

A Choice that Leaves No Choice: Unconstitutional Coercion Under Real ID

Michael J. Allen[†]

I. INTRODUCTION

After the tragic events of September 11, 2001, Congress enacted The Real ID Act of 2005 (“Real ID” or “Act”) in response to national security concerns and, in particular, unreliable standards for driver’s licenses and identification cards.¹ Notwithstanding congressional intent, Real ID faces serious opposition across a wide spectrum of political interests—from information privacy advocates and opponents of expansive federal government to proponents of immigrant rights.² Several state legislatures have enacted either objections to or rejections of Real ID’s licensing requirements, while other state legislatures have introduced similar bills for debate.³

† J.D. candidate, Seattle University School of Law, 2009; B.A., University of California at Los Angeles. I dedicate this Comment to the memory of my father, Stephen P. Allen (B.A. ‘57), whose love, encouragement, and unflagging support made my pursuit of a legal education possible. I also wish to thank Peter Smith, Magdalena Bragun, and the members of the *Seattle University Law Review* for their thoughtful and thorough input. Lastly, I owe my biggest debt of gratitude to my loyal, patient, and loving wife, Irina, who sacrifices so much to serve our family as I am so often absent with work and study.

1. Real ID Act of 2005, 49 U.S.C. § 30301 (2005). President George W. Bush ordered the 9/11 Commission at its inception to provide Congress with recommendations for the prevention of future terrorist attacks. See Arianna Garcia, Comment, *The Real ID Act and the Negative Impact on Latino Immigrants*, 9 SCHOLAR 275, 281 (2007). Representative James Sensenbrenner, who introduced the bill in the House, stated: “The goal of the Real ID Act is straightforward: it seeks to prevent another 9/11 type attack by disrupting terrorist travel.” *Id.* at 285.

2. Alexandra Marks, *Why States Are Resisting U.S. on Plan for REAL I.D.*, CHRISTIAN SCI. MONITOR, Nov. 5, 2007, available at <http://www.csmonitor.com/2007/1105/p02s01-usgn.htm>. See also ACLU, SCORECARD ON FINAL REAL ID REGULATIONS (2008), available at http://www.aclu-co.org/documents/Real_ID-Regs_Scorecard_JAN08.pdf.

3. See *infra* Part II.

Despite calls to repeal the Act, some states still plan to comply.⁴ The Department of Homeland Security (DHS), the federal agency responsible for implementing the statute and enforcing compliance, remains resolute in its commitment to implement the licensing provisions. DHS issued final regulations on January 29, 2008.⁵ Although these regulations take into consideration over 21,000 public comments,⁶ public concern persists.⁷ Governor Brian Schweitzer of Montana has urged a third of the nation's state governors to join him in opposing the implementation of Real ID.⁸ Despite this opposition, however, on January 1, 2010, citizens of states not in compliance with the mandatory minimum requirements of Real ID may not use state-issued driver's licenses or

4. Under DHS's implementing regulations, states had until March 31, 2008, to request an extension of the initial May 11, 2008 compliance deadline, or they would have been subject to DHS enforcement of the statute restricting the use of non-compliant identification documents for air travel or access to certain federal facilities. See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5274 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37) ("DHS wants to make clear that effective May 11, 2008, individuals from States who have not obtained an extension of the compliance date from DHS, or who have not submitted a Compliance Package to DHS under the deadlines provided by the final rule, will not be able to use their State-issued license for federal official purposes, including for identification to board a commercial airplane."). While most states formally requested the official extension until December 31, 2009, some states adamantly and publicly refused to request any extension from DHS (notably Montana, South Carolina, and Maine). However, DHS acted unilaterally before March 31, 2008, to grant extensions in the absence of formal requests for those states, so that as of the publication of this Comment, all states have until December 31, 2009, to meet the compliance deadline set by DHS regulations. DHS's actions effectively defer the deadline until after a new president will take office. See Eric Kelderman, *Real ID Showdown Averted*, STATELINE.ORG, Apr. 4, 2008, <http://stateline.org/live/details/story?contentId=297809> ("With the immediate crisis averted, the next showdown could come at the end of the extension, in January 2010, when there will be a new Congress, a different president and very likely another secretary of homeland security.").

5. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37). DHS appears determined to enforce fully the restrictions imposed by Real ID upon holders of non-compliant licenses or identity documents. In a recent interview, DHS spokesperson Laura Keehner, responding to allegations that the federal government will not sanction citizens of states that opt out of the Real ID program, stated: "There will be a practical consequence for residents of states whose leadership chooses the status quo and accepts noncompliant licenses. For example, they will not [be] able to fly on an aircraft or enter a federal building with a noncompliant license." See Spencer S. Hsu, *Homeland Security Retreats From Facets of 'Real ID'*, WASH. POST, Nov. 4, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/11/03/AR2007110300890_.

6. See DEP'T HOMELAND SECURITY, REGULATORY RULEMAKING, 6 C.F.R. PT. 37, FINAL EVALUATION 26 (2008), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480538c1b>.

7. See, e.g., ACLU, *supra* note 2.

8. Schweitzer Seeks Allies Against Real ID, BILLINGS GAZETTE, Jan. 19, 2008, available at <http://www.billingsgazette.net/articles/2008/01/19/news/state/35-schweitzer.txt>. In regards to Montana's intentions to participate in Real ID, Governor Schweitzer has commented, "No. Nope. No way. Hell no." See *Governor Signs Law Rejecting Real ID Act*, BILLINGS GAZETTE, Apr. 18, 2007, available at <http://www.billingsgazette.net/articles/2007/04/17/news/state/28-law.txt>.

identification cards to pass airport security or to access certain federal facilities.⁹

Real ID restricts using driver's licenses or other identification cards for federal purposes, such as air travel, unless the states issuing the documents comply with Real ID's requirements.¹⁰ State-issued driver's licenses are currently the de facto standard identification document within the United States.¹¹ Citizens and other residents most frequently rely upon driver's licenses to establish personal identity and obtain other forms of identification.¹² Because states produce licenses using different standards and procedures, proponents of Real ID argue that relying upon state-issued driver's licenses for personal identification creates a security risk that only federal standards can mitigate.¹³ In response, states opposing Real ID protest that the Act is an attempt by the federal government to coerce state compliance with federally mandated standards for driver's licenses, resulting in a de facto national identification system.¹⁴

9. Real ID went into effect on May 11, 2008. As of the writing of this Comment, DHS has granted initial compliance extensions to all fifty states. However, the initial extension period will expire on December 31, 2009. Thereafter, an additional extension until May 11, 2011 will only be available to those states that request an extension and are deemed by DHS to be in material compliance with eighteen prescribed milestones. DHS has singled out a state's ability to verify immigration status in the United States as one of the most important of those milestones. See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. at 5274. DHS admits that citizens of non-Real ID compliant states "will likely encounter significant travel delays." See *id.*

10. Real ID Act of 2005, 49 U.S.C. § 30301 (2005).

11. Serge Egelman & Lorrie Faith Cranor, *The REAL ID Act: Fixing Identity Documents with Duct Tape*, 2 *IS J.L. & POL'Y INFO. SOC'Y* 149, 150 (2006), available at <http://www.is-journal.org/V02I01/2ISJLP149.pdf>. All fifty states include photographs on the driver's licenses they issue. Approximately 227 million people hold driver's licenses or identification cards issued by states and the states collectively issue or renew nearly 70 million such documents each year. Randall Mikkelsen, *U.S. Readies "Reasonable" ID Card Rules After Debate*, *FIN. EXPRESS*, Jan. 12, 2008, <http://www.financialexpress.com/news/US-readies-reasonable-ID-card-rules-after-debate/260393/>.

12. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10,820, 10,827 (Mar. 9, 2007) (to be codified at 6 C.F.R. pt. 37).

13. See Delvin Barrett, *US Unveils New Driver's License Rules*, *NEWSVINE.COM*, Jan. 10, 2008, http://www.newsvine.com/_news/2008/01/10/1218356-us-unveils-new-drivers-license-rules.

14. See *infra* Part II.A. Privacy experts echo this contention. See *ELEC. INFO. PRIVACY CTR. (EPIC) ET AL., COMMENTS ON DEPARTMENT OF HOMELAND SECURITY'S NOTICE OF PROPOSED RULEMAKING: MINIMUM STANDARDS FOR DRIVER'S LICENSES AND IDENTIFICATION CARDS ACCEPTABLE BY FEDERAL AGENCIES FOR OFFICIAL PURPOSES 2-3*, available at http://epic.org/privacy/id-cards/epic_realid_comments.pdf [hereinafter *EPIC Comments*]; see also Letter from Mark Sanford, Governor of South Carolina, to Michael Chertoff, Secretary of the Department of Homeland Security (Mar. 31, 2008), available at <http://www.realnighmare.org/news> [hereinafter Letter from Mark Sanford to Michael Chertoff] ("Real ID upsets the balance of power between the federal government and the states by coercing the states into creating a national ID system for federal purposes."). This Comment argues that by embracing compliance with the Act, states must surrender their historical right to regulation driver licensing; by rejecting the Act, states risk exclud-

States should challenge the Real ID under the federalism principles enshrined in the Tenth Amendment, although the Act's driver licensing provisions infringe on both individual and state constitutional rights. A state challenge under the Tenth Amendment is more likely than modern individual rights jurisprudence to succeed in striking down Real ID. Arguing that the federal government impermissibly coerces state action under the Act will better protect both states and individual rights and succeed in having the Act overturned.

Part II of this Comment provides a historical context for the enactment of Real ID and describes its reception by the states. Part III surveys relevant principles of constitutional federalism and discusses three Supreme Court cases commonly cited by states opposing the Act. Part IV argues that the statutory scheme under Real ID interferes with state sovereignty protected by the Tenth Amendment and potentially violates fundamental individual constitutional rights. Finally, Part V concludes that judicial enforcement of the Tenth Amendment in the context of Real ID vindicates both the integrity of state governments and important rights of state citizens.

II. BACKGROUND

Before considering the constitutional concerns with the driver licensing provisions in Real ID, one must understand the history surrounding public resistance to national identification cards and the enactment of Real ID. This Part describes the historical opposition toward a national identification system in the United States and analyzes the primary provisions of the Act, its implementing regulations, and the opposition these provisions face from state governments.

A. National Identification Resistance and the Enactment of Real ID

The debate over whether to implement a national identification card is not new. The federal government introduced Social Security numbers (SSN) in 1936 to serve as account numbers for Social Security benefits.¹⁵ Although the use of the SSN has expanded considerably, particularly in the age of electronic commerce, politicians and the public have consistently rejected efforts to make them universal identifiers.¹⁶ During his administration, President Reagan strongly opposed a proposal by the At-

ing their citizens from access to important federally regulated services, such as domestic air travel and access to federal courts. See discussion *infra* Part IV.

15. For a detailed discussion of the historical opposition of American citizens to national identification card proposals, see *EPIC Comments*, *supra* note 14.

16. In 1977, the Carter Administration reiterated that the SSN was not to become an identifier. See *id.*

torney General that an identification card system was necessary to reduce illegal immigration.¹⁷ Congress has struck down similar proposals to improve the integrity of Social Security cards by converting them into photo identification.¹⁸

Public resistance toward a national standardization of identification documents endures today. For example, a section of the Illegal Immigration Reform and Immigrant Responsibility Act of 1999 (IIRIRA)¹⁹ imposed federal standards for state driver's licenses and birth certificates used as identification for federal purposes.²⁰ The section met widespread public criticism, with opponents alleging that its passage was a step toward a national identification system.²¹ The subsequent enactment of Real ID has rekindled heated opposition against standardizing identification documents.

Historically, states control the licensing of drivers within their territories. Before the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) passed,²² states were completely responsible for determin-

17. Dennis Behreandt, *Pushing National IDs: Congress Tried Its Best to Shackle the Nation with a National ID Through Passage of the Real ID Act*, NEW AM., July 9, 2007, at 2, available at 2007 WLNR 13759696 (citing account by Stephen Moore of the Cato Institute that a second cabinet member asked Attorney General William French Smith, "Why not tattoo a number on each American's forearm?" President Reagan reportedly responded to the question, "My God, that's the mark of the beast.").

18. See Egelman, *supra* note 11, at 150.

19. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). Before September 11, 2001, bipartisan support grew for legislation aimed at discouraging national standards for identification documents. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, IMMIGRATION ANALYSIS OF MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 29 n.89 (2005), available at <http://fpc.state.gov/documents/organization/42995.pdf>.

20. See GARCIA, LEE, & TATELMAN, *supra* note 19. The provisions offered states the choice between requiring inclusion of an individual's SSN in a machine-readable or visually readable format or requiring that each applicant submit his or her SSN for verification of validity with the Social Security Administration. In the face of public opposition, Congress blocked funding of the implementing regulations for these SSN requirements.

21. See *EPIC Comments*, *supra* note 14, at 29.

22. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004), *repealed in part by* 49 U.S.C. § 3030 (2005). The Act required the establishment of new standards aimed at ensuring the integrity for federal use of birth certificates, state-issued driver's licenses and identification cards, and social security cards; states may receive grants to assist with the implementation of the proposed birth certificate and driver's license standards. See also RICHARD F. GRIMMET, 9/11 COMMISSION RECOMMENDATIONS: IMPLEMENTATION STATUS 3 (2006). This grant incentive program contrasts sharply with the approach taken in Real ID towards imposition of federal standards. Congress permissibly could induce state governments to adopt federal licensing standards through a traditional incentive program. See discussion *supra* Part III. The penalty imposed under the Real ID unconstitutionally coerces state governments to implement federal standards. See discussion *supra* Part IV.

ing the standards for driver's licenses and personal identification cards.²³ Even with the passage of IRTPA, most licensing standards remained subject to the discretion of state and local governments.²⁴ The federal government, however, perceives security vulnerability in this patchwork of differing state standards for driver's licenses.²⁵ Real ID attempts to make licensing processes more secure by requiring uniformity from the states.²⁶

To address these security concerns, Representative F. James Sensenbrenner (R-Wisconsin) introduced the Act²⁷ as a measure that would disrupt terrorist travel and prevent another terrorist attack like the one on September 11th.²⁸ The bill passed the House but encountered resistance in Senate committee.²⁹ Ultimately, Congress tacked the text onto an emergency supplemental appropriations bill that included funding for the war in Iraq and tsunami victims in Southeast Asia.³⁰ The bill passed the

23. See GARCIA, LEE & TATELMAN, *supra* note 19, at 29. For a detailed survey of various state driver licensing practices and procedures, including discussion of post 9/11 security reforms underway across the fifty states, see Egelman, *supra* note 11, at 149.

24. IRTPA contained a number of provisions that appeared significantly less intrusive upon state sovereignty. See GARCIA, LEE & TATELMAN, *supra* note 19, at 29–30. Notably, that legislation mandated a process of negotiated rulemaking pursuant to the Administrative Procedure Act, as opposed to the notice and comment rulemaking permitted under Real ID. *Id.* at 31. The negotiated rulemaking process is intended to include representatives from state and local offices that issue driver's licenses and identification cards, state elected officials, the Department of Homeland Security, and other interested parties. Regulations promulgated under IRTPA must set minimum standards, but they are prohibited from infringing upon a state's power to set criteria for applicant eligibility categories and from requiring a state to take action that conflicts or otherwise interferes with full enforcement of state criteria concerning eligibility categories. IRTPA also prohibits regulations requiring any uniform document design and it includes procedures designed to protect individual privacy rights of applicants. See *id.* at 30–31.

25. Grimmet, *supra* note 22, at 32.

26. Egelman, *supra* note 11, at 152. However, many states contend that they have already independently taken many steps leading toward improved security in their respective driver licensing programs. See Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“[S]outh Carolina has proactively taken steps, without prompting from the federal government, to establish one of the most secure driver's licenses in the country . . . [w]e are making the very security upgrades that REAL ID calls for and are ahead of many states in doing so.”).

27. See Garcia, *supra* note 1, at 285–89 (discussing the treatment of the introduction of the Act and the related congressional debate); see also Manoj Govindaiah, Comment, *Driver Licensing Under the Real ID Act: Can Current Technology Balance Security and Privacy?*, 2006 U. ILL. J.L. TECH. & POL'Y 201, 202–03 (2006).

28. According to the 9/11 Commission Report, some of the terrorists in the 9/11 attacks had obtained valid driver's licenses that they used to board the airplanes, despite the hijackers' lack of lawful immigration status. See Garcia, *supra* note 1, at 285.

29. Some senators expressed grave concern about the licensing provisions of the Act. For example, Senator Lieberman (CT-D) spoke out against the Real ID Act on the Senate floor: “The Real ID Act would repeal much of the work from last year, and replace it with provisions that impose on state governments unworkable standards for driver's licenses.” See *id.* at 287 n.87.

30. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

House by a 368-58 vote³¹ and passed the Senate unanimously, although some members urged removal of the Real ID provisions.³²

B. The Provisions of Real ID and Proposed Implementing Regulations

Real ID restricts the use of state-issued driver's licenses or identification cards for federal purposes unless states implement the Act's licensing requirements. The Act mandates that the states comply with standards affecting the issuance and appearance of driver's licenses and identification cards and maintain motor vehicle databases that contain specific personal information about state citizens.

Section 202 is the meat of Real ID. It provides: "Beginning three years after the date of the enactment of this division, a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a state to any person unless the state is meeting the requirements of this section."³³ The Act expressly repeals the previous Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),³⁴ which had included potentially conflicting provisions regarding national standards for driver's licenses.³⁵ Although Real ID does not directly impose federal standards upon the states, state governments must adopt federal standards and modify any conflicting laws to ensure that state driver's license or identification cards are recognized for official federal purposes.³⁶ Specifically, the Act requires particular (1) eligibility criteria, (2) procedures, and (3) database sharing.

First, to issue a driver's license or identification card, the Act requires states to verify the issuance, validity, and completeness of certain personal identification documentation or personally identifiable information.³⁷ Furthermore, in a significant change from the status quo, states must also verify an applicant's lawful status in the United States before issuing a driver's license or identification card.³⁸ The Act identifies several categories of lawful status, many of which are temporary immigra-

31. See Garcia, *supra* note 1, at 286 n.86 (citing GARCIA, LEE & TATELMAN, *supra* note 19, at 29).

32. *Id.* at 287 n.87.

33. 49 U.S.C. § 30301.

34. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

35. GARCIA, LEE & TATELMAN, *supra* note 19, at 31.

36. *Id.* at 31 n.102.

37. 49 U.S.C. § 30301 (requiring presentation for verification of either: (1) a photo identification document, or a non-photo document containing both the individual's full legal name and date of birth; (2) date of birth; (3) proof of a SSN or verification of the applicant's eligibility for an SSN; and (4) name and address for the individual's principal residence).

38. See GARCIA, LEE & TATELMAN, *supra* note 19, at 31-32. IRTPA expressly prohibited agency regulation that interferes with this historical state authority over eligibility categories.

tion statuses subject to DHS jurisdiction.³⁹ It also establishes a system of temporary driver's licenses and identification cards for issuance to certain temporary residents and sets the maximum validity period for any regular driver's license at eight years.⁴⁰

Second, Real ID mandates particular licensing procedures.⁴¹ Even the physical appearance of a driver's license or identification card falls within the purview of the statutory standards. States that issue non-compliant driver's licenses must indicate to federal officials, by a unique design or color on the face of the card, that the card is not acceptable for federal purposes.⁴² Furthermore, proposed DHS regulations specify the type of identification information that states must include on these documents.⁴³

Third, the Act requires states to maintain and share motor vehicle databases. The databases must contain all data fields printed on driver's licenses or identification cards as well as driver histories, including mo-

39. 49 U.S.C. § 30301. The classes of residents whose immigration status must be verified by the state include lawful permanent residents; conditional permanent residents; approved asylum applicants; holders of valid, unexpired nonimmigrant visa status; applicants for temporary protected status; and individuals with pending applications for adjustment of status. Neither the Act nor the proposed DHS regulations require that documents include citizenship information, although some states have expressed interest in having Real ID compliant documents serve as land and sea border crossing documents for their citizens under the Western Hemisphere Travel Initiative.

40. Before Real ID, states were free to establish validity periods as they saw fit. In contrast, under Real ID, temporary licenses are to be issued for a validity period coterminous with the applicant's underlying period of authorized stay in the United States. The statute requires clear identification of temporary cards on the face of the document. *Id.*

41. Real ID requires states to adopt the following procedures and practices: (1) employ technology to capture digital images of identification source documents such as birth records; (2) retain paper copies of source documents for a minimum of seven years or images of source documents for a minimum of ten years; (3) subject each applicant to a mandatory biometrics image capture; (4) confirm with the Social Security Administration a SSN presented by an applicant by using the full SSN; (5) subject all persons authorized to manufacture or produce driver's licenses or ID documents to appropriate security clearance requirements; (6) refuse to issue a new card to a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated that prior driver's license; and (7) establish training for state licensing employees to identify fraudulent documents. See GARCIA, LEE & TATELMAN, *supra* note 19, at 32–33 (summarizing select provisions of 49 U.S.C. § 30301).

42. See *id.* at 33. Although this provision apparently permits states to continue issuing non-compliant licenses and identification documents, it obliges state governments to notify federal agents of the decision to issue non-compliant documents.

43. See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10,820 (Mar. 9, 2007) (to be codified at 6 C.F.R. pt. 37). DHS's Notice of Proposed Rulemaking (Proposed Rule) stipulates the following biographic and information and security features: full legal name; date of birth; gender; a unique driver's license number or other identification card number (not the SSN); a full facial digital photograph; address of principal residence; expiration dates; signature; certain physical security features; and a common, machine-readable technology.

tor vehicle violations and suspensions.⁴⁴ In particular, this requirement has greatly troubled proponents of individual privacy who are concerned about the security of personal data within massive, integrated databases.⁴⁵ Many fear that an integrated system of state databases could offer malefactors a one-stop-shop for personal information.⁴⁶ The standardization of information and interstate integration of state databases increase the likelihood that Real ID-compliant cards will become a national identification card of the kind feared and reviled by many citizens.⁴⁷

In its proposed rule, DHS acknowledges at least three key privacy concerns presented by the Act: (1) the connectivity of the databases; (2) the protection of personal information stored in the state databases; and (3) the protection of personal information stored on machine-readable technology on the license or identity documents.⁴⁸ However, DHS states that the recommended architecture for implementing interstate data exchanges does not create a national database because it leaves the meth-

44. See GARCIA, LEE & TATELMAN, *supra* note 19, at 33–34. For a thorough treatment of the privacy related issues raised by Real ID’s licensing provisions, as well as formal objections submitted to DHS by privacy experts, see *EPIC Comments*, *supra* note 14.

45. Many privacy experts cite vulnerabilities in large databases containing personally identifiable data and harshly criticize the legislation for failing to include language that expressly provides minimum privacy standards. As acknowledged by DHS in its Notice of Proposed Rulemaking, “[t]he Act does not include statutory language authorizing DHS to prescribe privacy requirements for state-controlled databases or data exchanges necessary to implement the Act. This is in sharp contrast with the express authorization in section 7212 of IRTPA, which was the prior state licensing provision repealed by the Real ID Act.” See Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10,825.

46. See Edwin Yohnka, *Real ID Act Could Be a Real Nightmare for Privacy*, CHI. SUN TIMES, May 19, 2007. Hacking into driver’s license databases is a growing problem nationally. Interoperability and integration of state databases under Real ID could create an attractive target for hackers, who by exploiting one weak point in the system architecture could gain access to a treasure trove of personal data. EPIC advocates for the use of a meta-system of electronically stored personal information as a superior choice to the type of consolidated, integrated data system required by Real ID. See *supra* note 40; see also Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“To err really is human. Sometimes it is for nefarious purposes, sometimes it is out of boredom—as was the case of the last teenager hacking into Pentagon databases—and still other times it’s borne out of nothing more than curiosity such as when federal employees recently opened the passport files of the country’s three Presidential candidates. But if you accept the reality that mistakes do happen and that bad people do hack into spots they are not supposed to access—does it really make sense to put all this information into a central database rather than have this information housed independently across fifty states?”).

47. See A. Michael Froomkin, *Creating a Viral Federal Privacy Standard*, 48 B.C. L. REV. 55, 81 (2007) (“These new Real ID-compliant cards will probably become de facto national ID cards. At present, there is no sign that the private sector will be prevented from using the cards for authentication or data indexing Thus, even if the new cards do not become full national ID cards, businesses will find these new cards to be such close substitutes for national ID cards. . . .”).

48. See Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10,825.

odology of the data exchanges to the discretion of the states; no federal agencies will operate the data exchanges affecting non-commercial driver's licenses.⁴⁹

Without the Real ID Act, however, states would be under no obligation to share access to their databases and would retain full authority to implement privacy protections suitable to the expectations of their citizenry and consistent with their state constitutions.⁵⁰ Real ID, therefore, limits the discretion of states to choose standards for licensing eligibility, establish procedures for producing identification documents, and maintain data records. Many states vehemently protest this curtailment of freedom.⁵¹

C. State Opposition to Real ID

State opposition to the licensing provisions of Real ID has burgeoned since the law passed in May 2005. Some states have passed legislation rejecting the Act outright and refusing its implementation, while others have proposed legislation to the same effect.

Reasons for this opposition vary, but three consistent themes emerge: high costs, compromised privacy, and a flawed legislative process.⁵² First, many states object to the Act because the timeline for compliance with the new licensing standards is financially unrealistic.⁵³ The National Governors Association estimates that compliance will cost states over \$11 billion within the first five years.⁵⁴ States will need to

49. See *id.* at 10,826 (“These two provisions mandate the State-to-State data exchange, however, the Notice of Proposed Rulemaking contemplates that the States will work out the business process and data access rules necessary to implement these provisions before May 11, 2008 by means of a collective governance structure.”). The proposed regulations cite a preliminary example of such an arrangement by representatives of the DMVs of California, Iowa, Massachusetts, and New York; however, DHS is conspicuously silent as to the expected costs of such a fifty-state collective governance structure. *Id.* Also, DHS indicated in its Notice of Proposed Rulemaking that neither it nor the Department of Transportation will collaborate with states on the privacy protections and access provisions for any state-to-state data exchange. *Id.*

50. See discussion *infra* Part II.C.

51. See *Schweitzer Seeks Allies Against Real ID*, *supra* note 8.

52. Those privacy concerns are (1) the connectivity of the databases; (2) the protection of personal information stored in the states' databases; and (3) the protection of personal information stored on machine-readable technology on the license or identity documents. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10,825.

53. See Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“It seems to me there is something wrong when the federal government imposes the burdens of creating a national ID system on the states—but only pays for two percent of the cost.”).

54. See *Testimony of Massachusetts Attorney General Martha Coakley, Before Joint Committee on Veterans and Federal Affairs*, (2007), available at <http://www.realnighmare.org/images/File/Testimony%20of%20Attorney%20General%20Coakley%20on%20Real%20ID%20Act.pdf> [hereinafter *Coakley Testimony*]; see also NAT'L CONFERENCE OF STATE LEGISLATURES, NAT'L

invest an estimated 21 million person-hours of computer programming to adapt their systems to the eligibility verification and database design requirements.⁵⁵ Although DHS has proposed regulations permitting phased adaptation, high costs remain a serious concern, particularly in the absence of allocated federal funding.⁵⁶ Second, states object that their own constitutions provide greater civil liberty protections than the U.S. Constitution.⁵⁷ Objections based on privacy concerns are especially common.⁵⁸ Finally, despite opposition from more than 600 organizations, the Act passed without sufficient deliberation, and it received neither a hearing by any congressional committee nor a vote solely on its merits.⁵⁹

GOVERNORS ASS'N & AM. ASS'N OF MOTOR VEHICLE ADM'RS, THE REAL ID ACT: NATIONAL IMPACT ANALYSIS 3 (2006).

55. See *Coakley Testimony*, *supra* note 54, at 2.

56. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01, 5281 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37) (describing the implementation timeline for Real ID, which includes a deadline of May 11, 2008, for state certification of compliance with the provisions of the Act). The final rule provides a process for states to seek an additional extension of the compliance deadline to May 11, 2011, by demonstrating material compliance with the core requirements of the Act. *Id.* at 5272. All driver's licenses and identification cards must be Real ID-compliant by May 11, 2014, for people born after December 1, 1964, and by December 1, 2017, for those born on or after December 1, 1964. *Id.* In promulgating its final regulations, DHS claims that this initial estimate will be reduced significantly to a cost of \$3.9 billion, a reduction achieved by regulations that permit states greater flexibility in issuing Real ID compliant licenses to older Americans, who must obtain Real ID compliant documentation by December 1, 2014. See Press Release, Dep't of Homeland Sec., DHS Releases Real ID Regulation (Jan. 11, 2008), available at http://www.dhs.gov/xnews/releases/pr_1200065427422.shtm (last visited Aug. 11, 2008).

57. Citing data privacy concerns, Washington's statute prohibits implementation or funding of the statutory program in the absence of federal funding and heightened privacy protections. The legislation also authorizes the state Attorney General to raise a legal challenge to the Act at the agreement of the Governor. See S.B. 5087, 60th Leg., Reg. Sess. (Wash. 2007).

58. The proposed DHS rule does not make states accountable for personal data they are required to collect. Common machine-readable technology mandated by the Act will put all information appearing on the front of the license (and possibly other personally identifiable data) in wide circulation with government officials and businesses. Such technology permits easy, computerized transfer of data on cards to private parties. Even if successful data protection were possible, personal data could be harvested by private companies able to develop parallel for-profit databases on citizens. See *Coakley Testimony*, *supra* note 54.

59. Legislation by both New Mexico and Massachusetts stresses the insufficiency of congressional deliberation on the merits of Real ID, which passed as part of a broader appropriations bill that included funding for war effort and natural disaster relief. See, e.g., Mont. Code Ann. § 61-5-128 (2007); S. J. Memorial 11, 48th Leg., 1st Sess. (N.M. 2007); S.B. 2138, 185th Gen. Court (Mass. 2007).

At least eighteen states have enacted legislation rejecting Real ID.⁶⁰ Maine was the first state to take action, but recently Montana has led the charge in barring the law's implementation. Montana's governor, Brian Schweitzer, is asking other governors to join Montana in resisting compliance with Real ID and not accepting the "Faustian bargain" of applying for an extension to comply from DHS.⁶¹ Montana's legislature enacted a statute asserting that Real ID effectively creates a national identification card; the statute invoked federalism principles that the implementation of Real ID would violate.⁶² Authors of the Montana legislation claim that rather than achieving Congress's goal of increasing security measures to thwart terrorists, the Act will provide fodder for identity thieves.⁶³ In addition, Nebraska's legislature brands the Act as intrusive upon the State's sovereign power to determine its own policies for identification, licensing, and credentialing its residents.⁶⁴ Nebraska views the

60. The states are Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Maine, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, South Carolina, and Washington. ACLU, *Anti-Real ID Legislation in the States*, REALNIGHTMARE.ORG, <http://www.realnighmare.org/news/105> (last visited Aug. 16, 2008). As of the writing of this Comment, Arizona is the latest state to join the ranks of states directly opposing the implementation of Real ID. Governor Napolitano signed legislation into law on June 17, 2008, that prohibits the executive branch from implementing or administering the provisions of the Act. See Matthew Benson, *Napolitano: Real ID a No-Go in Arizona*, ARIZ. REPUBLIC, Jun. 18, 2008 ("HB 2677 is a rare recent example of broad, bipartisan agreement at the state Capitol, with the Democratic governor and GOP-led Legislature finding common ground in their opposition to Real ID.").

61. See Letter of Brian Schweitzer, Governor of Mont., to Bill Ritter, Governor of Colo. (Jan. 18, 2008) (on file with author). Governor Schweitzer notes that Montana "recognized that Real ID was a major threat to the privacy, constitutional rights, and pocketbooks of ordinary Montanans." *Id.* He claims the passage of Montana's bill barring implementation of Real ID "[s]ent a strong message to Washington that this unfunded mandate needed to be repealed, and I'm proud to say Montana's two U.S. senators have gotten behind efforts to do just that at the federal level." *Id.* In his appeal to Governor Ritter, he concludes, "If we stand together, either DHS will blink or Congress will have to act to avoid havoc at our nation's airports and federal courthouses." *Id.*

62. MONT. CODE ANN. § 61-5-128 (2007) ("Whereas, the mandate to the states, through federal legislation that provides no funding for its requirements, to issue what is, in effect, a national identification card appears to be an attempt to 'commandeer' the political machinery of the states and to require them to be agents of the federal government, in violation of the principles of federalism contained in the 10th amendment to the U.S. Constitution, as construed by the United States Supreme Court in *New York v. United States*, 505 U.S. 1041 (1992), *United States v. Lopez*, 514 U.S. 549 (1995), and *Printz v. United States*, 521 U.S. 898 (1997)."). Montana's enactment contains nearly identical language to that used by Missouri and Tennessee. See *id.*

63. See *Montana Is Trying to Fight Off the National ID Card*, MONT. LAW. 6 (2007). Similarly, Arkansas' measure claims that Real ID's provisions requiring machine-readable technology would convert state-issued driver's licenses into tracking devices; the legislation also states that Real ID coerces the states by threatening the freedoms of their citizens. H.B. 2528, 86th Gen. Assem., Reg. Sess. (Ark. 2007).

64. Leg. Res. 28, 100th Leg., 1st Reg. Sess. (Neb. 2007).

provisions restricting access to federal facilities and air travel for citizens of non-compliant states as a threat by the federal government.⁶⁵

The legislatures of at least thirteen other states have proposed legislation similar to that enacted in opposition to Real ID.⁶⁶ For example, Massachusetts proposed legislation that explicitly authorizes the Commonwealth's Attorney General to mount a constitutional challenge to the Act.⁶⁷ The Massachusetts bill notes that the Constitution joined sovereign states in a federal system through Article IV and the Tenth Amendment and stresses that driver licensing is historically a state concern.⁶⁸

III. FEDERALISM PRINCIPLES

Basic federalism principles provide context for evaluating these state sovereignty concerns. Federalism "refers to the sharing of power between two separate levels of government, each representing the same people."⁶⁹ The federalist system enshrined in the structure of the Constitution is expressed in the Tenth Amendment, which affirms that the "powers not expressly delegated by the Constitution to the federal government are reserved by the States or the people."⁷⁰ This system of dual sovereignty benefits the people by maintaining the balance of governmental power and checking tyranny by the federal government.⁷¹

65. Nebraska characterizes restrictions imposed by Real ID as refusing to citizens of non-compliant states the privileges and immunities enjoyed by citizens of compliant states. *See id.*

66. *See supra* note 59.

67. S.B. 2138, 185th Gen. Court (Mass. 2007).

68. *See id.* ("Licensing of motor vehicle drivers and the regulation of motor vehicles has been considered as a state responsibility for more than one hundred years."). Massachusetts complains that the provisions of the Act that require verification of citizenship or immigration status will place the Registry of Motor Vehicles staff on the front lines of immigration enforcement by forcing state employees to determine federal citizenship and immigration status. *Id.* Echoing a common theme among several states, New Mexico's proposed bill stresses the more expansive protections of privacy and civil liberty under its constitution as compared with the federal Constitution. S. J. Memorial 11, 48th Leg., 1st Sess. (N.M. 2007). In addition, as with the legislation of other states, New Mexico affirms that its constitutional values include a higher level of individual protections under the state constitution. *Id.*

69. *See* Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 854 (2006) (quoting DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 20 (1995) ("Federalism is a governmental system that includes a central government and at least one major subnational tier of governments; that assigns significant substantive powers to both levels initially by the provisions of a written constitution; and that succeeds over time in sustaining a territorial division of powers by judicial, operational, and representational political means.")).

70. U.S. CONST. amend. X.

71. *See* Garry, *supra* note 69, at 859–61. As Professor Garry explains, "The Framers believed that by its protections of the pre-existing structure of state governments, the Constitution could safely grant powers to the federal government." *Id.* at 855. "To the extent that it defines state powers, the Constitution does so primarily through negative implication, by setting out certain limited con-

Through the nineteenth century and into the first quarter of the twentieth century, federalism found expression in the Court's jurisprudence.⁷² During that period, the Court used the Tenth Amendment as a limitation on congressional power.⁷³ Beginning in the New Deal Era and extending through the Warren and Burger Courts, however, a nationalist model emerged to expand federal powers.⁷⁴ During that period, the Court did not hold that even one law enacted by Congress exceeded legislative Commerce Clause powers, and it determined that only one federal law violated the Tenth Amendment.⁷⁵

Some scholars have argued that American federalism is an anachronism.⁷⁶ Once appropriate for forging a central government from separate sovereigns, the doctrine was dragged into the modern era despite the development of a stable, centralized national government that better represents the national community.⁷⁷ But the conflict over implementation of Real ID reveals how federalism is as relevant today to preserving the liberties of our national citizenry as it was when the Framers conceived the Constitution.

Several of the states opposing Real ID have invoked Supreme Court cases that scholars argue signal a federalism revival.⁷⁸ The Court's deci-

straints on those powers." *Id.* at 856. A primary rationale behind the principle of federalism was the belief that such a governmental structure would help preserve individual liberty. *See id.* at 852.

72. *See id.* at 862.

73. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 3.9, 246–48 (3d ed. 2006).

74. Garry, *supra* note 69, at 862; *see also* CHERMERINSKY, *supra* note 77, at 254–64 (discussion of expansion of federal regulation under Commerce Clause powers beginning during President Roosevelt's New Deal and extending through most of the twentieth century). *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal law setting wheat production quotas as applied against a farmer who only grew wheat for home consumption and did not sell his crop in interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (upholding federal legislation prohibiting the shipment in interstate commerce of goods manufactured locally within a state by employees paid less than the statutorily prescribed minimum wage and rejecting the view that the Tenth Amendment limits Congress's powers); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 379 (1937) (upholding federal regulation of the steel industry).

75. Garry, *supra* note 69, at 862.

76. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). Professor Vicki C. Jackson refutes this thesis. *See* Jackson, *infra* note 82.

77. *See id.* at 908–13 (noting that modern community has shifted from localized state-oriented community to national community, which is not secured by federalism). Professors Rubin and Feeley argue that according to this rationale, the Court "[s]hould never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it." *Id.* at 909.

78. *See* discussion *supra* Part II.C. That revival followed a long period of expansive congressional regulation of traditionally state-controlled functions under the Commerce Clause. *See* Garry, *supra* note 69, at 851–52, 854 (referring to revival of pre-New Deal Era federalism principles as the Rehnquist Court's "federalism revival").

sions in *New York v. United States*⁷⁹ and *Printz v. United States*⁸⁰ reflect this “new federalism.”⁸¹ In both of those cases, the Court upheld state sovereignty under the Tenth Amendment and traditional federalism principles. This Part assesses the resistance of the Court to define driver licensing as a traditional area of state authority insulated from federal interference and discusses the federalism principles expressed in *New York* and *Printz*.

A. A Traditional Area of State Concern

Real ID treads upon territory traditionally controlled by the states: driver licensing. A survey of state pronouncements on the subject reflects a strong sentiment among state legislatures that driver licensing remains a governmental function that states jealously guard.⁸² States have a compelling interest in determining skill and residency requirements for drivers on their roads; they have direct accountability within the localities protected by this regulation.

Notwithstanding this historical interest in licensing regulation by the states, the Supreme Court has not categorically defined driver licensing as a traditional state governmental function.⁸³ Indeed, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁴ the Court rejected as “unsound in principle” and “unworkable in practice” the utility of attempts to define traditional governmental functions as the measure of state au-

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

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

81. See Garry, *supra* note 69.

82. See discussion *supra* Part II.C. However, as Professor Vicki Jackson explains in her article exploring federalism issues raised by *Printz*, “[f]ocusing on whether a federal statute interferes with constitutionally contemplated functions of state governments may require developing a theory of core state governmental functions, an enterprise begun in *National League of Cities* and abandoned in [*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)].” Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2254–55 (1998). It may be possible to distinguish between uniquely state governmental functions from generally applicable laws such as the Fair Labor Standards Act applied to the states in *National League of Cities*. Professor Jackson suggests that *Lopez* may be characterized as a “mild application of a reinvigorated requirement that Congress’ means of carrying out its powers must be ‘necessary and proper’ to enumerated ends.” See *id.* at 2258. This contrasts with the categorical approach found in *Printz*, which Jackson criticizes as failing to identify a constitutional “doctrine that combines in appropriate degrees recognition of the fundamentally political character of federalism, its overreaching goal of creating a strong national union, and a textually and historically plausible account of when that national power is limited by the constitutionally secured interests of the states.” See *id.*

83. Even so, Congress has successfully extended its power to regulate even matters of traditional state concern under Commerce Clause jurisprudence since the New Deal. CHEMERINSKY, *supra* note 77, at 312–18.

84. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

tonomy under the Tenth Amendment.⁸⁵ In doing so, the Court has rejected the rubric of traditional state governmental functions when evaluating congressional action under the Commerce Clause.

In *Garcia*, the Court overruled its decision from nine years prior in *National League of Cities* and held that the Tenth Amendment does not prohibit Congress from making a general extension of the Fair Labor Standards Act to state employees, thus regulating the state as it does private actors.⁸⁶ In *National League of Cities*, the Court prohibited congressional regulation of states when legislative action infringed upon “traditional governmental functions” historically within the purview of state sovereignty.⁸⁷ In *Garcia*, however, the Court dismissed this functional distinction as unworkable and empirically confusing to the lower federal courts.⁸⁸ The Court reasoned that it was “difficult, if not impossible, to identify an organizing principle” to distinguish between discrete governmental functions.⁸⁹

85. G. Sidney Buchanan, *The Scope of State Autonomy Under the United States Constitution*, 37 HOUS. L. REV. 341, 396 (2000). The notion of traditional areas of state concern subsequently saw some resurgence. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court recognized that some areas of historical state power, including family law, criminal law enforcement, and education, might lie beyond Congress’ Commerce Clause power. *Id.* at 567. In that case, the Court nullified a congressional enactment that outlawed possession of a firearm within 1000 feet of a school and placed an outer boundary on Commerce Clause authority as limited to regulation of those economic activities having a “substantial effect” on interstate commerce. CHEMERINSKY, *supra* note 77, at 265–66 (narrowing definition of interstate commerce to encompass only regulation of (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that have “substantial relation” to interstate commerce, and warning that Congress should not regulate non-economic matters that were an area of traditional state concern). Despite public safety aspects of state licensing, there is an arguably economic aspect to driver licensing, especially given the mobility of modern society. That mobility could provide the substantial relationship to interstate commerce that could bring standardization of driver licensing within the ambit of the Commerce Clause under the rationale in *Lopez*.

86. *Garcia*, 469 U.S. 528.

87. Buchanan, *supra* note 85, at 395.

88. In particular, the Court noted the arbitrary nature of distinctions drawn between areas of traditional and non-traditional concern and observed that “licensing automobile drivers” and “operating a highway authority” were labeled “traditional,” whereas “operation of a mental health facility” was characterized as “nontraditional.” *Id.*

89. 469 U.S. at 539 (“The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental facility, is elusive at best.”). The Court characterized reliance on a historical standard in drawing the functional distinction as “illusory” and “arbitrary.” *Id.* Specifically, it noted that because “[t]he genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, . . . courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.” *Id.* at 544. Further, the majority pointed out that exploration of the traditional or integral nature of state governmental functions may actually constrict state prerogatives because it inevitably invites an unelected federal judiciary to decide which state policies it favors and which it dislikes. See Buchanan, *supra* note 85, at 397 (citing *Garcia*, 469 U.S. at 545–46).

Given this overruling of *National League of Cities*, lower courts would likely hesitate before applying a traditional area of state concern analysis to any judicial review of Real ID or to any similar federal attempt to legislate in the area of driver licensing. The Court has avoided limiting extensions of congressional authority over many traditional areas of state concern in favor of a narrower approach that targets legislation and compels state government action. The decisions in both *New York* and *Printz* reflect this approach.

B. Congressional Coercion: New York v. United States

The Court's decision in *New York v. United States* marks a departure from expanding federal authority through Congress' exercise of its Commerce Clause powers.⁹⁰ Although narrowly held as an exception to those concededly broad powers, the decision reflects a resurgence of Tenth Amendment jurisprudence reminiscent of the early judiciary's solicitude toward state sovereignty within the federal system.⁹¹

In *New York*, the Court struck down the "take title" provision contained within the Low-Level Radioactive Waste Policy Amendments Act of 1985 because the law coerced state legislatures to take action.⁹² Although the enactment was the product of extensive negotiation among the states to address issues of radioactive waste removal and disposal, the State of New York challenged the statute on Tenth Amendment grounds.⁹³

As Professor Buchanan explains in his article *The Scope of State Autonomy Under the United States Constitution*, "[i]n substance, Congress commanded the [s]tates to regulate private actor conduct," namely the creation and disposal of low-level radioactive waste, "[a]ccording to federally prescribed standards."⁹⁴ Ostensibly, the take-title provision gave states a choice: regulate the waste per congressionally mandated standards or receive title to the waste.⁹⁵ The latter amounted to a transfer by Congress of title to the waste from private producers to state governments; the Court likened such transfer to a "congressionally compelled subsidy from state governments to radioactive waste producers."⁹⁶ Writing for the majority, Justice O'Connor reasoned that the Constitution

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

91. *See supra* note 69.

92. *See* 505 U.S. at 185–86.

93. Buchanan, *supra* note 85, at 408–09.

94. *Id.* at 410.

95. *Id.*

96. *Id.* at 409.

would not “authorize Congress to impose either option as a freestanding requirement.”⁹⁷

A choice between two unacceptable options offers no choice at all.⁹⁸ Rather, such a statutory scheme effectively “commandeers” the machinery of state government by forcing it to enact or administer a federal regulatory program.⁹⁹ By depriving the states of free choice, the law “crossed the line distinguishing encouragement from coercion.”¹⁰⁰ As Professor Buchanan argues, “The power to enact laws and promulgate regulations of general applicability within a particular jurisdiction is a fundamental attribute of governmental sovereignty.”¹⁰¹ Although Congress has broad authority to preempt state legislation in a particular field or to induce state legislative action through incentives,¹⁰² it cannot compel states to enact federally prescribed standards into law by threatening to impose a penalty.¹⁰³

97. *New York*, 505 U.S. at 175.

98. *See id.* at 176. For an in-depth discussion of various theories of coercion as applied to the doctrine of unconstitutional conditions, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). In her seminal article on the subject of unconstitutional conditions, Professor Sullivan notes that the Court has repeatedly suggested that the problem with such conditions, whereby the government grants or withholds a particular benefit upon the beneficiary’s surrender of a constitutional right, is their coercive effect. *Id.* at 1428. However, she identifies inconsistencies in the Court’s account of coercion, observing that the Court has never developed a coherent rationale for determining the threshold test for coercion. *Id.* Looking to examples of coercion in both private law and moral philosophy, Professor Sullivan argues that any useful conception of coercion is irreducible normative. *Id.* However, she concludes that the indefiniteness of the Court’s coercion reasoning limits its utility, and she urges looking at other theories in search of a more satisfying rationale to support the doctrine of unconstitutional conditions. *Id.* at 1449–56.

99. Garry, *supra* note 69, at 869 (citing *New York*, 505 U.S. at 188).

100. *Id.* at 868. “The Constitution instead ‘[l]eaves to the several States a residuary and inviolable sovereignty,’ reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.” *New York*, 505 U.S. at 188 (quoting THE FEDERALIST NO. 39, at 245 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

101. Buchanan, *supra* note 85, at 412 (noting that a political entity that loses control of its legislative agenda retains little sovereignty, particularly when that unit is required to enact laws according to the strictures imposed by another political unit).

102. Professor Buchanan refers to this legislative technique as “conditional preemption” whereby Congress conditions state regulation of private actor conduct upon the state’s willingness to regulate conduct in accordance with federally prescribed standards. *Id.* If the state opts out of implementing those federal standards, it suffers no penalty, and Congress simply proceeds to regulate the conduct itself by directly implementing its own standards. *Id.* In both *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981), the Court held that such conditional preemption techniques do not violate state autonomy in violation of the Tenth Amendment. *Id.* at 355–56. Conditional preemption still offers Congress wide latitude to obtain state cooperation with federal policy. Professor Jackson argues that the *Printz* decision reflects the Court’s desire to establish clear rule-setting boundaries for the exercise of that congressional discretion. *See* Jackson, *supra* note 82, at 2211–12.

103. Professor Buchanan observes: “It is an entirely different matter to say that Congress can compel states to enact federally prescribed standards into law.” Buchanan, *supra* note 85. He adds:

In contrast, the dissenting justices in *New York* characterized the nuclear waste-disposal act as “the product of cooperative federalism, in which the states bargained among themselves to achieve compromises for Congress to sanction.”¹⁰⁴ Writing for the dissent, Justice White cited the extensive and complex negotiations among the states that led to the passage of the statute, arguing that New York had “reaped the benefits” of concessions that other states made in the negotiation process.¹⁰⁵

The majority, however, viewed the boundary drawn by its holding as a matter of constitutional principle that did not depend upon complicity of state officials in the legislative process.¹⁰⁶ States cannot bargain away their constitutional protections for a limited legislative purpose.¹⁰⁷ The holding in *New York*, therefore, provides a cogent rationale that can apply to an examination of the coercive effect of Real ID upon state governments. The Court reinforced this rationale with its categorical rejection in *Printz* of any law that compels states to either enact or administer a federal regulatory program.

C. *Commandeering of the State Government: Printz v. United States*

Printz v. United States continued the Supreme Court’s revival of federalism principles as a constraint on national power.¹⁰⁸ In *Printz*, the Court held that the Brady Act’s requirement that local law enforcement officers perform background checks on prospective purchasers of handguns was unconstitutional.¹⁰⁹ The Court viewed the requirement as a congressional command to the states’ executive branches to administer or enforce federal programs, thereby commandeering state governmental personnel into service of the federal government.¹¹⁰ Authoring the majority opinion, Justice Scalia broadly interpreted the reasoning in *New York* to identify a clear-cut rule against federal “commandeering” of state legislative or executive officials. In doing so, he drew upon historical

“If the Tenth Amendment contains any ‘invisible radiation’ that prohibits congressional encroachment on state autonomy, surely the facts of *New York* represent a case in which that radiation should be judicially recognized.” *Id.*

104. 505 U.S. at 189–94 (White, J., dissenting).

105. *Id.*

106. *Id.* at 182.

107. *Id.* (“Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”).

108. 521 U.S. 898 (1997). For a thorough analysis of the *Printz* decision, see Jackson, *supra* note 91, at 2181. Professor Jackson views *Printz* as a part of the natural progression of decisions showing increased sensitivity toward federal influence over state governments. *Id.*

109. 521 U.S. at 935.

110. *Id.* at 926–28.

understanding and practice and found “essential postulates”¹¹¹ in the structure of the Constitution that control its meaning even if not articulated elsewhere.¹¹²

The reasoning in *Printz*, thus, sets forth a “categorical principle” that Congress may not coerce state governments into carrying out a federal regulatory agenda.¹¹³ Although the licensing provisions of Real ID do not commandeer state DMV personnel to act as federal agents,¹¹⁴ they

111. According to Professor Jackson, Justice Scalia reiterates two arguments raised by O'Connor in *New York*. Jackson, *supra* note 82, at 2191–92. First, Justice Scalia reasons that the choice of establishing a national government that could operate directly on its citizens went hand in glove with a compromise to surrender those powers formally held by the Confederated Government to demand that states act as instruments of federal government. *Id.* (citing *Printz*, 521 U.S. at 919–20). Second, he argues that federal commandeering of state governments would interfere with the constitutional vision “that a State’s government will represent and remain accountable to its own citizens.” *Id.* In her article, Professor Jackson questions the historical accuracy of the first proposition. *Id.* She cites to Evan Caminker’s article, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001, 1042–59 (1995), which suggests that despite historical evidence demonstrating concern with Congress’ lack of success in requisitioning the states under the Articles of Confederation, it does not follow that the federal government relinquished that power by adding new powers to legislate directly for citizens. *Id.* As for the second proposition, Professor Jackson states that concerns for political accountability do proceed from the basic constitutional structure but do not support such a rigid rule. *Id.* at 2191.

112. In defense of the Brady Act, the federal government sought to distinguish *New York* on grounds that the statute did not require legislation by the states or any executive policymaking; rather, it simply directed state law enforcement agencies to provide limited, non-policy-making assistance. *See id.* at 2192–93. The Court rejected this reasoning as failing to demarcate clearly policy-making and limited or ministerial decision making as a useful boundary against federal intrusion, and it noted that even federally mandated ministerial tasks do not exculpate the state government from public blame for the statute’s burdens or mistakes in its administration. *Id.* Professor Jackson criticizes this justification by noting that the sheriffs required to conduct background checks under the facts of *Printz* could have communicated effectively to their constituents the actual source of the burden in the federal government’s legislation. *Id.*

113. *Id.* at 2194–95 n.70 (“‘The Federal Government may not compel the States to enact or administer a federal regulatory program.’ . . . Congress cannot circumvent that prohibition by conscripting the State’s officers directly. . . . It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”). Professor Jackson argues that with its this bright-line rule in *Printz*, the Court presumably sought to provide lawmakers with a clear, readily understandable guideline, but such guideline could create a kind of rigidity that contrasts with the pragmatism of earlier federalism jurisprudence and hampers the federal government’s ability to respond agilely to national crises. *See id.* at 2212. For a discussion of the possible extent of the Fourteenth Amendment and how its attendant jurisprudence may influence the entire Constitution more than the *Printz*’ Court’s federalism jurisprudence, see *id.* at 2210–11 (“The text of the post-Civil War Amendments, as well as precedent upholding federal voting rights statutes mandating affirmative state acts to adopt voting changes, pose formidable barriers to the Court’s applying any broad rule against federal compulsion of state governments to legislation enacted pursuant to those amendments.”).

114. Real ID does not directly require that state DMV personnel take particular actions, such as the information reporting requirements under the Brady Act. State governments retain discretion to manage and control their licensing officials and staff. Nonetheless, the substantive and procedural

do require state governments to take a variety of actions, both legislative and administrative, to effect compliance with statutory standards.¹¹⁵

IV. CONSTITUTIONAL CONCERNS WITH REAL ID

A. Coercive Nature of the Real ID Statutory Scheme

The driver licensing scheme set forth under Real ID coerces state governments in a manner repugnant to the Constitution. Congress may retain broad powers under the Commerce Clause to regulate a vast array of activity, but the Court in *New York* and *Printz* limited Congress from using those powers to compel state government action.¹¹⁶ In the Federal-

standards mandated by Real ID clearly dictate policy for state executive branches to implement. See discussion *supra* Part II.C.

115. The requirement to take affirmative action is a key element distinguishing the *New York* and *Printz* line of cases from the Supreme Court's most recent pronouncement upon Tenth Amendment federalism principles in *Reno v. Condon*, 528 U.S. 141 (2000). In that unanimous decision, the Court relied upon an established constitutional law distinction between affirmative obligations and negative prohibitions to uphold a federal privacy protection law in the face of a state challenge. See CHEMERINSKY, *supra* note 77, at 325–26. The case involved a challenge to the Driver's Privacy Protection Act, a federal law that prohibited states and well as private party actors from disclosing personal information collected by state DMVs, such as names, addresses, and SSNs. *Id.* Many states engaged in the sale of this information to individuals and businesses. The Fourth Circuit Court of Appeals declared the law unconstitutional as violating the Tenth Amendment based on that prohibition. However, the Supreme Court reversed in an opinion by Chief Justice Rehnquist, declaring that the law did not violate the Tenth Amendment because it was a prohibition of conduct, not an affirmative mandate as in *New York* and *Printz*. *Id.* Chief Justice Rehnquist stated: "It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*." *Condon*, 528 U.S. at 151. Real ID does not fall within that distinction, because it mandates implementation by states of a program of federal standards that will require affirmative state action and participation by state agency officials as prohibited by the Tenth Amendment under the *New York* and *Printz* line of cases. See discussion *infra* Part IV. That mandate applies directly to states as sovereign entities and does not affect private actors as well, as was the case in *Reno v. Condon*.

116. Buchanan, *supra* note 85, at 359–62. Professor Buchanan separates the methods by which Congress addresses the states when regulating into three discrete categories. *Id.* In Category One situations, Congress offers states a choice: in an area subject to federal pre-emption, they may regulate private actor conduct in a certain way or cease to regulate. *Id.* In Category Two and Three situations, Congress commands the states, rather than offers choices. *Id.* In Category Two, Congress regulates states as states by obligating states in a given area to conform their conduct to the dictates of congressional regulations either previously or contemporaneously applied to parallel private-sector conduct. *Id.* In Category Three, Congress mandates that states regulate private-actor conduct directly in accordance with federally prescribed standards. *Id.* In both Category Two and Three situations, the states would incur a penalty or other legal detriment for non-compliance with the federal directive. *Id.* Buchanan describes *New York* as a Category Three situation. *Id.* By requiring that states implement specific federal standards and processes for administering driver licensing and person identification programs, Real ID falls into the third classification, because it requires that states directly regulate the conduct of their citizens according to federal standards. *Id.*

ism Impact Statement to its proposed regulations,¹¹⁷ DHS points out that the Act regulates the federal government itself and not state governments.¹¹⁸ The agency stresses that the statute binds federal agencies to reject non-Real ID compliant licenses or identification cards for official federal purposes.¹¹⁹ Although the plain language of the Act may not explicitly compel any state to issue driver's licenses or other identification documents according to the statutory scheme, whether the statutory scheme effectively compels state governments to act remains an open question for the judiciary.¹²⁰

1. A Choice that Leaves No Choice

Because the issuance of driver's licenses remains a state regulatory function, the requirements established in the Act constitute an effective commandeering by Congress of the state regulatory process and of its local officials who issue the licenses.¹²¹ Although the federal government claims that the Act regulates the federal government, the practical effect of the statute is upon the apparatus of state governmental power. State legislatures will need to enact laws to implement the standards established by Real ID; state executive agencies will need to conform their administrative policies and practices to the strictures of the statute.¹²² If the Act effectively compels state governments, then it coerces states in violation of the Constitution.

On its face, the driver licensing scheme created by Real ID might seem distinguishable from the take title provision in *New York*. In that

117. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10820-01, 10,825 (proposed Mar. 9, 2007).

118. Congress may not simply "[c]ommandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 145 (1992) (quoting *Hodel v. Virginia Surface & Mining Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

119. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10,849 ("The proposed rule does not preempt state law. As detailed elsewhere in this document, the Real ID Act is binding upon Federal agencies, rather than on States. The proposed rule would not formally compel any state to issue driver's licenses or identification cards that will be acceptable for federal purposes.").

120. The question is raised by several state bills citing *New York* and *Printz* and in analytical literature, including the *CRS Report*. See discussion *supra* Part II.C; GARCIA, LEE & TATELMAN, *supra* note 19.

121. GARCIA, LEE & TATELMAN, *supra* note 19, at nn.92 & 102.

122. Modifications may include retro-fitting of licensing buildings and facilities; conducting background checks on personnel adjudicating and producing license documents, including creation and implementation of policies to conduct such background checks; design, implementation, and maintenance of new information technology systems to comply with data sharing provisions. See NAT'L CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION AND AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, THE REAL ID ACT: NATIONAL IMPACT ANALYSIS 3 (2006).

case, state governments felt the penalty for non-compliance with the statutory program by the prospect of gaining title to radioactive waste with all the associated legal and fiscal obligations.¹²³ Under Real ID, the federal government essentially tells the states, “Comply, or your people will pay the price.”¹²⁴ Despite this conceivable distinction from the facts in *New York*, it is difficult to justify how the latter scenario is any less coercive than the former. DHS attempts a justification by explaining that the citizens of the states, over whom Congress has authority to legislate directly,¹²⁵ bear the burden of choosing between compliance and non-compliance.¹²⁶

The interpretation, however, overlooks the underlying rationale of the majority in *New York* that a “choice which leaves no choice” is fundamentally coercive.¹²⁷ State governments do not want to be told how to regulate.¹²⁸ If states stand their ground and resist, they compromise the liberty of their people, including the right to interstate travel and full access to federal courts, but if states capitulate, they sacrifice a substantial degree of sovereignty. Citizens who elect their state government representatives must sacrifice sovereignty of their state governments to protect their personal liberties. Neither the states nor their citizens should have

123. *New York*, 505 U.S. at 144–45.

124. See *supra* note 5 (quoting DHS spokesperson Laura Keehner: “There will be a practical consequence for residents of states whose leadership chooses the status quo and accepts noncompliant licenses. . . . [T]hey will not [be] able to fly on an aircraft or enter a federal building with a non-compliant license”). State government officials have gotten the message. For example, in his letter to DHS on the eve of the March 31, 2008 deadline to request an extension for compliance with Real ID, Governor Sanford of South Carolina appealed to Secretary Chertoff: “I, therefore, respectfully request ask DHS to treat South Carolina’s citizens the same as it treats citizens of all other states, including those that cannot legally comply with REAL ID and those that have not requested an extension. . . . I would respectfully ask that DHS will be consistent and not needlessly penalize the citizens of South Carolina and allow them to travel and enter federal buildings like the citizens of all other states.” Letter from Mark Sanford to Michael Chertoff, *supra* note 14.

125. See *New York*, 505 U.S. at 162.

126. Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10820-01, 10,849 (proposed Mar. 9, 2007) (citing *New York*, 505 U.S. at 173 (“The citizens of a given State—not Congress—ultimately will decide whether the State complies with this regulation and the underlying statute.”)).

127. 505 U.S. at 175–76 (quoting *Hodel v. Virginia Surface & Mining Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981) (“In this [take title] provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, ‘[t]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”). For a detailed discussion of the theory of coercion, see Sullivan, *supra* note 98.

128. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1500–01 (1987). Professor Amar explains: “The independent and pre-existing organizational structures of state governments were seen as incipient pockets of resistance—here, political resistance—to unconstitutional federal conduct.” *Id.*

to choose between equally fundamental constitutional liberties.¹²⁹ It is unsatisfactory to say that the citizens of each state will ultimately choose whether to comply with Real ID and the consequences.¹³⁰

Although state governments represent the people, they remain a separate entity from the people, with a separate, inviolate existence as sovereigns within the federal system.¹³¹ State governments may derive power by consent of the governed, especially through the provisions of individual state constitutions, yet state governments are separate entities and not merely the proxy of the people.¹³² The Constitution conferred upon the national government power akin to that held by the preexistent state governments to act directly upon the people.¹³³ In her dissenting opinion in *Garcia*, Justice O'Connor refuted the proposition that state representatives elected to the national legislature naturally champion their constituent state government interests in the political process.¹³⁴ Similarly, it is hardly axiomatic that the interests of state governments, particularly the interest in preserving their sovereignty, will always align with the interests of their citizens. The federal travel restrictions imposed by Real ID create a conflict of interest between a state government—interested in preserving the integrity of its legislative agenda—and the people of the state—interested in preserving their ability to freely fly and enter federal buildings.

2. Is Real ID a Program of Cooperative Federalism?

The dissenting opinion in *New York* characterized the take title statute, which the majority of the Court struck down as an acceptable program of cooperative federalism. DHS seized upon similar reasoning as a justification for Real ID's regime of federally prescribed standards for state driver's licenses. However, the Act places federal and state interests at odds and falls far short of a cooperative enterprise.

DHS has stated that Real ID and the agency's proposed implementing rules are consistent with the Tenth Amendment and are not an impermissible usurpation of state sovereignty.¹³⁵ Rather, the agency claims

129. See Sullivan, *supra* note 98, at 1426.

130. See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10849 (citing *New York*, 505 U.S. at 173).

131. *Texas v. White*, 7 Wall. 700, 725 (1869) (“[a]n indestructible Union, composed of indestructible States”).

132. Amar, *supra* note 138.

133. *New York*, 505 U.S. 144, 163.

134. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587–88 (1985) (O'Connor, J., dissenting) (“The political process has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws.”).

135. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5329 (Jan. 29, 2008). DHS conducted a federal-

that the regulations present a permissible program of cooperative federalism in which the federal and state governments act voluntarily and in tandem to achieve a common policy objective.¹³⁶ When political pressure is less of a barrier to efforts toward increasing federal power, Congress might more readily prefer to preempt state law, but when it comes to driver's licenses and identification cards, the stakes are higher for the federal government.¹³⁷ DHS's characterization of Real ID as a program of cooperative federalism reflects an awareness of the tension between state prerogatives and national interests in this area.

Congress is understandably hesitant to preempt state law in the domain of driver licensing¹³⁸ because of the traditional local quality of licensing, the deep-rooted resentment and suspicion toward nationalization of identification documents,¹³⁹ and the expense and complexity of admin-

ism impact analysis pursuant to Executive Order 13123 regarding regulatory policies that have federalism implications. DHS claims that it consulted extensively with the states in promulgating its final rule and that it did so "in the spirit of Federalism" to "balance state prerogatives with the national interests at stake." *Id.* at 5330.

136. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10,820, 10,849 (proposed Mar. 9, 2007) (citing *New York*, 505 U.S. at 167, 173). Although the majority opinion in *New York* acknowledged that Congress may attach conditions to federal funding within its spending powers, the Court singled out the take title provision of the challenged statute as of a different character than conditions attaching to federal funds. 505 U.S. at 174–77. That provision "crossed the line distinguishing encouragement from coercion." *Id.* This Comment argues that Real ID sets up a statutory program that is more analogous to the take title provision in *New York* than to the typical conditional exercise of congressional power. The agency's argument might be more persuasive had Congress enacted a program more akin to Real ID's predecessor statute IRTPA, which mandated negotiated rulemaking that brings state and federal stakeholders together to develop the details for implementing national licensing standards. Real ID gives a federal agency full authority to regulate through informal rulemaking in which states and citizens may provide comment. This approach provides far greater federal government discretion in fleshing out the details of the program than it would under more formalized negotiated rulemaking.

137. See *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) ("By limiting the ability of the Federal Government to enlist state officials in the implementation of programs, the Court creates incentives for the National Government to aggrandize itself.").

138. See *New York*, 505 U.S. at 167 (indicating that pre-emption is a viable option for regulation "[w]here Congress has the authority to regulate private activity under the Commerce Clause . . . [W]e have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. . . . This arrangement, which has been termed '[a] program of cooperative federalism, is replicated in numerous federal statutory schemes.'").

139. See discussion *supra* Part II.A; see also Stephen Dinan, *GOP Split on Repeal of Real ID*, WASH. TIMES, Nov. 14, 2007, available at <http://washingtontimes.com/apps/pbcs.dll/article?AID=/20071114/NATION/> (quoting Rep. Sensenbrenner: "If there's a national policy then a driver's license becomes a national ID card . . . [that] ends up playing into the fears of the ACLU and the people on the far right that the Real ID is in fact a national ID card.").

istering a federal program across fifty states.¹⁴⁰ Having a local face on the administration of federal licensing policy deflects public criticism of the federal government because state agencies are on the front lines and will endure the most of the backlash.¹⁴¹ Thus, in the case of Real ID, strong political incentives urge avoiding preemption of state authority over the driver licensing and identification function. Even if faced with a potential constitutional challenge, the federal government will likely continue to pressure state governments into service rather than pursue a self-aggrandizing, high-profile program of standardized licensing that would subject its licensing agents to direct public ire.

Moreover, like the take-title provision in *New York*, the driver licensing provisions of Real ID frustrate the purposes behind the constitutional structure that reinforces political accountability at the local level.¹⁴² Congress could be viewed as having taken strong steps toward implementing the recommendations of the 9/11 Commission to combat terrorist tactics.¹⁴³ State officials at local licensing offices on the front lines of public interaction, however, would likely face the criticism and resentment of individuals who believe that the new system compromises their privacy and causes them greater inconvenience in obtaining driver's licenses. By implementing a national program of licensing standards through the agency of state governments, Real ID thus creates a tension between states and the federal government that undermines the potential for cooperation.

140. See Spencer S. Hsu, *Homeland Security Retreats From Facets of 'Real ID'*, WASH. POST, Nov. 4, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/11/03/AR2007110300890_/.

141. See Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“[This leads] some to suggest that this legislation represents a backdoor way of implementing a national ID card without the federal government bearing the financial or political cost of doing so.”).

142. 505 U.S. at 168 (“When Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. By contrast, when the federal government compels states to regulate, the accountability of both state and federal officials is diminished.”). In enacting legislation, the federal government could take credit for solving the problem of low-level radioactive waste, but state officials, acting pursuant to the federal mandate to enforce the federal standards, would bear the brunt of dismay at sacrifices required of particular communities targeted as sites for waste disposal. See *id.* at 169.

143. Before the terrorist attacks on the United States on September 11, 2001, all but one of the terrorist hijackers acquired some form of identification document, even by fraud, and used those documents to board commercial flights, rent cars, and conduct other activities leading up to the attacks. See Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10,820, 10,830 (proposed Mar. 9, 2007) (citing THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), which recommends implementation of more secure sources of identification for use in boarding aircraft and accessing vulnerable facilities).

B. Threats to Individual Citizen Rights under Real ID

Because Real ID prohibits the use of non-compliant state-issued identification for federal “official purposes,” the Act potentially infringes upon two rights recognized as fundamental under the Court’s individual rights jurisprudence: the right to travel and the right of access to federal buildings.

Real ID defines “official purpose” in open terms that grant DHS nearly unfettered agency discretion to designate other official purposes.¹⁴⁴ For now, DHS has proposed a relatively modest interpretation, but only the agency’s self-restraint cabins the scope of an official purpose.¹⁴⁵ DHS recognizes its broad discretion to expand the statutory definition.¹⁴⁶ Indeed, in its proposed rule, DHS indicates interest in expanding the scope of the definition by inviting public comment on how the agency might achieve such expansion.¹⁴⁷ Even under a relatively limited interpretation of the restrictions it imposes upon individuals holding non-compliant identification documents, Real ID still raises the question of whether the Act violates the constitutional right to travel and access federal buildings.

1. The Right to Travel

The freedom to travel throughout the United States is a basic right recognized since the birth of the nation.¹⁴⁸ The Articles of Confederation

144. “The term official purpose includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purpose that the Secretary shall determine.” 49 U.S.C. § 30301 (2005).

145. DHS proposed to limit the regulatory definition of “official purpose” to those purposes expressly stated in the Act—accessing Federal facilities, boarding commercial aircraft, and entering nuclear power plants. *Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 72 Fed. Reg. at 10,823.

146. *Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 72 Fed. Reg. 10820-01, 10,825 (proposed Mar. 9, 2007). The agency adds the following caveat to its preliminary interpretation of the scope of the official purpose statutory term: “DHS, under discretionary authority granted to the Secretary of Homeland Security under the Act, may expand this definition in the future.” *Id.* at 10,823. In its Final Rule, DHS responded to public commentator concerns over the scope of the official purpose definition by clarifying that the agency “does not agree that it must seek the approval of Congress as a prerequisite to changing the definition in the future.” *Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 73 Fed. Reg. 5272, 5288 (Jan. 29, 2008).

147. *Id.*; see also Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“I am also concerned that the present law clearly provides the Secretary of DHS substantial discretion to expand the scope of REAL ID. . . . [W]e have no assurances that at some point we won’t need a REAL ID to open a bank account or purchase a gun.”).

148. Patrick M. Garry, *The Constitutional Lynchpin of Liberty in an Age of New Federalism: Replacing Substantive Due Process with the Right to Travel*, 41 BRANDEIS L.J. 469, 486 (2007). At various times, the right to travel has been protected by “the Citizenship Clause, the Privileges and

explicitly acknowledged the right of the people of each state to “have free ingress and regress to and from any other State,” although this provision was never included in either the original text of the Constitution or the Bill of Rights.¹⁴⁹ In *United States v. Guest*,¹⁵⁰ the Court expressly declared a fundamental right to interstate travel that has been “firmly established and repeatedly recognized.”¹⁵¹ Generally, courts will not strictly scrutinize a law that restricts the movement of individuals between states unless the law regulates the right to travel as recognized by the Court under certain limited circumstances.

On occasion, the Court has used the Privileges and Immunities Clause to invalidate state laws restricting the movement of persons across state lines.¹⁵² In *Saenz v. Roe*,¹⁵³ the Supreme Court ruled that the Privileges and Immunities Clause of the Fourteenth Amendment provided the basis for reviewing and striking down laws that gave preference to long-time residents of a state over newly arrived citizens.¹⁵⁴ Writing for the majority in *Saenz*, Justice Stevens articulated three aspects of a fundamental right to travel.¹⁵⁵ The restrictions imposed by Real ID appear to fall within the first aspect, which protects the traditional right of free entry and exit across state lines, because denial of air travel may effectively prohibit an individual from entering one state from another. The impediment to travel across state lines is particularly acute

Immunities Clause, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment.” *Id.*

149. *See* ARTS. OF CONFEDERATION, art. IV (1778).

150. 383 U.S. 745, 758 (1966).

151. CHEMERINSKY, *supra* note 77, at 859. The Court explained in *Guest* that the right to travel is absent from the text of the Constitution because as a right so basic, it was simply assumed to exist. Justice Stewart wrote, “[a] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union that the Constitution created.” *Guest*, 383 U.S. at 758. Perhaps so basic a right defies codification, or perhaps it is implicit in the privileges and immunities of national citizens protected under Article IV of the Constitution. *See* *Edwards v. California*, 314 U.S. 160, 177–78 (1940) (Douglas, J. concurring) (“[T]he right of persons to move freely from State to State . . . is so fundamental. . . . The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.”). While acknowledging that the Court had consistently rejected claims under the privileges and immunities clause since the *Slaughter-House Cases*, Justice Jackson stated: “This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union” *Id.* at 183 (Jackson, J., concurring).

152. *Saenz v. Roe*, 526 U.S. 489 (1999).

153. *Id.*

154. *Saenz*, 526 U.S. at 502.

155. *Id.* at 500 (the three aspects of a fundamental right to travel are: (1) protection of the right of a citizen of one state to enter and to leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state).

in cases where distances of hundreds or thousands of miles separate the traveler from his destination.¹⁵⁶

However, *Saenz* involved a durational residency requirement under state law; its application of the Privileges and Immunities Clause could be narrowly limited to similar situations. Real ID entails federal government regulation of travel on federally regulated commercial aircraft over airspace subject to federal jurisdiction. The Court in recent years has endorsed strict scrutiny of state laws that impede interstate relocation, but it has resisted applying such strict review of all laws that might serve as a type of barrier to interstate travel.¹⁵⁷

The ability to travel freely through the common airways bears upon the social and economic vitality of a unified national entity. Denying air travel to some state citizens while allowing those who hold Real ID-compliant identification documents to fly will likely provoke frustration and resentment among the travel-restricted state citizens. The result will be interstate discord. Nevertheless, the privileges and immunities rationale employed by *Saenz*, as limited as it is, may only address regulation by state governments of privileges and immunities enjoyed by national citizens.¹⁵⁸ Moreover, extending the protections of Article IV against the federal government may require a significant expansion of existing jurisprudence.¹⁵⁹ For this reason, the Privileges and Immunities Clause offers little protection to citizens adversely affected by Real ID.

Because the right to travel jurisprudence under the Privileges and Immunities Clause is likely limited to state government action, the Fifth Amendment Due Process Clause may prove more fertile ground for rooting protections of the fundamental right to travel threatened by Real

156. The two non-contiguous states, Alaska and Hawaii, are among the states that have enacted laws rejecting Real ID. One can only imagine the challenge for citizens of those states to travel within the Union without access to commercial air transport.

157. In addition, the Court has said that the Article IV Privileges and Immunities Clause applies “[o]nly with respect to those privileges and immunities bearing upon the vitality of the Nation as a single entity,” and that the interest protected by the clause must be “sufficiently fundamental to the promotion of interstate harmony.” See CHEMERINSKY, *supra* note 77, at 469.

158. The use in *Saenz* of the long-dormant Privileges and Immunities Clause of the Fourteenth Amendment does open the door to future expansions of its applicability beyond durational residency requirement scenarios. *Id.* at 498. However, as noted by Justice Thomas in his dissent in *Saenz*, before invoking the clause the Court “should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and due process jurisprudence.” *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting).

159. CHEMERINSKY, *supra* note 77, at 466. The Supreme Court has interpreted Article IV as limiting the ability of a state to discriminate against those from out of state with regard to fundamental rights or important economic activities. *Id.* Most cases under the Privileges and Immunities Clause involved challenges to state and local laws that discriminate against out-of-staters regarding their ability to earn a living. *Id.* Further, the protection of the clause is limited to citizens of the United States, as opposed to aliens. *Id.*

ID.¹⁶⁰ By enacting and implementing the air travel restrictions in Real ID, the federal government arguably infringes the liberty of national citizens. The right to travel freely among the states is an essential aspect of liberty, which a citizen should only abdicate for a compelling government interest.¹⁶¹ Despite that most right to travel claims against the federal government have arisen in the context of restrictions upon individual liberty to travel internationally, Fifth Amendment protections can reasonably extend to the traditional sphere of interstate travel by citizens.

At least one federal court has held, however, that an individual does not enjoy complete constitutional protection over the freedom to select any mode of transportation.¹⁶² In *Gilmore v. Gonzales*,¹⁶³ a Ninth Circuit Court of Appeals panel held that there is no constitutional right to travel by a particular means, such as air travel.¹⁶⁴ Mr. Gilmore had refused to show any identification at an airport security checkpoint.¹⁶⁵ Under these facts, *Gilmore* may stand for the narrower proposition that the Constitution does not protect one's right to travel unimpeded without carrying any form of identification.

Still, the question remains whether the refusal of a particular mode of interstate transportation to one who actually presents a state-issued

160. The Supreme Court does not recognize a fundamental right to international travel, although dicta in early decisions suggested such right. Justice Douglas has written: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. . . . Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958). However, in subsequent cases rejecting claims based on both the right to travel and the First Amendment right to gather information by traveling to foreign countries, the Court stressed foreign policy justifications for the restrictions. Most cases involved refusals by the Department of State to issue passports to U.S. citizens. *See, e.g., Zemel v. Rusk*, 381 U.S. 1 (1965). Recent cases have applied only rational basis review to restrictions on foreign travel. *See, e.g., Regan v. Wald*, 468 U.S. 222 (1984) (applying rational basis test to uphold federal regulation banning travel to Cuba by U.S. citizens); *Haig v. Agee*, 453 U.S. 280, 306 (1981) ("[t]he freedom to travel abroad . . . is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable government regulation . . . [t]he freedom to travel outside the United States must be distinguished from the right to travel within the United States."); *Califano v. Aznavorian*, 439 U.S. 170, 176–77 (1978) ("[l]egislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements . . .").

161. Although Fifth Amendment challenges to travel restrictions by the federal government have generally addressed limitations upon international travel by U.S. citizens, and although the Court applied rational basis review in such cases, strict scrutiny still applies to interstate freedom of travel claims under that body of jurisprudence. *See* CHEMERINSKY, *supra* note 77, at 868–71.

162. Froomkin, *supra* note 47, at 59.

163. *Gilmore v. Gonzales*, 435 F.3d 1125, 1136–39 (9th Cir. 2006).

164. *Id.*

165. *Id.*

identification document implicates the right to interstate travel.¹⁶⁶ Despite alternative modes of transportation available to a traveler denied access to a flight, air travel is an essential aspect of modern social mobility nationwide and constitutes a vital element of interstate commerce. Perhaps the social and economic interests in unimpeded access to air travel for otherwise law-abiding citizens would compel a court to acknowledge that the mobility fundamental to modern liberty demands unrestricted domestic air travel.¹⁶⁷

In addition, because Real ID impairs the right of a discrete class of persons—those carrying non-compliant state-issued driver’s licenses or identification cards—to travel using commercial airlines, the Act could be subject to judicial scrutiny under the Equal Protection Clause.¹⁶⁸ However, the Court generally limits its recognition of protected classes under the Equal Protection Clause to groups based upon race or national origin.¹⁶⁹

Even if the travel restriction imposed by Real ID were subject to close judicial scrutiny under a privileges and immunities, due process, or equal protection theory, a court could find that any such restriction is narrowly tailored to a compelling national security interest.¹⁷⁰ The government argues that individuals with state-issued identification cards that do not comply with the Act can instead present federal passports to board flights.¹⁷¹ When weighed against the federal government’s interest in preserving the security of national airways post 9/11, the interest of indi-

166. Mr. Gilmore refused to show any identification at the airport. *Id.* at 1130. The security policy at issue in the case required presentation of some form of identification and pre-dated implementation of Real ID.

167. The court in *Gilmore* did not acknowledge that need for access to air travel squarely but neither did it question Gilmore’s allegation that “air travel is a necessity.” *Id.* at 1136.

168. The Equal Protection Clause of the Fourteenth Amendment has been incorporated into the Fifth Amendment Due Process Clause as against the federal government. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

169. Discrimination based on race or national origin is subjected to strict scrutiny; an intermediate level of scrutiny has been applied to discrimination based upon gender or against children born out of wedlock. In most other cases, the Court simply applies a rational basis review. *See CHEMERINSKY*, *supra* note 77, at 671–73. *See also id.* at 668 (citing *Buck v. Bell*, 274 U.S. 200, 208 (1927) (“[The Equal Protection Clause is] the last resort of constitutional arguments.”)).

170. *See CHEMERINSKY*, *supra* note 77, at 673–74.

171. DHS says as much in its Final Rule. Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5288 (Jan. 29, 2008) (“Moreover, travelers will be able to use identification other than a Real ID driver’s license or card. . . . Where individuals are allowed to board aircraft or enter Federal facilities with documents other than a State-issued driver’s license or identification [such as a passport or military identification card] . . .”).

vidual citizens in using non-compliant state issued identification for interstate travel may appear to some as simply a matter of convenience.¹⁷²

One can envision many scenarios in which citizens, particularly those of limited financial means, have never traveled abroad and do not possess a U.S. passport as an alternative form of identification. Given that passport application processing can take several months, the strictures of Real ID would significantly hinder the ability of a citizen with a driver's license from a state not complying with Real ID to engage in cross-country air travel.¹⁷³ For example, access to air travel is more than a matter of convenience for a person without a passport in Washington State whose mother dies in Washington D.C. if it means he might miss her funeral.

Nevertheless, even such a strong individual interest in unimpeded domestic air travel may not overcome what the Court could find to be a more compelling national security interest in federal regulation of air travel through Real ID. As such, right-to-travel jurisprudence, even if extended to apply where Real ID hampers air travel for those without compliant driver's licenses, probably fails to protect the fundamental freedom of all citizens to travel throughout the Union.

2. The Right of Access to Federal Courts

DHS's interpretation of Real ID, as reflected in its implementing proposed regulations, leaves open the question whether the nature of access procedures at a given federal building will determine an individual's right of access to federal courts. If a particular federal building's security procedures require state-issued identification, then citizens of non-compliant states could face infringement of that right under Real ID.¹⁷⁴

172. DHS articulates the overarching justification for Real ID as a congressional response to the recommendations of the 9/11 Commission to combat perceived vulnerabilities in a system of national identification based on state-issued driver's licenses with varying issuance standards. Proponents of national standards for identification documents cite the example of the September 11 terrorist attacks as an exploitation of vulnerabilities in this de facto system of national identification. *See* Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10,820, 10,830 (proposed Mar. 9, 2007) (noting that all but one of the terrorists obtained, legitimately or by fraud, state-issued identifications that permitted them to rent cars, move about the country, and ultimately board the aircraft that they hijacked).

173. While expedited passport processing is often available for those with imminent international travel, the State Department may not be willing to provide faster processing for those who plan to remain inside the United States. Expedited processing of passport applications generally takes about two weeks, although a faster track may be available where international travel has been booked and one can schedule an in person appearance at a local U.S. Passport Agency office.

174. "If the individual intends to use a State-issued driver's license or identification card, however, it must be one that is issued by a State that is complying with Real ID Act." Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. at 10,823.

As with the restriction on commercial air travel, this restriction upon entrance to federal buildings assumes that a U.S. citizen could present a U.S. passport instead of a state-issued driver's license. However, many U.S. citizens do not hold passports,¹⁷⁵ and many legal U.S. residents otherwise subject to the jurisdiction of the federal court system and entitled to redress within that system cannot obtain a U.S. passport.¹⁷⁶ Barring acceptance of foreign passports as sufficient identification, these individuals could face exclusion from the courthouse.

The constitutionally protected right to access the federal court system is grounded in the First Amendment right to redress the government for grievances and in the Sixth Amendment right to counsel in criminal cases.¹⁷⁷ The Court has spoken of the right to be heard as a principle that "lies at the foundation of all well-ordered systems of jurisprudence" and is "founded in the first principles of natural justice."¹⁷⁸ Recently, the Court articulated a fundamental constitutional right of physical access to courts in *Tennessee v. Lane*.¹⁷⁹

The requirement to present photo identification for admission to federal facilities, standing alone, likely does not tread upon an individual's right to access the federal courts.¹⁸⁰ The judiciary has an interest in preserving order in its courtrooms, and some regulation of physical access to buildings housing courtrooms proceeds rationally from that interest. In *Foti v. McHugh*,¹⁸¹ a Ninth Circuit panel held that no person has a constitutional right to enter a federal building anonymously,¹⁸² citing *Gilmore* as authority.¹⁸³ The holding in *Foti* appears to undermine any

175. Froomkin, *supra* note 47, at 59 n.8. Over the past ten years, the State Department has issued between 5.5 and 10.1 million passports per fiscal year. Even if all of those passports were issued to adults, the number would still total less than one third of the total U.S. population.

176. For example, lawful permanent residents and other foreign nationals legally present within the United States pursuant to an authorized asylum claim are not eligible for a U.S. passport because they are not U.S. citizens.

177. CHEMERISNKY, *supra* note 77, at 907–08.

178. *Id.* (quoting *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876)).

179. 541 U.S. 509 (2004). However, most decisions considering the scope of the right of access to the courts under due process and equal protection have done so in three major areas: (1) the right to appeal; (2) challenges to filing fee requirements; and (3) prisoners' access to the judiciary. See CHEMERISNKY, *supra* note 77, at 908.

180. See *United States v. Smith*, 426 F.3d 567 (2d Cir. 2005) (a requirement that court visitors must show photo identification does not violate the Sixth Amendment right to public trial). Nevertheless, the court took judicial notice of actions by the executive branch to enforce security measures by restricting access: "We are, however, concerned by the Marshals Service's restrictions of court access and wish to underscore the primary role of the courts in controlling access to premises containing courtrooms." *Id.* at 569.

181. *Foti v. McHugh*, No. 05-16079, 2007 WL 2472340 (9th Cir. Aug. 28, 2007).

182. *Id.*

183. *Gilmore v. Gonzales*, 435 F.3d 1125, 1136–39 (9th Cir. 2006).

argument that the restrictions imposed by Real ID effectively impede individual access to the federal courts.¹⁸⁴

The issue presented by the restriction imposed by Real ID, however, is broader than whether individuals have a right of *anonymous* access to federal buildings. Rather, Real ID potentially precludes persons with otherwise valid government-issued identification documents from access to the courthouse. Furthermore, *Gilmore* involved a requirement to show identification to board a commercial flight.¹⁸⁵ There may be cogent reasons for refusing to recognize a constitutional right to travel by particular means because there are other options available for travel; however, with Real ID's restriction on the use of non-compliant state documents,¹⁸⁶ the objective sought by the individual is simply unattainable because restriction of entrance to facility housing the court results in denial of access to the justice system.¹⁸⁷

V. PROTECTING THE PEOPLE THROUGH THE TENTH AMENDMENT

Threats to individual liberty are real under Real ID, but historical individual rights jurisprudence may not sufficiently shield individuals from the Act's arguably overreaching federal regulation of state driver licensing. Under existing individual-rights jurisprudence, courts might countenance claims by non-compliant state citizens that the statutory air travel and building access restrictions hinder free interstate travel and deny redress in federal courts. Even so, Real ID, with its national security impetus, would pass rational basis review and may even survive close judicial scrutiny. As applied to Real ID, neither of these rights affords sufficient protection to individual citizens. Rather, judicial enforcement of the Tenth Amendment would preserve state sovereignty against federal coercion while also protecting the liberty of the People against encroachment upon their right to travel and to access the federal court system.

First, the right to travel, though long recognized, lacks clear grounding in specific constitutional provisions, and the weight of precedent

184. Of course, as an unpublished opinion, *Foti* contains little analysis that might offer meaningful guidance about expanding or narrowing the applicability of its holding in future cases.

185. *Gilmore*, 435 F.3d at 1136–39.

186. Most citizens use driver's licenses as their principal form of identification and do not hold a federal passport. Egelman, *supra* note 11, at 150. Since the State Department within the Executive Branch controls issuance of the primary alternative photo identification document available to U.S. citizens, a passport, a citizen's right of access to the federal courts could become subject to the exclusive authority of the federal government. Passports are inherently external travel documents subject to the exclusive jurisdiction of the Executive Branch with its sweeping discretion over foreign affairs. See *supra* note 160 (citing *Haig v. Agee*, 453 U.S. 280, 306 (1981)).

187. This concern is especially pronounced in the criminal context, given Sixth Amendment protections of the rights of the accused to confront witnesses against him.

addresses state government intrusions upon citizen mobility, particularly in the area of durational residency requirements.¹⁸⁸ With Real ID, the federal government may infringe upon a right of national citizenship to travel among states without substantial interference. Perhaps courts would recognize the interference experienced by citizens from non-compliant states as a significant deprivation of the right to travel via an indispensable form of modern conveyance. On the other hand, at least one federal court has indicated that there is not a constitutional right to travel by a particular means.¹⁸⁹ In the case of Real ID, citizens from non-compliant states could obtain U.S. passports or elect other means of transportation, such as rail or bus, notwithstanding the contention that the pace of modern commercial activity demands interstate air travel.¹⁹⁰

Second, although grounded firmly in Bill of Rights protections,¹⁹¹ the right of access to federal courts may appear compelling and capable of judicial enforcement, that argument for enforcing that right lacks impetus in the context of Real ID. Prior right of access cases focus on unrelated fact patterns,¹⁹² and at least one federal court has upheld the government's right to impose identification document requirements for access to federal buildings housing courtrooms.¹⁹³ Whether limiting the range of acceptable forms of identification to exclude a substantial number of state citizens holding driver's licenses or identification cards as their sole form of photo identification violates the right of access to the courts remains an open question.

In contrast to the weakness of individual-rights jurisprudence as a challenge to Real ID, close judicial scrutiny of the federalism issues implicated by the Act effectively serves a dual purpose.¹⁹⁴ First, such re-

188. See *Saenz v. Roe*, 526 U.S. 489 (1999); see also *Califano v. Azavorian*, 439 U.S. 170 (1978) (drawing a clear distinction between freedom to travel abroad and the recognized constitutional right of interstate travel, as affected, for example, by durational residency requirements).

189. See *Gilmore*, 435 F.3d at 1125.

190. But see *Foti v. McHugh*, No. 05-16079, 2007 WL 2472340 (9th Cir. Aug. 28, 2007).

191. See discussion *supra* Part IV.B.2.

192. The fact patterns considered in the past cases include the right to appeal, challenges to filing fee requirements, and prisoners' access to judiciary. *CHEMERINSKY*, *supra* note 77, at 910; see, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (prisons obligated to provide law library facilities to inmates); *Bobbie v. Connecticut*, 401 U.S. 371 (1971) (unconstitutional to deny indigent individual access to courts for filing of a divorce petition because of inability to pay fees); *Griffin v. Illinois*, 351 U.S. 12 (1956) (court transcripts must be provided to indigent criminal defendants on appeal).

193. See *Foti*, No. 05-16079, 2007 WL 2472340.

194. For a thorough treatment of an argument in favor of judicial enforcement of federalism-based limits on national power, see *Jackson*, *supra* note 82, at 2182-83 ("Appropriately deferential judicial review can help reinforce the political branches' roles in considering the interests of state governments with the other interests the national government must advance, while maintaining the principled flexibility federalism requires."). However, Professor Jackson argues for a multi-factored, flexible standard—as opposed to the categorical rule in *Printz*—against commandeering of state government processes. *Id.*

view fortifies the structural safeguards of federalism by expanding Tenth Amendment jurisprudence to prevent usurpation of state government sovereignty.¹⁹⁵ Second, by protecting the integrity of state governments, the judiciary can effectively preserve the liberty of the People.¹⁹⁶

Although the federalism principles revived by the Rehnquist Court may have infused state and local governments with new strength to assert their authority under the Tenth Amendment, those principles have been largely absent from the Court's contemporary individual liberty jurisprudence.¹⁹⁷ Therefore, some commentators have argued that the Court should focus on leveraging classic federalism principles to promote individual liberty.¹⁹⁸ The conflict over Real ID offers an opportunity to expand Tenth Amendment protections of state sovereignty against federal excess and to assert federalism as a principled and effective bulwark against invasions of citizen liberty by the federal government where existing individual rights jurisprudence, rooted in substantive due process and equal protection, may prove an inadequate defense.¹⁹⁹

As Professor Garry observes, "the Framers viewed the structural provision of federalism as a default protection of individual liberty, operating continually as an institutional mechanism to check forces that might threaten that liberty."²⁰⁰ Unlike the modern Court, the Framers relied more upon these structural provisions of the Constitution to counter governmental abuses of power than upon judicial enforcement of individual substantive rights.²⁰¹ This structural restraint, embodied in the federalism and separation of powers doctrines, rather than reliance upon

195. See discussion *supra* Part IV.A.

196. See Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799 (2006). Professor Sullivan observes the theoretical depth and significance of the Rehnquist Court's federalism revival, even if the practical effects of its major holdings, including those in *New York* and *Printz*, were not as sweeping as might be perceived. *Id.* at 809. She contends that the Rehnquist Court dramatically revived the structural principles of federalism as grounds for judicial invalidation of statutes. This redevelopment of the political theory of federalism reminds us of our more overarching constitutional commitments to social fluidity. *Id.* at 813. As such, a revived structural federalism provides a theory to promote the freedom for local social experimentation that can help realize progressive as well as conservative ideals. *Id.* at 801.

197. Garry, *supra* note 148, at 469–70.

198. *Id.*

199. Amar, *supra* note 128, at 1519 ("Even if states have not always taken seriously their role in protecting individual constitutional rights against the federal government, they should do so.").

200. Garry, *supra* note 148, at 481.

201. See *id.* at 492 (quoting Isaac J.K. Adams, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 *VAND. L. REV.* 1883, 1889 (2004) ("Since *Griswold*, the Due Process Clause has served as the Supreme Court's 'chosen vessel' for the protection of unenumerated rights.")).

judicially defined individual rights, preserved political freedom and provided safeguards against federal tyranny.²⁰²

Indeed, to the Framers, the primary justification of federalism was not diversity or state competition²⁰³ but the role of the states as guardians against possible federal tyranny.²⁰⁴ Alexander Hamilton argued that individuals who felt their rights violated by the central government could use the state governments as the instruments of redress.²⁰⁵ A republican government differs in nature from a free government.²⁰⁶ Professor Garry explains “[w]hereas a free government focuses on securing specified individual rights, a republican government endeavors to achieve political freedom as a means of securing individual freedom.”²⁰⁷ Thus, the primary safeguards against government tyranny were architectural and are evident in the structure of the Constitution.²⁰⁸

There are real weaknesses in some of the potential arguments that Real ID contravenes the fundamental individual rights of citizens to travel freely throughout the country and to access the federal courts freely. However, by upholding federalism principles, states can effectively challenge the threat to their sovereignty under Real ID. In doing so, they can also preserve the freedom of their citizens and convince Congress to

202. Garry, *supra* note 69, at 874 (“The system of dual sovereignty between national and state governments was designed largely to create a government that would protect the liberty of its citizens.”). Professor Garry cites mobility of the population as key to the ability of individuals to move to states aligned with their visions of individual liberty. *Id.*

203. See Jackson, *supra* note 82, at 2214–15 (citing examples of potential benefits of federalism identified in scholarly literature on the subject).

204. Garry, *supra* note 69, at 875 (citing THE FEDERALIST No. 28, at 179–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that the states “will in all possible contingencies afford complete security against invasions of public liberty by the national authority . . .”). *Id.* at n.141. The Framers believed that the states would serve to check any encroachments by the national government on the liberties of the people. See *id.* at n.142 (citing THE FEDERALIST No. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961)).

205. *Id.* at 875–76.

206. THE FEDERALIST No. 28, at 179–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

207. Garry, *supra* note 69, at 875–76. Professor Garry makes a compelling argument that modern notions of individual rights tend toward being anti-social. Such rights, often judicially defined under post-New Deal substantive due process jurisprudence, are characterized by an “exaggerated absoluteness . . . hyperindividualism, . . . insularity, and . . . silence with respect to personal, civic, and collective responsibilities.” Garry, *supra* note 69, at 883–85 (quoting MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 4, 24 (1991)). He posits that the Framers did not view human beings as solitary creatures devoid of interpersonal relationships or obligations to society. *Id.* The Constitution contemplates democratic society as a political family: there must be processes with the family structure to give each member some individual freedom, yet also to bind each member to the family as a whole. *Id.* Thus, the Constitution primarily concerns the workings of the democratic community. See *id.* at 884.

208. Structural protections permit flexible and dynamic safeguards of liberty by shaping individual freedoms according to democratic desires and interests of the governed that evolve over time. See *id.* at 885.

openly debate whether the People will accede to a national identification program—the debate that was absent from the enactment of Real ID.²⁰⁹

VI. CONCLUSION

The present situation concerning implementation of Real ID is untenable. At a minimum, current state opposition undermines the implementation of a comprehensive and standardized identification system that serves the national security purposes for which Congress purportedly enacted Real ID.²¹⁰ As anticipated by the Framers, such opposition may indeed force the federal government to employ the political process to enact workable legislation after full debate of issues raised by a program of national identification.²¹¹ Congress should repeal the driver licensing provisions of Real ID and address the real concerns of the American people regarding national identification programs. Of course, Congress could demur and simply leave Real ID on the books, in which case the political process involving state representation in the national legislature may fail to satisfy the desires of either the states or its people.²¹² However, simply regulating existing law, even while considering state concerns,²¹³ will not achieve the stated goals of standardization as long as several states continue rejection of the plan.²¹⁴

Alternatively, states should bring actions within the judicial system to challenge the constitutionality of Real ID as coercive of their govern-

209. See Letter from Mark Sanford to Michael Chertoff, *supra* note 14 (“[I] join with millions of Americans in believing that national policy changes should be debated, not dictated—and REAL ID was never fully debated in Congress. . . . [R]ather than compelling states to comply with REAL ID with the threat of longer wait times for their citizens in airports across the country, I think the American people deserve a full and robust debate on whether REAL ID will provide greater national security, and, if so, whether the increased security outweighs the risks to our privacy interests and other costs that arise from creating a national ID system.”).

210. See discussion *supra* Part IV.A.1.

211. The fate of proposed legislation to repeal all or part of Real ID remains cloudy. Implementation of the Act meanwhile forges ahead in the face of clear rejection by a significant number of states.

212. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (O’Connor, J., dissenting) (stating that the political process and “[w]orkings of the National Government itself, rather than in discrete limitations on the objects of federal authority” may not defend interests of the people). Justice O’Connor further observes that “[t]he past two decades have seen an unprecedented growth of federal regulatory activity,” and she concludes that “[t]oday, as federal legislation and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary.” *Id.*

213. Concerns regarding funding, timelines, and privacy issues. DHS claims that it seriously considered concerns raised by the public during the notice and comment period (wherein it received over 21,000 public comments on its proposed rule) and incorporated those considerations into its final rule. See *Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 73 Fed. Reg. at 5274.

214. See *Coakley Testimony*, *supra* note 54, at 3.

ments. In this way, states can support the interests of the people in free interstate movement and equal access to federal facilities, including courts. Absent judicial action to uphold state sovereignty on the Tenth Amendment grounds, the citizens of several states will very likely receive unequal treatment within the Union and so will pay the ultimate price for Real ID's misguided reforms.