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NOTE

Condon v. Reno and the Driver's Privacy Protection Act: Was Garcia a Bump in the Road to States' Rights?

Between 1987 and 1989, Robert John Bardo, a resident of Tucson, Arizona, became increasingly obsessed with Rebecca Schaeffer, an up-and-coming actress living in Hollywood, California.¹ Pretending to be an old friend who wanted to send her a gift, Bardo hired a private detective agency to find Schaeffer's address.² The agency had a California contact who was able to obtain the information from the California Department of Motor Vehicles; at the time, state law permitted the public to access the records of some nineteen million drivers.³ Rather than send Ms. Schaeffer a present, on July 18, 1989, Bardo went to her apartment, where he shot and killed the twenty-one-year-old actress.⁴ The murder proved to be not only shocking and saddening, but galvanizing as well.⁵ Based in large

1. See Darrell Dawsey & Paul Feldman, *Police Directed to Evidence in Actress's Death*, L.A. TIMES, July 21, 1989, pt. II, at 1; Eric Malnic, *Man Who Killed TV Actress Gets Life Without Parole*, L.A. TIMES, Dec. 21, 1991, at B3. Rebecca Schaeffer played a character on the television sitcom *My Sister Sam* and appeared in the movie *Scenes from the Class Struggle in Beverly Hills*. See Darrell Dawsey & Eric Malnic, *Actress Rebecca Schaeffer Fatally Shot at Apartment*, L.A. TIMES, July 19, 1989, pt. I, at 1; see also 144 CONG. REC. S5462 (daily ed. May 22, 1998) (Sup. Docs. No. 1.1/A:144/67) (statement of Sen. Hatch) (describing Rebecca Schaeffer as a "rising television star"); 139 CONG. REC. 29,470 (1993) (Sup. Docs. No. x1.1:103/1-139/PT.20) (statement of Sen. Harkin) (describing Rebecca Schaeffer as "a promising young actress").

2. See Robert Welkos, *Public Records Led Suspect to Actress-Victim*, L.A. TIMES, July 22, 1989, pt. I, at 1.

3. See *id.* After Ms. Schaeffer's murder, California enacted legislation to restrict the Department of Motor Vehicle's dissemination of personal information contained in its records. See CAL. VEH. CODE §§ 1808.21-.23 (West Supp. 1999); Bill Loving, *DMV Secrecy: Stalking and Suppression of Speech Rights*, 4 COMMLAW CONSPECTUS 203, 203 (1996). California also enacted anti-stalking legislation. See CAL. PENAL CODE § 646.9 (West 1999); see also 138 CONG. REC. 24,813 (1992) (Sup. Docs. No. 1.1:102/2-138/PT.17) (statement of Sen. Cohen) ("The Nation's first antistalking law was enacted in California in 1990 after actress Rebecca Schaeffer was shot by a deranged fan.").

4. See Malnic, *supra* note 1, at B3. See generally Dawsey & Malnic, *supra* note 1, at 1 (describing the shooting death of Rebecca Schaeffer). Bardo was tried and convicted for the murder. See Malnic, *supra* note 1, at B3.

5. See 140 CONG. REC. H2526 (daily ed. Apr. 20, 1994) (Sup. Docs. No. 1.1/A:140/44) (statement of Rep. Goss) (noting that the Driver's Privacy Protection Act (DPPA or "the Act") "responds to the senseless murder of Rebecca Schaeffer"); Thomas H. Odum & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the*

part on this incident, Congress enacted the Driver's Privacy Protection Act of 1994 (DPPA or "the Act"),⁶ which addresses the public's access to motor vehicle records containing personal information.⁷

The DPPA prohibits the release of particular personal information⁸ by "a State Department of Motor Vehicles, and any officer, employee, or contractor[] thereof,"⁹ subject to extensive enumerated exceptions.¹⁰ The Act allows state departments of motor vehicles (DMVs) to opt out of the restrictions, provided that the departments give clear and conspicuous notice to operators, licensees, and registrants that a simple signature will block the DMV from making disclosures.¹¹ Additionally, the Act constrains the release of personal information and criminalizes the acquisition of such data

Tenth Amendment, 53 U. MIAMI L. REV. 71, 88 (1998) ("Congress enacted the DPPA primarily as an anti-stalking measure after the highly-publicized stalking death of actress Rebecca Schaeffer . . .").

6. Pub. L. No. 103-322, §§ 300001-300003, 108 Stat. 1796, 2099-2102 (codified as amended at 18 U.S.C. §§ 2721-2725 (1994 & Supp. II 1996)); *see also* Department of Transportation and Related Agencies Appropriations Act of 2000, Pub. L. No. 106-69, § 350(c), (d), 113 Stat. 986 (1999) (amending the DPPA).

7. *See* Condon v. Reno, 972 F. Supp. 977, 979 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999); *see also* 138 CONG. REC. 7105 (1992) (Sup. Docs. No. 1.1:102/2-138/PT.5) (statement of Rep. Moran) (referencing Schaeffer's murder in introducing the legislation that would become the DPPA); Joshua B. Sessler, Note, *Computer Cookie Control: Transaction Generated Information and Privacy Regulation on the Internet*, 5 J.L. & POL'Y 627, 654 (1997) (noting that the DPPA "was a response by Congress to the stalking and murder of an actress whose personal information was revealed via motor-vehicle records").

8. The DPPA specifically covers "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but . . . not . . . information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

9. *Id.* § 2721(a).

10. *See id.* § 2721(b). The Act mandates the disclosure of information for certain law enforcement activity, *see id.*, and permits disclosure for, among other things, government agency functions, market research, employee data verification, court proceedings, statistical analysis, insurance investigation, and notice of towings. *See id.* § 2721(b)(1)-(14); *see also id.* § 2721(d) (permitting state departments of motor vehicles (DMVs) to establish waiver procedures).

11. *See id.* § 2721(b)(11). In October 1999, Congress restructured the opt-out provision to be an opt-in provision. *See* Department of Transportation and Related Agencies Appropriations Act of 2000, § 350(e), 113 Stat. 986. The change is effective June 1, 2000, for most states and within three months of the Supreme Court's "final decision" in *Condon* for Oklahoma, South Carolina, and Wisconsin. *See id.* § 350(g)(2); *see also* Supplemental Brief for the Petitioners at *4-*5, *Condon v. Reno*, 1999 WL 962065 (No. 98-1464) (noting that after the amendment takes effect, "individuals must affirmatively permit disclosure of information about them").

“for any use not permitted” by the DPPA.¹²

Despite the noble goals of the statute,¹³ states have resisted complying with the DPPA, and private parties have joined the states in challenging the constitutionality of the legislation.¹⁴ Indeed, four circuit courts of appeals¹⁵ already had rendered decisions on the constitutionality of the DPPA when the United States Supreme Court granted the petition for certiorari in *Condon v. Reno*.¹⁶ In *Condon*, the Fourth Circuit Court of Appeals held that the DPPA violates the Tenth Amendment.¹⁷ By granting certiorari, the Supreme Court has set the stage not only for a final ruling on the constitutionality of the

12. 18 U.S.C. § 2722. The penalty for a violation of the DPPA by a person—defined as “an individual, organization or entity, but . . . not includ[ing] a State or agency thereof,” *id.* § 2725(2)—is a fine. *See id.* § 2723(a). In addition, a violation of the Act by a DMV subjects the department to “a civil penalty imposed by the Attorney General [of the United States] of not more than \$5,000 a day,” provided the department is shown to have “a policy or practice of substantial noncompliance with” the Act. *Id.* § 2723(b).

13. Representative Moran, sponsor of the DPPA, introduced the legislation specifically to “close a dangerous loophole in current law and protect the privacy of individuals.” 138 CONG. REC. H1785 (daily ed. Mar. 26, 1992) (Sup. Docs. No. 102/1:138/44) (statement of Rep. Moran). Nevertheless, the district court in *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818), observed that “it is doubtful whether the [Driver’s Privacy Protection Act] will safeguard anyone’s privacy. The [A]ct is riddled with exceptions that any determined, resourceful person could exploit, particularly since there are no standards for verifying the truth or accuracy of claims made by individuals requesting information.” *Id.* at 925. Commentators have also noted the general weakness of the DPPA. *See, e.g.*, 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) (“Given the variety of public- and private-sector sources for similar information, the efficacy of such legislation [as the DPPA] in actually stopping a determined stalker is questionable.”); George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 874 (1997) (discussing the weakness of the DPPA in protecting people from stalkers).

Interestingly, in the wake of Rebecca Schaeffer’s murder, *see supra* notes 1–5 and accompanying text, public outrage was directed not so much at the open records policy of the California DMV as at “[t]he presence of cheap, easily obtainable, easily concealable handguns,” *Something Can Be Done*, L.A. TIMES, July 23, 1989, pt. V, at 4, and “‘the system that allows things like this to happen, that allows a deranged person to get his hands on a deadly weapon.’” *Id.* (quoting Danna Schaeffer, Rebecca Schaeffer’s mother).

14. *See* Odom & Feder, *supra* note 5, at 73 nn.3–5.

15. *See* Pryor v. Reno, 171 F.3d 1281, 1288 (11th Cir. 1999) (enjoining enforcement of the DPPA), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. Jul. 6, 1999) (No. 99-61); *Travis*, 163 F.3d at 1001–02 (upholding the validity of the DPPA); *Oklahoma ex rel. Okla. Dep’t of Pub. Safety v. United States*, 161 F.3d 1266, 1272–73 (10th Cir. 1998) (upholding the validity of the DPPA), *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. May 3, 1999) (No. 98-1760); *Condon*, 155 F.3d at 456 (affirming the district court’s judgment enjoining enforcement of the DPPA).

16. 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

17. *See id.* at 456.

DPPA, but also for further development of its federalism jurisprudence.¹⁸

This Note first examines the Fourth Circuit's opinion in *Condon v. Reno*.¹⁹ The Note then traces Tenth Amendment and Commerce Clause jurisprudence through the late twentieth century,²⁰ emphasizing the development of two lines of cases: those involving generally applicable statutes²¹ and those involving "commandeering" statutes.²² Next, the Note examines the rationale of the *Condon* decision and suggests that the Fourth Circuit misinterpreted and misapplied the relevant law.²³ Finally, the Note discusses the impact that *Condon* may have on the Court's approach to federalism generally.²⁴

In *Condon v. Reno*,²⁵ the State of South Carolina sued the United States²⁶ in federal district court, alleging that the DPPA unconstitutionally encroached on state sovereignty.²⁷ South Carolina sought to enjoin permanently the Federal Government from enforcing the Act,²⁸ which threatened to displace the state's own legislation concerning DMV records.²⁹ The United States defended the constitutionality of the DPPA on the grounds that the enactment was within Congress's powers under the Commerce Clause³⁰ and the Enforcement Clause.³¹ The district court, however, agreed with

18. See generally Odom & Feder, *supra* note 5, at 152-67 (discussing the possible impact that a Supreme Court decision on the DPPA would have on federalism jurisprudence).

19. See *infra* notes 25-83 and accompanying text.

20. See *infra* notes 84-220 and accompanying text.

21. See *infra* notes 105-41 and accompanying text.

22. See *infra* notes 142-75 and accompanying text.

23. See *infra* notes 221-74 and accompanying text.

24. See *infra* notes 275-300 and accompanying text.

25. 972 F. Supp. 977 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

26. The parties named in the case were Charlie Condon, Attorney General of South Carolina, and Janet Reno, Attorney General of the United States.

27. See *Condon*, 972 F. Supp. at 979.

28. See *id.*

29. See *id.* at 980-81; see also S.C. CODE ANN. §§ 56-3-510 to -540 (West Supp. 1998) (describing permissible reasons and procedures for release of personal information by state DMVs).

30. See *Condon*, 972 F. Supp. at 982. The Commerce Clause declares that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3. For a brief history of the commerce power, see *United States v. Lopez*, 514 U.S. 549, 552-61 (1995), Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 527-30 (1997), and Matthew L. Pirmot, Note, *United States v. Wilson: Did Interstate General Substantially Affect Interstate Commerce?*, 77 N.C. L. REV. 361, 376-80 (1998).

31. See *Condon*, 972 F. Supp. at 986. The Enforcement Clause provides Congress

South Carolina that the federal statute violated the Tenth Amendment³² and granted the injunction.³³ The Federal Government appealed to the United States Court of Appeals for the Fourth

with the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Relying on *City of Boerne v. Flores*, 521 U.S. 507 (1997), the court of appeals rejected the Enforcement Clause argument. See *Condon*, 155 F.3d at 463. Because the Enforcement Clause of the Fourteenth Amendment functions as a remedial power only, the court examined the DPPA for evidence that it enforced a right protected by that Amendment. See *id.* at 464. In light of the availability of personal information in other public records and the lack of "a reasonable expectation of privacy" in the type of information contained in DMV records, the court held that the Constitution does not protect any purported right to privacy in such information. *Id.* at 465. Accordingly, the Enforcement Clause could not salvage the DPPA because the Act did not offend a right protected under the Fourteenth Amendment. See *id.* See generally Odom & Feder, *supra* note 5, at 123-32 (discussing the unconstitutionality of the DPPA under the Fourteenth Amendment).

32. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. South Carolina also alleged an Eleventh Amendment violation, but because the court grounded its decision in the Tenth Amendment, it declined to address the Eleventh Amendment challenge. See *Condon*, 972 F. Supp. at 979 n.3. See generally Odom & Feder, *supra* note 5, at 134-36 (suggesting that the DPPA may be invalid under the Eleventh Amendment). Additionally, several media-related intervenors challenged the DPPA on First Amendment grounds, but the district court likewise refrained from considering that issue. See *Condon*, 972 F. Supp. at 979 n.3; cf. *Loving v. United States*, 125 F.3d 862 (10th Cir. 1997) (table decision), available at No. 97-6060, 1997 WL 572147 (10th Cir. Sept. 8, 1997) (dismissing First Amendment challenge to DPPA for lack of ripeness). See generally Odom & Feder, *supra* note 5, at 134-36 (discussing the unconstitutionality of the DPPA under the First Amendment).

After the Court granted certiorari, Congress tied the DPPA to an appropriations act, see Department of Transportation and Related Agencies Appropriations Act of 2000, Pub. L. No. 106-69, § 350(a), (b), (e), 113 Stat. 986 (1999), in an apparent attempt to cast a safety net for the statute using its Spending Power, see U.S. CONST. art. I, § 8, cl. 1. See Supplemental Brief for the Petitioners at *3, 1999 WL 962065, *Reno v. Condon*, (No. 98-1464) ("One evident purpose of Section 350(a) [of the Appropriations Act] is to tie the DPPA's substantive restrictions on disclosure of personal information in state DMV records to a State's receipt of federal transportation funds."). But see Supplemental Brief for Respondents at *1, 1999 WL 975734, *Reno v. Condon*, (No. 98-1464) ("The [Appropriations] Act gilds the DPPA with only the thinnest veneer of constitutional legitimacy, a veneer which will not likely withstand even mild scrutiny by the courts below.") In light of the Appropriations Act provision mandating that "the Secretary shall not withhold funds provided in this Act for any grantee if a State is in noncompliance with this provision," § 350(f), the Spending Clause argument, at first blush, seems less than compelling. Although the Appropriations Act includes sunset provisions that allow Congress to untie the DPPA from the Spending Clause if it fails to reenact the new provisions, the parties to the *Condon* case agreed in supplemental briefs to the Supreme Court that the legislation changed the nature of the litigation. See Supp. Brief for the Petitioners at *7; Supp. Brief for Respondents at *2. While neither party thought that the issues in the case were moot, they both suggested that the Court remand the case so that all constitutional issues could be determined at once. See Supp. Brief for the Petitioners at *9; Supp. Brief for Respondents at *1-3.

33. See *Condon*, 972 F. Supp. at 979.

Circuit, which affirmed the district court's disposition of the case in a split decision.³⁴ Because the DPPA regulates the states without simultaneously regulating the private sector and thus requires the states to administer a federal regulatory scheme, the Fourth Circuit held that the Act impermissibly crossed the line dividing federal from state government.³⁵

Judge Williams, writing for the *Condon* majority, began the opinion by recounting the major features of the driver-protection legislation.³⁶ The court then described the procedural posture of the case, asserted its authority to review questions of statutory constitutionality de novo,³⁷ and defined the issue before it as "whether the DPPA violates the Tenth Amendment."³⁸ As an initial point of reference, the court observed that Congress's power under the Commerce Clause ends where the Tenth Amendment begins.³⁹ In an effort to reconcile the inherent tension created by the allocation of authority between the federal and state governments, the court set aside the question of "whether the DPPA regulates commerce" in order to focus on whether the Act "is consistent with the system of dual sovereignty established by the Constitution."⁴⁰ The court then

34. Judges Hamilton and Williams comprised the majority, while Senior Judge Phillips dissented. See *Condon*, 155 F.3d at 455.

35. See *id.*

36. See *id.* at 456-57; see also 18 U.S.C. §§ 2721-2725 (1994 & Supp. II 1996) (setting forth the text of the DPPA).

37. See *Condon*, 155 F.3d at 458 (citing *Plyler v. Moore*, 129 F.3d 728, 734 (4th Cir. 1997)). The rationale for de novo review in cases challenging the validity of federal legislation derives from the presumption of constitutionality given to acts of Congress. See *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1882) ("Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established . . .").

38. *Condon*, 155 F.3d at 457. See generally *supra* notes 31-32 (discussing other grounds for the challenge).

39. See *Condon*, 155 F.3d at 458. The exact locus of the line demarcating the Tenth Amendment from the commerce power has varied over time. See *EEOC v. Wyoming*, 460 U.S. 226, 246-47 (1983) (Stevens, J., concurring) (comparing cases embodying a "miserly construction" of the commerce power vis-à-vis the Tenth Amendment to cases applying a broad reading of that power).

40. *Condon*, 155 F.3d at 458. The district court likewise did not examine whether the DPPA regulated interstate commerce. See *id.* at 466 n.2 (Phillips, J., dissenting); cf. *Pryor v. Reno*, 998 F. Supp. 1317, 1325-26 (M.D. Ala. 1998), *rev'd*, 171 F.3d 1281 (11th Cir. 1999) (discussing how the DPPA regulates interstate commerce and listing the circumstances under which drivers' personal information may be disseminated), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. Jul. 6, 1999) (No. 99-61); 139 CONG. REC. S15763 (daily ed. Nov. 16, 1993) (Sup. Docs. No. 1.1A:103/1:139/159) (statement of Sen. Boxer) (discussing the interstate commerce basis of the DPPA). But see *Odom & Feder, supra* note 5, at 136-38 (suggesting that the DPPA "may well exceed the commerce power delegated to Congress").

briefly reviewed the two lines of cases that, according to the Fourth Circuit, comprise the analytical framework for evaluating congressional action under the Commerce Clause and the Tenth Amendment.⁴¹ The validity of statutes governing states and private entities engaged in similar commercial activity is determined by their fidelity to the principles set forth in *Garcia v. San Antonio Metropolitan Transit Authority*⁴² and its progeny.⁴³ By comparison, the validity of statutes that govern only states is determined by their adherence to the anti-commandeering principles laid down in the *New York v. United States*⁴⁴ and *Printz v. United States*⁴⁵ line of cases.⁴⁶ Because the DPPA applies only to states and not to private parties, the court concluded that the statute fell outside the *Garcia* line of cases.⁴⁷ Analytically, then, the court had to consider whether the DPPA violates the latter line of cases—the “commandeering” line—which defines the outer boundaries of permissible congressional action.⁴⁸

The first set of cases discussed in the opinion was the “generally applicable” line, the flagship of which is *Garcia v. San Antonio Metropolitan Transit Authority*.⁴⁹ This line of cases stands for the proposition that the Constitution permits Congress to regulate state action directly, provided that the federal legislation is generally applicable to both private and public entities.⁵⁰ The court observed, however, that this set of cases “has not been a model of consistency.”⁵¹ Notwithstanding the inconsistency in this line of cases,

41. See *Condon*, 155 F.3d at 458–60; see also *New York v. United States*, 505 U.S. 144, 160–61 (1992) (observing that one line of Tenth Amendment cases involves “generally applicable laws” while the other “concerns the circumstances under which Congress may use the States as implements of regulation”).

42. 469 U.S. 528 (1985).

43. See *Condon*, 155 F.3d at 458.

44. 505 U.S. at 144; see also *infra* notes 142–55 and accompanying text (discussing *New York*).

45. 521 U.S. 898 (1997); see also *infra* notes 156–75 (discussing *Printz*).

46. See *Condon*, 155 F.3d at 458.

47. See *id.* at 461–62.

48. See *id.* at 460.

49. 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976); see *infra* notes 105–26 and accompanying text (discussing *Garcia*). Generally applicable legislation applies equally to both private and public actors. See *Condon*, 155 F.3d at 461. See generally BLACK’S LAW DICTIONARY 684 (6th ed. 1990) (defining “general law” as applying equally to all groups).

50. See *Condon*, 155 F.3d at 459; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2207 & n.122 (1998).

51. *Condon*, 155 F.3d at 458–59. The Supreme Court has vacillated in this area over the past three decades. Compare *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968) (upholding application of the Fair Labor Standards Act (FLSA) to public employees), *overruled by*

the majority in *Condon* found the current state of the law to be clear: “[U]nder *Garcia* and its progeny, Congress may . . . subject the States to legislation that is also applicable to private parties.”⁵²

The court thoroughly discussed and rejected the idea that a *Garcia* analysis applied to the DPPA.⁵³ Rather, the majority concluded that because the Act applied *only* to state departments of motor vehicles—and no private party has such a state department—the challenged legislation was not a law of general applicability.⁵⁴ Consequently, the court deemed an analysis under *Garcia* and its progeny inappropriate.⁵⁵

After rejecting an analysis under *Garcia*, the court analyzed the statute under the second line of Tenth Amendment-Commerce Clause cases, the “commandeering” line.⁵⁶ The court focused on the most recent cases in this line, *New York v. United States*⁵⁷ and *Printz v. United States*.⁵⁸ This area of constitutional law involves attempts by

National League of Cities, 426 U.S. at 833, and *Garcia*, 469 U.S. at 556 (upholding application of the FLSA to public employees), with *National League of Cities*, 426 U.S. at 845 (striking down application of the FLSA to public employees), overruled by *Garcia*, 469 U.S. at 531.

52. *Condon*, 155 F.3d at 459 (citing *Garcia*, 469 U.S. at 547–56); see also *infra* notes 105–26 and accompanying text (discussing *Garcia*).

53. See *Condon*, 155 F.3d at 461–63. But see *Travis v. Reno*, 163 F.3d 1000, 1003–06 (7th Cir. 1998) (discussing why *Garcia* does apply to the DPPA). See generally *infra* notes 105–26 and accompanying text (discussing *Garcia*).

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

55. See *id.* at 461–62. In support of its interpretation of the Act as one not subject to the reasoning of the “generally applicable” line of cases, the court of appeals cited two district court cases challenging the constitutionality of the DPPA, both of which have since been reversed. See *id.* (citing *Travis v. Reno*, 12 F. Supp. 2d 921, 929 (W.D. Wis. 1998), *rev’d*, 163 F.3d 1000 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818); *Oklahoma ex rel. Oklahoma Dep’t of Pub. Safety v. United States*, 994 F. Supp. 1358, 1362 (W.D. Okla. 1997), *rev’d*, 161 F.3d 1266 (10th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. May 3, 1999) (No. 98-1760)).

The federal government argued that because other federal legislation regulating private parties’ disclosure of personal data is on the books, see Video Privacy Protection Act, 18 U.S.C. § 2710 (1994); Cable Communications Policy Act, 47 U.S.C. § 551 (1994), these laws in the aggregate cloak the DPPA in the mantle of “general applicability.” See *Condon*, 155 F.3d at 462. The Fourth Circuit disagreed. See *id.* at 462–63. But see *Travis*, 163 F.3d at 1005 (“Statute books teem with laws regulating the disclosure of information from databases It is hard to name any substantial collection of information yet to be regulated.”). For a suggestion that the DPPA is generally applicable, see *infra* notes 242–50 and accompanying text.

56. See *Condon*, 155 F.3d at 460–63.

57. 505 U.S. 144 (1992); see also *infra* notes 142–55 and accompanying text (discussing *New York*).

58. 521 U.S. 898 (1997); see also *infra* notes 156–75 and accompanying text (discussing *Printz*).

Congress to use states to implement regulatory programs.⁵⁹ The consonance of the opinions under this prong of the law comprises the principle that the *Condon* majority presented as a straightforward aphorism: The federal government “‘may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.’”⁶⁰ The *Condon* court ultimately agreed with both the district court and the State of South Carolina that the DPPA implicated this latter line of Commerce Clause cases.⁶¹

The court compared the DPPA to the statutory provisions struck down in *New York* and *Printz* and recognized that the DPPA neither compelled states to legislate on the subject of disclosing motor vehicle record data,⁶² nor conscripted state officials to enforce its terms.⁶³ Because the DPPA charges state officers with *administration* of the Act, however, the court held that the DPPA exemplifies excessive congressional lawmaking as defined by *New York* and *Printz*.⁶⁴ The Act limits the disclosure of information by the state, individuals, and organizations as well as the access to that information by individuals and organizations.⁶⁵ The district court characterized these limitations as “clearly” regulating the behavior of state employees whose task it is to disseminate or withhold the personal data and of the state citizens seeking such information.⁶⁶ The court of appeals agreed with the district court’s finding that “Congress passed the DPPA

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

60. *Id.* at 460 (quoting *Printz*, 521 U.S. at 935).

61. See *id.* (noting that “state officials must, as the district court found, administer the DPPA”); see also *Condon v. Reno*, 972 F. Supp. 977, 985–86 (D.S.C. 1997) (holding that the DPPA was not a generally applicable statute, but rather one that required states to control citizens’ conduct in relation to motor vehicle records, and enjoining the enforcement of the DPPA in South Carolina).

62. See *Condon*, 155 F.3d at 460; see also *Pryor v. Reno*, 998 F. Supp. 1317, 1326–31 (M.D. Ala. 1998), *rev’d*, 171 F.3d 1281 (11th Cir. 1999) (comparing and contrasting the DPPA with the legislation at issue in *New York* and *Printz*), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. Jul. 6, 1999) (No. 99-61); cf. Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C) (1994) (take title provision); *New York*, 505 U.S. at 174–77 (holding the take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional).

63. See *Condon*, 155 F.3d at 460; cf. Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2) (1994) (background check provision); *Printz*, 521 U.S. at 918 (stating that “the precise issue before us here . . . is the forced participation of the States’ executive in the actual administration of a federal program”).

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

65. See 18 U.S.C. §§ 2721–2722 (1994 & Supp. II 1996).

66. See *Condon*, 972 F. Supp. at 985.

specifically to regulate the States' control of their property (i.e., the motor vehicle records) and to require the States in turn to regulate their citizens' access to and use of these records."⁶⁷ After noting that it is "perfectly clear" that Congress lacks the authority to charge state officials with the responsibility of administering federal legislation, the court held that the DPPA is unconstitutional.⁶⁸

Senior Circuit Judge Phillips dissented on the grounds that Congress enacted the DPPA in accordance with both its Commerce Clause power and the "structural limitations" that the Constitution imposes on that power.⁶⁹ In disagreeing with the majority's analysis of the Supreme Court's Tenth Amendment jurisprudence,⁷⁰ the dissent narrowly construed the scope of *New York* and *Printz* while simultaneously broadening the reach of *Garcia* and its progeny.⁷¹ As Judge Williams had done in the majority opinion, Judge Phillips distinguished the DPPA from the federal statutes at issue in *New York* and *Printz*.⁷² However, while the majority determined that the DPPA offends the principle that prohibits Congress from conscripting state officials,⁷³ the *Condon* dissent relied on the proposition set forth in *South Carolina v. Baker*:⁷⁴ it is permissible for federal legislation to cause a "[s]tate wishing to engage in certain activity [to] take administrative and sometimes legislative action to comply with federal standards regulating that activity."⁷⁵ The dissent argued that because the DPPA regulates the states directly, rather than as intermediaries between the federal government and private citizens,⁷⁶ *Condon* fit the *Baker* mold.⁷⁷

67. *Id.* at 985–86; see also *Condon*, 155 F.3d at 460 (agreeing with the district court).

68. *Condon*, 155 F.3d at 460 (citing *Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. 144, 176 (1992)).

69. *Id.* at 465 & n.1 (Phillips, J., dissenting).

70. See *id.* at 465 (Phillips, J., dissenting). The dissent rejected the majority's analysis on the basis that it "[p]igeonhol[ed] the Act into one of two narrow legal constructs that it apparently believes exclusively define the Tenth Amendment's constraints on federal power." *Id.* (Phillips, J., dissenting).

71. See *id.* at 466–69 (Phillips, J., dissenting); see also *infra* notes 225–30, 279 and accompanying text (suggesting that *Garcia* deserves a broad reading).

72. See *Condon*, 155 F.3d at 468 (Phillips, J., dissenting). The dissent viewed *New York* and *Printz* as *sui generis*. See *id.* at 468 (Phillips, J., dissenting) (referring to the "unique question" presented by those cases).

73. See *id.* at 460.

74. 485 U.S. 505 (1988); see also *infra* notes 128–41 and accompanying text (discussing *Baker*).

75. *Condon*, 155 F.3d at 467 (Phillips, J., dissenting) (quoting *Baker*, 485 U.S. at 514–15).

76. See *id.* at 466–67 (Phillips, J., dissenting).

77. See *id.* at 468 (Phillips, J., dissenting); see also *Pryor v. Reno*, 998 F. Supp. 1317, 1329 (M.D. Ala. 1998) (applying *Baker*), *rev'd*, 171 F.3d 1281 (11th Cir. 1999), *petition for*

The dissent next addressed the majority's classification of *Baker* as a "generally applicable" case.⁷⁸ Although the dissent conceded that *Baker* involved a statute that resembles one of general applicability, Judge Phillips's interpretation of that case, and of *Garcia*, attempted to go beyond mere labeling and examined the doctrinal underpinnings of those decisions.⁷⁹ Judge Phillips first observed that the tax clause under consideration in *Baker* applies solely to public bonds issued by state and local government. Therefore, the tax clause was not generally applicable in the same sense as the statutes in *Garcia* and subsequent cases.⁸⁰ Additionally, Judge Phillips posited that the "generally applicable" cases "never have intimated that only by such generally applicable legislation may Congress, consistent with the structural limitations of federalism, impose obligations on the states."⁸¹ Rather, reasoned the dissent, the validity of the statutes in the "generally applicable" line of cases emanated from their direct regulation of state conduct.⁸² Because "the DPPA does not require that states act at all," but instead applies only when the states make a decision to participate in the interstate market of personal information, the dissent argued that the Act does not offend the Tenth Amendment.⁸³

To forecast the impact of the Fourth Circuit's decision in *Condon* and to predict the Supreme Court's likely resolution of the matter on appeal, it is necessary to understand the jurisprudential origins of the case.⁸⁴ The contours of federalism established by the United States Constitution have been evolving for more than 200 years,⁸⁵ and the

cert. filed, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818); Recent Case, *Fourth Circuit Holds That Driver's Privacy Protection Act Violates Tenth Amendment*, 112 HARV. L. REV. 1100, 1103-04 (1999) (noting similarities between *Condon* and *Baker*).

78. *Condon*, 155 F.3d at 467-68 (Phillips, J., dissenting).

79. *See id.* (Phillips, J., dissenting).

80. *See id.* at 467 n.3 (Phillips, J., dissenting). *But see id.* at 461 n.5 (disagreeing with the dissent's characterization of the statute at issue in *Baker*).

81. *Id.* at 467-68 (Phillips, J., dissenting).

82. *Id.* at 468 (Phillips, J., dissenting). The statutes in *New York* and *Printz*, on the other hand, attempted to indirectly regulate private conduct by interposing the states as legislators and administrators. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 160 (1992); *Condon*, 155 F.3d at 468 (Phillips, J., dissenting).

83. *Condon*, 155 F.3d at 468 (Phillips, J., dissenting). The dissent further characterized the DPPA as pre-emptive legislation, consistent with statutes like the National Voter Registration Act, 42 U.S.C. § 1973gg (1994), and the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994). *See id.* at 469 (Phillips, J., dissenting).

84. *Cf. Printz*, 521 U.S. at 925 ("Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court.").

85. *See Printz*, 521 U.S. at 918-22; THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 45, at 292-93 (James

Court's decision concerning the constitutionality of the DPPA could be another important step that defines the balance of power between the states and federal government. The following discussion provides a brief overview of the late twentieth-century embodiment of that jurisprudence.⁸⁶

The fifteen-year period from 1968 to 1982 witnessed the Supreme Court's struggle with the proper balance between the federal government's power under the Commerce Clause and the states' sovereign power under the Tenth Amendment.⁸⁷ During that time, the analytical approach regarding congressional authority to control states through legislation remained result-oriented,⁸⁸ but the Court's emphasis shifted from a focus on the entities subjected to legislation to a focus on the activities governed by legislation.⁸⁹ Additionally, the "States as States" concept emerged during the same time period.⁹⁰ Under this construct, federal legislation

Madison) (Clinton Rossiter ed., 1961). The evolution of federalism began during the infancy of the United States, as the concept of federalism embodied in the federal constitution represented an intentional deviation from the Articles of Confederation, under which the federal government lacked the authority to regulate the states in any capacity. *See Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999); DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 243-44 (2d ed. 1991); *see also* EEOC v. Wyoming, 460 U.S. 226, 273 (1983) (Powell, J., dissenting) ("Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again.").

86. *See generally* Erwin Chemerinsky, *Theories of Federalism: Federalism Not as Limits But as Empowerment*, 45 KAN. L. REV. 1219, 1221-25 (1997) (tracing federalism in the twentieth century); Dave Frohnmayer, *A New Look at Federalism: The Theory and Implications of "Dual Sovereignty"*, 12 ENVTL. L. 903, 905-11 (1982) (tracing the historical development of federalism).

87. *See supra* note 51; *see also* Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 84-85 (1985) (noting that "[t]wice the Supreme Court has reversed itself on the question of whether state sovereignty restricts Congress in exercising its powers under the commerce clause [sic]").

88. *See* Alan R. Arkin, Comment, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TUL. L. REV. 1569, 1588 (1996).

89. *Compare* *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968) ("If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976), *with National League of Cities*, 426 U.S. at 852 ("We hold 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 by Art. I, § 8, cl. 3 [the Commerce Clause]."), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

90. *See National League of Cities*, 426 U.S. at 845; *see also infra* note 107 (discussing *National League of Cities*).

unconstitutionally invaded the province of the states if it (1) "regulate[d] the 'States as States,'"⁹¹ (2) "address[ed] matters that are indisputably '[attributes] of state sovereignty,'"⁹² (3) "directly impair[ed a state's] ability 'to structure integral operations in areas of traditional governmental functions,'"⁹³ and (4) failed to be of such overriding importance as to "justif[y] state submission."⁹⁴ The Court eventually declared this test unworkable and abandoned it in *Garcia v. San Antonio Metropolitan Transit Authority*.⁹⁵

Three years before the Court disposed of the "States as States" test, another important development in federalism emerged with the 1982 case of *Federal Energy Regulatory Commission v. Mississippi (FERC)*:⁹⁶ the Court pronounced that Congress has the power to try to "induce state action in areas that otherwise would be beyond Congress' regulatory authority."⁹⁷ The State of Mississippi challenged, on Commerce Clause and Tenth Amendment grounds, Titles I and III of the Public Utility Regulatory Policies Act of 1978 (PURPA).⁹⁸ Inter alia, PURPA instructs states and non-regulated utilities to "consider" implementing and adopting particular standards of regulation in the field of electric and gas utilities.⁹⁹ The Court described the Tenth Amendment issue as "somewhat novel"¹⁰⁰ because, rather than enacting a statute of general applicability, Congress "attempt[ed] to use state regulatory machinery to advance federal goals."¹⁰¹ The Court's analysis centered on the optional

91. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287 (1981) (quoting *National League of Cities*, 426 U.S. at 854).

92. *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 845 (second alteration in original)).

93. *Id.* (quoting *National League of Cities*, 426 U.S. at 852).

94. *Id.* at 288 n.29.

95. 469 U.S. 523, 546-47 (1985); see *infra* notes 105-26 (discussing *Garcia*); see also Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1625 (1994) (arguing that "interpersonal dynamics" within the Court played a part in the abandonment of *National League of Cities*).

96. 456 U.S. 742 (1982). Justice O'Connor wrote a dissent in which Chief Justice Burger and Justice Rehnquist joined. See *id.* at 775-97 (O'Connor, J., concurring in the judgment and dissenting in part). The theory of the dissent was that the challenged provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA) offended each prong of the *Hodel* test, see *supra* note 91-94 and accompanying text, except the fourth prong's balancing test. See *FERC*, 456 U.S. at 778-82, 781 n.8 (O'Connor, J., concurring in the judgment and dissenting in part).

97. *FERC*, 456 U.S. at 766.

98. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 15 U.S.C. §§ 3201-3211 (1994); 16 U.S.C. §§ 2611-2645 (1994)).

99. 16 U.S.C. § 2621(a); see *FERC*, 456 U.S. at 746.

100. *FERC*, 456 U.S. at 758.

101. *Id.* at 759.

nature of the PURPA provisions. These provisions allow states to administer regulations and rates unrelated to federal standards¹⁰² or to withdraw from the utility regulation field entirely.¹⁰³ The majority held that there is no Tenth Amendment violation when the federal government has the ability to totally pre-empt a field but instead permits the states to enter that field on the contingency that they legislate in harmony with federal standards.¹⁰⁴

The Court's approach to the Tenth Amendment's limitations on the federal commerce power changed dramatically in the mid-1980s. The vehicle for this change, *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰⁵ is the bulwark of generally applicable statutes under the Tenth Amendment and heralded a shift from a result-

102. See 15 U.S.C. § 3208; 16 U.S.C. § 2627(b); *FERC*, 456 U.S. at 749–50.

103. See *FERC*, 456 U.S. at 764.

104. See *id.* The Court likened the case to *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), which involved a suit to enjoin the enforcement of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (codified as amended at 30 U.S.C.A. §§ 1201–1328 (West 1986 & Supp. 1999)), on the grounds, inter alia, that it violated the Tenth Amendment. See *Hodel*, 452 U.S. at 268. The Act required states either to submit for approval by the Secretary of the Interior a permanent plan for regulating surface mining in conformity with standards established by the Act or to accept a scheme created and administered by the Secretary of the Interior. See 30 U.S.C.A. §§ 1253–1254 (West 1986); *Hodel*, 452 U.S. at 271–72. The Act imposed on the Secretary the duty to create and administer a plan for a state. See 30 U.S.C.A. §§ 1253–1254 (West 1986); *Hodel*, 452 U.S. at 271–72. Until the permanent plan was enacted, the Surface Mining Act provided interim regulations. See 30 U.S.C.A. § 1252 (West 1986).

In *Hodel*, the Court held that the Surface Mining Act did not violate the Tenth Amendment because the provisions at issue directly regulated only the conduct of private actors. See *Hodel*, 452 U.S. at 288. Not only was a state government under no compulsion to enforce the provisions of the Surface Mining Act or to spend state monies, but states could choose not “to participate in the federal regulatory program in any manner whatsoever.” *Id.* at 288. Congress’s statutory tool permitting states to choose whether or not to enter into the pre-emptible field was consonant with its powers under the Constitution. See *id.* at 290. Although the *FERC* Court reasoned that PURPA presented the states with such a choice, Justice Blackmun, writing for the majority, acknowledged that “it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA’s requirements.” *FERC*, 456 U.S. at 767. This acknowledgment presaged by a decade the analysis that would be *New York v. United States*, 505 U.S. 144 (1992). In *FERC*, Justice O’Connor’s dissent lambasted the majority for painting PURPA as a statute conferring options on the states. She argued that the majority’s reasoning would have caused a different outcome in *National League of Cities v. Usery* because the states could have chosen to discharge government employees and to shut down those parts of the state government. See *FERC*, 456 U.S. at 781–82 (O’Connor, J., concurring in the judgment and dissenting in part). Justice O’Connor’s majority opinion in *New York* drew heavily on these principles. See *New York*, 505 U.S. at 174–77.

105. 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976).

oriented to a process-oriented analysis.¹⁰⁶ This five-to-four decision overruled *National League of Cities v. Usery*¹⁰⁷—a case that stood for the principle that Congress could not intrude on state activities that qualified as “traditional government functions”—less than a decade after the Court had handed down that decision.¹⁰⁸ Pursuant to *National League of Cities*, the San Antonio Metropolitan Transit Authority (SAMTA), a county-run mass transit system, determined that it was immune from the Fair Labor Standards Act of 1938

106. See *supra* notes 49–55 and accompanying text (discussing the *Condon* court’s treatment of the “generally applicable” line of cases). But see *infra* notes 225–28 and accompanying text (suggesting that *Garcia*’s relevance stems from analytical points other than the generally applicable nature of the statute that was at issue).

107. 426 U.S. at 833, overruled by *Garcia*, 469 U.S. at 528. In 1974 Congress amended the Fair Labor Standards Act of 1938 (FLSA), ch. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C.A. §§ 203–219 (West 1998)), broadening the scope of the Act to cover federal, state, and local governments as employers. See Pub. L. No. 93-258, 88 Stat. 55, 58–59 (1974) (codified as amended at 29 U.S.C.A. § 203). In response, an association of cities joined with the National Governors’ Conference and 19 states to challenge the amendments. See *National League of Cities*, 426 U.S. at 836 n.7. The plaintiffs conceded that if the newly protected employees were private sector workers, they would be within the reach of Congress. See *id.* at 837. They argued that extending the terms of the FLSA to virtually all public employees, however, upset the balance of power between the states and the federal government. See *id.* The Supreme Court agreed. See *id.* at 845. Thus, while Congress had successfully extended the FLSA in 1966, see *Maryland v. Wirtz*, 392 U.S. 183 (1968), overruled by *National League of Cities*, 426 U.S. at 833, overruled by *Garcia*, 469 U.S. at 528, the Court held that the legislature, in 1974, overstepped the scope of its power as contemplated by Article I and the Tenth Amendment. See *National League of Cities*, 426 U.S. at 845. The nature of the constitutional violation was that Congress directed its authority “to the States as States.” *Id.* Expanding on the concept of “States as States,” the Court held “that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions,” the amendments fall outside the commerce power. *Id.* at 852. The Court also noted that the costs of implementing the FLSA amendments would be in the millions of dollars for the states, see *id.* at 846, and concluded that “the Act displace[d] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.” *Id.* at 847. Consequently, California had to reduce the number of required hours in its Highway Patrol training by more than half. See *id.* at 847. The Court described the situation as a veritable Hobson’s choice: the States would either have to increase revenue, presumably by raising taxes, or cut the provision of crucial state services like fire and police protection so that current revenue could cover the wages and overtime of employees. See *id.* at 848. Despite its discussion of the economic ramifications of the FLSA, the Court later would conclude that “the determinative factor in [*National League of Cities*] was the nature of the federal action, not the ultimate economic impact on the States.” *Hodel*, 452 U.S. at 292 n.33. The two factors are not so easily separated, however. While the FLSA itself was responsible for states restructuring their pay scales and overtime policies, the economic impact on the state or local government would be a catalyst behind that entity’s rethinking the interplay between revenue and employment. At the very least, the economic impact of the challenged provisions would inform the decisions of state and local governments in balancing revenue with employment. See *National League of Cities*, 426 U.S. at 847–48.

108. See *Garcia*, 469 U.S. at 557.

(FLSA) provisions regarding overtime pay.¹⁰⁹ After SAMTA sought a declaratory judgment to clarify the applicability of the FLSA, the United States Secretary of Labor counterclaimed, requesting that the Court enforce a Department of Labor opinion that had disaffirmed SAMTA's self-determined immunity.¹¹⁰ Garcia, a SAMTA employee, intervened, seeking overtime pay.¹¹¹

The Court examined the four prerequisites to a state's immunity from federal legislation¹¹² and singled out the "traditional governmental functions" inquiry as having created particular difficulty in Tenth Amendment jurisprudence.¹¹³ The Court, speaking through Justice Blackmun, recognized that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism."¹¹⁴ Justice Blackmun reviewed six years of opinions to illustrate the inconsistent results that the test produced in the lower federal courts.¹¹⁵

After rejecting the *National League of Cities* framework for determining the boundary between federal and state power under the Tenth Amendment, the Court looked to the Constitution and found, "in the structure of the Federal Government itself," an intent on the part of the Framers to preserve the position of the states within the federal order.¹¹⁶ In a striking departure from prior federalism decisions,¹¹⁷ the Court determined "that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of

109. See *id.* at 534. SAMTA's predecessor, the San Antonio Transit System, was the entity that actually made the determination. See *id.* at 531.

110. See *id.* at 534.

111. See *id.*

112. See *supra* notes 91-94 and accompanying text.

113. See *Garcia*, 469 U.S. at 537-39.

114. *Id.* at 531.

115. See *id.* at 538-39. Indeed, challenges to nearly identical state activities had spawned conflicting opinions among the circuits. Compare, e.g., *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982) (holding that operation of a highway authority is a traditional governmental function), and *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (holding that automobile driver licensing is a traditional governmental function), with *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (holding that public road traffic regulation is not a traditional governmental function).

116. *Garcia*, 469 U.S. at 550-51. See generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-84 (1980) (summarizing the extent of states' influence in each sector of the political process).

117. See Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 BYU L. REV. 329, 341-42.

result.”¹¹⁸ The Court was referring to the political process,¹¹⁹ which it said ensures “that laws that unduly burden the States will not be promulgated.”¹²⁰ The Court specifically identified the role of the states in the federal law-making process as the crucial element in maintaining the proper balance in federalism.¹²¹ In the immediate context, the *Garcia* Court posited that Congress’s simultaneous provision of federal subsidies to transit systems like SAMTA and subjection of public mass transit to the FLSA illustrated the political process’s limitations on the commerce power.¹²² The Court found further evidence of the successful workings of the political process in the fact that the FLSA imposed no more obligations on SAMTA than it did on other public and private employers.¹²³ This observation appears to be the genesis of the characterization of *Garcia* as a “generally applicable” case.

Justice Powell’s stinging dissent first chastised the majority for failing to recognize that the analytical framework established by *National League of Cities* involved balancing the interests of a given federal statute “against the effects of compliance on state sovereignty.”¹²⁴ Justice Powell then described the majority’s framework for federalism as one in which “federal political officials, invoking the Commerce Clause, are the sole judges of the limits of

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

119. *See id.*

120. *Id.* at 556. Before embracing process-oriented federalism, the Court considered other standards by which to distinguish traditional and non-traditional governmental functions. *See id.* at 541–45. The Court, however, rejected the proprietary-governmental distinction, the historical standard, the uniqueness test, and the necessity test. *See id.* Ultimately, the problem rested with the notion that “[a]ny rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.” *Id.* at 546. *But cf.* EEOC v. Wyoming, 460 U.S. 226, 250 (1983) (Stevens, J., concurring) (“My personal views on [the merits of legislation] are, however, totally irrelevant to the judicial task I am obligated to perform.”).

121. *See Garcia*, 469 U.S. at 550–51. The Constitution originally gave the states a role in choosing Senators by direct vote of the state legislature, *see* U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1, as well as the power to regulate voter qualifications for both the House of Representatives and President, *see id.* art. I, § 1, cls. 1, 3; *id.* art. II, § 1, cl. 3.

122. *See Garcia*, 469 U.S. at 555. In a footnote, the Court explained that Congress’s allocation of money to SAMTA was not crucial to the decision to uphold the FLSA amendments. *See id.* at 555 n.21.

123. *See id.* at 554.

124. *Id.* at 562 (Powell, J., dissenting) (citing *National League of Cities v. Usery*, 426 U.S. 833, 852–53 (1976)).

their own power."¹²⁵ Dissenting separately, Justice Rehnquist indicated, perhaps presciently, that the rationale of *National League of Cities* would "in time again command the support of a majority of this Court."¹²⁶

Notwithstanding the *Garcia* dissents' "express promise[] to disregard stare decisis issues,"¹²⁷ the Court strongly reaffirmed *Garcia* three years later in *South Carolina v. Baker*.¹²⁸ In that case, South

125. *Id.* at 567 (Powell, J., dissenting). In language similar to that of Justice Powell's, one commentator described the process-oriented federalism engendered by *Garcia*: "In refusing to enforce the tenth amendment [sic]—to play the role they regularly undertake in respect to other provisions of the Bill of Rights—the *Garcia* majority leaves an important constitutional sentry post unmanned." A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 796 (1985).

126. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). Justice O'Connor "share[d] Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility." *Id.* at 589 (O'Connor, J., dissenting); see also *infra* notes 285–89 and accompanying text (discussing, in the context of the DPPA, the likelihood of a return to the *National League of Cities* test).

A recent Fourth Circuit case, *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 607 (1998), may shed some light on the continuing vitality of the *Garcia* decision. There, the court of appeals required the parties to submit supplemental briefs to discuss the question of the constitutionality of the FLSA as applied to state employee salaries, in light of *Printz v. United States*, 521 U.S. 898 (1997). See *West*, 137 F.3d at 756–57. Emergency medical technicians (EMTs) in Anne Arundel County, Maryland, sought overtime pay from the county under the terms of the FLSA because the county had treated the EMTs as fire protection employees, who were exempt from the overtime provisions of the Act. See 29 U.S.C.A. § 207(k) (West 1998); *West*, 137 F.3d at 757. The county argued that *Printz* stood for a prohibition of not only federal legislation directing state governmental function, but also of generally applicable laws causing excessive interference with state governmental function. See *West*, 137 F.3d at 758–59. The court avoided addressing directly this characterization of *Printz* and instead asserted that *Garcia* controlled. See *id.* at 760. The Fourth Circuit panel concluded that, while the EMTs were not engaged in the fire department's fire protection activities, they were nevertheless exempt from FLSA overtime requirements under a different statutory provision. See *id.* at 761, 764; see also 29 U.S.C.A. § 213(a)(1) (making salaried administrative employees exempt from overtime requirements).

Before deciding whether the federal legislation protected the plaintiffs, the court observed the Supreme Court's shift in federalism analysis, noting that "[i]n a recent line of cases culminating in [*Printz*], . . . the Supreme Court has imposed limits, either through the Commerce Clause or the Tenth and Eleventh Amendments, on the power of Congress to enact legislation that affects state and local governments." *West*, 137 F.3d at 757–58. Despite the court's concern that the application of the FLSA to local governments may no longer have been "constitutionally uncontroverted," it invoked *Garcia*, reasoning that it would be inappropriate for a lower federal court to second-guess its enduring validity. *Id.* at 757, 760. The fact that *Auer v. Robbins*, 519 U.S. 452 (1997), decided contemporaneously with *Printz*, applied the FLSA to a local government agency influenced the Fourth Circuit Court of Appeals' decision to treat *Garcia* as good law. See *West*, 137 F.3d at 760.

127. Tushnet, *supra* note 95, at 1634.

128. 485 U.S. 505 (1988).

Carolina and the National Governors' Association (NGA)¹²⁹ challenged a provision of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),¹³⁰ which exempted certain bonds from federal income tax based upon the bonds' issuance in registered, as opposed to bearer, form.¹³¹ The Court examined South Carolina's Tenth Amendment challenge to the Act under the assumption that the TEFRA provision at issue "directly regulated States by prohibiting outright the issuance of bearer bonds."¹³² South Carolina asserted two distinct arguments: first, that Congress, in enacting TEFRA, violated the Tenth Amendment and second, that TEFRA violated principles of intergovernmental tax immunity.¹³³ Justice Brennan, writing for the majority, invoked *Garcia* and dispatched the Tenth Amendment argument almost summarily.¹³⁴ Because South Carolina presented no evidence that "the national political process . . . operate[d] in a defective manner," in the enactment of TEFRA, there could be no Tenth Amendment violation.¹³⁵ The sweeping breadth of the *Garcia* political-process framework was delineated in Justice Brennan's opinion: "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."¹³⁶

129. South Carolina originally brought suit, and the NGA intervened. *See id.* at 510.

130. Pub. L. No. 97-248, § 310(b)(1), 96 Stat. 324, 596. This Act was codified at 26 U.S.C. § 103(j)(1) (1982), but was repealed in 1986. *See* Act of Oct. 22, 1986, Pub. L. No. 99-514, § 1301(a), 100 Stat. 2085, 2602-2603. The provision, however, was still applicable in *Baker*, as the facts at issue in that case took place in 1985, while the provision was still in effect.

131. *See Baker*, 485 U.S. at 507-08, 510-11. Registered bonds differ from bearer bonds in three significant respects. First, ownership of the former is documented on a central registry, whereas ownership of the latter is manifested by mere possession. *See id.* at 507. Second, transfer of ownership of registered bonds occurs only by revising the registration list. By comparison, mere delivery of the bond itself effectuates a transfer of ownership for bearer bonds. *See id.* Finally, while registered bonds pay interest only to the entity named on the registry, bearer bonds pay interest to whomever tenders the interest coupon. *See id.*

132. *Id.* at 511.

133. *See id.* at 510. South Carolina argued that the TEFRA provision imposed taxes on interest accrued on a state-issued bond. *See id.* at 515. After an extended discussion on the state of the law regarding intergovernmental tax immunity, *see id.* at 516-27, the Court concluded that "[t]he tax is imposed on and collected from bondholders, not states, and any increased administrative costs incurred by states in implementing the registration system are not 'taxes' within the meaning of the tax immunity doctrine." *Id.* at 526.

134. *See id.* at 511-15.

135. *Id.* at 512-13.

136. *Id.* at 512. Justice Scalia attempted to dilute the almost boundless significance given to *Garcia* by Justice Brennan. Justice Scalia "read [*Garcia*] as explicitly disclaiming . . . the proposition attributed to it in today's opinion . . . that the 'national political

Using the rationale of *FERC*, the NGA also argued that TEFRA's registered bond provision "commandeer[ed] the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme."¹³⁷ The Court rejected this contention and distinguished the TEFRA provisions from the PURPA legislation at issue in *FERC*. TEFRA regulated both state and private activities directly, while PURPA had sought only to "influence the manner in which States regulate private parties."¹³⁸ Without expressly laying this case at the doorstep of the "generally applicable" statute theory, the Court alluded to this underlying rationale in its rejection of South Carolina's commandeering argument.¹³⁹ According to *Baker*, the mere fact that states have had to change certain statutes in order to administer a registered bond scheme does not mean that those states' lawmaking processes have been commandeered.¹⁴⁰ When a state wants to engage in conduct that necessitates administrative or legislative action in order to comply with federal regulations, such action "is a commonplace that presents no constitutional defect."¹⁴¹

By contrast, the Supreme Court did find federal commandeering of the states in *New York v. United States*.¹⁴² The State of New York and two counties objected to the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985.¹⁴³ The

process' is the States' only constitutional protection, and that nothing except the demonstration of 'some extraordinary defects' in the operation of that process can justify judicial relief." *Id.* at 528 (Scalia, J., concurring in part and concurring in the judgment); see also *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (noting that "this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers" (emphasis added)). Compare John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1391 (1997) (observing that the historical record demonstrates that the political process is not the sole guardian of federalism), with Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 590 (1994) (arguing that 60 years of Supreme Court decisions are founded on the proposition that the political process is the sole guardian of federalism). See generally Bradford C. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1169 (1998) ("Since *Garcia*, debate has continued over whether the political safeguards of federalism should be regarded as the exclusive, or merely the primary, means of policing federal power.").

137. *Baker*, 485 U.S. at 513.

138. *Id.* at 514; see also *supra* notes 96-104 and accompanying text (discussing *FERC v. Mississippi*, 456 U.S. 742 (1982)).

139. See *Baker*, 485 U.S. at 514.

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

141. *Id.*

142. 505 U.S. 144 (1992).

143. Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021(b) (1994)).

challenged provision required a state to take title to, possession of, and liability for any low-level radioactive waste produced within its borders for which the state had not already provided disposal.¹⁴⁴ While Congress undoubtedly intended the take title provision to create an incentive for the states to regulate waste, the Court found that Congress, in enacting this “unique” provision,¹⁴⁵ “crossed the line distinguishing encouragement from coercion.”¹⁴⁶

Writing for the majority, Justice O'Connor narrowed the Court's focus: because this case did not involve generally applicable legislation, *National League of Cities/Garcia* did not control, nor did *Baker*.¹⁴⁷ Instead, Justice O'Connor shifted the analysis to the incentive and encouragement theory of federal legislation in the Tenth Amendment context by invoking *Hodel v. Virginia Surface Mining & Reclamation Ass'n*¹⁴⁸ and *FERC*.¹⁴⁹ After reaffirming the general rule that “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,’ ”¹⁵⁰ Justice O'Connor turned to the challenged provision. The federal legislation at issue gave states two alternatives: regulate as directed by Congress or become owners of privately generated radioactive waste. The Court held that the first “option” was clearly beyond the commerce power and violated the Tenth Amendment.¹⁵¹ The second “option” was likewise invalid because it commandeered a state “into the service of federal regulatory purposes.”¹⁵² Because both choices offered by the statute impermissibly infringed upon states' authority, the statute offered no real choice at all.¹⁵³ Consequently, the statute's

144. See 42 U.S.C. § 2021e(d)(2)(C). There were two other provisions challenged as well, see *New York*, 505 U.S. at 152–54, but they were upheld. See *id.* at 173–74. In the event that a state could not dispose of all the waste generated within its boundaries, the take title provision was to become operative as of January 1, 1996. See *id.* at 174–75.

145. *New York*, 505 U.S. at 177.

146. *Id.* at 175.

147. See *id.* at 160.

148. 452 U.S. 264 (1981); see *supra* note 104 (discussing *Hodel*).

149. See *New York*, 505 U.S. at 161–62; see also *supra* notes 96–104 (discussing *FERC*). The *New York* Court's recognition of two distinct lines of cases was emphasized by the *Condon* majority. See *Condon*, 155 F.3d at 458–60; *supra* notes 41–68 and accompanying text.

150. *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

151. *Id.* at 175.

152. *Id.*

153. See *id.* at 175–76. The Court declined the Federal Government's invitation to employ a balancing test to weigh the federal interests against the threat to state sovereignty and noted that, although such an approach had been used in cases involving generally applicable laws, see *id.* at 177–78 (citing *EEOC v. Wyoming*, 460 U.S. 225, 242

take title provision was unenforceable.

Justice White argued in dissent that the Court's recognition of the two lines of Commerce Clause cases was without support because "[i]n no case ha[d] the Court rested its holding on such a distinction."¹⁵⁴ White's dissent gave great weight to the political process that spawned the low-level radioactive waste legislation. In addition, Justice White argued that *Garcia* provided the proper framework for analysis, despite the fact that the statute at issue was not one of general applicability.¹⁵⁵

New York's prohibition on commandeering the states was reaffirmed in *Printz v. United States*.¹⁵⁶ In *Printz*, certain provisions of the Brady Handgun Violence Prevention Act ("Brady Act")¹⁵⁷ were challenged as unconstitutional because they required designated state officials to perform background checks on would-be gun purchasers.¹⁵⁸ Two state officials charged under the Brady Act with the responsibility of performing the checks "object[ed] to being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws [was] unconstitutional."¹⁵⁹ After completing an exhaustive but futile search for statutes that similarly commandeered state officials,¹⁶⁰ the Court based its analysis on the structure of the Constitution.¹⁶¹ The majority reasoned that, because the Constitution "contemplates that a State's government will represent and remain accountable to its own

n.17 (1983); *National League of Cities v. Usery*, 426 U.S. 833, 853 (1976)), the Court had "more recently departed from this approach." *Id.* at 178 (citing *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985)). The majority also refrained from invoking the political process rationale espoused in *Garcia*, despite the overwhelming evidence that the states and their executives had encouraged and consented to the legislation. *See id.* at 180-81. Instead, the Court reiterated the fundamental tenets of federalism: "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187.

154. *Id.* at 201 (White, J., concurring in part and dissenting in part). "An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties." *Id.* at 201-02 (White, J., concurring in part and dissenting in part).

155. *See id.* at 205 (White, J., concurring in part and dissenting in part).

156. 521 U.S. 898 (1997).

157. 18 U.S.C. § 922 (1999 & Supp.).

158. *See id.* § 922(s)(1)(A)(i)(III)-(IV), (s)(2); *Printz*, 521 U.S. at 902-04. The Court found § 922(s)(2) unconstitutional and also eliminated the duty imposed upon state officials under § 922(s)(1)(A)(i)(III) and (IV). *See Printz*, 521 U.S. at 933-35.

159. *Printz*, 521 U.S. at 905.

160. *See id.* at 905-18.

161. *See id.* at 918-25.

citizens,"¹⁶² control of state officers by Congress would upset the balance of power between the federal and state levels of government.¹⁶³ Supreme Court precedent further buttressed the conclusion "that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."¹⁶⁴ In reaching its conclusion, the Court cited, among other decisions, *New York v. United States*.¹⁶⁵

The United States distinguished the take title provision in *New York* from the background check provision in *Printz* on the grounds that the latter did not require a state legislature or state executive to make policy.¹⁶⁶ The Court rejected this contention because of the obvious difficulty in line-drawing between policy-making and non-policy-making mandates.¹⁶⁷ The Court also dismissed a balancing test suggested by the Federal Government in which the background check's importance, efficiency, and temporary nature would ostensibly outweigh the sovereignty interests of the states.¹⁶⁸ The Court noted that such a weighing of interests could be used to evaluate "whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but that the Brady Act's entire purpose was "to direct the functioning of the state executive," making a balancing test unsuitable.¹⁶⁹ The Court concluded by reiterating *New York's* prohibition on congressional compulsion of the states and added "that Congress cannot circumvent that prohibition by conscripting the States' officers directly."¹⁷⁰

In dissent, Justice Stevens hearkened back to *Garcia* and the political process.¹⁷¹ Given the states' and citizens' representation at the federal level, he argued that the Court should not assume that members of Congress will neglect the sovereignty interests of the

162. *Id.* at 920.

163. *See id.* at 921-22.

164. *Id.* at 925. *Hodel v. Virginia Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), in fact, stood explicitly for this anti-commandeering principle, as the federal statutes upheld in those cases "did not require the States to enforce federal law." *Printz*, 521 U.S. at 925.

165. *See Printz*, 521 U.S. at 926.

166. *See id.*

167. *See id.* at 927-28.

168. *See id.* at 932.

169. *Id.*

170. *Id.* at 935. For an argument that *Printz's* "clear line" approach is flawed, see Jackson, *supra* note 50, *passim*.

171. *See Printz*, 521 U.S. at 939-70 (Stevens, J., dissenting).

electorate.¹⁷² A more reasonable presumption, he contended, is that any statute that burdens state officials is the result of deliberate contemplation that the constituents will benefit from the legislation.¹⁷³ Thus, Justice Stevens echoed Justice Brennan's majority opinion in *Baker*¹⁷⁴ and Justice White's dissent in *New York*.¹⁷⁵

A brief look at the 1998 Supreme Court Term provides further insight into the likelihood of the Supreme Court upholding the constitutionality of the DPPA and the concomitant impact on federalism jurisprudence. A series of decisions handed down in May and June 1999 may indicate that the Court will continue to strengthen states' rights. First, *Alden v. Maine*¹⁷⁶ may assist in anticipating the Court's decision in *Condon*. In *Alden*, probation officers sued the state of Maine in its capacity as their employer, seeking overtime pay allegedly owed to them under the FLSA.¹⁷⁷ Using the Eleventh Amendment as the vehicle to reaffirm the Court's commitment to defining the proper balance between state and federal power, a five-Justice majority, speaking through Justice Kennedy, held that Congress lacks the authority to empower private citizens to sue states for damages in state court without the states' consent.¹⁷⁸

Citing *Printz* frequently, the Court examined federalism with an eye toward "the special role of the state courts in the constitutional design."¹⁷⁹ Because a state's sovereign immunity, at least within its own courts, is a function of the sovereign's consent, Congress cannot unilaterally grant citizens a right to sue a state in that state's courts.¹⁸⁰ Indeed, if Congress possessed such power it could "turn the State against itself and ultimately . . . commandeer the entire political machinery of the State against its will and at the behest of

172. *See id.* at 956 (Stevens, J., dissenting).

173. *See id.* (Stevens, J., dissenting).

174. *See supra* notes 134-36 and accompanying text.

175. *See supra* notes 154-55. Justice Stevens also argued in dissent that *New York* "clearly did not decide the question presented here, whether state executive officials—as opposed to state legislators—may in appropriate circumstances be enlisted to implement federal policy." *Printz*, 898 U.S. at 963 (Stevens, J., dissenting). Additionally, he characterized the background checks as a "minimal requirement" and distinguished between state and county officials. *Id.* at 964-65 (Stevens, J., dissenting).

176. 119 S. Ct. 2240 (1999).

177. *See id.* at 2246.

178. *See id.* Chief Justice Rehnquist, along with Justices O'Connor, Scalia, and Thomas joined the majority opinion. *See id.* Justice Souter dissented. *See id.* at 2269-95 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined the dissenting opinion. *See id.* at 2269 (Souter, J., dissenting).

179. *Id.* at 2263.

180. *See id.* at 2264.

individuals.”¹⁸¹ The Court explicitly reaffirmed the pre-eminence of the United States Constitution and its Supremacy Clause vis-à-vis state court enforcement of federal law, but observed that those principles attach only when Congress acts within its authority.¹⁸²

In a vigorous dissent, Justice Souter accused the majority of ignoring “the accepted authority of Congress to bind States under the FLSA and to provide for enforcement of federal rights in state court.”¹⁸³ After dispensing with the Eleventh Amendment argument,¹⁸⁴ the *Alden* dissent turned to the federalism issue.¹⁸⁵ Perhaps recognizing what may lie on the horizon,¹⁸⁶ Justice Souter quickly noted that the *Garcia* holding was not at issue in the case at hand¹⁸⁷ and expressly affirmed that “*Garcia* remains good law, [and] its reasoning has not been repudiated.”¹⁸⁸ The dissent explicitly disagreed that a state’s immunity to suit in its own courts is a function of federalism¹⁸⁹ and noted that *Alden* was not a case of the federal government coercing the states to conform to its wishes.¹⁹⁰ Justice Souter registered his dissatisfaction with the majority’s rule, which he believed effectively eliminated a private cause of action against state employers in state courts. He argued that the FLSA’s public remedy, a claim brought on behalf of the injured party by the Secretary of Labor, is of little substance.¹⁹¹

A month later, the Court handed down another Eleventh Amendment case. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹⁹² the same five-Justice majority¹⁹³ struck down the portion of the Trademark Remedy

181. *Id.* Such a corruption of the political process would ostensibly violate the tenets of federalism as espoused in *Garcia* as well. See *supra* notes 105–26 and accompanying text (discussing *Garcia*); cf. *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress lacks not only the power to “compel the States to enact or enforce a federal regulatory program,” but also to “circumvent that prohibition by conscripting the States’ officers directly”).

182. See *Alden*, 119 S. Ct. at 2265.

183. *Id.* at 2270 (Souter, J., dissenting).

184. See *id.* at 2270–87 (Souter, J., dissenting).

185. See *id.* at 2287–95 (Souter, J., dissenting).

186. The horizon is the *Condon* decision.

187. See *id.* at 2288 (Souter, J., dissenting). *Garcia*, like *Alden*, involved a challenge to the FLSA. For the Court’s historical treatment of the FLSA, see *supra* note 51.

188. *Alden*, 119 S. Ct. at 2292 (Souter, J., dissenting).

189. See *id.* at 2288 (Souter, J., dissenting).

190. See *id.* at 2288 n.34 (Souter, J., dissenting) (“There is no ‘commandeering’ of the State’s resources where the State is asked to do no more than enforce federal law.”).

191. See *id.* at 2293 (Souter, J., dissenting).

192. 119 S. Ct. 2219 (1999).

193. Justice Scalia wrote the majority opinion, in which Chief Justice Rehnquist and

Clarification Act (TRCA)¹⁹⁴ that purported to grant private entities a cause of action against a state for misrepresentation in advertising.¹⁹⁵

Writing for the Court, Justice Scalia began by restating the two means by which individuals may sue states: (1) when Congress, acting pursuant to the Enforcement Clause of the Fourteenth Amendment, authorizes such causes of action and (2) when the state waives its immunity.¹⁹⁶ In determining that neither of these circumstances existed, the Court relied on *Seminole Tribe of Florida v. Florida*¹⁹⁷ and *City of Boerne v. Flores*.¹⁹⁸ Together, these cases stand for the proposition that the Enforcement Clause confers upon Congress the authority to abrogate state immunity from suit, but only when legislation is truly remedial or preventative of constitutional violations.¹⁹⁹ Justice Scalia rejected the argument that a state, by engaging in certain conduct, impliedly consents to suit,²⁰⁰ and in doing so, he engaged in a discussion that may be useful to the DPPA forecast.

College Savings Bank argued that the TRCA set up a constructive waiver opportunity because the statute clearly indicated that states engaging in particular conduct were subject to suit and that states' participation in the qualifying conduct was voluntary.²⁰¹ In no uncertain terms, the Court extinguished the legal concept of constructive waiver of sovereign immunity because precedent requires that any waiver of Eleventh Amendment immunity be "unequivocal."²⁰² Significantly, the Court recognized that "[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to

Justices O'Connor, Kennedy, and Thomas joined. *See id.* at 2222. Justice Stevens filed a dissenting opinion, *see id.* at 2233-34 (Stevens, J., dissenting), as did Justice Breyer with whom Justices Stevens, Souter, and Ginsburg joined. *See id.* at 2234-40 (Breyer, J., dissenting).

194. 15 U.S.C. § 1114(1) (1994).

195. *See College Savings Bank*, 119 S. Ct. at 2222-23.

196. *See id.* at 2223 (citations omitted).

197. 517 U.S. 44 (1996); *see College Savings Bank*, 119 S. Ct. at 2224.

198. 521 U.S. 507 (1997); *see College Savings Bank*, 119 S. Ct. at 2224.

199. *See College Savings Bank*, 119 S. Ct. at 2224. In a relatively terse discussion, Justice Scalia rejected the notion that the TRCA addressed property rights that are protected by constitutional due process. *See id.* at 2224-25.

200. *See id.* at 2226-31.

201. *See id.* at 2226; *see also* 15 U.S.C. § 1114(1) (1994) (describing civil claims).

202. *See College Savings Bank*, 119 S. Ct. at 2228 (citing *Great No. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (observing that a waiver of sovereign immunity must "be unequivocally expressed").

have waived that immunity."²⁰³ Additionally, the Court noted that the concept of constructive waiver does not apply to other constitutionally protected rights and that there is no reason that a state's right to be free from suit should implicate a different rule.²⁰⁴

Finally, the Court discussed congressional power under the Spending Clause²⁰⁵ and Compact Clause.²⁰⁶ In these contexts, the Constitution permits Congress to impose waivers of state immunity.²⁰⁷ Although Justice Scalia conceded that Congress can use its authority to disburse funds or to ratify interstate compacts in order to encourage state conduct, he explained that the use of such powers is constitutional because it effectively rewards a state for making a particular choice.²⁰⁸ By contrast, when the federal government tries to encourage state behavior by conditioning it upon the existence of state sovereign immunity, it is no longer mere encouragement because "the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."²⁰⁹

*Davis v. Monroe County Board of Education*²¹⁰ also presents several minor points that may be relevant to the Supreme Court's disposition of *Condon*. In *Davis*, the Court held that, in an action against a school district, monetary damages are available to a student who is the victim of sexual harassment by a classmate.²¹¹ In an opinion written by Justice O'Connor,²¹² over the dissent of Justice Kennedy,²¹³ the Court determined that Title IX of the Education Amendments of 1972²¹⁴ represented a valid exercise of congressional

203. *College Savings Bank*, 119 S. Ct. at 2228.

204. *See id.* at 2229.

205. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

206. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ." *Id.* art. I, § 10, cl. 3.

207. *See College Savings Bank*, 119 S. Ct. at 2231.

208. *See id.*

209. *Id.* This ruling seems to reflect Justice O'Connor's dissent in *FERC v. Mississippi*, 456 U.S. 742, 775–97 (1982) (O'Connor, J., concurring in the judgment and dissenting in part); *see supra* note 96.

210. 119 S. Ct. 1661 (1999).

211. *See id.* at 1666.

212. Justices Stevens, Souter, Ginsburg, and Breyer joined the majority opinion. *See id.*

213. Chief Justice Rehnquist and Justices Scalia and Thomas joined the dissenting opinion. *See id.* at 1676 (Kennedy, J., dissenting).

214. 20 U.S.C. §§ 1681–1688 (1994).

power under the Spending Clause and that Congress had complied with the rule requiring a clear statement of the conditions to which states accepting federal funding under a statute subject themselves.²¹⁵ Justice O'Connor's alignment in *Davis* with Justices Stevens, Souter, Ginsburg, and Breyer is significant, as she generally aligns with the *Davis* dissenters on federalism matters.²¹⁶

The *Davis* dissent vehemently disagreed that Title IX complied with the clear statement rule.²¹⁷ The result of the majority's opinion, by Justice Kennedy's account, will be that "[t]he Nation's schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator."²¹⁸ Moreover, the "federal government will have insinuated itself . . . into one of the most traditional areas of state concern."²¹⁹ This statement may reflect a broader willingness of the members comprising the dissenting bloc to return to a "States as States" type of federalism analysis.²²⁰

It has been said that "[a]scertaining the constitutional line between federal and state power is among the most difficult judicial tasks."²²¹ Add to that inherent difficulty the recent trend in the Supreme Court's treatment of federal statutes directed at the states,²²²

215. See *Davis*, 119 S. Ct. at 1669-70; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding that a clear statement by Congress to the states itemizing the conditions of accepting federal funding is crucial to the validity of a statute enacted under the spending power).

216. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); see also Dr. Bill Swinford & Dr. Eric N. Waltenburg, *The Supreme Court and the States: Do Lopez and Printz Represent a Broader Pro-State Movement?*, 14 J.L. & POL. 319, 320 (1998) (noting that before *Lopez*, Justice O'Connor "had made no secret of [her] desire to continue to enhance the Court's protection of state autonomy"); Linda Greenhouse, *Sex Harassment in Class Is Ruled Schools' Liability*, N.Y. TIMES, May 25, 1999, at A1 (observing that "Justice O'Connor, until now, had been a reliable ally on the states' rights side virtually any time a case raising Federalism issues was before the Court").

217. See *Davis*, 119 S. Ct. at 1677-78 (Kennedy, J., dissenting).

218. *Id.* at 1678 (Kennedy, J., dissenting).

219. *Id.* (Kennedy, J., dissenting). This language echoes *National League of Cities v. Usery*-era federalism. See *supra* notes 89 and 107.

220. See *infra* notes 273-74 and 293-95 and accompanying text (discussing the relevance of this potential shift to the Court's upcoming decision in *Condon*).

221. *Oklahoma ex rel. Okla. Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1269 (10th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. May 3, 1999) (No. 98-1760).

222. See, e.g., *id.* at 1272 ("[W]e are cognizant of the Supreme Court's trend established by *New York* and *Printz* of striking down federal legislation which 'commandeers' state legislative and administrative processes."); *Pryor v. Reno*, 998 F. Supp. 1317, 1330 (M.D. Ala. 1998) (adverting to "the Supreme Court's trend, indicated by *New York* and *Printz*, of invalidating federal legislation on the grounds that it 'commandeers' state legislative

and the conclusion that *Condon* stands to play a significant role in the continuing evolution of the Court's federalism jurisprudence is virtually inescapable.²²³ Despite the Fourth Circuit panel's holding in favor of the State of South Carolina, *Condon* is not entirely consistent with the reasoning of either *Garcia* or *New York/Printz*. Ultimately, the circuit court's sensitivity to state sovereignty is undermined by the unsound rationale that underlies the decision to enjoin the enforcement of the DPPA.

There are two pivotal fallacies in the majority's reasoning: its characterization of Supreme Court precedent and its interpretation of the DPPA. In discussing applicable Tenth Amendment precedent, the court accurately noted that Supreme Court decisions fall roughly into one of two lines of cases: the *Garcia* line or the *New York/Printz* line.²²⁴ While it is arguably correct to describe the *Garcia* line of cases as turning on the generally applicable nature of the relevant legislation,²²⁵ the Fourth Circuit went further by portraying those cases as holding that "Congress may *only* subject the States to legislation that is also applicable to private parties."²²⁶ This reading of *Garcia* misconstrues the rationale of that case. The *Garcia* Court did mention the general applicability of the statute at issue,²²⁷ but it explicitly rejected an analytical approach that would make such a result-oriented factor the decisive element in a Tenth Amendment

and administrative processes"), *rev'd*, 171 F.3d 1281 (11th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. Jul. 6, 1999) (No. 99-61).

223. To date, three other circuits have heard similar cases involving state challenges to the constitutionality of the DPPA. See *supra* note 15 and accompanying text. See generally Odom & Feder, *supra* note 5, at 167 ("[A]ny resolution of the DPPA litigation other than a straightforward application of *New York* and *Printz*, promises to break new ground.").

224. See *Condon*, 155 F.3d at 458; see also *Oklahoma*, 161 F.3d at 1271 ("To be sure, the Supreme Court has noted a logical distinction between generally applicable laws, which incidentally apply to states, and law compelling States to legislate or regulate in accordance with federal law.").

225. *But see Condon*, 155 F.3d at 467-68 (Phillips, J., dissenting) (arguing that in the 'generally applicable' line of cases the Supreme Court has "never . . . intimated that only by such generally applicable legislation may Congress, consistent with the structural limitations of federalism, impose obligations on the states"). The Supreme Court "has not had specific occasion since 1985 to reconsider" the power of Congress to impose generally applicable legislation on states. Clark, *supra* note 136, at 1187 n.196.

226. *Condon*, 155 F.3d at 461 (emphasis added). The court cited *New York v. United States*, 505 U.S. 144, 160 (1992), for this proposition, but the reference was misleading. The passages in *New York* attested to nothing more than the fact that the most recent Tenth Amendment cases involved generally applicable statutes and that the statute at issue was not generally applicable. See *id.*

227. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

case.²²⁸ The Fourth Circuit's extrapolation was not only fallacious,²²⁹ but it also proved crucial to the *Condon* decision.²³⁰

The *Condon* majority ultimately rested its decision on the anti-commandeering principles of *New York* and *Printz*, but not without considering the Federal Government's argument that those cases apply only to statutes requiring states to regulate third parties.²³¹ The court reasoned that if the commandeering cases did not apply, as the United States argued, then *Garcia* must apply.²³² But *Garcia* was

228. See *id.*; see also Recent Case, *supra* note 77, at 1102 n.34 (observing that *Garcia* focused on a process-oriented analysis). Indeed, despite the similarities between the cases, *Garcia* did not reaffirm the logic of the overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), overruled by *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. at 528, which had been expressly grounded on the fact that FLSA was a generally applicable statute. See *id.* at 197. In that case, 28 States and one school district challenged the constitutionality of an amendment to the FLSA. See Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102, 80 Stat. 831, 831 (codified as amended at 29 U.S.C. § 203 (1994 & Supp.)); *Wirtz*, 392 U.S. at 185. The FLSA amendments, passed in 1966, extended the Act to cover state employees working in hospitals, institutions, and schools. See Act of Sept. 23, 1966, § 102, 80 Stat. at 831; *Wirtz*, 392 U.S. at 187. Before the amendments, the FLSA expressly had exempted state governments from its purview. See Fair Labor Standards Act of 1938, ch. 718, § 3(d), 52 Stat. 1060, 1060. The Court upheld the provisions that subjected state-run hospitals and schools to the FLSA. See *Wirtz*, 392 U.S. at 187-88. The Court rejected the States' contention "that the Act may not be constitutionally applied to state-operated institutions because [the Commerce Clause] power must yield to state sovereignty in the performance of governmental functions." *Id.* at 195. To the contrary, the Court held that when a state participates in economic activities that Congress has validly regulated with respect to private parties, "the State too may be forced to conform its activities to federal regulation." *Id.* at 197.

Justices Douglas and Stewart objected to the decision to uphold the FLSA amendments on the grounds that they would "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education." *Id.* at 203 (Douglas, J., dissenting). The dissent was worried not only about the overtime provisions of the Act, but also about the impact of the Act's civil and criminal penalties for non-compliance on the states and state officials. See 29 U.S.C. §§ 215-216 (1994); *Wirtz*, 392 U.S. at 202 (Douglas, J., dissenting). The dissent agreed that Congress could, under the proper circumstances, regulate state activity under the Commerce Clause. See *Wirtz*, 392 U.S. at 203 (Douglas, J., dissenting). However, the dissent argued that Congress could not regulate state activity when it would "overwhelm state fiscal policy," as under the FLSA. *Id.* at 203 (Douglas, J., dissenting).

229. In *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818), the Seventh Circuit Court of Appeals upheld the constitutionality of the DPPA and discussed the pitfalls of *Condon*. See *id.* at 1006 (decrying the Fourth Circuit's injection of the word 'only' into the *New York* passage cited in *Condon*); see also *supra* note 225 and accompanying text (discussing the passage from *New York*).

230. See *Condon*, 155 F.3d at 463.

231. See *id.* at 461. The distinction the United States attempted to make was between federal laws that dictate state regulation of state behavior and state regulation of its citizens. See *id.*

232. See *id.*

inapplicable according to the court because the DPPA is not a law of general applicability; it does not purport to govern the disclosure of information filed in private databases as well as public ones.²³³ In reaching this conclusion, however, the court of appeals overlooked significant aspects of both *Garcia* and *South Carolina v. Baker*.²³⁴

By shoehorning all recent Tenth Amendment cases into two mutually exclusive and narrow categories,²³⁵ the court was forced to label *Baker* as a *Garcia*-type case—that is, one that involved a statute of general applicability.²³⁶ In support of this characterization, the court cited *New York* and *Printz*, both of which lumped *Baker* together with other cases involving “generally applicable” statutes.²³⁷ But the citations to those cases are not unequivocally convincing. The Court in *New York* referred to *Baker* as an example of a case involving a generally applicable statute and declined to revisit its holding.²³⁸ Moreover, the *Printz* Court referred to *Baker* only for the value of Chief Justice Rehnquist’s concurrence in which the Chief Justice expressed the opinion that the minimal nature of the relevant statute’s invasion on state sovereignty should suffice to defeat the Tenth Amendment challenge.²³⁹ While both references may go a long way toward establishing that the statute in *Baker* was generally applicable, they fall far short of establishing either the proposition that *Baker*’s only proper interpretation is in the context of its generally applicable statute or that *Baker* stands for the idea that *only* through generally applicable laws can Congress regulate the States.²⁴⁰ Given the impropriety of treating *Baker* as a commandeering case,²⁴¹

233. See *id.*

234. See Recent Case, *supra* note 77, at 1102–04 & n.34; see also *supra* notes 105–26, 127–41 and accompanying text (discussing *Garcia* and *Baker*). Compare *Condon*, 155 F.3d at 462 (“Under *Garcia*, a statute is constitutional only if it is generally applicable.”), with Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1657 (1987) (noting that “*Garcia*’s primary emphasis [is] on procedural protections”).

235. See *Condon*, 155 F.3d at 458; *id.* at 465 (Phillips, J., dissenting).

236. See *id.* at 461 n.5.

237. See *id.* at 461; see also *Printz v. United States*, 521 U.S. 898, 932 (1997) (citing *South Carolina v. Baker*, 485 U.S. 505 (1988)); *New York v. United States*, 505 U.S. 144, 160 (1992) (same).

238. See *New York*, 505 U.S. at 160.

239. See *Printz*, 521 U.S. at 932; *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment).

240. Compare *Condon*, 155 F.3d at 461 (noting that the federal government’s authority to regulate states extends “only” to laws of general applicability), with *Travis v. Reno*, 163 F.3d 1000, 1006 (7th Cir. 1998) (disagreeing with the Fourth Circuit’s characterization that Congress can regulate states only through laws of general applicability), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818).

241. See *Baker*, 485 U.S. at 514–15 (holding that TEFRA did not “commandeer” within

the Fourth Circuit's only option in *Condon* was to confine *Baker* to the "generally applicable" line of cases.

Arguably, by the terms of the DPPA, *Condon* does not belong to the "generally applicable" line.²⁴² On its face, the DPPA applies only to states.²⁴³ But on a second level, the statute does apply equally to private and public entities. Section 2721(c) governs the resale or redisclosure of personal information originally obtained from a state DMV.²⁴⁴ Under that provision, "[a]n authorized recipient of personal information" can redisclose or resell the information only as stipulated in the Act.²⁴⁵ Thus, at the first possible opportunity, the statute regulates private citizens' conduct in the same manner as it regulates state conduct. In other words, because citizens do not operate a DMV, the DPPA does not cover them as department administrators; it does cover them, however, as soon as they disclose or, more properly, *redisclose* motor vehicle record information.

Additionally, in *Travis v. Reno*,²⁴⁶ the Seventh Circuit classified the DPPA as legislation akin to a generally applicable statute because federal "[s]tatute books teem with laws regulating the disclosure of information from databases."²⁴⁷ Moreover, the *Travis* court saw profound similarities between the DPPA and TEFRA, the statute at issue in *Baker*.²⁴⁸ Indeed, Congress directed TEFRA only at governments as actors, while a separate statute applied to private parties.²⁴⁹ The Seventh Circuit concluded that the DPPA's regulation of government-owned databases was sufficiently analogous to the *Baker* statute to justify application of that case to Wisconsin's challenge to the DPPA.²⁵⁰ The Fourth Circuit, unfortunately, did not follow such reasoning.

In fact, *Baker* is more than either a "generally applicable" case or a failed "commandeering" case—it is a case involving the opportunity

the Tenth Amendment meaning of the term).

242. See generally 18 U.S.C. § 2721 (1994 & Supp. II 1996) (text of the DPPA).

243. See *id.* § 2721(a). The Act states that, "a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose" personal information. *Id.*

244. See *id.* § 2721(c).

245. *Id.*

246. 163 F.3d 1000 (7th Cir. 1998).

247. *Id.* at 1005.

248. See *id.* at 1005–06.

249. See *id.* at 1006.

250. See *id.* ("If one statute addressed only to states passes muster when other laws place private parties under equivalent obligations, why not the Driver's Privacy Protection Act?"). But see Odom & Feder, *supra* note 5, at 154 n.478 (arguing that *Baker* is "easily distinguished").

to make a choice.²⁵¹ The source of *Baker's* significance is the following oft-quoted²⁵² passage: "That a State *wishing to engage* in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."²⁵³ While the *Condon* court recognized that the DPPA commandeers—in a *New York/Printz* manner of speaking—neither the state legislative process nor the state executive officials themselves, the court determined that the Act forces the states to administer congressional legislation.²⁵⁴ Rather than ending the inquiry, the court's recognition of administration without classic commandeering should have spurred further inquiry into the issue. Specifically, the court should have consulted *Baker*.²⁵⁵ It may have recognized the similarities between the statutes at issue in the two cases: while both required compliance, neither required the state to engage in the relevant conduct in the first place.²⁵⁶ Additionally, both statutes applied to singularly public conduct.²⁵⁷ Again, the fallacy is the court's determination that the two lines of Tenth Amendment-Commerce Clause cases are mutually exclusive. In the *Condon* court's view, if the DPPA is not generally applicable, it qualifies for *New York/Printz* analysis.²⁵⁸ Moreover, because *New York* and *Printz* "made it perfectly clear that the Federal Government may not require state officials to administer a federal regulatory program," the court was left with the conclusion that the DPPA was unconstitutional.²⁵⁹ The "commandeering" line of cases was too blunt a tool to dissect the DPPA; *Baker* would have

251. TEFRA required the regulation of bonds for tax purposes, but did not require a state to sell bonds in the first instance. See Pub. L. No. 97-248, 96 Stat. 324 (codified as amended at 26 U.S.C. § 103 (1994)).

252. See, e.g., *City of New York v. United States*, 971 F. Supp. 789, 795 (S.D.N.Y. 1997) (quoting *Baker*), *aff'd*, 179 F.3d 29 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999) (No. 99-328); *Koog v. United States*, 852 F. Supp. 1376, 1385 (W.D. Tex. 1994) (same), *rev'd*, 79 F.3d 452 (1996), *cert. denied sub nom. United States v. Gonzalez*, 521 U.S. 1118 (1997).

253. *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988) (emphasis added).

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

255. Cf. *Oklahoma ex rel. Okla. Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) ("Our conclusion that the DPPA differs from the statutes at issue in *New York* and *Printz* is buttressed by the Supreme Court's decision in *Baker*."), *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. May 3, 1999) (No. 98-1760).

256. *Accord Condon*, 155 F.3d at 467 (Phillips, J., dissenting) (noting that administration of the DPPA by DMVs "will be of [the states'] own choosing").

257. The TEFRA provision at issue dealt only with public bonds. Similarly, the DPPA deals only with the dissemination of information by state DMVs. See Recent Case, *supra* note 77, at 1103-04.

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

259. *Id.* at 460.

provided a finer instrument.

Additionally, the *Condon* court's statement that Congress "may not require State officials to administer a federal regulatory program"²⁶⁰ severely dilutes the rationale of *New York*. The take title provision at issue in *New York* was struck down because it went beyond encouraging the states to act.²⁶¹ The provision compelled, rather than encouraged, states to conform to Congress's aspirations because the "choices" it purported to give were not within the power of Congress to offer. Consequently, the statute provided no meaningful choice.²⁶² While certain pronouncements in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*²⁶³ may signal a shift in what qualifies as "encouragement" as opposed to "compulsion,"²⁶⁴ the DPPA probably still provides options for the states.²⁶⁵ First, the Act "only appl[ies] once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files."²⁶⁶ Because only thirty-four states allow easy access to personal information compiled in DMV records,²⁶⁷ it is difficult to argue that the choice not to engage in this conduct is so oppressive as to be no choice at all.²⁶⁸ Additionally, the Act has an opt-out provision that permits DMVs to

260. *Id.*

261. *See* *New York v. United States*, 505 U.S. 144, 177 (1992).

262. *See id.* at 174-77. For a discussion of *New York*, *see supra* notes 142-55 and accompanying text.

263. 119 S. Ct. 2219 (1999); *see also supra* notes 192-209 and accompanying text (discussing *College Savings Bank*).

264. *See College Savings Bank*, 119 S. Ct. at 2231 (holding that "where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity").

265. *Cf. FERC v. Mississippi*, 456 U.S. 742, 765-66 (1982) (upholding Congress's authority to exercise Commerce Clause power when the resulting legislation gave states a choice of whether or not to participate in the regulatory scheme).

266. *Condon*, 155 F.3d at 468 (Phillips, J., dissenting); *accord Oklahoma ex rel. Okla. 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], 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."), *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. May 3, 1999) (No. 98-1760).

267. *See Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

268. *See* Recent Case, *supra* note 77, at 1105; *cf. FERC*, 456 U.S. at 781-82 (O'Connor, J., concurring in part and dissenting in part) (describing the "choice" of a state to either regulate in conformity with federal standards or to stop regulating utilities as absurd and comparing it to a choice of a state to either comply with a federal statute "dictat[ing] the agendas and meeting places of state legislatures," or to "abolish their legislative bodies").

disclose personal information provided that they give notice of the possibility of disclosure and that the licensee or registrant has the opportunity to prohibit the release by signing the same form.²⁶⁹ That the Act provides the states with the chance to continue to disclose information freely, subject only to an affirmative prohibition by a citizen, seems to cleanse it of any hint of commandeering. The requirement that the DMV provide the citizen with the opportunity to prohibit disclosure satisfies the *Baker* standard for routine compliance under a statute into the purview of which the state has opted to come.

The two circuits that have sustained the DPPA against Tenth Amendment challenges have employed a seductive rationale.²⁷⁰ The Seventh Circuit, in considering the same question presented in *Condon*, found that the DPPA “affects states as owners of databases; it does not affect them in their role as governments.”²⁷¹ Similarly, the Tenth Circuit observed that the DPPA does not “limit[] a state’s ability to regulate in the field of automobile licensing and registration, an exercise traditionally left to the states.”²⁷² These statements, while accurate, recall the *National League of Cities* reasoning, which the Court expressly abandoned in *Garcia*.²⁷³ Nevertheless, assuming the Fourth Circuit’s division of Tenth Amendment-Commerce Clause cases into discrete categories is correct, then the abandonment of the “traditional governmental functions” standard should be limited to the “generally applicable” line of cases where it originated. Because the Fourth Circuit held that the DPPA is not generally applicable, perhaps inquiry should be made into the nature of the governmental activity sought to be regulated by Congress.²⁷⁴ *Condon* failed to undertake this inquiry.

269. See 18 U.S.C. § 2721(b)(11) (1994).

270. See *Travis v. Reno*, 163 F.3d 1000, 1008 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818); *Oklahoma*, 161 F.3d at 1272.

271. *Travis*, 163 F.3d at 1004.

272. *Oklahoma*, 161 F.3d at 1272.

273. See *supra* notes 112–20 and accompanying text; see also *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”); George J. Thomas, *The Brady Act, the Tenth Amendment, and America’s Gun Cult*, 30 U. WEST L.A. L. REV. 23, 27 (1999) (“While federalism has been very much in vogue in recent years, the High Court has been reluctant to overrule *Garcia* explicitly.”); cf. Tushnet, *supra* note 95, at 1634 (“*New York v. United States* did not quite overrule *Garcia*.”).

274. *But cf. Printz v. United States*, 521 U.S. 898, 932 (1997) (rejecting a balancing test).

Condon v. Reno resulted in enjoining states' enforcement of the Driver's Privacy Protection Act, a federal statute. The Fourth Circuit's decision, however, is not the last word on the issue, as the Supreme Court will hear the case during the 1999 Term.²⁷⁵ Aside from resolving the issue of the constitutionality of the DPPA, the case provides an opportunity for the Supreme Court to define further the boundary between state and federal power. The DPPA and the Fourth Circuit's disposition of *Condon* present the Court with two issues: (1) whether generally applicable statutes are the "only" means of constitutionally regulating state conduct or whether *Baker* represents a latent line of reasoning; and (2) whether it is prudent to affirm the continuing vitality²⁷⁶ of *Garcia's* process-oriented limits to federal authority or to return to the *National League of Cities* result-oriented jurisprudence.

The *Condon* court's statement that "[u]nder *Garcia* and its progeny, Congress may only 'subject state governments to generally applicable laws' "²⁷⁷ is of such potentially sweeping consequence that the Supreme Court must directly address this characterization.²⁷⁸ *Garcia* refused to hold that generally applicable statutes are the *only* permissible vehicle by which Congress may regulate states directly.²⁷⁹ Moreover, the Court's post-*Garcia* decisions have not embraced explicitly such a narrow holding.²⁸⁰ Nevertheless, the Supreme Court now has the opportunity to address this point and either embrace or refute the Fourth Circuit's conclusions. If the Court agrees with the *Condon* majority on the "generally applicable" issue, then it can decline to address the applicability of *Baker*. Such a decision would be a tacit suggestion that *Baker's* holding depended on its status as a "generally applicable" case. On the other hand, if the Court disagrees with the Fourth Circuit's pigeonholing of *Garcia*, the Court can invoke *Baker* and cultivate a heretofore dormant strand of jurisprudence. The dormant reasoning underlying *Baker* involves

275. See 119 S. Ct. 1753 (1999) (granting certiorari). Oral arguments were heard on November 10, 1999.

276. See Thomas, *supra* note 273, at 27.

277. *Condon*, 155 F.3d at 461 (quoting *New York v. United States*, 505 U.S. 144, 160 (1992)).

278. Cf. *supra* note 87 and accompanying text (noting the Court's past struggle with the limits of federal power over the states).

279. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985); see also *supra* note 154 and accompanying text (quoting Justice White's concurrence in *New York*, 505 U.S. at 201, expressing disdain for the notion that general applicability could cleanse a statute of unconstitutional invasion on state sovereignty).

280. See Clark, *supra* note 136, at 1187 n.196; *supra* notes 225-29 and accompanying text.

federal regulation of certain state conduct that is not addressed by a solitary generally applicable statute. The Court could address these circumstances by designating a new category of cases, the "states-only" line, to serve as the analytical framework to evaluate statutes that govern conduct in which, by definition, no private person can engage.²⁸¹ This line would include both *Baker* and *Condon* and would also embrace the Seventh Circuit's notion that generally applicable legislation can derive from multiple statutes rather than a single piece of legislation.²⁸² Indeed, the addition of such a category is necessary because constitutional assessments of congressional power cannot be confined to the rigid categories of "generally applicable" and "commandeering."

Moreover, the fact that statutes like TEFRA and the DPPA defy facile categorization indicates that a constitutional analysis that upholds commandeering statutes "only" if they are of general applicability cannot be sustained. This observation suggests that the distinct categories articulated in the Fourth Circuit's opinion are unsound.²⁸³ Significantly, Justice O'Connor may be willing to repudiate the bright-line rule that *Printz* represents.²⁸⁴ Perhaps the bright line rule could be replaced by the fundamental state sovereignty calculus that *Garcia* abandoned. The alternative is that *Baker* and *Condon*, rather than serving as the vanguard of a new category of statutes, serve instead as the vehicle for overruling *Garcia* and returning to *National League of Cities*.

Thus, the "states-only" approach to statutes like TEFRA and the DPPA may cross the process-result line that *Garcia* drew and cause federalism analysis to revert to the "States as States" analysis established in *National League of Cities*. Because some members of the Court have indicated an inclination to return to the *National League of Cities* analytical model, this retrogression may be

281. See *supra* note 257 and accompanying text.

282. See *Travis v. Reno*, 163 F.3d 1000, 1006 (7th Cir. 1998) ("This is some distance from a holding that duties imposed on state and private parties must appear in 'the same legislation.'"), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818).

283. After all, "we must never forget, that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

284. Justice O'Connor's concurrence in *Printz* explicitly adverted to her dissatisfaction with the rigid rule established in that case. See *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid." (citation omitted)). Moreover, commentators have observed Justice O'Connor's dislike of bright-line rules. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 605 (1986).

inevitable.²⁸⁵ In addition to the disagreement within the Court in deciding *Garcia*, last term's decision in *Davis* prompted a four-Justice dissent to invoke notions of "traditional areas of state concern" in explaining its view of Title IX.²⁸⁶ This language can be traced back to the pre-*Garcia* era, but whether it signals that a majority of the Court is ready to return to the *National League of Cities* traditional state functions test will have to wait until the Court's opinion in *Condon*.

Although it would appear at first glance that there is now a majority to overturn *Garcia*—specifically, Chief Justice Rehnquist, along with Justices O'Connor, Scalia, Kennedy, and Thomas—such an alignment may prove elusive. While these five Justices tend to vote as a bloc in states' rights cases, Justice O'Connor sometimes elevates gender issues above federalism.²⁸⁷ This voting predisposition may have two consequences: the DPPA may withstand the Court's constitutional scrutiny, but the Court's holding may be fragmented. A five-to-four split on the merits of the case could sustain the DPPA, but the rationale underlying the decision could overrule *Garcia* and return to the *National League of Cities* approach.²⁸⁸ In other words, Justice O'Connor may provide the swing vote for both the merits and the more fundamental federalism issues underlying the case. Justice O'Connor might vote to overrule *Garcia* insofar as it stands for a

285. See *supra* note 126 and accompanying text (discussing then-Justice Rehnquist's and Justice O'Connor's dissents in *Garcia*).

286. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1678 (1999) (Kennedy, J., dissenting); see also *supra* notes 210–20 and accompanying text (discussing *Davis*).

287. Justice O'Connor broke from alignment with the states' rights bloc to support women's rights in *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 834 (1992). While *Casey*'s holding may represent a "significant retreat," Sheila M. Smith, Comment, *Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1906 n.97 (1995), from *Roe v. Wade*, 410 U.S. 113 (1973), Justice O'Connor's position in the case was indisputably more sympathetic to women's rights than that of Chief Justice Rehnquist and Justices Scalia and Thomas. Compare *Casey*, 505 U.S. at 846 (opinion of O'Connor, Kennedy, and Souter, JJ.) ("We are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."), with *id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . ."). Justices White, Scalia, and Thomas joined the Chief Justice's opinion. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); Barbara Palmer, Note, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII Sex-Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159, 170 (1991) (listing cases in which Justice O'Connor "can be seen as endorsing women's rights"); Linda Greenhouse, *From the High Court, a Voice Quite Distinctly a Woman's*, N.Y. TIMES, May 26, 1999, at A1.

288. Justice O'Connor may side with Justices Stevens, Souter, Ginsburg, and Breyer to uphold the constitutionality of the Act. Justice O'Connor, however, may only concur in the opinion, siding instead with the states' rights rationale set forth by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.

process-based approach to federalism analysis while holding that the DPPA encroaches not on an area of traditional state concern, but on a state activity in which a state merely chooses to engage. It is perhaps ironic that a statute of so little substantive import could have such a significant jurisprudential impact.²⁸⁹

The Fourth Circuit's *Condon* opinion illustrates the confused state of the law in the federalism arena. The current approach led the *Condon* court to conclude that the two lines of cases—"commandeering" and "generally applicable"—are not only mutually exclusive, but also analytically exhaustive.²⁹⁰ Form was elevated over function as the court looked no deeper than the first section of the challenged Act.²⁹¹ This analysis brought only states within the statute's purview, forcing the court to conclude that the statute was not generally applicable. Because the states have to administer the statute in some sense, the court determined that it commandeered the states, *Baker's* caveat notwithstanding.²⁹²

Sentiment on the Supreme Court to readdress the current model for evaluating federalism cases²⁹³ makes the outcome of *Condon* uncertain.²⁹⁴ Chief Justice Rehnquist has indicated his interest in returning to the *National League of Cities* analytical model, and there appear to be sufficient votes to achieve the change.²⁹⁵ In light of his

289. See *supra* note 13 and accompanying text (discussing the weaknesses of the DPPA). Of course, it is axiomatic that the wisdom or utility of a challenged law is "totally irrelevant to the judicial task [the Court is] obligated to perform." *EEOC v. Wyoming*, 460 U.S. 226, 250 (1983) (Stevens, J., concurring).

290. See *supra* notes 41–48 and accompanying text.

291. See *supra* note 54 and accompanying text.

292. See *supra* note 73–75 and accompanying text.

293. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579–89 (1985) (Rehnquist & O'Connor, JJ., dissenting); see also *West v. Anne Arundel County*, 137 F.3d 752, 760 (4th Cir. 1998) (adverting to the changing tide of federalism signaled by the Supreme Court in the wake of *Printz*), *cert. denied*, 119 S. Ct. 607 (1998).

294. *But cf. Odom & Feder, supra* note 5, at 152 (suggesting two possible outcomes and noting that either "would greatly clarify Tenth Amendment jurisprudence").

295. See Martha A. Field, *Address at the Twentieth Annual Law Review Symposium: Fear and Federalism, The Meaning of Federalism*, 23 OHIO N.U. L. REV. 1365, 1367, 1368 (1997); Swinford & Waltenburg, *supra* note 216, *passim*. Professors Swinford and Waltenburg note the voting bloc comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas and question whether "[t]here are now five solid votes for continued dramatic change in the way the Court defines and defends the policy purview of the states." *Id.* at 320. After analyzing the voting patterns in almost three dozen cases from the 1994–96 terms, the professors concluded that "the five-justice pro-state bloc on the Rehnquist Court is quite conspicuous in its coherence On average, these five Justices supported the states 76% of the time in the cases discussed" *Id.* at 357. One scholar has suggested that the Chief Justice already returned to the *National League of Cities* approach. See Manning Gilbert Warren, III, *Federalism and Investor Protection: Constitutional Restraints on Preemption of State Remedies for Securities Fraud*,

professed interest in states' rights, Chief Justice Rehnquist's desire to return to the previous model is ironic, as the *National League of Cities* test did not invalidate any federal statutes on federalism grounds.²⁹⁶ Nevertheless, an unknown factor is Justice O'Connor. Although she joins in the majority of most of the states' rights cases,²⁹⁷ Justice O'Connor sometimes switches alignment when gender issues are involved.²⁹⁸ Because federalism jurisprudence is in a state of flux, and because the DPPA is undeniably an anti-stalking statute,²⁹⁹ Justice O'Connor's vote is pivotal—it may be the one that keeps the DPPA on the books and completes the *Garcia* dissenters' prophecy.³⁰⁰

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LAW & CONTEMP. PROBS., Summer 1997, at 169, 190 (“Two years before the *Printz* case, Chief Justice Rehnquist's turn to speak finally came in *Lopez v. United States*, in which he fulfilled his own *Garcia* prophecy.”); see also Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 244 (“On the surface, *Printz* contains signals that *National League of Cities*'s resurrection is at hand.”).

296. See Tushnet, *supra* note 95, at 1626.

297. See *supra* note 216 and accompanying text.

298. See *supra* note 287 and accompanying text; cf. Smith, *supra* note 287, at 1893 (“[C]ommentators speculate that Justice Ginsburg's perspectives on women's issues will result in her supporting women's rights more often, and perhaps more passionately, than Justice O'Connor has done.”).

299. See Odom & Feder, *supra* note 5, at 88–89; *supra* notes 6–12 and accompanying text.

300. See *supra* note 126 and accompanying text.