text.

76. See *supra* note 75.

77. See *Pryor v. Reno*, 171 F.3d 1281, 1288 (11th Cir. 1999) (stating that the operation of DMVs is a sovereign activity in which states have traditionally engaged), *vacated*, 120 S. Ct. 929 (2000); see also Odom & Feder, *supra* note 8, at 100-01 (noting that states have traditionally operated DMVs and regulated the disclosure of information contained in motor vehicle records through state legislation). The

have emphasized that the statute forced DMVs to change the way they currently sold and disseminated drivers' personal information.⁷⁸ In addition, courts reviewing the constitutionality of the DPPA have noted that compliance is difficult because of the Act's prolixity and complexity.⁷⁹ The myriad of mandatory and discretionary exceptions to the DPPA has led commentators to note that "[t]he breadth of the list of enumerated users of the driver information, and the absence of controls over their conduct, makes the restriction on the access and use of the information ineffective."⁸⁰ Critics have also alleged that the DPPA forces the states to administer a federal regulatory program.

Since the invention of the car, states have been the only entities that have operated DMVs, issued driver licenses, registered vehicles, and collected and disseminated the information pertaining to those transactions.⁸¹ The states have traditionally determined the scope and conditions of disclosure of personal information contained in motor vehicle records through state legislation.⁸² For example, South Carolina provided that an individual could obtain a driver's personal information only if the DMV provided drivers the opportunity to opt-

Eleventh Circuit's statement in *Pryor* is similar to the "traditional governmental functions" test enunciated in the now-overruled decision of *National League of Cities v. Usery*, 426 U.S. 833, 849-52 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *See also infra* notes 121-39 and accompanying text (discussing in greater detail the Court's rejection of the traditional governmental functions test enunciated in *Usery* as unworkable in practice and contrary to the very principles of federalism upon which the case purportedly rested). *But see* *Travis v. Reno*, 163 F.3d 1000, 1008 (7th Cir. 1998) (upholding the DPPA, but suggesting that the principles of federalism enunciated in *Usery* are truer to the Constitution than the principles enunciated in *Garcia*), *cert. denied*, 120 S. Ct. 931 (2000).

78. *See* *Odom & Feder*, *supra* note 8, at 100-01 (noting that states have traditionally operated DMVs and regulated the disclosure of information contained in motor vehicle records through state legislation).

79. *See* *Condon v. Reno*, 155 F.3d 453, 457 (4th Cir. 1998) (stating that "[t]he undisputed evidence submitted establishes that implementation of the DPPA would impose substantial costs and effort on the part of the Department [of Motor Vehicles] in order for it to achieve compliance") (quoting *Condon v. Reno*, 972 F. Supp. 977, 981 (D.S.C. 1997), *rev'd*, 120 S. Ct. 666 (2000); *see also* *Odom & Feder*, *supra* note 8, at 113 ("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.")).

80. *Bill Loving*, *DMV Secrecy: Stalking and Suppression of Speech Rights*, 4 *Comm. L. Conspectus* 203, 212 (1996); *see also* *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) (stating that in light of all of its exceptions, the DPPA is an ineffective anti-stalking measure because the suggestion that it will stop stalkers is "misleading at best, and fraudulent at worst").

81. *See* *Odom & Feder*, *supra* note 8, at 98 ("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.").

82. *See id.* at 98-99 (noting that "a vast majority of States have long recognized the public good that flows from open records and open government").

out of the State's disclosure scheme.⁸³ The South Carolina statute also required individuals who requested drivers' personal information to give the state their name and address and to stipulate that the information would not be used for phone solicitation.⁸⁴ Because the DPPA is a constitutional federal law, state laws that directly conflict with the Act, such as the South Carolina statute which fails to satisfy the minimal federal standards established by the DPPA, are invalid.⁸⁵

The DPPA's many complex mandatory and discretionary disclosure provisions⁸⁶ make compliance with its provisions difficult. To comply with the DPPA, numerous state DMVs have had to make many costly changes. These changes include conducting extensive training for employees in the circumstances under which they can release drivers' personal information, and changing the procedures that DMVs use when handling requests for driver information.⁸⁷ The DPPA, therefore, forces states to change the way they operate and train employees as a prerequisite to continuing to sell and disseminate drivers' personal information.⁸⁸

Some states challenged the constitutionality of the DPPA on the grounds that it forces state entities to administer federal regulations in contravention of the Tenth Amendment. These states argued that the DPPA forced DMVs to administer a federal regulatory program in violation of the principles of federalism enunciated in *New York and Printz*, because the DPPA forces non-compliant DMVs to adopt new rules, establish new mechanisms for determining when a mandatory or discretionary disclosure situation exists, take certain actions in response to requests for the information, and train workers to conform with the complex regulations, or pay penalties for failing to "administer" the DPPA.⁸⁹ In response to the DPPA's enactment, some states filed suits challenging its constitutionality.⁹⁰ In order to

83. See S.C. Code Ann. § 56-3-540 (Law. Co-op. Supp. 1999); see also *Reno v. Condon*, 120 S. Ct. 666, 670 (2000) (discussing the provisions of the South Carolina statute, which regulated the disclosure of drivers' personal information); *Condon v. Reno*, 155 F.3d 453, 457 (4th Cir. 1998) (stating that the South Carolina statute regulating the disclosure and dissemination of DMV records varies significantly from the DPPA), *rev'd*, 120 S. Ct. 666 (2000).

84. See S.C. Code Ann. § 56-3-510(1).

85. The South Carolina statute regulating the dissemination of personal information, although in direct conflict with federal legislation, is unconstitutional only because the DPPA is a valid federal law. See U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 27-28 (1824) (holding that state laws that conflict with valid federal laws are unconstitutional because they violate the Supremacy Clause).

86. See 18 U.S.C. §§ 2721-2725 (1994 & Supp. III 1997).

87. See *Pryor v. Reno*, 998 F. Supp. 1317, 1323-24 (M.D. Ala. 1998).

88. See *id.* at 1324.

89. See, e.g., *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998) ("Wisconsin seeks to persuade us that the [DPPA] has the same vice as the statutes condemned in *Printz* and *New York*."), *cert. denied*, 120 S. Ct. 931 (2000).

90. See *Travis v. Reno*, 12 F. Supp. 2d 921, 922 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998); *Pryor*, 998 F. Supp. at 1322; *Oklahoma ex rel. Oklahoma Dep't*

analyze the viability of these constitutional challenges, the next part presents the doctrinal background governing the Tenth Amendment's limitations on Congress's ability to regulate the states as states under the Commerce Clause.

II. THE RESTRICTIONS THE TENTH AMENDMENT IMPOSES ON CONGRESS'S COMMERCE CLAUSE POWERS

This part analyzes the scope of Congress's authority to regulate activity engaged in by the states as states. After briefly describing Congress's Commerce Clause powers, it discusses the Tenth Amendment limitations on those powers by revisiting recent Supreme Court decisions in this area.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."⁹¹ In *United States v. Lopez*,⁹² the Supreme Court held that Congress, pursuant to its Commerce Clause powers, can regulate objects in interstate Commerce,⁹³ the channels of interstate Commerce,⁹⁴ and

of *Pub. Safety v. United States*, 994 F. Supp. 1358, 1360 (W.D. Okla. 1998), *rev'd*, 161 F.3d 1266 (10th Cir. 1998); *Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998).

91. U.S. Const. art. I, § 8, cl. 3.; *see also Nevada v. Skinner*, 884 F.2d 445, 450 (9th Cir. 1989) ("The Commerce Clause forms the broadest base of Congressional power. The power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.'" (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (footnote omitted)); Frederick H. Cooke, *The Commerce Clause of the Federal Constitution* 66 (1908) (noting that Congress's Commerce Clause powers can be utilized to regulate an "infinite variety" of subjects).

92. 514 U.S. 549 (1995). Courts have noted that "*Lopez* is a landmark, signaling the revival of federalism as a constitutional principle, and it must be acknowledged as a watershed decision in the history of the Commerce Clause." *United States v. Bailey*, 115 F.3d 1222, 1233 (5th Cir. 1997) (Smith, J., dissenting); *see also Cooke, supra* note 91, at 66 (stating that Congress's Commerce Clause power is "plenary, complete in itself, and may be exerted by Congress to its utmost extent").

93. For example, in *Champion v. Ames*, 188 U.S. 321 (1903), the Court held that Congress had the authority under the Commerce Clause to prohibit the sale of lottery tickets because they were articles in interstate commerce. The Court in *Ames* noted that "in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in [the courts'] opinion, such regulations may not be the best or most effective that could be employed." *Id.* at 353; *see also Cooke, supra* note 91, at 66 (stating that the Constitution granted Congress a large amount of leeway in determining what type of legislation to utilize in order to regulate interstate commerce). Similarly, in *Acorn v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), the Fifth Circuit held that Congress had the power to regulate drinking water coolers in order to prevent lead contamination because water coolers were articles in interstate commerce. *See id.* at 1394. The court in *Acorn*, however, went on to hold that the legislation at issue violated the Tenth Amendment because it forced the states to regulate in accordance with a Congressional mandate. *See id.*

94. Courts have noted that the Commerce Clause unquestionably grants Congress the power to regulate the navigable waters of the United States. *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608 (3d Cir. 1974); *see also The Daniel Ball*, 77 U.S.

activities that substantially affect interstate commerce.⁹⁵ Congress's Commerce Clause powers are plenary, and therefore, the Supreme Court does not consider Congress's motive or purpose for enacting particular regulations when determining the constitutionality of those laws.⁹⁶ For example, in *Katzenbach v. McClung*,⁹⁷ the Court held that Congress, pursuant to its Commerce Clause powers, could regulate discrimination against blacks in a small local restaurant, even though Congress's motive in enacting the legislation was to effectuate social change in the South.⁹⁸

Although Congress's power to regulate pursuant to the Commerce Clause is plenary, the exercise of this power is limited by the constitutional principles of federalism embodied in the Tenth Amendment.⁹⁹ The Tenth Amendment provides that "[t]he powers

(10 Wall.) 557, 564-65 (1870) (stating that Congress has the authority under the Commerce Clause to regulate the navigable waters of the United States that are used in interstate commerce); *United States v. Underwood*, 344 F. Supp. 486, 489-93 (M.D. Fla. 1972) (same).

95. See *Lopez*, 514 U.S. at 558-59. For example, in *United States v. Darby*, 312 U.S. 100 (1941), the Court held that Congress had the power under the Commerce Clause to regulate local working conditions because that intrastate activity had a substantial affect on interstate commerce. See *id.* at 109-11, 115, 119-20; see also *Wickard v. Filburn*, 317 U.S. 111, 118-20, 125, 128-29 (1942) (holding that Congress can regulate, pursuant to its Commerce Clause powers, any activity no matter how local, if the cumulative effects of the intrastate activity substantially affect interstate commerce). But see *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting) (arguing that the Court's Commerce Clause jurisprudence indicates that Congress has the authority to regulate intrastate activities that "significantly affect" interstate commerce). Similarly, in *Perez v. United States*, 402 U.S. 146 (1971), the Court held that Congress validly enacted criminal legislation prohibiting loansharking under its Commerce Clause powers, even though government prosecutors did not have to prove that a particular loanshark's activity affected interstate commerce as an element of the crime. See *id.* at 147 n.1, 154-56. The Court upheld this legislation because it considered loansharking to be in a "class of activities" that substantially affected interstate commerce. See *id.* at 154-56. The *Perez* Court stated that "[e]xtortionate credit transactions, though purely intrastate, may . . . affect interstate commerce" and that "there is a tie-in between local loan sharks and interstate crime." *Id.*; see also *Redish*, *supra* note 12, at 58 (noting that loansharking had a substantial connection to interstate commerce because it was the second largest source of revenue for organized crime). The Supreme Court in *Lopez* noted the importance of Congressional findings, investigations, and hearings in *Perez* that proved that loansharking substantially affected interstate commerce. See *Lopez*, 514 U.S. at 562-63 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question [(possessing a gun near a school)] substantially affected interstate commerce . . . they are lacking here.").

96. See *Darby*, 312 U.S. at 115.

97. 379 U.S. 294 (1964).

98. See *id.* at 296, 303-05; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243, 257, 261-62 (1964) (upholding Congressional Commerce Clause legislation prohibiting motels from discriminating against blacks even though Congress's motive in enacting the legislation was the elimination of segregation and racial discrimination, not fixing a commercial problem).

99. See *Reno v. Condon*, 120 S. Ct. 666, 671 (2000); *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 156-57 (1992); see also *Acorn v. Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996) (holding that the principles

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.”¹⁰⁰ Thus, the Tenth Amendment prohibits Congress from infringing upon areas reserved to the states by the Constitution.¹⁰¹ The Constitution establishes a federal system of dual sovereignty by granting the federal government only certain enumerated powers while reserving to the states all powers that the states possessed at the time of ratification that had not been delegated to the Federal government, or expressly prohibited by the Constitution.¹⁰² The Framers, by “split[ting] the atom of sovereignty,” created two separate political entities, one federal and one state, each responsive to its citizens’ needs and “each protected from incursion by the other.”¹⁰³

Thus, the federal system provided by the Constitution establishes a balance of power between the state and federal governments by allocating only certain limited powers to the federal government.¹⁰⁴

of federalism enunciated in *New York* prohibit Congress from exercising its Commerce Clause powers to force states to administer federal regulatory programs); *City of New York v. United States*, 971 F. Supp. 789, 794 (S.D.N.Y. 1997) (recognizing that “[i]t is now well settled that the Tenth Amendment and the principles of federalism inherent in the structure of the Constitution limit the ways in which Congress can require action by the states in pursuit of federal policies”); Melissa Ann Jones, Note, *Legislating Gun Control in Light of Printz v. United States*, 32 U.C. Davis L. Rev. 455, 464 (1999) (recognizing that the Tenth Amendment imposes substantive limits on Congress’s exercise of its Commerce Clause powers).

100. U.S. Const. amend. X.

101. See *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999) (“Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

102. See U.S. Const. arts. I-III; see also U.S. Const. Amend. X (reaffirming the notion embodied throughout the Constitution that the federal government possesses only the enumerated powers); *Alden*, 119 S. Ct. at 2247 (noting that the Constitution established a limited federal government by granting only certain enumerated powers); *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring) (noting that the Constitution established a federal government with enumerated, and hence limited, powers); *Lopez*, 514 U.S. at 575-80 (Kennedy, J., concurring) (recognizing that the Framers and Ratifiers granted only certain enumerated powers to the federal government); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (same).

103. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (noting that the “Constitution created a legal system . . . establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it”). The framers further divided the powers granted to the federal government among the executive, legislative, and judicial branches. See *Alden*, 119 S. Ct. at 2247 (“The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design.”). This separation of powers, and the concomitant system of checks and balances, further ensures that the federal government will not become tyrannous. See Redish, *supra* note 12, at 4.

104. See *Federal Energy Regulatory Comm’n v. Mississippi* (“FERC”), 456 U.S. 742, 790 (1982) (O’Connor, J., concurring in part and dissenting in part) (stating that the Framers and Ratifiers attempted to curb the “evils” of central authority by

This system was not established for the benefit of the states; instead “the Constitution divides authority between federal and state governments for the protection [and benefit of the American people].”¹⁰⁵ Thus, the principles of federalism inherent in the federal system prohibit Congress from exercising its Commerce Clause powers in a manner that intrudes upon the fundamental aspects of state sovereignty because this usurpation would upset the balance of power established by the Constitution and, therefore, potentially subject the people to a tyrannous federal government.¹⁰⁶

In cases implicating the Tenth Amendment, the Court analyzes the constitutionality of Congressional legislation by focusing either on whether an enumerated power, such as the Commerce Clause, grants

allocating “power between [the] state[s] and national authorities, and divid[ing] the national power among [the] three branches of [the federal] government”). Justice O’Connor stated in *FERC* that “[u]nless we zealously protect these distinctions[] [between state and federal powers] we risk upsetting the balance of power that buttresses our basic liberties.” *Id.*

105. *New York v. United States*, 505 U.S. 144, 181 (1992); see also *Gregory*, 501 U.S. at 458-59 (stating that the federal system benefits the people in a myriad of ways, including: ensuring a government that is more sensitive to the needs of a heterogeneous society; increasing the opportunities for democratic involvement in the political process; allowing more innovation and experimentation in government; and, most importantly, establishing a “double security” system that places checks on the abuses of government); Bednar & Eskridge, *supra* note 18, at 1467 (emphasizing that a federal system can satisfy the economic needs and political preferences of a heterogeneous society better than a centralized system); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 *Vand. L. Rev.* 1251, 1253 (1994) (recognizing the crucial role that federalism plays in empowering geographically based minorities in the political system by protecting political minorities from the tyranny of the majority); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *Harv. L. Rev.* 2180, 2217-27 (1998) (stating that federalism achieves important values, such as creating alternative locations of power, and criticizing Professors Rubin and Feeley for not recognizing the important interests served by these values). *But see* Rubin & Feeley, *supra* note 18, at 909, 917-20, 923-25 (stating that “[t]he Supreme Court should never invoke [the principles of] federalism as a reason for invalidating” Congressional legislation because federalism does not ensure that government will be more sensitive to the needs of a heterogeneous society); see also Frank B. Cross, Essay, *Realism About Federalism*, 74 *N.Y.U. L. Rev.* 1304, 1304-05 (1999) (arguing that “federalism does not . . . have authentic legal significance as a principled constraint on the power of the national government,” and that giving “significance to federalism will [lead to] . . . unprincipled, arbitrary judicial decisionmaking [sic] that can disrupt the functioning and accountability of Congress”); Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 *Ga. St. U. L. Rev.* 1009, 1014 (1997) (noting that there is serious question as to whether federalism “is a valuable, indeed essential mechanism for achieving” political goals, such as increased citizen participation in the democratic process, innovation and experimentation, government responsiveness, and the promise of liberty). See generally Erwin Chemerinsky, *The Values of Federalism*, 47 *Fla. L. Rev.* 499, 524, 526-39 (1995) (noting how the values attributed to federalism by the Supreme Court are “seldom more than just slogans,” but stating that federalism does promote important values); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 *Vand. L. Rev.* 1229, 1230-46 (1994) (discussing the four major views of federalism and noting why they are inadequate).

106. See *Gregory*, 501 U.S. at 458-64.

Congress the power to pass the law, or on whether the legislation “invades the province of state sovereignty reserved by the Tenth Amendment.”¹⁰⁷ As the *New York* Court observed, each inquiry is a “mirror image” of the other because if the Constitution grants Congress a particular power, then the Tenth Amendment expressly provides that the power is not reserved to the states; and “if a power is an attribute of state sovereignty reserved by the Tenth Amendment,”¹⁰⁸ then the Constitution has not granted Congress that power. It has not always been clear, however, what types of federal legislation violate the Tenth Amendment.¹⁰⁹ In order to analyze how that determination is made, the following sections present the recent Supreme Court decisions in this area.

107. *New York*, 505 U.S. at 155.

108. *Id.* at 156.

109. In the past, the Supreme Court’s interpretation of the Tenth Amendment’s restrictions on Congress’s exercise of its Commerce Clause powers has not been a model of consistency, to say the very least. *See supra* note 39. For example, during certain periods in history, Congress did not have the constitutional authority under the Commerce Clause to regulate mining, manufacturing, agriculture, or the minimum wage and overtime benefits of non-professional state workers because the Supreme Court held that constitutional principles of federalism prohibited federal regulation in those areas. *See National League of Cities v. Usery*, 426 U.S. 833, 848-52 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985); *Carter v. Carter Coal Co.*, 298 U.S. 238, 289-97 (1936); *United States v. Butler*, 297 U.S. 1, 63-64, 77-78 (1936); *Hammer v. Dagenhart* 247 U.S. 251, 275-77 (1918), *overruled by United States v. Darby*, 312 U.S. 100, 116-17 (1941). At present, however, Tenth Amendment restrictions on Congress’s Commerce Clause power have significantly decreased. For example, since 1937, the Supreme Court has held that the Commerce Clause enables Congress to regulate mining, manufacturing, and agriculture, and since 1985, Congress has had the authority to regulate the minimum wage and overtime benefits of non-professional state workers. *See Garcia*, 469 U.S. at 546-50, 555-56; *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *United States v. Darby*, 312 U.S. 100, 120-24 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937); *see also Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 153-54 (1942) (noting that the Commerce Clause grants Congress the power to regulate intrastate activities such as manufacturing); *cf. Steward Mach. Co. v. Davis*, 301 U.S. 548, 574, 585 (1937) (holding that an excise tax imposed on employers by the Social Security Act did not coerce the state in violation of “the Tenth Amendment or . . . [the] restrictions implicit in our federal form of government”). *Steward Machine* bucked a trend in a line of cases, including *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-38, 41 (1922), in which the Supreme Court invalidated federal taxes on the ground that these “taxes” were really an attempt by Congress to regulate an area reserved to the states by the Tenth Amendment. *See Steward Machine*, 301 U.S. at 590-92. Although the Tenth Amendment limitations on Congress’s regulatory power have decreased substantially since the Great Depression, the Tenth Amendment still prohibits Congress from enacting certain types of legislation, such as laws that conscript state executive officers to implement federal regulations or laws that commandeer the state legislatures by coercing the state into enacting legislation that the federal government deems appropriate. *See Printz v. United States*, 521 U.S. 898, 926-34 (1997); *New York*, 505 U.S. at 174-77.

A. National League of Cities v. Usery

In *National League of Cities v. Usery*,¹¹⁰ the Supreme Court struck down the 1974 amendments to the Fair Labor Standards Act ("FLSA"), which extended minimum wage and overtime requirements to all non-professional state workers, because they violated the Tenth Amendment by impairing the states' ability to function effectively in the federal system.¹¹¹ In *Usery*, the Court noted that although Congress's regulatory power under the Commerce Clause is plenary,¹¹² the federal system of government limits Congress's authority to regulate the states pursuant to its Commerce Clause powers.¹¹³ The Court derived this limitation from the structure of the Constitution, the principles of federalism, and the Tenth Amendment itself, which "expressly declares the constitutional policy that Congress may not exercise [its] power in a fashion that impairs the States' . . . ability to function effectively in a federal system."¹¹⁴ The *Usery* Court also expressly overruled *Maryland v. Wirtz*,¹¹⁵ a case that held that the extension of the FLSA to state hospital and school workers was a constitutional exercise of Congress's Commerce Clause powers that did not violate the Tenth Amendment.¹¹⁶ Supplanting the *Wirtz* decision, the Court ruled that the 1974 amendments to the FLSA exceeded Congress's authority because the challenged amendments regulated the states in an area of traditional governmental function, and therefore violated the Tenth Amendment.¹¹⁷

The *Usery* Court established the "traditional governmental functions" test to help it determine whether Congressional legislation enacted pursuant to the Commerce Clause violates the substantive

110. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

111. *See id.* at 835-39; *see also* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1564-65 (1994) (noting that the *Usery* Court based its decision on the outdated territorial model of federalism, which insulates certain areas from federal regulation).

112. *See supra* notes 91-98 and accompanying text.

113. *See Usery*, 426 U.S. at 842.

114. *Id.* at 842-44 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

115. 392 U.S. 183 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976).

116. *See id.* at 186-87, 193, 196-99. The *Wirtz* Court used a balancing test that weighed the federal and state interests at stake in determining whether legislation that targets the states as states violates the Tenth Amendment. *See id.* at 198-99.

117. *See Usery*, 426 U.S. at 852 (holding that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress"); *see also* Blumstein, *supra* note 105, at 1283 (noting that the *Usery* Court held that the Tenth Amendment enforces substantive limits on federal power even in "areas in which a source of federal constitutional power existed").

limits imposed by the Tenth Amendment.¹¹⁸ Although the *Usery* Court attempted to define and protect specific areas of state activity that must be immune from federal intrusion to protect the sovereignty of the states from federal overreaching, this test ultimately proved unworkable.¹¹⁹

B. *Garcia v. San Antonio Metropolitan Transit Authority*

In 1974, when the FLSA amendments were enacted, the San Antonio Metropolitan Transit Authority (“SAMTA”) complied with the amendment’s minimum wage and overtime requirements. But when the *Usery* Court held that the FLSA could not be applied to the states in areas of traditional governmental function, SAMTA ceased to comply.¹²⁰ Subsequently, the Wage and Hour Administration of the Department of Labor issued an opinion stating that despite *Usery*’s holding, SAMTA was not immune from application of the FLSA minimum wage and overtime requirements because operating a mass transit system was not a traditional governmental function. SAMTA brought an action seeking a declaratory judgment that its operations were entitled to Tenth Amendment immunity from application of FLSA’s overtime requirements because under *Usery*, the operation of a mass transportation system was a traditional governmental function and therefore immune from federal regulation.

The Supreme Court thereby gained the opportunity in *Garcia* to reconsider the constitutional soundness of its determination in *Usery*.¹²¹ In *Garcia*, the Court noted that the FLSA was a law of

118. See *Usery*, 426 U.S. at 851-52. In *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 287-88 (1981), the Court held that Congressional Commerce Clause legislation violates the principles of federalism enunciated in *Usery* if the legislation: (1) regulates the states as states; (2) targets matters that are clearly attributes of state sovereignty; and (3) impairs the states’ “ability ‘to structure integral operations in areas of traditional governmental functions.’” See also Mishkin, *supra* note 39, at 151 (stating that the *Hodel* Court clarified the vague principles of federalism discussed in *Usery* by creating a three-part test to determine whether Congressional Commerce Clause legislation violates the Tenth Amendment).

119. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539-43 (1985) (holding that the “traditional governmental functions” test was unworkable in practice and contrary to the very principles of federalism upon which it purportedly rested); *infra* notes 124-31 and accompanying text; see also Merritt, *supra* note 111, at 1566 (noting that “[n]either the language of the Tenth Amendment nor political theory . . . [has] succeeded in defining a unique circle of ‘traditional governmental functions’ reserved to the states”); Tushnet, *Why the Court*, *supra* note 39, at 1626-27 (discussing the Court’s decade-long struggle to apply the principles of federalism enunciated in *Usery* before finally overruling the case in *Garcia*).

120. See *Garcia*, 469 U.S. at 532-34.

121. Compare *id.* at 550-55 (holding that the states’ role in the national political process, not judicially enforced spheres of unregulable state activity, is the principal means to protect the role of the states in the federal system), with *Usery*, 426 U.S. at 849-52 (establishing the “traditional governmental functions” test to determine which state activities should be insulated from federal regulation in order to ensure the role of the states in the federal system). The “traditional governmental functions” test was

general applicability because it applied to private entities as well as the states, and therefore, the states merely had to comply with the same regulations as did private entities.¹²² The Court interpreted *Usery's* inquiry into whether a particular governmental function was "traditional" in nature as merely a "means of determining whether the federal statute at issue unduly handicaps 'basic state prerogatives' . . . [without] offer[ing] an explanation of what makes one state function a 'basic prerogative' and another function not basic."¹²³ The *Garcia* Court, however, objected to the very nature of an inquiry based "on a judicial appraisal of whether a particular governmental function is . . . 'traditional,'" and consequently overruled *Usery* because the Court considered such a test unworkable and contrary to the principles of federalism upon which it purportedly rested.¹²⁴

The *Garcia* Court announced two major objections to the "traditional governmental functions" test. First, the Court found the test unworkable because it required the divination of which state functions are traditional. The Court deemed this a difficult and troublesome task in which the constitutional distinctions between regulable and unregulable state activity are "elusive at best."¹²⁵ In support of this conclusion, the Court cited many lower court cases that struggled with, and inconsistently applied, the holding in *Usery* as evidence that the "traditional governmental functions" test was unworkable.¹²⁶ For example, the lower courts determined that the regulation of traffic on public roads¹²⁷ and the regulation of air transportation¹²⁸ were not traditional governmental functions, but determined that ambulance services¹²⁹ and licensing automobile drivers¹³⁰ were traditional governmental functions and thus immune from federal regulation under the Commerce Clause.¹³¹ The *Garcia* Court also found the "traditional governmental functions" test to be

intended to aid the court in determining violations of the Tenth Amendment by identifying certain fundamental areas of state sovereignty that could not be regulated without impairing the states' ability to function effectively in a federal system. See *supra* notes 118-19 and accompanying text. The *Garcia* Court thus had to determine whether the Tenth Amendment principles of federalism prohibited the federal government from regulating state commercial activity based solely on whether the law regulated the states in an area of "traditional governmental function." See *Garcia*, 469 U.S. at 536-37.

122. See *Garcia*, 469 U.S. at 537.

123. *Id.* at 540.

124. *Id.* at 546-47.

125. *Id.* at 539.

126. See *id.* at 538-39.

127. See *Friends of the Earth v. Carey*, 552 F.2d 25, 38-39 (2d Cir. 1977).

128. See *Hughes Air Corp. v. Public Utils. Comm'n of Cal.*, 644 F.2d 1334, 1340 (9th Cir. 1981).

129. See *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982), *aff'd*, 705 F.2d 1005, 1017 (8th Cir. 1983).

130. See *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978).

131. See *Garcia*, 469 U.S. at 538.

contrary to the principles of federalism because the test required federal courts to determine what state activities are unregulable, thereby allowing the judiciary to encourage state activity it approves of and discourage activity it dislikes.¹³² The Court noted that this judicial power might discourage states from experimenting with new, unorthodox programs in which state citizens choose to engage, and consequently hinders the states' ability to act as the laboratories for social and economic experimentation envisioned by the Constitution.¹³³

The *Garcia* Court subsequently determined what constitutional restrictions the Tenth Amendment imposes on Congress's ability to regulate activity in which the states as states engage.¹³⁴ The *Garcia* Court observed that although one can easily recognize that the principles of federalism embodied in the Tenth Amendment impose restrictions on Congress's exercise of its Commerce Clause power, it is extremely difficult to define the nature and content of those restrictions.¹³⁵ Consequently, the Court concluded that the role of the states in the federal system is guaranteed by the structure of the federal government, and not by judicial enforcement of substantive Tenth Amendment restrictions on Congress's enumerated powers.¹³⁶ The Court explained that the structure of the federal government, as set forth in the Constitution, guarantees that state interests will be protected from Congressional overreaching because the states play a crucial role in the national political process. This role is pivotal because the individuals elected to Congress come from the states, and each state receives equal representation in the Senate as well as proportional representation in the House of Representatives.¹³⁷ Thus, the *Garcia* Court held that the constitutional limitations on Congress's

132. *See id.* at 543-47. Under this view, the unelected judiciary should not make personal judgments about the validity of legislation passed by the democratically elected Congress based on their own opinion of whether the law was a good idea. *See id.*; Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 Harv. L. Rev. 29, 82-86 (1999) [hereinafter Tushnet, *The New Constitutional Order*]. One view of the judiciary's role holds that it exists solely to determine whether a law violates the Constitution, not to make a political judgment about the soundness of decisions made by the people through their elected representatives. *See id.* at 82-86.

133. *See Garcia*, 469 U.S. at 543-47.

134. *See id.* at 547-55.

135. *See id.* at 547.

136. *See id.* at 550.

137. *See id.* at 551; *see also* United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (stating that a reasonable interpretation of the intent of the Framers and Ratifiers is that they entrusted the protection of the federal system to the political process, not the judiciary); 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, 558 (1954) (stating that the political process in general, and "the role of the states in the composition and selection of the central government" in particular, is the vehicle through which the states are protected from federal overreaching).

exercise of its Commerce Clause powers are principally procedural, and therefore “[a]ny 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.”¹³⁸ Under this framework, the Court held that the FLSA minimum wage and overtime requirements, as applied to SAMTA, were constitutional because they did not destroy the state’s sovereignty, violate any constitutional provision, including the Tenth Amendment, or cause any malfunction in the political process.¹³⁹

C. South Carolina v. Baker

Although the legislation at issue in *South Carolina v. Baker*,¹⁴⁰ section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act (“TEFRA”), was not passed pursuant to Congress’s Commerce Clause powers, in its opinion the Court decided important issues regarding the type of restrictions the Tenth Amendment imposes on congressional regulation of the states as states.¹⁴¹ Section 310(b)(1) of TEFRA required state, federal, and private corporate issuers of long-term bonds to issue the bonds in registered form. Failure to comply meant that interest earned on the bonds would not be exempt from federal income tax.¹⁴² The Court treated TEFRA as a law of general applicability because it applied equally to the states and private entities.¹⁴³ Although TEFRA did not explicitly prohibit the states from issuing the non-tax-exempt bearer bonds, the Supreme Court, in its Tenth Amendment analysis, treated section 310 as if it did.¹⁴⁴

Challenging the constitutionality of TEFRA, South Carolina argued that the statute violated the principles of federalism enunciated in *Garcia* because an uninformed Congress chose an ineffective remedy, and therefore the political process failed.¹⁴⁵ The Court, however, characterized *Garcia* as holding “that the [Tenth Amendment] limits are structural, not substantive-*i.e.*, that States must find their protection from congressional regulation through the national political process.”¹⁴⁶ The *Baker* Court acknowledged that some “extraordinary defects” in the political process might trigger

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

139. *See id.* at 554-57.

140. 485 U.S. 505 (1988).

141. *See generally id.* at 526-27 (addressing important issues of federalism).

142. *See id.* at 507-08.

143. *See id.* at 510.

144. *See id.* at 511.

145. *See id.* at 512; *see also infra* note 312 and accompanying text (discussing the importance of the political process in shielding the state from excessive federal regulation that may impair the states from properly performing their role in the federal system).

146. *Baker*, 485 U.S. at 512.

substantive Tenth Amendment restrictions that would invalidate congressional regulations of state activity, but failed to explain what might constitute such a defect.¹⁴⁷ The Court declined to invalidate TEFRA on these grounds because “nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation.”¹⁴⁸ In essence, the Court held that the political process does not fail when the federal government passes legislation that the states feel is unwise. After finding that the national political process did not fail in this case, the *Baker* Court suggested that if a state could prove that it was politically alone and isolated, the Court would seriously consider the possibility that a failure in the political process had occurred.¹⁴⁹

After making the determination that section 310(b)(1) of TEFRA did not violate the principles of federalism set forth in *Garcia*, the Court addressed South Carolina’s alternative argument:¹⁵⁰ that section 310(b)(1) violates the Tenth Amendment because it commandeers the legislative and administrative process of the state by coercing the state to enact and administer a federal regulatory program.¹⁵¹ South Carolina argued that section 310(b)(1) did so because the states, to continue issuing tax-exempt bonds, would have to enact new laws to issue the bonds in registered form, and state officials would have to invest a great deal of time and effort to implement a registered bond system.¹⁵² The *Baker* Court, however, dismissed South Carolina’s argument without deciding whether such commandeering violated the Tenth Amendment, because the Court determined that TEFRA did not force the states to enact or administer a federal regulatory program.¹⁵³ The Court ruled that when the states make legislative and administrative changes in order to comply with a federal statute, the states are not forced to administer a federal regulatory program because such changes are “an inevitable consequence of regulating a state activity.”¹⁵⁴ Furthermore, the Court stated that even though state administrative and legislative

147. *See id.*

148. *Id.* at 513.

149. *See id.* at 512-13.

150. This Comment suggests that determining whether legislation that commandeers the states by forcing states to legislate and enforce laws to regulate third parties is not a separate inquiry from whether the principles of federalism as enunciated in *Garcia* are violated. *See infra* Part V. This Comment argues that federal legislation that commandeers the states to regulate third parties causes a defect in the national political process because forcing the states to engage in activities that only they can engage in (“uniquely sovereign activities”) diminishes the political accountability of both the federal and state governments and, therefore, impairs the political process. *See infra* notes 306-18 and accompanying text.

151. *See Baker*, 485 U.S. at 513.

152. *See id.* at 514.

153. *See id.* at 514-15.

154. *Id.* at 514.

action was necessary before South Carolina could continue engaging in the regulated activity in compliance with federal regulations, this type of “commandeering” is “a commonplace [result of regulation] that presents no constitutional defect.”¹⁵⁵ Finally, the Court noted that South Carolina’s theory of commandeering would render *Garcia* a nullity and restrict congressional regulation of state activities more severely than did *Usery* because most federal statutes regulating the states as states effectively force states to make such changes.¹⁵⁶

For these reasons, the Court held that section 310(b)(1) of TEFRA did not commandeer the state legislative or administrative process because it directly regulated state activity instead of “seek[ing] to control or influence the manner in which [s]tates regulate private parties.”¹⁵⁷ The *Baker* Court, therefore, reserved for later judicial determination the issue of whether the Tenth Amendment prohibits Congress from forcing the states to regulate third parties on behalf of the federal government.

D. New York v. United States

In *New York v. United States*,¹⁵⁸ the Supreme Court decided the question left unresolved by *Baker*: whether the principles of federalism embodied in the Tenth Amendment prohibited Congress from enacting legislation that forces state legislatures to enact or administer federal regulatory programs.¹⁵⁹ The *New York* Court considered whether provisions of the Low-Level Radioactive Waste Policy Act (“LRWP”), including the “take-title” provision,¹⁶⁰ were unconstitutional because they overstepped the boundaries of federal authority in violation of the Tenth Amendment.¹⁶¹ The Court began its opinion by noting that recent cases interpreting the Tenth Amendment, such as *Usery*, *Garcia*, and *Baker*, were distinguishable from *New York* because those cases involved laws of general

155. *Id.* at 515.

156. *See id.* at 515.

157. *Id.* at 514.

158. 505 U.S. 144 (1992).

159. *See id.* at 188.

160. The take-title provision required states to either subsidize waste producers by becoming owners of the waste, and therefore liable for resulting damages, or enact a federal regulatory program. *See id.* at 175-77. The Court also evaluated two other incentive provisions. The first set of incentives (1) authorized states with disposal sites to collect a surcharge on waste transported from other states; (2) allowed the Secretary of Energy to place a portion of those funds in an escrow account; and (3) then granted funds from this account to states that achieved certain federally mandated goals. *See id.* at 171-72. The second set of incentives authorized states with waste disposal sites to raise the costs of disposal to out-of-state customers and, eventually, prohibit out-of-state waste from being imported unless the waste-exporting states met certain federal deadlines. *See id.* at 173-74.

161. *See id.* at 149-54.

applicability.¹⁶² In contrast, the Court characterized the facts of *New York* as concerning the circumstances “under which Congress may use the States as implements of regulation.”¹⁶³ After making this determination, the Court stated that although the power to directly regulate waste disposal was within the ambit of Congress’s Commerce Clause authority, Congress did not have the power to force the states to regulate interstate commerce.¹⁶⁴

The Court held that Congress violates the Tenth Amendment when, pursuant to its Commerce Clause powers, it passes laws that “commandeer” the state legislature by forcing a state to enact or administer a federal regulatory program.¹⁶⁵ According to the Court, coercing states into enacting and administering federal regulatory programs diminishes the political accountability of both the federal and state governments.¹⁶⁶ A decrease in political accountability impedes the political process because it hinders the ability of citizens to elect officials who share their views.¹⁶⁷ Legislation that “commandeers” state legislatures masks the true origin of the regulation, and thus potentially shields the federal government from responsibility for unpopular decisions.¹⁶⁸ For example, if the New York State legislature voluntarily enacted the provisions at issue, citizens of New York who disagreed with that decision could vote the incumbent legislators out of office and elect officials who share their views.¹⁶⁹ Alternatively, when the federal government passes legislation that preempts state legislation, the citizens of New York can direct their anger, and possibly votes, at federal officials.¹⁷⁰ If, however, the federal government can indirectly regulate private entities by forcing the state legislatures to enact or administer regulatory programs, the citizens will not know whether state or federal officials devised the program and, therefore, political accountability is diminished.¹⁷¹

After explaining the political accountability rationale upon which its decision appears to rest, the Court considered whether the provisions of the LRWP commandeered the state legislature in

162. *See id.* at 160-61.

163. *Id.* at 161.

164. *See id.* at 188.

165. *See id.* at 188 (“Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

166. *See id.* at 168-69.

167. *See id.*

168. *See id.* The Court stated that political “[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate.” *Id.* at 169.

169. *See id.* at 168.

170. *See id.* at 168-69.

171. *See id.*

violation of the Tenth Amendment.¹⁷² The Court determined that the first two sets of incentives, which conditioned the receipt of federal money on compliance with federal goals and authorized states with waste disposal sites to discriminate in interstate commerce against states that failed to comply with federal regulations, did not violate the Tenth Amendment because the first was a valid exercise of Congress's Spending Clause power and the second was a valid exercise of conditional preemption.¹⁷³ The Court did hold, however, that the "take-title" provision violated the Tenth Amendment because the provision forced the state to choose between enacting a federal regulatory program and being held financially responsible for damages as owners of the waste.¹⁷⁴ The Court noted that the "take-title" provision failed to provide the state with a critical alternative: the "[s]tate may not decline to administer the federal program. No matter which path the [s]tate chooses, it must follow the direction of Congress."¹⁷⁵ By failing to provide the states with the choice not to legislate, the federal government crossed "the line distinguishing encouragement from coercion."¹⁷⁶

E. *Printz v. United States*

In *Printz v. United States*,¹⁷⁷ the Supreme Court followed and extended its reasoning in *New York* by deciding that the Tenth Amendment prohibited Congress from enforcing certain provisions of the Brady Handgun Violence Prevention Act ("Brady Act"). The contested provisions of the Brady Act required state chief law enforcement officers ("CLEOs") to participate in the temporary administration of a federal regulatory program by conducting background checks and accepting handgun applicant statements.¹⁷⁸

172. *See id.* at 169.

173. The Court held that the first set of incentives did not violate the Tenth Amendment because the Spending Clause granted Congress the power to condition the distribution of funds on whether the states achieved certain goals. *See id.* at 171-73. The Court also held that the second set of incentives offered states the choice of either regulating an activity within Congress's Commerce Clause power "according to federal standards or having state law pre-empted by federal regulation," an example of conditional preemption that was already determined to be constitutional. *Id.* at 173-74; *see* Federal Energy Regulatory Comm'n v. Mississippi ("FERC"), 456 U.S. 742, 764-65 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

174. *See New York*, 505 U.S. at 175-77. The Court noted that both of these "choices" would commandeer the state to enact and administer a federal regulatory program. *See id.* at 176-77.

175. *Id.* at 177.

176. *Id.* at 175; *see also* *Koog v. United States*, 79 F.3d 452, 459-60 (5th Cir. 1996) ("[T]he [s]tate has no walk-away opportunity, however costly or difficult, the [s]tates are victims of impermissible federal coercion.").

177. 521 U.S. 898 (1997).

178. *See id.* at 902-04. Once the Attorney General completed the creation of a national gun database, CLEOs would be relieved of their administrative task. *See id.*

The petitioners in *Printz* challenged the constitutionality of the Brady Act's interim registration provisions on the grounds that the provisions conscripted state officers to enforce and administer a federal regulatory program aimed at third parties.¹⁷⁹

After discussing and accepting historical evidence demonstrating that the Framers did not construe the Constitution as granting Congress the power to force state officers to implement federal regulatory programs, the *Printz* Court examined whether the "novel" CLEO provisions of the Brady Act violated the Tenth Amendment.¹⁸⁰ The Court first noted that the Framers designed the Constitution's structure to protect the people from a potentially tyrannous federal government by dividing power between the state and federal governments.¹⁸¹ According to the Court, Congressional legislation forcing state CLEOs to administer the Brady Act would upset this balance because "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."¹⁸² The CLEO provisions of the Brady Act would also upset the balance of power between the executive and legislative branches of the federal government because the Constitution grants only the President the authority to enforce Congressional legislation; thus, the Constitution did not grant Congress the authority to indirectly enforce its legislation by conscripting state executive officers.¹⁸³ The Court also emphasized that the Constitution granted Congress the authority to regulate private entities, not states, to ensure that both the state and federal governments remain responsive and politically accountable to the people.¹⁸⁴

After examining the structure of the Constitution, the *Printz* Court analyzed the most "conclusive" evidence regarding the constitutionality of the CLEO provisions of the Brady Act—the recent cases interpreting the Tenth Amendment limitations on Congressional power.¹⁸⁵ The Court characterized these prior cases as holding that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs,"¹⁸⁶ and noted that "this Court never has sanctioned

at 902.

179. *See id.* at 905.

180. *See id.* at 925-27.

181. *See id.* at 919-23. The "double security" system established by the structure of the Constitution shields the people from excessive centralized authority because of the balance of power existing between the federal and state governments, and the establishment of the three branches of the federal government, which hold each other in check. *See id.*

182. *Id.* at 922.

183. *See id.* at 922-23.

184. *See id.* at 919-20.

185. *See id.* at 925.

186. *Id.*

explicitly a federal command to the States to promulgate and enforce laws and regulations.¹⁸⁷ Finally, the Court rejected the United States's argument that the CLEO provisions were constitutional because they served important purposes and that state executive officers were in a better position to administer the regulations.¹⁸⁸ The Court noted that although these factors may be relevant "if we were evaluating whether the incidental application to the States of a federal law of general applicability" under the *Garcia* line of cases was permissible, this balancing was inappropriate when "the whole *object* of the law [is] to direct the functioning of the state executive, and hence [to] compromise the structural framework of dual sovereignty" because "[i]t is the very *principle* of separate state sovereignty that such a law offends"¹⁸⁹

After discussing past decisions, the Court ruled that the CLEO provisions of the Brady Act attempted to circumvent the holding in *New York* that Congress cannot compel the States to enact or administer federal regulatory programs.¹⁹⁰ The Court, therefore, held that the CLEO provisions of the Brady Act were unconstitutional because they forced state executive officials to enforce federal laws in violation of the Tenth Amendment.¹⁹¹ According to the Court, "[t]he Federal Government may [not] issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program . . . [because] such commands are fundamentally incompatible with our constitutional system of dual sovereignty."¹⁹²

Although Congress's Commerce Clause powers are plenary, the Tenth Amendment imposes substantive restrictions on the exercise of that power. Recent Supreme Court cases demonstrate that the Tenth Amendment prohibits Congress from regulating the states as states in a manner that forces the states to utilize their sovereign power to

187. *Id.* at 926 (quoting *Federal Energy Regulatory Comm'n v. Mississippi* ("FERC"), 456 U.S. 742, 761-62 (1982)).

188. *See id.* at 931-32.

189. *Id.* at 932 (emphasis in original).

190. *See id.* at 933.

191. *See id.* at 933-35.

192. *Id.* at 935. Because *Printz* was a 5-4 decision, the concurring opinions of Justices O'Connor and Thomas may qualify the majority opinion, but that issue is beyond the scope of this Comment. Justice O'Connor emphasized that the Court's holding did not spell the end of the Brady Act's objectives because Congress could, pursuant to its Spending Clause powers, condition the receipt of federal funds on compliance with the CLEO provisions. *See id.* at 935-36 (O'Connor, J., concurring). O'Connor also noted that the Court refrained from deciding whether ministerial reporting requirements imposed by Congress on the states pursuant to the Commerce Clause powers were unconstitutional. *See id.* at 936 (O'Connor, J., concurring). Justice Thomas's concurring opinion emphasized that the Tenth Amendment affirms the notion that "the federal government is one of enumerated, hence limited, powers" and urged the Court to temper its Commerce Clause jurisprudence. *Id.* at 936-37 (Thomas, J., concurring).

enact and administer federal regulatory programs, but allows Congress to regulate the states as states when they engage in an activity in which private entities also engage. Under this legal framework, the Fourth Circuit addressed the constitutionality of the DPPA.

III. THE FOURTH CIRCUIT'S DECISION IN *CONDON V. RENO*

In *Condon v. Reno*,¹⁹³ the Fourth Circuit reviewed and affirmed the district court's opinion and held that the DPPA violated the Tenth Amendment.¹⁹⁴ In *Condon*, the Fourth Circuit noted that although the Commerce Clause grants Congress the authority to regulate entities engaged in interstate commerce, the Tenth Amendment restricts the exercise of this power when it is directed at the states.¹⁹⁵ The court then stated that Congress can constitutionally regulate the states as states without violating the Tenth Amendment only through the use of generally applicable laws.¹⁹⁶ In support of this conclusion, the Fourth Circuit identified what it considered to be two distinct lines of Supreme Court cases involving the Tenth Amendment limitations on the exercise of Congressional authority under the Commerce Clause: the *Garcia* line and the *New York* line.¹⁹⁷ The court characterized the *Garcia* line of cases, a line including *Wirtz*, *Usery*,

193. 155 F.3d 453 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

194. *See id.* at 456-62; Recent Cases, *supra* note 56, at 1100-01; *see also* Hartzell-Jordan, *supra* note 8, at 220-26 (noting that the Fourth Circuit affirmed the district court's holding that the DPPA violates the Tenth Amendment and granted an injunction prohibiting the enforcement of the Act in South Carolina). *But see* Travis v. Reno, 163 F.3d 1000, 1001-02 (7th Cir. 1998) (reversing the district court's decision and holding that "whatever may be said about the Act's wisdom, it is within the commerce power and compatible with the constitutional principles of federalism"), *cert. denied*, 120 S. Ct. 931 (2000).

195. *See Condon*, 155 F.3d at 460.

196. *See id.* at 461. *But see* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 161 F.3d 1266, 1271 (10th Cir. 1998) (declaring that this holding made by the Fourth Circuit was incorrect because "[t]he Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in [the] activity"); *Condon*, 155 F.3d at 467-68 (Phillips, J., dissenting) (stating that the recent Supreme Court cases providing the Tenth Amendment restrictions on Congress's exercise of its Commerce Clause power have never even intimated that Congress may regulate the states in a manner "consistent with the structural limitations of federalism" only through generally applicable legislation); *see also* Hartzell-Jordan, *supra* note 8, at 227 (discussing how Judge Phillips's dissent in *Condon* took issue with the majority's determination that only generally applicable laws pass constitutional muster).

197. *See Condon*, 155 F.3d at 458; *see also* Lind & Eckart, *supra* note 8, at 19-20 (noting that there are two different lines of cases employed to determine whether Commerce Clause legislation regulating the states as states violates the Tenth Amendment: the *Garcia* line of cases and the *New York* and *Printz* line). *But see infra* Part V (arguing that *New York* and *Printz* are not a separate and distinct line of cases, but instead are examples of the substantive Tenth Amendment restrictions enunciated in *Garcia* that are necessary to combat an extraordinary defect in the national political process).

and *Baker*, as a model of inconsistency that, in light of the *New York* line, could be interpreted as merely standing for the proposition that Congress can regulate state activities through laws of general applicability.¹⁹⁸ In contrast, the court characterized the *New York* line of cases, which includes *Printz*, as a “model of consistency” that stood for the proposition that Congress may not use the state governments as implements of regulation.¹⁹⁹

The Fourth Circuit noted that the DPPA was distinguishable from the “take-title” provision in *New York*,²⁰⁰ and the CLEO provisions of the Brady Act in *Printz*,²⁰¹ because the DPPA neither commandeered the state legislative process nor conscripted state executive officers to enforce a federal regulatory program targeting third parties.²⁰² Nonetheless, the court concluded that the DPPA required state officials to “administer” a federal regulatory program in violation of the principles of federalism enunciated in *New York* and *Printz* because the DMVs must change their operations at substantial cost in order to comply with the DPPA.²⁰³

The Fourth Circuit’s holding rejected the United States’s argument that *New York* and *Printz* should not govern the instant case because the DPPA, unlike the “take-title” and CLEO provisions, neither directly regulates commercial activity in which the states engage, nor forces the states to regulate the activity of third parties,²⁰⁴ and therefore, the constitutionality of the DPPA should be determined under the *Garcia* line of cases.²⁰⁵ Instead of rebutting this argument, the court assumed, *arguendo*, that the federal government’s “narrow” reading of *New York* and *Printz* was correct. Despite this assumption, the Fourth Circuit held, in the alternative, that the DPPA is unconstitutional even under the *Garcia* line of cases because

198. See *Condon*, 155 F.3d at 459. The Supreme Court’s Tenth Amendment jurisprudence before *Garcia* was also extremely erratic. See *supra* note 39.

199. See *Condon*, 155 F.3d at 459.

200. See *supra* notes 160-61, 174-76 and accompanying text.

201. See *supra* notes 178-83 and accompanying text.

202. See *Condon*, 155 F.3d at 461; see also *id.* at 466 (Phillips, J., dissenting) (recognizing that “[t]he [*Condon*] majority concedes, as it must, that the end object of the Act is the direct regulation of state conduct. It is not the indirect regulation of private conduct—here [personal] information use—by forcing the states directly to regulate that conduct . . .”).

203. See *id.* at 460; see also Kim, *supra* note 9, at 244-45 (reiterating that the *Condon* court struck down the DPPA as violative of the principles of federalism embodied in the Tenth Amendment).

204. In fact, the DPPA does not force the States to do anything at all. See *infra* notes 323-25. Instead of complying with the DPPA, a state can choose to discontinue the sale and dissemination of drivers’ personal information. See *infra* note 323 and accompanying text.

205. See *Condon*, 155 F.3d at 461-62 (“The United States attempts to sidestep this problem, however, by contending that the holdings in *Printz* and *New York* apply only when the law in question requires the State[s] to regulate the behavior of [their] citizens.”).

“Congress may only subject the States to legislation that is also applicable to private parties.”²⁰⁶ After making this novel ruling, the court determined that the DPPA was not generally applicable because it targets the states in a unique way.²⁰⁷ The court also rejected the United States’s argument that the DPPA is constitutional even under the Fourth Circuit’s narrow reading of the *Garcia* line because the DPPA subjects the DMVs to a similar type of regulation to which the government subjects private entities and, therefore, is generally applicable.²⁰⁸ The court re-emphasized that Congress can never regulate the activity of the states as states subject to one exception: when the law is truly generally applicable.²⁰⁹

Thus, the Fourth Circuit based its decision that the DPPA violates the Tenth Amendment on two major holdings: (1) The DPPA forces state officers to “administer” a federal regulatory program in violation of the Tenth Amendment because the DMVs must change the way they operate and retrain employees at considerable expense;²¹⁰ and (2) Congress may regulate the commercial activity of the states only through the use of generally applicable laws, which constitutes the one and only exception to a general prohibition against the federal government’s direct regulation of the states.²¹¹ Subsequently, the Supreme Court granted certiorari in *Condon* to settle the question of whether the DPPA violated the Tenth Amendment. The next part discusses the reasoning utilized by the Supreme Court to reverse the Fourth Circuit and uphold the DPPA as valid Commerce Clause legislation.

IV. THE SUPREME COURT’S DECISION IN *RENO V. CONDON*

On January 12, 2000, the Supreme Court in *Reno* reversed the Fourth Circuit’s decision and issued a unanimous opinion holding that the DPPA is a constitutional exercise of Congress’s Commerce Clause powers and does not violate the principles of federalism embodied in the Tenth Amendment.²¹² Chief Justice Rehnquist’s brief opinion for the unanimous Court began by incontrovertibly stating that the DPPA does not violate the principles of federalism delineated in *New York*

206. *Id.* at 461. *But see* *Travis v. Reno*, 163 F.3d 1000, 1005-06 (7th Cir. 1998) (intimating that the DPPA is generally applicable because similar private activity, the sale and dissemination of personal information, is regulated by other statutes), *cert. denied*, 120 S. Ct. 931 (2000).

207. *See Condon*, 155 F.3d at 461-62.

208. *See id.* at 462-63. For example, the federal government regulates the extent to which video stores and cable companies may disclose the information they have collected. *See* Video Privacy Protection Act of 1988, 18 U.S.C.A. § 2710 (West 1998 & Supp. 2000); Cable Communications Policy Act, 47 U.S.C.A. § 551 (West 1994).

209. *See Condon*, 155 F.3d at 462.

210. *See id.* at 460.

211. *See id.* at 461-63.

212. *See Reno v. Condon*, 120 S. Ct. 666, 668, 671-72 (2000).

and *Printz*.²¹³ After examining the DPPA's provisions, such as the mandatory and discretionary disclosure provisions, the regulations on redisclosure, the opt-in requirement, and the penalties for violating the various provisions,²¹⁴ the Court made a critical factual determination about the DPPA.²¹⁵ The Court stated that the law was one of general applicability because it does not apply solely to the states in that it also regulates the resale and redisclosure of drivers' personal information by private entities that obtained the information from a state DMV.²¹⁶ The Court noted that the DPPA is generally applicable because the statute "regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information . . . and private resellers or redisclosers of that information."²¹⁷

In accord with the United States's argument,²¹⁸ the Court held that, in this context, the personal information disseminated by DMVs is "a 'thin[g] in interstate commerce'"²¹⁹ because this information is used by a myriad of people engaged in interstate commerce²²⁰ and is "used in the stream of interstate commerce by various . . . entities for matters related to interstate motoring."²²¹ Because the Court held that drivers' personal information is an article in interstate commerce, it was unnecessary for the Court to rule on whether the intrastate activities of the DMVs had a "sufficiently substantial impact on interstate commerce" to justify Congress's use of its Commerce Clause powers.²²²

After holding that the Commerce Clause granted Congress the authority to regulate the sale and dissemination of drivers' personal information, the Court turned to the question of whether the Tenth

213. *See id.* at 668. For a detailed discussion of the principles of federalism enunciated in *New York* and *Printz*, see *supra* notes 158-92 and accompanying text.

214. *See supra* Part I (providing a more thorough examination of the DPPA).

215. *See Reno*, 120 S. Ct. at 669.

216. *See id.*

217. *Id.* at 672. The Court's crucial determination that the DPPA is generally applicable made it unnecessary for the Court to decide how to reconcile *Garcia* and its progeny with *New York* and *Printz*. See *infra* notes 287-93 and accompanying text.

218. *See* Brief for Petitioners at 23, *Reno v. Condon*, 120 S. Ct. 666 (2000) (No. 98-1464), available in 1999 WL 513843 (advocating that personal information disclosed by State DMVs is "legitimately subject to congressional regulation because the States place the private information in[] commerce, and because dissemination of the information is an activity 'having a substantial relation to interstate commerce'" (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995))); see also *supra* notes 91-98 and accompanying text (explaining Congress's Commerce Clause powers).

219. *Reno*, 120 S. Ct. at 671 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995) (alteration in original)).

220. *See id.* ("[M]otor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce . . .").

221. *Id.*

222. *Id.*; *supra* notes 91-98 and accompanying text (describing in more detail Congress's power to regulate interstate commerce).

Amendment prohibited Congress from regulating this personal information in the manner prescribed by the DPPA.²²³ The Court first addressed the Fourth Circuit's ruling that the DPPA violated the principles of federalism enunciated in *New York* and *Printz*.²²⁴ The Fourth Circuit had held that the DPPA violated the Tenth Amendment because it effectively requires the DMV to re-train employees and make other changes at a substantial cost, and therefore forces the states to administer a federal regulatory program.²²⁵ In *Reno*, the Court reaffirmed that *New York* and *Printz* impose substantive Tenth Amendment limitations on Congress's exercise of its Commerce Clause powers.²²⁶ The *Reno* Court then interpreted its decision in *New York* as holding that the Constitution does not grant Congress the power "to [] require the States to govern according to Congress' instructions,"²²⁷ and interpreted *Printz* as holding "that Congress cannot circumvent... [*New York's*] prohibition by conscripting the States' officers directly. The Federal Government may neither... [require] the states to address particular problems, nor command the States' officers... to administer or enforce a federal regulatory program."²²⁸ After characterizing the principles of federalism enunciated in *New York* and *Printz* in this manner, the Court analyzed whether the DPPA violated the principles set forth in those cases.²²⁹

The Court agreed that the DPPA would impose a burden on DMVs, but rejected South Carolina's argument that the DPPA violates the prohibitions of *New York* and *Printz*.²³⁰ But instead of relying on *New York* and *Printz* to reach its conclusion, the Court determined "that this case is governed by our decision in *South*

223. See *Reno*, 120 S. Ct. at 671.

224. See *id.* at 671-72.

225. See *supra* note 203 and accompanying text.

226. See *Reno*, 120 S. Ct. at 671-72.

227. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

228. *Id.* at 671 (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)).

229. See *id.* at 671-72.

230. See *id.* at 672. South Carolina stated that the DPPA places an enormous burden on the states because they must administer complicated provisions on a daily basis. See Brief for Respondents at 10, *Reno v. Condon*, 120 S. Ct. 666 (2000) (No. 98-1464), available in 1999 WL 688428 (noting that "[t]he DPPA thrusts upon the States all of the day-to-day responsibility for administering its complex provisions"). South Carolina also complained that the DPPA requires the states to shoulder an economic burden that would drain financial resources. See *id.* at 16-17 (arguing that the DPPA allows the federal government to receive credit for solving a problem even though the states, not the federal government, would "incur the financial... burdens of administering the statute"). South Carolina also noted that the DPPA's provisions threaten the states with penalties if they fail to comply with the regulations. See *id.* at 6 (asserting that the DPPA "creates potentially severe federal penalties for erroneous decisions by state officials"). For all of these reasons, South Carolina vehemently argued that the DPPA forces the states to administer a federal regulatory program in violation of *New York* and *Printz*. See *id.* at 15.

Carolina v. Baker . . .”²³¹ The Court explained that the *Baker* Court upheld the challenged legislation because it “regulate[d] state activities” instead of “seek[ing] to control or influence the manner in which States regulate private parties.”²³² In addition, the *Reno* Court recognized that in *Baker*, the state, as in the instant case, argued that the federal government “commandeered the state legislative and administrative process . . . because state officials had to devote substantial effort to determine how best to implement [the provisions of the statute].”²³³ The *Reno* Court noted that *Baker* concluded that “[s]uch ‘commandeering’ is . . . an inevitable consequence of regulating a state activity,”²³⁴ and laws that require a state to take certain administrative actions to comply with federal regulations as a prerequisite to engaging in such activity present no constitutional defect.²³⁵

Without clearly explaining why *Baker* provided the proper precedent for evaluating the constitutionality of the DPPA rather than *New York* and *Printz*, the Court distinguished the DPPA and the statute challenged in *Baker* by noting that neither “require[d] the States in their sovereign capacity to regulate their own citizens.”²³⁶ Thus, because the DPPA regulates the “States as the owner of databases[,] [i]t does not require . . . [the State legislatures to legislate] and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”²³⁷ Although this language, when viewed in light of the Seventh Circuit’s holding in *Travis v. Reno*,²³⁸ suggests the possibility of a market participator

231. *Reno*, 120 S. Ct. at 672 (citations omitted).

232. *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)); *supra* notes 140-57 and accompanying text (discussing the Court’s decision in *Baker*)

233. *Reno*, 120 S. Ct. at 672 (quoting *Baker*, 485 U.S. at 514-15).

234. *Id.* (quoting *Baker*, 485 U.S. at 514-15).

235. *See id.* at 672 (citing *Baker*, 485 U.S. at 514-15).

236. *Id.* at 672.

237. *Id.*

238. 163 F.3d 1000 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000). Judge Easterbrook’s opinion for the Seventh Circuit stated that “the basic distinction between cases such as [*Baker*] and cases such as *New York* [and *Printz*] is that states and private parties may be the *objects* of [commercial] regulation, although states cannot be compelled to become regulators of private conduct.” *Id.* at 1004 (stating that the DPPA “affects states as owners of databases; it does not affect them in their role as governments”) (emphasis in original). Judge Easterbrook’s opinion for the court also stated that many federal laws regulate the commercial activity of the states as states and that the “anticommandeering rule comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens.” *Id.* at 1004-05. For these reasons, the court concluded that the DPPA “does not commandeer [the] states in violation of the [Tenth Amendment],” because the DPPA “affects states as owners of data, rather than as sovereigns . . .” *Id.* at 1005; *cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 435-37 (1980) (holding that states, when acting as market participants, can discriminate against the citizens of other states in interstate commerce without violating the Dormant Commerce Clause); *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979) (holding that the states, when acting in their sovereign

versus citizen regulator distinction in the Court's Tenth Amendment jurisprudence, the Court did not explicitly so hold.²³⁹

Because the *Reno* Court determined that the DPPA was a law of general applicability,²⁴⁰ it refrained from deciding whether the Fourth Circuit incorrectly held that Congress may regulate the states as states pursuant to the Commerce Clause powers only through laws of general applicability.²⁴¹ Thus, the *Reno* Court left for later judicial determination the question of whether general applicability is a constitutional prerequisite for federal regulation targeting the states as states.²⁴² The next part analyzes the soundness of the *Reno* Court's decision in light of recent Supreme Court Tenth Amendment jurisprudence.

V. ANALYSIS OF THE SUPREME COURT'S DECISION IN *RENO V. CONDON*

This part argues that the *Reno* Court was correct in reversing the Fourth Circuit's decision in *Condon*. The *Reno* Court, however, did not provide a coherent rationale for its decision. This Comment argues that the Court missed an opportunity to stabilize its Tenth Amendment jurisprudence by failing to recognize: that *New York* and *Printz* are not separate and distinct from the *Garcia* line of cases; the importance of the underlying activity being regulated; and the pivotal role state choice plays in the Court's Tenth Amendment jurisprudence.

The Supreme Court's decision in *Reno* correctly reversed the Fourth Circuit and held that the DPPA is a valid exercise of Congress's Commerce Clause powers that does not violate the principles of federalism embodied in the Tenth Amendment.²⁴³ Specifically, the Court held that the DPPA regulates an article in interstate commerce: drivers' personal information contained in DMV databases that is then sold and disseminated.²⁴⁴ The *Reno* Court

capacity as market regulators, violate the Dormant Commerce Clause if they regulate interstate commerce in a discriminatory manner).

239. See *Reno*, 120 S. Ct. at 672.

240. See *supra* notes 216-17 and accompanying text.

241. See *Reno*, 120 S. Ct. at 672.

242. See *id.*

243. See *id.* at 668.

244. See *id.* at 671. The Supreme Court in *Reno* exercised caution in deciding that the Commerce Clause grants Congress the power to pass the DPPA, as evidenced by its holding that, in this context, drivers' personal information is an article in interstate commerce. See *id.* The caution exercised by the Supreme Court is contrasted by the lower courts' unequivocal determination that the Commerce Clause clearly grants Congress the power to regulate the sale and dissemination of drivers' personal information. See *Oklahoma ex rel. Oklahoma Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272-73 (10th Cir. 1998), *cert. denied*, 120 S. Ct. 930 (2000); *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000); see also *Pryor v. Reno*, 171 F.3d 1281, 1284 (11th Cir. 1999) ("[I]t is abundantly clear that

determined that the Tenth Amendment does not invalidate legislation, such as the DPPA, that regulates the commercial activity in which the states as states engage, even though such regulation forces the states to implement costly changes in the way they currently operate.²⁴⁵ The *Reno* Court, however, refrained from deciding whether the Fourth Circuit incorrectly determined that general applicability is a constitutional requirement for congressional Commerce Clause legislation that regulates the states as states.²⁴⁶

The *Reno* Court correctly decided the case but did not clearly provide a rationale for its decision.²⁴⁷ Although some language in the Court's opinion,²⁴⁸ when viewed in light of the Seventh Circuit's decision in *Travis*,²⁴⁹ suggests that the Supreme Court may consider adopting a market participant versus citizen regulator distinction, the Court did not explicitly make that holding.²⁵⁰ In addition, the Court avoided the difficult question of how to reconcile *Garcia*, *Baker*, *New York*, and *Printz* by torturing the accepted definition of what type of legislation is generally applicable in order to encompass the DPPA's provisions.²⁵¹ The Court did this by holding that the DPPA was generally applicable even though states are affected differently than private entities that redisclose drivers' personal information.²⁵²

The *Reno* Court reversed the Fourth Circuit's decision because the Court disagreed with the Fourth Circuit's conclusion that the DPPA violated the substantive Tenth Amendment limitations on Congress's Commerce Clause power.²⁵³ This reversal was justified because the Fourth Circuit based its conclusion that the DPPA was unconstitutional on two erroneous holdings resulting from a misinterpretation of the Supreme Court cases that provide, and explain, the constitutional restrictions that the principles of federalism

trafficking in databases is an activity that substantially affects interstate commerce these days."), *vacated*, 120 S. Ct. 929 (2000).

245. See *Reno*, 120 S. Ct. at 668, 671-72; *supra* notes 223-37 and accompanying text.

246. See *Condon v. Reno*, 155 F.3d 453, 461-62 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000); *supra* notes 240-42 and accompanying text; *infra* text accompanying notes 326-31.

247. See *Reno*, 120 S. Ct. at 671-72.

248. See *supra* notes 237-39 and accompanying text.

249. See *supra* note 238 and accompanying text.

250. See *Reno*, 120 S. Ct. at 672. The market participant versus citizen regulator distinction apparently adopted by the Seventh Circuit in *Travis*, correctly recognizes that the nature of the state activity being regulated, commercial activity or sovereign activity, is crucial in determining whether Commerce Clause legislation violates the Tenth Amendment. See *Travis v. Reno*, 163 F.3d 1000, 1004-05 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000); *supra* note 238 and accompanying text. This distinction is too narrow a test for determining whether legislation violates the Tenth Amendment because it would not protect all "uniquely sovereign activities," does not mesh well with past precedent such as *Garcia*, and may further complicate an already confused area of the law. See *infra* text accompanying notes 316-18.

251. See *Reno*, 120 S. Ct. at 672; *supra* note 8 and accompanying text.

252. See *Reno*, 120 S. Ct. at 672; *supra* notes 8, 216-17 and accompanying text.

253. See *Reno*, 120 S. Ct. at 672; *supra* notes 224-37 and accompanying text.

impose on Congressional Commerce Clause legislation.²⁵⁴

The Supreme Court recognized that the Fourth Circuit incorrectly ruled that the DPPA violated the principles of federalism enunciated in *New York* and *Printz*.²⁵⁵ The Fourth Circuit failed to identify correctly the critical differences between the DPPA and the legislation invalidated in those cases. The unconstitutional provision in *New York*, the “take-title” provision, attempted to force New York State to enact legislation regulating third parties.²⁵⁶ Similarly, in *Printz*, the unconstitutional CLEO provisions of the Brady Act attempted to force state executive officers to administer and enforce laws aimed at third parties.²⁵⁷ Only sovereigns can enact and administer laws directed at third parties. In those contexts, the Supreme Court has held that Congressional legislation that forces state executive or legislative officials to enforce or administer federal regulatory programs diminishes the political accountability²⁵⁸ of both the federal and state governments and violates the principles of federalism embodied in the Tenth Amendment.²⁵⁹

In contrast to the provisions invalidated in *New York* and *Printz*, the DPPA directly regulates the commercial activity in which the states as states voluntarily engage.²⁶⁰ Although the DPPA principally regulates the way state DMVs sell and disseminate drivers’ personal information contained in their databases,²⁶¹ many private entities sell personal information and are regulated by the federal government

254. See *supra* notes 210-11 and accompanying text.

255. See *Reno*, 120 S. Ct. at 672; *supra* note 230.

256. See *New York v. United States*, 505 U.S. 144, 153-54 (1992).

257. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *supra* notes 177-79 and accompanying text.

258. Although the *Condon* court did not conclude that the DPPA diminished political accountability, the Eleventh Circuit did. See *Pryor v. Reno*, 171 F.3d 1281, 1287-88 (11th Cir. 1999), *vacated*, 120 S. Ct. 929 (2000). The Eleventh Circuit determined that the DPPA diminishes political accountability because state officials will bear the financial cost of administering the program and will be blamed by the public if the program is unpopular because their officers will administer the program on a daily basis. See *id.* at 1287-88. The Eleventh Circuit, however, failed to consider that unlike the legislation invalidated in *New York* and *Printz*, the DPPA gave the states the choice of whether to “administer” the federal regulatory program. See *infra* notes 320-25 and accompanying text. The DPPA imposes regulatory burdens only on those states that choose to sell and disseminate drivers’ personal information, and therefore, political accountability is not diminished because the states are simply bearing the responsibility for making the decision to engage in this type of commercial activity. See *infra* notes 318-25 and accompanying text.

259. See *supra* notes 158-92 and accompanying text.

260. See *Oklahoma ex rel. Oklahoma Dep’t of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) (“If states do not wish to comply with [the DPPA’s] regulations, they may stop disseminating information in their motor vehicle records to the public. In contrast, the statute in *New York* offered no such alternative to the states.”), *cert. denied*, 120 S. Ct. 930 (2000). See generally 18 U.S.C. §§ 2721-25 (1994 & Supp. IV 1998) (regulating the sale and dissemination of drivers’ personal information).

261. See *supra* note 8.

through other statutes.²⁶² The DPPA does not force the states to engage in the sale and dissemination of drivers' personal information;²⁶³ the DPPA merely requires compliance with certain federal standards as a condition to engaging in this form of commercial activity.²⁶⁴ Consequently, the legislative branch of the federal government enacted the DPPA, and the executive branch of the federal government shoulders the burden of enforcing the DPPA's provisions.²⁶⁵

Despite Congress's enactment of a law that regulates the commercial activity in which the states as states choose to engage, the Fourth Circuit held that the DPPA forces the States to "administer" a federal regulatory program in violation of the Tenth Amendment restrictions set forth in *New York* and *Printz*.²⁶⁶ This reasoning, however, ignored the Supreme Court's holding in *Baker*. The *Baker* Court explicitly ruled that the states are not commandeered into administering federal regulatory programs even though they must implement a variety of costly administrative and legislative changes to continue engaging in the activity in conformity with the federal legislation.²⁶⁷ According to the *Baker* Court, "[s]uch 'commandeering' is . . . an inevitable consequence of regulating a state activity."²⁶⁸ The Fourth Circuit, however, attempted to avoid the precedential force of *Baker* by holding, in the alternative, that the principles of federalism enunciated in *Garcia*, when viewed in light of *Printz* and *New York*, generally prohibit Congress from regulating the commercial activity of the states as states unless Congress enacts a law of general applicability.²⁶⁹

In *Reno*, the Court held that the DPPA does not force the states to

262. See *Travis v. Reno*, 163 F.3d 1000, 1005-06 (7th Cir. 1998) (noting that an important factor in determining whether legislation is generally applicable is the extent to which the same activity is being engaged in by private entities that are regulated in separate statutes), *cert. denied*, 120 S. Ct. 931 (2000); *supra* notes 8, 208.

263. See *infra* note 323 and accompanying text.

264. See *Condon v. Reno*, 155 F.3d 453, 460 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

265. See *id.* at 460; Brief for Petitioners at 27, *Reno v. Condon*, 120 S. Ct. 666 (2000) (No. 98-1464), available in 1999 WL 513843.

266. See *Condon*, 155 F.3d at 460-61; *supra* note 203 and accompanying text. Despite the fact that the *New York* and *Printz* Courts invalidated the federal regulations on Tenth Amendment grounds based on a political accountability rationale, the *Condon* court did not even attempt to justify its decision based on this rationale. See *Condon*, 155 F.3d at 460-61 (declining to rely on, or mention, the political accountability rationale to justify invalidating the DPPA on substantive Tenth Amendment grounds). *But see* *Pryor v. Reno*, 171 F.3d 1281, 1287-88 (11th Cir. 1998) (holding that the DPPA violates the substantive Tenth Amendment restrictions enunciated in *New York* and *Printz* because it diminishes political accountability), *vacated*, 120 S. Ct. 929 (2000).

267. See *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988); *supra* notes 154-55 and accompanying text.

268. *Baker*, 485 U.S. at 514.

269. See *Condon*, 155 F.3d at 461-63; *supra* notes 206-09 and accompanying text.

administer a federal regulatory program in violation of the substantive Tenth Amendment limitations on Congress's Commerce Clause powers.²⁷⁰ Rather than rely on *New York* and *Printz* to determine the constitutionality of the DPPA, the Court relied upon its earlier holding in *Baker*.²⁷¹ The Court also noted that the DPPA, like the provisions challenged in *Baker*, did not force the states to regulate their citizens through the use of the states' sovereign powers.²⁷² The Court emphasized that the DPPA does not force the state legislatures to legislate, or force executive officers to enforce federal laws; instead "[t]he DPPA regulates the [s]tates as . . . owners of databases."²⁷³ Although the Court ruled that the *Condon* court incorrectly relied on *New York* and *Printz* rather than *Baker*,²⁷⁴ the Court did not provide a rationale explaining why the substantive Tenth Amendment limitations enunciated in *New York* and *Printz* do not apply to legislation such as the DPPA.²⁷⁵

Although the *Reno* Court reversed the Fourth Circuit's determination that the DPPA is unconstitutional, it refrained from addressing the Fourth Circuit's alternative holding that Congress can regulate the commercial activity of the states as states only through the use of generally applicable laws.²⁷⁶ According to the Fourth Circuit, the *Garcia* line of cases, as modified by *New York* and *Printz*, stands for the proposition that generally applicable laws are the one exception to a general prohibition against the federal government regulating the commercial activity engaged in by the states as states.²⁷⁷

270. See *Reno v. Condon*, 120 S. Ct. 666, 668, 671-72 (2000); *supra* notes 229-30 and accompanying text.

271. See *Reno*, 120 S. Ct. at 672.

272. See *id.*

273. *Id.*

274. See *id.*; *supra* notes 224-31 and accompanying text.

275. See *Reno*, 120 S. Ct. at 672. Judge Easterbrook's opinion for the Seventh Circuit used similar language to hold that the principles of federalism enunciated in *New York* and *Printz* did not apply to the DPPA based on what appeared to be a market participant versus citizen regulator distinction. See *Travis v. Reno*, 163 F.3d 1000, 1004-05 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000); *supra* note 238 and accompanying text. Although the *Reno* Court utilized similar language, the Court did not appear to adopt a citizen regulator versus market participant distinction. See *Reno*, 120 S. Ct. at 671-72. The *Reno* Court, therefore, did not explicitly provide a rationale for its decision. See *id.*

276. See *Reno*, 120 S. Ct. at 672; see also text accompanying notes 240-42 (describing how the *Reno* Court analyzed this portion of the Fourth Circuit's opinion).

277. See *Condon v. Reno*, 155 F.3d 453, 461-63 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000); *supra* notes 206-09 and accompanying text. In *Condon*, the court also held that the fact that Congress regulates the same activity of private entities in different statutes "is irrelevant to the Tenth Amendment [analysis]." *Condon*, 155 F.3d at 462. According to the Fourth Circuit, federal regulation of commercial activity engaged in by the States as States and private parties must be contained in one piece of legislation or the legislation is unconstitutional. See *id.* This holding is puzzling because it means that legislation is constitutional if it regulates a similar activity engaged in by states and private entities in the same statute, but unconstitutional if it

The Fourth Circuit's alternative holding, however, is a radical departure from Supreme Court precedent.²⁷⁸

In *Garcia*, the Supreme Court held that, in general, Congress can regulate the activity that the states as states engage in without violating the Tenth Amendment because the states' role in the federal system is protected principally by the national political process. According to *Garcia*, the states' position in the federal system is not generally protected by the Court's imposition of substantive Tenth Amendment restrictions that insulate state activity from regulation in certain areas.²⁷⁹ Thus, according to the *Garcia* Court, the Tenth Amendment limitations on Congressional legislation targeting the activities of the states as states are principally structural, not substantive.²⁸⁰

The Fourth Circuit's alternative holding in *Condon* emasculates *Garcia*²⁸¹ because under that ruling the Tenth Amendment would generally insulate from federal regulation every commercial activity in which the states as states engage.²⁸² The one exception to this prohibition would allow Congress to regulate the commercial activity of the states through generally applicable laws.²⁸³ This mechanical test to determine the constitutionality of Congressional legislation that directly regulates the states' activity is even more restrictive than the "traditional governmental functions" test set forth in the now overruled *Usery* case,²⁸⁴ and conflicts with the principles of federalism

regulates only the states, even if every other private entity engaging in the same activity is regulated through a separate statute and, therefore, the constitutionality of legislation would have nothing to do with the activity regulated. *But see Travis*, 163 F.3d at 1005-06 (determining that the existence of other statutes regulating private entities that engage in the same activity is an important factor to be considered when determining whether the law is generally applicable). The Supreme Court, however, held that the DPPA was generally applicable because it regulated the "universe of entities" engaged in the sale and distribution of drivers' personal information, not because other statutes regulated similar private activity. *See Reno*, 120 S. Ct. at 668, 672.

278. *See infra* notes 281-314 and accompanying text.

279. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-55 (1985); *supra* notes 136-38 and accompanying text.

280. *See South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988); *Garcia*, 469 U.S. at 547-55; *see also* Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657, 1660-65 (1987) (noting that the Tenth Amendment principles of federalism enunciated in *Garcia* require judicial abstention from invalidating Congressional Commerce Clause legislation unless such judicial intervention is necessary to remedy a defect in the national political process).

281. Although the Fourth Circuit's extremely narrow reading of *Garcia*, in light of *New York and Printz*, casts doubt on *Garcia's* vitality, in 1999 four Supreme Court justices signed an opinion stating that "*Garcia* remains good law, its reasoning has not been repudiated . . ." *Alden v. Maine*, 119 S. Ct. 2240, 2292 (1999) (Souter, J., dissenting).

282. *See Condon*, 155 F.3d at 461-63.

283. *See id.*

284. *See supra* notes 117-19 and accompanying text.

enunciated in *Garcia*.²⁸⁵ The Fourth Circuit, however, reasoned that its conclusion was correct because the *New York* and *Printz* Courts declined to apply the principles of federalism enunciated in the *Garcia* line of cases to legislation that was not generally applicable.²⁸⁶

The *Reno* Court refrained from deciding whether Congressional Commerce Clause legislation regulating the states as states must be generally applicable to pass constitutional muster under the Tenth Amendment because the Court determined that the DPPA is generally applicable.²⁸⁷ Even though the DPPA affects the states and private entities that redisclose drivers' personal information differently,²⁸⁸ the Court determined that the DPPA was generally applicable because it regulates the "universe of entities" that participate in the sale and dissemination of drivers' personal information.²⁸⁹ In addition, the Court apparently did not base its holding that the DPPA was generally applicable on the fact that the federal government also regulates the sale and dissemination of personal information by private entities via other statutes.²⁹⁰ This conclusion seems questionable, especially in light of the fact that certain provisions of the Brady Act and the Low-Level Radioactive Waste Disposal Act also regulated private parties in a different manner than the states. Even the United States's brief, which relegated the argument that the DPPA is generally applicable to a footnote, suggests that the government thought it unlikely that the Act would be considered generally applicable.²⁹¹ By stretching the accepted definition of generally applicable legislation to include the DPPA, the *Reno* Court avoided having to reconcile the *Garcia* line

285. The mechanical "traditional governmental functions" test enunciated in *National League of Cities v. Usery*, 426 U.S. 833, 850-55 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), insulated certain areas of state activity from federal regulation without regard to the nature of the underlying activity being insulated. The Fourth Circuit's strict general applicability test is an even more restrictive mechanical test than the "traditional governmental functions" test, and would greatly expand the restrictions that the Tenth Amendment imposes on Congress's exercise of its Commerce Clause powers.

286. See *Condon*, 155 F.3d at 461.

287. See *Reno v. Condon*, 120 S. Ct. 666, 672 (2000); *supra* notes 214-17 and accompanying text.

288. See *supra* notes 216-17 and accompanying text.

289. *Reno*, 120 S. Ct. at 672.

290. See *generally id.* (declining to hold that, although the DPPA regulates the States in a unique way, it is generally applicable because private entities engaged in similar activity are regulated in separate statutes). In doing so, the *Reno* Court chose not to follow the Seventh Circuit's lead and focus on the fact that private entities engaging in the same activity are regulated in other statutes. See *Travis v. Reno*, 163 F.3d 1000, 1005 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000).

291. See Brief for Petitioners at 34 n.15, *Reno v. Condon*, 120 S. Ct. 666 (2000) (No. 98-1464), available in 1999 WL 513843. In this footnote, the United States argued that "it is questionable whether the court of appeals correctly concluded that the DPPA is not generally applicable." *Id.*

with *New York* and *Printz*.²⁹²

The *Reno* Court should have held that Congressional Commerce Clause legislation does not have to be generally applicable to pass constitutional muster under the Tenth Amendment because the Fourth Circuit made a fundamental error by interpreting the *Garcia* line, in light of *New York* and *Printz*, so narrowly. By placing such importance on the generally applicable nature of the challenged legislation, the Fourth Circuit misinterpreted the recent Supreme Court cases that set forth the Tenth Amendment restrictions on Congress's Commerce Clause powers.²⁹³

The principles of federalism enunciated in *Garcia* provide that the federal system is protected principally by the states' role in the national political process.²⁹⁴ The *Garcia* Court, however, acknowledged the possibility that a defect in the national political process could trigger judicial enforcement of substantive Tenth Amendment restrictions.²⁹⁵ Although most commentators and courts view *Garcia* as embracing total judicial abdication from utilizing the power of judicial review to invalidate legislation on Tenth Amendment grounds,²⁹⁶ a few commentators, and the *Baker* Court, have recognized that *Garcia* could allow substantive Tenth Amendment restrictions to remedy extraordinary defects in the national political process.²⁹⁷

292. See *supra* notes 240-42 and accompanying text.

293. The *Garcia* Court held that, in general, Congress can regulate the states as states under the Commerce Clause unless a defect in the national political process occurs, because the role of the states is protected principally by the structure of the national government, and not by judicially defined spheres of unregulable state activity. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-53 (1985). Although in *New York* and *Printz*, the Supreme Court noted that *Garcia* did not apply because the challenged legislation at hand was not generally applicable, the Court held that Congress cannot commandeer the state legislatures or conscript state executive officials to enact or administer federal regulatory programs because this type of legislation diminishes political accountability. See *Printz v. United States*, 521 U.S. 898, 919-21 (1997); *New York v. United States*, 505 U.S. 144, 168-69 (1992). The Court in *New York* and *Printz*, therefore, did not invalidate the legislation based on the generally applicable nature of the legislation, they merely tried to avoid the precedential weight of *Garcia*. See *supra* notes 162-64, 189 and accompanying text; see also Hartzell-Jordan, *supra* note 8, at 247 (discussing the Fourth Circuit's holding).

294. See *supra* notes 136-38 and accompanying text.

295. See *Garcia*, 469 U.S. at 556-57.

296. See *Alden v. Maine*, 119 S. Ct. 2240, 2292 (1999) (Souter, J., dissenting) (stating that the *Garcia* court "held that whatever protection the Constitution afforded to the States' sovereignty lay in the constitutional structure, not in some substantive guarantee").

297. See *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988) (deciding whether the challenged legislation violated the principles of federalism enunciated in *Garcia* by determining if the legislation caused an extraordinary defect in the national political process); Odom, *supra* note 280, at 1660-65 (stating that *Garcia* allows for Tenth Amendment restrictions on Congress's exercise of its enumerated powers). But see Redish, *supra* note 12, at 42 (stating that while "it is true . . . that the Court in *Garcia* implied that it will intervene if there is a breakdown in the [political]

In *Baker*, the Court faced the question of whether the principles of federalism enunciated in *Garcia* prohibited Congress from enacting TEFRA.²⁹⁸ South Carolina argued that *Garcia* invalidated this legislation because TEFRA caused a defect in the national political process.²⁹⁹ According to South Carolina, the political process failed because an uninformed Congress passed ineffective legislation.³⁰⁰ The *Baker* Court, however, rejected South Carolina's arguments and held that Congress's unwise legislative choices do not constitute extraordinary defects in the political process because neither *Garcia* nor the Tenth Amendment allowed the courts to second-guess the choices made by a democratically elected Congress.³⁰¹ Although the *Baker* Court noted that *Garcia* did not identify or define what defects would trigger the imposition of substantive Tenth Amendment limitations, the Court suggested that a defect in the national political process may have existed if South Carolina was left politically alone and isolated.³⁰² The *Baker* Court left for later judicial determination "another issue":³⁰³ whether legislation that commandeers the legislative and executive branches of the state government to regulate third parties violates the Tenth Amendment.³⁰⁴

In *New York*, the Court had occasion to decide the issue left unresolved by *Baker*. The *New York* Court determined that this type

process[] . . .," it is unlikely that the "Court's standard, to the extent that it was designed to represent anything other than total abandonment of . . . state protection, would be workable"); Mishkin, *supra* note 39, at 157 (noting that the necessity for some judicially enforced Tenth Amendment restrictions "argues for overruling *Garcia*—or, at very least, enlarging enormously upon the tiny 'process' opening left by the majority opinion"). The general consensus is that "*Garcia* was read to mean there would be no judicial enforcement against Congress of the law of federalism." Jackson, *supra* note 105, at 2224. This Comment recognizes that the opening for substantive Tenth Amendment restrictions under *Garcia* is currently extremely narrow when viewed in light of *Baker*, but argues that the Supreme Court should reconceptualize its decisions in *Garcia*, *Baker*, *New York*, and *Printz* to enlarge the "extraordinary defect" opening to encompass legislation that diminishes political accountability. See *infra* notes 315-18 and accompanying text.

298. See *Baker*, 485 U.S. at 508; *supra* notes 142-44 and accompanying text.

299. See *Baker*, 485 U.S. at 511-13.

300. See *id.* at 512-13.

301. See *id.*

302. See *id.* at 513. Although the Court's example seemed to suggest that *Garcia* left an extremely narrow opening for substantive Tenth Amendment restrictions, in the text preceding this example the Court noted that it was not "attempt[ing] any definitive articulation [of the opening] here." *Id.* at 512.

303. This Comment argues that this inquiry was not another issue at all. In fact, this Comment argues that the Court should consider diminished political accountability to be an extraordinary defect in the political process that triggers substantive Tenth Amendment restrictions under *Garcia*. See *infra* text accompanying notes 310-16.

304. See *Baker*, 485 U.S. at 513. When the Court finally addressed the merits of this argument in *New York*, the Court held that the Tenth Amendment prohibits Congress from commandeering the state legislature because this diminishes the political accountability of the state and federal governments. See *supra* notes 165-72.

of legislation violated the Tenth Amendment based on a political accountability rationale, not a mechanical determination that the legislation was not generally applicable.³⁰⁵ The *New York* Court avoided the precedential force of the *Garcia* line by distinguishing those cases as addressing Congress's authority to subject the states to laws of general applicability. The *New York* Court, however, held the "take-title" provision unconstitutional because it diminished political accountability by allowing Congress to indirectly regulate third parties by forcing the states in their sovereign capacity to regulate in a particular field or a particular way.³⁰⁶ The holding in *New York*, therefore, was based on a political accountability rationale, not a mechanical determination that the law was not generally applicable.³⁰⁷

Similarly, in *Printz*, the Court noted that revisiting the *Garcia* line of cases was unnecessary because the CLEO provisions of the Brady Act were not generally applicable.³⁰⁸ But the Court's inquiry did not end there. The *Printz* Court went on to hold that the CLEO provisions violated the Tenth Amendment because forcing state executive officers to enforce federal regulatory programs circumvents the holding in *New York*, thereby diminishing political accountability.³⁰⁹

Both *New York* and *Printz* demonstrate that Congressional Commerce Clause legislation violates the Tenth Amendment when the legislation causes diminished political accountability.³¹⁰ A lack of political accountability impairs the proper functioning of the national political process because, as noted in *New York*, citizens will be unable to determine whether state or federal officials should be held responsible for enacting legislation.³¹¹ If the citizens cannot easily discern which level of government enacted legislation, the democratic political process is compromised.³¹² Furthermore, even though the

305. See *New York v. United States*, 505 U.S. 144, 168-69, 188 (1992).

306. See *id.* at 159-61; *supra* notes 174-76 and accompanying text.

307. See *New York*, 505 U.S. at 168-69; *supra* notes 165-76 and accompanying text. The *New York* court stressed that laws that force the states to enact and administer federal regulatory programs allow Congress to indirectly regulate in a manner that would prevent the people from knowing which officials enacted the program and, therefore, diminishes political accountability of federal and state governmental officials. See *New York*, 505 U.S. at 168.

308. In *Printz*, the Court noted that a balancing test taking into account factors such as the burden the Brady Act would place on the states, may be appropriate when evaluating a law of general applicability but not when "the whole object of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty." *Printz v. United States*, 521 U.S. 898, 932-33 (1997) (emphasis omitted).

309. See *id.* at 934-35.

310. See *supra* notes 158-92 and accompanying text.

311. See *New York*, 505 U.S. at 168-69.

312. See *id.* The political accountability rationale argues that a number of undesirable results can occur if the federal government commandeers the states, including: (1) state officials being wrongly voted out of office; (2) federal officials not

Courts in *New York* and *Printz* distinguished the *Garcia* line because of the generally applicable nature of the challenged legislation, those Courts determined the constitutionality of the legislation based on whether the provisions diminished political accountability.³¹³ The *Reno* Court should have clearly stated that the DPPA did not violate the substantive Tenth Amendment limitations enunciated in *New York* and *Printz* because the DPPA did not diminish political accountability.³¹⁴

This Comment argues that the Supreme Court should stabilize its Tenth Amendment jurisprudence by adopting a reconceptualization of *Garcia*, *Baker*, *New York*, and *Printz*. As a first step, the *Reno* Court should have provided a rationale for its decision by holding that a careful analysis of *Garcia*, *Baker*, *New York*, and *Printz* demonstrates that these cases are not two separate and distinct lines of Tenth Amendment jurisprudence, but one line of cases following *Garcia*. *New York* and *Printz* are examples of the substantive Tenth Amendment restraints enunciated in *Garcia* that are necessary to compensate for failings in the political process. The *New York* and *Printz* Courts decided the constitutionality of the particular legislation by determining whether the law regulates in a manner that diminishes the political accountability of state and federal officials by forcing the states to engage in the most basic sovereign activities, such as enacting legislation to regulate third parties, and enforcing and administering laws against third parties.³¹⁵ *New York* and *Printz*, therefore, demonstrate that federal legislation that forces the states to engage in “uniquely sovereign activities” leads to diminished political accountability.³¹⁶ Forcing the states to engage in a uniquely sovereign

being held accountable for their decisions; and (3) federal legislators themselves not feeling as accountable to the electorate because they can indirectly regulate through the state government. See Jackson, *supra* note 105, at 2201. The Constitution requires that both the state and federal governments remain politically accountable to the people. See *id.*; see also *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (recognizing that political accountability is necessary for the federal system to provide its citizens with more liberty than a unitary system); *FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 636 (1992) (“Federalism serves to assign political responsibility, not to obscure it.”). Citizens must know whether state or federal officials should be held politically accountable for a given action in order for the federal system to perform properly. See *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). The concern about legislation that diminishes political accountability “is grounded in legitimate considerations of constitutional history and structure.” Jackson, *supra* note 105, at 2200.

313. See *supra* notes 158-92 and accompanying text.

314. See *supra* note 258 and accompanying text.

315. See *Printz v. United States*, 521 U.S. 898, 933-35 (1997); *New York*, 505 U.S. at 168-69, 188.

316. See *supra* notes 158-92 and accompanying text; see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (stating that legislation determining the qualification of state judges “goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity”). It is clear that “[t]hrough the structure of its government, and the character of those who exercise government

activity leads to a defect in the national political process because citizens may blame state officials who had no choice but to engage in the federal program instead of the federal officials who passed the legislation; and in addition the states will be forced to pay for federal regulatory programs for which Congress may get credit.³¹⁷ In contrast, when the federal government simply regulates commercial activity in which the states as states choose to engage, political accountability is not diminished because the states can avoid the political consequences by choosing not to engage in the commercial activity. Choice plays a crucial role in the Court's Tenth Amendment jurisprudence.³¹⁸

Failing to recognize the critical distinction between encouragement and coercion would "plunge the law into endless difficulties . . ." by accepting the fallacy that choice is impossible.³¹⁹ Congress cannot force the states to enact or administer federal regulatory programs because the "touchstone of this impermissible coercion is whether the States are precluded from rejecting the role envisioned for them by the federal government."³²⁰ The ability to choose not to follow a federal regulatory program that calls for the states to enact or administer such a program is a critical choice the states must be given under the Tenth Amendment.³²¹ Although the federal government must give the states a choice as to whether or not to engage in uniquely sovereign activities, the choice imposed by the federal government can be an extremely difficult one.³²²

The *Reno* Court, therefore, should have focused on the fact that the DPPA does not impermissibly coerce the states by forcing them to

authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

317. See *supra* note 312 and accompanying text.

318. It is settled that "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

319. *Id.* at 590.

320. *Koog v. United States*, 79 F.3d 452, 457 (5th Cir. 1996).

321. See *id.*; see also *New York*, 505 U.S. at 177 (stating that legislation that commandeers the state legislature fails to give the states a critical alternative—the choice not to engage in the sovereign activity of administering a regulatory program against third parties); *Acorn v. Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996) (holding that the challenged legislation violates the Tenth Amendment because the states were deprived of the choice to refrain from enacting or administering the federal regulatory program); *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980) (holding that legislation is not invalid under the Tenth Amendment if "it leaves the states free to make choices which are essential to their functions as states").

322. See *Federal Energy Regulatory Comm'n v. Mississippi* ("FERC"), 456 U.S. 742, 766 (1982); see also *Koog*, 79 F.3d at 459-60 (holding that if "the State has no walk-away opportunity, however costly or difficult, the States are victims of impermissible federal coercion"); cf. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (upholding the constitutionality of legislation under the "traditional governmental functions test" on the grounds that it did not compel the states to do anything at all because they had a choice to not do what the federal government requested).

administer a federal regulatory program because the states can choose not to sell and disseminate drivers' personal information.³²³ By failing to recognize the crucial role choice plays in determining whether legislation violates the substantive Tenth Amendment restrictions enunciated in *New York* and *Printz*, the *Reno* Court missed an opportunity to reconcile these cases with the Court's Spending Clause jurisprudence.³²⁴ Also, the Court should have noted that states are not given a true choice if they must either enact or administer a federal regulatory program or not engage in sovereign activities because this would cross the line between inducement and impermissible coercion.³²⁵

General applicability is merely an indicator of constitutionality under the Tenth Amendment, because not every statute targeting the states as states impermissibly coerces the states by forcing them to engage in "uniquely sovereign activities." Generally applicable legislation, for example the legislation challenged in *Garcia* and *Baker*, does not impermissibly coerce the states because of the nature of the underlying activity being regulated.³²⁶ Legislation that is not generally applicable, however, may impermissibly force the states to engage in the most basic of sovereign activities, such as legislating and enforcing laws against third parties. Such a result can never occur when the law is generally applicable, but will also not necessarily occur when the law is directed at the states as states, depending on the nature of the activity being regulated.³²⁷

The Supreme Court's opinion in *Reno* missed an opportunity to embrace this conceptualization of past precedent. The Court failed to hold that the principles of federalism enunciated in *Garcia* prevent Congress, acting pursuant to the Commerce Clause, from forcing the states as states to engage in "uniquely sovereign activities." Otherwise, such commandeering would lead to diminished political

323. See *Oklahoma ex rel. Oklahoma Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) ("If states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public."), *cert. denied*, 120 S. Ct. 930 (2000); see also Hartzell-Jordan, *supra* note 8, at 248-50 (noting that the DPPA and the legislation challenged in *Baker* is distinguishable from the legislation invalidated in *New York* and *Printz* because the states had a choice in the former case to avoid complying with the regulations); Recent Cases, *supra* note 56, at 1102 (stating that the "anti-commandeering standard is inextricably linked to a state's ability to decline the imposed regulation").

324. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987); see also *Oklahoma v. Harris*, 480 F. Supp. 581, 587 (D.D.C. 1979) ("The Tenth Amendment has been consistently construed so as to support the grant and use of federal funds conditioned upon a state's compliance with federal requirements, as long as the state may also choose not to comply.").

325. Cf. *New York*, 505 U.S. at 175 (holding that by giving the state two unconstitutional choices, Congress crosses "the line distinguishing encouragement from coercion").

326. See *supra* notes 120-57 and accompanying text.

327. See *supra* text accompanying note 44.

accountability, which is a defect in the national political process.³²⁸ Examples of this impermissible type of legislation include statutes that force the state legislature to enact laws,³²⁹ force state executive officials to enforce regulations,³³⁰ and determine the qualifications of high-level state governmental officials such as judges.³³¹

The *Reno* Court correctly reversed the Fourth Circuit's decision because the DPPA does not violate the substantive Tenth Amendment restrictions imposed on Congress's exercise of its Commerce Clause powers. The Court, however, should have clarified its Tenth Amendment jurisprudence by holding that *New York* and *Printz* are not a distinct line of Tenth Amendment jurisprudence; rather, they are cases following the *Garcia* line that impose substantive Tenth Amendment limitations in order to prevent a defect in the national political process—diminished political accountability.³³² The Court should have further clarified that the substantive Tenth Amendment protections under *Garcia* are triggered when federal legislation diminishes political accountability by forcing the States to engage in “uniquely sovereign activities.”³³³

The DPPA directly regulates a commercial activity that the states as states engage in: the sale and dissemination of personal information.³³⁴ The Court should have upheld the constitutionality of the DPPA based on this fact alone, because the underlying activity being regulated is commercial, not uniquely sovereign.³³⁵ Furthermore, the DPPA does not force the states to administer a federal regulatory program because states have the choice of avoiding federal regulation by choosing not to engage in the commercial sale and dissemination of drivers' personal information.³³⁶ Because state officials chose to continue engaging in this activity with the knowledge that federal regulations attach, political accountability is not diminished even if citizens think that the state passed the law. This is so because state officials make an informed choice to engage in the regulated activity

328. See *supra* notes 311-15 and accompanying text.

329. See *New York*, 505 U.S. at 174-77.

330. See *Printz v. United States*, 521 U.S. 898, 922-23 (1997).

331. See *Gregory v. Ashcroft*, 501 U.S. 452, 463-64 (1991). Although the *Gregory* Court did not hold that the principles of federalism invalidated Congressional Commerce Clause legislation that determined the qualifications of high-ranking government officials, the Court intimated that it would do so. See *supra* note 180. Because of situations such as these, where Congress could force states to engage in uniquely sovereign activities that do not involve regulating citizens, the market participant versus citizen regulator distinction apparently adopted by the Seventh Circuit is too narrow to protect states because it would not prohibit all federal laws that force states to engage in uniquely sovereign activities. See *Travis v. Reno*, 163 F.3d 1000, 1003-05 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000).

332. See *supra* text accompanying notes 313-15.

333. See *supra* notes 315-18 and accompanying text.

334. See 18 U.S.C. §§ 2721-25 (1994 & Supp. III 1997).

335. See *supra* notes 315-18 and accompanying text.

336. See *supra* notes 319-25 and accompanying text.

that may result in the state being blamed for a federal program, and therefore, they make a calculated decision to risk such confusion. For these reasons, the *Reno* Court should have held that the DPPA does not violate the principles of federalism enunciated in *Garcia* because it does not force the states to engage in any activity, let alone “uniquely sovereign activities,” and therefore does not cause an extraordinary defect in the national political process by diminishing political accountability.

CONCLUSION

In *Reno v. Condon*, the Supreme Court held that the enactment of the DPPA was an exercise of Congress’s Commerce Clause powers that did not violate the Tenth Amendment. The unanimous Court correctly recognized that the DPPA does not violate the principles of federalism, but did not provide a cogent rationale for the decision. The Court should have recognized the importance of the nature of the underlying state activity being regulated, noted the crucial role of state choice, and clarified the relationship between *Garcia*, *Baker*, *New York*, *Printz*, and *Reno*. The Court, however, avoided having to reconcile these recent Supreme Court cases by stretching the definition of general applicability to encompass the DPPA. By doing so, the Court missed an opportunity to stabilize its Tenth Amendment jurisprudence.

Notes & Observations