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Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver's Privacy Protection Act Constitutional Under the Tenth Amendment?

*Rachel F. Preiser**

INTRODUCTION

Congress passed the Driver's Privacy Protection Act of 1994 ("DPPA") in response to state sales of personal information contained in motor vehicle records to individuals and to direct marketing companies who use it to identify select groups of prospective customers for particular products.[1] Thirty-four states sell their department of motor vehicles ("DMV") records to individual citizens and to direct marketers, essentially allowing their unregulated distribution to any party seeking them.[2] This practice of selling and distributing personal information has serious implications for the privacy and safety of individual citizens.[3]

In considering the DPPA, Congress dwelt in particular on the use of DMV information by murderers, robbers, and stalkers to identify their victims.[4] In California, a man who had hired a private detective to obtain the address of actress Rebecca Shaeffer from the state department of motor vehicles brutally murdered her in the doorway of her Los Angeles apartment.[5] Another California resident copied

* Thanks to Professors Donald Regan and Roderick Hills for their last-minute comments and critique. I take full responsibility for the content of this piece.

1. Driver's Privacy Protection Act ("DPPA") of 1994, 18 U.S.C.A. §§ 2721-2725 (West Supp. 1998). Personal information collected by state motor vehicle departments (DMVs) includes names, addresses, and social security numbers of registered drivers.

2. *See* 139 CONG. REC. 29,469 (1993) (statement of Sen. Robb); *see also* Michael W. Miller, *Firms Peddle Information from Driver's Licenses*, WALL ST. J., Nov. 25, 1991, at B1. According to Miller, "[m]ost drivers who register for a license have no idea their personal information finds its way into the hands of marketers." In a 1993 article for the Boston Globe, Larry Tye described our information age as "a time when invisible list-makers have replaced door-to-door salesmen . . . and marketers swap the details of our private lives like baseball cards." *See* Larry Tye, *No Private Lives: List-makers Draw a Bead on Many*, BOSTON GLOBE, Sept. 6, 1993, at 1, *available in* LEXIS, News Library, Bglobe File.

3. *See Protecting Driver Privacy: Legislative Hearing on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 322 (1994) (statement of Dr. Mary J. Culnan, Associate Professor, School of Business, Georgetown University).

4. *See* 139 CONG. REC. 29,467 (1993) (statement of Sen. Hatch).

5. *See id.* at 29,466 (statement of Sen. Boxer).

down the license plate numbers of five young women and sent them threatening letters after obtaining their home addresses from the California DMV.[6] Anti-abortion groups have long used license plate numbers of cars parked in front of abortion clinics to track down and harass women seeking abortions by obtaining their addresses from DMV records.[7]

The abandon with which DMVs sell the complete contents of their records on registered drivers to national marketing companies is equally disconcerting. These national marketers specialize in identifying the overweight, divorced, wealthy, or short in stature in order to assist enterprises eager to target the consumer base most responsive to their form of solicitation.[8] Because the compilation, analysis, and distribution of such information is in fact an important national industry, accounting for five percent of U.S. employment and $350 billion in annual revenue,[9] the regulation of that industry is an area of immediate national concern.[10]

The DPPA regulates the distribution of DMV personal information by placing a prohibition both on state and individual activities. First, the Act prohibits states from freely releasing personal information from state DMV records.[11] It then enumerates the conditions under which states may continue to distribute DMV information — if they choose not to abandon the field to federal control — and limits

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6. *See id.*

7. *See id.* at 29,469 (statement of Sen. Robb).

8. *See* Miller, *supra* note 2.

9. *See* Tye, *supra* note 2. In describing the burgeoning direct marketing industry, Tye notes:

> [A]s marketing in America becomes more and more targeted, more and more people are wondering whether it's an unacceptable invasion of privacy . . . [a]nd whether the old system of self-regulation makes sense for a direct marketing industry that, according to a [Direct Marketing Association]-sponsored analysis of everything from advertising to computer services, accounts for 5 percent of US employment and $350 billion in annual revenues.

Id.

10. Editor and author Anne Fadiman recently commented on the mass marketing deluge of the information age in *Ex Libris: Confessions of a Common Reader*. Ms. Fadiman notes, in her chapter entitled "The Catalogical Imperative":

> I have never actually solicited a catalogue. Although it is tempting to conclude that our mailbox hatches them by spontaneous generation, I know they are really the offspring of promiscuous mailing lists, which copulate in secret and for money. One of the . . . horrors of the direct mail business is that you never know to whom your name will be pandered.

ANNE FADIMAN, EX LIBRIS: CONFESSIONS OF A COMMON READER 114 (1998); *see also infra* Part I for a discussion of the constitutionality of federal regulation of the distribution of DMV records under the Commerce Clause.

11. Part (a) of the statute provides: "[A] State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." Driver's Privacy Protection Act of 1994, 18 U.S.C.A. § 2721(a) (West Supp. 1998).

the redistribution of that information by authorized individuals who obtain it from the DMV.[12] The state may opt out of the regulatory scheme entirely by placing a notice on all of its official forms indicating that personal information collected may be freely disclosed and providing the opportunity for any registrant to prohibit such disclosure.[13]

Three of the four district courts that have considered challenges to the DPPA have held the law unconstitutional, although two of those

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12. The permissible uses are enumerated in part (b) of section 2721 as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions....

(2) For use in connection with matters of motor vehicle or driver safety and theft....

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only —

(A) to verify the accuracy of personal information submitted by the individual... and (B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding....

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization....

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer... to obtain or verify information relating to a holder of a commercial driver's license....

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on [its] forms... notice that personal information... may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that —

individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses....

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

18 U.S.C. §2721(b.). The law goes on to limit the resale or redisclosure of personal information obtained from DMV records by "authorized recipients" as follows:

An authorized recipient of personal information... may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12))... Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this title must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

18 U.S.C.A. § 2721(c).

13. *See* 18 U.S.C.A. § 2721(b)(11) (quoted *supra* note 12).

three were reversed on appeal.[14] At both the district and appellate court levels, dispute over the Act focuses not on whether it falls within Congress's Article I commerce power, but rather on the question of whether the Act impermissibly regulates the states in violation of the limitations on federal power imposed by the Tenth Amendment.[15] Although the Supreme Court has established that the two inquiries are, in theory, two sides of the same coin,[16] courts have often treated them independently.[17]

The first inquiry deserves more serious attention than courts evaluating the DPPA have given it. Under modern Commerce Clause jurisprudence, which posits relatedness to the interstate exchange of goods and services as the touchstone for the federal commerce power,[18] the DPPA seems a valid exercise of congressional authority. Under a more functional, less formalistic view of the Commerce Clause proposed by Professor Donald Regan, the question of whether the DPPA passes muster is less clear-cut. This view of the Commerce Clause extends federal power only to areas of concern to the nation as a nation, that the states are not competent to regulate independently.[19] The DPPA may address such an issue. The second inquiry, like the first, is concerned with whether the federal government is using the

14. *See* Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998) (holding the DPPA constitutional), *rev'd*, 171 F.3d 1281 (11th Cir. 1999); Travis v. Reno, 12 F. Supp. 2d 921 (W.D. Wis. 1998) (holding the DPPA unconstitutional), *rev'd*, 163 F.3d 1000 (7th Cir. 1998); Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 994 F. Supp. 1358 (W.D. Okla. 1997) (holding the DPPA unconstitutional), *rev'd*, 161 F.3d 1266 (10th Cir. 1998); Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997) (holding the DPPA unconstitutional), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

15. *See, e.g.*, *Condon*, 972 F. Supp. at 982-86 (holding the DPPA unconstitutional as a violation of the Tenth Amendment and finding that the statute cannot be justified as an exercise of the commerce power).

16. Justice O'Connor, writing for the majority in *New York v. United States*, asserted that these two questions — the extent of Congress's power under the Commerce Clause and the extent of the domain of sovereignty reserved to the states under the Tenth Amendment — "are mirror images of each other." 505 U.S. 144, 156 (1992).

17. *See, e.g.*, *New York*, 505 U.S. at 160. The *New York* Court struck down a provision of the Low-Level Radioactive Waste Policy Act requiring states either to regulate waste disposal according to federal standards or to take title to radioactive waste produced within their borders. Although the regulation of radioactive waste disposal at issue in *New York* clearly fell within Congress's interstate commerce power, the Court struck down the "take-title" provision of the Act on Tenth Amendment grounds.

18. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zone Act is not within the federal commerce power because it is too remote from commerce both in character and purpose).

19. *See* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 580-81 (1995) (arguing that the only viable alternative to the accretion of unworkable formalisms within Commerce Clause jurisprudence is an approach that focuses on whether a federal law enacted under the commerce power in fact seeks to achieve a national interest that could not be achieved by the separate states).

states to accomplish a federal objective that is beyond its enumerated powers. In pursuing this Tenth Amendment inquiry, however, the Court has been primarily concerned with the mode of regulation rather than whether a federal law regulates an appropriate domain. The Court in *New York v. United States* struck down the "take-title" provision of the Low-Level Radioactive Waste Policy Act on the grounds that it "commandeered" state legislatures to develop a federally prescribed regulatory program, while recognizing that the domain of regulation was within federal power.[20] The Court expanded on this anti-commandeering rule in *Printz v. United States*, holding that the federal government could not circumvent the rule simply by commanding state officers rather than the state itself.[21] The Court found that laws that commandeer the states violate the Tenth Amendment and fundamental federalist principles by allowing the federal government to operate indirectly through the states, thereby avoiding financial and political responsibility for federal policies.[22]

The two circuit courts that have held the DPPA unconstitutional found that the burden of compliance upon states violates the anti-commandeering precedent laid down by *New York* and *Printz*.[23] In holding the DPPA unconstitutional, these courts state that the DPPA conscripts state officers into federal service by requiring them to become familiar with and implement new standards for the release of DMV information.[24] One district court has also based its decision to enjoin the law's application on the burdensome fines it imposes on noncompliant states.[25]

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20. *See New York*, 505 U.S. at 161.

21. 521 U.S. 898, 932 (1997) (holding that a provision of the Brady Handgun Violence Prevention Act requiring state officials to conduct background checks on all prospective gun purchasers impermissibly commandeered state officers to administer and enforce a federal regulatory scheme). The *Printz* Court stated that "where, as here, it is the whole *object* of the law to direct the functioning of the state executive," the law violates the Tenth Amendment protection of state sovereignty against federal incursion. *Id.*

22. *See New York*, 505 U.S. at 168-69. The *New York* Court noted:

> [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 regulatory program may remain insulated from the electoral ramifications of their decisions. 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.

Id at 169.

23. *See* Pryor v. Reno, 171 F.3d 1281 (11th Cir. 1999); Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

24. *See Pryor*, 171 F.3d at 1286; *Condon*, 155 F.3d at 456-57 (quoting the district court decision, *Condon v. Reno*, 972 F. Supp. 977, 979-81 (D.S.C. 1997)).

25. *See* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 994 F.Supp. 1358, 1364 (W.D. Okla. 1997), *rev'd*, 161 F.3d 1266 (10th Cir. 1998).

In contrast, the district court in *Pryor v. Reno* and several appellate courts have upheld the DPPA[26] by relying on earlier Supreme Court Tenth Amendment jurisprudence, often referred to as the *Garcia* line of cases.[27] In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court held that the minimum wage and overtime provisions of the Fair Labor Standards Act should be applied to state, as well as private, employers.[28] In so doing, *Garcia* rejected the prohibition on federal regulation of states as states in domains of traditional state function that had been established by *National League of Cities v. Usery*.[29] The courts that have upheld the DPPA, relying on the *Garcia* line of cases, rest their decisions on the distinction between federal laws that commandeer the states and federal laws that simply require state compliance in order to take effect.

The *New York* and *Printz* decisions are in some tension with the Tenth Amendment jurisprudence that immediately followed *Garcia*,[30] because they rely to some extent on pre-*Garcia* formalisms regarding dual sovereignty.[31] The split between the courts on the constitutionality of the DPPA testifies to this tension, for the disagreement turns on the question of which of the two competing lines of precedent should control.[32] While acknowledging the tension in Tenth Amendment ju-

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26. *See* Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998), *rev'd*, 171 F.3d 1281 (11th Cir. 1999); Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998); Oklahoma, *ex rel.* Oklahoma Dep't of Pub. Safety, 161 F.3d 1266 (10th Cir. 1998).

27. The *Garcia* line of cases is generally taken to include cases which preceded *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), including *EEOC v. Wyoming*, 460 U.S. 226 (1983), *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* 452 U.S. 264 (1981), as well as some which followed in the course it charted, such as *South Carolina v. Baker*, 485 U.S. 505 (1988).

28. 469 U.S. 528 (1985).

29. National League of Cities v. Usery, 426 U.S. 833 (1976) (establishing a three-part test that finds a violation of state sovereignty where a federal law (1) regulates states as states (2) in an area of traditional state sovereignty (3) so as to directly impair the states' ability to structure integral operations in areas of traditional governmental functions).

30. This Note refers to the cases immediately following *Garcia* — such as *South Carolina v. Baker* — as "the *Garcia* line," although *Garcia* may be seen as clearing the way not only for these cases but also for the competing line of precedent embodied in *New York* and *Printz*.

31. Because the anachronistic language of sovereignty pervades the *New York* and *Printz* Courts' Tenth Amendment analysis, it is at times difficult to recognize that the Courts' decisions in both cases are preoccupied not with a delineation of discrete realms of absolute power of federal and state governments but rather with identifying unconstitutional modes in which the federal government has sought to exercise otherwise viable regulatory control.

32. *Compare, e.g.*, Condon v. Reno, 972 F. Supp. 977, 984 (D.S.C. 1997) ("The court agrees with Defendants' characterization of the DPPA and finds that the DPPA is not the type [of] federal legislation prohibited by *New York* and *Printz*. Rather, the court finds that the DPPA is analogous to the statute found constitutional in *South Carolina v. Baker*.") ("The State asserts, and the Court agrees, that the DPPA falls within the prohibition of *New York* and *Printz*."), *aff'd*, 155 F.3d 453 (4th Cir. 1998), *cert. granted,* 119 S. Ct. 1753 (1999)

risprudence following *Garcia*, courts have recently reaffirmed that the *Garcia* line remains good law.[33]

Confusion over the relationship between the *Garcia* and *New York-Printz* lines of cases is a central feature of the disagreement over the constitutionality of the DPPA. The *New York* Court characterizes the laws at issue in the *Garcia* line of cases — laws the Court describes as "generally applicable," because they subject states to the same legislation applicable to private parties — as posing no problem for its anti-commandeering principle.[34] In addition, the *New York* and *Printz* Courts acknowledge that federal laws that preempt state regulation, or conditionally preempt it by allowing states to choose between preemption and implementation of federal regulations, also escape the problems posed by commandeering.[35] The Courts stop short, however, of explicitly recognizing that laws of general applicability usually operate in a preemptive mode.[36] This Note draws the connection between generally applicable laws and the mode of conditional preemption, arguing that both are constitutionally unproblematic because they tend to preserve the fundamental federalist principle of political accountability. By providing a unifying federalist explanation for the privileged place given to laws of general applicability and conditional preemption, this Note lends coherence to the strands of Tenth Amendment jurisprudence.

This Note argues for the constitutionality of the DPPA, first engaging the threshold question of whether the law falls within the federal commerce power and then considering whether its legislative mode is permissible in light of Tenth Amendment jurisprudence. Part I argues that the DPPA is properly within the reach of Congress's commerce power. Part II lays the groundwork for the Tenth Amendment examination of the DPPA's legislative mode, by establishing the relation of general applicability to commandeering and preemption in

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with Pryor v. Reno, 998 F. Supp. 1317, 1329 (M.D. Ala. 1998), *rev'd*, 171 F.3d 1281 (11th Cir. 1999).

33. *See* West v. Anne Arundel County, 137 F. 3d 752 (4th Cir. 1998). In *West*, the Fourth Circuit reconsidered the constitutionality of those provisions of the Fair Labor Standards Act (the same law under attack in *Garcia*) that apply specifically to state employers. While acknowledging that *Printz* stressed the importance of the Tenth Amendment's limitation of federal power, the court nevertheless relied on *Garcia* to uphold the challenged provisions, stating that "neither *Printz* nor any other Supreme Court case has specifically overruled *Garcia*." *Id.* at 760.

34. *See* New York v. United States, 505 U.S. 144, 160-61 (1992).

35. *See* Printz v. United States, 521 U.S. 898, 925 (1997); *New York*, 505 U.S. at 167.

36. *Cf.* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 921 (1998) (asserting that "[i]t is true as a matter of fact that most generally applicable laws . . . can be defended as conditional preemption of what legislators regard as a socially costly activity").

a federalism context. Part III argues that the DPPA takes the form of conditional preemption rather than impermissible commandeering; hence, it should survive the second part of the constitutional analysis.

I. EVALUATING THE DPPA AS AN EXERCISE OF FEDERAL PREEMPTION UNDER THE COMMERCE CLAUSE

Congress's longstanding power to preempt state law within a field subject to national control is not subject to dispute.[37] The preemptive mode of federal infringement on the states' exercise of power must, however, be limited to areas in which the Constitution explicitly grants federal control.[38] Otherwise, the national government would cease to be a government of enumerated powers.

An assessment of whether the DPPA is constitutional relies on the determination of whether the national sale of state DMV information falls within the federal government's enumerated powers, specifically the commerce power. Section I.A demonstrates that the DPPA falls within the formalistic definition of the commerce power presented by recent Supreme Court Commerce Clause jurisprudence as embodied in *United States v. Lopez*.[39] Section I.B offers a more functional approach to defining the limits of the commerce power and argues that the DPPA may also pass muster under this analysis.

A. *Commerce Clause Jurisprudence: Does the DPPA Fall Within the Federal Commerce Power?*

To determine the constitutionality of the DPPA, one must answer the threshold question of whether it regulates a domain that falls within Congress's commerce power as enumerated in Article I, Section 8.[40] This threshold determination is a necessary prerequisite to justifying the mode of conditional preemption that the law takes.[41]

Historically, the Court has tended towards a kind of Commerce Clause analysis that looks only for characteristics of commerce with-

37. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 767 (1994). According to Gardbaum, the federal power of preemption was first clearly articulated by the Court in *New York Central Railroad v. Winfield*, 244 U.S. 147 (1917). *See* Gardbaum, *supra*, at 815 n.65.

38. *See* Gardbaum, *supra* note 37, at 770. Gardbaum states that the "issue[] of . . . preemption arise[s] only where the states and the federal government have concurrent power," implying that there can be no legitimate exercise of federal preemption in a given area of regulation unless the area falls within the federal government's control as well as that of the states.

39. United States v. Lopez, 514 U.S. 549 (1995).

40. *See* U.S. CONST. art. I, § 8, cl. 3.

41. *See* Gardbaum, *supra* note 37, at 770; *see also supra* text accompanying note 39; New York v. United States, 505 U.S. 144, 159-60 (1992).

out considering the overarching purpose of a law or whether federal intervention is necessary to accomplish that purpose.[42] That analysis has alternately produced excessively narrow and overbroad versions of the federal commerce power.[43] The latter interpretation is exemplified in the Supreme Court's 1941 decision in *United States v. Darby*.[44] In *Darby*, the Court held that Congress had power to prohibit the interstate shipment of lumber manufactured by employees whose working conditions violated the Fair Labor Standards Act because the commerce power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate."[45] In contrast, several cases of the same period employed commerce-fetishizing formalisms to restrict the scope of the Commerce Clause, either by excluding manufacturing from federal regulation as not comprehended in "commerce,"[46] or by excluding from federal control activities that have only an indirect influence on commerce between the States.[47] For more than half a century before *Lopez*, however, the trend had been towards an expansive view of the scope of the federal commerce power.[48]

Although the Court attempted to narrow the potential expansiveness of its approach by striking down the Gun-Free School Zone Act in *Lopez*, it relied on formalisms that have periodically plagued its application of the Commerce Clause.[49] Hence, the Court held that an act prohibiting possession of a gun within 500 feet of a school zone overreached the federal government's commerce power, because the law's

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42. *See* Regan, *supra* note 19, at 560-562.

43. *See* Stephen M. McJohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 7-10 (1995).

44. *See* United States v. Darby, 312 U.S. 100, 117-24 (1941) (holding that the Commerce Clause was not limited to the regulation of commerce among the states but extended to regulation of intrastate activities that so influenced interstate commerce as to warrant federal regulation); *see also* Regan, *supra* note 19, at 560 nn.19-21 and accompanying text.

45. *Darby*, 312 U.S. at 118.

46. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the commerce power did not authorize the regulation of bituminous coal production because production precedes commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that federal antitrust laws did not reach a conspiracy among sugar producers because manufacture is not commerce).

47. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that a federal law setting minimum wage and maximum hours for slaughterhouse workers went beyond the government's commerce power because the regulation had only an "indirect" effect on interstate commerce).

48. *See* McJohn, *supra* note 43, at 1.

49. *See* United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("As the Chief Justice explains . . . neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus."); *cf. A.L.A. Schechter Poultry Corp.*, 295 U.S. at 550; *E.C. Knight Co.*, 156 U.S. at 16.

effect on and relatedness to "interstate commerce" were too remote to fall within the reach of the Commerce Clause.[50]

The Court's analysis in *Lopez* nevertheless expresses the current state of the inquiry into the scope of the commerce power. Under this analysis the DPPA clearly passes muster, since it regulates a national market in information, involving the movement of DMV records containing personal information on all of a state's licensed drivers across state lines.[51] Because the distribution of DMV records is an interstate activity that enables the national exchange of personal information, the Commerce Clause empowers the federal government to regulate that activity.

B. *Is the DPPA Valid Under a Functional Approach to the Commerce Clause?*

Not only does the DPPA fall within the Commerce Clause according to the formalistic analysis used in *Lopez*, but it also satisfies the more comprehensive requirements of a functional approach. Because the *Lopez* Court limited its inquiry to indicators of "interstate commerce" and failed to consider whether the purpose of the federal law was a nationally important one that could not be competently achieved by independent state regulation, it failed to provide a solid analytical framework for Commerce Clause doctrine.[52] By focusing commerce clause analysis on the degree of relatedness of a regulated activity to the movement of goods, data, or people across state lines,

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50. *See Lopez*, 514 U.S. at 551 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.").

51. A "good" that both moves in interstate commerce and is essential to facilitating interstate commerce — like the personal information from DMV records sold to mass marketers nationwide and used by them to reach national consumers — would be an "instrumentality" of interstate commerce and hence within the federal commerce power. *See Lopez*, 514 U.S. at 558-59 ("First, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." (citations omitted)).

52. *See Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce.... [T]here is no indication that [Respondent] had recently moved in interstate commerce, and there is no requirement [in the Act] that his possession of the firearm have any concrete tie to interstate commerce."); *see also* Regan, *supra* note 19, at 555 (noting that, although the outcome of *Lopez* is probably correct, the Court's analysis is "unsatisfactory"). The formalistic quality of the *Lopez* Court's analytical framework is exposed by the amendment to the Gun-Free School Zone Act made following the *Lopez* decision in order to render the law constitutional within the *Lopez* guidelines. The law was amended to prohibit the possession within 500 feet of a school zone of any gun *that has traveled in interstate commerce*. *See* 18 U.S.C.A. § 922(q)(2)(A) (West Supp. 1999).

the Court ignored the constitutionally significant question of whether a law has a nationally important purpose requiring federal implementation.[53]

A more substantive, functional analysis, advocated in the work of Professor Regan, would take account of the particular institutional structure of our government to address the question of whether a uniform federal regulation is necessary to effect a purpose of genuine national interest.[54] The Commerce Clause grants the federal government legislative power to pursue such an interest, important to the nation as a nation and which the states are separately incompetent, or not motivated, to achieve.[55] If a domain proves to be within the federal commerce power so understood, then it is by definition suited to the legislative mode of preemption.

The DPPA, in regulating the distribution of personal information by state DMVs to mass marketers and others, implicates interstate communication and transportation, issues of genuine national interest.[56] Applying Regan's definition of national interest as an interest that concerns the nation as a nation, the best argument in support of restricting distribution of DMV information in the national interest is that such restrictions reduce the potential danger associated with obtaining a license.[57] Reducing this danger decreases a burden placed upon interstate travel; individuals will not be forced to choose between securing their personal information and obtaining a license.

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53. *See* Regan, *supra* note 19, at 570-71.

54. *See id.* at 569, 571 (arguing that federal regulation is not appropriate to address the problem of gun possession near schools at issue in *Lopez* because "[t]here is nothing in the background of the [Gun-Free School Zones Act] to suggest that states are less capable of dealing with the problem . . . than the federal government; nor is there anything to suggest the states are inadequately motivated to do so").

55. *See id.* at 570-71. Regan supports his reading of the Commerce Clause with the language of the sixth Virginia Resolution, approved by the Constitutional Convention on July 17, 1787. The resolution stated "[t]hat the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which harmony of the United states may be interrupted by the exercise of individual legislation." NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (W.W. Norton & Co. ed., 1966).

56. *See supra* notes 2-10 and accompanying text; *see also* Regan, *supra* note 19, at 571-73. Regan recognizes "transportation and communication" as "general interests of the union." *Id.* at 571.

57. According to Regan, a "genuine interest of the nation" is more than merely an interest that concerns all states in the nation. Rather, it is an interest that particularly implicates the national identity and the states' ability to operate as a nation. The assessment of what constitutes a genuine national interest is in the first instance for Congress to make, not the courts. *See* Regan, *supra* note 19, at 567-73, 579-81. Although Congress has raised safety concerns regarding the distribution of DMV information, *see supra* text accompanying notes 4-7, it has not explicitly identified that threat as a threat to national transportation, and thus, Regan would not necessarily identify the regulation of DMV information as a genuine national interest.

The second question in determining whether the domain of DMV information distribution falls within the commerce power is whether the federal government is in fact more competent or more motivated than the separate states to protect the national interest effectively. On the one hand, pressure from a state's citizens concerned with privacy and safety may be a powerful motivating factor that would encourage the states, independently, to take the necessary measures to limit the distribution of the citizens' personal information. Certainly the resources necessary for regulation of the distribution of DMV information are as readily available to states as to the federal government. While both are competent to regulate, however, the states, unlike the federal government, are faced with the disincentive presented by the prospect of severely limiting the revenues they draw from the unregulated distribution of their DMV records.[58] That pecuniary motivation to ignore or subvert the general privacy and safety interests of the people suffices to tip the balance in favor of federal regulation.[59] Therefore, while both the federal and state governments are competent to regulate the distribution of DMV records, the states may lack the regulatory motivation necessary to ensure the protection of national safety and privacy interests.

Because the DPPA is within the federal government's enumerated power under the Commerce Clause, under the formalistic approach of *Lopez* and perhaps under the functional approach advocated by recent scholarship, the mode of preemption is proper to federal regulation of the distribution of DMV records. Moreover, the law addresses an issue potentially of national concern, one that the states independently are disinclined to adequately address due to the financial disincentives posed by limiting the sale of DMV records.

II. TOEING THE *GARCIA* LINE: THE TENTH AMENDMENT IMPLICATIONS OF LEGISLATIVE FORM

Having survived the threshold Commerce Clause inquiry, the DPPA must also endure the second prong of the constitutionality test — that is, whether the mode of the law is compatible with the Tenth

58. *See, e.g.*, Travis v. Reno, 163 F.3d 1000, 1002 (7th Cir. 1998) (stating that "because Wisconsin formerly sold its records for use in creating mailing lists, and for other purposes, the Act deprives the state of approximately $8 million in annual revenue").

59. *See* Regan, *supra* note 19, at 580. Regan argues that "[e]ven if Congress has no advantage in competence, it would still have adequate reason to intervene if the states were motivated to ignore or subvert the general interest."

It should be noted that a state policy respecting privacy by closing state motor vehicle records might conceivably have the benefit of attracting more residents to the state and thereby increasing the state's tax base. The countervailing power of this benefit, however, is difficult to assess and somewhat farfetched by comparison with the concrete loss of revenues that would immediately result from the cessation of the sale of DMV records.

Amendment. The origin of the focus on legislative mode, of primary concern to the *New York* and *Printz* Courts, may be traced to the Court's earlier decision in *Garcia.* By doing away with the judicial cataloguing of "traditional government functions"[60] relegated to state sovereign control, *Garcia* paved the way for *New York*'s and *Printz*'s focus on the mode of regulation of the laws under scrutiny.[61]

The relationship between the Court's decision in *Garcia* and the Court's later decisions in *New York* and *Printz* is complicated, both by *Garcia*'s inattention to the Tenth Amendment as a limitation on federal authority and by *New York*'s apparent marginalization of cases in the *Garcia* line. First, *Garcia* proposes that state participation in the political process is a sufficient limitation on federal overreaching,[62] while *New York* and *Printz* strongly reassert the role of the Tenth Amendment in constraining the manner in which the federal government exercises its constitutional authority.[63] Second, and equally vexing for the development of a coherent Tenth Amendment jurisprudence, the *New York* Court summarily treats the *Garcia* line of cases

60. The notion that realms of traditional state function were by their nature beyond federal power to regulate was articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and elaborated in numerous cases thereafter. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc. 452 U.S. 264, 287-88 (1981) (listing interference with a state's "ability 'to structure integral operations in areas of traditional governmental functions' " as the third prong in a test of an act's validity under the commerce power); United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (holding that, although the federal government is entitled to remedy drunk driving on a federal enclave, the suspension of drunk driver's license was beyond federal power because licensing of automobile drivers is a "traditional government function"); Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977) (holding that regulation of traffic on public roads is not a "traditional government function" of the state and not immune to federal control).

61. *See* Thomas H. Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1666 (1987) (arguing that *Garcia* is significant not merely because it declared *National League of Cities* unworkable, but also, more importantly, because "it calls for the development of new theories of federalism-based limitations on the commerce power"); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341. Rapaczynski argues that the *Garcia* Court's reliance on the "national political process" to protect state power from federal incursion establishes a "process-oriented" approach to federalist problems, in which the political process is subject to judicial correction where it can be shown to have failed. *See id.* at 364. Although Rapaczynski acknowledges *Garcia*'s failure to identify how exactly the national political process works to protect federalist values or what constitutes a defect in this political process, he nevertheless sees the *Garcia* approach as a promising alternative to the rigid notions of "dual sovereignty" that dominated pre-*Garcia* Tenth Amendment jurisprudence. *See id.* at 368-69.

62. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-52 (1985). The *Garcia* Court notes that the Constitution ensures the influence of the states in the federal system by giving states control over the electoral qualifications for the legislative branch and a key role in presidential elections. *See id.* at 551 (citing U.S. CONST. art. I, § 2, art. II, § 1).

63. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

as concerned with laws of general applicability.[64] This characterization of the *Garcia* line, absent any explanation of its ramifications for federalism, has been a primary source of confusion for courts in considering the DPPA's constitutionality. In short, courts have been uncertain about the scope and meaning of *Garcia* in the wake of *New York*.[65]

Part II parses the federalism implications of general applicability by exploring its relation to the legislative modes of commandeering on the one hand and conditional preemption on the other. Section II.A argues that, by shifting the focus of Tenth Amendment inquiry away from a formalistic cataloguing of traditional government functions, *Garcia* in fact set the stage for *New York*'s and *Printz*'s focus on legislative mode. Section II.B offers an explanation grounded in federalist principles for the *New York* Court's recognition that the laws at issue in the *Garcia* line do not pose the federalist problems entailed by commandeering. Specifically, Section II.B argues, through the example of *South Carolina v. Baker*, that the federalism implications of generally applicable laws are illuminated by focusing on the preemptive mode in which they tend to operate.

A. Garcia *Set the Stage for* New York *and* Printz

The Court in *Garcia* held constitutional the provision of the Fair Labor Standards Act imposing maximum hour/minimum wage requirements on state employers, thereby rejecting the blanket prohibition on the regulation of "States as States" established in *National League of Cities*.[66] The *Garcia* Court rejected the traditional government function test because it offered no coherent basis for identifying what these most fundamental elements of state sovereignty were.[67] Moreover, the Court found that this "traditional function"-finding endeavor, relying on a rigid, a priori definition of state sovereignty, was fundamentally incompatible with the dynamic role of federalism in a

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

65. *See, e.g.*, Pryor v. Reno, 171 F.3d 1281, 1286-87 (11th Cir. 1999); Condon v. Reno, 155 F.3d 453, 460-63 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

66. *See* National League of Cities v. Usery, 426 U.S. 833, 845, 852 (1976); see also *Garcia*, 469 U.S. at 555-557.

67. *See Garcia*, 469 U.S. at 538-39. The *Garcia* Court noted, for example, that under the "traditional government function" test, courts had been led to designate the licensing of drivers as within the bounds of state sovereignty, *see* United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978), while upholding federal regulation of traffic on public roads, *see* Friends of Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977). The Court concluded that "[t]he constitutional distinction between licensing drivers and regulating traffic . . . is elusive at best." *Garcia*, 469 U.S. at 539.

democratic society.[68] The *New York* and *Printz* Courts are indebted to *Garcia* for taking this radical stance, which propelled Tenth Amendment jurisprudence out of the "traditional government function" rut and hence beyond its unhelpful focus on demarcating the "what" of state sovereignty as the primary means of precluding federal encroachment.[69] In so doing, *Garcia* enabled the *New York* and *Printz* Courts to treat how federal regulation functions as a source of important limitations on the federal government's exercise of its constitutional authority under the Tenth Amendment.

The *New York* and *Printz* Courts go beyond *Garcia* in their understanding of the means by which the principal federalism concerns of political accountability and prevention of tyranny must be protected. Presuming the federal political process sufficient to preserve the balance of power between state and federal government, the *Garcia* Court concluded that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially crafted limitations on federal power."[70] *Printz* and *New York*, on the other hand, clearly establish that, regardless of the political process by which laws are engendered, federal regulation that operates by commandeering the states violates the limitations on federal power implicit in the Tenth Amendment.[71] Still, *New York* and *Printz* were able to construct this new analytical

68. *See Garcia*, 469 U.S. at 545-46; *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2212-13, 2228, 2240 (1998) (discussing the tension between principled constitutional adjudication and the demands of flexible federalism and arguing for process-based, clear evidence requirements that focus on the source of federal power and need for federal action); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 12-14, 36 (1988) (rejecting *National League of Cities*' "traditional governmental function" basis for limiting the federal commerce power and arguing that the constitutional guarantee of a republican form of government produces a more workable concept of federalism); Rapaczynski, *supra* note 61, at 359-68. Rapaczynski, following the *Garcia* Court, rejects the language of dual sovereignty employed by the Court and scholars in attempting to clarify the tension between state and federal power that underpins the federalist structure of our government. The fiction of a rigid divide is exposed by *Garcia*'s conclusion that process may be the primary means of identifying appropriate exercises of state and federal power. *Id.* at 351-52, 356-57, 359-60. Rapaczynski notes that "the traditional concept of sovereignty simply obfuscates the fact that actual authority in the modern states resides in an often shifting configuration of political, economic, and social groups, with the state being only one of the contenders." *Id.* at 359 n.50.

69. *See* Merritt, *supra* note 68, at 15 (noting the radical character of *Garcia*); Rapaczynski, *supra* note 61, at 372-73. Rapaczynski argues that *Garcia*'s reliance on the political process to tend the federalist balance of power does not exclude the imposition of real limitations on the federal government's exercise of its legislative authority. Rather, *Garcia*'s emphasis on the political process recognizes that substantive limits can only be meaningful if informed by a complex account of the nature of federalist institutions. *Id.*

70. *Garcia*, 469 U.S. at 552.

71. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

framework for Tenth Amendment analysis based on legislative mode because *Garcia* razed the "traditional government function" edifice of Tenth Amendment jurisprudence that had stood in its place.

B. *Federalism Implications of General Applicability*

Without challenging the validity of *Garcia*, the *New York* Court sidestepped the *Garcia* line of cases by identifying them as concerned with laws of "general applicability," that is, laws that apply to both states and private parties.[72] Although the *New York* Court uses the term "laws of general applicability" as a term of art, the phrase used as such occurs nowhere in *Garcia* or the cases generally associated with it. To the degree that the concept is present in cases of the *Garcia* line, it is important solely as an indicator that the laws at issue do not seek to dominate the states in their sovereign relation to their citizens.[73] Nevertheless, the *New York* Court stated that the challenge to the "take-title" provision of the Low-Level Radioactive Waste Policy Act "presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."[74] The Court's distinction between federal laws that apply only to states and generally applicable laws that apply to both state and private activities, however, offers only a superficial basis for the constitutionality of a law under the Tenth Amendment.[75]

The concern posed by laws that apply to the states but not private parties is that the federal government may use such legislation to regulate private parties indirectly without accepting the political and economic burden such regulation entails.[76] This legislative indirection

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72. *See New York*, 505 U.S. at 160. The phrase appears to derive from a line of Free Exercise cases epitomized by *Employment Division v. Smith*, 494 U.S. 872, 877-80 (1990), in which the Court reviewed the question of whether a facially neutral law (hence, "generally applicable") is constitutional under the Free Exercise clause of the First Amendment if a particular religious group were prejudicially affected by the law.

73. *See, e.g.*, *Garcia*, 469 U.S. at 554; South Carolina v. Baker, 485 U.S. 505, 514-15 (1988); *see also infra* Section II.B.1.

74. *New York*, 505 U.S. at 160.

75. *See New York*, 505 U.S. at 201-02 (White, J., dissenting) (exposing the formalistic quality of the Court's analysis regarding laws of general applicability). With regard to the majority's distinction between federal statutes that regulate both states and private parties and those that regulate only state activity, Justice White asserts that "[i]n no case has the Court rested its holding on such a distinction." *Id.* at 201. Finding no support for the majority's suggestion that generally applicable laws per se constitute a lesser incursion on state sovereignty, Justice White astutely notes that "[t]he alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties [as well]." *Id.* at 202.

76. *See Printz*, 521 U.S. at 929-30; *New York*, 505 U.S. at 167-69. The *Printz* Court describes the federalist concerns raised by commandeering as follows:

poses a serious threat to the federalist principle of prevention of tyranny through political accountability.[77] Problems of accountability arise if voters mistakenly hold state officers responsible for actions those officers were forced to take under federal law, or if voters fail to hold the federal government responsible for imposing certain choices and costs on the states.[78] Moreover, federal lawmakers will hold themselves less responsible to voters if they find ways to direct states to carry out federally prescribed programs.[79] A federal law that seeks to impose the same constraints on both states and private parties is by definition not an instance of the federal government evading direct regulation of private conduct, and so it does not pose this threat to federalist values associated with commandeering.[80] In short, general applicability is one indication that a law does not interfere with the balance of state and federal power in this way.[81]

This notion of general applicability may also be a throwback to the ultimately unworkable "traditional government function" test propounded by *National League of Cities* and rejected by *Garcia*.[82] To the degree that a statute is designed to regulate the activity of both states

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> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs . . . they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz, 521 U.S. at 930.

77. *See* Jackson, *supra* note 68, at 2200-05; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1573-74 (1994).

78. *See* Jackson, *supra* note 68, at 2201.

79. *See id.*

80. This is not to say that laws of general applicability, which operate predominantly in a preemptive mode, *see infra* Section II.B.1, are entirely free from accountability confusion. As Jackson notes, a certain level of confusion regarding public accountability inheres in the federalist structure established by the Constitution: "[A] federal system necessarily results in a more confusing situation for voters than does a unitary, centralized government. Standard preemption — the effect of federal law in negating the area in which state law can operate — can obscure the causes of inaction by state officials." Jackson, *supra* note 68, at 2201-02 (footnote omitted).

It should be noted that conditional preemption in some sense reduces this problem, in that it allows states to choose between implementation of federal standards and preemption in a field in which state activity affects the national welfare, a choice for which state citizens may justly hold the state, rather than the federal government, accountable.

81. *See* Travis v. Reno, 12 F. Supp. 2d 921, 929 (W.D. Wis.), *rev'd*, 163 F.3d 1000 (7th Cir. 1998) ("[T]he purpose of drawing a distinction between laws of general applicability and laws directed exclusively at states is not to suggest that the former are always constitutional and the latter are always unconstitutional . . . . Rather, the distinction is one indication how much a congressional enactment upsets the structural balance between federal and state sovereignty, if at all.").

82. *See supra* notes 29, 67-68 and accompanying text; Jackson, *supra* note 68, at 2207. As Jackson points out, there is no doubt that the *Printz* Court remained mired to some extent in an arguably outdated "separate spheres" model of dual sovereignty. *See id.* at 2206.

and private individuals, it is less likely to be encroaching on an area of uniquely governmental function, as such functions will tend to be carried out by states rather than individuals.[83] The fact that an activity is carried out only by the states, however, is but one indicator that it may not fall within reach of federal regulatory power; that indicator is not in itself sufficient to render federal regulation of that activity per se unconstitutional.

Because of the *New York* Court's failure to explain why generally applicable laws do not pose federalism problems, the Court's passing identification of the laws at issue in the *Garcia* line of cases as such has proven confusing to courts in evaluating the DPPA. For example, the Fourth Circuit, in *Condon v. Reno*, affirmed the lower court holding that the DPPA was unconstitutional on the grounds that it is not a law that applies equally to states and individuals.[84] The Fourth Circuit apparently concluded, from *New York*'s and *Printz*'s characterizations of the *Garcia* line of cases as concerned with laws of general applicability, that federal laws regulating states as states would *only* be permissible under the Tenth Amendment if they applied to both state and private parties. This reasoning is formalistic in that it fails to take account of the basis on which generally applicable laws are deemed to preserve federalist values.

The mere fact that the DPPA does not take the form of a law of general applicability does not conclude the inquiry into its constitutionality. For the same reasons that generally applicable laws tend to be unproblematic for federalism, laws taking the form of conditional preemption are equally so. *New York* and *Printz* distinguish permissible conditional preemption from impermissible commandeering without making explicit the analytical connection between generally applicable laws and preemptive ones.[85] After articulating its anti-commandeering rule, the *New York* Court simply asserts that "[t]he Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation."[86] This distinction between commandeering and preemption cuts closer to the quick of the federalist problem of separating efficacious exercises of federal authority that do not compromise federalist values, from federal overreaching that undermines a state's ability to be politically responsible to its citizens.

Section II.B.1 examines *South Carolina v. Baker* as an instance of a case in the *Garcia* line that, in addition to fitting the descriptive category of general applicability, operates through the mode of condi-

83. *See* Jackson, *supra* note 68, at 2207.

84. 155 F.3d 453, 463 (4th Cir. 1998).

85. *See* Hills, *supra* note 36, at 921.

86. New York v. United States, 505 U.S. 144, 178 (1992).

tional preemption. Section II.B.2 argues that the mode of conditional preemption encompasses all laws that offer the states a genuine choice between abandoning a regulatory field and implementing federal requirements, regardless of whether the field involves regulation of private as well as state activity.

1. *From General Applicability to Conditional Preemption:* South Carolina v. Baker

Although the *New York* Court explicitly stated that the *Garcia* line of cases should be applied in evaluating "laws of general applicability," there is no indicator that these are the only cases to which the earlier line of Tenth Amendment jurisprudence should apply.[87] Neither *Garcia* itself, nor *Baker* which followed and elaborated upon it, grounds the decision to uphold federal law in the identification of the law as a "law of general applicability."[88] The *New York* Court's retrospective identification of the laws treated by the *Garcia* line of cases as "generally applicable" is descriptively accurate; yet, it should not be misconstrued as providing the legal underpinning or the limiting principle on which these decisions were based.[89]

The law at issue in *Garcia*, correctly described by the *New York* Court as a law of general applicability, is more precisely characterized for federalism purposes as a law operating in the legislative mode of preemption. The conditions for preemption exist when the state and federal governments have concurrent power within a particular field of regulation.[90] In *Garcia*, the San Antonio Metropolitan Transit Authority argued that control of mass-transit was a traditional state function, hence within state control;[91] at the same time, prior Court decisions had extended the federal government's commerce power to intrastate activities, like the creation of a mass-transit system, that affect interstate commerce.[92] Hence, the prerequisite concurrent state and federal power was present, making preemption viable.

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87. *See New York*, 505 U.S. at 177-78.

88. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); South Carolina v. Baker, 485 U.S. 505 (1988).

89. *See* William A. Hazeltine, New York v. United States: *A New Restriction on Congressional Power Vis-a-Vis the States*, 55 OHIO ST. L.J. 237, 250-51 (1994) (arguing that the *New York* Court failed to adequately address prior Supreme Court precedent as embodied in the *Garcia* line of cases).

90. *See* Gardbaum, *supra* note 37, at 770.

91. *See Garcia*, 469 U.S. at 530-31; Brief of San Antonio Metropolitan Transit Authority, *Garcia* (No. 82-1913), *available in* LEXIS, Genfed Library, Briefs file.

92. *See Garcia*, 469 U.S. at 537 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* 452 U.S. 264, 276-77 (1981), for this proposition).

Preemption doctrine dictates that where federal and state laws conflict in a field of concurrent power, federal law will prevail.[93] More broadly, preemption doctrine allows that, even absent a contrary state law, the federal government may take regulatory possession of the field by passing legislation that makes manifest this intent.[94] The undoubted constitutionality of the legislative mode of preemption has been grounded most frequently in the Supremacy Clause, and, less commonly, in the Necessary and Proper Clause of the Constitution.[95] In other words, the mode of preemption is constitutional by virtue not only of the preeminence of federal law in areas of legitimate federal control, but also of the existence of a national interest that requires that a given field be uniformly regulated according to a single set of rules.[96] Setting standards for employee working conditions — for example, environmental regulation — is a field of this kind in which preemption is appropriate.[97]

Section 310 of the Internal Revenue Code ("IRC") at issue in *South Carolina v. Baker*, also generally applicable to both state and private enterprises,[98] differs from the law at issue in *Garcia* in that it operates in a conditionally preemptive mode. The provision of IRC section 310 that was challenged in the case barred ("preempted") the state issuance of unregistered ("bearer") bonds, but allowed the state to continue to issue bonds in compliance with federal registration requirements.[99] The national concern the law sought to address was the use of unregistered bonds as an instrument of tax evasion.[100] That concern was of self-evident national importance[101] and probably would have justified complete federal preemption of the field. By making federal occupation of the bond-issuing field conditional on the state's decision not to implement federal requirements, the law departed from standard preemption. The challenged provision was upheld, however, on the grounds that it intervened directly in a state activity rather than commandeering the states to regulate a private activity according to a federal regulatory scheme.[102] In other words, it gave the

93. *See* Gardbaum, *supra* note 37, at 770.

94. *See id.* at 771-72.

95. *See id.* at 773-74, 781-83.

96. *See id.* at 781.

97. *See* Hills, *supra* note 36, at 921.

98. *See* South Carolina v. Baker, 485 U.S. 505, 510 (1988).

99. *See id.* at 511.

100. *See id.* at 508-09 (stating that Internal Revenue Service studies indicated that unreported income had grown from an estimated range of $31.1 billion to $32.2 billion in 1973 to a range of $93.3 billion to $97 billion in 1981).

101. *See id.*

102. *See id.* at 514.

states a choice between preemption in the field of issuing bonds and continuing to be active in the field by bringing its issuing standards into compliance with federal registration requirements.

The *Baker* Court relied and elaborated upon *Garcia*'s approach to federalist problems, recognizing that compliance with federal preemption did not present the difficulties posed by federal commandeering of the states.[103] The Court based its analysis on an assessment of the IRC's objectives as well as the mode in which it sought to accomplish them. The Court found that the IRC's regulation of state issuance of bonds did not violate federalist principles; the regulation did not seek to control the manner in which the states regulate private parties, and hence did not unduly interfere with political accountability or the political responsiveness of local government to the popular voice.[104] Rather, the Court recognized that any federal regulation demands compliance, which may be mischaracterized as "commandeering."[105]

The *Baker* Court, taking its cues from *Garcia*, sought to hammer out a more analytical approach to assessing the federalist concerns presented by federal regulation of state activities. Notably, both the *New York* and *Printz* decisions recognize preemption of the kind at issue in *Baker* as a valid exercise of federal power.[106]

2. *Understanding the Limits of Conditional Preemption:* New York v. United States

As already noted, it is possible to reconcile the *Garcia* line of cases with *New York* and *Printz* by recognizing the *Garcia* line as concerned not simply with "laws of general applicability" but, more fundamentally, with federal laws that preempt contrary state laws. The *New York* Court's assertion that Congress has the power to preempt state law implies a recognition of the constitutionality of federal laws that offer states a choice between preemption in a given field and continuing to regulate in accordance with federal requirements. *Printz* makes this explicit.[107] In recognition of the permissibility of conditional preemption, the *Printz* Court cited *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* and *Federal Energy Regulatory Commission v. Mississippi* ("*FERC*") as cases that justifiably upheld federal laws because compliance with federal standards under these laws was merely "a precondition to continued state regulation of an otherwise pre-

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

104. *See id.*

105. *See id.* at 514.

106. *See* United States v. Printz, 521 U.S. 898, 925-27 (1997); New York v. United States, 505 U.S. 144, 178 (1992).

107. *See Printz*, 521 U.S. at 925-27.

empted field."[108] This distinction between commandeering and conditional preemption is central to evaluating the scope of the anti-commandeering principle established in *New York* and *Printz*.[109]

Some courts have read too narrowly *New York*'s exemption of preemption from its anti-commandeering imperative and, as a result, have understood that exemption as applying exclusively to laws that preempt state regulation of *private* parties.[110] This error derives from a misreading of the *New York* Court's statement that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[111] Although this pronouncement is concerned with laws that regulate private parties, it does not suggest, as some courts have inferred,[112] that federal preemption of state law is *only* permissible with regard to regulation of private activity.[113] In fact, that reading is directly at odds with the Court's earlier holding in *Baker*.[114]

In *Baker*, the Court specifically upheld the Internal Revenue Code provision that essentially prohibited states from continuing to issue unregistered bonds on the grounds that "[s]ection 310 regulates state activities; it does not . . . seek to control or influence the manner in

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108. *See id.* at 925-26.

109. *See* Matthew D. Adler & Seth F. Kreimer, New York, Printz *and* Yeskey*: The New Etiquette of Federalism*, 1998 SUP. CT. REV. 71, 82-83; Hills, *supra* note 36, at 917 (arguing that generally applicable laws should be exempted from the per se anti-commandeering rule of *New York* "not because they apply to private persons as well as nonfederal officials, but rather because such laws typically have the form of conditional preemption").

110. *See, e.g.*, Condon v. Reno, 155 F.3d 453, 463 n.6 (4th Cir. 1998), *cert. granted,* 119 S. Ct. 1753 (1999) (citing *New York* for the proposition that *only* where Congress has the power to regulate private parties may it impose laws that take on the form of conditional preemption).

111. *See New York*, 505 U.S. at 167.

112. *See, e.g.*, *Condon*, 155 F.3d at 463 n.6 ("The dissent contends that the DPPA is constitutional because Congress could have 'preempted the field of motor vehicle information disclosure.' We disagree. *Only* 'where Congress has the authority to regulate *private* activity under the Commerce Clause . . . [may it] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.' "(internal reference omitted) (first emphasis added)).

113. *See* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 161 F.3d 1266, 1271 (10th Cir. 1998) ("The Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in certain activity.").

114. *See* Travis v. Reno, 163 F.3d 1000, 1005-06 (7th Cir. 1998). The *Travis* Court locates *Condon's* overly narrow reading of *New York* in the Fourth Circuit's conclusion that Congress may regulate the states *only* through laws of general applicability, drawn from *New York*'s observation that most recent Tenth Amendment cases have dealt with such laws. *See id* at 1006 ("Once again the word 'only' comes from the Fourth Circuit rather than the Supreme Court.").

which States regulate private parties."[115] According to *Baker*, then, a federal law presenting states with a choice between preemption of a state activity (issuing bonds) and continuation of that activity in compliance with federal guidelines is entirely constitutional where the consequences of the state activity fall within Congress's enumerated powers.[116] In order for *New York* to be consistent with past Supreme Court precedent, its preemption exception cannot be understood as applying only to federal laws that directly regulate private activities.[117]

Because *New York* and *Printz* acknowledge the validity of laws operating in a preemptive mode as well as laws of general applicability, these decisions are consistent with such cases of the *Garcia* line as *Baker*. Conditional preemption respects the federalist concern for protecting political accountability and responsiveness, while enabling the federal government to intervene where necessary to accomplish a public good within its enumerated powers.[118] This kind of flexibility within the federalist structure of our government was deemed essential by *Garcia*.[119] *New York* and *Printz* simply constrain that flexibility by identifying commandeering as a mode of federal legislation that is inconsistent with the Tenth Amendment. These Courts relied on *Garcia* in shifting the focus of Tenth

115. South Carolina v. Baker, 485 U.S. 505, 514 (1988). Section 310 of the IRC actually imposed a tax on income from state and local unregistered bonds. The *Baker* court assumed that this tax essentially prohibited states from issuing unregistered bonds by making them undesirable. *See id.* at 511.

116. *See id.* at 526 (finding that a tax like that imposed by IRC section 310 on interest earned by holders of unregistered bonds in order to effectively prohibit issuance of such bonds, was within the federal government's constitutional taxing power). That the choice to comply with federal guidelines might require substantial effort on the part of state legislators and executives did not trouble the *Baker* court: "Such 'commandeering' is . . . an inevitable consequence of regulating a state activity." *Id.* at 514.

117. The dissenting judge in the Fourth Circuit's *Condon* decision, supporting the lower court's finding that the DPPA was unconstitutional, relies on this argument in attempting to reconcile the *Garcia* line of cases with the Supreme Court's decisions in *New York* and *Printz*. *See Condon*, 155 F.3d at 468 (Phillips, J., dissenting). Judge Phillips asserts that "the legislation at issue in *Garcia* and *Wyoming* . . . was immune to Tenth Amendment challenge not so much — if at all — because they applied equally to state and private actors as because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." *Id.*

118. The *New York* Court recognized conditional preemption as a mode of federal regulation that, by presenting states with a choice, could preserve the federalist values of political accountability and responsiveness:

> If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted.

New York, 505 U.S. at 168.

119. *See Garcia*, 469 U.S. at 545-46.

Amendment analysis beyond the particular activity regulated and towards the manner of regulation.

III. THE CONSTITUTIONALITY OF THE DPPA: DISTINGUISHING PERMISSIBLE PREEMPTION FROM IMPERMISSIBLE COMMANDEERING

The *New York* and *Printz* Courts recognized the constitutionality of federal preemption of state law, thereby affirming the distinction between preemption and impermissible federal commandeering of the states.[120] Both Courts reiterated the constitutional viability of federal laws of the former kind, while holding that the laws of the latter type are inherently incompatible with the fundamental principles of federalism.[121] Section III.A argues that the DPPA is constitutional because, unlike the laws at issue in *Printz* and *New York*, it exemplifies conditional preemption rather than commandeering. Section III.B compares the DPPA to other laws that the Court has held constitutional in several cases in the *Garcia* line and that present less compelling instances of conditional preemption than the DPPA.

A. *The DPPA Takes the Constitutionally Permissible Form of Conditional Preemption*

The courts that have failed to recognize the DPPA as an instance of conditional preemption have accordingly not recognized that the law falls outside the anti-commandeering rule established in *Printz* and *New York*. The two circuit courts that have held the DPPA unconstitutional have objected to the benefit the federal government would wring from the states by requiring them to train their own DMV employees to distinguish valid from invalid requests for per-

120. *See Printz*, 521 U.S. at 925-26 ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present the problem . . . raised [by commandeering] because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field"); *New York*, 505 U.S. at 160 ("Petitioners . . . do not dispute that under the Supremacy Clause Congress could, if it wished, preempt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen.")

121. *See, e.g.*, ; *Printz*, 521 U.S. at 925-26 ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present the problem . . . raised [by commandeering] because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field."); *New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.").

sonal information under the DPPA requirements.[122] Only one circuit court and one district court that have considered the law have recognized that the Act offers states the alternative of pulling out of the field entirely by simply closing their records to the public.[123] While recognizing the preemption alternative afforded by the DPPA, the district court nevertheless dismissed it as insufficient to address the accountability concerns at the heart of the anti-commandeering rule.[124]

Laws taking the form of conditional preemption are generally deemed constitutional because they allow the federal government to regulate in areas of particularly national concern without violating fundamental federalist values. Such laws preserve state autonomy by offering states a choice between continuing to regulate in a particular field in accordance with federally prescribed standards or abandoning the field entirely to direct federal control.[125] This basic characteristic of choice is more than a formal quality of conditional preemption.

The distinction offered in *Printz* between permissible federal laws that apply incidentally to the states and impermissible federal laws whose "whole object [is] to direct the functioning of the state executive" is consistent with the view of commandeering as something more than mere compliance.[126] The federal government is guilty of impermissible commandeering when it could accomplish its particular goal by directly regulating the behavior of private parties but instead chooses to achieve its ends by ordering the states to constrain their citizens in a particular way. In such a case, the problem of political accountability is obvious, in that the federal government shirks direct imposition on private parties and instead seeks through its legislation to conscript the states into doing its dirty work. Because DMVs are a primary site for the accumulation of personal information about a state's citizens and because individuals are generally not engaged in collecting such information on a state-wide basis, however, the federal government cannot regulate the national market in DMV records by

122. *See, e.g.*, Pryor v. Reno, 171 F.3d 1281, 1285-86 (11th Cir. 1999); *Condon*, 155 F.3d at 460.

123. *See* Oklahoma *ex rel.* Oklahoma Dep't of Pub. Safety v. United States, 161 F.3d 1266, 1272 (10th Cir. 1998) ("If states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public."); Travis v. Reno, 12 F. Supp. 2d 921, 928 (W.D. Wis.), *rev'd*, 163 F.3d 1000 (7th Cir. 1998).

124. *See Travis*, 12 F. Supp. 2d at 928. The court objects to the DPPA's preemption alternative for failing to deflect accountability from the states: "That states may avoid obligations imposed by the act by 'choosing' to close their motor vehicle records to the public entirely does not avoid this problem because States, not the federal government, will remain accountable to their citizens for such a decision." *Id.* It is not clear, however, why the state should not be held accountable for the decision to allow its regulatory power to be preempted instead of choosing to regulate in accordance with federal requirements.

125. *See* Hills, *supra* note 36, at 926-27.

126. *See* Printz v. United States, 521 U.S. 898, 932 (1997) (emphasis removed).

directly regulating private parties.[127] Therefore, the most direct method of accomplishing the DPPA's objective is to target state activity.

Unlike the DPPA, the laws at issue in *New York* and *Printz* impermissibly sought to dictate the states' regulation of private parties rather than directly regulate state activity or private behavior or both.[128] The "take-title" provision of the Low-Level Radioactive Waste Policy Act under examination in *New York* interfered with the states' relation to private citizens by requiring the state to take title to the waste produced by in-state private waste producers. The *New York* Court recognized Congress's right to regulate the conduct of private waste producers directly but objected to the mode of regulation chosen here because it impermissibly commandeered the states to regulate private citizens in a federally prescribed manner.[129] Similarly, in *Printz*, the challenged provision of the Brady Handgun Violence Prevention Act sought to dictate the relation between the state and its citizens by requiring state officers to conduct background checks on prospective handgun purchasers.[130] The DPPA, by contrast, accomplishes federal objectives by operating directly on the relevant state activity rather than seeking to reach the conduct of individuals by manipulating the states' relation to their citizens.

In exempting laws of general applicability from the prohibition on commandeering, the *Printz* and *New York* Courts focused on prohibiting only congressional legislation that accomplishes indirectly an objective that the federal government could as easily accomplish directly. This is not to suggest, however, that the only federal laws that do not threaten federalist principles are generally applicable laws.[131]

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127. *See Oklahoma Dep't of Pub. Safety ("ODPS")*, 161 F.3d at 1271. The *ODPS* court cites with approval Judge Phillips's dissenting opinion in *Condon*, stating that "it is no basis for invalidating [the DPPA] . . . that no private equivalent could be found in the particular area of regulation." *Id.* (citing *Condon*, 155 F.3d at 469 (Phillips, J., dissenting) (internal quotation marks omitted)). The *ODPS* court further asserts that "[t]he Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in certain activity." *Id.*

128. *See Travis*, 163 F.3d at 1004 ("[T]he basic distinction between cases such as [*Baker*] and cases such as *New York* is that states and privates parties may be the *objects* of regulation, although states cannot be compelled to become regulators of private conduct.").

129. *See* New York v. United States, 505 U.S. 144, 174-77 (1992); *see also Condon*, 155 F.3d at 466 (Phillips, J., dissenting) ("[T]he end object of the [DPPA] . . . is not the indirect regulation of private conduct — here information use — by forcing the states directly to regulate that conduct, in the way that the states were held impermissibly compelled to regulate the waste-handling conduct of private parties in *New York v. United States*."). *But see* Richard D. Weiner, New York v. United States*: Federalism and the Disposal of Low-Level Radioactive Waste*, 34 NAT. RESOURCES J. 197, 216-17 (1994). Weiner is skeptical of this reading of *New York*. He argues that the Court's failure to define the phrase "regulatory program" leaves an impermissibly wide range of federal statutes open to challenge. *See id.*

130. *See Printz*, 521 U.S. at 929-31.

131. *See supra* Section II.B.

Where a federal law seeks to achieve a nationally important objective that falls within the government's enumerated powers and can do so only by regulating states as states, the law cannot be characterized as commandeering.[132] In such a case, the object of the law is not to commandeer the states; rather, the law overrides state policy with the object of protecting a national interest that falls under the federal government's power to regulate.[133] Moreover, state compliance with a demand for federal access to such state information is recognized by *Printz* and *New York* as probably too de minimus to qualify as commandeering of the kind these cases prohibit.[134] Hence, it seems likely that implementation of the DPPA would be within the federal government's institutional capacity.

Although the DPPA fails to articulate a precise federal regulatory mechanism for the distribution of DMV information should states choose to abandon the field entirely by closing their DMV records, it does not misuse preemption as merely an empty threat.[135] The fact that a federal law preempting state law fails to specify a regulatory alternative is not in itself sufficient to render the law unconstitutional.[136] The preemption alternative offered by the DPPA is valid because it simply is not a threat but a viable solution to the problem the law is designed to address.[137] In this respect, it resembles the prohibition on state issuance of unregistered bonds offered by IRC section 301 and is distinguishable from PURPA's exemption alternative that did nothing to address the national energy crisis.[138]

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132. *See* South Carolina v. Baker, 485 U.S. 505, 515 (1988).

133. The standard for determining what constitutes a "national interest" is not altogether clear. *See supra* note 57 and accompanying text. While Section I.B suggests that regulation of the distribution of private DMV information might be such an interest, resolution of the standard for determining what constitutes a "national interest" is beyond the scope of this Note.

134. *See Printz*, 521 U.S. at 937 (1997) (O'Connor, J., concurring).

135. A better drafted DPPA might give some outline of the federal regulatory scheme that the government intends to implement should States choose preemption over continued regulation in accordance with federal regulations. Even where Congress fails to provide an explicit alternative regulatory mechanism to replace the preempted state regulatory scheme, however, it nevertheless acts within its preemption power. *See* FERC v. Mississippi, 456 U.S. 742, 766 (1982).

136. *See id.*

137. *See* Hills, *supra* note 36, at 925 ("[I]f the only purpose of preemption of state or local policy is simply to pressure state or local governments into enacting regulations according to federal standards, then the preemption would be just as unconstitutional as an outright demand for the regulatory services.").

138. *See id.* at 924-26. Hills objects to the *FERC* Court's failure to consider the question whether the preemption provision of PURPA was related to achieving the law's stated purpose:

> [The Court's] reasoning does not explain how the implicit threat of preemption has any nexus to the goal of insuring that utilities implement federal energy-saving standards. After all, unless unregulated utilities are somehow more inclined toward conservation of energy

B. *Conditional Preemption as Exemplified in* FERC v. Mississippi *and* South Carolina v. Baker *Assists in Assessing the DPPA*

A look at the Supreme Court's use of preemption analysis in upholding other federal regulatory laws highlights the validity of the DPPA. Under the DPPA, states have options similar to those upheld in *Baker* and options less coercive than those upheld in *FERC v. Mississippi.*

In *FERC,* the Court upheld a provision of the Public Utility Regulatory Policies Act ("PURPA"), relying on preemption analysis to justify its decision.[139] The federal law at issue in *FERC* required state regulatory authorities and nonregulated utilities to consider implementing federal regulatory standards to combat a nationwide energy crisis resulting from utilities' unregulated use of natural gas and oil in the generation of electricity.[140] It also gave the Federal Energy Regulatory Commission the separate power to exempt energy producers entirely from state regulation.[141] The Supreme Court found that occupying the field of public utility regulation in a time of national energy crisis was a constitutional exercise of federal preemptive power.[142]

The *FERC* Court held the challenged provisions of PURPA constitutional on the grounds that they operated in the permissible mode of conditional preemption.[143] The Court analogized PURPA to the Surface Mining Control and Reclamation Act upheld in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* that gave states the option of either regulating strip mining in compliance with federal

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than regulated utilities, the preemption of utility regulation does nothing to advance, and might even impede, PURPA's purpose.

Id. at 926.

139. *See FERC,* 456 U.S. at 742.

140. *See id.* at 745-46.

141. *See id.* at 759.

142. *See id.* at 745, 763-64. It is worth noting that the Court appears to limit its recognition of the federal government's power to preempt regulation of utilities by specifying private actors: "Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned . . . ." *Id* at 765. The Court's apparent reservation of the question of whether the same regulation was equally unproblematic as applied to state activity must be understood in light of the jurisprudential environment in which *FERC* was decided. At the time of the decision, *National League of Cities,* which forbade federal regulation of states "as states" in areas of "traditional state functions," was still good law. It seems likely that, had *FERC* been decided after *Garcia* overturned *National League of Cities,* the Court would not have equivocated on the question whether a federal law regulating state as well as private activity in a field of self-evident national concern could be deemed a valid exercise of Congress's preemption power.

143. *See id.* at 768 n.30 (describing PURPA as "a scheme that gives the States a choice between regulating in conformity with federal requirements, or abandoning regulation in a given field").

environmental protection standards or abandoning the field to the Secretary of the Interior who was charged with implementing a federal program.[144] The Court found that in the field of energy regulation, as in the field of strip mining regulation, "the Federal Government could have pre-empted all. . . regulations; instead, it allowed the States to enter the field if they promulgated regulations consistent with federal standards."[145] The Court adjudged PURPA unproblematic for Tenth Amendment purposes because the law operated by conditional preemption, giving states a choice while legitimately seeking to protect a national interest.[146]

PURPA is a less compelling instance of conditional preemption than the DPPA, however, in that the choice PURPA offers the states is less genuine and, so, more coercive. Because the law fails to provide the possibility of federal regulation of energy producers as an alternative in the event of state default, the broad preemption power that the law grants the FERC acts as a federal threat of complete deregulation should states refuse to consider federal regulatory standards.[147] As such, the preemption provision may act to coerce states into implementing federal standards rather than providing them with a bona fide choice, since deregulation could in no sense ameliorate the national energy crisis.[148] In this respect, PURPA differs significantly from the DPPA. Federal preemption of the field of DMV record distribution by closing state DMV records to the public would clearly address the privacy and safety concerns that motivated the DPPA by keeping the personal information contained in DMV records out of the interstate marketplace. The DPPA's preemption alternative, then, unlike the preemption alternative provided by PURPA, offers a bona fide means of addressing the concern the law was designed to remedy.

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144. *See id.* at 764-65 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288-290).

145. *FERC*, 456 U.S. at 764.

146. *See id.* at 769-70 & n.33.

147. *See* Merritt, *supra* note 68, at 64-65. According to Merritt, "PURPA . . . required the states either to consider the proposed federal standards or to abandon all regulation of their electric utilities. . . . The 'choice' embodied in PURPA, therefore, was illusory." *Id.* at 65 (footnote omitted).

148. *See* Hills, *supra* note 36, at 921-27. Hills argues that certain "conditions" associated with preemption may be unconstitutional, adding a further constraint to the federal government's use of conditional preemption to exercise control over certain state-regulated fields. Hills sketches a judicial approach to preemption that might identify instances of misuse, "prohibit[ing] conditional preemption of state or local policies whenever (1) the condition that the nonfederal government must meet would, if imposed unconditionally, be unconstitutional, and (2) Congress threatened preemption of nonfederal policy merely to gain leverage to extract compliance with the condition." *Id.* at 924. The challenged provisions of PURPA were of the latter kind.

The provision of the Internal Revenue Code at issue in *South Carolina v. Baker* resembles the DPPA in that it does not have the coercive potential of PURPA but rather presents the states with a genuine choice. The provisions of the IRC at issue in *Baker* had as their objective the elimination of "unregistered bonds" that had become an instrument of tax evasion.[149] The Court found that because the issuance of such bonds was of national concern, the federal government was justified in requiring states to eliminate the undesirable effects of that activity either by turning over the regulatory field to the federal government or complying with federal registration requirements.[150] Like the DPPA, then, IRC section 301 was a valid exercise of the federal government's power of conditional preemption in an area of national concern.

Nevertheless, the alternatives presented by IRC section 301 and the DPPA — withdrawal from the field or continued regulation in compliance with federal standards — necessarily demand some legislative cooperation from the states, in the form of amendments to or repeal of existing laws.[151] The *Baker* Court saw no coercion or commandeering implicit in the demand for state cooperation. Rather, recognizing that "[a]ny federal regulation demands compliance," the *Baker* Court found no constitutional defect in the fact that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity."[152]

CONCLUSION

The DPPA, then, is a constitutional instance of the federal government's use of conditional preemption to achieve an interest of national importance that the separate states are not motivated to achieve independently. By giving states a choice between adopting federal restrictions and withdrawing from the field of regulating DMV information distribution entirely, the federal government is in no sense coercing the states into implementing federal regulations. For that reason, the DPPA poses none of the political accountability problems presented by laws that commandeer the states. At most, the DPPA allows the federal government to clear the way for federal regulation in this domain wherever a state chooses preemption over implementation of federal requirements. Closing state DMV records to the public

149. *See* South Carolina v. Baker, 485 U.S. 505, 509 (1988).

150. *See id.* at 508-09, 514-15; *see also* Hills, *supra* note 36, at 918-21.

151. *See* Travis v. Reno, 163 F.3d 1000, 1003-04 (7th Cir. 1998) (relying on *Baker* in upholding the DPPA).

152. *Baker*, 485 U.S. at 514-15.

is a reasonable means of controlling the problem of unregulated distribution of personal information. The DPPA is, therefore, a constitutional exercise of the federal commerce power in that it does not violate basic federalist principles of political accountability and responsiveness, but rather operates in the permissible mode of conditional preemption to regulate a domain properly within federal control.