

RIGHT RESULT, WRONG REASONS: *RENO V. CONDON*

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*Reno v. Condon*¹ was a pleasant surprise. For the first time in a decade, the Supreme Court rejected a federalism challenge to a federal statute and upheld the constitutionality of the federal Drivers' Privacy Protection Act of 1994.² In fact, Chief Justice William Rehnquist's opinion unanimously reversed a Fourth Circuit decision that found the Act to violate the Tenth Amendment.³ An important federal statute that protects privacy was thus upheld.

It seems uncharitable to quarrel with the decision in any way. I wrote an amicus brief for a coalition of women's rights groups, domestic violence groups, and reproductive health care groups urging the Court to uphold the law.⁴ Yet, although I believe that the result was correct, I found the Court's reasoning questionable, and I believe that the Court missed an important

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1. 528 U.S. 141 (2000).

2. Pub. L. No. 103-322, 108 Stat. 2099-2102 (1994) (codified at 18 U.S.C. §§2721-2725 (1994 & Supp. 1998)).

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

4. See Brief of Feminist Majority Foundation, et. al., Amici Curiae in Support of Appellant United States, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464), available in 1999 WL 503879 [hereinafter Brief Amici Curiae]. The brief was written on behalf of the Feminist Majority Foundation; American Civil Liberties Union; American College of Obstetricians and Gynecologists; Center for Reproductive Law & Policy; National Abortion Federation; National Abortion and Reproductive Rights Action League; National Center for Victims of Crime; National Coalition of Abortion Providers; National Coalition Against Domestic Violence; National Organization for Women Foundation, Inc.; National Women's Health Organization; NOW Legal Defense and Education Fund; Pennsylvania Coalition Against Domestic Violence; Planned Parenthood Federation of America, Inc.; STOPDV, Inc.; and The Women's Law Project.

opportunity for changing or at least clarifying the law regarding the Tenth Amendment and federalism.

In this Article, I make three points. First, the Court's distinction of earlier, recent Tenth Amendment cases was not persuasive. Second, ideally, the Court should have overruled these earlier cases, *New York v. United States*⁵ and *Printz v. United States*,⁶ and their holding that Congress cannot commandeer state governments. I realize, however, that this was unlikely because there has been no change in the composition of the Court since these cases were decided. Therefore, third, the Court should have held that there is a compelling interest exception to the Tenth Amendment and that it was met here.

I. THE UNPERSUASIVE DISTINCTIONS IN *RENO V. CONDON*

Reno v. Condon involved the constitutionality of the federal Drivers' Privacy Protection Act.⁷ The Act prohibits state departments of motor vehicles, and their employees, from disclosing personal information about individuals without their consent.⁸ The law was inspired by acts of violence against women and reproductive health care professionals who had been stalked and murdered by individuals who learned their addresses through the use of information gained from state departments of motor vehicles.⁹ Specifically, California Senator Barbara Boxer introduced the bill after the tragic stalking and murder of actress Rebecca Schaeffer.¹⁰ Robert Bardo, a man who had been confined to mental institutions on several occasions, obtained Schaeffer's address through the California Department of Motor Vehicles.¹¹ Having her address, he went to her apartment where he shot and killed her.¹²

5. 505 U.S. 144 (1992).

6. 521 U.S. 898 (1997).

7. 18 U.S.C. §§2721-2725 (1994 & Supp. 1998).

8. See *Reno v. Condon*, 528 U.S. 141, 143 (2000).

9. See, e.g., *Protecting Driver's Privacy Hearings, Subcomm. on Civil and Constitutional Rights of House Judiciary Comm.*, 103d Cong. (1994) (testimony of David Beatty, Dir. of Pub. Aff., Nat'l Victim Ctr.), available in 1994 WL 14168013 [hereinafter Beatty Testimony]; see also 139 CONG. REC. S15,761-65 (daily ed. Nov. 16, 1993); 140 CONG. REC. H2522-24 (daily ed. Apr. 20, 1994).

10. See 139 CONG. REC. S14,437 (1993).

11. See 138 CONG. REC. H1785-01 (daily ed. Mar. 26, 1992).

12. See *id.*

The United States Court of Appeals for the Fourth Circuit declared the Act unconstitutional as violating the Tenth Amendment.¹³ The Fourth Circuit relied on the Supreme Court's recent decisions in *New York v. United States* and *Printz v. United States*, which establish that Congress cannot commandeer state governments.¹⁴

In *New York v. United States*,¹⁵ in 1992, the Court declared unconstitutional the 1985 Low-Level Radioactive Waste Policy Amendments Act, which forced states to clean up their nuclear wastes by 1996. The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes.¹⁶ However, by a 6-3 margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."¹⁷ Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states.¹⁸ Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation.¹⁹ The Court concluded that it was "clear" that because of the Tenth Amendment and limits on the scope of Congress's powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."²⁰

The Court followed this principle five years later in *Printz v. United States*.²¹ In *Printz*, the Court declared unconstitutional the Brady Handgun Prevention Act.²² The law required that state and local law enforcement

13. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998).

14. For a detailed argument that the Act is unconstitutional, see 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 (1998).

15. 505 U.S. 144 (1992).

16. See *id.* at 160.

17. *Id.* at 175.

18. See *id.* at 176.

19. See *id.* at 175.

20. *Id.* at 188.

21. 521 U.S. 898 (1997).

22. 18 U.S.C. § 922 (1994 & Supp. 1998).

personnel conduct background checks before issuing permits for firearms.²³ The Court held that forcing state and local law enforcement personnel to do this violates the Tenth Amendment.²⁴ Justice Scalia, writing for the 5-4 majority, concluded that compelling state and local activity is inconsistent with dual sovereignty and the Tenth Amendment.²⁵ The Court said that Congress cannot compel states to administer a federal mandate.²⁶

In *Reno v. Condon*,²⁷ the Supreme Court distinguished these two earlier cases, reversed the Fourth Circuit, and upheld the constitutionality of the Drivers' Privacy Protection Act. Chief Justice Rehnquist, writing for the unanimous Court, offered three main arguments. First, the Court began by emphasizing that the law was a valid exercise of Congress's Commerce Clause authority.²⁸ State Department of Motor Vehicles often sold this information. As Chief Justice Rehnquist wrote:

The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring.²⁹

This, however, is not a basis for distinguishing *New York* or *Printz*. In both of those cases, the Court accepted that the laws were within the scope of Congress's power to regulate commerce. Indeed, Chief Justice Rehnquist expressly recognized this in *Reno v. Condon*:

But the fact that drivers' personal information is, in the context of this case, an article in interstate commerce does not conclusively resolve the constitutionality of the DPPA. In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked authority over the subject matter, but because those statutes

23. See *Printz*, 521 U.S. at 902-03.

24. See *id.* at 935.

25. See *id.*

26. See *id.* at 933.

27. 528 U.S. 141 (2000).

28. See *id.* at 148.

29. *Id.*

violated the principles of federalism contained in the Tenth Amendment.³⁰

Second, the Court distinguished *New York* and *Printz* on the grounds that the state was prohibiting, not requiring, state government actions.³¹ Chief Justice Rehnquist stressed that the Act “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.”³² The laws in *New York* and *Printz* imposed affirmative duties on state governments; the Drivers’ Privacy Protection Act is a prohibition on release of information.³³

Yet, this distinction between affirmative duties and negative prohibitions seems dubious. Others have pointed out, in different contexts, that this distinction is often just a matter of phrasing.³⁴ The laws in *New York* and *Printz* each could have been characterized as prohibitions. In *New York*, states were prohibited from having unsafe low-level nuclear wastes in their borders.³⁵ In *Printz*, states were prohibited from issuing permits for firearms without conducting background checks.³⁶

Indeed, the Drivers’ Privacy Protection Act could have been recharacterized as imposing affirmative duties on the states. As the State of South Carolina argued in its brief to the Supreme Court, the law “thrusts upon the State all of the day-to-day responsibility for administering its complex provisions.”³⁷ As Chief Justice Rehnquist noted, “the DPPA requires the State’s employees to learn and apply the Act’s substantive restrictions . . . and . . . these activities will consume the employees’ time and thus the State’s resources.”³⁸ States were required to comply with the affirmative mandate to create systems to ensure the secrecy of information.

Moreover, the distinction between affirmative duties and negative prohibitions makes little sense in terms of the underlying goals of the Court’s Tenth Amendment jurisprudence. Both duties and prohibitions

30. *Id.* at 149.

31. *See id.* at 150-51.

32. *Id.* at 151.

33. *See id.* at 144.

34. *See, e.g.,* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

35. *See New York v. United States*, 505 U.S. 144, 151 (1992).

36. *See Printz v. United States*, 521 U.S. 898, 902-03 (1997).

37. Brief of Respondent at 10, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464).

38. *Condon*, 528 U.S. at 150.

impose costs on state and local governments.³⁹ Cleaning up nuclear wastes, conducting background checks before issuing permits for firearms, and protecting the secrecy of motor vehicle information all cost money to state treasuries. Moreover, if, as discussed below, the Court's concern is that federal mandates frustrate accountability because voters do not know who is responsible for government action, that is as true with prohibitions as affirmative duties.

Third, the Court distinguished the earlier cases on the ground that the Drivers' Privacy Protection Act does not exclusively regulate state governments.⁴⁰ Chief Justice Rehnquist wrote: "[T]he DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce."⁴¹

Yet, it is not clear why this matters. If congressional commandeering of state governments violates the Tenth Amendment, it should not matter that private entities are also being regulated. The primary focus of the Drivers' Privacy Protection Act was on regulating state governments; just as the primary focus of the Low Level Radioactive Waste Disposal Act and the Brady Bill were on regulating state governments. Moreover, the Court's reasoning would mean that Congress could reenact these earlier two laws simply by making sure that some private conduct was regulated by them also.

In short, although I completely agree with the Court's conclusion in *Reno v. Condon*, upholding the constitutionality of the Drivers' Privacy Protection Act, I find its distinctions of the earlier rulings unpersuasive. How, then, should the Court have written the opinion?

II. IDEALLY, THE COURT IN *RENO V. CONDON* SHOULD HAVE OVERRULED *NEW YORK V. UNITED STATES* AND *PRINTZ V. UNITED STATES*

I believe that the ideal result in *Reno v. Condon* would have been for the Court to overrule the anti-commandeering principle. It is a rule not justified by the text, the Framers' intent, historical practice, or sound constitutional policy analysis. Indeed, it often is counter-productive to the

39. *See id.* at 149-51.

40. *See id.*

41. *Id.* at 151.

Court's goal of advancing state autonomy and is inconsistent with Congress's powers under the Constitution.

There is nothing in the text of the Constitution that mentions or even hints at an anti-commandeering principle. The Tenth Amendment's text, of course, says only that Congress cannot act unless authorized by the Constitution, while states can act unless prohibited by the Constitution.⁴² Nor was the issue discussed at the Constitutional Convention. Neither *New York v. United States* nor *Printz v. United States* attempts to justify the anti-commandeering principle based on the Constitution's text or Framers' intent.

In *Printz*, Justice Scalia said that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."⁴³ Justice Scalia reviewed the experience in early American history and found that there was no support for requiring states to participate in a federal regulatory scheme.⁴⁴ As to history, Justice Scalia said that Congress, in the initial years of American history, did not compel state activity and since "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."⁴⁵

As Justice Souter points out in dissent, there is a strong argument that Justice Scalia is incorrect in terms of the Framers' intent.⁴⁶ Strong statements exist from Madison and Hamilton that Congress could call upon states to execute federal laws.⁴⁷ More importantly, it seems very dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit. There are countless reasons why the federal government did not require state action then, including that they did not think of the possibility, or that they thought that their goals could best be achieved by direct federal action, or that they sought to establish the federal government's own authority to act, or that political pressures at the time prevented specific mandates. To infer rejection of congressional power from inaction is to assume the truth of one explanation to the exclusion of

42. See U.S. CONST. amend. X.

43. *Printz v. United States*, 521 U.S. 898, 905 (1997).

44. See *id.* at 907-10.

45. *Id.* at 905.

46. See *id.* at 975-76 (Souter, J., dissenting).

47. See *id.* at 971-73.

all others. The absence of a particular practice at a specific time does not mean that those then in power thought it unconstitutional. There are many explanations for why a type of law was not used at a given moment.

Justice Scalia also justified the anti-commandeering principle in *Printz* by invoking the structure of the Constitution.⁴⁸ He writes that “[i]t is incontestable that the Constitution established a system of ‘dual sovereignty.’”⁴⁹ Yet, this does not explain why federal mandates to states are inconsistent with dual sovereignty. The argument, as presented by Scalia, is entirely based on a definition of dual sovereignty and what it means in terms of the structure of American government. Indeed, the concept of dual sovereignty is purely descriptive of having both federal and state governments. There must be separate reasons, apart from the existence of dual sovereignty, as to why a federal law unduly intrudes state prerogatives. This requires a normative theory about federalism and the proper relationship of federal and state governments. Justice Scalia did not even allude to such a theory, but just concluded that federal mandates to state governments violates dual sovereignty.

Simply put, the anti-commandeering principle has no support in the text, the Framers’ intent, or historical practice. The primary reason Justice O’Connor gave in *New York v. United States* for why Congress cannot compel states to act is that it would frustrate democratic accountability because voters would not understand that the state was acting pursuant to a federal mandate.⁵⁰ The Court explained that allowing Congress to commandeer state governments would undermine accountability because Congress could make a decision, but the states would take the political heat and be held responsible for a decision that was not theirs.⁵¹ Justice O’Connor wrote:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . .

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the . . . program may remain insulated from the electoral ramifications of their decision.

48. *See id.* at 918.

49. *Id.*

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

51. *See id.* at 169.

Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁵²

The premise for Justice O'Connor's argument is that democratic accountability requires that voters clearly understand which level of government is responsible for actions taken. This premise was simply asserted by the Court. Justice O'Connor offered no justification as to the constitutional basis for this premise of democratic accountability. Obviously, nothing in the Constitution's text supports this premise. Nor is it grounded in prior Supreme Court decisions. Perhaps it can be justified by political theory, but Justice O'Connor made no attempt to do so in her majority opinion.

Nor was there explanation as to why the voters could not understand when the state was acting pursuant to a federal mandate. Justice O'Connor assumed that if Congress forces the states to do something, voters will not hold Congress responsible but will blame the conduct on the primary actors, state governments.⁵³ Voters, however, can surely comprehend when a state is acting because it is required to do so by federal law. Every person does many things that he or she otherwise would not do because of federal mandates. Paying taxes is a simple example. Why then cannot people understand that a state government, too, might have to do something because of a federal mandate?

State government officials, of course, could explain to the voters that the federal government required the particular actions. Justice O'Connor never explains why the federal government will not be held accountable under such circumstances. From a matter of constitutional policy, in terms of the goals of federalism, the anti-commandeering principle is undesirable and even counter-productive. For instance, in *New York v. United States*, the Court's express purpose is protecting state governments. Yet, the Court's ruling actually could have exactly the opposite effect. The Court in *New York v. United States* said that Congress could set out detailed standards for how nuclear wastes are to be handled and could require that states comply with them. *New York*, however, said that what Congress could not do is force states to devise means for dealing with the problem.

52. *Id.* at 168-69.

53. *See id.*

In other words, it is impermissible for Congress to let the states decide for themselves how to handle the wastes, but it is permissible for Congress to force the states to do so in a particular manner. Yet, the latter would allow the states more discretion and choices and thus be more protective of state sovereignty than the approach that the Court was willing to allow.

More generally, the federal government has the power pursuant to the Supremacy Clause to ensure compliance with federal law. The federal government should be able to regulate state and local governments to ensure that this occurs. The federal government's lawful objectives of cleaning up nuclear wastes, keeping handguns out of dangerous hands, and protecting privacy all warrant ensuring state compliance and enforcement. The anti-commandeering principle interferes with this and should have been overruled.

III. THE COURT SHOULD HAVE RECOGNIZED A COMPELLING INTEREST EXCEPTION TO THE NO COMMANDEERING PRINCIPLE

I recognize, however, that it is extremely unlikely that the Court would have overturned *New York v. United States* and *Printz v. United States*. There has been no change in the composition of the Court since *Printz*. The five Justices in the majority in *Printz*—Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—repeatedly have shown their strong commitment to protecting states' rights and limiting federal power in a variety of contexts.⁵⁴

54. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740 (2000) (holding that the civil cause of action for gender motivated violence within the Violence Against Women Act is unconstitutional as not within the scope of Congress's commerce clause authority); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that state governments may not be sued in federal court for violating the Age Discrimination in Employment Act. The law is not a valid exercise of Congress's Section 5 power that authorizes suits against state governments.); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that, because of state sovereign immunity, a state government may not be sued in state court without its consent. Maine could not be sued in a Maine court for violating the Fair Labor Standards Act without its consent); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding the Eleventh Amendment bars a claim against a state for violating patents. The Patent and Plant Protection Remedy Clarification Act is an unconstitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment in authorizing federal court jurisdiction for such claims against state governments). Each of these cases was a 5-4 decision with these five Justices in the majority.

Therefore, more realistically, what the Court should have done in *Reno v. Condon* was recognize a compelling interest exception to the Tenth Amendment and find that it was met by the Drivers' Privacy Protection Act. In *New York v. United States*, Justice O'Connor's majority opinion expressly declared that a compelling government interest is not sufficient to permit a law that otherwise would violate the Tenth Amendment.⁵⁵ Justice O'Connor wrote that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."⁵⁶

But Justice O'Connor offered no explanation for why a compelling interest should not be sufficient to justify congressional action, assuming that the Tenth Amendment creates an anti-commandeering principle. Fundamental constitutional rights—such as freedom of speech—can be infringed by the government if strict scrutiny is met; that is, if the government's action is proven necessary to achieve a compelling purpose. Even race discrimination is allowed if the government meets strict scrutiny. Why then an absolute ban on commandeering? Justice O'Connor just doesn't say.

This is highly formalistic in that it completely excludes all functional analysis. In fact, Justice O'Connor conceded that "[t]he result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity."⁵⁷ The decision appears formalistic because it is formalistic: the Court reasoned deductively from premises that were minimally defended and the Court disavowed any attention to functional considerations.

The Court, consistent with the five Justice majority's commitment to states' rights, could have continued the anti-commandeering principle, but also recognized a compelling interest exception. This would have been preferable to the distinctions drawn in *Reno v. Condon*, which for the reasons discussed in Part I were not persuasive.

The Court then should have found that the Drivers' Privacy Protection Act is constitutional because it serves a compelling purpose. Indeed, three compelling interests are served by the law. First, the Act protects informational privacy. Each of us must disclose certain information to our state department of motor vehicles in order to get a drivers' license and

55. See *New York*, 505 U.S. at 178.

56. *Id.*

57. *Id.* at 187.

license plates for our cars. This includes information that we may want to keep secret, such as our home addresses and our social security numbers. The Act serves the essential goal of ensuring that this information remain secret, except when needed by the government for appropriate purposes.

Second, protecting the privacy of information possessed by state departments of motor vehicles is crucial in protecting women from stalking and violence. Indeed, the legislative history of the Act documents the need to prevent violations of women's rights and particularly to prevent stalking and violence against women. Senator Barbara Boxer, a sponsor of the bill, spoke of how those "who move to escape an abusive relationship shouldn't have to choose between registering a car and maintaining their safety."⁵⁸ Senator Boxer mentioned several specific examples of women who were assaulted and murdered by assailants who learned the women's addresses through state departments of motor vehicles. Likewise, Senator John Warner, a co-sponsor of the bill, spoke of how the "legislation is to protect a wide range of individuals" from the release of private information from state departments of motor vehicles.⁵⁹

For example, throughout the legislative history of the Act, there is mention of the tragic stalking and murder of actress Rebecca Schaeffer.⁶⁰ Robert Bardo, a man who had been confined to mental institutions on several occasions, obtained Schaeffer's address through the California Department of Motor Vehicles.⁶¹ Having her address, he went to her apartment where he shot and killed her.⁶²

David Beatty, the Director of Public Affairs for the National Victims Center, testified at length before the House Judiciary Committee about the need for the law to protect women from violence.⁶³ Mr. Beatty explained that "accessing government records is the most common way in which abusers find their victims once they've moved in an attempt to escape."⁶⁴

58. Brief Amici Curiae at 17 (quoting Statement of Barbara Boxer, Driver's Privacy Protection Act (Oct. 26, 1993)).

59. 139 CONG. REC. S15764 (daily ed. Nov. 16, 1993) (statement of Sen. Warner).

60. See, e.g., Beatty Testimony, available in 1994 WL 14168013; see also 139 CONG. REC. S15,761-65 (daily ed. Nov. 16, 1993); 140 CONG. REC. H2522-24 (daily ed. Apr. 20, 1994).

61. See Beatty Testimony, available in 1994 WL 14168013.

62. See *id.*

63. See *id.*

64. *Id.*

Mr. Beatty described many instances of women who had been stalked and murdered by individuals who found them through the use of information from departments of motor vehicles.⁶⁵ He concluded that limiting access to information at state departments of motor vehicles “will not only reduce the likelihood of further harassment and violence but will actually save the lives of numerous innocent victims.”⁶⁶

There is a serious national problem with women being stalked and subjected to violence. The easiest way, and sometimes the only way, for a stalker to locate his victim is through information from state departments of motor vehicles. The report and recommendations of the National Institute of Justice and the Centers for Disease Control and Prevention, is authoritative and instructive.⁶⁷ The Report found that “[s]talking is more prevalent than previously thought: 8 percent of women and 2 percent of men in the United States have been stalked at some time in their life; an estimated 1,006,970 women and 370,990 men are stalked annually.”⁶⁸

The Report also found that most stalking victims are women.⁶⁹ Specifically, it found that “[s]eventy-eight percent of the stalking victims identified by the survey were women . . . and . . . 87 percent of the stalkers identified by victims were male.”⁷⁰

The Report recommended “address confidentiality programs” as a way of combatting stalking.⁷¹ The Report noted that stalking victims are urged to relocate and to secure a confidential mailing address.⁷² The Report expressly concluded: “*Stalking intervention strategies should include address confidentiality programs.* Survey data indicate that about a fifth of all stalking victims move to a new location to escape their stalker.”⁷³ Restricting the release of information by state departments of motor vehicles obviously is crucial to ensuring address confidentiality.

65. *See id.*

66. *Id.*

67. *See* Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, RES. IN BRIEF (National Institute of Justice Centers for Disease Control and Prevention, Wash., D.C.), Apr. 1998.

68. *Id.* at 2.

69. *See id.* at 5.

70. *Id.*

71. *Id.* at 12.

72. *See id.* at 14.

73. *Id.*

Confidentiality of personal information, such as addresses, is particularly important for victims of domestic violence. In 1994, Congress found that domestic violence is the leading cause of injuries to women between the ages of fifteen and forty-four.⁷⁴ Nearly 30% of all murders of women are committed by husbands or boyfriends.⁷⁵ One study found that “[a]t least 90 percent of battered women who are killed by their past or present lovers were known to have been stalked by them before being murdered.”⁷⁶

A woman who is fleeing an abusive, violent relationship desperately needs to keep her new address secret. One commentator explained:

An abused woman must be able to keep her whereabouts confidential because many abusive and controlling men spend enormous amounts of time and effort spying on, seeking out, following, and harassing their victims. Such stalking behaviors can be especially lethal to the victims and children. Once her location is known to her abuser, he is very likely to go on battering her. And he may even kill her, and her children, as well.

Given that most abusive men continue to search for and abuse their prior partners, for a battered woman to be safe, she has to be able to keep any new address confidential.⁷⁷

Congress has recognized this in other statutes as well, such as the provision of the Violence Against Women Act which provides for confidentiality of post office information.⁷⁸

Address confidentiality is truly a matter of life and death for many women. The Drivers' Privacy Protection Act is thus essential to safeguarding women and protecting them from stalking and acts of violence. The Act eliminates the ability of stalkers to gain their victims'

74. See H.R. CONF. REP. NO. 103-711, at 391 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1859.

75. See CONGRESSIONAL RESEARCH SERVICE, LIBR. OF CONG., PUB. NO. 94-142, VIOLENCE AGAINST WOMEN: AN OVERVIEW 5 (1994).

76. Joan Zorza, *Recognizing and Protecting the Privacy and Constitutionality Needs of Battered Women*, 29 FAM. L.Q. 273, 275 (1995).

77. *Id.* at 281-82 (citation omitted).

78. See 42 U.S.C. § 13951 (1994) (requiring the United States Postal Service to protect the confidentiality of domestic violence shelters' and abused persons' addresses). See also *id.* § 14014 (providing for the preparation of a report on the confidentiality of victims' addresses).

addresses by simply paying a small fee to state departments of motor vehicles. This compelling interest should have been a basis for upholding the Act.

Third, privacy of information possessed by state department of motor vehicles is crucial in protecting women's constitutional right to reproductive choice by protecting health care professionals and patients from stalking and violence. The Act also is important in that it safeguards the privacy of doctors and health care personnel who perform abortions and the women who see these professionals for reproductive health care. As Senator Boxer stated upon introducing the Act, "doctors and nurses shouldn't have to worry about anti-abortion activists taking down their license plate numbers and then harassing and intimidating them and their families."⁷⁹

Extremist anti-abortion groups are engaged in a campaign of violence against health care facilities and professionals that perform abortions. The *1998 National Clinic Violence Survey Report* found that "[a]lmost one-fourth of clinics faced severe anti-abortion violence in 1998."⁸⁰

One researcher found: "Anti-abortion extremists have increasingly resorted to aggressive and violent actions in an attempt to achieve their objectives. . . . After the first fatal attack on an abortion clinic in 1993, there have been seven murders [of doctors and clinic health care workers]."⁸¹ The *1998 National Clinic Violence Survey* found that 22.2% of clinics experienced one or more forms of severe violence, including blockades, invasions, bomb threats, bombings, arson threats, arsons, chemical attacks, death threats, and stalking.⁸²

Extremist, violent anti-abortion protestors stalk, threaten, assault, and sometimes murder health care professionals who perform abortions.⁸³ The *1998 National Clinic Violence Survey* found that 5.1% of clinics had experienced stalking and that 8.5% of clinics experienced home picketing.⁸⁴

79. Brief Amici Curiae at 21 (quoting Statement of Senator Barbara Boxer, Driver's Privacy Protection Act (Oct. 26, 1993)).

80. Jennifer Jackman et al., *1998 National Clinic Violence Survey Report* (visited Oct. 23, 2000) <<http://www.feminist.org/research/cvsurveys/1998/finaldraft.html>>.

81. Olga Rodriguez, *Advocating the Use of California's Stalking Statute to Prosecute Radical Anti-Abortion Protestors*, 7 HASTINGS WOMEN'S L.J. 151, 153-54 (1996).

82. See Tracy Sefl et al., *1999 National Clinic Violence Survey Report* (visited Oct. 23, 2000) <<http://www.feminist.org/research/cvsurveys/1999/1999ClinicSurvey.htm>>.

83. See Rodriguez, *supra* note 81, at 153.

84. See Jackman et al., *supra* note 80.

Extremist anti-abortion groups have engaged in a concerted effort to track down doctors, staff, and patients through their license plate numbers. Indeed, anti-abortion groups have adopted an aggressive campaign of publicly identifying doctors and other health care personnel who work at facilities that perform abortions and publicizing their home addresses. Randall Terry, founder of the extremist group, Operation Rescue, initiated a "No Place to Hide Campaign," in which the faces of doctors were put on "Wanted Posters" that were placed around their residential neighborhoods.⁸⁵ The key to the targeting and stalking of these health care professionals is the ability of extremist anti-abortion protestors to learn home addresses of those who work at facilities that perform abortions. The easiest way, and sometimes the only way, to gain this information is through state departments of motor vehicles.

Indeed, the publications of these violent anti-abortion groups specifically describe how doctors can be stalked by copying their license numbers and then learning their home addresses via state departments of motor vehicles.⁸⁶ Operation Rescue of California, in its "Abortion Buster's Manual," specifically stated that in many states it is possible "to trace abortionists' license plate numbers through your state's vehicle registration agency."⁸⁷ The Manual provided a detailed description of how to gain personal information about doctors and health care personnel from the departments of motor vehicles.

Some extremist anti-abortion groups have organized what they termed, "The Nuremberg Files," which they described as a project of "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity."⁸⁸ The dossiers are presented as "Wanted Posters." The Nuremberg Files website encourages the gathering of information against "persons who perform abortions (doctors, nurses, etc.), persons who own or direct abortion clinics, persons who provide protection to abortion clinics (security guards, escorts, law enforcement officers, etc.), and judges and politicians who pass or uphold laws authorizing child-killing or oppressing pro-life activists."⁸⁹

85. Rodriguez, *supra* note 81, at 153.

86. See *Florida Pro-Lifers ID Replacement for Gunn*, LIFE ADVOC., Sept. 1993, at 19; *Killer Clown Exposed*, LIFE ADVOC., Oct. 1993, at 16.

87. Amici Curiae Brief at 23 (quoting Kevin Sherlock, *Operation Rescue of California, Presents Abortion Buster's Manual*).

88. *Id.* (quoting <<http://www.netfreedom.net/nuremberg/index.html>>).

89. *Id.*

The website said that it wanted to gather “current and past personal data including date and place of birth, home and business addresses and phone numbers, Social Security numbers, [and] automobile license plate numbers.”⁹⁰ All of this is information that was available from state departments of motor vehicles prior to the enactment of the Drivers’ Privacy Protection Act. Other hard copy “Wanted Posters” have been created targeting doctors and staff who work at reproductive health care facilities.

The information gained is used to assault and even murder health care professionals providing reproductive health services. Such a wanted poster was prepared concerning Dr. John Britton. The flyer was titled, “Wanted for Crimes Against Humanity,” and included his picture and the description of his motor vehicle and its license plate number, as well as other information that was available from department of motor vehicle records. Subsequently, Dr. Britton was murdered by Paul Hill, an anti-abortion extremist who assisted in obtaining Dr. Britton’s identity and then created the “Wanted Posters” against Dr. Britton.

Extremist anti-abortion groups copy license plate numbers from cars leaving clinics and other facilities that provide reproductive health services.⁹¹ State departments of motor vehicles are then used to identify the individuals and to provide personal data, including home addresses, of health care professionals and patients.⁹² In a deposition, anti-abortion extremist Meredith T. Raney, Jr., described copying license plate numbers at facilities in Florida and then getting addresses from the Florida Department of Transportation.⁹³

Patients, as well as health care professionals, are targeted. One group announced what it called, “Operation Goliath,” and its formal press release stated: “We are starting to have our volunteers take down the license plate number of anyone that they are not able to give literature to. We then trace their license number through legal means, and obtain their name and address.”⁹⁴

90. *Id.*

91. *See, e.g.*, 138 CONG. REC. H1785-01 (daily ed. Mar. 26, 1992).

92. *See* Amici Curiae Brief at 23.

93. *See id.* at 24-25 (citing *Aware Woman Center for Choice, Inc. v. Raney* (M.D. Fla. No. 99-05) (deposition of Meredith T. Raney, Jr.)).

94. 138 CONG. REC. H1785-01 (daily ed. Mar. 26, 1992).

The violence directed at health care professionals directly threatens the ability of women to exercise their right to abortion. Indeed, Attorney General Janet Reno has spoken of a nationwide conspiracy to impede access to abortions.⁹⁵ One expert noted that “[h]arassment and intimidation may dissuade skilled clinicians from entering this field, or convince them to quit.”⁹⁶ The stalking and targeting of health care professionals has resulted in many resigning. In 1998, 4.8% of clinics lost staff as a result of anti-abortion violence.⁹⁷ “Of the . . . clinics reporting violence-related staff resignations, 11.8% lost a physician, 52.9% lost nurses, 35.3% lost administrators, 11.8% lost counselors, and 5.9% had lab technicians resign.”⁹⁸

This campaign of violence against health care providers directly impedes the ability of women to exercise their constitutional right to make reproductive choices. Today, 86% of American counties have no abortion provider, a 14% drop from 1992.⁹⁹

Women exercising their constitutional right to obtain an abortion require the assistance of doctors and health care professionals. Stalking and violence against those working at health care facilities that perform abortions directly threaten this constitutional right. The Drivers’ Privacy Protection Act is crucial in protecting the secrecy of personal information concerning these health care professionals and limiting the ability of extremist anti-abortion groups to engage in stalking and acts of violence. This should have been deemed a compelling interest sufficient to uphold the law.

CONCLUSION

How the Supreme Court writes an opinion is, in many ways, as important as the result. The principles announced in a decision provide guidance to lower courts and even to the Supreme Court itself in future cases. *Reno v. Condon* came to the right result, but did so based on

95. See James Risen, *Social Issues: Abortion Clinic Attacks Cast Glare on New Group of Extremists*, L.A. TIMES, Jan. 17, 1995, at A5.

96. David A. Grimes, *Clinicians Who Provide Abortions*, 80 OBSTETRICS & GYNECOLOGY 719, 721 (1992).

97. See Jackman et al., *supra* note 80.

98. *Id.*

99. See Stanley K. Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 FAM. PLAN. PERSP. 263 (1998).

questionable distinctions. A much preferable alternative would have been for the Court to overturn *New York v. United States* and *Printz v. United States*. Failing this, the Court at least should have recognized a compelling interest exception to the Tenth Amendment and should have found it to be met by the Drivers' Privacy Protection Act.

If the Court had chosen this latter approach, it would have declared that there is a compelling interest in protecting women from being stalked and in safeguarding health professionals and patients who work at and use reproductive health care facilities. This declaration, in itself, would have been a major step forward by the Supreme Court.

Simply put, *Reno* came to the right result, but not for the clearest or best reasons.

