National Health Information Privacy and New Federalism

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INTRODUCTION

Protecting the privacy of identifiable health information has been an important and pervasive concern of federal and state legislators, courts, and executive agencies, private health care providers, attorneys, academics, and individuals in the 1990's and into the new millennium. There are numerous justifications for greater individual privacy protections, specifically concerning health data. Unlike some personal data, health information is viewed by many individuals as highly-sensitive. Whether an individual has a communicable (e.g., HIV, syphilis, tuberculosis) or other disease (e.g., diabetes, multiple sclerosis), condition (heart or back ailment, mental illness), or genetic propensity (e.g., BRCA 1 breast cancer gene) is perhaps the most sensitive of personal information about a person. Furthermore, health records, which are increasingly held in electronic form, contain large amounts of other personal information which can be used to create a profile of an individual.¹

In the United States, a society which strongly values individual autonomy and decision-making, protecting the privacy of personally-identifiable health data is critical.² Insufficient protections of health care information can lead to unauthorized disclosures which may subject individuals to social stigma and

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1. This includes demographic information, such as age, sex, race, marital status, children, and occupation; financial information, such as employment status, income, and methods of payment; personal identifiers other than name, including Social Security number, addresses, and phone numbers; and information about why treatment is sought, such as being the victim of a violent crime, firearm injury, or the at-fault party in an auto accident. See Lawrence O. Gostin, Health Care Information and the Protection of Personal Privacy: Ethical and Legal Considerations, 127 ANNALS INTERNAL MED. 683 (1997).

discrimination by insurance companies, medical providers, and employers.\textsuperscript{3} As autonomous agents, people are ethically entitled to some expectation of privacy in their personal affairs provided the exercise of these interests does not harm others.\textsuperscript{4} Respecting personal privacy requires that individuals maintain some degree of control over their personal information.

However, in a modern national health information infrastructure that encourages widespread collection, storage, and disclosure of identifiable health information, there exist new challenges to protecting health data privacy. Commercial entities—insurers, health product manufacturers, pharmaceutical companies, information processors, and private marketers—and public entities—government-supported researchers, public health agencies—argue for access to health data for uses which are both legitimate and unwarranted. Protecting health data through legislation, administrative regulations, court decisions, or health care practices or policies affords individuals some level of privacy expectations in their personally-identifiable health information.

Failing to protect the privacy of health information devalues the information itself. Without adequate privacy protections, health information may simply become a market and research commodity. Like other personal data, health data could be exchanged and used in a marketplace like any other commodity, without regard to the individuals which they identify. The seriousness of such implications is not limited to violations of privacy expectations arising from constitutional liberty interests or ethical principles of autonomy and justice. As I and others have argued, protecting health information privacy by providing individuals some control over their health data would improve the quality and reliability of health data because individuals would be more likely to utilize health services without fear of unwarranted disclosures.\textsuperscript{5} This, in turn, would support communal uses of the data for societal goods, such as public health and health research, and diminish tort-based liabilities by reducing the opportunities for medical malpractice or invasions of individual privacy—ultimately, protection of health information privacy


\textsuperscript{4} See Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 126 (4th ed. 1994).

\textsuperscript{5} See Janlori Goldman, Protecting Privacy To Improve Health Care, 17 HEALTH AFF. 47 (1998).
would improve the quality of clinical care and medical products in the marketplace.\(^6\)

Arguments for better health information privacy protections have motivated significant legal reform, particularly at the state level. States have traditionally recognized the long-standing bastion of privacy protection: the common law duty of confidentiality between a doctor and patient.\(^7\) Through the use of their virtually limitless police powers,\(^8\) states have also enacted numerous types of privacy laws and policies relating to health research data, genetic information, public health data, and other subsets of health information such as HIV information and cancer registry data. While many of these state laws apply only to government collections of data, some states have passed comprehensive medical confidentiality laws which cover all types of health data. Model state privacy acts have been developed concerning genetic privacy,\(^9\) public health information,\(^10\) and health information generally.\(^11\)

The passage of numerous and varied state privacy laws and regulations, however, has resulted in a patchwork system of protections.\(^12\) Glaring exceptions to protecting privacy remain.\(^13\)

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8. Police powers originate in the inherent need of government to restrain the private actions of citizens to reduce the negative transgressions of such actions on the private rights or property of another. See, e.g., Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States 1-2 (1886). As one author theorizes, "police powers have their origin in the law of necessity." W.P. Prentice, Police Powers Arising Under the Law of Overruling Necessity 4 (1894). Whenever individual actions or other elements constitute threats to the public welfare, governments should be able to use their powers to reduce, deter, or enjoin the resulting harms to society. See James G. Hodge, Jr., Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law, 14 J. Contemp. Health L. & Pol'y 93, 100-01 (1997).


10. See Model State Public Health Privacy Project (last modified Feb. 24, 1999) <http://www.critpath.org/msphpa/privacy.htm> [hereinafter MSPHPA]. The project was sponsored by the Centers for Disease Control and Prevention (CDC), the Council of State and Territorial Epidemiologists (CSTE), the Association of State and Territorial Health Officers (ASTHO), and the National Conference of State Legislatures (NCSL).


12. See, e.g., Donna E. Shalala, Health Care Information and Privacy, 8 Health 223, 227 (1998) ("[W]e rely on a patchwork of state laws. The fact is,
State privacy laws differ extensively within and across jurisdictions according to the type, source, and holder of the data. For example, HIV data may be protected more extensively than tuberculosis data. A health researcher may be held to stricter standards than a practicing physician. And a state public health agency may be required to meet stringent protections against disclosures while a state worker's compensation board may publicly disclose similar data.¹⁴

These varying and inconsistent laws have contributed to pleas for federal health information privacy protections. Lacking significant constitutional guarantees of health information privacy, Congress has introduced comprehensive health information privacy bills in both Houses in the past several years pursuant to the Health Insurance Portability and Accountability Act (HIPAA) of 1996.¹⁵ Even though Congress has failed to meet a self-imposed deadline pursuant to HIPAA to pass such legislation covering electronic health data, the federal Department of Health and Human Services (DHHS) is preparing administrative regulations for the same purpose,¹⁶ even though it recommends the passage of federal privacy legislation.

Whether comprehensive federal health information privacy protections emanate from new congressional privacy laws or DHHS' administrative regulations, it seems certain that the federal government will provide some privacy protections for identifiable health information used in the private sector. It is uncertain, however, whether and to what extent the federal government should or can effectually protect health information privacy in an era of new federalism. Mirroring the trend toward greater national privacy protections of health data over the past twenty-five years is a marked political and judicial shift toward a constitutional redistribution of federal and state powers. Federalism has become a powerful, substantive tool of constitutional

¹³ See Shalala, supra note 12, at 224 ("[T]he way we protect the privacy of our medical records right now is erratic at best—dangerous at worst.").


Principles of new federalism suggest not only that the existing powers of the federal government should be limited, but that prior federal responsibilities should increasingly be returned to the states. Whenever federal and state interests collide, federalism-based arguments arise. This includes the federal government's attempt to regulate in the interest of protecting individual health information privacy, traditionally an area of state concern. The relationship between federalism and health information privacy ultimately concerns the ability of government in the United States to protect individual privacy, something which European and other countries attempted in the 1990's. Principles of new federalism challenge the assumption that the federal government may appropriately supply these protections and further suggest that the existing patchwork of state protections must not only be preserved, but may in fact be preferred.

Without questioning the ethical value of protecting individual health information privacy (which is virtually indisputable), this Commentary analyzes the federalism implications underlying issues of national health information privacy. Part I briefly explores legal privacy protections of health information through a review of existing federal and state constitutional, statutory, and common law, and proposed federal health information privacy regulations. Part II explains new federalism through a discussion of its traditional notions and modern application in Supreme Court and lower court jurisprudence, as well as other political developments. Thereafter the theoretical and applied relationships between new federalism and national health information privacy protections are analyzed. The primary consequence of new federalism is that while national, preemptive legislation may be needed to fully protect health information privacy, it is unlikely to be accomplished politically or legally.

I. LEGAL PROTECTION OF HEALTH INFORMATION PRIVACY

Though protecting health information privacy is increasingly important within a modern health information infrastructure which exchanges health data electronically, individual

17. "There is no going back of federalism," says Professor Susan Low Bloch of Georgetown University Law Center. Joan Biskupic, Vexing Social Issues Portend A Stirring Term for Supreme Court, WASHINGTON POST, Oct. 6, 1996, at A6. "This is something Rehnquist and O'Connor have been working toward for years and now that they have the votes they are not likely to stop" in their federalism jurisprudence. Id.

privacy is not necessarily paramount. There are communal interests in the use and disclosure of individual health data. The collection, use, and disclosure of health data may benefit individuals and society by enhancing patient choices, furthering clinical advancements and medical research, and protecting public health. These and other communal interests concerning identifiable health data arguably cannot be thwarted through restrictive privacy provisions.\(^\text{19}\)

Assuming a balance between individual privacy and communal interests can be attained, protecting the privacy of individually-identifiable health data can be satisfied in many ways.\(^\text{20}\) One method of affording individuals some measure of privacy is to provide rigorous legal safeguards of health information. These legal safeguards may be expressed through federal or state constitutional protections of health information privacy, legislation, or case law. As this Section demonstrates, however, existing legal safeguards are inadequate, fragmented, and inconsistent. There exist major gaps in legal protection of privacy and significant theoretical problems with its structure.

A. Constitutional Right to Privacy

Scholars have debated the existence and extent of a constitutional right to informational privacy independent of the Fourth Amendment prohibition on unreasonable searches and seizures.\(^\text{21}\) To some, judicial recognition of a constitutional right to informational privacy is particularly important since the government is a primary collector and disseminator of health information. As a result, individuals need protection from the


20. The law is merely one tool to improve individual privacy protections. Internal privacy policies of health care providers, data processors, and other private sector entities which acquire, use, and disclose identifiable health data can greatly impact individual expectations of the privacy of their health information. The same can be said for voluntarily-executed policies of governmental holders of data, including public health agencies, researchers, universities and academic centers, and other commissions or agencies. Adherence to ethical principles and human rights documents in support of the privacy of individual health data may also lead to greater privacy protections. Ultimately, however, where government and the private sector fail to administer sufficient privacy protections, the law may guide, if not require, such protections.

government itself, without resort to federal or state legislation. An effective constitutional remedy is the surest method to shield them from unauthorized government acquisition or disclosure of personal information.

Unfortunately, the Constitution does not expressly provide a right to informational privacy. A body of case law, however, does suggest judicial recognition of a limited right to informational privacy as a liberty interest within the Fifth and Fourteenth Amendments to the Constitution. In Whalen v. Roe, the United States Supreme Court examined whether the constitutional right to privacy encompasses the collection, storage, and dissemination of health information in government data banks. In dicta, the Court acknowledged “the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.” However, the Court failed to craft a constitutional remedy to meet this threat. Justice Stevens, writing for a unanimous Court, simply recognized that “in some circumstances” the duty to avoid unwarranted disclosures “arguably has its roots in the Constitution.” The Court found no violation in Whalen because the state had adequate standards and procedures for protecting the privacy of sensitive medical information. Rather, it suggested deferentially that the supervision of public health and other important government activities “require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.”

Most lower courts have read Whalen as affording a tightly circumscribed right to informational privacy, or have grounded the right on wide-ranging state constitutional provisions. Courts have employed a flexible test balancing the government invasion of privacy against the strength of the government interest. Pro-

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22. See Gostin, supra note 2, at 495-98.
24. Whalen, 429 U.S. at 605.
25. Id.
26. Id.
27. See, e.g., Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987). Since the 1970s, more than a dozen states have adopted constitutional amendments designed to protect a variety of privacy interests, including limitations on access to personal information. See Gostin, supra note 2, at 498.
28. See United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (holding that National Institute of Occupational Safety and Health was entitled to receive medical records of private employees exposed to toxic substance subject to their informed consent). The court enunciated five factors
vided the government articulates a valid societal purpose and employs reasonable security measures, courts have not interfered with traditional governmental activities of information collection. Unmistakably, government could enunciate a powerful societal purpose in collection of health information such as public health or law enforcement.

The right to informational privacy under the federal or state constitutions is, of course, limited to state action. As long as the federal or state government itself collects information or requires other entities to collect it, state action will not be a central obstacle. However, collection and use of health data by private or quasi-private health data organizations, health plans, researchers, and insurers remains constitutionally unprotected.

B. Common Law Protections

Most states recognize via common and statutory law the legal duties of confidentiality of certain health care professionals (generally physicians) not to disclose health information concerning patients. Such duties are not absolute. Disclosures without individual consent may lawfully be made to protect third parties from identifiable harm, to report information for public health purposes as required by state law, or sometimes in cases of medical emergency. Unwarranted disclosures, however, may subject responsible parties to civil liability under several legal theories.29

Although a traditional construct of privacy protections and a forerunner of modern privacy theory, the duty of confidentiality is antiquated. While it protects health data as part of the physician-patient relationship, modern data collection is based only in small part on this relationship. Health records, moreover, contain a substantial amount of information gathered from numerous primary and secondary sources: laboratories, pharmacies, schools, public health officials, researchers, insurers, and other individuals and institutions. Patient health records are not merely kept in the office of private physicians or health plans, but also by government agencies, regional health database organizations, and information brokers. Databases maintained in each of these settings are collected and transmitted electroni-
cally, reconfigured, and linked. The duty of confidentiality which arises at the point of clinical care simply does not extend to all these parties for all these purposes. Focusing legal protection of health information privacy on the therapeutic relationships between physicians and patients within a national health information infrastructure is thus highly inadequate.

C. Legislative and Administrative Protections

1. Existing Federal and State Protections

Federal and state legislatures and executive agencies have enacted and considered a growing number of statutes and regulations to protect privacy. The federal government has previously enacted several statutes and regulations to protect privacy of health information. The Privacy Act of 1974 requires federal agencies to utilize fair information practices with regard to the collection, use, or dissemination of systematized records, including health data. The Freedom of Information Act (FOIA) of 1966 requires the federal government to disseminate various information but exempts from disclosure several categories of records which include personally-identifiable health information. The Electronic Communications Privacy Act of 1986 protects electronic communications during transmission or while in storage against unauthorized interceptions and improper uses, although it likely does not protect interceptions of non-encrypted information over radio frequencies. Other federal regulations require privacy protections in relation to the treatment of persons for drug or alcohol dependency in federally-funded facilities and the administration of human subject research.

Most states have passed privacy statutes that mimic the federal Privacy Act and FOIA and thus apply only to state collections of data. A few states have enacted comprehensive medical information privacy acts. These laws provide broad protections for health information acquired, collected, used, or disclosed within the state. States have also passed disease-specific privacy laws which set forth stringent privacy and security protections for

30. See Gostin, supra note 2, at 499-508.
certain types of information, including medical information concerning one's HIV status\(^3\) or other sexually-transmitted disease,\(^9\) genetic information,\(^4\) information utilized in medical research (such as state cancer registries), or public health information.\(^{41}\)

2. Privacy Theory and A Model Proposal

Although the sophistication of these and other state proposals varies, they generally protect individual privacy pursuant to what I call the "privacy formula," simply stated as follows:

\[ \text{HIP} = (\text{Unlimited DHI} + \text{IC}) + (\text{Narrow DHI} - \text{IC}) \]

Where: HI = health information; P = privacy; D = disclosures; IC = informed consent.

This privacy theory, often coupled in modern laws with security provisions and fair information practices, empowers individuals with some degree of control (through rights of access and informed consent requirements\(^{42}\)) over the use and disclosure of their identifiable health information. Disclosures are generally prohibited unless a person has consented to the release of his health information.\(^{43}\) There are two caveats to this equation: (1) where health information is truly non-identifiable—the information cannot be identified or linked to the person to which the information relates—individual privacy interests are not impli-
cated, and thus no limits should apply to the use or disclosure of such information;\textsuperscript{44} and (2) exceptions to the general prohibition of disclosures of identifiable health data without informed consent must be minimal, clearly stated, and acceptable deviations. Thus, for example, disclosures of individual communicable disease data pursuant to state reporting statutes to public health authorities without specific informed consent are acceptable where needed to properly conduct public health surveillance.\textsuperscript{45} However, many privacy laws as proposed and enacted contain exceptions for disclosures without informed consent, some of which unjustifiably infringe on the individual privacy interests which the laws are designed to protect.

Many state health information privacy laws struggle to balance competing interests underlying the acquisition, use, and disclosure of identifiable health information between respecting individual privacy and allowing warranted, communal uses of health information. One model state privacy proposal, the Model State Public Health Privacy Act\textsuperscript{46} (which concerns public health information), attempts to reach this balance. Without discounting either the individual or communal interest, the Act focuses its protections on the information itself. It affirmatively allows people to access, inspect, and amend their health information;\textsuperscript{47} learn the ways in which it is used and disclosed;\textsuperscript{48} request a record of disclosures;\textsuperscript{49} and seek criminal or civil sanctions for actions inconsistent with the Act.\textsuperscript{50}

Coextensively, the Act limits (to a degree) the ability of public health agencies to acquire, collect, and use identifiable health information. Public health agencies may acquire, collect, and use individually-identifiable health information only so long as such information is needed to accomplish legitimate public health purposes.\textsuperscript{51} They must de-identify the information when-

\begin{itemize}
\item \textsuperscript{44} See Hodge et al., \textit{supra} note 6, at 1470.
\item \textsuperscript{45} See Gostin & Hodge, \textit{supra} note 3, at 710-18; see also \textsc{Wash. Rev. Code Ann.} § 70.02.050(2)(a) (West 1992 & Supp. 1996) (allowing a health care provider to disclose identifiable health information without a patient’s authorization to “federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to determine compliance with state or federal licensure, certifications or registration rules or laws; or when needed to protect the public health”).
\item \textsuperscript{46} See MSPHPA, \textit{supra} note 10.
\item \textsuperscript{47} See \textit{id.} at §§ 6-101.
\item \textsuperscript{48} See \textit{id.} at §§ 2-102, 4-109, 6-101.
\item \textsuperscript{49} See \textit{id.} at § 4-109.
\item \textsuperscript{50} See \textit{id.} at § 7-101.
\item \textsuperscript{51} A “public health purpose” is defined as:
ever possible, expunge unnecessary information confidentially, and maintain its accuracy. More importantly, the Act strictly regulates disclosures of identifiable health information to persons or entities outside the agency. Consistent with the privacy formula, it allows disclosures of health information to be made for any purpose with advance, written informed consent. Disclosures without informed consent are limited to a few, narrow exceptions. Any disclosures of information must be as least intrusive as possible to personal privacy and include common-sense language that describes basic privacy protections which the subsequent holder must adhere.

Though existing federal and state privacy statutes and regulations are meaningful and serve valuable ends, they share several weaknesses: (1) like constitutional privacy protections, these statutes generally apply only to government collections, uses, or disclosures of health information, and thus often do not confer protections to health information in the private sector; (2) they generally fail to address the new challenges to individual privacy arising from the automation of medical records; and (3) they collectively represent a patchwork effort to address privacy and security concerns of individuals in specific health information or information held by specific entities. These statutes do not comprehensively protect health information regardless of its subject or holder. Some kinds of data are treated as super-confidential, while other data are virtually unprotected. The weaknesses of this myriad approach to health information privacy support the

[A] population-based activity or individual effort primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community, including (a) assessing the health needs and status of the community through public health surveillance and epidemiological research, (b) developing public health policy, and (c) responding to public health needs and emergencies.

Id. at § 1-103(9).

52. See id. at § 3-104.
53. See id. at § 6-103.
54. See id. at § 4-103.
55. Disclosures without informed consent by public health agencies or secondary recipient may only be made: (1) directly to the individual; (2) to appropriate federal agencies or authorities; (3) to health care personnel where necessary in a medical emergency to protect the health or life of the person who is the subject of the information; (4) pursuant to a court order sought exclusively by public health agencies in light of a clear danger to an individual or the public health; (5) to appropriate agencies performing health oversight functions; or (6) to identify a deceased individual, determine the manner of death, or provide information where the deceased is a prospective organ donor. See id. at § 4-104.
56. See id. at § 4-103.
need for comprehensive national health information privacy legislation or administrative regulations.

3. Prospective Federal Protections

Prospective federal health information privacy legislation or regulations are mandated by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).\(^{57}\) HIPAA seeks to reduce the administrative and financial burdens of health care by standardizing the electronic transmission of health-related data. In addition to security provisions which require health care providers to ensure the confidentiality of their electronic information, HIPAA required Congress to pass legislation by August 21, 1999, to set uniform standards for the transmission of health insurance information, including recommendations for security measures to protect private medical information.\(^{58}\) While several health information privacy bills were considered by Congress,\(^{59}\) no action to date has been taken.

In the absence of congressional action, HIPAA requires that the Department of Health and Human Services (DHHS) draft and implement administrative regulations by February 21, 2000. DHHS is in the process of finalizing these regulations after receiving thousands of comments from the public concerning the initial draft. While DHHS would prefer that Congress pass privacy legislation (consistent with advice from the National Committee on Vital and Health Statistics),\(^{60}\) should Congress fail to act, DHHS' recommendations reflect the eventual regulatory framework for protecting health information privacy. The general purpose of DHHS' recommendations is to facilitate the transmission of reasonably-identifiable electronic health information data among health payers and providers without compromising the privacy interests of individuals in the information. While

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\(^{60}\) National Committee on Vital and Health Statistics, Health Privacy and Confidentiality Recommendations (1997).
the recommendations do not cover all users and holders of identifiable health data, they present to date the broadest federal privacy protections of health information in the private sector.

DHHS' recommendations focus on five key principles: (1) boundaries—health care information should be disclosed for health purposes only (e.g., treatment, payment, or other health care operations), with limited exceptions; (2) security—health information should not be distributed unless the patient authorizes it or there is a clear legal basis for doing so and those who receive such information must safeguard it; (3) consumer control—persons are entitled to know of the existence of and purposes for which their health information is being used and to correct incorrect information in their health records; (4) accountability—those who improperly hold, distribute, or use health information should be criminally punished and held civilly liable to harmed individuals, especially when such actions are for monetary gain; and (5) public responsibility—privacy interests of individuals must not override national priorities of public health, medical research, health services research, quality assurance, health care fraud and abuse, and law enforcement in general.

An important component of these recommendations is DHHS' intent, consistent with language in HIPAA itself and several congressional bills, to not preempt all state health information privacy laws. Rather, DHHS would likely provide a floor of privacy regulations for national uniformity. Only those state laws which conflict with or are less protective of federal privacy rights would be preempted. State laws which are more protective of privacy would survive. As such, establishing uniformity of health information privacy protections, a basic goal underlying national legislation or regulation, is significantly thwarted. Federal law may establish a minimum of protections for the use of health information in most contexts, but state law could raise the floor of protections for certain data or holders. Thus, the development of homogenous privacy protection may be nullified through floor preemption by the allowance of various existing and future state laws which require additional protections for some, but not all, data. Absent a federal privacy policy which covers all users and holders of health data and completely preempts existing state protections, privacy protections will continue to vary from state to state. Perhaps a national, broad preemptive approach to protecting health information privacy is

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needed-and yet, for the reasons discussed below, it is politically and legally problematic under principles of federalism.

II. New Federalism and Its Relationship to Health Information Privacy

Several observations stem from the foregoing discussion of legal protections of health information privacy. First, traditionally, protecting the privacy of health data has largely been the responsibility of state governments. State governments are uniquely positioned through the use of their broad police powers to regulate health information privacy to the degree and manner deemed necessary. Second, while state experimentation is potentially valuable, collectively such variability has resulted in an unfair and incomplete system of health information privacy protections. Existing state laws represent a patchwork approach which is inconsistent, at times weak, and antiquated. Third, as a result, Congress and DHHS have responded with proposals for national privacy protections. These proposals, however, fail to make uniform privacy protections where floor preemption is utilized. Individuals may continue to lack protection of certain health data across jurisdictions, raising equitable issues of fairness.

From these three observations, a fourth naturally follows. Intersecting the need for better privacy protections are significant federal and state government interests. The federal government has a significant national interest in uniformly protecting the privacy of health information. State governments have traditional interests in protecting the privacy of health data within their jurisdictions. These competing interests raise an interesting intergovernmental debate: which government, state or federal, is responsible for protecting privacy? Can they share responsibility, and if so, to what degree? These questions are fundamentally issues of federalism. Their resolution requires an assessment and application of the principles of federalism which are explained in the sections below.

A. Principles of Federalism

1. A Principle of Law and Design

It has been said that the Constitution "acts as both a fountain and a levee."62 It "controls the flow of governmental power between state and federal governments . . .", and subsequently

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curbs that power to protect individual freedoms.\textsuperscript{63} As the dark, bolded line in the Figure below illustrates, if the Constitution is a fountain from which powers flow to the federal government and the states,\textsuperscript{64} the principle of federalism represents the partition in the pool from which the states' fountain draws.

\textbf{Federalism}

\begin{center}
\begin{tikzpicture}
  \draw[thick] (-2,-2) rectangle (5,2);
  \draw[thick] (0,0) circle (2);
  \draw[thick] (0,-3) circle (1);\node at (0,-2.5) {\textbf{Federal Powers}};
  \draw[thick] (0,3) circle (1);\node at (0,2.5) {\textbf{U.S. Constitution}};
\end{tikzpicture}
\end{center}

Federalism divides and balances the available pool of legislative power into two segments of government, national and state.\textsuperscript{65} It is as much a principle of law as it is a principle of governmental design: federalism historically represents the fundamental framework of American government.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{63} Id.
\item \textsuperscript{64} It is uncertain that the Framers or Supreme Court conceived the Constitution as a source of power to the states since the states simply retained their powers not otherwise delegated to the federal Congress nor prohibited by the Constitution. See Gibbons v. Ogden, 22 U.S. 1, 87 (1824) ("[T]he constitution gives nothing to the States or the people. Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom.").
\item \textsuperscript{66} See Texas v. White, 74 U.S. 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."); A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA 2 (1986) [hereinafter FEDERALISM REPORT] ("federalism is a constitutionally based, structural theory of government designed to ensure political freedom").
\end{itemize}
In practice, federalism distinguishes between the powers among the levels of American governments. The federal government has those limited powers granted pursuant to the Constitution, including the power to enact laws in areas which the federal government has jurisdiction. To preserve the powers of the federal government from intrusion by the states, the Supremacy Clause provides that federal laws and regulations override conflicting state laws under the doctrine of preemption. State law is preempted by federal constitutional or statutory law either by express provision, by a conflict between federal and state law, or by implication where "Congress so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." 

Likewise, with the passage of the Tenth Amendment, states retained their dominant place in American government by reserving sovereign power over "all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." These powers, collectively known as police powers, give states broad jurisdiction to regulate matters affecting the health, safety, and general welfare of the public, including health information privacy.

While the distinction between federal and state powers is a consequence of federalism, it is not always predictable in application. Federalism does not represent a bright line between state

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67. See, e.g., Editorial, The Court and Federalism, WASH. POST, Jan. 14, 2000, at A26 ("The proper question [of federalism] is whether . . . policy issues [should] be addressed by the appropriate level of government, rather than which level is likely to deliver a particular favored outcome.").

68. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").


and federal powers.\textsuperscript{74} "The meaning of federalism, after all, has been the primary political issue for most of American history"\textsuperscript{75} even though the distribution of powers among governments was originally meant to be relatively clear.\textsuperscript{76} In spite of the Framers' intent to clarify inter-governmental powers, the powers of federal and state governments approach one another on a regular basis. It is precisely at the point when federal and state powers collide that federalism takes on many shades and "almost imperceptible gradations."\textsuperscript{77}

Federalism issues can be classified into two broad categories. The first category is state intrusions into the federal sphere. These intrusions include instances where states intrude on the constitutional authority of the federal government by, for example, enacting laws which interfere with Congress' regulation of interstate commerce,\textsuperscript{78} or fail to recognize federal supremacy or authority by, say, attempting to impose taxes on federal goods.\textsuperscript{79} Such examples proliferate during the early years of the republic as states tested the limits of their sovereign powers.

The second category is federal intrusions into traditional state duties. Originally federal exercises which interfered with traditional state powers were virtually inconceivable in light of the considerable weight of state police powers.\textsuperscript{80} In theory, federal

\begin{footnotesize}
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\item \textsuperscript{74} See New York v. United States, 505 U.S. 144, 155 (1992) ("The task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.").
\item \textsuperscript{75} R. Shep Melnick, Statutory Reconstruction: The Politics of Eskridge's Interpretation, 84 Geo. L.J. 91, 120 (1995).
\item \textsuperscript{76} The essence of federalism is that federal and state governments "should be limited to [their] own sphere and, within that sphere, should be independent of the other." Ruth Locke Roettinger, The Supreme Court and State Police Power: A Study in Federalism 5 (1957) (citing K.C. Wheare, Federal Government (1951)); see also Younger v. Harris, 401 U.S. 37, 44 (1971) ("[Federalism involves] a proper respect for state functions . . . and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").
\item \textsuperscript{78} See, e.g., South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (finding constitutional a South Carolina law that prohibited trucks over 90 inches wide or weighing over 20,000 gross pounds on state highways despite infringement on interstate commerce).
\item \textsuperscript{79} McCulloch v. Maryland, 17 U.S. 316 (1819) (invalidating the attempt by Maryland to tax the issuance of bank notes by the newly created national bank).
\item \textsuperscript{80} States were considered essential to the functioning of government because they retained the majority of powers. See Federalism Report, supra note 66, at 10. So powerful were the states under the original balance of power among the national and state governments that Alexander Hamilton com-
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legislation which touched areas traditionally left to the states was beyond Congress' jurisdiction, and therefore did not reign supreme over state law. However, the expansion of the federal government during the New Deal required a relaxation of such traditional notions of federalism. As explained below, arguments stemming from federal intrusion over states typify, though not exclusively, modern federalism debates.

2. New Federalism

What has been coined "new federalism" is a principle of political change spurred by mini-revolutions among the states and judicial activism that is enveloped in the idea that the existing powers of the federal government should be limited and returned to the states. Increasingly, federalism has been the focal point of political and judicial issues. Although several state governors failed in their 1994 effort to organize a "Conference of States" to draft federal constitutional amendments in support of greater state rights, Congress has recently introduced several bills which would require it to consider federalism issues prior to

mented "there is greater probability of encroachments by the [states] upon the federal [government] than by the federal [government] upon the [states]." Id. at 9 (citing THE FEDERALIST No. 31 (Alexander Hamilton)). See also New York v. United States, 505 U.S. 144 (1992) (emphasis added):

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.


82. The term "new federalism" may have first been used by Donald E. Wilkes, Jr. in his article, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 KY. L.J. 421 (1974).

83. See, e.g., Juliet Eilperin, House GOP's Impact: Transforming an Institution, WASHINGTON POST, Jan. 4, 2000, at A4 (chronicling the failures of former House of Representatives Speaker, Newt Gingrich, Eilperin comments that "while Gingrich had once hoped to lead the country from the speaker's chair, some of the changes he set in motion may well diminish the legislative branch's power in the years to come by transferring powers to state and local governments").

84. See Richard C. Reuben, The New Federalism, A.B.A. J., Apr. 1995, at 76-77 (arguing the resurgence of federalism is partially the result of increased political efforts of the states to move toward greater autonomy from the federal government and the effects of such efforts on the political processes on Capitol Hill).

the passage of legislation. In August, 1999, President Clinton signed the second draft of his executive order concerning federalism. The initial draft of the order was roundly rejected by state and local government associations for its failure to appropriately reflect new federalism principles. The revised order disfavors federal preemptive laws or policies, requires executive officials to defer to states whenever possible in setting national standards, and features an enforcement mechanism against implementation of federal executive policies that lack a federalism "impact statement."

The United States Supreme Court has "played a major role" in setting "a new frontier of federalism." Beginning with the Court's 1976 decision in National League of Cities v. Usury, new federalism cases have resulted in the Court's (1) adoption of a super-strong rule against federal invasion of "core state functions;" (2) presumption against application of federal statutes to state and local political processes; (3) disdain for federal action that "commandeers" state governments into the service of federal regulatory purposes; (4) rejection of federal

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88. Id.
89. Id.
94. See Printz v. United States, 521 U.S. 898 (1997) (declaring unconstitutional the federal requirement under the Brady Handgun Violence Prevention Act that state chief law enforcement officers temporarily conduct background checks on prospective handgun purchasers); New York v. United States, 505
claims brought by private parties against states\textsuperscript{95} for overtime wages,\textsuperscript{96} patent infringements,\textsuperscript{97} engaging in false advertising,\textsuperscript{98} and to resolve gambling disputes;\textsuperscript{99} and (5) adoption of the "plain statement rule" that Congress must "mak[e] its intention unmistakably clear in the language of the statute"\textsuperscript{100} that state law is preempted where such may alter the balance of federalism.\textsuperscript{101} Most recently, the Court opined that state employees cannot sue states for violations of the federal Age Discrimination in Employment Act because Congress lacked the power, consistent with the Eleventh Amendment,\textsuperscript{102} to subject states to such suits.\textsuperscript{103}

The majority of these cases concern the second classification of federalism issues—when does federal intrusion into predominantly state matters exceed the limits of federal powers? However, new cases before the Court evince atypical federalism disputes where states and private parties have aggressively begun to challenge issues under the federal domain. For example, in its first term of this century, the Court decided that states cannot impose environmental regulations on oil tankers that are more


\textsuperscript{102} "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." \textsc{U.S. Const. amend. XI}.

strict than those provided by federal law. The Court will soon rule on whether private parties can bring state personal injury claims against automobile manufacturers who failed to install airbags in the late 1980s despite preemptive federal legislation and regulations which allowed manufacturers to install either automatic seatbelts or airbags; and whether states can enforce state laws which prohibit state purchasing agreements with companies doing business in objectionable international locales (based on their authoritarian governments, human rights issues, or other criteria), in possible contravention of the federal constitutional power to regulate foreign affairs.

These cases are reminiscent of early federalism disputes where states intruded upon federal power. They reflect the idea that the constitutional principle of federalism is more than a single-edge sword against federal centralism. Federalism cuts both ways. Curtailing the power of the federal government (the impetus for new federalism) simultaneously empowers the states. As Justice O'Connor opined in New York v. United States, the authority of Congress under the Constitution may be examined in two ways:

In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

107. See supra Pt. II(A)(1).
109. Id. at 155-56 (citations omitted); but see Martin H. Redish, Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal
Thus not only can states challenge federal acts which impede on their traditional powers, they can also attempt to intrude on federal authority. This is a consequence of a revived federalism which has become a powerful, substantive tool of constitutional law.110

B. The Intersection of New Federalism and Health Information Privacy

As mentioned above,111 an attempt by Congress or DHHS to impose national health information privacy standards involves a collision of inter-governmental interests, thus implicating federalism. The federal government’s interest in nationalizing privacy protections naturally overlaps the states’ interests in setting their own privacy standards. Can these interests be accomplished coextensively? Theoretically perhaps, but realistically no. As argued below, principles of federalism suggest that (1) while the federal government may have the power to regulate health information privacy, it cannot totally preempt state health information privacy laws to homogenize protections; and (2) because states have traditionally regulated health information privacy, the federal government’s ability to regulate in this area is limited. The federal government cannot compel states to legislate in the interests of national uniformity and may not subject states to liability for failure to adhere to federal laws. Furthermore, states serve a valued role in protecting health information privacy which federalism suggests cannot be discounted.

1. Congressional Powers

Though regulating health information privacy at the national and state levels implicates federalism concerns, the issue is not whether Congress or DHHS (with congressional authority) has the constitutional power to enact national health information privacy standards. Congress has ample authority in this area. Consistent with principles of federalism, Congress can utilize its power to regulate interstate commerce112 to nationalize privacy protections of health data exchanged (inter- or intra-state) by

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111. See supra Pt. II(A).

112. See U.S. Const. art. I, § 8, cl. 3.
commercial entities (e.g., health care providers, data processors, health insurers). It can offer states a choice pursuant to the Commerce Clause between regulating activity according to federal standards, or having state law preempted by federal regulation, in the spirit of "cooperative federalism." Federal laws like the Americans with Disabilities Act or the Family and Medical Leave Act feature such provisions.

The Court's recent decision, *Reno v. Condon*, clarifies the commerce powers of Congress to regulate in the interest of protecting individual privacy. The Court held that the Driver's Privacy Protection Act of 1994 (DPPA), which restricts the disclosure of personally-identifiable information held by state motor vehicle departments (DMVs), is a proper exercise of

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114. *Id.* (citing *Hodel*, 452 U.S. at 289).


117. 120 S. Ct. 666 (2000).


119. "Personal information" means 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." 18 U.S.C. § 2725(3).

120. The DPPA protects individual privacy consistent with the "privacy formula." *See supra* Pt. I(C)(2). The Act restricts states' ability to disclose a driver's personal information without the driver's consent by generally prohibiting state DMVs from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record" without individual consent. 18 U.S.C. § 2721(a). Pursuant to a recent amendment to the DPPA, states may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure. Instead, states must obtain a driver's consent to disclose the driver's personal information. 18 U.S.C. § 2721(d).

Consistent with the second caveat of the "privacy formula," the DPPA's prohibition of disclosures without consent is subject to a number of statutory exceptions, including disclosures for (A) use in connection with matters of motor vehicle or driver safety and theft, emissions, product alterations, recalls, advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records by motor vehicle manufacturers to carry out federal programs, see 18 U.S.C. § 2721(b)(2); (B) use "by any government agency" or by "any private person or entity acting on behalf of a Federal, State or local agency in carrying out its functions," 18 U.S.C. § 2721(b)(1); (C) any state-authorized purpose relating to the operation of a motor vehicle or public safety, see 18 U.S.C. § 2721(b)(14); (D) use by a business to verify the accuracy of personal information, see 18 U.S.C. § 2721(b)(3); (E) court, agency, or self-regulatory body proceedings, see 18
Congress' authority to regulate interstate commerce.\textsuperscript{121} Congress passed the DPPA in 1994 in response to the well-publicized case of an actress murdered by a stalker who obtained her address through California motor vehicle records.\textsuperscript{122} The Court held that personally-identifiable information contained within motor vehicle records is a "thin[ge] in interstate commerce," and is thus appropriate for federal regulation.\textsuperscript{123}

The Court was unpersuaded by arguments raised by several states\textsuperscript{124} and spearheaded by the South Carolina Attorney General that the DPPA violated principles of federalism. Reversing two lower court decisions,\textsuperscript{125} the Court found that the DPPA does not require (1) states in their sovereign capacity to regulate their own citizens,\textsuperscript{126} but rather regulates states as "owners of databases"; (2) state legislatures to enact any laws or regulations; and (3) state officials to assist in the enforcement of federal statutes regulating private individuals. As a result, the DPPA does not impede on the sovereign authority of states in violation of the principles of federalism.\textsuperscript{127}

While \textit{Reno} suggests Congress may utilize its commerce power to regulate health information, Congress also has other powers at its disposal. It can encourage uniform state regulation

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\item U.S.C. § 2721 (b) (4); (F) research purposes provided the information is not further disclosed or used to contact the individuals to whom the data pertain, \textit{see} 18 U.S.C. § 2721 (b) (5); (G) use by automobile insurers, \textit{see} 18 U.S.C. § 2721 (b) (6); (H) notifying vehicle owners that their vehicle has been towed or impounded, \textit{see} 18 U.S.C. § 2721 (b) (7); (I) use by licensed private investigative agencies or security services, \textit{see} 18 U.S.C. § 2721 (b) (8); and (J) private toll transportation services, \textit{see} 18 U.S.C. § 2721 (b) (10).
\item 121. \textit{See Reno}, 120 S. Ct. at 671.
\item 122. \textit{See Joan Biskupic, Court Backs Privacy For Data on Drivers, WASHINTON Post, Jan. 13, 2000, at A1.}
\item 123. \textit{See United States v. Lopez, 514 U.S. 549, 558-59 (1995)}:
The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.
\item 126. \textit{See Reno, 120 S. Ct. at 668.}
\item 127. \textit{See id. at 668.}
\end{itemize}
or offer incentives to influence policy choices made by states. For example, pursuant to its power to tax and spend,\textsuperscript{128} Congress may attach conditions on a state's receipt of federal funds. So long as Congress' conditions bear some relationship to the purpose of federal spending,\textsuperscript{129} it can require states to adopt and administer health information privacy standards.

2. The Question of Preemption

Even if Congress has the constitutional authority to regulate, can it politically implement comprehensive health information privacy standards? This is a central federalism question. As discussed above,\textsuperscript{130} national, broadly preemptive standards are needed to fully and uniformly protect health information privacy. Congress has the power to totally preempt all state health information privacy laws to accomplish this goal. However, principles of federalism require Congress to be explicitly clear in its intent to preempt state law in core areas traditionally under state control, including state health information privacy laws. The clarity of federal language needed to totally preempt state laws in this capacity acts as a "red flag," warning federal legislators, state governments, and other interested parties of the potential for federal control over a traditional, state-based matter. Unless the need for federal control is overwhelming, the proposed legislation is altered by the response of states and their congressional representatives.

The reality of federalism as a political construct is readily seen in existing federal health information policy which suggests that federal law should set minimum standards for protecting health information privacy, allowing states to create higher standards. Furthermore, congressional and DHHS' proposals specifically exempt uses and disclosures of identifiable health information for public health purposes. This broad exemption, which greatly relies on what constitutes "public health" in a given state, is reflective of federalism where regulating public health

\textsuperscript{128} See U.S. Const. art. I, § 8.

\textsuperscript{129} See, e.g., South Dakota v. Dole, 483 U.S. 203, 206 (1987) (upholding federal law allowing Secretary of Transportation to withhold federal highway funds from states failing to prohibit persons under twenty-one years old from purchasing alcohol). The Court declared that exercises of the conditional spending powers are valid subject to several restrictions: (1) they must be in pursuit of the general welfare in the discretion of Congress; (2) Congress must condition federal funds unambiguously; (3) the conditions must be reasonably related to the particular federal program or national interest; and (4) they must not otherwise be coercive or in violation of other constitutional provisions. See id.

\textsuperscript{130} See supra I(C)(3).
has always been a core state function consistent with broad state police powers.131

3. State Liabilities

Assume that health information privacy is sufficiently compelling to rally political support for broadly preemptive federal legislation setting uniform standards for protecting individual privacy interests. Principles of federalism suggest not only that this is politically difficult to accomplish, but also that it may be an inherently flawed strategy. Administering such protections requires enforcement mechanisms which, like the protections themselves, must be uniformly applied. A primary enforcement mechanism is the allowance of civil sanctions for breaches of privacy principles, including suits by citizens against states. Like the federal government, states collect, use, and disclose a large amount of health data about individuals. Comprehensive national privacy restrictions would view states as any other actor to the extent they hold identifiable health data.132 As a result, violations of federal law by states would likely subject states to civil sanctions brought by private citizens in federal or state courts. As the Supreme Court held in Seminole Tribe of Florida v. Florida133 and several subsequent opinions,134 the Eleventh Amendment of the Federal Constitution significantly limits Congress' ability to subject sovereign states to citizen suits.

Congress circumvented this issue in passing the Driver's Privacy Protection Act (DPPA). The Act makes it unlawful for any "person" knowingly to obtain or disclose any record for a use that is not permitted under its provisions, or to make a false representation in order to obtain personal information from a motor vehicle record.135 Violators may be subject to criminal fines.

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132. Pursuant to its commerce power, Congress can apply uniform provisions concerning information privacy to state and private actors. See Reno v. Condon, 120 S. Ct. 666, 672 (2000):

[We] need not address . . . whether general applicability is a constitutional requirement for federal regulation of the States because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.


134. See supra notes 96-98.

and civil liability through actions brought by aggrieved individuals. The DPPA, however, specifically defines "person" to exclude states and state agencies, thus avoiding the issue of subjecting sovereign states to civil liability at the hands of their own citizens. Congress, however, may be loathe to withhold civil liability sanctions against states by private citizens pursuant to breaches arising under health information privacy legislation where states control a great deal of health data.

4. The Role of States

A federal policy which incorporates broad, preemptive regulations discounts the role of states in regulating health information privacy. The federal government may share jurisdiction in the field, but it may not obliterate the states' role without violating federalism principles on two grounds. First, the federal government cannot easily take over an area of governmental responsibility traditionally reserved to the states (like protecting the privacy of health data). This is a core precept of new federalism. Second, it is not in the interests of the federal government to eliminate state responsibilities in this regard. The federal government is not well-positioned to completely administer health information privacy regulations. It needs state government assistance.

For Congress to guarantee state participation and sharing of responsibility for protecting privacy, it must somehow utilize state resources (e.g., administrative agencies, courts, law enforcement). Congress' ability to require state assistance and adherence to federal privacy policy, however, is complicated. As the Court clarified in Printz v. United States, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." Thus, Congress cannot compel states to pass state legislation in accordance with national privacy objectives (although it may encourage

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136. See 18 U.S.C. §§ 2723(a), 2725(2).
139. States which maintain a "policy or practice of substantial noncompliance" with the DPPA, however, may be subject to civil penalties imposed by the United States Attorney General of not more than $5,000 per day of substantial noncompliance. 18 U.S.C. § 2723(b). Neither the parties nor the Court in Reno found any federalism objection to the imposition of a standard fine by the federal government against states which fail to comply with federal law.
141. Id. at 935.
the passage of state legislation through spending incentives) or require state officials to administer federal privacy regulations (although it may require adherence to privacy laws or administer such regulations directly).

In this regard, federalism constrains the federal government in its attempt to nationalize health information privacy standards through legislation or regulations. Simultaneously, the duties of states to protect individual privacy are preserved. This consequence of federalism is both positive and negative. From the negative view, federalism stands in the way of effective, efficient, and uniform health information privacy protections administered by a central entity (e.g., a federal data protection board). Failing to implement a national standard complicates the exchange of data, allows for inconsistent disclosures of data, may leave some individual’s health data unprotected depending on state law, and is otherwise inconsistent with the development of a national health information infrastructure.

From the positive view, federalism preserves the role of more responsive state and local governments to address and administer privacy protections consistent with their citizens’ needs. While national, uniform protections of individual privacy are desired within the modern health information infrastructure, variable protections are also valuable. A single, comprehensive federal privacy policy cannot possibly protect some health data to the degree needed. For example, citizens in a state with a higher incidence of HIV/AIDS may seek to protect such data more significantly than another state with a relatively small HIV/AIDS population. Variability among health information privacy protections in this example may be needed to protect one state’s HIV/AIDS population from certain types of stigma or discrimination which these citizens have experienced. Such variability, however, cannot flow from a single, federal privacy policy. This, of course, is one of the primary strengths of uniform federal protections: that variability will largely be eliminated thus equalizing individual protections across states.

The conundrum of federalism is that while many may want a national, uniform system of health information privacy protections, ultimately this may not easily be accomplished through

142. See Hodge et al., supra note 6, at 1470.
143. See Gostin, supra note 2, at 516-17.
144. As South Carolina State Attorney General Charles Condon suggested following the Supreme Court’s decision in Reno, “[a] one size-fits-none attempt by the federal government to protect privacy will not work.” Biskupic, supra note 122, at A1.
145. See Gostin, supra note 2, at 517.
national law. This seems perplexing to observers who believe the federal government has the constitutional power to homogenize protections, but fail to understand that the federal government’s authority is limited by the inherent structure of our federalist system. Ultimately, federalism requirements do not prohibit the implementation of national, uniform protections. These protections may derive, for example, from uniform state laws.\textsuperscript{146} The end result—national health information privacy protections—may largely be the same, although the manner in which they are provided must flow from our federalist system of government.

**Conclusion**

The inherent societal and individual goods underlying the protection of the privacy of health data are incontrovertible. Protecting privacy is ethically sustainable and necessary to ensure quality health data within a national health information infrastructure and accomplish communal goals such as health research and public health. Legal protections at the national government level may ensure a single, uniform privacy standard. As this Commentary illustrates, however, regulating health information privacy through national legislation or administrative regulations raises core federalism concerns. While there is support for the nationalization of privacy protections, accomplishing this through federal law is complicated. State and local governments have always had a role in protecting the privacy of individual health data which principles of federalism acknowledge. Ultimately, federalism requires that the role of states be respected which, in turn, limits the ability of the federal government to implement broadly preemptive national privacy protections. This end result of federalism is not preferred where it allows for continued variability of health protections stemming from the myriad of state privacy laws. Yet, allowing state experimentation is an admirable, if not inconvenient, trait of a federalist system of government. Perhaps it is a consequence of federalism which we should adhere.

\textsuperscript{146} Many state laws are sufficiently uniform as to create a virtually equivalent system of laws in these areas (e.g., workers compensation, commercial laws). At least one proposal for uniform state health information privacy law, the Uniform Health Care Information Act of 1985, however, was not well-received by states. See id. at 516.