Denver Law Review

Volume 77
Issue 3 *Tenth Circuit Surveys*

Article 8

January 2021

Privacy in the Information Age

Stephanie Reedy

PRIVACY IN THE INFORMATION AGE

INTRODUCTION

Developing technology and increased access to information have had a tremendous impact on daily life, making transactions and activities quicker, cheaper, and less complicated than before. Instead of going to a bank and getting cash to make purchases, a simple swipe of a card automatically deducts the amount from your account. Cashiers scan bar codes into computers that automatically tally the price of an order, and consumers using grocery store "savings cards" automatically receive discounts on specially advertised items.

However, these conveniences and savings come with a hidden price tag. Computers that make debit and savings cards possible also collect personal information and provide that information to others.[1] Opening a checking account, buying groceries, getting a license, paying taxes, and using the telephone results in the collection and possible dissemination of personal information. The sale of this information, ranging from socio-economic and cultural background to personal preferences and biases, has become a major industry in the United States.[2] These bits of information are "key marketing tools that permit sellers to direct their advertising and sales efforts toward the proper population segments and to design future products in conformity with projected buying behaviors."[3]

In the midst of this highly profitable trade in personal information, privacy issues have taken on greater significance.[4] Technological developments "have led to the emergence of an 'information society' capable of gathering, storing, and disseminating increasing amounts of data about individual citizens."[5] Determining whether to restrict access to such information and how to regulate those restrictions is a "hotly contested" issue among both legal scholars and the public.[6] Although there have been some efforts at protecting the individual's right to informational privacy through legislation, those efforts have been isolated and lack uniformity.[7] "Statutory and decisional privacy law alike have developed

---

1. *See generally* Katrin Schatz Byford, *Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment*, 24 RUTGERS COMPUTER & TECH. L.J. 1, 43, 48, 49 (1998) (discussing how electronic networks will serve as the primary vehicle for the collection and sale of personal information).

2. *See id.* at 48.

3. *Id.*

4. *See id.*

5. *Id.*

6. *See id.*

7. *See id.* at 2.

in an erratic and haphazard fashion; no single theory of privacy, nor even a consistent set of theories, has informed this process."[8]

A major obstacle to creating a uniform policy or rationale for privacy of personal information is the conflict that arises when an individual attempts to prevent the release of this information. Privacy is not a clear-cut, black-and-white issue. Protecting individual privacy threatens the democratic principles of an open, accessible government and negatively influences the profit margins of powerful commercial interests. These protections–which often take the form of legislation enacted by Congress–also raise important constitutional concerns and problems of inconsistent statutory interpretation.

This paper considers two of the Tenth Circuit's decisions regarding the interpretation of informational privacy protection over the last year,[9] and discusses various social and legal conflicts at the heart of the informational privacy debate.[10] Part One discusses the constitutional battles that occur, both when the federal government attempts to regulate privacy in the states, and when conflict arises between maintaining public government records and protecting personal privacy. In *Reno v. Condon*,[11] the United States Supreme Court affirmed the principles set forth by the Tenth Circuit in *Oklahoma v. United States*.[12] *Reno* dealt with privacy matters that implicate the United States Constitution, and specifically, the Tenth Amendment.[13]

Part Two discusses the problems courts face when interpreting privacy-protection statutes enacted by Congress, and focuses on a federal statute enacted to protect the privacy of income-tax filings. In *Rice v. United States*,[14] the Tenth Circuit joined at least one other circuit that expanded the plain meaning of a provision of the Internal Revenue Code,

---

8. *Id.*

9. The survey period extends from September 1, 1998 through August 31, 1999.

10. The Tenth Circuit also considered informational privacy issues in *U.S. West v. FCC*. U.S. West v. FCC, 182 F.3d 1224 (10th Cir. 1999). In that case, the court considered provisions in the Telecommunications Act of 1996 that prevent telecommunications carriers from using proprietary customer information for marketing purposes without prior customer approval. *U.S. West*, 182 F.2d at 1228. U.S. West claimed that the Federal Communications Commission ("FCC") rules created to implement the 1996 Act violated the First Amendment because they restricted U.S. West from engaging in commercial speech with customers. *Id.* at 1230. The court conducted a four-part First Amendment analysis and determined that the FCC "failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests." *Id.* at 1239. The court, after finding that the rules violated the First Amendment, vacated the FCC's Order and the regulations it had adopted. *Id.* at 1239-40.

11. 120 S. Ct. 666 (2000). The court's decision was January 12, 2000. *See Reno*, 120 S.Ct. at 666.

12. 161 F.3d 1266 (10th Cir. 1998).

13. *See Reno*, 120 S. Ct. at 670-71. The Tenth Amendment reserves to states all powers not expressly given to the federal government. *See* U.S. CONST. AMEND. X.

14. 166 F.3d 1088 (10th Cir. 1999).

enacted to protect the confidentiality of tax-return information.[15] Because of this judicially created exception to the statute, the Internal Revenue Service may release confidential tax information from tax-evasion convictions to the press.[16]

I. PUBLIC RECORDS OR INDIVIDUAL PRIVACY: THE CONSTITUTIONAL IMPLICATIONS OF FEDERAL PRIVACY LEGISLATION IN THE DRIVER'S PRIVACY-PROTECTION ACT[17]

A. *Background*

"There is a long and well recognized public interest in open government" and in maintaining public access to government records so that citizens may directly monitor the functions of government agencies.[18] Yet, in the field of motor vehicles records information, where states historically maintained public records,[19] the interest in open government directly conflicts with an individual's desire to keep personal information from the public.[20]

This conflict came into the national spotlight in 1989, when an obsessed fan stalked and killed actress Rebecca Schaeffer in the actress's home.[21] The fan obtained Schaeffer's address and other personal information from a private detective, who obtained the information from Schaeffer's motor vehicle record.[22] Schaeffer's death sparked a flurry of anti-stalking legislation at the state level.[23] By 1993, all 50 states had enacted some sort of anti-stalking measure.[24] In 1994, Congress enacted the Driver's Privacy Protection Act ("DPPA"),[25] compelling states to regulate motor vehicle record disclosures according to a uniform national policy.[26]

The DPPA prohibits any State Department of Motor Vehicles from knowingly disclosing personal information obtained from a motor vehicle record.[27] The State may disclose personal information only in matters

---

15. *See Rice*, 166 F.3d at 1091 (citing Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989)).

16. *See id.* at 1092.

17. Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998).

18. Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism under the Tenth Amendment*, 53 U. MIAMI L. REV. 71, 108-09 (1998).

19. *See id.* at 109.

20. *See id.* at 76.

21. *See id.* at 88.

22. *See id.*

23. *See id.* at 88-89.

24. *See id.*

25. 18 U.S.C. §§ 2721-25 (1994 & Supp. IV 1998).

26. *See id.*; *see* Odom & Feder, *supra* note 18, at 77.

27. 18 U.S.C. § 2721(a) (1994).

of motor vehicle safety, theft, emissions, recalls and advisories, court proceedings, research activities, or if the individual gave express consent.[28] The State may also release motor vehicle record information to government agencies, to businesses that want to verify the accuracy of information provided by a consumer, to insurers, licensed private investigation agencies, employers seeking information about commercial driving licenses, and with written consent from the individual.[29] The DPPA provides a criminal fine of $5,000 for each day a motor vehicle department refuses to comply with DPPA provisions, and provides civil remedies against anyone who knowingly violates the statute.[30]

By enacting the DPPA, Congress asserted authority over an area of regulation that had traditionally been the domain of state government, causing conflict between the states and federal government regarding the Tenth Amendment's reservation of power to the states.[31] Since the early 1900's, state governments "have licensed drivers and registered motor vehicles," determining the conditions for releasing motor vehicles record information.[32] Congress, in enacting the DPPA, compelled "States to regulate disclosure of information from their motor vehicle records in accordance with a declared uniform national policy."[33] A previous attempt to assert federal control over licensing activities failed in 1986, when Congress sought to enact legislation to create a national licensing system for commercial drivers.[34] Hearings on the bill recognized that "the licensing of drivers was classified as a traditional State governmental function," and the legislature aborted the plan.[35]

The enactment of the DPPA resulted in nationwide litigation and a split in the circuits over the constitutionality of the statute.[36] The United States Supreme Court upheld the constitutionality of the DPPA,[37] thereby affirming the Tenth Circuit's holding that the DPPA properly regulates the States' release of an individual's personal information.[38] The Court's decision further refined the concept of what action results in a Tenth

28. *See id.* § 2721(b) (1994 & Supp. IV 1998).
29. *See id.*
30. *See id.* § 2723-24 (1994).
31. *See* Odom & Feder, *supra* note 18, at 99.
32. *Id.* at 99-100.
33. *See id.* at 77.
34. *See* S. REP. NO. 99-411, at 12 (1986).
35. Odom & Feder, *supra* note 18, at 167.
36. *See* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000); Travis v. Reno, 163. F.3d 1000 (7th Cir. 1998); Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998); Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998), *rev'd*, 171 F.3d 1281 (11th Cir. 1999), *vacated*, 120 S. Ct. 929 (2000).
37. *See* Reno v. Condon, 120 S. Ct. 666, 672 (2000).
38. *See Oklahoma*, 161 F.3d at 1272-73.

Amendment violation and reinforced the federal government's right to directly regulate State activities.[39]

B. *Tenth Circuit Case:* Oklahoma v. United States[40]

1. Facts

The Tenth Circuit was one of two Circuits to correctly decide a DPPA challenge before the Supreme Court announced its January 2000 decision in *Reno*.[41] The *Oklahoma* case began on September 13, 1997, when the State of Oklahoma challenged the DPPA in District Court, arguing that the statute directly conflicted with State law and, therefore, was an unconstitutional attempt to regulate state activity.[42]

"Oklahoma law currently provides that motor vehicle records are public record."[43] The Department of Public Safety must "retain and file every application for a license it receives . . . [and] note whether the application is granted or denied; and if denied, the basis thereof."[44] Further, Title 47 provides:

The Department of Public Safety or any motor license agent upon request shall prepare and furnish a summary to any person of the traffic record of any person subject to the provisions of the motor vehicle laws of this state. Said summary shall include the enumeration of any motor vehicle collisions, reference to convictions for violations of motor vehicle laws, and any action taken against the person's privilege to operate a motor vehicle, as shown by the files of the Department for the three (3) years preceding the date of the request.[45]

Oklahoma provides a misdemeanor offense for any public official who willfully violates the Oklahoma Open Records Act. The state legislature created the act with the express purpose of ensuring "the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power."[46]

While Colorado changed its law to reflect the DPPA's mandate,[47] Oklahoma refused, even though Oklahoma's statutes directly conflicted with the DPPA.[48] Instead, Oklahoma filed an Application for Preliminary

39. *See Reno*, 120 S. Ct. at 671-72.
40. 161 F.3d at 1266.
41. *See Reno*, 120 S. Ct. at 666.
42. *See* Oklahoma v. United States, 994 F. Supp. 1358, 1360 (W.D. Okla. 1997).
43. *Oklahoma*, 994 F.Supp. at 1360.
44. *Id.*
45. OKLA. STAT. tit. 47, § 6-117(H) (1988 & Supp. 2000).
46. OKLA STAT. tit. 51, § 24A.2 (1998 & Supp. 2000).
47. The Colorado Legislature declared that its law was "mandated by the provisions of the [DPPA] and that the state may be subject to penalties if legislation to comply with the federal act is not enacted . . . ." H.B. 97-1348 § 1 (Colo. 1997).
48. *See* Odom & Feder, *supra* note 18, at 116.

Injunction in federal district court in September 1997, the same month the DPPA took effect.[49] Oklahoma asked the court to enjoin the United States government from enforcing the DPPA, and challenged the constitutionality of the statute as violating the Tenth and Eleventh Amendments.[50] Oklahoma also argued that Congress exceeded its authority under the Commerce Clause by enacting the statute.[51]

The District Court granted Oklahoma's request and permanently enjoined the United States from enforcing the DPPA in Oklahoma.[52] The court held that "[t]he power that Congress sought to exercise by dictating when and how States may disclose personal information from driver's license records is a power 'not delegated to the United States by the Constitution, nor prohibited by it to the States . . . .'"[53] According to the court, the DPPA, "would require Oklahoma to train DPS employees and the employees in approximately 270 tag agencies across the State on when and how records may be released. Additionally, the State would be required to monitor the tag agents to ensure their compliance with the federal standards."[54]

2. Decision

In reversing the District Court and upholding the statute as constitutional, the Tenth Circuit considered:

> [W]hether the DPPA is a valid exercise of congressional power to which contrary state law must yield consistent with constitutional principals [sic] of federalism and the Tenth Amendment's reservation to the States of all 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States.'[55]

The Tenth Circuit based its reasoning on two United States Supreme Court cases that set aside acts of Congress on Tenth Amendment grounds. First, in *New York v. United States,*[56] the Court considered a provision that forced state legislatures either to enact laws to regulate the disposal of the state's nuclear waste, or to take title and possession of the waste and associated liabilities.[57] Failing to "choose" between the two options resulted "in the state becoming liable for all damages waste gen-

---

49. *See* Oklahoma v. United States, 994 F. Supp. 1358, 1359 (Okla. 1997), *rev'd,* 161 F.3d 1266 (10th Cir. 1998).

50. *See Oklahoma,* 994 F. Supp. at 1360.

51. *See id.*

52. *See id.* at 1364.

53. *Id.* at 1363 (quoting U.S. CONST. AMEND X).

54. *Id.* at 1362.

55. Oklahoma v. United States, 161 F.3d 1266, 1268 (10th Cir. 1998).

56. 505 U.S. 144 (1992).

57. *See New York,* 505 U.S. at 151-54.

erators suffered as a result of the state's inaction."[58] In *New York*, the Court held that the provision violated the division of authority between state and federal governments, because the law "effectively required states either to legislate pursuant to Congress' direction, or to implement an administrative solution."[59] The Court emphasized that a state could not decline to administer the program, and was forced to follow Congress' mandate with either choice.[60] The Court held that Congress couldn't commandeer "'the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[61]

In the second case, *Printz v. United States*,[62] the Court declared the interim provisions of the Brady Handgun Violence Prevention Act unconstitutional because the provisions required state and local law enforcement officials to conduct background checks on gun purchasers.[63] The Court held that Congress couldn't circumvent the prohibitions set out in *New York* by stating "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[64]

In *Oklahoma*, the State argued that the DPPA violates the mandates set out in *New York* and *Printz* because the DPPA directs the state to specifically regulate the disclosure of motor vehicle information according to a federally mandated program.[65] The United States, in contrast, argued that the Constitution only prohibits Congress from requiring states to enact or administer a federal regulatory program designed to address problems created by third parties, and does not prohibit Congress from regulating state activity directly.[66]

The United States cited *South Carolina v. Baker*,[67] where the Court reasoned that requiring states to enact legislation is "'an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'"[68]

The Tenth Circuit determined that Oklahoma's arguments against the DPPA were not as persuasive as those advanced in *Printz* or *New*

---

58. *Oklahoma*, 161 F.3d at 1269 (citing *New York*, 505 U.S. at 174-77).
59. *Id.* at 1269.
60. *See New York*, 505 U.S. at 176-77.
61. *Id.* at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 288 (1981)).
62. 521 U.S. 898 (1997).
63. *See Printz*, 521 U.S. at 933-34.
64. *Id.* at 933 (quoting *New York*, 505 U.S. at 188).
65. *See* Oklahoma v. United States, 161 F.3d 1266, 1268 (10th Cir. 1998).
66. *See Oklahoma*, 161 F.3d at 1270.
67. 485 U.S. 505 (1988).
68. *Oklahoma*, 161 F.3d at 1270 (quoting *South Carolina*, 485 U.S. at 514-15).

York. "Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process by requiring states to enact legislation regulating the disclosure of personal information from motor vehicle records. Rather, the DPPA directly regulates the disclosure of such information and preempts contrary state law."[69] Also, the Court reasoned that, unlike the statute in *New York*, the DPPA allows Oklahoma an alternative. "If states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public."[70]

The court also distinguished the DPPA from the statute in *Printz*, stating that "the DPPA does not conscript state officials to enforce federal law."[71] "The DPPA neither limits a state's ability to regulate in the field of automobile licensing and registration, an exercise traditionally left to the states, nor restricts a state's ability to use motor vehicle information in its own regulatory activities."[72]

The Tenth Circuit also cited *Baker*, which "rejected the notion that the federal government may never force a state wishing to engage in certain activity to take administrative or legislative actions to comply with federal standards."[73] The Court acknowledged the Supreme Court's trend toward striking down federal laws that "commandeer" state legislative and administrative processes, but found the logic in *Baker* to be controlling. "[A]ny expansion of Tenth Amendment jurisprudence to invalidate the DPPA is best left to the Supreme Court. At this stage . . . we find nothing that requires us to invalidate the DPPA."[74]

C. *Supreme Court Decision:* Reno v. Condon[75]

In *Reno v. Condon*, the Supreme Court upheld the DPPA as a constitutional assertion of Congress' power to regulate the dissemination of personal information obtained through motor vehicle records,[76] thus reaffirming the Tenth Circuit's decision in *Oklahoma v. United States*.[77] Chief Justice Rehnquist, writing for a unanimous court, first determined that the DPPA is a valid exercise of Congress' authority to regulate interstate commerce under the Commerce Clause, because motor vehicle records are "'a thin[g] in interstate commerce.'"[78] "[I]nsurers, manufacturers, direct marketers and others engaged in interstate commerce [use this

69. *Id.* at 1272 (citing *New York*, 505 U.S. at 178).
70. *Id.* at 1272.
71. *Id.*
72. *Id.*
73. *Id.* (citing South Carolina v. Baker, 485 U.S. 505, 514-15 (1988)).
74. *Id.* at 1272.
75. 120 S. Ct. 666 (2000).
76. *See Reno*, 120 S. Ct. at 672.
77. 161 F.3d 1266 (10th Cir. 1998).
78. *Reno*, 120 S. Ct. at 671.

information] to contact drivers with customized solicitations . . . [making the information's] sale or release into the interstate stream of business . . . sufficient to support congressional regulation."[79]

The Court then considered the Tenth Amendment issues raised by *Printz* and *New York*. The Court found those cases do not apply to the DPPA, because the federal statute in question neither required state legislatures to enact a particular kind of law nor commanded state officers to administer or enforce a federal regulatory program.[80] The controlling case, according to the Court, is *South Carolina v. Baker,* which forced many States to amend state statutes to comply with the federal statute.[81] However, the Court held that action to be "an inevitable consequence of regulating a state activity . . . . That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards . . . is a commonplace that presents no constitutional defect."[82]

In *Reno*, the Court applied similar reasoning to the DPPA, finding that the statute does not require a State to regulate its own citizens.[83] "The DPPA regulates the states as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."[84]

D. *Other Circuits*

The DPPA sparked challenges in the Fourth, Seventh, Tenth, and Eleventh Circuits, which split on the issue. Both the Fourth and Eleventh Circuits held the statute unconstitutional, while the Tenth and Seventh Circuits upheld the statute as a valid exercise of Congressional authority under the Commerce Clause.

1. Holding the Statute Unconstitutional: The Fourth Circuit

In *Condon v. Reno*, the District Court held that the DPPA violated the Tenth Amendment and permanently enjoined the United States from enforcing the statute against South Carolina.[85] The Fourth Circuit affirmed, rejecting arguments from the United States that the DPPA statute is valid under the Commerce Clause.[86] The Court considered *Printz* and

79. *Id.* (citing United States v. Lopez, 514 U.S. 549, 558-59 (1995)).
80. *See id.* at 672.
81. *See id.* (citing South Carolina v. Baker, 485 U.S. 505 (1988)).
82. *Id.* (citing *South Carolina*, 485 U.S. at 514-15).
83. *See id.* at 672.
84. *Id.*
85. Condon v. Reno, 972 F. Supp. 977, 979 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, Reno v. Condon, 120 S. Ct. 666 (2000).
86. Condon v. Reno, 155 F.3d 453, 465 (4th Cir. 1998), *rev'd*, Reno v. Condon, 120 S. Ct. 666 (2000).

New York and acknowledged that the DPPA is different in several respects from the statutes struck down in those cases.[87] The DPPA does not require states to enact legislation and does not require that state officials report or arrest violators of the DPPA, but under the statute, state officials must administer the DPPA.[88] "The Supreme Court, in both New York and Printz, has made it perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program."[89]

The Fourth Circuit also rejected the United States' argument that the Supreme Court holding in *Garcia v. San Antonio Metropolitan Transit Authority*[90] applied in this case.[91] Under *Garcia*, Congress may only subject state governments to generally applicable laws.[92] The United States argued that the DPPA is constitutional under *Garcia* because it "'subjects the States to the same type of regulation to which a private party could be subjected.'"[93] The Fourth Circuit soundly rejected this argument because the DPPA in fact only applies to the states. "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."[94]

Finally, the Fourth Circuit rejected the federal government's contention that Congress enacted the DPPA to protect an individual's Fourteenth Amendment right to privacy. The Court noted that personal information on drivers' licenses is accessible from a number of other sources and is provided by individuals to strangers to cash checks and purchase alcohol.[95] The Fourth Circuit also stated that pervasive regulation, such as motor vehicle registration, leads to a limited expectation of privacy.[96] "[N]either the Supreme Court nor this Court has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records."[97]

87. *Condon*, 155 F.3d at 460.
88. *See id.*
89. *Id.*
90. 469 U.S. 528 (1985).
91. *See Condon*, 155 F.3d at 461.
92. *See Garcia*, 469 U.S. at 528.
93. *Condon*, 155 F.3d at 461.
94. *Id.* at 462.
95. *See id.* at 465.
96. *See id.* at 464.
97. *Id.*

2. Holding the Statute Unconstitutional: The Eleventh Circuit

Pryor v. Reno,[98] decided by the Eleventh Circuit in April 1999, followed the Fourth Circuit's rationale in *Condon*.[99] In *Pryor*, Alabama sought an injunction to prevent the United States from enforcing the DPPA, arguing that the statute was an unconstitutional directive requiring it to administer a federal program in violation of the Tenth Amendment.[100]

The district court held the statute constitutional, but the Eleventh Circuit reversed, holding that because the statute is not self-administering and state officers must review requests for information, the DPPA forces states to administer a Congressionally mandated federal regulatory program.[101] "[W]hen Congress requires the States to administer a federal program, democratic accountability is diminished and for this reason the Tenth Amendment is offended."[102]

The Eleventh Circuit also believed the DPPA failed under the Commerce Clause because "Congress drew its authority to regulate this activity from its nexus to interstate commerce, and then proceeded to exempt from the reach of the Act virtually all its interstate connections."[103] Congress enacted the DPPA to protect the public from criminals, but "[i]n trying to protect legitimate governmental and business uses of [personal] information . . . Congress riddled the Act with more holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act."[104]

3. Upholding the Statute: The Seventh Circuit

The Seventh Circuit, like the Tenth, upheld the constitutionality of the DPPA, but for different reasons. The court in *Travis v. Reno*[105] reasoned that since "[n]othing in the [DPPA] interferes with [a] state's ability to license drivers and remove dangerous ones from the road,"[106] the [DPPA] "affects states as owners of [information] databases; it does not affect them in their role as governments" regulating driver licensing and automobile registration.[107] This distinction is crucial, the court found, because Congress is permitted to regulate states as marketplace partici-

98. 171 F.3d 1281 (11th Cir. 1999), *vacated*, 120 S. Ct. 929 (2000).
99. *Condon*, 155 F.3d at 453.
100. *Pryor*, 171 F.3d at 1282, 1284.
101. *See id.* at 1284, 1286.
102. *Id.* at 1288.
103. *Id.* at 1284.
104. *Id.*
105. 163 F.3d 1000 (7th Cir. 1998).
106. *Travis*, 163 F.3d at 1003.
107. *Id.* at 1004.

pants in other arenas through statutes such as the Video Privacy Protection Act.[108]

There is just no blinking the fact that federal law pervasively regulates states as marketplace participants; the anti-commandeering rule [of *Printz* and *New York*] comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens. Because the [DPPA] affects states as owners of data, rather than as sovereigns, it does not commandeer states in violation of the Constitution. Wisconsin is no more a regulator or law enforcer when it decides what information to release from its database than is the corner Blockbuster Video outlet.[109]

The United States argued that, because "[s]tatute books teem with laws regulating the disclosure of information from databases," the DPPA does not place states at a disadvantage when compared to similarly situated private entities and is therefore not unconstitutional.[110] "Discrimination against states is forbidden, but a nondiscriminatory system may take more than one law to implement. 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."[111]

Finally, the Seventh Circuit rejected news media claims that the DPPA violates the First Amendment by limiting access to information in public records, writing, "[p]eering into public records is not part of the 'freedom of speech' that the [F]irst [A]mendment protects."[112] Instead, those protesting the limitation of public information should use the Freedom of Information Act to request the information and, if access is denied, should sue the agency that should have disclosed the information.[113]

D. *Analysis*

These constitutional challenges to the DPPA raised the critical question of how much control Congress may assert over the states to limit the disclosure of personal information obtained through state regulatory activities. The controversy pitted a national attempt to protect the privacy rights of individuals against a State's right to regulate its affairs without interference from the federal government, and centered upon two distinct lines of cases. The first, concerning the power of Congress to regulate the

108. *See id.* (citing Video Privacy Protection Act, 18 U.S.C. § 2710 (1994)).
109. *Id.* at 1004-05.
110. *Id.* at 1005.
111. *Id.* at 1006.
112. *Id.* at 1007.
113. *See id.*

"'states as states'",[114] is governed by *Garcia*[115] and *Baker*,[116] and allows "Congress to enact laws of general applicability that incidentally apply to state governments."[117] These cases allow Congress to directly regulate state activity even if States must create legislation to comply, as long as that regulation "does not commandeer the state legislative and administrative processes."[118] The second line of cases deals with congressional authority to direct states to implement or administer a federal regulatory scheme,[119] and is governed by *New York*[120] and *Printz*.[121] Under these cases, "Congress may not enact any law that would direct the functioning of the States' executives or legislatures."[122]

Condon is distinguishable from *Printz* primarily because the *Printz* statute specifically required state officials to monitor and regulate the sale of handguns–to take affirmative actions in order to comply with the federal statute.[123] The DPPA, in contrast, provides that states "shall not knowingly disclose or otherwise make available" personal information obtained from motor vehicle records.[124] Under the DPPA, state officials are asked *not* to act–which prevents the statute from "conscripting" state officials in the same way in which *Printz* required conscription.[125] In *Condon*, the state argued that the DPPA forced officials to implement a federal statute, because state workers must not release records without consent.[126] But, as the Tenth Circuit pointed out, "[i]f states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public."[127] The states have a choice, even if choosing not to disseminate the information results in a significant loss of revenue.[128] In *New York*, unlike *Condon*, Congress failed to preserve a state's ability to choose its method of compliance.[129] The statute in *New York* forced state legislatures to choose between en-

---

114. Robert C. Lind & Natalie B. Eckhart, *The Constitutionality of the Driver's Privacy Protection Act*, 17-SUM COMM. LAW 18, 20 (1999) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

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

116. South Carolina v. Baker, 485 U.S. 505, 514-15 (1988).

117. Lind & Eckhart, *supra* note 114, at 20.

118. *Id.* at 21.

119. *See id.*

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

121. Printz v. United States, 521 U.S. 898 (1997).

122. Condon v. Reno, 155 F.3d 453, 458 (4th Cir. 1998).

123. *See Printz*, 521 U.S. at 904.

124. 18 U.S.C. § 2721(a) (1994).

125. *Condon*, 155 F.3d at 460.

126. *See id.*

127. Oklahoma v. United States, 161 F.3d 1266, 1272 (10th Cir. 1998).

128. *See generally* Travis v. Reno, 163 F.3d 1000, 1002 (7th Cir. 1998) (noting that the Wisconsin Department of Transportation received about eight million dollars each year from the sale of motor vehicle information).

129. *See* New York v. United States, 505 U.S. 144, 188 (1992).

acting laws to regulate the disposal of the state's nuclear waste, or taking title and possession of the waste and its liabilities.[130] Thus, providing a choice between two equally unacceptable options in *New York* provided no choice at all, but the DPPA simply states the federal requirement and leaves states with the power to decide how they will comply with that requirement.

The Supreme Court's decision upholding the DPPA and affirming the Tenth Circuit's reasoning shifted recent Tenth Amendment jurisprudence away from the broad-based restrictions on federal limitations of state power laid out in *Printz* and *New York*. The decision paves the way for future congressional legislation regulating state activities, including privacy legislation, so long as that regulation falls short of actually dictating state legislation or forcing state officials to implement federal programs. If a state retains a choice in how it will comply with a federal statute, the Court seems willing to accept that statute as a valid regulation of state activities.

PART II. IS CONFIDENTIAL TAX RETURN INFORMATION REALLY CONFIDENTIAL?: STATUTORY INTERPRETATIONS OF FEDERAL PRIVACY LEGISLATION

A. *Background*

When the legislature first introduced income tax in 1861, it required that all tax return information be available for public inspection and review.[131] The legislature abolished the tax in 1872, but then reinstated the income tax in 1894, this time requiring tax information *not* be disclosed to the public.[132] After a Constitutional amendment ensured the ability to impose and collect taxes on personal income, Congress enacted the Revenue Act of 1913, which required that tax returns be public records open to any examination authorized by the President.[133] After 1913, Presidents generally shared tax return information with governmental entities as needed, and did not disclose the information to the public.[134]

In the 1970's, Congress grew concerned about governmental abuse of the tax return information sharing system, because the Nixon Administration was using tax information obtained from the IRS to "harass and intimidate political opponents."[135] This concern caused Congress to enact the Tax Reform Act of 1976,[136] which states that tax "[r]eturns and return

130. *See id.* at 169.

131. *See* Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577, 578 (1998).

132. *See id.*

133. *See id.* at 578-79.

134. *See id.* at 579.

135. *Id.*

136. *See id.*

information shall be confidential . . . "[137] The Tax Reform Act has always included a number of statutory exceptions to the general rule that tax return information is confidential.[138] The Tax Reform Act provides for both civil and criminal penalties against government officials who disclose confidential tax information outside of those exceptions.[139]

In recent years, however, several Circuit Courts have developed a judicially created exception to this statute and allow the disclosure of information in press releases that publicize tax convictions.[140] The Tenth Circuit rejected the concept in one 1983 case[141] and embraced it in a 1999 decision.[142]

B. *Tenth Circuit Case:* Rice v. United States[143]

1. Facts

A jury convicted Rice of filing false tax refund claims and tax returns in March 1994, and according to standard departmental procedure, the Internal Revenue Service ("IRS") issued two press releases publicizing the criminal proceedings.[144] Rice, a certified public accountant, filed a civil action against the United States claiming that the IRS wrongfully disclosed confidential tax information in the press releases.[145] The District Court granted the motion for summary judgment in favor of the United States and the IRS, concluding that the press releases did not disclose confidential tax information about Rice, and "that all the information contained in the press releases came from public documents and proceedings. Specifically, the court found that . . . an IRS [agent who had prepared the press releases] had reviewed the indictment against

---

137. 26 U.S.C. § 6103(a) (1994 & Supp. III 1997).

138. *See* 26 U.S.C. § 6103(c)-(p) ((1994 & Supp. III 1997) (authorizing the release of tax return information to state tax officials, people with a material interest, Congressional committees, the President, White House personnel, heads of federal agencies, the Treasury Department and Department of Justice and federal agencies for purposes of non tax-law administration).

139. *See* 26 U.S.C. § 7431(a) (1994 & Supp. III 1997) (creating a private cause of action for damages against the United States for improper disclosure of tax information); 26 U.S.C. § 7213(a) (1994 & Supp. III 1997) (imposing criminal punishment for willful disclosures of tax information by government employees).

140. *See generally* Rowley v. United States, 76 F.3d 796, 802 (6th Cir. 1996) (holding that information recorded in a federal tax lien may be disclosed to the public); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (holding that once tax information is made public in court proceedings, the taxpayer loses the right to privacy of that information); Thomas v. United States, 890 F.2d 18, 21-22 (7th Cir. 1989) (holding that disclosure of tax return information published in a tax court opinion does not violate confidentiality requirements).

141. *See* Rice v. United States, 166 F.3d 1088, 1092 (10th Cir. 1999) (holding that information gleaned from public records and public proceedings may be disclosed without violating confidentiality requirements).

142. *See* Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983) (rejecting the argument that prior in-court statements stripped that information of its confidentiality).

143. 166 F.3d 1088 (10th Cir. 1999).

144. *See id.* at 1089.

145. *See id.*

Rice, attended his trial and sentencing," and used that information as her only source for the press releases.[146] Rice appealed the decision, arguing that because the information contained in the press releases was confidential tax return information, the United States violated the confidentiality provisions of the Tax Reform Act.[147] Rice also argued alternatively that there were genuine issues of material fact about the source of the information contained in the press releases and that summary judgment was inappropriate.[148]

2. Decision

The Tenth Circuit rejected Rice's claims, refusing to hold that the IRS press release necessarily constituted an unauthorized disclosure of tax return information.[149] The Court distinguished the case from its 1983 decision in *Rodgers v. Hyatt*,[150] which held that an in-court statement based on confidential information did not justify an IRS agent's later discussion of that information with third parties.[151] In *Rodgers*, the Court found that the IRS agent had obtained information from internal documents and tax returns, testified about that information in court, and then later disclosed that information to a third party out of court.[152] On the other hand, in *Rice*, the agent obtained her information from public proceedings and documents; the Court held that "whether information about a taxpayer may be classified as 'return information' invoking application of § 6103 turns on the immediate source of the information."[153] The Tenth Circuit also stated that Rice had not presented sufficient evidence that the IRS agent obtained the press release information from an impermissible source, which would require vacating the district court's grant of summary judgment.[154]

> Like it or not, a trial is a public event. The IRS press releases in this case did not publicize Rice's tax return information; they publicized public proceedings and documents. While those proceedings and documents may have revealed 'return information,' that revelation was proper under the exception to § 6103 allowing such disclosure in federal court where the taxpayer is a party to the proceedings.[155]

---

146. *Id.* at 1090.
147. *See id.*
148. *See id.*
149. *See* Rice v. United States, 166 F.3d 1088, 1091 (10th Cir. 1999).
150. 697 F.2d 899 (10th Cir. 1983).
151. *See Rice*, 166 F.3d at 1091 (citing Rodgers v. Hyatt, 697 F.2d 899, 905-06 (10th Cir. 1983)).
152. *See Rodgers*, 697 F.2d at 904-05.
153. *Rice*, 166 F.3d at 1091-92.
154. *See id.* at 1092.
155. *Id.*

C. *Other Circuits*

The Sixth, Seventh and Ninth Circuits have held that confidential tax return information that is brought into the public domain through public proceedings can be publicized without violating the Tax Reform Act's confidentiality requirements.[156] The Fifth Circuit, in contrast, has favored a strict statutory construction of the Tax Reform Act and held that the source of the disclosed information determines whether the statute has been violated.[157]

1. Ninth Circuit

In *Lampert v. United States*,[158] the Ninth Circuit held that not allowing the publication of tax return information obtained from public records would violate the purpose of the Tax Reform Act.[159] "We believe that Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made part of the public domain, the taxpayer may no longer claim a right of privacy in that information."[160] *Lampert* involved a number of cases consolidated on appeal in which the government issued press releases publicizing actions against the taxpayers for tax evasion.[161]

2. Seventh Circuit

One year after *Lampert*, the Seventh Circuit decided a similar case in which the IRS sent a press release detailing losses and damages to the taxpayer's hometown newspaper.[162] In *Thomas v. United States*,[163] the court did not consider whether disclosing return information in a judicial record bars taxpayers from complaining about subsequent disclosures, because the court found the press release information did not come from Thomas' tax return, but from the Tax Court's opinion in the case.[164] The Seventh Circuit "refused to decide whether the tax-court opinion removed the 'protective cloak' from the information, so that the IRS would

156. *See* Rowley v. United States, 76 F.3d 796, 802 (6th Cir. 1996) (holding that information recorded in a federal tax lien may be disclosed to the public); Thomas v. United States, 890 F.2d 18, 21-22 (7th Cir. 1989) (holding that disclosure of tax return information published in a tax court opinion does not violate confidentiality requirements); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (holding that once tax information is made public in court proceedings, the taxpayer loses the right to privacy of that information).

157. *See* Darrell Calvin, *How Far Do the Powers of the I.R.S. Extend in the Fifth Circuit?: Johnson v. Sawyer*, 5 TEX. WESLEYAN L. REV. 79, 91-92 (1998).

158. 854 F.2d 335 (9th Cir. 1988).

159. *See Lampert*, 854 F.2d at 338.

160. *Id.*

161. *See id.* at 336.

162. *See* Thomas v. United States, 890 F.2d 18, 19 (7th Cir. 1989).

163. *Thomas*, 890 F.2d at 18.

164. *See* Calvin, *supra* note 157, at 84.

not have been in violation of the statute if it had disseminated the information directly from its files."[165]

3. Sixth Circuit

In 1996, the Sixth Circuit in *Rowley v. United States*[166] considered taxpayer claims that the government violated the Tax Reform Act by disclosing tax return information when advertising a public auction of the taxpayer's property to pay a tax obligation.[167] The Government argued that it did not violate the statute because the tax information in question was public record due to recording the tax liens.[168] The court ruled for the Government, stating that the recording of federal tax liens "is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public."[169]

D. *Analysis*

The statutory requirements of the Tax Reform Act represent "a tension between two conflicting public policies: (1) a Congressional policy favoring the confidentiality of [tax] returns and (2) the need of various governmental institutions to gain access to taxpayer-supplied information in order to perform their official duties."[170] The Tenth Circuit is correct in its reasoning that publishing tax information about a convicted tax evader, when that information is part of a public recording or court testimony, does not breach an existing right of privacy. People accused or convicted of crimes generally lose any right to privacy relating to their names, addresses, details of their crimes–even background information and previous convictions–once criminal charges are brought into open court. This information becomes part of the public record, and the media and the public-at-large have access to the information.

Financial information submitted on tax forms during the crime of tax fraud or tax evasion is no different. By putting false or misleading information on his tax forms, Rice opened himself up to investigation by the IRS and forfeited any right to privacy for that information. Just as an indictment for assault or murder might necessitate the release of details of an abusive relationship, false financial information might be essential to prove a case of tax fraud. Therefore the IRS, like the general media, can publish details about criminal convictions that have been the subject of open public court proceedings.

---

165. *Id.*
166. 76 F.3d 796 (6th Cir. 1996).
167. *See Rowley*, 76 F.3d at 797.
168. *See id.*
169. *Id.* at 801.
170. Darby, *supra* note 131, at 578.

At the same time, the Tenth Circuit makes an irrelevant distinction between the IRS agent in *Rodgers* (who testified in open court and then provided that information to a third party)[171] and the agent in *Rice* (who did not testify, but provided information from another agent's testimony to third parties through a press release).[172] A person convicted of tax evasion gives up the right to keep financial records used in a criminal act from the public once the court proceeding exposes that information. Consequently, it should not matter whether the investigating agent or a public relations agent discusses that information because the defendant no longer has a right to keep that information private.

Critics of the judicially created exception allowing disclosure of tax information after public proceedings argue that the IRS and the tax disclosure requirements are statute-driven, and that a statute must create any exceptions to those requirements as well.[173] "If any further life is given the [IRS], it is for Congress, and not the judiciary to declare. If taxpayers . . . are to have their transgressions publicized, it should be with the specific approval of their elected representatives."[174] Critics also discredit the suggestion that material disclosed in public proceedings loses its confidential nature:

> Confidentiality is a matter of degree, and simply because material may be available for public inspection, it should not be implied that the public already has or ever will obtain knowledge of such information . . . . Whether public information is found in a court opinion or a public record, the public awareness of such information is generally very limited.[175]

Ensuring the confidentiality of tax return information will help promote respect for our tax system, encourage truthful disclosures on returns, and limit the abuse of government power, according to supporters of strict statutory interpretation. Distrustful taxpayers "may be less inclined to be faithful to [IRS] mandates when tax day rolls around each year," but government can foster respect by ensuring "that government agents are not allowed to abuse power simply because it is there for the taking."[176] The Sixth, Seventh and Ninth Circuits, and most recently the Tenth Circuit, appear to be much less concerned with fostering respect or ensuring confidentiality once information has been released into the public domain.

CONCLUSION

As technology improves and access to information continues to increase, the courts will likely consider many more informational-privacy

171. *See* Rogers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983).
172. *See* Rice v. United States, 166 F.3d 1088, 1092 (10th Cir. 1992).
173. *See* Calvin, *supra* note 157, at 80.
174. *Id.*
175. *Id.* at 96.
176. *Id.* at 96-97.

cases. During this survey period alone, the Tenth Circuit decided two important informational-privacy cases, and the holdings in each of those cases conflicted with at least one other Circuit.[177] Regarding the issue of personal information derived from driver's license and motor vehicle registration records, the Tenth Circuit found, and the U.S. Supreme Court confirmed, that Congress has power to regulate the disclosure of such information by the states.[178] The Court's decision to uphold the DPPA may open the door to future congressional legislation to protect the privacy rights of individuals, as long as the legislation affects interstate commerce and does not conscript or commandeer the states. The Tenth Circuit conflicted with at least one other Circuit in its most recent decision on permitting disclosure of tax-return information filed with the IRS.[179] This decision favored the Government's need to publicize convictions for tax fraud over the protection of confidential information already in the public record.[180] *Rice* illustrates the problems courts have when interpreting privacy statutes that do not implicate the Constitution.[181]

These differences of opinion among the Circuits indicate the difficulty courts face when trying to balance the privacy rights of an individual with the Government and business need to collect and distribute personal information. Balancing will become even more difficult in the future as access and availability of information continue to increase. The need for uniform privacy theory and privacy law to help with that balancing will become increasingly important as well. "Rather than seeing privacy as a static, unchanging feature of human existence, theoretical approaches should regard privacy as a dynamic, adaptive process that derives full meaning only from its broader cultural context."[182] The need for a fresh approach to privacy rights is particularly great in the area of electronic communications and computers. "Only by deciding a priori what it is that matters about privacy, and by establishing a comprehensive set of policy guidelines will we be able to adapt our privacy laws to a rapidly changing socioeconomic context."[183]

Creating uniform and consistent privacy laws is especially necessary to combat the potential abuse of power that personal information provides to Government and businesses. "Knowledge is power, and in any social interaction, an imbalance in the amount and nature of personal information possessed by each party creates and perpetuates power dis-

177. *See, e.g.*, Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998); Rice v. United States, 166 F.3d 1088 (10th Cir. 1999).

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

179. *See, e.g., Rice*, 166 F.3d at 1092.

180. *See id.*

181. *See id.*

182. Byford, *supra* note 1, at 7.

183. *Id.* at 3.

parities," according to one proponent of overhauling privacy law.[184] "In a society where surveillance and the collection of personal information have become institutionalized, those who control the data collection process have potentially immense social power at their disposal."[185]

Stephanie Reedy

184. *Id.* at 24.
185. *Id.*