

## NOTE

# The Constitutionality of the Driver's Privacy Protection Act: A Fork in the Information Access Road

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## I. INTRODUCTION

- City police departments discovered to have abused the cover of immunity to avoid prosecution for major traffic violations, leaving citizens to cover accident damages caused by at-fault police officers.<sup>1</sup>
- Minorities driving through mostly white suburbs found twice as likely to be ticketed for traffic violations as whites.<sup>2</sup>
- Drunken snowmobile driver kills child in an accident, yet the snowmobiler's license and licenses of more than 2,000 other snowmobile owners had been suspended for alcohol-related offenses.<sup>3</sup>

All of these public safety news stories were constructed with the use of motor vehicle records.<sup>4</sup> And all of these stories—and stories like them—may never again be possible in the wake of the federal Driver's Privacy Protection Act of 1994 (DPPA).<sup>5</sup>

The DPPA, instituted in 1997, regulates the disclosure of personal information in motor vehicle records. New controversy surrounds it today as the U.S. Supreme Court evaluates the arguments presented in November 1999 regarding its constitutionality.<sup>6</sup> Decisions in the Fourth, Seventh, Tenth, and Eleventh Circuit courts over the past year have disputed the DPPA's validity under the Tenth, Eleventh, Fourteenth, and First Amendments. A split among these courts, coupled with the tremendous growth in technology and subsequent new in-roads for information access, have drawn increased attention towards the DPPA.

The concern for information access in light of the DPPA, however, reaches beyond the courts' elucidated concerns about dual sovereignty and the public's right to privacy. This Note argues that there is a forgotten argument—or at least brushed to the side. Only one of the courts—the Seventh Circuit—actually examined the DPPA's effect on the First Amendment. This issue should not only be considered as a serious factor, but scrutinized carefully within the discussion surrounding the DPPA's

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1. See Lauri Schumacher, *Driver Records Still in Jeopardy*, QUILL, Sept. 1997, at 23, available at <<http://spj.org/foia/drivers/drivmain1.html>>.

2. See *id.*

3. See *id.*

4. See *id.*

5. 18 U.S.C. §§ 2721-2725 (1994 & Supp. II 1996).

6. As of the publication date of this Note, the Supreme Court was docketed to hear the oral arguments for *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 67 U.S.L.W. 3588 (U.S. May 17, 1999) (No. 98-1464), involving the DPPA, on November 10, 1999. *On the Docket—Northwestern University* (visited Oct. 31, 1999) <<http://www.medill.nwu.edu/docket/cases.srch>>.

constitutionality, especially since the Act's ramifications now have spread into virtually every corner of the news-gathering process.

This Note does not delve with extensive detail into the legal arguments behind dual sovereignty or right to privacy, but rather utilizes these issues generally in order to properly frame a comprehensive discussion about the constitutionality of the DPPA in light of the First Amendment and information access. In addition, rather than focus on the rights of private individuals, this Note centers on the insidious effects of the DPPA on the ability of the news media and commercial institutions to access motor vehicle records.

Part II of this Note provides an overarching examination of the DPPA as a statute and as a policy, presenting a detailed look at the legislative history and congressional intent behind the Act as well as its consequent statutory construction. Part III examines the states' options under the DPPA and the difficulty they faced in implementing the Act while simultaneously striving to preserve notions of state sovereignty and information access. Part IV presents the recent decisions of the four circuits currently split over the DPPA's constitutionality, summarizing the arguments presented within Tenth, Fourteenth, Eleventh, and First Amendment contexts. Part V reviews these decisions and the DPPA's ramifications from a First Amendment standpoint and argues in favor of finding the Act unconstitutional for several enumerated reasons. This Note concludes by noting that although the Act may have been well-intended and even necessary on an individual state-by-state bases, the federal DPPA ultimately not only infringes on the First Amendment, but unduly inhibits the news-gathering process and severely restricts the right of information access.

## II. BACKGROUND OF THE DRIVER'S PRIVACY PROTECTION ACT

### A. *Historical and Legislative Background*

Senator Barbara Boxer (D-California) introduced the DPPA into the U.S. Senate on November 16, 1993,<sup>7</sup> as an amendment to the Violent Crime Control Act of 1994.<sup>8</sup> The proposed DPPA was developed "to

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7. See 139 CONG. REC. S15,761-66 (1993) (statement of Sen. Boxer).

8. See W. Kent Davis, *Drivers' Licenses: Comply with the Provisions of the Federal Driver's Privacy Protection Act; Provide Strict Guidelines for the Release of Personal Information from Drivers' Licenses and Other Records of the Department of Public Safety*, 14 GA. ST. U. L. REV. 196, 197 (1997) (citing Jane Kirtley, *The EU Data Protection Directive and the First Amendment: Why a "Press Exemption" Won't Work*, 80 IOWA L. REV. 639, 641 (1995)).

protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government.”<sup>9</sup> The impetus behind the Act was the 1989 death of actress Rebecca Schaeffer, star of the hit television series, *My Sister Sam*.<sup>10</sup> A stalker murdered Schaeffer in the doorway of her California apartment after obtaining her home address through a Tucson detective agency that had procured the information from state motor vehicle records.<sup>11</sup>

Although Senator Boxer and additional supporters argued that the DPPA served as a necessary and well-written act intending to strike “a critical balance between the legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety,”<sup>12</sup> not everyone stood in agreement that a federal DPPA was the right means to meet those ends. In fact, although Senator Orrin Hatch (R-Utah) agreed that more measures should be taken to combat stalking and to prevent general disclosure of personal information by government agencies, he highlighted three distinct and legitimate concerns about instituting a federal DPPA.<sup>13</sup> First, Senator Hatch raised the practical issue that there had not been an adequate amount of time since the introduction of the crime bill to address the DPPA’s potential impact and cost.<sup>14</sup> Second, he reminded the Senate that the Act would place “unfunded mandates”<sup>15</sup> on the states which could result in the states prohibiting all uses of motor vehicle records, even for “legitimate business and press purposes.”<sup>16</sup> Finally, Senator Hatch voiced a constitutional concern about subjecting states’ departments of motor vehicles to civil penalties for “wrongful disclosure of drivers license information” under the Act.<sup>17</sup>

Before relinquishing the floor of the Senate during the debate, Senator Hatch raised what he saw as one of the greatest potential harms of the DPPA: severely restricting access to information and thus, greatly

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9. 139 CONG. REC. S15,761 (1993) (statement of Sen. Boxer).

10. *See id.* at S15,762.

11. *See id.*; 138 CONG. REC. H1785 (1992) (statement of Rep. Moran); *see also* William J. Watkins, Jr., *The Driver’s Privacy Protection Act: Congress Makes a Wrong Turn*, 49 S.C. L. REV. 983, 984 (1998).

12. 139 CONG. REC. S15,763 (1993) (statement of Sen. Boxer).

13. *See id.* at S15,763 (statement of Sen. Hatch).

14. *See id.* (statement of Sen. Hatch) (according to Senator Hatch, the crime bill had been introduced less than one month prior to the discussion of the DPPA as an amendment).

15. The term “unfunded mandates” refers to the fact that although the federal DPPA would mandate or force the states to institute the Act, it would not provide the states with any federal funding to help defray implementation costs. *See id.*

16. 139 CONG. REC. S15,763 (1993) (statement of Sen. Hatch).

17. *Id.*

inhibiting the news-gathering process.<sup>18</sup> Reading aloud a letter from the Utah branch of the Society of Professional Journalists, Senator Hatch elucidated the concerns of the press and stated that consideration needed to be given to “these professional journalists and others who feel [Senator Boxer’s] amendment might be damaging to the information-gathering process.”<sup>19</sup> Despite Senator Hatch’s objections, both the U.S. Senate and House of Representatives<sup>20</sup> passed the amendment, and President Bill Clinton signed it into law on September 13, 1994,<sup>21</sup> thus creating the federal DPPA currently in place.

### *B. Statutory Construction and Application*

The DPPA contains five main sections. The first part of the statute, section 2721, sets out the general prohibition of the release and use of particular personal information obtained from state motor vehicle records.<sup>22</sup> Specifically, section 2721(a) of the DPPA states that “a State department of motor vehicles [DMV] . . . 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.”<sup>23</sup> Section 2725(3) further defines “personal information” as “an individual’s photograph, social security number, driver identification number, name, address, telephone number, and medical or disability information.”<sup>24</sup> However, an individual’s five-digit zip code, as well as information on vehicular accidents, driving violations, and driver’s status, are not included in this prohibitory measure.<sup>25</sup> Additionally, section 2721(b) also lists the fourteen exceptions to the DPPA, ranging from agencies carrying out official functions to insurance companies verifying information provided by potential clients.<sup>26</sup> The “permissible uses” appear as follows:

- (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a [f]ederal, [s]tate, or local agency in carrying out its functions.
- (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product

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18. *See id.*

19. *Id.*

20. *See* 138 CONG. REC. H1785 (1992) (statement of Rep. Moran). House Representative James P. Moran (D-Va.) was the House sponsor for the DPPA. *See id.*

21. *See* Davis, *supra* note 8, at 197.

22. *See* 18 U.S.C. § 2721 (1994 & Supp. III 1997).

23. *Id.* § 2721(a).

24. 18 U.S.C. § 2725(3) (1994).

25. *See id.*

26. *See* 18 U.S.C. § 2721(b)(1)-(14); *see also* Watkins, *supra* note 11, at 985.

alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner [sic] records from the original owner records of motor vehicle manufacturers.

(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 to the business or its agents, employees, or contractors; 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 in any [f]ederal, [s]tate or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a [f]ederal, [s]tate, or local court.

(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, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating[,] or underwriting.

(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 or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. App. 2710 et seq.).

(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 forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department 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—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(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.<sup>27</sup>

The “opt-out” choice constitutes one final and crucial provision of section 2721. Under sections 2721(b)(11) and (12) of the federal DPPA, state motor vehicle departments may establish what has commonly been referred to as “opt-out provisions” upon adoption of the federal Act. These provisions allow a state to release personal information to any individual or business as long as the state provides drivers written notice that includes, in a “clear and conspicuous manner[,] . . . an opportunity to prohibit such disclosures.”<sup>28</sup> This provision includes requests for personal information for bulk distribution of surveys, marketing, or solicitations.<sup>29</sup> The use of individual state opt-out provisions as responses to the DPPA will be examined and discussed in further detail in Part III of this Note.

Section 2722 prohibits unlawful acts, including procurement of motor vehicle records for unlawful purposes (purposes not permitted under section 2721(b)) and false representation for purposes of obtaining information from an individual’s motor vehicle records.<sup>30</sup> Any individual who commits the acts enumerated in section 2722 or knowingly violates any part of the DPPA faces criminal fines in accordance with section 2723, which also provides for the controversial five thousand dollars-a-day civil penalty against states that have “a policy or practice of substantial noncompliance” with the DPPA.<sup>31</sup>

The fourth part, section 2724(a), also raises serious debate, as it authorizes causes of action and subsequent remedies against any person who “knowingly obtains, discloses or uses personal information, from a motor vehicle record,” for a purpose that violates the DPPA.<sup>32</sup> This Note, in

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27. 18 U.S.C. § 2721(b)(1)-(14).

28. *Id.* § 2721(b)(11).

29. *See id.* § 2721(b)(12)(A).

30. *See id.* § 2722(a)-(b) (1994).

31. *Id.* § 2723(a)-(b) (1994).

32. *Id.* § 2724(a)-(b) (1994).

Part IV, discusses how section 2724(a) is unclear and generates much controversy as to whether it actually allows claims against states and state employees acting in their official capacities. The fifth and final part of the Act, section 2725, clarifies three crucial terms used in the Act itself by providing clear definitions. The section defines a “motor vehicle record” as “any record that pertains to a motor vehicle operator’s permit, motor vehicle title, motor vehicle registration, or identification card issued by a [DMV].”<sup>33</sup> The term “person” includes “an individual, organization, or entity, but does not include a State or agency thereof.”<sup>34</sup> The section also states that “personal information” encompasses “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.”<sup>35</sup> When taken in sum, these five sections—sections 2721 through 2725—establish the statutory provisions and requirements that the fifty states were required to adopt and abide by when the federal DPPA became effective law in 1997.<sup>36</sup>

### III. STATE RESPONSE

Although the DPPA was enacted in 1994, states had until September 13, 1997, to implement the Act.<sup>37</sup> The states’ legislative responses to the federal law varied considerably, as the resulting state statutes differed on several particular provisions.<sup>38</sup> Those state laws included statutes that mirrored the federal law, proved more restrictive than the federal law, included opt-out or opt-in provisions, or created media exemptions. Of the eleven states that enacted state statutes that mirrored the federal law, only Arkansas tightened restrictions on driver (as opposed to vehicle) records.<sup>39</sup>

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33. *Id.* § 2725(1) (1994).

34. *Id.* § 2725(2) (1994).

35. *Id.* § 2725(3) (1994).

36. *See id.* § 2721 (1994 & Supp. III 1997).

37. *See id.*

38. *Where the States Stand*, QUILL, Sept. 1997, at 24, available at *SPJ: FOI Resource Drivers Records* (visited Aug. 26, 1999) <<http://spj.org/foia/drivers/drivside1.html>>. For an excellent and fairly up-to-date contact list for all the states’ department of motor vehicles (complete with addresses and phone numbers), see the Federal Trade Commission’s Internet site, *Department of Motor Vehicle Addresses* (visited Aug. 26, 1999) <<http://www.ftc.gov/privacy/dmv-add.htm#Michigan>>.

39. *See Where the States Stand*, *supra* note 38, at 24. The states implementing statutes mirroring the federal law include the following: Alabama, Arkansas (vehicle records), Connecticut, Delaware, Kentucky, New Jersey, North Carolina, Oklahoma, and Vermont. *See id.*



Arkansas' driver records, along with the records of seven other states, have been controlled by surprisingly more restrictive state laws that predate the DPPA.<sup>40</sup>

The majority of the states, however, chose to establish a certain form of legal exemption through opt-out laws or policies.<sup>41</sup> These opt-out laws give individual drivers or vehicle owners the option to choose the level of confidentiality for personal information by keeping some, but not all, motor vehicle records open.<sup>42</sup> For example, Minnesota gives its drivers three options on their opt-out forms: 1) choose not to allow individual

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40. *See id.* The states that implemented state laws already more restrictive than the federal DPPA include the following: Alaska (driver records), Arkansas (driver records), California, Georgia, Hawaii, Pennsylvania, Utah, and Virginia. *See id.* Massachusetts chose to mirror federal law as well, but only after considering an opt-out provision. *See id.*; Massachusetts Registry of Motor Vehicles, *Driver Privacy Protection Act* (visited Oct. 31, 1999) <<http://www.state.ma.us/rmv/privacy/index.htm>>. New Jersey followed suit after deciding against a media exemption. *See Where the States Stand, supra* note 38, at 24; N.J. STAT. ANN. § 39:2-3.4 (West 1997). Although Alabama considered both an opt-out policy and a media exemption, the state quickly filed suit against the federal government on the grounds that the DPPA conflicted with Alabama's disclosure laws, especially Alabama Code sections 32-6-14 and 26-12-40 (Alabama's "Open Records Act"). *See* ALA. CODE §§ 32-6-14, 36-12-40 (1975); *Pryor v. Reno*, 998 F. Supp. 1317, 1323 (M.D. Ala. 1998); *rev'd*, 171 F.3d 1281 (11th Cir.), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. July 6, 1999) (No. 99-61).

41. *See id.* The states that established opt-out laws or policies include the following: Alaska (vehicle), Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah (vehicle), West Virginia, Wisconsin, and Wyoming. *See id.* The motor vehicle departments in Indiana and New Mexico, however, chose not to implement the opt-out provisions because of the high costs. *See id.* Maine also instituted a general opt-out policy. *See* Maine Secretary of State, *Maine's Driver Privacy Brochure* (visited Feb. 28, 1999) <<http://www.state.me.us/sos/bmv/privacy.htm>>. Louisiana and Michigan adopted opt-out policies specifically regarding surveys, marketing, and solicitations. *See* Louisiana Department of Public Safety Office of Motor Vehicles, *Letters of Clearance* (visited Oct. 28, 1999) <<http://www.dps.state.la.us/OMV1.nsf/1b2fc6edb63de9b1862564800069f248/6b1827af0c10a7a78625661a00490110?OpenDocument>>; Michigan Secretary of State, *List Sales Opt-Out Declaration* (visited Feb. 28, 1999) <<http://www.sos.state.mi.us/bdvr/opt-out.htm>>. Massachusetts considered instituting an opt-out policy, but apparently decided against it. *See Where the States Stand, supra* note 38, at 24; Massachusetts Registry of Motor Vehicles, *supra* note 40. In addition to opt-out laws, some privacy advocates encouraged a rather converse option, an opt-in provision, which instead operated on the presumption of total privacy. Under these laws, individuals would theoretically give permission to let his or her name be given out. *See* Joshua V. Sessler, *Computer Cookie Control: Transaction Generated Information and Privacy Regulation on the Internet*, 5 J.L. & POL'Y 627, 654-55 (1997). Opt-in options were successfully opposed by information media and direct marketing companies, however, that understandably feared that a similar fate would lay in wait for other public databases such as voter registration and real estate records. *See id.*

42. *See* Schumacher, *supra* note 1, at 23.

inquiries to be made on records; 2) choose not to let personal information be given out for solicitation purposes; and 3) choose both options 1 and 2.<sup>43</sup> Despite the fact that opt-out provisions appeared as attractive alternatives to the restrictive federal DPPA, some states were reluctant to move ahead and create the opt-out forms for fear of liability, federal penalties, and the cost of administering new record-keeping systems.<sup>44</sup>

Implementation of media exemptions served as the last-chance remedial measure available to keep at least some of the records open for those states that feared the potential repercussions from opting out and even for some states that enacted opt-out laws or policies. These exemptions, which fall under a provision of the federal DPPA,<sup>45</sup> allow media organizations access to records for reasons dealing with vehicle and driver safety.<sup>46</sup> Only a handful of states utilized these exemptions—many of which had state press associations that had pushed for the special provisions—since a majority of the national media organizations surprisingly had fought against the exemptions.<sup>47</sup>

#### IV. CIRCUIT SPLIT ON CONSTITUTIONALITY

Since the DPPA's enactment in 1994, four federal appellate courts have grappled with the issue of the Act's constitutionality.<sup>48</sup> The Tenth and Seventh Circuits found the Act constitutional.<sup>49</sup> However, in September 1998, the Fourth Circuit—the first circuit court in the country to actually issue a decision on the constitutionality of the DPPA—deemed the Act unconstitutional as a violation of both the Tenth and Fourteenth

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43. See Kyle E. Niederpruem, *FOI Alert Volume 2 Issue 12, In Other States* (visited Aug. 26, 1999) <[http://spj.org/foia/alerts/alerts\\_v2/issue13.html](http://spj.org/foia/alerts/alerts_v2/issue13.html)>.

44. See Kyle E. Niederpruem, *Driver Act Now State Fight* (visited Aug. 26, 1999) <<http://spj.org/foia/drivers/drivmain2.html>>.

45. See 18 U.S.C. § 2721(b) (1994 & Supp. III 1997).

46. See Schumacher, *supra* note 1, at 23.

47. See *Where the States Stand*, *supra* note 38, at 24. The states that chose to institute media exemptions were the following: Colorado, Illinois, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, and Oregon. See *id.* New Jersey considered establishing a media exemption, but appears to have chosen against it. See *id.*; N.J. STAT. ANN. § 39:2-3.4 (West 1997). Alabama, Louisiana, and Michigan also considered media exemptions, but as of the publication date of this Note, the Author found no evidence that any of these states actually implemented such an exemption.

48. See *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. July 6, 1999) (No. 99-61); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 67 U.S.L.W. 3588 (U.S. May 17, 1999) (No. 98-1464); *Oklahoma ex rel. Okla. Dept. of Pub. Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818).

49. See *Oklahoma*, 161 F.3d 1272-73; *Travis*, 163 F.3d at 1006-07.

Amendments.<sup>50</sup> Only seven months later in April 1999, the Eleventh Circuit followed similar suit, finding that the DPPA violates the Tenth Amendment.<sup>51</sup>

Quickly dispensing with the question of Congress's use of its Commerce Clause power in construction of the DPPA,<sup>52</sup> each court then focused on the DPPA's constitutionality under at least one or more of four specific amendments: Tenth, Fourteenth, Eleventh, and First Amendments.<sup>53</sup> The courts' analyses varied in detail and content. Although each of the four courts adequately addressed the concept of dual sovereignty under the Tenth Amendment, only one court thoroughly examined the merits of the DPPA under the First Amendment—the Seventh Circuit.

#### A. *Tenth Amendment*

The courts relied on two main legal principles: 1) the system of dual sovereignty set out by the language of the Tenth Amendment; and 2) two separate lines of Supreme Court decisions that attempt to resolve the historically troublesome issues of federalism and state sovereignty to analyze the DPPA's constitutionality under the Tenth Amendment.

The Tenth Amendment of the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people."<sup>54</sup> As conceded by all the courts in question, this Amendment establishes the system duly recognized as "dual sovereignty" under the Constitution.<sup>55</sup> However, the circuit courts faced great difficulty in determining the proper division of sovereignty between the federal and state powers. This same line-drawing debate demarcates the two lines of recent Supreme Court cases that the circuit courts essentially relied upon and differentiated in the quest to determine whether proper authority had been conferred to

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50. *See Condon*, 155 F.3d at 460-62, 465.

51. *See Pryor*, 171 F.3d at 1288.

52. Although the Eleventh Circuit would eventually proceed under the assumption that the DPPA had been enacted properly under Congress's Commerce power, the court initially pointed out that this question was, in reality, a "troublesome issue." *See id.* at 1284. The court continued to state that in "trying to protect legitimate governmental and business uses of such information Congress riddled the Act with more holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act." *Id.* The court chose not to further address this issue, however, as it had already deemed the Act unconstitutional under the Tenth Amendment. *See id.* at 1284-85.

53. *See id.* at 1285; *see also Condon*, 155 F.3d 453; *Oklahoma*, 161 F.3d 1266; *Travis*, 163 F.3d 1000.

54. U.S. CONST. amend. X.

55. *See Condon*, 155 F.3d at 458; *Oklahoma*, 161 F.3d at 1269.

Congress to enact the federal DPPA.<sup>56</sup>

The first line of cases examined by the circuit courts included *Maryland v. Wirtz*<sup>57</sup> in 1968 and *Garcia v. San Antonio Metropolitan Transit Authority*<sup>58</sup> in 1985. The courts used the cases to delineate Congress's authority to regulate the states as states, essentially holding that "Congress may enact laws of general applicability that incidentally apply to state governments."<sup>59</sup> The courts in both the Tenth and Seventh Circuits relied on this legal framework and focused on a more recent Supreme Court case, *South Carolina v. Baker*,<sup>60</sup> which the government parties suggested never posed a bar to federal legislation that regulated state activity directly.<sup>61</sup> *Baker* involved the constitutionality of section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), a statute similar in structure to the DPPA.<sup>62</sup> TEFRA removed interest earned on bearer bonds issued by state and local governments from federal income tax exemptions.<sup>63</sup> The Court did not invalidate the law under the Tenth Amendment despite the fact that the law allegedly "commandeered the state legislative and administrative process."<sup>64</sup> Criticizing the Fourth Circuit's decision that held the DPPA unconstitutional, the Tenth Circuit argued that the DPPA did not conscript state officials in order to enforce federal law. The Tenth Circuit instead claimed that like the TEFRA provision in *Baker*, the DPPA operated as a federal regulation of state activity and therefore "a commonplace that presents no constitutional defect."<sup>65</sup> The Seventh Circuit backed up the Tenth Circuit's decision just two weeks later, stating that "commandeering" occurred as an "inevitable consequence of regulating a state activity," rationalizing that merely because a burden had been imposed on interstate commerce did not mean that the DPPA was unconstitutional.<sup>66</sup> The court further reasoned that the

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56. See generally *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997).

57. 392 U.S. 183 (1968).

58. 469 U.S. 528 (1985).

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

60. 485 U.S. 505 (1988).

61. See *Oklahoma ex rel. Okla. Dept. of Pub. Safety v. United States*, 161 F.3d 1266, 1270 (10th Cir. 1998).

62. See *Baker*, 485 U.S. at 515.

63. See *id.* at 514.

64. *Id.* at 514-15.

65. *Oklahoma*, 161 F.3d at 1272 (quoting *Baker*, 485 at 515).

66. *Travis v. Reno*, 163 F.3d 1000, 1004 (7th Cir. 1998) (quoting *Baker*, 485 U.S. at 514-15).

burden imposed by one law and offset by another should come to a bottom line of substantially equal burdens.<sup>67</sup> Both courts, however, arrived at the same conclusion that in light of *Baker* and the fact that the DPPA did not bear down unequally on the states, the DPPA appeared to be a valid exercise of Congress's power under the Tenth Amendment.

In the Fourth Circuit, however, Judge Williams pointed out the danger of relying on case law that involved frequent decision turnovers and pervasive problems with clarity, like the first line of cases. He therefore discredited this entire line of cases as unreliable for evaluating the DPPA. He stated in *Condon* that “[t]he Supreme Court’s jurisprudence with respect to the first line of cases has not been a model of consistency.”<sup>68</sup> Judge Williams instead discovered his “model of consistency” in a second, more recent group of cases.<sup>69</sup> Led by *New York v. United States*<sup>70</sup> and *Printz v. United States*,<sup>71</sup> this second line of cases established Congress’s authority to direct states to implement or administer federal regulatory schemes.<sup>72</sup> This authority is limited only by the fact that Congress may not enact any law that may direct the functioning of the states’ executive or legislative processes.<sup>73</sup> The Fourth Circuit adopted this rationale and concluded that since the district court had found that state officials must administer the DPPA,<sup>74</sup> the regulation hence operates in clear violation of the above Supreme Court law.<sup>75</sup> Alternatively, under the first line of cases, the Fourth Circuit deemed the DPPA unconstitutional, because “a law is not generally applicable simply because it *could be* generally applicable . . . . Congress may invade the sovereignty of the [s]tates only when it *actually enacts* a

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67. *See id.* at 1006 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997)).

68. *Condon v. Reno*, 155 F.3d 453, 458 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 119 S. Ct. (1999).

69. *See id.* at 459 (“In contrast, the Supreme Court’s jurisprudence with respect to the second line of cases has been a model of consistency.”).

70. 505 U.S. 144 (1992) (holding that Congress could not “commandeer” the “legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program”). This case involved a federal statute that included a provision requiring individual states to either enact legislation regulating low-level radioactive waste generated within the state’s borders or take title to the waste. *See id.* at 176.

71. 521 U.S. 98 (1997) (holding that Congress cannot circumvent the prohibition of compelling states to enact or enforce a federal regulatory program, as stated in *New York v. United States*, 505 U.S. 144 (1992), by directly conscripting a state’s officers). *Printz* involved the well-known “Brady Bill,” which regulated the sale of handguns and included a provision requiring state law enforcement officers to participate, even if only temporarily, in the administration of the federally enacted regulatory scheme. *See id.*

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

73. *See id.*

74. *See Condon v. Reno*, 972 F. Supp. 977, 985-86 (D.S.C. 1997), *rev’d*, 155 F.3d 453 (1998), *cert. granted*, 119 S. Ct. 1753 (1999).

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

law of general applicability. Nothing short of that will pass constitutional muster.”<sup>76</sup>

Just seven months later, the Eleventh Circuit reinforced the Fourth Circuit’s ruling when it held the DPPA unconstitutional for violating the Tenth Amendment.<sup>77</sup> The Eleventh Circuit followed a similar rationale and adhered to the second, more recent line of cases led by *New York* and *Printz*. The court reasoned that unlike the laws at issue in *Garcia* and *Baker*, “[i]nstead of bringing the [s]tates within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the [s]tates’ control of the [s]tates’ own property—the motor vehicle records.”<sup>78</sup> In addition, the court stated that the “principle of state sovereignty” protected not just state power, but “a fundamental attribute” of [s]tate sovereignty: “democratic accountability.”<sup>79</sup> This concept of democratic accountability, according to the court, formed the foundation on which the U.S. Supreme Court rested its holdings in *New York* and *Printz*.<sup>80</sup> Therefore, because the DPPA did not operate as a law of general applicability and diminished democratic accountability, the court found the DPPA unconstitutional for violation of the Tenth Amendment.<sup>81</sup>

Based upon these rationales, the Fourth and Eleventh Circuits determined that Congress had no authority to enact the DPPA under the United States’ system of dual sovereignty.

#### B. Fourteenth Amendment

The Tenth Circuit, in *Oklahoma ex rel. Oklahoma Department of Public Safety v. United States*,<sup>82</sup> reasoned that since the DPPA had been found valid in the face of the Tenth Amendment, it consequently did not have to address the United States’ additional argument that the DPPA was also constitutional under section five of the Fourteenth Amendment.<sup>83</sup> The Seventh Circuit, in its own words, “ducked” the issue altogether in *Travis v. Reno*, mentioning the question only to push the topic to a “future suit.”<sup>84</sup> The Eleventh Circuit, relegating the Fourteenth Amendment evaluation to the final footnote in its decision, determined that since the information in

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76. *Id.* at 462 (second emphasis added).

77. *See Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. July 6, 1999) (No. 99-61).

78. *Id.* at 1287.

79. *See id.*

80. *See id.*

81. *See id.* at 1288.

82. 161 F.3d 1266 (10th Cir. 1998).

83. *See id.* at 1273, n.6.

84. *Travis*, 163 F.3d 1000, 1007.

motor vehicle records did not constitute, in the court's view, "intimate personal information given to a state official in confidence," it was not "confidential information."<sup>85</sup> Therefore, the court explained that no constitutional right to privacy existed for motor vehicle records because an individual did not have a "reasonable expectation that the information is confidential."<sup>86</sup> Thus, the Eleventh Circuit determined that the DPPA overstepped Congress's exercise of power under section five of the Fourteenth Amendment.<sup>87</sup>

The Fourth Circuit, the only court to proceed through a full analysis, concluded in *Condon* that the DPPA had been enacted in violation of Congress's powers as enumerated under section five of the Fourteenth Amendment. The Amendment states, in pertinent part:

No [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>88</sup>

Relying on the recent Supreme Court case, *City of Boerne v. Flores*,<sup>89</sup> the Fourth Circuit emphasized that Congress's power to enact legislation under the Fourteenth Amendment is not unlimited and "does not override all principles of federalism."<sup>90</sup> Instead, Congress's power only extends to "enforc[ing] the provisions of the Fourteenth Amendment."<sup>91</sup> According to the Fourth Circuit, this required the DPPA's constitutionality under section five of the Fourteenth Amendment to turn on whether the Act enforced some right guaranteed under the amendment.<sup>92</sup> The court then proceeded to evaluate the only right the government contended that the DPPA enforced under the Fourteenth Amendment: the right to privacy.

At the outset, the Fourth Circuit noted that "there is 'no general constitutional right to privacy,'"<sup>93</sup> rather, only limited rights of privacy as

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85. *Pryor*, 171 F.3d at 1288 n.10.

86. *Id.*

87. *See id.*

88. U.S. CONST. amend. XIV, §§ 1, 5.

89. 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act was a "considerable congressional intrusion into the States' traditional prerogatives," and also that in enacting the statute, Congress had exceeded its power as given under the Fourteenth Amendment).

90. *Condon v. Reno*, 155 F.3d 453, 464 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 119 S. Ct. 1753 (1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991)).

91. *Id.* (quoting *City of Boerne*, 521 U.S. 507 (emphasis added)).

92. *See id.*

93. *Condon*, 155 F.3d at 464 (quoting *Whalen v. Roe*, 429 U.S. 589, 608 (1977)).

to issues of reproduction,<sup>94</sup> contraception,<sup>95</sup> abortion,<sup>96</sup> and marriage.<sup>97</sup> In addition, and “[o]f particular importance here, neither the Supreme Court nor this [c]ourt has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records.”<sup>98</sup> The court then provided four reasons why motor vehicle record information could not be considered private information. First, the court stated that drivers did not have a reasonable expectation of privacy toward this sort of information.<sup>99</sup> Second, the court highlighted that since the same type of information was available from a number of other sources, like public property tax records, the information could not be considered confidential.<sup>100</sup> Third, the court outlined the long history supporting the treatment of motor vehicle records as public records, citing a previous Fourth Circuit case where the court held that an individual’s name and home address are “‘a matter of public record in motor vehicle registration and licensing records.’”<sup>101</sup> Finally, the court reasoned that private parties often received the same information in order to cash checks, use credit cards, board planes, or purchase alcohol, and that the court seriously doubted that “‘an individual has a constitutional right to privacy in information routinely shared with strangers.’”<sup>102</sup> Therefore, the court held that Congress violated section five of the Fourteenth Amendment by enacting the DPPA, because no constitutional right to privacy existed for motor vehicle record information.<sup>103</sup>

### C. Eleventh Amendment

Although the Fourth, Tenth, and Eleventh Circuits never examined the DPPA under the Eleventh Amendment, the state of Wisconsin and the original plaintiffs in *Travis v. Reno*<sup>104</sup> argued in the Seventh Circuit that the

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94. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

95. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

96. See *Roe v. Wade*, 410 U.S. 113 (1973).

97. See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

98. *Condon*, 155 F.3d at 464.

99. See *id.* at 464-65 (citing *New York v. Class*, 475 U.S. 106, 113 (1986) (noting that individuals have a diminished expectation of privacy in matters related to their automobiles)).

100. See *id.* at 465 (citing *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (holding that an individual must have a reasonable expectation of confidentiality to have a constitutional right to privacy)).

101. *Id.* (quoting *United States Dept. of Health and Human Services v. FLRA*, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987)).

102. *Id.*

103. See *id.*

104. 163 F.3d 1000 (7th Cir. 1998).



penalty provisions of the DPPA violated the Eleventh Amendment.<sup>105</sup> The Eleventh Amendment reads: “The [j]udicial power of the United State shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by [c]itizens of another [s]tate, or by [c]itizens or [s]ubjects of any [f]oreign [s]tate.”<sup>106</sup> This amendment basically bars federal suits by private parties looking to impose liability with damages coming from the state treasury or public funds, but does not prevent suits imposing individual and personal liability on state officials.<sup>107</sup> The legal debate surrounding these tenets of the amendment centered on two relevant provisions within the DPPA. The first provision, section 2723(b), provides for a five thousand dollars-a-day civil penalty against the states for noncompliance with the DPPA.<sup>108</sup> The second provision in question involved section 2724(a), which allows a civil damages remedy against a person who knowingly discloses personal information from a motor vehicle record.<sup>109</sup> The plaintiffs feared that these punitive provisions would authorize suits against public/state employees, in their official capacities, and agents.<sup>110</sup> This would directly violate the Supreme Court ruling that, absent a waiver, Congress is prohibited from authorizing suits against states because “the Commerce Clause does not grant Congress the power to abrogate the States’ sovereign immunity.”<sup>111</sup>

Although the Eleventh Circuit never reached the Eleventh Amendment issue,<sup>112</sup> in the initial *Pryor* case, the Alabama District Court reasoned that the DPPA did not authorize private individuals to initiate actions against a state since, under section 2725(2), “person” means “an individual, organization, or entity, but . . . not a State or agency.”<sup>113</sup> In addition, the court refused to go beyond interpreting the plain meaning of the statute despite the fact that only state employees have access to and the ability to release the records.<sup>114</sup> Alabama also argued that the Eleventh Amendment precluded the United States from taking action against the states, thus rendering unconstitutional the imposition of civil penalties

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105. *See id.* at 1006.

106. U.S. CONST. amend. XI.

107. *See Pryor v. Reno*, 998 F. Supp. 1317, 1331-32 (M.D. Ala. 1998); *rev’d*, 171 F.3d 1281 (11th Cir.), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. July 6, 1999) (No. 99-61) (citing *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991)).

108. *See* 18 U.S.C. § 2723(b) (1994).

109. *See* 18 U.S.C. § 2724(a) (1994).

110. *See Travis*, 163 F.3d at 1007; *see also Pryor*, 998 F. Supp. at 1331.

111. *Pryor*, 998 F. Supp. at 1331 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)).

112. *See Pryor v. Reno*, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999).

113. *Pryor*, 998 F. Supp. at 1332 (quoting 18 U.S.C. § 2725(2) (1994)).

114. *See id.*

against the states for noncompliance under section 2723(b). The court, however, insisted that this argument was “patently frivolous” and that the Supreme Court refused to bar federal court suits by the federal government against a state under the Eleventh Amendment.<sup>115</sup> But other than directly citing one case, the court gave no additional reasons for its rationale, only stating “[t]he court takes very seriously its oath and obligation to uphold the supreme law of the land and would neither be presumptuous enough nor ‘activist’ enough to deem that it, as a district court, has the authority to make new law.”<sup>116</sup>

Similarly, the Seventh Circuit reasoned that the statute “seems” to limit suits to personal capacity actions, which, in theory, should avoid subsequent constitutional problems. The court added that a future suit brought directly under section 2724 exposing a state to financial liability would allow for more time to determine if the Constitution authorized that step.<sup>117</sup> Therefore, the Seventh Circuit determined that for the purposes of the case at bar, the DPPA did not violate the Eleventh Amendment and moved on to examine the Acts’ constitutionality under a fourth and final constitutional amendment: the First Amendment.

#### D. First Amendment

The Fourth and Seventh Circuits were the only courts to recognize possible First Amendment challenges to the DPPA, and they actively avoided extensive discussions or legal rationales. For example, in *Condon*, the Fourth Circuit reasoned that although the several media intervenors<sup>118</sup> in the case had challenged the DPPA’s constitutionality on First Amendment grounds, the district court had found the Act unconstitutional under the Tenth Amendment and, therefore, had not been required to and chose not to discuss the First Amendment issue.<sup>119</sup> As a consequence, the

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115. *See id.* at 1333.

116. *Id.*

117. *See* *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998). The Seventh Circuit went on to state that addressing the Eleventh Amendment in a later case would also most likely raise the issue they had “ducked” all along, specifically “whether [section five] of the [F]ourteenth [A]mendment supports the Act and therefore authorizes Congress to override the [E]leventh Amendment.” *Id.*

118. The media intervenors in the *Condon* case included the South Carolina Press Association, Virginia Press Association, North Carolina Press Association, West Virginia Press Association, Maryland/Delaware Press Association, the Newspaper Association of America, and the American Society of Newspaper Editors. *See Driver’s Privacy Protection Act of 1994 Ruled Unconstitutional* (visited Aug. 26, 1999) <<http://www.fac.org/news/970912a-s.asp>>.

119. *See* *Condon v. Reno*, 155 F.3d 453, 455 n.1 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 119 S. Ct. 1753 (1999).

district court's choice precluded the court of appeals from addressing the First Amendment challenge as well.

The Seventh Circuit in *Travis* examined the merits of a potential First Amendment challenge, but never reached a decision on the issue. Relying on Supreme Court precedent that some access rights connected to the judicial process are protected by the First Amendment,<sup>120</sup> the court conceded that it could not exclude the possibility that in the future, a particular driver's license record could be deemed constitutionally exempt from the Act.<sup>121</sup> However, the Seventh Circuit characterized the case at bar as a "facial attack" on the DPPA and reasoned that this case was simply "not the time or place to explore the [record access] subject."<sup>122</sup> The court concluded its short First Amendment discussion by commenting that if the plaintiffs had truly wanted to assert a constitutional claim on the right of access to a particular record, they should have sued the record's custodian, who had the power to disclose the record, instead of the Attorney General or the United States.<sup>123</sup>

## V. RAMIFICATIONS

### A. *First Amendment Implications*

Although all the courts thoroughly examined the DPPA under the concept of dual sovereignty, none of them properly addressed the First Amendment concerns that the DPPA raises. In fact, even though two of the four federal appellate courts deemed the DPPA constitutional, neither of their analyses included a comprehensive review of the Act's effects on information access or the First Amendment. Not only does this omission leave open a wide window for further debate, but it calls into question the stability of the courts' conclusions that have already been reached with regard to the Act's constitutionality.

The First Amendment, in pertinent part, reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>124</sup> While the First Amendment's Speech and Press Clauses have been interpreted in many contexts, the Supreme Court in *Richmond Newspapers, Inc. v.*

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120. *See Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that absent overriding interests, trials of criminal cases must be open to the public).

121. *See Travis*, 163 F.3d at 1007.

122. *Id.*

123. *See id.* The Tenth Circuit emphasized that the proper defendant to sue is the person whose actions cause injury, not the author of the legal rule that leads to those actions. *See id.*; *Illinois v. Chicago*, 137 F.3d 474, 478 (7th Cir. 1998); *Quinones v. Evanston*, 58 F.3d 275, 277 (7th Cir. 1995).

124. U.S. CONST. amend. I.

*Virginia*<sup>125</sup> stated that they clearly conferred the right to gather information and, subsequently, protected the public's right to know in regards to trials involving criminal cases.<sup>126</sup> In its decision, the *Richmond* Court reiterated the Court's previous findings that the First Amendment should be interpreted as broadly as possible.<sup>127</sup> As the Court had stated earlier in *Branzburg v. Hayes*,<sup>128</sup> "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>129</sup> While this protection at times has been limited by the Court—for example, with prisons<sup>130</sup> and nonjudicial proceedings<sup>131</sup>—the information shielded by the DPPA should not fall subject to such limitation because, as discussed below, the records involved traditionally have been available and contain information that often has already been published elsewhere. In addition, the records do not involve any physical intrusion into privacy, nor do they involve any sensitive, private information. Finally and most importantly, drivers' records serve a crucial and fundamental role within the news-gathering process and the public's right to know.

For example, the Tenth Circuit, in *Gilbert v. Medical Economics Co.*,<sup>132</sup> held that publishing a physician's photograph, name, and private facts about her psychiatric history and marital life was substantially relevant to the newsworthy topic of policing failures in the medical profession and did not constitute an invasion of privacy.<sup>133</sup> The court reasoned that if a matter involves a "legitimate public interest" that is of "newsworthy" value, the disclosure or publication of information about that matter is said to be protected or "privileged" under the First Amendment.<sup>134</sup>

The right of seeking out the news for a legitimate public interest falls

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125. 448 U.S. 555 (1980).

126. *See id.* at 576-77.

127. *See id.* at 576 ("For the First Amendment does not speak equivocally . . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.").

128. 408 U.S. 665 (1972).

129. *Id.* at 681; *see also Richmond Newspapers, Inc.*, 448 U.S. at 576.

130. *See Pell v. Procunier*, 417 U.S. 817, 835 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15-16 (1978). These cases basically held that no First Amendment right of entry exists for jails or prisons, and that journalists "have no more right to visit jails or prisons than anyone else does." RALPH L. HOLSINGER & JON PAUL DILTS, *MEDIA LAW* 369 (3d ed. 1994).

131. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that protective orders were proper to prevent a newspaper from publishing information its lawyers had collected while attempting to defend against a libel suit).

132. 665 F.2d 305 (10th Cir. 1981).

133. *See id.* at 308-09.

134. *Id.*

into great contention with the DPPA. Motor vehicle records are used for many reasons in the news-gathering process and usually result in benefiting public safety. In a letter of opposition sent to Senator Hatch and the U.S. Senate's Committee on the Judiciary, the Utah branch of the Society of Professional Journalists cited several important situations in which motor vehicle records have been recently used in furtherance of the public interest.<sup>135</sup> For example, the group wrote that news organizations discovered that there were pilots, bus drivers, and police officers who had driving under the influence (DUI) convictions and were still operating vehicles.<sup>136</sup> A series of articles in New Mexico based on these records "helped change the state's DUI laws and the court system's leniency with DUI convictions."<sup>137</sup> Similarly, a Florida reporter used the records to identify drivers who had six or more DUI convictions and were still behind the wheel.<sup>138</sup> Still another reporter utilized the records to pick out hooded members of the Ku Klux Klan who had marched through the area.<sup>139</sup> Hundreds of stories like these are found through the use of motor vehicle records—"basic record[s] used daily by journalists to track down sources and report on public safety issues,"<sup>140</sup>—yet thousands of similar stories undoubtedly have been squelched by the 1997 implementation of the DPPA.

In addition to these functional problems, media organizations claim the DPPA has inconsistent practical ramifications. Motor vehicle records often allow verification of the names of car owners or drivers to prevent incorrect identification in news stories of individuals with common names.<sup>141</sup> In some states, the state statutes already prohibited this use. Even in states where the media still can utilize records for name verification purposes, press associations continue to fear that this concern will become a reality in just a matter of time.

Despite the strength and validity of the above arguments, it is impossible to thoroughly determine the constitutionality of the DPPA without evaluating First Amendment rights in light of the notion of right to

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135. See 139 CONG. REC. S15,763 (1993) (letter from the Society of Professional Journalists, Utah Headliners Chapter).

136. See *id.*

137. *Id.*

138. See Watkins, *supra* note 11, at 985.

139. See *id.* (citing *Congress Should Steer Clear of State Drivers' Records*, THE NEWS MEDIA & THE LAW

140. Schumacher, *supra* note 1, at 23.

141. See Kyle E. Niederpruem, *FOI Alert, Volume 2, Issue 13, Indiana Slams Records Shut in Surprise Move* (visited Aug. 26, 1999) <[http://spj.org/foia/alerts/alerts\\_v2/issue.13.htm](http://spj.org/foia/alerts/alerts_v2/issue.13.htm)>.

privacy. Although many proponents of the DPPA argue that Congress created the Act in line with the public's "right to privacy" under section five of the Fourteenth Amendment, the Fourth Circuit reiterated in *Condon* that there never has been a distinct constitutional right to privacy.<sup>142</sup> In fact, in 1977, the Supreme Court clearly stated in *Whalen v. Roe*<sup>143</sup> that "there is no 'general constitutional right to privacy.'"<sup>144</sup> The Court later, however, went on to extend a constitutional "zone of privacy" to two separate interests: (1) "the interest in independence in making certain kinds of important decisions," and (2) "the individual interest in avoiding disclosure of personal matters."<sup>145</sup>

The *Whalen* Court's creation of the first interest—*independent decision making*—set up the Court to find in 1978 the existence of a *limited right to privacy in marriage* in *Zablocki v. Redhail*.<sup>146</sup> This "limited right," first established by the Court in the context of reproduction in the 1942 case *Skinner v. Oklahoma*,<sup>147</sup> slowly extended to the issue of contraception in the 1965 case *Griswold v. Connecticut*,<sup>148</sup> and then to abortion in the 1973 controversy, *Roe v. Wade*.<sup>149</sup> These privacy rights, however, have always been clearly limited rights, as "there is no explicit constitutional guarantee of a right to privacy."<sup>150</sup> This first interest in no way implicates the information included in drivers' records and covered by the DPPA. Although the *Whalen* Court also created the second interest of nondisclosure, it seemingly did not view the interest as "fundamental," because it did not apply strict scrutiny in evaluating this interest in the *Whalen* case itself.<sup>151</sup> Interestingly enough, the Supreme Court has never decided a case where it invalidated a government regulation or action

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142. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, *Reno v. Condon*, 119 S. Ct. 1753 (1999).

143. 429 U.S. 589 (1977).

144. *Id.* at 607-08 (Stewart, J., concurring) (citing *Katz v. United States*, 389 U.S. 347, 350-01 (1967)).

145. *Id.* at 599-600; see also FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 62-63 (1997).

146. 434 U.S. 374 (1978).

147. 316 U.S. 535 (1942).

148. 381 U.S. 479 (1965).

149. 410 U.S. 113 (1973).

150. CATE, *supra* note 145, at 65. Cate concludes that the Supreme Court has established four primary areas of privacy rights: "First Amendment protection for expression, association, and religion; Fourth Amendment limits on searches and seizures; fundamental decisionmaking [sic] grounded in 'penumbras' and 'emanations' of the Bill of Rights; and Fourteenth Amendment guarantee of due process and protection for nondisclosure of personal information (also based on the Fourteenth Amendment)." *Id.*

151. See *id.* at 63.

under this second privacy interest.<sup>152</sup>

However, upon closer examination, it becomes clear that privacy rights—no matter what they are—actually have no real impact on the DPPA’s constitutionality, because the Act at no time reaches far enough to implicate these privacy interests. For example, Judge Williams pointed out in *Condon v. Reno*<sup>153</sup> that the Supreme Court has recognized that automobiles do not come with privacy guarantees.<sup>154</sup> The Court emphasized this in *New York v. Class*<sup>155</sup> in 1986, when it noted that individuals have a lower privacy expectation in matters regarding their automobiles.<sup>156</sup> In addition, some of the exact information currently protected by the DPPA has not even been rendered “private information” by some courts. For example, in 1987, the Fourth Circuit held in *United States v. Bales*<sup>157</sup> that disclosing an individual’s social security number on a loan application did not violate the individual’s right to privacy.<sup>158</sup>

Notwithstanding the privacy arguments, other logical arguments also support abolishing the federal DPPA. First, as the Fourth Circuit noted, the same information restricted under the DPPA is easily available elsewhere.<sup>159</sup> For example, every licensed pilot’s name, address, and medical data can all be found online in a public database operated by the United States.<sup>160</sup> Similarly, anyone can obtain the name and address of airplane owners by listing the number displayed on the airplane’s tail.<sup>161</sup>

Second, private parties often obtain such information for reasons such as cashing a check, using a credit card, or purchasing alcohol, not to mention that there has been quite an extensive history of treating motor vehicle records as public records.<sup>162</sup> For example, in *Department of Health and Human Services v. FLRA*,<sup>163</sup> the Fourth Circuit recognized that an individual’s name and home address “is a matter of public record in motor vehicle registration and licensing records.”<sup>164</sup> Therefore, the DPPA could

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152. *See id.* Although the Supreme Court has not decided such a case, several federal appellate and district courts have used this interest to do so. *See id.*

153. 155 F.3d 453 (4th Cir. 1998).

154. *See id.* at 465.

155. 475 U.S. 106 (1986).

156. *See id.* at 112-13.

157. 813 F.2d 1289 (4th Cir. 1987).

158. *See id.*

159. *See Condon*, 155 F.3d at 465.

160. *See id.* at 465 n.9 (citing <<http://www.avweb.com/database/airmen>>).

161. *See id.* (citing <<http://www.avweb.com/database/aircraft>>).

162. *See id.*

163. 833 F.2d 1129 (4th Cir. 1987).

164. *Id.* at 1135 n.8; *see also Condon*, 155 F.3d at 465.

even be characterized as virtually unnecessary, at least at the federal level.

Along this same vein, additional arguments assert that, although the DPPA was instituted in part to protect individuals from stalkers, the law actually does not provide protection from the “disingenuous acquisition of information” by potential criminals.<sup>165</sup> This refers to the sad fact that a stalker could feasibly obtain personal information about a victim under a “guise of legitimacy.”<sup>166</sup> Therefore, “given the persistence and devious nature of stalkers and the numerous exceptions to confidentiality,” the DPPA ends up providing, at most, only a temporary protection from stalkers.<sup>167</sup> Ironically, even under the provisions of the federal DPPA, Rebecca Shaeffer’s address most likely would have been located, because her stalker obtained her information via a private detective who, under the current Act, falls under one of the fourteen exemptions and can access the restricted personal information.<sup>168</sup>

Recent trends to curtail news-gathering activities in other ways only heighten the threat the media received from the federal DPPA. Laws such as “paparazzi legislation” introduced into the U.S. House of Representatives by the late Representative Sonny Bono (R-California), in addition to the independent state legislation on this issue in states such as California and Michigan, serve as examples of how the media’s right to gather news slowly has been diminished.<sup>169</sup> Erosion of this news-gathering right occurs mostly because “there’s not always a collision between information and privacy, but there’s sufficient conflict to frighten the public.”<sup>170</sup> These kinds of unfounded fears most likely also explain the fact that although sixty-two percent of adults polled by the Associated Press indicated they felt that motor vehicle and other similar records should stand

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165. George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 874 (1997); see also Kyle Niederpruem, *DMV Data Could Be Lost Without Lobbying* (visited Aug. 26, 1999) <<http://www.asne.org/kiosk/editor/june/niederpr.htm>>.

166. Stevenson, *supra* note 165, at 874.

167. *Id.*

168. See 18 U.S.C. § 2721(b)(8) (Supp. III 1997) (allowing disclosure of information “[f]or use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection”); see also Harry Hammitt, *States to Feds: We Don’t Want Your Legislated Privacy* (visited Aug. 26, 1999) <<http://govt-tech.govtech.net:80/gtmag/1997/gt/dec/access/access.shtm>>. In fact, it has even been said that, “[a] sixth-grader with a PC is more of an enemy in Senator Boxer’s ‘war’ for privacy than individuals perusing motor vehicle records.” Watkins, *supra* note 11, at 985 (footnote omitted).

169. See *FOI: Paparazzi Laws*, QUILL, Sept. 1998, at 19 (1998).

170. Kenneth A. Paulson, *Commentary: Press Must Encourage Open Records, Not Feed Public’s Privacy Fears* (visited Aug. 26, 1999) <[http://www.freedomforum.org/newsstand/forum\\_news/1997/12s.asp](http://www.freedomforum.org/newsstand/forum_news/1997/12s.asp)>.



open to the public in some form or another, only thirty-four percent of those same adults polled felt that the government should provide access to a news reporter wanting to expose wrongdoing through use of the records.<sup>171</sup>

As society scrambles toward privacy and fees for information received through systems providing enhanced access rise, additional ramifications rear their ugly heads. For example, these record fees often cost more than obtaining the information directly.<sup>172</sup> This especially holds true in the advent of privatization, where government agencies delegate public functions to private contractors.<sup>173</sup>

Finally, although the DPPA is completely separate and inherently different from the federal Freedom of Information Act (FOIA)<sup>174</sup> passed in 1966, both acts share a reliance on state implementation and create huge repercussions within the news-gathering industry. Despite the fact that FOIA contains only two exemptions that allow agencies to withhold information if disclosure could invade the privacy of individuals,<sup>175</sup> the Supreme Court, when forced to choose, has elected privacy over openness

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171. See *Results from the Associated Press Survey*, QUILL, Sept. 1997, at 18. The survey consists of a telephone poll of 1,008 adults taken in all states except Alaska and Hawaii.

172. See Kyle E. Niederpruem, *FOI Alert, Vol. 2, Issue 12, Public v. Privatized Records, Who's Winning This War?* (visited Aug. 26, 1999) <[http://spj.org/foia/alerts/alerts\\_v2/issue11.htm](http://spj.org/foia/alerts/alerts_v2/issue11.htm)>. "The National Newspaper Association and American Court & Commercial Newspapers are currently conducting a joint research project examining public-private data partnerships. Concerns over user fees split between government and private access providers is driving the debate." *Id.*

173. See *id.*

174. See 5 U.S.C. § 552 (1994 & Supp. II 1996).

175. See 5 U.S.C. § 552(b)(6) (exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); 5 U.S.C. § 552(b)(7)(C). This section restricts disclosing:

[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a [s]tate, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

*Id.*

on numerous occasions.<sup>176</sup> This analogy definitely bodes troublesome, as it demonstrates how the presumption of disclosure intended for FOIA has been subordinated in the face of privacy interests.<sup>177</sup> If this is the case with a presumption of disclosure, it can only be imagined how far the presumption of privacy, as embodied by the DPPA, eventually may reach.

### B. *Costs and Alternatives*

The DPPA not only violates several constitutional amendments, but totes a hefty and unnecessary price tag for states and companies alike. Instituting the DPPA required the states to absorb excessive income losses coupled with outrageous expenditures in order to develop mechanisms to implement and enforce the Act.<sup>178</sup> Even with opt-out provisions in place to prevent greater losses of income, the monetary costs still appear incredibly high, especially since no federal funds are available to help the states ease the price of instituting the Act.<sup>179</sup> In fact, in 1997, states' per-year estimates for implementing the DPPA with opt-out policy procedures ranged from \$120 thousand in Minnesota to one million dollars in Indiana.<sup>180</sup> These figures reflect the cost of notifying not only every driver, but also every vehicle owner about the availability of the opt-out option.<sup>181</sup> Because of these projected cost estimates, both the New Mexico and Indiana motor vehicle departments chose not to implement opt-out provisions for the federal DPPA.<sup>182</sup> Although this opt-out provision provides only one

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176. See *The Privacy Paradox: Government Access* (visited Aug. 26, 1999) <[http://www.rcfp.org/pp\\_pt2.html](http://www.rcfp.org/pp_pt2.html)>; see also *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding that a third-party must show intent to use information to examine workings of the government in order to examine individuals' personally identifiable information from government records); *Department of State v. Ray*, 502 U.S. 164 (1991) (holding that the State Department could refuse to disclose records identifying refugees who were denied asylum and consequently deported back to Haiti); *Department of Defense v. FLRA*, 510 U.S. 487 (1994) (holding that home addresses of government employees should not be disclosed to union organizers). For an evaluation of the FOIA, see Jane Kirtley, *Freedom of Information Act—How Is it Working?* COMM. LAW., Fall 1996, at 7.

177. For a fairly comprehensive listing of Supreme Court decisions involving FOIA, see *Supreme Court Decisions Involving the FOIA* (visited Aug. 26, 1999) <<http://www.accessreports.com/statutes/commentary/COURTS.htm>>.

178. See Schumacher, *supra* note 1, at 25.

179. See News Media Update, *Another Federal Judge Finds Driver's Records Act Unconstitutional* (visited Aug. 26, 1999) <<http://www.rcfp.org/NMU/980629f.html>>.

180. See Schumacher, *supra* note 1, at 24-25. As of September 1997, only 432,774 drivers out of 3.5 million in Minnesota utilized the opt-out policy. See *id.* In addition, the Arkansas Office of Motor Vehicles also estimated that providing an opt-out provision would cost \$332,000 the first year and \$45,000 every year thereafter. See *id.*

181. See Niederpruem, *supra* note 43.

182. See *Where the States Stand*, *supra* note 38, at 25.

possibility for circumventing the DPPA's effects, it may be the most palatable option when compared to the other alternatives, which include creating media exemptions, stockpiling records, turning to marketing departments, or blatantly ignoring the law.

The media exemption option garnered much attention in the initial DPPA implementation debate in 1997, as lines were quickly and sharply drawn between state press associations and national media groups.<sup>183</sup> Created by either law or administrative rule making, media exemptions allow journalists to continue to check personal information by use of DMV records.<sup>184</sup> However, the records are only opened for matters that involve vehicle and/or driver safety.<sup>185</sup> Many state press associations supported this special privilege of guaranteeing access through the media exemptions, but they often did so fearing that if given the option in an opt-out policy, too many drivers would opt-out in favor of confidentiality, rendering the remainder of the records virtually meaningless.<sup>186</sup> The national organizations, however, took a different stance on the topic of media exemptions. Influential groups such as the Society of Professional Journalists, the American Society of Newspaper Editors, the Newspaper Association of America, the National Newspaper Association, the Radio-Television News Directors Association, and the Reporters Committee for Freedom of the Press all argued *against* media exemptions for the states, holding fast and true to their long-standing traditions of opposing special treatment for the news media.<sup>187</sup> In addition, many journalists voiced the concern that limiting access only to issues involving vehicle and/or driver safety concerns would prove too narrow a classification and would impede the routine use of DMV records for reasons such as checking addresses or name spellings.<sup>188</sup> Despite the controversy, nine states adopted media exemption laws or policies in the face of the DPPA enactment in 1997.<sup>189</sup>

For the nineteen states that did not preserve the access to driver and vehicle records through either the opt-out or media exemptions, there stand few viable access options for the media to pursue.<sup>190</sup> Despite the fact that

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183. See Schumacher, *supra* note 1, at 23.

184. See *id.*

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See *Where the States Stand*, *supra* note 38, at 24.

190. See *id.* The states that chose not to adopt or implement any opt-out provision, media exemptions, or already had state laws more restrictive than the federal DPPA include the following: Alabama, Alaska (driver), Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, New Jersey, New Mexico, North Carolina,

many journalists and news agencies may have stockpiled DMV records, this measure at best buys time. Not only do the records have a limited shelf life, but stockpiling itself can become a computer nightmare.<sup>191</sup> As a result, some reporters have turned to their media's marketing departments to retrieve limited information.<sup>192</sup> However, marketing database information falls subject to the same problems as stockpiled records, and only statistical—not personal—information is available through these databases.<sup>193</sup> The problems encountered are not singular to news agencies' marketing databases. Rather, they take a toll on many commercial marketing and database companies that package and sell data.<sup>194</sup> In fact, companies such as the Polk Companies, TRW Target Marketing Services, Metromail, and Donnelley Marketing Inc. all lobbied for opt-out laws prior to the enactment of the federal DPPA.<sup>195</sup> These marketing companies share their concerns about profits with many states that gain income from sales of name and address lists to direct marketers.<sup>196</sup>

In retaliation to the DPPA, however, some databases which already possessed personal information gleaned from DMV records claimed they would just ignore the federal law. One company, Shadowsoft Inc., runs a World Wide Web site database but requires service users to identify themselves in order to help prevent criminal usage of the information.<sup>197</sup>

A similar, California-based personal information database, *HireRight*, caters to a unique audience that often appears overlooked in discussion of DPPA ramifications: employers.<sup>198</sup> In reality, the DPPA may have its harshest effects against this group of individuals, as it dramatically limits access to information that is heavily relied upon in hiring, promotion, and retention decisions.<sup>199</sup> Specifically, the DPPA restrictions make it more difficult for national employers to maintain consistent hiring policies

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Oklahoma, Pennsylvania, Utah, Vermont, Virginia, and Washington. *See id.*; Massachusetts Registry of Motor Vehicles, *supra* note 40.

191. *See* Schumacher, *supra* note 1, at 24.

192. *See id.* The *News-Press* in Fort Myers, Florida, is one newspaper where reporters successfully utilized the paper's marketing database to gather information about a neighborhood deed restriction that prohibited residents from parking pickup trucks on the street or in driveways. *See id.*

193. *See id.*

194. *See id.*

195. *See* Niederpruem, *supra* note 43.

196. *See* John Gibeaut, *Keeping Federalism Alive: Courts Overturn Law Barring State Release of Driver Record*, A.B.A. J., Jan. 1998, at 38, 38.

197. *See* Schumacher, *supra* note 1 at 24.

198. *See Driver Privacy Protection Act Limits the Use of Driver History* (visited Jan. 25, 1999) <<http://www.hronline.org/consult/hrtopic/DPPA%20CCRRA%20update.htm>>.

199. *See id.*

across several states because of the varying state DMV records access laws.<sup>200</sup> In addition, states are free to enact stricter privacy laws, making it even more difficult for any employer to obtain the information needed, especially if the employer is trying to hire drivers.<sup>201</sup>

## VI. CONCLUSION

As this Note demonstrates, a great deal of controversy still surrounds the DPPA as it battles through its second year of implementation. In light of the recent circuit split, as well as the sheer nature and content of the Act itself, it is not surprising that the U.S. Supreme Court accepted certiorari for November 1999. If the Supreme Court rules the DPPA unconstitutional, the states will then have the option to turn back to their state driver's privacy protection statutes enacted prior to the federal DPPA.<sup>202</sup> In at least thirty-seven states, this means a return to laws far less restrictive than the federal DPPA, reducing costs to the states, individuals, and employers. Invalidation of the DPPA would allow individual states to determine how to best institute systems of privacy protection for drivers while still maintaining a careful balance with the First Amendment. It also would secure for journalists across the country the knowledge that driver's privacy protection acts are not here to halt the news-gathering process or to inhibit the watchdog function of the media, but rather to protect every American driver and vehicle owner from misuse and criminal use of personal information. For "[a] democratic society ceases to be democratic when government operates in the dark, and when those in power are beyond public scrutiny. Some loss of personal privacy is simply a cost of freedom."<sup>203</sup>

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200. *See id.*

201. *See id.*

202. *See* Stephen Key, *BMV To Seek Rule Allowing Media Access* (visited Aug. 26, 1999) <<http://www.hspa.com/bvmseek.htm>>. This option, however, creates the risk that "a bad federal law will remain enshrined in a number of bad state laws." Hammitt, *supra* note 168.

203. Andrew Glass, *A New Threat to FOI: Closing Database Access* (visited Aug. 26, 1999) <<http://www.asne.org/kiosk/editor/98.jan/glass1.htm>> (quoting COLUMBUS (OHIO) DISPATCH editorial).