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The Driver's Privacy Protection Act: On the Fast Track to National Harmony or Commercial Chaos

Oliver J. Kim

Note

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On June 2, 1987, seventeen year-old Robert John Bardo visited the Burbank Studios, hoping to present his favorite actress, Rebecca Schaeffer, with a bouquet of flowers and a teddy bear.[1] As part of the studio's standard operating procedure, the studio security guards refused to let Bardo onto the set and sent Schaeffer a note that "an overly persistent fan" had attempted to contact her.[2] On July 18, 1989, Bardo succeeded in meeting the unsuspecting actress outside her apartment. However, instead of showing his admiration by bringing Schaeffer tokens of affection, he ambushed Schaeffer and shot her to death.[3]

Bardo had little difficulty locating Schaeffer's residence. At the time of the incident, California law permitted the California Department of Motor Vehicles to release a resident's complete driving record, including his or her home address, for a mere five dollars.[4] During his trial, Bardo testified that after being unable to meet Schaeffer at her television studio, he hired a private detective who found her address through the California Department of Motor Vehicles.[5]

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* J.D. Candidate 2000, University of Minnesota Law School; B.A. 1995, Indiana University, Bloomington. The author would like to thank Amy Harting and Alvin Hayes of the Indiana Bureau of Motor Vehicles. The author would also like to thank Adam Gislason, Tae-Yoon Kim, Dana Shenker, and Lois Magner Kim for their helpful advice and suggestions.

1. *See* Tracy Wilkinson, *Murder Suspect's "Obsession" Foretold in Studio Visit*, L.A. TIMES, Aug. 2, 1989, § 2, at 1.

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.* The California Department of Motor Vehicles annually processed nearly 16 million requests for driver and motor vehicle records at a cost

Shocked by the relative ease with which Bardo obtained Schaeffer's home address, legislators in star-studded California used Schaeffer's death as a rallying cry to introduce reforms to control access to state databases.[6] Congress, too, decided to take corrective measures by implementing the Driver's Privacy Protection Act (DPPA), which requires all states to adopt procedures restricting access to motor vehicle records.[7] Although the act regulated the commercial distribution of such records, its sponsor, Senator Barbara Boxer, added that she believed people also have a right to keep information collected by the government private.[8]

State governments reacted differently to the enactment of DPPA. Whereas some states welcomed DPPA as a means of reducing administrative workload,[9] others feared that DPPA compliance would mean steep financial burdens.[10] Additionally, for some states, DPPA threatened a practice that provided a steady stream of revenue: selling driver and motor vehicle records to mass-marketers.[11] Rather than face such costs, several states have challenged this regulatory scheme as a violation of the Tenth and Fourteenth Amendments.[12]

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of $1 to $5 per transaction. *See id.*

6. At the state level, California Assemblyman Mike Roos introduced a bill that would allow individuals to list post office boxes or business addresses on their driver records. *See* CAL. VEH. CODE § 1808.21 (West 1999); *see also* Wilkinson, *supra* note 1, § 2, at 1 (discussing the Rebecca Schaeffer shooting and identifying Roos as the assemblyman who introduced the bill).

7. *See* 18 U.S.C. § 2721 (1994 & Supp. II 1997). Senator Barbara Boxer introduced DPPA, which ultimately was passed into law as part of the Violent Crime Control and Law Enforcement Act of 1993. *See* 139 CONG. REC. S15745-01, *S15761 (1993); *see also infra* notes 92-104 and accompanying text (discussing the passage and implementation of DPPA).

8. *See* Marc Sandalow, *Boxer Bill Would Protect Privacy of DMV Records*, S.F. CHRON., Oct. 26, 1993, at A6 ("This bill recognizes that people have the right to more privacy and a right to more control over the disclosure of information that the government collects about them.").

9. *See* John Yacavone, *Is Your State Prepared to Implement the Driver's Privacy Protection Act?*, MOVE, Spring 1997, at 20, 22.

10. *See* Oklahoma v. United States, 994 F. Supp. 1358, 1362 (W.D. Okla. 1997), *rev'd*, 161 F.3d 1266 (10th Cir. 1998); Condon v. Reno, 972 F. Supp. 977, 981 (D.S.C. 1997) (finding that "implementation of the DPPA would impose substantial costs"), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

11. *See* Travis v. Reno, 12 F. Supp. 2d 921, 923 (W.D. Wis. 1998) (noting that Wisconsin generates $8 million annually from sales of motor vehicle records), *rev'd*, 163 F.3d 1000 (7th Cir. 1998); *see also* Yacavone, *supra* note 9, at 23 (noting that several states sell motor vehicle records).

12. *See* Pryor v. Reno, 998 F. Supp. 1317, 1317 (M.D. Ala. 1998) (holding

Underlying the administrative and economic rationales is the concern over how government bureaucracies control and use individuals' personal information.[13] Fears of "Big Brother" using the extensive information found in government databanks have long gripped the popular consciousness.[14] It is easy to dismiss popular accounts of such fears as mere fiction, but it is nonetheless true that both public and private actors maintain vast databases that contain personal information such as social security numbers, consumer transactions, or medical history.[15]

Individuals, however, must give up some privacy to enjoy the conveniences of modern society.[16] For example, a bank may want to know if an applicant has ever been convicted of credit fraud, or a doctor may need to know what medications a patient is currently taking.[17] Clearly such knowledge has value both to the individual and to society.[18] At some point, however, an individual's privacy outweighs the value of releasing personal, private information to the public. Information technology may expose key, private elements of individual autonomy, including

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DPPA constitutional), *rev'd*, 171 F.3d 1281 (11th Cir. 1999); *Travis*, 12 F. Supp. 2d at 921 (holding DPPA unconstitutional); *Oklahoma*, 994 F. Supp. at 1358 (same); *Condon*, 972 F. Supp. at 977 (holding DPPA unconstitutional); *see also* Loving v. United States, No. 97-6060, 1997 U.S. App. LEXIS 23639, at *4 (10th Cir. Sept. 8, 1997) (dismissing a First Amendment claim for lack of standing).

13. *See* Robert Franklin, *Keeping Open Records Open*, MINNEAPOLIS STAR TRIB., Feb. 2, 1994, at A12 (arguing that by not giving the public access to motor vehicle records, DPPA will allow "convicted murderers and drug users [to operate] school buses" and "drunk drivers to fly commercial airplanes"); Yacavone, *supra* note 9, at 22 (noting that approximately half of the states had "open records" laws at the time DPPA was passed).

14. *See, e.g.*, GEORGE ORWELL, 1984 (1949); ENEMY OF THE STATE (Touchstone Pictures 1998); THE NET (Columbia Pictures 1995).

15. *See generally* AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999). Through motor vehicle agencies, states own one of the nation's most extensive databases. *See* STEVEN L. NOCK, THE COSTS OF PRIVACY 59 (1993) (noting that in 1989, more than 165 million Americans held a driver's license—and thus were registered with a state motor vehicle agency).

16. *See* ETZIONI, *supra* note 15, at 5-7. As an unparalleled form of identification, the driver's license is a symbol of modern convenience: it allows its holder not only to drive but also to purchase alcohol, to register to vote, to write checks, and to do countless other activities requiring identification. *See* NOCK, *supra* note 15, at 59.

17. *See generally* ETZIONI, *supra* note 15 (discussing modern society's need to balance public good against individual privacy).

18. *See* Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2384 (1996).

with whom we associate,[19] where we go,[20] and what we consume.[21] The challenge then for modern society is to determine where that balance should be struck, and who should make and enforce such a decision. When the Supreme Court considers the constitutionality of DPPA,[22] the Court will have the opportunity—if it chooses—to limit or expand how the federal government implements civil rights legislation.

Using DPPA as a model, this Note explores when Congress may regulate state practices in light of recent Supreme Court decisions on federalism. Part I describes the state of Commerce Clause and privacy jurisprudence leading up to the passage of DPPA. Part II analyzes the possible means available to Congress to pass DPPA. Part II also suggests that privacy has real value as a commodity and should be protected as a commercial right, not a civil one. This Note concludes that DPPA is a constitutionally permissible exercise of federal commercial regulatory power.

I. THE FEDERAL GOVERNMENT'S ABILITY TO REGULATE STATE ACTIVITIES

A. CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE

One of Congress's greatest legislative powers is the ability to regulate interstate commerce.[23] After struggling with the

19. *See, e.g.*, John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747 (1992).

20. *See, e.g.*, Peter Wayner, *Closed Door Policy: Princeton's Electronic Security System, Designed to Protect Students, Makes Some Feel Safer and Others Uneasy*, N.Y. TIMES, Nov. 12, 1998, at D1.

21. *See, e.g.*, Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529 (1998); Tim Huber, *Hatch Says U.S. Bancorp Sold Private Data*, ST. PAUL PIONEER PRESS, June 10, 1999, at 1A.

22. *See* Condon v. Reno, 119 S. Ct. 1753 (1999) (granting certiorari).

23. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* THE FEDERALIST NO. 11 (Alexander Hamilton) (discussing the need for uniform commercial policy). Since the New Deal era, the Supreme Court has seemingly "rubber stamped" any federal commercial policies with a connection to interstate commerce, however remote. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 197 (1968) (holding that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence"); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (finding an interstate commercial link sufficient to uphold applica-

question of what activities constitute commerce,[24] the Supreme Court held that any federal commercial regulation reasonably related to the national economy could be considered a constitutional exercise of the Commerce Clause.[25] Under this broad interpretation of commerce, the federal government has used commercial regulations to provide for a wide variety of civil rights. Often, these regulations intrude on what some might consider traditionally local, intrastate activities.[26] Just as the United States uses commercial regulations against sovereign nations that have committed human rights abuses, the federal government has used its commercial powers against the economies of sovereign states that have failed to protect the civil rights of minorities.[27]

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tion of Title II of the 1964 Civil Rights Act against a motel because it served out-of-state customers and bought out-of-state goods).

Federal regulatory power over interstate commerce is so strong that states may not impinge on interstate commerce even when Congress has not explicitly or directly regulated a commercial activity; such state regulatory conduct might cause economic warfare between the states and cripple the national economy. *See* Benjamin C. Bair, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 MICH. L. REV. 2408 (1995). States may act as "market participants," or in a similar fashion to any private business, however, without threatening interstate commerce. *See generally* Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559 (1990); James Hinshaw, Note, *The Dormant Commerce Clause After* Garcia*: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511 (1992).

24. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 189-206 (3d ed. 1996) (discussing the evolution of the Commerce Clause).

25. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act); *see also* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 795-96 (1996); David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of* Lopez, A.B.A. J., July 1995, at 46, 47.

26. *See, e.g.*, *Heart of Atlanta*, 379 U.S. at 243-44; Katzenbach v. McClung, 379 U.S. 294, 297 (1964).

27. *See McClung*, 379 U.S. at 301-05 (holding that Congress may intrude on local activities when it, as a collective embodiment of the nation, feels such local activities have an affect on interstate commerce).

1. Congressional Power To Regulate Interstate Commerce Is Not Absolute

In *United States v. Lopez*,[28] the Supreme Court cast a shadow of doubt over previously established Commerce Clause jurisprudence. In *Lopez*, the majority emphasized that before Congress could regulate an area of commercial activity, there must be a substantial link between interstate commerce and that activity.[29] The Court identified "three broad categories of activity" from its jurisprudence where it had found a substantial link to exist: "the use of the channels of interstate commerce," "the instrumentalities of commerce, or persons or things in interstate commerce," or any activity that has a "substantial relation to interstate commerce."[30] While the majority opinion seemed to be only "restating" already existing catego-

28. 514 U.S. 549 (1995). In his analysis of the federal Gun-Free School Zones Act, Chief Justice Rehnquist seemingly developed a more stringent standard for determining the constitutionality of federal legislation. *See* Susan M. Bauerle, Comment, *Congress's Commerce Clause Authority: Is the Pendulum Finally Swinging Back?*, 1997 DET. C.L. REV. 49 (1997). *But see* Althouse, *supra* note 25, at 806-12 (considering whether *Lopez* is a "throwback," or a return to prohibiting federal regulation of areas traditionally regulated by states). While Althouse argues that "*Lopez* is not a revival of *National League*'s affirmative limitation on the commerce power," she later notes that "*Lopez* has the effect of preserving areas of state activity that are free from federal interference." *Id.* at 811. While *Lopez* may preserve federalism, this is only a side effect, not its main purpose. Thus, one could read *Lopez* as ignoring federalism issues and acting solely as an outer limit to the Commerce Clause.

29. *See Lopez*, 514 U.S. at 637 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."). *But see id.* at 599-600 (Thomas, J., concurring) (criticizing the majority's "substantial effects" test as an ineffective means of reigning in federal commerce regulations); Althouse, *supra* note 25, at 800; Andrew St. Laurent, *Reconstituting* United States v. Lopez: *Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 79-80 (1997). However, using prior case law to illustrate a "new" meaning of "substantial" is problematic: if cases such as *Wickard* are examples of activities with substantial effects, then *Lopez* has not changed the level of judicial review for the Commerce Clause. Without a clear definition, problems may arise in defining what is commerce, particularly in today's information age. *See* Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103 (1992) (discussing information as commercial property).

30. *See Lopez*, 514 U.S. at 557-60. The *Lopez* Court did not overrule any prior case law regarding the Commerce Clause; instead, the majority opinion attempted to fit famous—albeit far-reaching—Commerce Clause cases within the newly identified three categories. *See id.* at 559-60.

ries of commerce, it failed to flesh out the meaning of each category.[31]

Lower courts have applied the *Lopez* standard inconsistently when reviewing federal legislation with questionable commercial aspects.[32] Many courts have continued to uphold federal regulatory statutes so long as a rational relationship exists between the activity in question and interstate commerce.[33] Courts also have accepted boilerplate rationales cre-

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31. *See* Stewart, *supra* note 25, at 46-47.

32. *See, e.g.*, United States v. Miller, 116 F.3d 641, 673 (2d Cir. 1997) (finding that a "substantial" nexus meant "at least some minimum effect on interstate commerce.... [For example,] the purchasing of supplies from time to time [such as] gasoline, anything of the sort [that] satisfies the element of interstate commerce"); United States v. Maloney, 71 F.3d 645, 662-64 (7th Cir. 1995) (upholding an instruction to the jury that "interstate commerce is affected if [the jury found] that the Circuit Court of Cook County has any impact, regardless of how small or indirect, on the movement of any money, goods, services, or persons from one state to another"); United States v. Sherlin, 67 F.3d 1208, 1212-14 (6th Cir. 1995) (finding that a university building is used in interstate commerce and therefore Congress may criminalize its destruction by arson under the Commerce Clause).

One might doubt whether merely purchasing gasoline creates a "substantial" effect on interstate commerce. *See* Stewart, *supra* note 25, at 48 ("[I]f federal jurisdiction can be based on the mere transportation or shipment of a product in interstate commerce, as the [federal] carjacking statute does, then virtually all thefts—right down to shoplifting—can be federal offenses."). But this interpretation of an interstate nexus is plausible when one considers that the *Lopez* opinion explicitly includes "[e]ven *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority [by penalizing locally grown and consumed goods because such goods could compete in the aggregate with goods in interstate commerce]." *Lopez*, 514 U.S. at 560.

One reason that lower courts may be hesitant to adopt a higher standard of review is that the Supreme Court itself has not applied *Lopez* to subsequent decisions. *See* United States v. Robertson, 514 U.S. 669, 670-72 (1995) (per curiam) (finding—without referring to *Lopez*—that defendant's purchase of interstate goods and hiring of out-of-state workers for his mining operation satisfied the interstate commerce requirement). Further, the Supreme Court has validated "at least twelve cases ... under the Commerce Clause" in the past two decades, suggesting that the Court has had ample opportunity to consider new limits for Commerce Clause legislation. Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 656 (1996). *Lopez* could therefore be read as more of a warning to Congress than a landmark case. *See id.* at 655-56 (arguing that "the Court's record as a whole casts significant doubt on whether decentralization is highly valued by most members of the Court"); *see also* JOHN A. FEREJOHN & BARRY R. WEINGAST, THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? x-xi (1997). For examples of various federal statutes threatened by *Lopez*, see St. Laurent, *supra* note 29, at 61.

33. Such holdings might seem to conflict with Justice Rehnquist's view that substantial must mean substantial. *See Lopez*, 514 U.S. at 559. There is sufficient language in the *Lopez* opinion, however, to justify these decisions.

ated during litigation instead of congressional findings made during the legislative process.[34]

2. The Tenth Amendment as an External Limit on the Reach of the Commerce Clause

While the Framers envisioned a strong central government,[35] they did not intend to destroy the integrity of the states.[36] For example, the Constitution protects the states by offering them equal representation in the Senate[37] and forbidding the federal government from altering a state's boundaries.[38] Further, the Tenth Amendment limits the scope of federal power by providing that "[t]he powers not delegated to the [federal government] are reserved to the States."[39] Thus even if Congress enacts a federal regulation within the parameters of an enumerated power, states may invoke the Tenth Amendment to limit the scope of such a regulation.[40] Although the

See Lopez, 514 U.S. at 583 (Kennedy and O'Connor, JJ., concurring) (suggesting that federal commercial regulations need a "connection or identification with commercial concerns that are central to the Commerce Clause" and warning that the majority opinion may overstep precedent).

34. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 710-11 (1996). While the *Lopez* Court suggested that congressional findings might influence a decision by showing the link between commerce and the activity in question, the Court noted that such findings were in no means dispositive. *See Lopez*, 514 U.S. at 562-63.

35. *See* THE FEDERALIST NO. 3 (John Jay) (arguing that a strong union will be more secure and just than a confederation made of state governments); *see also* THE FEDERALIST at xii (Clinton Rossiter ed., 1987) (insisting that "the central government must enjoy unquestioned supremacy in its assigned fields"); IRWIN UNGER, THESE UNITED STATES 159-60 (4th ed. 1989).

36. *See* THE FEDERALIST NO. 46 (James Madison); *see also* UNGER, *supra* note 35, at 160.

37. *See* U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

38. *See* U.S. CONST. art. IV, § 3, cl. 1.

39. U.S. CONST. amend. X.

40. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2197 (1998) (discussing interpretative doctrines that limit the breadth of federal regulations into state functions); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 BYU L. REV. 329 (1996). As of yet, the Court has not placed such restrictive limits on other enumerated powers. *See, e.g.*, New York v. United States, 505 U.S. 144, 167-69 (1992) (upholding monetary incentives as a permissible means of encouraging states to adopt federal programs because such grants still maintain political accountability); South Dakota v. Dole, 483 U.S. 203 (1987) (upholding Congress's use of the Taxing and Spending Clause to require states to impose a minimum drinking age to receive federal highway

Supreme Court has held that the Tenth Amendment simply recognizes the federalist system of government, the Amendment is an external limit on the reach of federal powers.[41]

a. The Tenth Amendment as a Reminder of the Dual Nature of Federalism

The Constitution does not explicitly mention federalism, but the Supreme Court has found implicit safeguards for the federalist system in the Constitution.[42] In *Garcia v. San Antonio*,[43] the Court held that the Tenth Amendment is a mere "truism," or a reminder that the federalist system divides powers between the federal government and the states.[44] By explicitly granting a power to the federal government, the Constitution prohibits the states from exercising that same power.[45] The Constitution, however, "offers no guidance about where the frontier between state and federal power lies."[46]

The *Garcia* Court suggested that the best way to protect federalism and states' interests is through the political process, not the judicial system.[47] After all, Congress embodies the in-

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funding). *But see* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (using doctrines of statutory interpretation to limit the expansion of remedial legislation passed under Congress's Fourteenth Amendment powers into state-determined age limits for state judges) "In the face of... ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.*

41. *See infra* notes 42-61 and accompanying text.

42. *See generally* New York v. United States, 505 U.S. 144 (1992); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); FERC v. Mississippi, 456 U.S. 742 (1982).

43. 469 U.S. 528 (1985).

44. *See id.* at 531 (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)); *see also* THE FEDERALIST NO. 9, at 39 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("A firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection."). *But see Garcia*, 469 U.S. at 560 (Powell, J., dissenting) ("[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.").

45. *See Garcia*, 469 U.S. at 548 ("[T]he sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10."); *see also New York*, 505 U.S. at 156 (noting that whatever powers are not granted to the federal government still belong to the states).

46. *Garcia*, 469 U.S. at 550.

47. *See Garcia*, 469 U.S. at 552-53 (noting that the "effectiveness of the federal political process in preserving the States' interest is apparent even today in the course of federal legislation").

terests of both the people (through the House of Representatives)[48] and the states (through the Senate)[49] in a way that the unelected federal judiciary cannot.[50] Through this system, the states have enjoyed considerable benefits, including land grants and financial aid.[51]

b. The Tenth Amendment Ensures Political Accountability at Both the State and Federal Levels

In recent decisions, the Supreme Court has interpreted the Tenth Amendment to provide additional safeguards for federalism and thus limit the expansion of federal power.[52] First, the Supreme Court in *New York v. United States*[53] held that Congress cannot "commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program."[54] If the federal government commandeers the states' legislative processes to enact a federal policy decision, then the electorate cannot hold the appropriate body politically accountable for enacting such a policy.[55] But if Congress simply offers grants or other financial rewards to encourage states to adopt a federal policy, then residents could

48. *See* U.S. CONST. art. 1, § 2, cl. 1 ("The House of Representatives shall be . . . chosen . . . by the People.").

49. *See* U.S. CONST. art. 1, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."), *amended by* U.S. CONST. amend. XVII, § 1.

50. *See Garcia*, 469 U.S. at 550 ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 481-84 (2d ed. 1995); UNGER, *supra* note 35, at 159 (discussing the development of the American system of separation of powers).

51. *See Garcia*, 469 U.S. at 553.

52. *See* Peter A. Lauricella, Comment, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1378-79 (1997). The Supreme Court has also used the Eleventh Amendment to limit federal expansion. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2230-31 (1999) (determining that states do not waive their Eleventh Amendment immunity when acting as market participants). However, the question of whether DPPA violates the Eleventh Amendment is not before the courts and is beyond the scope of this Note.

53. 505 U.S. 144 (1992).

54. *Id.* at 145 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)); *see also* Jeffrey B. Teichert, Note, New York v. United States*: Constitutional Order or Commerce Clause Chaos?*, 7 BYU J. PUB. L. 377 (1993).

55. *See New York*, 505 U.S. at 168.

still hold their state representatives politically accountable for adopting such policies. For example, residents can vote against state legislators who decide to accept a federal grant in exchange for adopting a federal regulatory scheme.[56]

Second, in *Printz v. United States*,[57] the Supreme Court struck down a federal statute that forced state law enforcement officials to implement federal policies because the statute violated federalism.[58] The Court reasoned that state officials could not be truly accountable to their local electorate if they also had to follow regulatory mandates set by the federal government.[59] Accordingly, state executives should not be responsible for implementing and executing federal policy.[60] The majority concluded that "[w]hen a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'"[61]

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56. *See id.*

57. 521 U.S. 898 (1997).

58. *See id.* at 935 (striking down the Brady Handgun Violence Prevention Act, which required local law enforcement officers to perform background checks on individuals wishing to purchase a gun). *But see* South Carolina v. Baker, 485 U.S. 505, 514-15 (1988) (noting that any federal policy will require some change in state regulatory policy); Jackson, *supra* note 40, at 2246-55 (arguing against the use of a "bright line" rule to prohibit legislative commandeering).

59. *See Printz*, 521 U.S. at 920; *cf.* THE FEDERALIST NO. 39 (James Madison).

60. *See Printz*, 521 U.S. at 926-27.

61. *Id.* at 923-24 (cross-reference omitted) (quoting language from U.S. CONST. art. I, § 8). Justice Thomas, however, suggested that the Commerce Clause could be limited externally by the explicit provisions of an amendment rather than vague notions of federalism. *See id.* at 938 (Thomas, J., concurring) (suggesting that "the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of [the Second] Amendment's protections," and therefore that to construe the Commerce Clause expansively would make other portions of the Constitution superfluous). *But see* Jackson, *supra* note 40, at 2196 (arguing that Justice Scalia, writing for the majority, "was thus profoundly mistaken when he argued that federal imposition of enforcement duties on state law enforcers is . . . unsupportable"). Jackson argues that the rigidity of the *Printz* holding could have substantial effects on uniform national policies such as those in the areas of labor and employment. *See id.* at 2212-13, 2253 (asserting that "[i]nstead of a bright-line rule against 'legislative commandeering,' courts could adopt a presumption that federal directives to state legislatures are not 'Necessary and Proper'" (citation omitted)). Of course, such a flexible rule could lead to judicial law-making, allowing federal judges to pick and choose which federal regulations are necessary and proper for a state legislature to adopt.

B. THE FOURTEENTH AMENDMENT AS A MEANS OF ENFORCING CIVIL RIGHTS AGAINST THE STATES

The federal government also may regulate the states under the Enforcement Clause of the Fourteenth Amendment.[62] Unlike the Commerce Clause, the Fourteenth Amendment explicitly allows the federal government to override state sovereignty when protecting individuals from abuses by the state.[63] Congress, however, may only use its regulatory powers to remedy state abuses, not create rights.[64]

1. Congress Can Only Enforce Civil Rights Explicitly Guaranteed by the Constitution or Determined by the Judiciary

Congress has passed expansive legislation under the Fourteenth Amendment to combat widespread discrimination in areas such as voting[65] and employment.[66] Congress may enforce most of the first eight constitutional amendments against the states through the Fourteenth Amendment.[67] Controversies arise, however, when the courts recognize a right that is not explicitly enumerated in the Constitution.[68] But even if a right is not enumerated within the Constitution, the Court has found implicit protections "that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[69]

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62. U.S. CONST. amend. XIV, § 5. *See* Gregory v. Ashcroft, 501 U.S. 452, 462 (1991) (noting that "the Equal Protection Clause provides a check on . . . state authority").

63. *See Gregory*, 501 U.S. at 462.

64. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

65. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994); *see also* Katzenbach v. Morgan, 384 U.S. 641 (1966).

66. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-33 (1994).

67. *See* Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) ("This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.").

68. *See generally id.* at 507-27 (Black, J., dissenting); *see also* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 60 (1997) (discussing the controversy of the privacy cases); RICHARD HIXSON, PRIVACY IN A PUBLIC SOCIETY 79-80 (1987) (discussing contraception cases); STONE ET AL., *supra* note 24, at 940-1059.

69. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)).

Nonetheless, the judiciary has not tolerated exercises of enforcement legislation as readily as it has federal commercial legislation.[70] The scope of legislation passed under the Fourteenth Amendment may only remedy discriminatory practices defined by the Court, not Congress.[71] In other words, Congress can only create remedial legislation under the Fourteenth Amendment to protect rights explicitly found in the Constitution or rights determined by the judiciary to be within the Due Process Clause.[72]

2. Judicial Findings on Privacy

The Supreme Court has never recognized a general constitutional right to privacy.[73] Rather, the Court has drawn on common law tort theory[74] to find that an individual's expecta-

70. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997).

71. *See id.* at 520 (holding that congressional authority under § 5 of the Fourteenth Amendment is remedial, not determinative). In *Boerne*, the Court struck down the Religious Freedoms Restoration Act, 42 U.S.C. § 2000bb to bb-4 (1994), noting that this nation had never experienced a history of religious discrimination strong enough to warrant remedial legislation affecting state practices.

72. *See id.* at 531 (noting that little history exists in the legislative record on "animus or hostility to the burdened religious practices or [an indication of] some widespread pattern of religious discrimination in this country").

While preventative measures may sometimes be warranted, granting Congress the authority to determine what is a violation would give the legislature power exceeding the scope and intention of the Fourteenth Amendment. *See id.* at 532 (stating that "[r]emedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'") (quoting The Civil Rights Cases, 109 U.S. 3, 13 (1883)). *But see In re* Young, 141 F.3d 854, 860 (8th Cir. 1998) (noting that "Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection" (citation omitted)), *cert. denied sub nom.* Christians v. Crystal Evangelical Free Church, 119 S. Ct. 43 (1998).

73. *See* American Fed'n of Gov't Employees v. HUD, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy"). *But see* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (noting that "privacy rights are . . . 'plainly rooted in the traditions and significant concerns of our society'" (citation omitted)).

74. Prior to his appointment to the Supreme Court, Justice Brandeis advocated persuasively for a right to privacy. *See* Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The theories advanced in *The Right to Privacy* were used successfully in developing tort liability for public disclosure of private facts and other privacy-based torts. *See* DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT: SEX, DRUGS, AND THE RIGHT TO LIFE 75-88, 91 (1992) (discussing the common law foundation of the right to privacy); *see also* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Do-*

tion of privacy may limit government intrusion into his or her personal affairs.[75] For example, the Court has found such an expectation to exist in areas such as police investigations[76] and reproductive rights, including contraception[77] and abortion.[78] In *Whalen v. Roe*,[79] the Court identified two areas "sometimes characterized as protecting 'privacy' . . . . [o]ne is the individual interest in avoiding disclosure of personal matters, and another

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main, 55 MD. L. REV. 425, 432, 432-33 nn.37-39 (1996) (noting that "[m]ost states recognize an invasion of privacy action for the public disclosure of private facts through their common law" and listing the cases establishing such a tort in 41 states and the District of Columbia).

75. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

"Privacy" is an amorphous and difficult concept to define legally. *See, e.g.*, C. Herman Pritchett, *Foreword* to DAVID M. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY at vii, vii-ix (1979) (offering anecdotal problems including the refusal of officials at the U.S. Embassy in Moscow to release the name of a visiting American citizen who died in a fall; the officials believed they were restricted by the Privacy Act). Advances in technology often conflict with contemporary notions of privacy and call for adequate protection. *See, e.g.*, MCWHIRTER & BIBLE, *supra* note 74, at 147 (describing "mind and body" tests, such as genetic testing, that either will be or are being used in the workplace). Such legal protections, however, must be specifically tailored to permit legitimate uses of information. *See* Pritchett, *supra*, at ix (discussing an Oregon privacy statute that prohibited state officials from releasing an individual's criminal record; the legislature failed to realize that the statute would prevent police from contacting recent arrestees' relatives for bail).

76. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (requiring law enforcement officers to obtain a search warrant before using wiretapping devices).

77. *See, e.g.*, *Griswold*, 381 U.S. 479, 485. In *Griswold*, the Supreme Court held that Connecticut could not prohibit the use of contraceptives by married couples. *See id.* The level of intrusion necessary to enforce such a law would place an impermissible burden on a married couple's intimate relationships. *See id.* at 485-86. Although the right to privacy is not explicitly found in the Constitution, the Supreme Court in *Roe v. Wade* concluded that privacy "is founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 152-53 (1973). For an interesting note on the legal strategies (or scheming) behind *Griswold*, see HIXSON, *supra* note 68, at 79-80. Privacy is still considered to be embedded within the Fourteenth Amendment; at times, the Court has attempted to find a right of privacy included within penumbras around the First, Fourth, and Ninth Amendments. *See* Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977) (relying on *Roe*, 410 U.S. at 152-53).

78. *See Roe*, 410 U.S. at 152-53.

79. 429 U.S. 589 (1977). The Court considered whether a state registry of the names of patients using particular prescription drugs violated patients' and doctors' rights to privacy. *See id.* at 591. Such a registry implicated both an individual's right to nondisclosure as well as the right to make important decisions in private. *See id.* at 600.

is the interest in independence in making certain kinds of important decisions."[80] "[T]he accumulation of vast amounts of

80. *Id.* at 598-600 (citations omitted). Writing for a unanimous Court, Justice Stevens pointed to several cases for examples of the right to nondisclosure of private facts, including *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 82 (1974) (Douglas, J., dissenting) (arguing that allowing access to financial records could invade an individual's rights to privacy and free association), *Stanley v. Georgia*, 394 U.S. 557 (1969) (privacy and possession of pornography in the home), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy and contraceptives), and *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (privacy and searches and seizures). Justice Stevens also cited a number of cases upholding the right to make personal decisions free from government intrusion, including *Doe v. Bolton*, 410 U.S. 179 (1973) (privacy and abortion), *Roe v. Wade*, 410 U.S. 113 (1973) (privacy and abortion), *Loving v. Virginia*, 388 U.S. 1 (1967) (privacy and marriage), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (privacy and education), and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same). *See Whalen*, 429 U.S. at 599-600 nn.25-26. Despite the Court's delineation of privacy into two distinct spheres, "privacy" remains a difficult concept to define in clear legal terms. *See* HIXSON, *supra* note 68, at 46, 52-89 (discussing various legal and nonlegal scholars' thoughts on privacy).

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court began limiting the "kinds of important decisions" that fell within the second *Whalen* category. *Id.* at 190-91. The *Bowers* Court considered whether a state statute criminalizing homosexual sodomy unconstitutionally impinged on the right to privacy. *See id.* at 190. Although enforcing the statute implicated the same problem as the prohibition on contraception did in *Griswold*—how could a state enforce such a statute without barging into a private citizen's bedroom?—the Court refused to include sodomy within the right to privacy. *See id.* at 196. The majority reasoned that it could not extend the right to privacy to include homosexual activity without eventually including all consensual acts, such as drug use:

> Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* [dealing with obscene materials in an individual's home] itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Id. at 195-96 (citation omitted).

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court severely limited a plaintiff's recourse for the public disclosure of private facts. *See id.* at 541. The Court held that punishing a newspaper for disclosing the identity of a rape victim violated the First Amendment. *See id.* at 532. While this ruling led many commentators to pronounce "dead the more than century-old tort of public disclosure of private facts," Mintz, *supra* note 74, at 426 & n.1, *Florida Star* dealt with a newspaper that *lawfully* obtained private facts. The newspaper was not a proper defendant for a civil lawsuit because such suits might cause a chilling effect. *See* MCWHIRTER & BIBLE, *supra* note 74, at 84-85 (noting that "[i]f fault lay anywhere, it was with the [police] department, which itself violated the statute . . . [prohibiting releasing a rape] victim's name"); *see also* Mintz, *supra* note 74, at 456 (discussing a theory of liability

personal information in computerized data banks or other massive government files . . . . much of which is personal in character and potentially embarrassing or harmful if disclosed" implicates both areas.[81] Thus, the public had a right to be assured that the state would maintain such information securely.[82] Furthermore, the Court noted that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."[83] However, the Court found the state's interest—combating illegal sales of prescription drugs—outweighed an in-

based on whether the private facts revealed were "lawfully obtained").

81. *Whalen*, 429 U.S. at 605; *see also* VISIONS OF PRIVACY 6 (Colin J. Bennett & Rebecca Grant eds., 1999); *cf.* HIXSON, *supra* note 68, at 209 (noting that in 1971 "anyone who knows a credit grantor's identifying code number and has access to a telephone may be able to reach the reservoir of detailed financial information that already exists on over a hundred million persons," which today is a conservative estimate (citation omitted)).

In *Whalen*, the state wanted to register patients who used certain prescription drugs. It hoped to use this registry to track down doctors and patients who resold prescription drugs on the black market. *See Whalen*, 429 U.S. at 591. The New York statute theoretically implicated both types of privacy, freedom from personal disclosures and independence in making important decisions. *See id.* at 600. First, patients and doctors might decide to risk potential medical or legal consequences rather than prescribe or obtain certain drugs because of the chance that such information will become publicly known. Their ability to make important decisions in private would thus be affected. *See id.* Second, patients might fear that employers and family members could find out that they used an often-abused substance, violating their right to be free from disclosure of embarrassing personal information. *See id.*

82. *See id.* at 605. The right to privacy is really about control over one's own person. *See* HIXSON, *supra* note 68, at 226-27 (suggesting that federal statutes on privacy attempt to give citizens control over information collected by the government). Individuals have little control over how personal information is later used by data-collecting agencies. *See* Komuves, *supra* note 21, at 569-77. As one commentator noted,

> [C]elebrities, alive or dead, retain rights to control others' use of their names or likenesses for commercial purposes. For example, if Elvis Presley's heirs can prevent someone from using his name on a bar or restaurant to make money, why can't the ordinary citizen prevent the commercial use of his name through the sale of [his] name and SSN on a mailing list?

Id. at 574 (citation omitted).

83. *Whalen*, 429 U.S. at 605. The Court left open the question of the extent of this duty: "[w]e therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions." *Id.* at 605-06. The Court, however, noted that such a "duty arguably has its roots in the Constitution." *Id.* at 605. For a discussion on problems inherent in modern record-keeping systems, see Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847, 851-58 (1998), and Glenn Chatmas Smith, *We've Got Your Number! (Is It Constitu-*

ombating illegal sales of prescription drugs—outweighed an individual's interest in making decisions and being free from embarrassment.[84]

Lower courts have struggled to maintain a balance between the public's need for various types of information and individual privacy.[85] Clearly, some personal information is needed for an orderly, efficient government.[86] Federal and state actors often have legitimate reasons for obtaining information on an individual. For example, agents of public regulatory agencies may need access to personal records to promote public health and safety[87] or ensure the honesty and respectability of public employees.[88] At the same time, the government must assure citizens that such information will not be arbitrarily released in an embarrassing fashion or used to abridge their freedom. Although courts have adopted a balancing test to weigh these two competing interests, the balance has generally been struck in the government's favor.[89] Some courts have

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tional to Give It Out?): Caller Identification Technology and the Right to Informational Privacy, 37 UCLA L. REV. 145, 202-05 (1989). Although these articles consider private companies' systems, the problems with many private companies' record-keeping systems mirror the problems public agencies face when creating their own registries.

84. *See Whalen*, 429 U.S. at 600, 603-04; *supra* note 81 and accompanying text.

85. *Compare* American Fed'n of Gov't Employees v. HUD, 118 F.3d 786, 791 (D.C. Cir. 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information."), *with* Doe v. Southeastern Pa. Transp. Auth., 886 F. Supp. 1186, 1189-92 (E.D. Pa. 1994) (holding that the government's need for an individual's personal information must be balanced against his or her privacy interests), *aff'd*, 72 F.3d 1133 (3d Cir. 1995). The circuits are split on the standard of review privacy claims about disclosure should receive. *See* CATE, *supra* note 68, at 64 (noting that the Second, Third, Fifth, and Ninth Circuits review *Whalen*-type scenarios under a seemingly higher standard, whereas the Fourth and Sixth Circuits seem to limit *Whalen* severely).

86. *See* NOCK, *supra* note 15, at 8, 13.

87. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578-80 (3d Cir. 1980); United States v. Allis-Chambers Corp., 498 F. Supp. 1027, 1031 (E.D. Wis. 1980); *see also* Hayley Rosenman, *Patients' Rights to Access Their Medical Records: An Argument for Uniform Recognition of a Right of Access in the United States and Australia*, 21 FORDHAM INT'L L.J. 1500, 1517-19 (1998).

88. *See* Walls v. City of Petersburg, 895 F.2d 188, 192-94 (4th Cir. 1990); Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 110-11 (3d Cir. 1987).

89. *See* Doe v. Attorney Gen., 941 F.2d 780, 796 (9th Cir. 1991) (adopting a balancing approach to a nondisclosure claim); *Westinghouse*, 638 F.2d at 578 (weighing factors that include the type of record requested, the information it might contain, the potential for harm in any subsequent nonconsensual disclo-

only found for the government when satisfied that there are sufficient procedural safeguards to ensure that personal information remains private.[90] Government agencies may also be held to a higher standard of accountability if they fail to keep individuals' personal information private and inadvertently release it.[91]

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sure, the injury to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the need for access, and whether there is some recognizable public interest in granting access).

In making its decision, a court also may consider the type of information requested, the reason the information is needed, and the individual involved. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 455-65 (1977). In *Nixon*, the Supreme Court suggested that President Nixon might have had a stronger privacy expectation in his personal effects had he not been the highest elected official. *See id.* "[A]ny intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening.... Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe*." *Id.* at 458 (citations omitted). "[T]he constitutionality of the [Presidential Recordings and Materials Preservation] Act must be viewed in the context... of appellant's status as a public figure." *Id.* at 465. President Nixon had argued unsuccessfully that the archivists could not view his records because of potential public disclosure of "extremely private communications between him, and among others, his wife, his daughters, his physician, lawyers, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." *Id.* at 459.

90. *See* Shoemaker v. Handel, 795 F.2d 1136, 1144 (3d Cir. 1986) (determining that the New Jersey horse racing commission's testing plan adequately protected jockeys' privacy rights but "[i]f the Commission ceases to comply with the proposed confidentiality rules, the jockeys may return to court with a new lawsuit"); *see also* Komuves, *supra* note 21, at 572-74 (1998) (discussing a growing judicial recognition of an individual's privacy in personal identifiers such as social security numbers, but noting a lack of judicial remedies for improper use of such identifiers).

One observer noted that the public sector is investing increasingly in technology that will reduce costs and promote efficiency. *See* Budnitz, *supra* note 83, at 872-74 (noting that the public sector's increasing reliance on "smart cards" and other technological advances to distribute benefits to individuals allows government employees greater access to personal, private information). Such an investment may save money by reducing paper waste, "human capital," and storage costs, but states may not take security measures to ensure the validity and security of collected information. Perhaps prophetically, Justice Brennan warned of the dangers in relying on massive computer databanks: "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring).

91. *See* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("Information is constitutionally protected when a legitimate expectation exists that it will

C. PASSAGE OF THE DRIVER'S PRIVACY PROTECTION ACT

Although DPPA was initially designed to ease Hollywood's fears of stalkers,[92] the privacy statute received wide support from various special interest groups concerned about the potential harms from state distribution of personal information.[93]

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remain confidential while in the state's possession." (citation omitted)). Most citizens, however, believe that information stored electronically will not remain confidential. *See* Budnitz, *supra* note 83, at 874. Such a conclusion is not unreasonable, as anecdotal evidence about "hacking" and identity theft demonstrates. *See* CATE, *supra* note 68, at 203 (noting that 90% of Americans surveyed by a *USA Today* poll believe that data-collecting agencies should develop and bear the expense of privacy-friendly "opt-in" systems, where consumers request to become a data subject instead of requesting to be removed from a data list ("opt out")); Budnitz, *supra* note 83, at 874-79 (discussing problems in self-regulatory methods).

For example, in *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995), the Tenth Circuit considered whether an individual had a right to privacy in his wife's diary. After receiving the permission of the plaintiff, Gary Sheets, to examine his deceased wife Kathy's diary, police investigators inadvertently placed the diary into a public investigative file. *See id.* at 1386. Salt Lake City officials used Kathy Sheets' diary in their investigation of two bombings. *See id.* While it was unclear whether the police assured her husband that the diary's contents would remain confidential, Sheets testified that he only gave the diary to the police because he expected it to remain private. *See id.* at 1386, 1388. Passages from the diary, however, found their way into three books on the incident, either as supporting materials or as direct quotations. *See id.* at 1386. In affirming the jury verdict for the plaintiff, the *Sheets* court held that the fact that the police could not recall whether they had "initially assured Mr. Sheets of the diary's confidentiality does not negate . . . that an understanding of confidentiality did exist." *Id.* at 1388. Moreover, even though the police might have a "compelling state interest" in receiving the diary as part of their investigation, there was "no such compelling interest in the dissemination of Mrs. Sheets' diary . . . ." *Id.* at 1388-89; *see also* Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) ("[E]ven if the information was properly obtained [by the State Attorney], the state may have invaded Fadjo's privacy in revealing it . . . .").

92. *See* Sandalow, *supra* note 8, at A6; *see also* Scott Hays, *Inside Celebrity Obsessions*, L.A. TIMES, Oct. 17, 1990, at E1; Duke Helfand, *No Rest For Victims of Stalking*, L.A. TIMES, Jan. 5, 1996, at B1.

Of course, movie stars are not the only people who wish to control access to their addresses and other information. For example, Indianapolis mayor and former Marion County prosecutor Stephen Goldsmith has "gone to elaborate means" to keep his home address private because of numerous death threats. Gerry Lanosga, *Mayor's Secret Address Prompts Legal Inquiry*, INDIANAPOLIS NEWS, April 14, 1995, at B1.

93. *See, e.g., Driver's Privacy Protection Act of 1993: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103d Cong. (1994) [hereinafter *Hearings*] (statement of Congressman James P. Moran), *available in* 1994 WL 14168121 (discussing criminal applications of drivers and motor vehicle records); *Hearings* (testimony of Professor Mary J. Culnan, Georgetown University, School of Business Admini-

DPPA required all state agencies responsible for maintaining drivers and motor vehicle records to prohibit the indiscriminate release of such information to the general public by September 14, 1997.[94] Congress, however, recognized that there are legitimate reasons for accessing such records and provided exemptions for certain public and private actors such as courts,[95] law enforcement officers,[96] insurance companies,[97] tow truck operators,[98] and commercial trucking employers.[99]

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stration), *available in* 1994 WL 14168083 (discussing the use of motor vehicle information by "individual companies, direct marketers who compile databases and then sell lists to other direct marketers, and firms that compile databases for use in prospect research by fundraisers" and the problems in industry self-regulation); *Hearings* (testimony of Janlori Goldman, American Civil Liberties Union), *available in* 1994 WL 14168075 (discussing the ACLU Privacy and Technology Project and arguing for a uniform national policy "given that DMVs collect personal information as a condition of licensure, and the information is intended for use in that context"); *Hearings* (testimony of Donald L. Cahill, Legislative Chairman, Fraternal Order of Police), *available in* 1994 WL 14168055 (testifying in support of DPPA); *Hearings* (testimony of David Beatty, National Victims Center), *available in* 1994 WL 14168013 (discussing statistics from the National Victim Center and the inability of states to respond adequately to the privacy concerns of domestic abuse victims); *Hearings* (testimony of David F. Snyder, American Insurance Association), *available in* 1994 WL 212701 (testifying in support of DPPA). *But see, e.g.*, *Hearings* (testimony of Richard A. Barton, Direct Marketing Association), *available in* 1994 WL 14168138 (testifying against DPPA in general but supporting provisions that allow citizens to opt out of DPPA provisions); *Hearings* (testimony of Richard Oppel, American Society of Newspaper Editors, the Newspaper Association of America, the Reporters Committee for the Freedom of the Press, the Radio-Television News Directors Association, the Society of Professional Journalists, and the National Newspaper Association), *available in* 1994 WL 212720 (offering anecdotal evidence of how journalists used driver and motor vehicle records in various stories written to benefit the public).

In addition to DPPA, there are a host of other federal statutes and proposals to regulate the dissemination of personal information. *See generally* The Privacy Act of 1974, 5 U.S.C. § 552(a)-(q) (1994) (regulating federal record-keeping and dissemination of personal information); United States v. Westinghouse Elec. Co., 638 F.2d 570, 576-77 (3d Cir. 1980) (discussing legislation "relating to discrete subject areas provisions protecting an individual's privacy in the information collected, and limiting the circumstances under which there can be inspection and disclosure."); CATE, *supra* note 68, at 76-79 (discussing federal legislation aimed at public agencies); *id.* at 80-88 (discussing federal legislation aimed at particular private industries).

94. *See* Pub. L. No. 103-322, § 300003 (1994).
95. *See* 18 U.S.C. § 2721(b)(4) (1994).
96. *See id.* § 2721(b)(1).
97. *See id.* § 2721(b)(9) (Supp. II 1997).
98. *See id.* § 2721(b)(7) (1994).
99. *See id.* § 2721(b)(9) (Supp. II 1997).

DPPA also prohibits states from disclosing records to mass-marketers without providing citizens an opportunity to opt out of such mass distributions.[100] The U.S. Attorney General could impose fines on states that improperly disseminate driver or vehicle records to an unauthorized individual.[101] In addition, authorized recipients face civil penalties for releasing such information into the hands of an unauthorized third party.[102]

Several states easily complied with the DPPA requirements. For example, Alaska, Arkansas, and Hawaii already had privacy legislation in place.[103] The majority of states had less stringent or no privacy legislation, however, and a few states even turned selling such personal records into a steady source of revenue, often netting millions of dollars annually.[104]

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100. *See id.* § 2721(b)(12)(A)-(B) (1994); *see also id.* § 2721(b)(11) (allowing a state to release personal information about an individual for any purpose as long as the individual has had an opportunity to opt out and declined to do so).

An example of a distribution company is ACS, a California-based distributor of celebrity address lists that caters to "Entertainment Tonight," "Hard Copy," and other national entertainment news programs. *See* Nancy Spiller, *Celebrity Address Lists Pose a Risk*, TORONTO SUN, April 9, 1995, at 15. ACS, which advertises both internationally and domestically, sells between 700 and 1,000 copies of its celebrity address list a month. *See id.*

101. *See* 18 U.S.C. § 2723(b) (1994) ("Any State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.").

102. *See id.* § 2724(a)-(b). An individual whose personal information is disseminated can bring a private cause of action against a "person who knowingly obtains, discloses or uses personal information . . . for a purpose not permitted [by DPPA]." *Id.* § 2724(a). In such a suit, a court may award actual damages up to $2,500, punitive damages, reasonable attorney and other litigation fees, and any other equitable relief within the court's discretion. *See id.* § 2724(b).

103. *See* Yacavone, *supra* note 9, at 22.

104. *See* David Beatty, *Protect Motorists' Privacy*, USA TODAY, April 14, 1994, at 10A ("In most states (37, to be exact) anyone can walk into a motor vehicle office with your tag number . . . and get your name, address and phone number—no questions asked."); John Gibeaut, *Keeping Federalism Alive: Courts Overturn Law Barring State Release of Driver Record*, A.B.A. J., Jan. 1998, at 38 (noting that "[m]ore than 30 states allow access to [state motor vehicle records], and many routinely sell driver's license lists to direct marketers"); Yacavone, *supra* note 9, at 22-23.

II. PROTECTING INDIVIDUAL PRIVACY: CIVIL OR COMMERCIAL

A. THE CURRENT CIRCUIT SPLIT ON CHALLENGES TO DPPA

1. Approach of the Fourth and Eleventh Circuits

In *Condon v. Reno*, the Fourth Circuit was the first court to strike down DPPA, affirming a district court's injunction.[105] The *Condon* court noted that "the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution."[106] Thus, the crucial issue was not what activity DPPA regulated but what actor DPPA regulated—here, the states.[107]

The *Condon* court believed that when a state challenges a federal commercial regulation, "the resulting enactment is analyzed by [a court] under one of two different lines of cases."[108] Under the first line of cases, courts must uphold "laws of general applicability that incidentally apply to state governments."[109] Congress, however, must state "with unmistakable clarity" that a law is generally applicable to states and private actors alike.[110] Under the second line of cases, courts should strike down laws seeking "to direct the States to implement or administer a federal regulatory scheme."[111] From these two lines of cases, the *Condon* court concluded that the Constitution grants Congress the power to regulate individuals but generally not states.[112] In other words, "Congress may *only*

105. 155 F.3d 453 (4th Cir. 1998), *aff'g* 972 F. Supp. 977 (D.S.C. 1997), *cert. granted*, 119 S. Ct. 1753 (1999); *see* Mark Hansen, *Mid-Atlantic Drift*, A.B.A. J., Aug. 1999, at 66-68 (explaining that although *Condon* was close (2-1), the decision was not surprising given the court's conservative reputation).

106. *Condon*, 155 F.3d at 458.

107. *See id.*

108. *Id.* at 459.

109. *Id.* at 458. This line of cases includes *South Carolina v. Baker*, 485 U.S. 505 (1988), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *EEOC v. Wyoming*, 460 U.S. 226 (1983).

110. *Condon*, 155 F.3d at 459 n.4 (relying on Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998), and Gregory v. Ashcroft, 501 U.S. 452 (1991)).

111. *Condon*, 155 F.3d at 459. Such cases include *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

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

'subject state governments to generally applicable laws.'"[113] Further, Congress could only preempt states' own regulatory schemes if Congress "has the authority to regulate [similar] private activity."[114] The *Condon* court held that DPPA fell under the second line of cases and thus violated the Tenth Amendment.[115] DPPA could not be a law of general applicability because it was aimed specifically at states—after all, only states license drivers and vehicles.[116] DPPA would only be a law of general applicability if it was part of some grand privacy scheme regulating all types of databases.[117] Although the court recognized that DPPA would be enforced by the U.S. Attorney General, the court noted that "state officials must . . . administer the DPPA" because states control and maintain the databanks containing driver and vehicle records.[118]

The *Condon* court added that Congress lacked power under the Fourteenth Amendment to pass DPPA. The court initially noted that "there is no general constitutional right to privacy."[119] The Supreme Court had only recognized a right to privacy in such intimate areas as reproduction, contraception, and

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113. *Id.* at 456 (emphasis added) (quoting *New York*, 505 U.S. at 160). The Fourth Circuit noted, however, that this line of cases was filled with inconsistency. *See id.* at 458-59 (noting that the Supreme Court had reversed itself three times in considering whether the Fair Labor Standards Act applied to state employees).

114. *Id.* at 463 n.6 (quoting *New York*, 505 U.S. at 160).

115. *See id.* at 463.

116. *See id.* at 461-62. As noted previously, the Fourth Circuit believed that the crucial question was who was being regulated, not what was being regulated. *See supra* text accompanying note 107. Thus, the court found it irrelevant that Congress regulated dissemination of personal information by private actors in other areas. *See also Condon*, 155 F.3d at 462 (acknowledging that Congress had passed under the Commerce Clause such statutes as the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994), the Cable Communications Policy Act, 47 U.S.C. § 551 (1994), and the Fair Credit Reporting Act, 15 U.S.C. § 1618b (1994)).

117. *See id.* at 462.

> A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

Id.

118. *Id.* at 460-62.

119. *Id.* at 464 (quoting Whalen v. Roe, 429 U.S. 589, 608 (1977) (Stewart, J., concurring)).

marriage.[120] These areas generally concern the sanctity of the home and thus carry a corresponding "reasonable expectation of privacy."[121] There is no such expectation, however, in a driver or vehicle record, because individuals routinely give out such information in daily transactions. Further, driving is a highly regulated field, and motor vehicle records generally have been considered public.[122]

Senior Circuit Judge Phillips dissented, arguing that DPPA could be passed under the Commerce Clause.[123] Judge Phillips agreed that the initial question was "whether Congress may, consistent with the Tenth Amendment, impose its will on States respecting conduct uniquely engaged in by States and state actors."[124] He suggested Congress could have tied DPPA to federal highway funding requirements[125] or, as an extreme measure, Congress could have preempted the entire field of motor vehicle information disclosure.[126] Congress instead chose to regulate the states directly. Judge Phillips noted such a regulation was quite different from *New York* and *Printz*, where the states were forced to regulate private parties according to federal, not state, standards.[127] Thus, according to Judge Phillips, the federal government had not commandeered the states to enforce its regulatory scheme. The federal government still had the responsibility of enforcing DPPA, and thus Congress would bear the brunt of the political backlash if the statute failed.[128]

Judge Phillips then turned to the question of whether DPPA needed to be a generally applicable law.[129] Although he

120. *See id.* (citing Skinner v. Oklahoma, 316 U.S. 535 (1942) (castration); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage)).

121. *Id.* at 464-65.

122. *See id.* at 465.

123. *See id.* at 465 n.1 (Phillips, J. dissenting). Believing that DPPA was a constitutional exercise of the Commerce Clause, Judge Phillips did not reach the question of whether DPPA could be justified as an exercise of the Fourteenth Amendment.

124. *Id.* at 466.

125. *See id.* The majority rejected this hypothetical as too remote. *See id.* at 463 n.6 ("We are hard pressed to see a connection between a privacy statute and highway funds.").

126. *See id. But see supra* text accompanying note 114.

127. *See Condon*, 155 F.3d at 466-67.

128. *See id.* at 466, 468-69.

129. *See id.* at 467.

acknowledged that the *Garcia* line of cases dealt with regulations affecting states and private actors equally, he disagreed with the majority's belief that a federal regulation *must* be generally applicable to be constitutional.[130] Instead, he argued that the statutes at issue in *Garcia* and its progeny regulated the states directly, rather than commandeering states to regulate third parties.[131] Unlike *New York*, states had the choice of abiding by the federal guidelines for dissemination or leaving the field entirely.[132] Judge Phillips concluded that DPPA would be just as "intrusive" on states if it had been passed as part of a larger privacy scheme.[133]

Like the *Condon* majority, the Eleventh Circuit in *Pryor v. Reno*[134] also struck down DPPA as unconstitutional. Unlike the Fourth Circuit, the *Pryor* court questioned whether DPPA had a substantial link to interstate commerce. The *Pryor* court pointed to the numerous exceptions in DPPA for various legitimate uses of driver and vehicle information.[135] Congress claimed its "authority to regulate the States' dissemination of personal DMV information lies in its power to regulate the commercial aspect of this information," but the interstate aspect of DMV records had "escaped" through these exceptions.[136]

The *Pryor* court, however, ultimately did not "resolve this troublesome issue [because the court believed that] the Act violated the Tenth Amendment."[137] While acknowledging that

130. *See id.* at 467-68.

131. *See id.* at 468 (relying loosely on Thomas H. Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987)). Under Odom's theory, "general applicability" is irrelevant to the consideration of Tenth Amendment challenges to federal laws. *See* Odom, *supra*, at 1679-81. For example, Congress could have passed a minimum wage statute aimed solely at states as employers but could not require states to enforce a minimum wage against private actors. *See Condon*, 155 F.3d at 468 & n.3.

132. *Cf.* South Carolina v. Baker, 485 U.S. 505, 509 (1987) (upholding "powerful incentives to issue bonds in registered form" to receive tax-exempt status; states could still issue bonds in unregistered form, but would lose the exemption).

133. *See Condon*, 155 F.3d at 469.

134. 171 F.3d 1281 (11th Cir. 1999), *rev'g* 998 F. Supp. 1317 (M.D. Ala. 1998).

135. *See id.* at 1284 ("In trying to protect legitimate governmental and business uses of such information, however, Congress riddled the Act with more holes than Swiss cheese."); *see also supra* notes 95-100 and accompanying text (citing exceptions to DPPA).

136. *Pryor*, 171 F.3d at 1284.

137. *Id.* at 1284-85.

DPPA established a different regulatory scheme than *Printz* and *New York*,[138] the *Pryor* court noted that states could only release driver and vehicle records according to the federal government's directives.[139] Further, DPPA required state involvement to be effective. Because only states keep such records, only state officers can regulate the use of these records.[140]

Like the Fourth Circuit, the Eleventh Circuit also rejected the federal government's reliance on *Garcia* because the court did not believe DPPA was a "generally applicable federal regulation."[141] Again noting that only states maintain driver and vehicle records, the *Pryor* court likened DPPA to *Printz* because in both cases, state officers were required to regulate "information that belongs to the State and is available to them only in their official capacity by examining databases and records that only state officials have access to."[142]

Finally, the *Pryor* court concluded without much comment that DPPA could not be justified as an exercise of the Fourteenth Amendment.[143] Although the court conceded a right to "confidentiality" in personal information, it did not believe such a right extended to information contained in a driver or vehicle record.[144]

2. Approach of the Seventh and Tenth Circuits

Two other federal circuits have upheld the constitutionality of DPPA under the Commerce Clause.[145] The Tenth Circuit

138. *See id.* at 1285 ("We recognize that the DPPA does not compel Alabama to enact legislation as in *New York*; nor does it conscript state officers to help the federal government search for potential violations of federal law as in *Printz*.").

139. *See id.* at 1285-86.

140. *See id.* at 1286 (noting that under this scheme, state officers would essentially be "acting as federal agents making federal policy") (relying on Printz v. United States, 521 U.S. 898, 928-29 (1997)).

141. *Id.* at 1286.

142. *Id.* at 1288 n.8.

143. *See id.* at 1288 n.10.

144. *See id.* The Eleventh Circuit offered *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991) (per curiam), as an example of a right to privacy. *See Pryor*, 171 F.3d at 1288 n.10.

145. Because both circuits found DPPA to be a constitutional exercise of the Commerce Clause, neither addressed whether DPPA could be upheld under the Fourteenth Amendment. *See* Oklahoma v. United States, 161 F.3d 1266, 1273 n.6 (10th Cir. 1998); Travis v. Reno, 163 F.3d 1000, 1002 (7th Cir. 1998). Both circuits also explicitly rejected a First Amendment challenge to DPPA. *See id.* at 1007; Loving v. United States, No. 97-6060, 1997 U.S. App.

was the first circuit to uphold DPPA, overturning a district court decision.[146] Like the Fourth Circuit, the Tenth Circuit turned to *New York* and *Printz* to ascertain the "constitutional line between federal and state power."[147] But the Tenth Circuit disagreed with the Fourth Circuit's reading of these cases to "establish[] a blanket rule that 'Congress may only subject state governments to generally applicable law.'"[148] Agreeing with the *Condon* dissent, the court noted that the Fourth Circuit's initial inquiry[149] was flawed because DPPA would have the same impact on states even if it was part of a "generally applicable" law.[150] The release of personal data is not "uniquely governmental" and is already subject to considerable federal regulation, unlike vehicle and driver licensing and registration.[151]

Further, the Tenth Circuit noted, the Supreme Court had upheld commercial regulations that imposed burdens only on states.[152] For example, in *South Carolina v. Baker*, the Court upheld a statute removing the tax-exempt status for public bonds issued by states and localities, causing them to make administrative and legislative changes to qualify for such changes.[153] The Tenth Circuit noted that if Congress could force states wishing to issue bonds to conform to federal regulations, then surely Congress could do the same to states wishing to sell driver and vehicle records.[154]

Soon after the *Oklahoma* decision, the Seventh Circuit reached a similar decision in *Travis v. Reno*.[155] The *Travis*

LEXIS 23639 at *4 (10th Cir. Sept. 8, 1997) (dismissing a First Amendment claim for lack of standing).

146. *See Oklahoma*, 161 F.3d at 1272-73.

147. *Id.* at 1269.

148. *Id.* at 1271 (quoting Condon v. Reno, 155 F.3d 453, 461 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999)).

149. *See supra* text accompanying note 107 (stating that the crucial question, according to the Fourth Circuit, is who, not what, is being regulated).

150. *See Oklahoma*, 161 F.3d at 1271 (quoting *Condon*, 155 F.3d at 469 (Phillips, J., dissenting)).

151. *Id.* at 1272 (pointing to the Fair Credit Reporting Act, 15 U.S.C. § 1681b (1994), and the Video Privacy Protection Act, 18 U.S.C. § 2710 (1994), as examples of federal regulations limiting the dissemination of personal information).

152. *See id.*

153. *See id.* (citing South Carolina v. Baker, 485 U.S. 505, 509 (1987)); *see also supra* notes 58, 132.

154. *See id.*

155. Travis v. Reno, 163 F.3d 1000, 1001 (7th Cir. 1998). The decision

court rejected Wisconsin's argument that DPPA commandeered states in the same manner as *Printz* and *New York*.[156] DPPA's requirement that Wisconsin establish a regulatory "mechanism" was not "forbidden commandeering."[157] The Court noted that the Fair Labor Standards Act, which the Supreme Court upheld in *Garcia*, likewise required states to develop regulatory schemes according to federal guidelines.[158] The Seventh Circuit determined that courts should only apply the "anti-commandeering rule" when the federal government seeks to use the states to regulate its citizens, not when the federal government seeks to regulate the states as marketplace participants.[159]

Like the Tenth Circuit, the *Travis* court also found nothing unique about states' record-keeping systems. The only "unique" state function is licensing and registration, which DPPA does not regulate.[160] Thus, Congress was regulating Wisconsin and other states as owners of databases, not as states.[161] The court rejected Wisconsin's argument that Congress could only regulate state-owned databases if it regulated all such databases under a "generally applicable" law.[162] Even Wisconsin conceded that a state operating a string of video rental stores would be subject to the Video Privacy Protection Act.[163]

Both circuits criticized the Fourth Circuit for overstepping its authority. The Tenth Circuit chastised the Fourth Circuit

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overturned a trial court's judgment, *Travis v. Reno*, 12 F. Supp. 2d 921 (W.D. Wis. 1998).

156. *See Travis*, 163 F.3d at 1003.

157. *Id.*

158. *See id.* at 1003-04.

159. *See id.* at 1004-05.

160. *See id.* ("Yet the activity under consideration is not licensing but disclosure.").

161. *See id.* at 1005 (noting that "[i]t is hard to name any substantial collection of information yet to be regulated").

162. *See id.* at 1006 (reasoning that "[a] statute covering all databases would rival the Internal Revenue Code for complexity without offering states any real defense from the cost and inconvenience of regulation").

163. *See id.* at 1004. The *Travis* court also noted that the Video Privacy Protection Act, 18 U.S.C. § 2710 (1994), closely mirrored DPPA. *See Travis*, 163 F.3d at 1004. Indeed, the Video Privacy Protection Act was also inspired by an invasion of privacy: during the Supreme Court nomination hearings for Judge Robert Bork, a newspaper published a "profile" of the judge based on movies his family had rented at a local video store. *See* S. REP. NO. 100-599, at 5 (1988).

for following legal trends rather than actual doctrine.[164] The Seventh Circuit noted that the *Condon* holding was "some distance" from *Garcia* and *New York*.[165] The Seventh Circuit also pointed out that the Fourth Circuit, not the Supreme Court, had found that states could only be regulated by generally applicable laws.[166]

B. CONGRESS HAS THE ABILITY TO REGULATE STATE PRACTICES

Congress was well within the parameters of its enumerated powers when it enacted DPPA. First, in the absence of congressional action, the states were selling a type of national resource—personal information about their citizens—in the national marketplace. As noted by the Seventh and Tenth Circuits, Congress's power to regulate interstate commerce is supreme.[167] Second, the states conducted these commercial transactions in an indiscriminate manner, thus possibly infringing on citizens' privacy. Congress could address either situation through its enumerated powers. The *Condon* and *Pryor* courts instead improperly weighed state sovereignty as more important than uniform national commercial policies and individuals' privacy interests.[168]

1. Congress May Regulate States as Participants in Interstate Commerce

Although Congress's power to regulate commercial activities is not absolute, the Fourth and Eleventh Circuits misconstrued restrictions on congressional control of state commercial activities.[169] Congress does have the ability to regulate directly state activities that have an impact on interstate commercial

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164. *See* Oklahoma v. United States, 161 F.3d 1266, 1272 (10th Cir. 1998). As the court stated,

> [w]hile we are cognizant of the Supreme Court's trend established by *New York* and *Printz* ... [i]f a precedent of the Supreme Court ... "has direct application in a case ... the Court of Appeals should follow the case that directly controls," ... [even if it] "appears to rest on reasons rejected in some other line of decisions."

Id. (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

165. *See Travis*, 163 F.3d at 1006.

166. *See id.* (pointing out that the *Condon* opinion misinterpreted *New York* by adding the word "only").

167. *See supra* notes 152-54, 160-63 and accompanying text.

168. *See supra* notes 108-18, 137-40 and accompanying text.

169. *See supra* notes 108-18, 137-40 and accompanying text.

activity.[170] This ability is not affected by current Supreme Court rulings on the Tenth Amendment or the Commerce Clause.[171]

a. DPPA Does Not Commandeer States

The Tenth Amendment does not prohibit federal commercial regulations that have an affect on state activities.[172] The Tenth Amendment is not supposed to protect a state's commercial activities.[173] Rather, the Tenth Amendment prevents the federal government from using the states as an enforcement mechanism in a federal regulatory scheme.[174] *Affirmative* requirements are quite different than *negative* prohibitions because the federal government is not mandating that the states take a particular action, but limiting their range of activities.[175] Under the Fourth and Eleventh Circuits' reading of *Printz* and *New York*, there is no difference between affirmative responsibilities and negative restrictions. Indeed, these courts held

170. *See infra* notes 186-90 and accompanying text.

171. *See infra* notes 186-90 and accompanying text.

172. The states challenging DPPA argued that complying with DPPA would affect state motor vehicle agencies. *See* Travis v. Reno, 12 F. Supp. 2d 921, 928 (W.D. Wis. 1998) (noting that the Wisconsin Department of Transportation had to "train employees," create and mail forms on DPPA procedures, and "answer questions about the act"), *rev'd*, 163 F.3d 1000 (7th Cir. 1998); Pryor v. Reno, 998 F. Supp. 1317, 1324 (M.D. Ala. 1998) (noting Alabama's fear that DPPA compliance would impose "substantial costs"), *rev'd*, 171 F.3d 1281 (11th Cir. 1999). *New York* and *Printz*, however, do not suggest that any impingement on state sovereignty is a violation of the Tenth Amendment. *See* Printz v. United States, 521 U.S. 898 (1997) (holding that Congress cannot force state executives to carry out a federal regulatory scheme); New York v. United States, 505 U.S. 144 (1992) (holding that Congress cannot force the states through the Commerce Clause to adopt affirmative regulations).

173. The Tenth Amendment was not designed to protect market participation because interstate commercial activity is not an intrastate act of governance. *See* Manheim, *supra* note 23, at 572-73 ("The distinction between the governmental and proprietary activities of states was also important in determining the reach of the tenth amendment. Although a state's sovereign functions might be protected from federal interference, its proprietary actions were on a par with private parties." (citation omitted)); *id.* at 583 ("When participating in the market, the state is not 'regulating' commerce any more than is a private trader; it is 'contracting.'").

174. *See New York*, 505 U.S. at 164-66 (1992) (holding that the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce").

175. *See id.* at 166 (noting that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts").

that DPPA placed affirmative duties, not negative restrictions, on the states.[176] The courts argued these duties were impermissible "commandeering" in the same manner as *Printz* and *New York*.[177]

The Fourth and Eleventh Circuits, however, misconstrued the appropriate meaning and application of the term "commandeering."[178] Several states had to alter their administrative policies or statutes to comply with DPPA.[179] The courts should not consider such changes as unconstitutional "commandeering."[180] For example, the federal mandates in *New York* and *Printz* upset the federalist notion of political accountability because federal officials could reap the political rewards of "solving" a problem, while state officials handled dirty, politically unsavory work such as raising taxes to pay for enforcing federal regulations.[181]

DPPA required some states to change procedures but did not require substantive changes in states' policies on driving and vehicular regulations. While DPPA is a substantive *federal* decision, it touches on areas traditionally considered within federal powers—namely civil rights and commercial

176. According to *Condon* and *Pryor*, even though DPPA prohibited state action, the mere act of complying with DPPA was an affirmative duty. Thus, the federal government commandeered the states by forcing state legislatures to adopt legislation to bring state agencies into compliance with the federal statute and making state officers determine who was qualified to receive driver and motor vehicle records. *See* Pryor v. Reno, 171 F.3d 1281, 1285-86 (11th Cir. 1999); Condon v. Reno, 155 F.3d 453, 460-61 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

177. *See supra* notes 106-13, 136-41 and accompanying text.

178. *See Pryor*, 171 F.3d at 1284-85; *Condon*, 155 F.3d at 460.

179. *See generally* Yacavone, *supra* note 9 (describing the various tactics states have taken to comply with DPPA). The DPPA requirements, however, "feel" different than those required by the statutes considered in *New York* and *Printz*. *See supra* notes 53-61 and accompanying text.

180. Compare the level of compliance in DPPA (prohibiting sales of public records) with *New York*, *see supra* notes 53-56 (discussing the requirement that the states adopt a policy on hazardous waste disposal), and *Printz*, *see supra* notes 57-61 (discussing the requirement that state executives regulate gun purchases according to federal guidelines). Negative commercial directives, or prohibiting harmful goods from being sold in the national marketplace, were one of the first recognized commerce clause powers. *See* STONE ET AL., *supra* note 24, at 194-205 (discussing the development of the Commerce Clause as a means of prohibiting the sale and transport of goods across interstate lines).

States, of course, are free to go beyond the requirements of DPPA and pass even stricter privacy laws. *See* Yacavone, *supra* note 9, at 23 (noting that three states had strict privacy laws prior to the passage of DPPA).

181. *See supra* notes 52-61 and accompanying text.

policy.[182] Forcing states to adopt substantive changes would violate the Tenth Amendment.[183] Substantive issues such as minimum requirements for receiving a driver's license remain exclusively within the control of state governments.[184]

b. Federal Regulations Do Not Need To Be "Generally Applicable" To Regulate States

The Fourth and Eleventh Circuits held that states can only be regulated by the federal government as part of a larger regulatory scheme which applies to both private and public actors equally.[185] If a state enters into a commercial venture using its own unique resources, it can never be subjected to federal regulations because its sovereignty would be violated.[186]

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182. *See supra* notes 23-27 and accompanying text.

183. *Cf.* New York v. United States, 505 U.S. 144, 157 (noting that "the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role [into areas that the Framers might have expected to remain state responsibilities, such as waste disposal]"). Congress has regulated vehicle and driving standards, but such statutes have been upheld as merely persuasive, not coercive, spending provisions. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding a requirement that states must adopt the national drinking age as a prerequisite for receiving federal aid for highway maintenance). Although driving and automobiles play a substantial role in interstate commerce, Congress probably could not regulate a state's administrative and licensing procedures directly. *See* United States v. Lopez, 514 U.S. 549, 564-66 (1995).

Conversely, selling records is not a "traditional" state function; indeed, it is not even a unique function. *See* Travis v. Reno, 163 F.3d 1000, 1004-05 (7th Cir. 1998) (observing that DDPA "affects states as owners of data, rather than sovereigns," making states no different than "the corner Blockbuster Video outlet"). Selling records is commercial, not a political function or governance. *See* Manheim, *supra* note 23, at 602-04 (noting that *Garcia* rejects the idea that a state has the same immunity when acting either as a proprietor or as a sovereign). DPPA does not invade the states' traditional province of vehicle and driver licensing: it does not change the minimum age requirement to drive a vehicle, does not determine whether a car must have a front and rear license plate, and does not contemplate a new registration scheme. DPPA merely targets the use of personal records in the open market. *See* 18 U.S.C. § 2721 (1994 & Supp. II 1997).

184. *See Travis*, 163 F.3d at 1008 ("It is quite enough to say that the Driver's Privacy Protection Act leaves the state's internal and political affairs alone and regulates only how it interacts with private parties who seek information in its possession.").

185. *See supra* notes 112-13, 141-42 and accompanying text.

186. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985) (rejecting as "unworkable" any test "identifying 'uniquely' governmental functions"). Another way to solve this problem would be to overrule *Garcia* and return to the "traditional state functions" doctrine: states traditionally li-

This conclusion is flawed for two reasons. First, following this line of reasoning, any federal regulation aimed at state commercial activity would violate the Tenth Amendment.[187] Mere changes in states' administrative policies to conform to federal guidelines, however, do not necessarily implicate a threat to state sovereignty.[188] Further, DPPA is no different from other privacy statutes that regulate "owners of databases."[189] Generally, once Congress begins to regulate a commercial activity, anyone engaging in that commercial activity—whether a state, a corporation, or an individual—must make some changes to standard operating procedures.[190]

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cense vehicles and drivers, but selling information is not a traditional function or even a function unique to states. *See* Condon v. Reno, 155 F.3d 453, 459 n.3 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999). Thus, Congress could pass DPPA without threatening state sovereignty because keeping records is neither a traditional nor unique state function. This would allow Chief Justice Rehnquist's prediction in *Garcia* to be fulfilled. *See id.*

187. For example, if a state could use the market participant exemption to escape from the dormant Commerce Clause, then

> market participant immunity may prompt the state to purchase an enterprise and regulate it as proprietor, rather than as sovereign. A state prohibited from excluding non-resident use of local landfills could overcome commerce clause scrutiny by purchasing the property. A state unable to prohibit the export of hydroelectric power generated on its rivers might be able to do so if it owns the utility company. A city concerned with noise at its local airport would have greater control as owner-operator than as regulator and might be well-advised to buy it from its private owner.

Manheim, *supra* note 23, at 602-03 (footnotes omitted). Suppose then that Congress did pass legislation prohibiting local landfills from excluding out-of-state waste, thus making this an "active" Commerce Clause question. *Condon* and *Pryor* would allow a state-owned landfill to exclude out-of-state waste because Congress would otherwise be impinging on state sovereignty. *See supra* notes 112-18, 141-42 and accompanying text.

188. *New York* and *Printz* do not suggest that any impingement on state sovereignty is a violation of the Tenth Amendment. Further, the Tenth Amendment was not necessarily designed to protect states' participation in the marketplace. See *supra* notes 185-87 and accompanying text (arguing that states lose their shield of sovereignty when acting as market participants).

189. Travis v. Reno, 163 F.3d 1000, 1004 (7th Cir. 1998). Thus, states' driver and motor vehicle databases are not necessarily unique state resources. The "uniqueness" of such databases comes only from the fact that the records are created via a unique state function. But once the state has performed this function, the data is no longer unique.

190. *See* South Carolina v. Baker, 485 U.S. 505, 514-15 (1988) (noting that any federal policy will require some change in state regulatory policy). Here, the state is no different from a utility company or a magazine that chooses to sell its list of clients or subscribers. Once the state acts like other commercial participants, it should lose its sovereignty "shield" and become like any other commercial actor. For example, why should public employers escape mini-

Second, Congress's commercial regulatory power may preempt states' decision-making powers in order to establish uniform commercial policies.[191] The states should not be able to avoid federal regulations merely because these regulations conflict with their own commercial policies.[192] Allowing states to side-step federal regulations would ignore the nation's disastrous economic experience under the Articles of Confederation, which led the Framers to place the power to regulate interstate commerce in the federal government to ensure uniformity.[193] If states could freely enter the marketplace without being constrained by federal regulations, then they could destroy national unity by engaging in trade wars and favoring local industry.[194] Thus, the courts have generally prohibited states from

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mum wage requirements or be able to discriminate against the elderly? *See, e.g., Garcia*, 469 U.S. at 555-56 (holding that the Fair Labor Standards Act should be applied to all employers, including state agencies).

Moreover, DPPA is as close to a law of general applicability as possible. Both states and private actors who can lawfully receive driver and vehicle records are forbidden from releasing them to third parties not falling under one of DPPA's exceptions. *See* 18 U.S.C. § 2721 (1994 & Supp. II 1997). DPPA merely targets the source of such information (the states) and the permissible recipients.

191. *See* U.S. CONST. art. I, § 8, cl. 3. The Founding Fathers recognized the need for unity and uniformity among the states. *See* THE FEDERALIST NO. 3 (John Jay). The Articles of Confederation allowed each state to play a role in the nation's economy by setting tariffs, creating state currencies, and other commercial activities. *See* UNGER, *supra* note 35, at 146-47. This arrangement was disastrous to the creation of national unity. States could engage in economic warfare, using their economic policies to favor their own citizens while retaliating against other states. *See* THE FEDERALIST Nos. 21, 22 (Alexander Hamilton); *see also* FEREJOHN & WEINGAST, *supra* note 32, at 5; Hinshaw, *supra* note 23, at 520. The Founding Fathers sought to achieve unity by allowing only the federal government to control the national economy. The *Travis* court's ruling, however, is a step backwards. Under that court's view, a state would be able to determine what products, goods, and services can be placed into the national economy under the guise of "state sovereignty" as long as it had a hand in the product's development. *See supra* note 187 and accompanying text (discussing the problems with extending Tenth Amendment immunity when states act as market participants); *see also* Lauricella, *supra* note 52, at 1397.

192. *Travis*, 163 F.3d at 1007-08 ("Surely plaintiffs don't mean that all federal laws violate the Constitution when applied to states, because they may contradict the choices made by the states' elected legislators.").

193. *See* New York v. United States, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ."); *see also* Oklahoma v. United States, 161 F.3d 1266, 1270-73 (10th Cir. 1998); THE FEDERALIST NO. 44 (James Madison); *supra* note 191.

194. *See* THE FEDERALIST NO. 6 (John Jay) (comparing the wars between

adopting regulations that threaten interstate commerce[195] and only permitted them to pursue purely commercial activities in the absence of congressional direction.[196] DPPA, however, is a clear indication of the congressional voice, which declares that states can no longer sell personal records in the national marketplace.[197]

c. The Courts Should Be Respectful of Political Institutions

As unelected officials, judges should recognize a degree of institutional respect for the political branches. In *New York* and *Printz*, the Court feared that states would be blamed for their inability to solve problems of national consequence and unfairly face the political backlash.[198] Here, the Fourth and Eleventh Circuits' concerns about political accountability are misplaced.[199] First, only states issue drivers' licenses and reg-

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European nations to potential trade wars between the states); *see also Travis*, 163 F.3d at 1007-08; THE FEDERALIST NO. 22 (Alexander Hamilton); *supra* notes 23, 187.

195. *See* Hinshaw, *supra* note 23, at 518-26 (discussing justifications for the Dormant Commerce Clause).

196. *See* Bair, *supra* note 23, at 2420-27 (discussing the market participant doctrine); Hinshaw, *supra* note 23, at 523-26 (same).

197. *See* Yacavone, *supra* note 9, at 23 (discussing the prohibitions on state motor vehicle agencies).

198. *See supra* notes 52-61.

199. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-54 (recognizing "[t]he effectiveness of the federal political process in preserving the States' interests"). Political accountability is not a strong argument, particularly in this situation. *See* Jackson, *supra* note 40, at 2200-05 (arguing that political accountability is a poor rationale for striking down federal statutes); *see also* MCWHIRTER & BIBLE, *supra* note 74, at 84-85 (noting that the state is a proper defendant when it fails in its duty to maintain the confidentiality of private facts). After all, each state has equal representation in the Senate regardless of population. *Cf.* Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENTARY 213 (1995) (arguing—albeit jokingly—that the makeup of the Senate runs counter to democratic principles). Indeed, states can lobby for their special interests much more effectively than privacy advocates, who represent a large, diffuse group. *See* ESKRIDGE & FRICKEY, *supra* note 50, at 49-57 (discussing the "free rider" problems associated with mobilizing the electorate around widely-distributed benefits). Privacy is an abstract concept, making it very difficult for advocates to mobilize the electorate to support reforms. *See* VISIONS OF PRIVACY, *supra* note 81, at 5, 13-14. If a majority of the people's representatives (the House) and a majority of the states' representatives (the Senate) agree on a policy within the scope of Congress's powers, then the courts should respect this popular decision. To do otherwise would mean the United States is not a union at all.

Some commentators pointed to the 1994 "Republican Revolution" as evidence that the system *Garcia* envisioned does work. The Republican landslide was a response to excessive federal regulations and abuses of the Tenth

ister motor vehicles.[200] Second, Congress passed DPPA because the states were indiscriminately releasing personal information.[201] Consequently, states *should* be blamed for the resulting harms that occur when state agencies indiscriminately release personal information.

Whether DPPA will be an effective regulatory scheme is *not* a question for the courts.[202] The Eleventh Circuit's suggestion that DPPA might not truly regulate commerce because it is filled with "more holes than Swiss cheese"[203] was inappropriate.[204] Congress granted these exceptions as a way of letting states continue to sell records for legitimate purposes.[205] This compromise is less burdensome on states than forcing them to prohibit driver and vehicle record sales altogether.[206] States that do sell records will only need to adopt minor changes to continue this venture.

Amendment, and returned power to the states. *See* FEREJOHN & WEINGAST, *supra* note 32, at 27, 157-58 (suggesting that the Republican Revolution was an example of the *Garcia* system); Jackson, *supra* note 40, at 2238-39 (same); *see also* Lauricella, *supra* note 52, at 1377-78 (noting, for example, that Republican Presidential candidate Bob Dole carried a copy of the Tenth Amendment with him on the campaign trail).

200. *See* NOCK, *supra* note 15, at 56-57.

201. Indeed, it was California's indiscriminate release of Rebecca Schaeffer's record that led to the passage of DPPA. *See supra* notes 1-4 and accompanying text.

202. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) ("The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."); Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting) ("I do not to any extent whatever base my view . . . on a belief that the law is wise or that its policy is a good one.").

203. Pryor v. Reno, 171 F.3d 1281, 1284 (11th Cir. 1999).

204. *See* FERC v. Mississippi, 456 U.S. 742, 758 (1982) ("It is not for us to say whether the means chosen by Congress represent the wisest choice."). The court's role is to judge the legality of DPPA, not its effectiveness. A regulation can allow items to flow *into* commerce as well as keeping items out of the stream of commerce. If Congress has the power to completely prohibit the sale of driver and vehicle records, *see* Condon v. Reno, 155 F.3d 453, 469 (4th Cir. 1998) (Phillips, J., dissenting), *cert. granted*, 119 S. Ct. 1753 (1999), then it surely has the lesser power to prohibit indiscriminate sales having potentially unethical and illegal purposes.

205. The structure of DPPA suggests that the political process works. The opt-out provision allows states to continue to sell records, and gives individuals a means of protecting their privacy. *See supra* note 100.

206. *Cf. FERC*, 456 U.S. at 765 ("Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards.").

The courts' only role is to determine whether Congress is exercising its powers lawfully; if so, Congress's power is supreme.[207] DPPA regulates a wholly commercial activity, the sales of state records in the stream of commerce.[208] In contrast, the Gun-Free School Zones Act at issue in *Lopez* attempted to regulate mere possession.[209] The *Lopez* Court concluded that possessing a weapon in a designated school zone was too remote from an actual commercial transaction to be subject to Commerce Clause regulation.[210] DPPA, however, is directed toward an actual commercial transaction.[211] Thus, the courts should find that Congress properly enacted DPPA under the Commerce Clause without usurping areas traditionally within the powers of the states.

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207. *See* Oklahoma v. United States, 994 F. Supp. 1358, 1361 (W.D. Okla., 1997) (noting that judges must afford "great weight to the decisions of Congress") (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)), *rev'd*, 161 F.3d 1266 (10th Cir. 1998); *see also* Bair, *supra* note 23, at 2423 (noting that "the political nature of state proprietary activity makes congressional action more appropriate than judicial intervention"); Bauerle, *supra* note 28, at 54-55 (discussing what happens once Congress "speaks" to dormant commerce conduct).

208. Note that one must believe that DPPA falls within the *Lopez* restatement of the Commerce Clause before finding DPPA to be a lawful execution of the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549, 564-66 (1995) (arguing that there are limits to the reach of the Commerce Clause). Information has an interstate connection and is not entirely an intrastate activity like education or domestic relations. Numerical identifiers do have value because they can easily be used by unscrupulous individuals to obtain home addresses, social security numbers, and other data for criminal purposes. *See* Nimmer & Krauthaus, *supra* note 29, at 104-09 (discussing information as a type of commodity).

209. *See supra* notes 28-31 and accompanying text.

210. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring); St. Laurent, *supra* note 29, at 78, 81-82 (analyzing the concurring opinions in the *Lopez* decision).

211. *See* Travis v. Reno, 12 F. Supp. 2d 921, 923 (W.D. Wis. 1998) (noting that Wisconsin makes some $8 million annually from such sales), *rev'd*, 163 F.3d 1000 (7th Cir. 1998); Condon v. Reno, 972 F. Supp. 977, 981 (D.S.C. 1997) (noting that South Carolina collects fees for sales of motor vehicle records), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999); *see also* Nimmer & Krauthaus, *supra* note 29, at 104-09 (discussing information as a tangible commodity); Yacavone, *supra* note 9, at 23 (noting the profitability of driver and vehicle record sales). Congress also made substantial findings to demonstrate the link between commerce and the sale of records. *See supra* note 93 (discussing congressional testimony); *see also Lopez*, 514 U.S. at 562-63 (noting that, while not dispositive, congressional findings may help a judge locate the link between commerce and the regulated conduct); Frickey, *supra* note 34, at 711-12 (suggesting that findings should be given substantial weight when they are not "boilerplate").

2. Congress May Enforce a Right to Privacy Against the States Under the Fourteenth Amendment

a. States Have a Duty To Respect Individual Privacy by Enacting Appropriate Safeguards for the Release of Personal Information

Only the Fourth and Eleventh Circuits addressed the federal government's second argument that DPPA is a permissible exercise of congressional power under the Enforcement Clause of the Fourteenth Amendment. Both circuits held that the judicial definition of privacy did not encompass the information contained in driver and vehicle records.[212] Such a holding would have vast repercussions for federal and state regulatory and police powers.[213] The driver's license is considered a reliable form of identification because it contains so much information.[214] Allowing an individual to invoke a right of privacy whenever a creditor or law enforcement officer needed to obtain his or her name or address would impede efficient government and commerce.[215]

There remains a credible argument that even at such a mundane level, personal privacy should be respected and Congress may enforce a right to privacy under the Fourteenth Amendment.[216] Although requiring motorists to license and register their vehicles and keeping such information on file is generally within the states' authority,[217] states that indiscriminately release such information intrude on individual privacy and autonomy. Citizens reasonably believe that states use information such as social security numbers, home addresses,

212. *See* Pryor v. Reno, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999); *Condon*, 155 F.3d at 464-65.

213. For these reasons, it makes more sense to recognize personal information as a *commercial* right rather than a civil right enforceable under the Fourteenth Amendment. It would be extremely hazardous to elevate the information found in a driver or motor vehicle record to the same protected status as abortion, marriage, and other familial and reproduction rights.

214. *See* NOCK, *supra* note 15, at 59.

215. *See* James Rule & Lawrence Hunter, *Property Rights in Personal Data*, *in* VISIONS OF PRIVACY, *supra* note 81, at 177-180; ETZIONI, *supra* note 15, at 3-7.

216. Before Congress can exercise its remedial powers under the Enforcement Clause, the judiciary must determine that there is a constitutional right which is being suppressed by the states' discriminatory practice. As recognized in *Whalen v. Roe*, 429 U.S. 589, 605 (1977), and evidenced by common law, nondisclosure is part of the right to privacy.

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

and birth dates only for administrative purposes[218] and do not expect that such data will be sold to anyone willing to hand over a few dollars.[219] Indeed, the vast majority of citizens believe record-keeping agencies should give individuals the opportunity to opt out of any distribution scheme.[220] The states' failure to keep such personal information private violates "a concomitant statutory or regulatory duty to avoid unwarranted disclosures."[221] DPPA merely fulfills this duty by attempting to ensure the security of such personal records.[222]

b. The Courts Should Respect Congress's Deliberative Powers To Enact an Appropriate Remedy

Congress is the best branch to determine how to enforce a right to nondisclosure of personal information. Unlike the courts, Congress has broad fact-finding powers, allowing it to consider when and how personal data can be released. As a national representative body, Congress also is a better indicator of what the reasonable person believes should be private and can

218. Court rulings that suggest one "assumes the risk" that his or her personal information will be routinely given out by a service provider are anachronistic. *See* CATE, *supra* note 68, at 59 (noting that the Supreme Court is often a poor barometer of what society feels is "reasonable"). Society does not merely rely on automobiles and telephones—they have become a necessity. *See* Smith, *supra* note 83, at 200-05 (discussing the expectation customers have with their telephone service providers). Even if motor vehicle records have a low privacy value, what is a state's counterbalancing interest? The state cannot claim it needs access because it already has the records. Furthermore, the party claiming a need for access is often a private third party who may not be able to assert a legitimate need to justify violating another person's privacy. *See* United States v. Westinghouse Elec. Corp., 638 F.2d. 570, 578 (3d Cir. 1980) (considering the degree of need for access as a factor).

219. The act of reducing human beings to a numerical identifiers is ethically questionable. *See* Komuves, *supra* note 21, at 571 ("Prevalent ideals of liberalism and democracy promote treating people as individuals, not as numbers. We associate the treatment of people as numbers with totalitarian regimes and institutions . . . ." (footnotes omitted)); *see also* HIXSON, *supra* note 68, at 214 (comparing President Nixon, who used federal databanks to track his enemies, to despotic kings, who "used official surveillance information to punish disaffected citizens").

220. *See* Mary J. Culnan & Robert J. Bies, *Fair Information Practices for Marketing*, *in* VISIONS OF PRIVACY, *supra* note 81, at 151-53.

221. *Whalen*, 429 U.S. at 605.

222. *See* MCWHIRTER & BIBLE, *supra* note 74, at 84-85 (citing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), where the Court blamed the state, not the media, for improper disclosure of a rape victim's identity); *see also* Mintz, *supra* note 74, at 454-57 (arguing that nondisclosure claims should hinge on whether the person who discloses private information lawfully received it).

provide a uniform solution.[223] Courts, on the other hand, have limited contact with the public and can only make decisions on a case-by-case basis, often creating a diversity of opinions about what a reasonable person expects should be private. For example, the district court in *Travis* held that there is no expectation of privacy when obtaining a driver's license, because a person gives the same information to a grocery clerk when cashing a check.[224] However, on appeal, the Seventh Circuit pointed out that the same type of personal information is also given to a video rental clerk when applying for a store membership, which is protected information.[225]

Even if the disclosure of such information does not rise to the level of confidentiality required for judicial protection,[226] Congress may seek to establish a statutory minimum of protection using its powers under the Fourteenth Amendment.[227] A difference of opinion between the courts and Congress regarding the appropriate means to enforce a judicially-recognized civil right does not necessarily create a constitutional violation.[228] Congress is well within the parameters of the Fourteenth Amendment when it passes legislation designed to prohibit states from impeding on judicially recognized rights.[229]

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223. *See supra* note 218 and accompanying text.

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

225. *See Travis*, 163 F.3d at 1005.

226. As several courts have noted, numerous other courts have found that the release of potentially more embarrassing information does not constitute a violation of privacy. *See, e.g.*, *Travis*, 12 F. Supp. 2d at 925 (relying on Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986)). *But see* Jackson, *supra* note 40, at 2216 (arguing that "[i]ndividual rights, unlike the interests of states, do not have the same 'political safeguards' and thus require more judicial protection"). The court answered the wrong question, however. The issue is not whether the court should find a violation of privacy if a state accidentally discloses an individual's personal information to a stalker, an identity thief, or the like; the issue is whether Congress can require the states to fulfill their duty to safeguard their constituents' information.

227. *See In re* Young, 141 F.3d 854, 860 (8th Cir. 1998) (noting several examples in which Congress legislated greater protection for individual rights than those found in the Constitution), *cert. denied sub nom.* Christians v. Crystal Evangelical Free Church, 119 S. Ct. 43 (1998). After all, once the Court has determined that a right exists, it is well within Congress's power to remedy any state abuses of such a right. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

228. *See City of Boerne*, 521 U.S. at 519.

229. *See* U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Congress is merely implementing the "statutory duty" suggested by *Whalen*. *See* Whalen

Here, Congress is providing individuals with a means of exercising their right to privacy by prohibiting states from indiscriminately releasing personal information.[230]

Further, the Fourth and Eleventh Circuits underestimated the importance of DPPA as a means of protecting individuals' privacy. The courts too easily dismissed DPPA's protection simply because it is similar to information that individuals often give out freely.[231] Such a comparison misses an obvious point. Consumers have a choice about what information they want revealed to the public when they order telephone service, and can request complete anonymity.[232] Similarly, a store clerk might ask a customer for his or her driver's license number or social security number when writing a check,[233] but a customer could choose an alternative method of payment so that he or she does not have to disclose such information.[234] A "customer" at a state motor vehicle agency must provide personal information when he or she "does business" with the state by obtaining a driver's license or registering his or her vehicle. DPPA allows

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v. Roe, 429 U.S. 589, 605 (1977).

230. *Cf.* Budnitz, *supra* note 83, at 860-65, 881-82 (discussing opt-out systems as a means of giving consumers control over their personal information).

231. *See* Condon v. Reno, 155 F.3d 453, 465 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999); Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998). A phone book contains an individual's name, address, and of course phone number. *See* Travis v. Reno, 12 F. Supp. 2d 921, 925 (W.D. Wis. 1998) (noting that the information contained in a driver or vehicle record is "available to anyone with a phone book"), *rev'd*, 163 F.3d 1000. A driver's record may contain much more information, however, including an individual's social security number, date of birth, previous addresses, and any history of fines or violations. *See* NOCK, *supra* note 15, at 59 (listing some of the information that may appear in a record).

232. *See* Smith, *supra* note 83, at 200-05 (discussing ways in which individuals attempt to show a reasonable expectation of privacy by purchasing an unlisted phone number). Not only can a consumer request an unlisted number but he or she can also request that the phone number remain anonymous and be "blanked out" on caller identification.

Further, the information contained in driver and vehicle records is not the same as information found in a phone book listing. Driver and vehicle records frequently contain social security numbers, previous registered addresses, and dates of birth—all of which can be used to commit credit fraud and identity theft. *See* Budnitz, *supra* note 83, at 863-65 (discussing potential abuses of numerical identifiers).

233. *See Travis*, 12 F. Supp. 2d at 925.

234. *See* Smith, *supra* note 83, at 213-20 (discussing alternatives that protect privacy in "monopoly" situations, such as telephone utilities).

individuals to request an "unlisted" license or registration with their state's department of motor vehicles.[235]

CONCLUSION

An old children's joke asks when is a door not a door.[236] Likewise, the courts must recognize that there are occasions when a state is not sovereign. Once states begin to make arbitrary commercial decisions, they cease to be sovereigns and become mere market participants. States also have special duties to protect their constituents' rights, which should not be neglected for the sake of making a quick buck. The federal government can regulate such conduct under either the Commerce Clause or the Fourteenth Amendment. While federalism is an important concept, it should not bar creating uniform commercial regulations and securing individual rights.

As the Supreme Court reviews DPPA's constitutionality, the Court should consider that the rights of states should not necessarily remain supreme over the rights of the people or the powers of the federal government. In light of recent decisions that continue to evaluate states' rights, however, it seems unlikely that DPPA will survive constitutional scrutiny.

235. *See id.* at 200-02 (arguing that there should be ways for an individual to express a reasonable privacy expectation). For example, an individual willing to spend additional money on an unlisted phone number demonstrates a greater expectation of privacy than individuals willing to have their numbers appear in a phone book.

236. A door is not a door when it's "a jar," or ajar.