

Western New England Law Review

Volume 38 38 (2016)
Issue 1

Article 4

1-1-2016

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Recommended Citation

Jacqueline A. Miller, *CONSTITUTIONAL LAW—THE REAL ID ACT: VIOLATING MASSACHUSETTS RESIDENTS' RIGHT TO TRAVEL AND THE TENTH AMENDMENT*, 38 W. New Eng. L. Rev. 127 (2016), <http://digitalcommons.law.wne.edu/lawreview/vol38/iss1/4>

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CONSTITUTIONAL LAW—THE REAL ID ACT: VIOLATING
MASSACHUSETTS RESIDENTS' RIGHT TO TRAVEL AND THE
TENTH AMENDMENT

*Jacqueline A. Miller**

The Real ID Act establishes minimum federal standards for the production and issuance of state-issued driver's licenses. The Department of Homeland Security is implementing the Real ID Act through an enforcement schedule that sets out a timeline of where and when noncompliant state-issued driver's licenses would be recognized for federal purposes in order to force states to comply.

Under the enforcement schedule, Massachusetts residents faced having their driver's licenses not federally accepted from April to October of 2014. Currently, Massachusetts has an extension until October 10, 2016 to comply with the Real ID Act, causing Massachusetts driver's licenses to be temporarily acceptable for federal purposes. This has created an abundance of uncertainty amongst residents of Massachusetts about the future validity of their driver's licenses. Unfortunately, this will only become more problematic for Massachusetts residents in the future as the enforcement schedule eventually expands to cover all federal facilities and federally regulated commercial aircrafts.

The Real ID Act enforcement violates both the Privileges or Immunities Clause of the Fourteenth Amendment's right to travel and the Tenth Amendment. Massachusetts' option to comply with the Real ID Act risks the sanctions that affect its residents' right to travel. Specifically, if Massachusetts does not comply, its residents will have to live with the uncertainty regarding Massachusetts driver's licenses and whether or not they will be valid in the future for travel on commercial airlines. Thus, it is a choice that essentially leaves no choice.

“I am a US citizen and *suddenly* my Massachusetts ID isn't

good enough?”¹

INTRODUCTION

Since 1908, driver’s licenses have been issued under the control of the individual states.² Massachusetts has developed standards for issuing driver licenses to protect public safety.³ These standards include minimum age and physical ability requirements, among others.⁴ Historically, the federal government has viewed all state drivers’ licenses equally and has not threatened to disturb the states’ power in that area.⁵ That is no longer the case following the implementation of the Real ID Act.⁶

Congress passed the Real ID Act both in response to the terrorist attacks of September 11, 2001, and also amid concerns

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1. Jessica Meyers, *Mass. IDs at odds with federal law: Federal agencies blocking entry, citing compliance*, BOSTON GLOBE (Aug. 26, 2014), at A1, <http://www.bostonglobe.com/news/nation/2014/08/25/massachusetts-licenses-rejected-parts-washington/iQ15H871MxTHAqpnN1Rj7N/story.html> (quoting Susan Podziba, who was denied entry to a federal building in July because she had a Massachusetts driver’s license) (emphasis added).

2. United States v. Snyder, 852 F.2d 471, 475 (9th Cir. 1988); see Michele L. Waslin, *Driving While Immigrant: Driver’s License Policy and Immigration Enforcement*, OUTSIDE JUSTICE: IMMIGRATION AND THE CRIMINALIZING IMPACT OF CHANGING POLICY AND PRACTICE 3, 8 (David C. Brotherton et al. eds., 2013) (stating, “Rhode Island passed the first driver’s license law in 1908”).

3. MASS. GEN. LAWS ch. 90, § 8 (2012); see Gordon v. Bedard, 164 N.E. 374, 376 (1929) (discussing MASS. GEN. LAWS ANN. ch. 90, § 8 (2012) as being “passed to make the roads more safe and convenient for travelers [sic] by preventing unlicensed persons from operating motor vehicles thereon. The purpose of licensing operators of automobiles is to make it reasonably certain that the licensee is qualified for the task and a proper person to be licensed”).

4. MASS. GEN. LAWS ch. 90, § 8 (2012).

5. See, e.g., *Snyder*, 852 F.2d 471, 475 (9th Cir. 1988).

Drivers’ licenses are issued pursuant to the states’ police powers, and the federal government has no constitutional authority to interfere with a state’s exercise of its police power except to the extent the state’s action intrudes on any of the spheres in which the federal government itself enjoys the power to regulate.

Id.

6. Real ID Act Driver’s Licenses and Identification Cards, 6 C.F.R. § 37 (2014) [hereinafter Real ID Act].

over illegal immigration.⁷ The Real ID Act imposes minimum federal requirements on the issuance and format of state driver's licenses.⁸ The purpose of the Real ID Act is to improve the reliability and accuracy of state-issued identification documents—a vital component of the national security framework.⁹ As a result, if states comply with the Real ID Act they lose the “right to determine [their] own licensing procedures and protocols.”¹⁰

By December 2013, less than half of the states took steps to comply with the Real ID Act¹¹ and many expressed their opposition to it through statutes.¹² To force states to comply with the Real ID Act, the Department of Homeland Security created an enforcement schedule.¹³ The enforcement schedule sets out a timeline of where and when noncompliant, state-issued driver's licenses lose federal recognition.¹⁴ Periodically, the enforcement schedule updates the state driver's licenses that are federally accepted and those states that are not.¹⁵ This has created an abundance of uncertainty amongst Massachusetts residents about

7. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 390 (W.W. Norton & Co. 2004).

8. See 6 C.F.R. § 37 (b)(c) (2014).

9. *Real ID Frequently Asked Questions for the Public*, U.S. DEP'T OF HOMELAND SEC. (Dec. 21, 2015), <http://www.dhs.gov/real-id-public-faqs> [<http://perma.cc/4F35-CDBB>]; *Real ID Enforcement in Brief*, U.S. DEP'T OF HOMELAND SEC. (Oct. 14, 2015), <http://www.dhs.gov/real-id-enforcement-brief> [<http://perma.cc/XJ56-LJ75>].

10. Allie Bohm, *Yes, the States Really Reject Real ID*, AMERICAN CIVIL LIBERTIES UNION (Mar. 27, 2012), <https://www.aclu.org/blog/technology-and-liberty/yes-states-really-reject-real-id> (quoting a statement sent by Montana governor, Brian Schweitzer, to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security hearing on the Real ID Act).

11. Press Release, DHS Press Office, DHS Releases Phased Enforcement Schedule for REAL ID (Dec. 20, 2013) (on file with author), <http://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id> [<http://perma.cc/RLJ8-VZ7M>] (listing the compliant states as: Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Indiana, Kansas, Maryland, Mississippi, Nebraska, Ohio, South Dakota, Tennessee, Utah, Vermont, Wisconsin, West Virginia, and Wyoming).

12. ALASKA STAT. ANN. § 44.99.040 (West 2014); ARIZ. REV. STAT. ANN. § 28-336 (2008); IDAHO CODE ANN. § 40-322 (West 2008); ME. REV. STAT. ANN. TIT. 29-A, § 1411 (2013); MONT. CODE ANN. § 61-5-128 (2013); OKLA. STAT. ANN. tit. 47, § 6-110.3 (West 2014); 74 PA. STAT. ANN. § 301 (West 2012); S.C. CODE ANN. § 56-1-85 (2007); VA. CODE ANN. § 2.2-614.2 (West 2009); WASH. REV. CODE ANN. § 43.41.390 (West 2007).

13. *Real ID Enforcement in Brief*, U.S. DEP'T OF HOMELAND SEC. (Dec. 21, 2015), <http://www.dhs.gov/real-id-enforcement-brief> [<http://perma.cc/XJ56-LJ75>].

14. *Id.*

15. *See id.*

the validity of their driver's licenses since the Real ID enforcement schedule began its first phase of enforcement in April 2014.¹⁶

The story of Susan Podziba is a perfect example of the problems faced by Massachusetts residents because of the enforcement of the Real ID Act.¹⁷ Podziba is the founder and principal of Podziba Policy Mediation, based out of Brookline, Massachusetts.¹⁸ She has mediated scores of cases across the policy spectrum, including international relations, public health, and education—among others.¹⁹ Podziba travelled to Washington DC in late July 2014 to be the public policy mediator at a high-level meeting for the National Oceanic and Atmospheric Administration.²⁰ However, unknown to Podziba, the second phase of the Real ID Act enforcement schedule had been in full enforcement since July 21, 2014.²¹

The second phase of the enforcement schedule prohibits entering restricted areas for federal facilities and for nuclear power plants for those who show a Real ID Act noncompliant state-issued identification.²² At the time Massachusetts was a noncompliant state.²³ The National Oceanic and Atmospheric Administration Building is listed as a restricted federal facility,²⁴ so when Podziba arrived at the federal restricted building and presented her Massachusetts driver's license, she was told she could not enter the

16. *Id.* The first phase of enforcement restricted areas at the Department of Homeland Security's Nebraska Avenue Complex headquarters. *Id.*

17. Meyers *supra* note 1.

18. *Bio*, PODZIBA POLICY MEDIATION, <http://podziba.com/bio> [<http://perma.cc/9NHP-F4U6>] (last visited Nov. 9, 2015).

19. *Id.* (explaining that Podziba has a long history of working with the Federal Government; her clients have included U.S. Departments of Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation, the U.S. Environmental Protection Agency, U.S. Institute of Peace, and the United Nations).

20. Meyers, *supra* note 1.

21. *Real ID Enforcement in Brief*, DHS (U.S. Department of Homeland Security, Washington, D.C.) (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf [<http://perma.cc/Z647-9NJU>].

22. *Real ID Enforcement in Brief*, *supra* note 13.

23. *Real ID Enforcement in Brief*, DHS (U.S. Department of Homeland Security, Washington, D.C.) (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf [<http://perma.cc/Z647-9NJU>] (listing Massachusetts as a noncompliant state as of April 18 2014.); Meyers *supra* note 1 (listing Massachusetts as a noncompliant state as of April 26, 2014).

24. *Valid Ids: Personal Identification for Entry to NOAA Facilities*, EARTH SYSTEM RESEARCH LABORATORY: CHEMICAL SCIENCES DIVISION, <http://www.esrl.noaa.gov/about/visiting.html#security> (last visited Nov. 9, 2015).

building due to her noncompliant form of identification.²⁵ As a result, Podziba was ultimately forced to conduct her high level meeting in a cafeteria outside the security gate of the National Oceanic Atmospheric Administration Building.²⁶

Podziba wished she had been informed about the issue before heading to Washington D.C and stated, “[i]t was bizarre, and then I really felt embarrassed”²⁷ Podziba, who had previously worked on a secure driver’s license project, also voiced her views on the Real ID Act, saying, “I support security, but Massachusetts, to me, is on top of public policy issues and requirements”²⁸

Stories such as Susan Podziba’s are an inevitable result of the Real ID Act’s enforcement schedule.²⁹ On October 15, 2014, the Department of Homeland Security announced that Massachusetts received a one-year extension to comply with the Real ID Act.³⁰ Since the extension has ended, Massachusetts has been granted a renewal of its extension until October 10, 2016.³¹ Therefore, a Massachusetts ID is temporarily acceptable for federal purposes after not being acceptable since April 21, 2014.³²

Unfortunately, this period of ever-changing validity for driver’s licenses is only going to become more problematic for Massachusetts residents as the enforcement schedule eventually expands to cover federally regulated commercial aircrafts.³³ This Note questions the effectiveness of the Real ID Act and discusses how its enforcement causes uncertainty regarding the future of Massachusetts driver’s licenses.³⁴

This Note argues that enforcement of the Real ID Act violates

25. Meyers, *supra* note 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See Real ID Enforcement in Brief, supra* note 13.

30. *Massachusetts Granted Real ID Compliance Extension*, MASSACHUSETTS REGISTRY OF MOTOR VEHICLES (Oct. 17, 2014), <https://www.massrmv.com/tabid/1609/ctl/detail/mid/4285/itemid/500/Massachusetts-Granted-Real-ID-Compliance-Extension.aspx> [<https://perma.cc/GQ8F-VRUL>].

31. *Real ID Enforcement in Brief, supra* note 13.

32. *Compare* Jessica Meyers, *Mass. IDs at odds with federal law: Federal agencies blocking entry, citing compliance*, BOSTON GLOBE (Aug. 26, 2014), at A1, <http://www.bostonglobe.com/news/nation/2014/08/25/massachusetts-licenses-rejected-parts-washington/iQ15H871MxTHAqpnN1Rj7N/story.html>, *with* Jessica Meyers, *Massachusetts granted REAL ID extension*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/metro/2014/10/15/massachusetts-granted-real-extension/9MIFUBBU4zLwMJOvD3igI/story.html>.

33. *See id.*

34. *Id.*

both the Privileges or Immunities Clause³⁵ of the Fourteenth Amendment's right to travel and the Tenth Amendment.³⁶ The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"³⁷ Enforcement of the Real ID Act creates uncertainty regarding the future of Massachusetts driver's licenses and whether or not they will be valid in the future to travel on commercial airlines.³⁸

The Tenth Amendment guarantees that "[t]he powers not delegated to the United States . . . are reserved to the States"³⁹ Congress cannot force a state to enact a regulatory program by "commandeer[ing] the legislative process[] of the States"⁴⁰ The federal government's use of the Real ID Act's method of enforcement to coerce the states into compliance is a violation of the Tenth Amendment.⁴¹

Part I of this Note traces the history of the Real ID Act and establishes what led to the delayed enforcement schedule.⁴² Specifically, this Part addresses the arguments supporting the federal government's reasoning for implementing the Real ID Act. Section I.A provides an overview of the Real ID Act, discusses the Real ID Act's history, and explains the required minimum standards for state licenses. Section I.B describes the rebelling states' attempts to oppose the Real ID Act. Additionally, Section I.B explains the effect the rebelling states had on the Real ID Act. Section I.C details the Real ID Act's enforcement schedule, discusses the timing of the enforcement, and outlines what is included and excluded from the schedule.

Part II addresses issues that Massachusetts residents face under the enforcement of the Real ID Act.⁴³ Section II.A reviews

35. Not to be confused with the Privileges *and* Immunities Clause from Article Four of the United States Constitution that prevents states from treating citizens of other states in a discriminatory matter. U.S. CONST. art. IV, § 2, cl. 1. This Note argues that the Federal Government is treating Massachusetts residents in a discriminatory matter, not other states. See discussion *infra* Part III.

36. U.S. CONST. amend. X.

37. U.S. CONST. amend. XIV, § 1.

38. See *Real ID Enforcement in Brief*, *supra* note 13.

39. U.S. CONST. amend. X.

40. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

41. U.S. CONST. amend. X.

42. Real ID Act, *supra* note 6.

43. See *Real ID Enforcement in Brief*, *supra* note 13.

Massachusetts' federal status during the enforcement schedule in regards to driver's licenses. Section II.A also establishes how Massachusetts' current extension to comply with the Real ID Act has created uncertainty regarding the validity of Massachusetts residents' driver's licenses by highlighting the high burden that Massachusetts has to overcome in a short amount of time. Section II.B establishes how the uncertainty surrounding Massachusetts driver's licenses has already had a negative impact on Massachusetts residents in regards to travel. Section II.B further illustrates how a passport does not relieve a Massachusetts resident's burden of providing valid identification while traveling.

Part III argues that the federal government is violating the right to travel under the Privileges or Immunities Clause of the Fourteenth Amendment through enforcement of the Real ID Act.⁴⁴ Section III.A gives an overview of the history of the right to travel developed from the Privileges or Immunities Clause.⁴⁵ Part III.B explains how the enforcement of the Real ID Act interferes with Massachusetts residents' right to travel. Section III.B also explains that it is the federal government violating the right to travel, and not the Commonwealth of Massachusetts.

Part IV argues that the federal government is violating the Tenth Amendment through the sanctions imposed by enforcement of the Real ID Act.⁴⁶ The effects of these sanctions include limitations on Massachusetts residents' right to travel.⁴⁷ Section IV.A describes how the Tenth Amendment prohibits the federal government from coercing the states into implementing a federal law through sanctions as exemplified by *New York v. US*⁴⁸ and *United States v. Windsor*.⁴⁹ Section IV.B explains how enforcement of the Real ID Act produces sanctions on the states if they refuse to implement the Real ID Act.⁵⁰

I. HISTORY OF THE REAL ID ACT ENFORCEMENT

Although the Real ID Act was first enacted in 2005, it has taken nine years for its enforcement to begin.⁵¹ Further, full-scale

44. See *infra* Part III.

45. See *infra* Part III.

46. See *infra* Part IV.

47. See *Real ID Enforcement in Brief*, *supra* note 13.

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

49. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

50. See *infra* Section IV.B.

51. Compare Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 312

enforcement will not begin until at least eleven years after the Real ID Act was passed.⁵² The enforcement delay is a result of strong opposition to the Real ID Act from many states that has existed over the years.⁵³

A. *What is the Real ID Act?*

Congress passed the Real ID Act as an amendment to a much broader supplemental defense appropriation bill that funded the war in Iraq and aided tsunami victims in Southeast Asia.⁵⁴ The Real ID Act is described as an act that is “designed to help in the fight against terrorism.”⁵⁵

The Real ID Act contains many different provisions that cover a wide variety of issues.⁵⁶ These include waiving laws that interfere with the construction of physical barriers at the borders;⁵⁷ updating and tightening the laws and procedures on applications for asylum, removal, and deportation of aliens for terrorist activity;⁵⁸ funding some reports and pilot projects related to border security;⁵⁹ and changing visa limits for temporary workers.⁶⁰ The most controversial provision of the Real ID Act includes mandating minimum federal requirements on the issuance and format of state driver’s licenses.⁶¹

(2005) (Real ID Act was enacted on May 11, 2005), with *Real ID Enforcement in Brief*, *supra* note 13.

52. Compare Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 312 (2005) (Real ID Act was enacted on May 11, 2005), with *Real ID Enforcement in Brief*, *supra* note 13.

53. See ALASKA STAT. ANN. § 44.99.040 (West 2014); ARIZ. REV. STAT. ANN. § 28-336 (2008); IDAHO CODE ANN. § 40-322 (West 2008); ME. REV. STAT. tit. 29-A, § 1411 (2013); MONT. CODE ANN. § 61-5-128 (2013); OKLA. STAT. ANN. tit. 47, § 6-110.3 (West 2014); 74 PA. STAT. ANN. § 301 (West 2012); S.C. CODE ANN. § 56-1-85 (2007); VA. CODE ANN. § 2.2-614.2 (West 2009); WASH. REV. CODE ANN. § 43.41.390 (West 2007).

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

55. Jay M. Zitter, *Validity, Construction, and Application of REAL ID Act of 2005*, Pub. L. No. 109-13, 119 Stat. 231, 11 A.L.R. FED. 2D 1 (2006).

56. See Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 231 (2005).

57. 8 U.S.C. § 1103 (2006).

58. *Id.* at §§ 1182, 1252.

59. *Id.* at § 1712.

60. *Id.* at § 1184.

61. Zitter, *supra* note 55.

1. The Origin of the Real ID Act

The September 11th terrorist attacks that killed 2,977 people fundamentally changed the United States.⁶² On September 11, 2001, terrorists hijacked four commercial airlines.⁶³ The nineteen hijackers were able to gain access to the planes by acquiring thirty-four identifications.⁶⁴ These included thirteen driver's licenses and twenty-one federal or state-issued identification cards.⁶⁵ Janice Kephart, former counsel to the 9/11 Commission, argued, “[i]f a birth certificate or social security card had been required . . . the hijackers would have been hard pressed to obtain validly issued state/U.S. identifications.”⁶⁶

The National Commission on Terrorist Attacks Upon the United States provided a report (hereinafter “9/11 Commission Report”) of the 9/11 terrorists attacks and provided recommendations to the President, Congress, and the public for their consideration.⁶⁷ While assessing the United States’ risk for a potential terrorist attack, the 9/11 Commission Report concluded that “[t]oday more than 9 million people are in the United States outside the legal immigration system.”⁶⁸ As a result, one of the recommendations was that the federal government set minimum

62. CNN Library, *September 11th Fast Facts*, CNN (Sept. 07, 2015, 12:41 PM), <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts> [http://perma.cc/3WG9-8GPJ]. “A total of 2,977 people killed . . . in the worst terrorist attack in U.S. history.” *Id.*

63. *Id.* American Airlines Flight 11 was traveling from Boston to Los Angeles when it struck the north tower of the World Trade Center in New York City. *Id.* United Airlines Flight 175 was traveling from Boston to Los Angeles when it struck the south tower of the World Trade Center in New York City. *Id.* American Airlines Flight 77 was traveling from Dulles, Virginia to Los Angeles when it struck the Pentagon Building in Washington. *Id.* United Airlines Flight 93 traveling from Newark, New Jersey to San Francisco when it crashed in a field near Shanksville, Pennsylvania. *Id.*

64. *Border Security and Enforcement: The 9/11 Commission Staff Report on Training for Border Inspectors, Document Integrity, and Defects in the U.S. Visa Program: Hearing on Terrorist Travel Before the Subcomm. on Terrorism, Technology, and Homeland Security and Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 15 (2005) (statement of Janice L. Kephart).

65. *Id.* at 15. The driver licenses were used “to move freely around the country to meet, plan, and case targets, open bank accounts, rent cars, [and] take flying lessons . . .” *Id.* Hijacker, Al-Marabh, had obtained five driver’s licenses from Michigan in the preceding thirteen months and also had licenses from Massachusetts, Ontario, and Florida. *Id.* at 9.

66. *Id.* at 15.

67. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES., *THE 9/11 COMMISSION REPORT XV* (W.W. Norton & Co. 2004).

68. *Id.* at 390.

standards for the issuance of federally recognized identification, such as state driver's licenses.⁶⁹ The Real ID Act then emerged from the 9/11 Commission Report's recommendations and established standards for the issuance of driver's licenses and other federally recognized identification cards.⁷⁰

2. Real ID Act Enactment History

The Real ID Act originated in the form of a standalone bill in 2004 called the Intelligence Reform and Terrorism Prevention Act (hereinafter "IRTPA").⁷¹ The purpose of the IRTPA was "[t]o reform the intelligence community and the intelligence and intelligence-related activities of the United States Government"⁷² The immigration provision that included the issue of national standards for issuing driver's licenses was introduced to the 108th Congress as a part of IRTPA in 2004.⁷³ Representative James Sensenbrenner introduced the immigration provision to the Senate where he faced much criticism and opposition, and in doing so, threatened to "kill the entire bill."⁷⁴ As a result of Representative Sensenbrenner's insistence, a compromise was reached allowing the provision to be a part of the 109th Congress' first piece of passing legislation.⁷⁵

In 2005, Congressional leaders imposed the Real ID Act as an attachment to an unrelated, must-pass, supplemental defense

69. *Id.* (footnote omitted).

Recommendation: Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.

Id.

70. See ALLISON M. SMITH, CONG. RESEARCH SERV., RL 32127, SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED ALIENS 1-2 (2005).

71. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004).

72. *Id.* at 1.

73. MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL 32754, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 1 (2005), <http://fas.org/sgp/crs/homsec/RL32754.pdf> [<http://perma.cc/34KZ-FHZA>].

74. Mary Curtius, *GOP Congressman Renews Push for Immigration Curbs*, L.A. TIMES, (Jan. 27, 2005) <http://articles.latimes.com/2005/jan/27/nation/na-immig27> [<http://perma.cc/5NLK-AJR8>].

75. *Id.*; see GARCIA, *supra* note 73, at 1.

appropriations bill.⁷⁶ The Real ID Act was a part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 (hereinafter “Emergency Supplemental Appropriations Act”) that funded the war in Iraq and aided tsunami victims in Southeast Asia.⁷⁷ A version of the Emergency Supplemental Appropriations Act, which did not include the Real ID Act provisions, passed the Senate in April 2005 by a unanimous vote.⁷⁸ Subsequently, a conference report to provide the correct version of the Emergency Supplemental Appropriations Act that included the Real ID Act provisions passed through Congress on May 5, 2005.⁷⁹ The Senate vote on the Emergency Supplemental Appropriations Act also passed on May 10, 2005, with no debate.⁸⁰

According to Anita Ramasastry, Professor at the University of Washington School of Law, it would have been extremely difficult not to pass the bill.⁸¹ She stated that “[i]t would have been a serious political liability for a congressman to vote against funding for the war on terror and tsunami relief. So it is not surprising that there were no debates, hearings or public vettings of the act.”⁸² President George W. Bush signed the Real ID Act into law on May 11, 2005.⁸³

3. State Requirements of the Real ID Act

The Real ID Act sets a minimum standard that states have to meet in order to issue a state driver’s license.⁸⁴ The minimum

76. See Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 302-312 (2005).

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

78. GARCIA, *supra* note 73, at 1.

79. *Id.*

80. See Matt Sundeen & Jeremy Meadows, *The REAL ID Rebellion*, 34 STATE LEGISLATURES 26, 26 (2008).

81. Anita Ramasastry, *Why the ‘Real ID’ Act is a real mess*, CNN (Aug. 12, 2005, 2:36 PM), http://www.cnn.com/2005/LAW/08/12/ramasastry.ids/index.html?_s=PM:LAW [<http://perma.cc/35JU-PADG>].

82. *Id.*

83. *E.g.*, *The History of Federal Requirements for State Issued Driver’s Licenses and Identification Cards*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> [<http://perma.cc/QM6V-ESHP?type=live>] (last visited Nov. 9, 2015).

84. The Real ID Act contains a large number of different provisions that cover a wide variety of issues including waiving laws that interfere with the construction of physical barriers at the borders; updating and tightening the laws and procedures on applications for asylum, removal, and deportation of aliens for terrorist activity; funding some reports and pilot projects related to border security; and changing visa

standard includes information and features on the driver's license,⁸⁵ verification of information before issuing a driver's license,⁸⁶ and practices in the issuance of driver's licenses.⁸⁷

Section 37.17 of the Real ID Act includes information that one would expect to find on a Massachusetts driver's license: the applicant's full legal name, residential address, birth date, gender, identification number, digital front-facing photograph and signature.⁸⁸ Relatively new information that is required of a Real ID compliant driver's license includes physical security features designed to prevent fraud and a common machine-readable technology, with defined minimum data elements.⁸⁹

Under Section 37.11 of the Real ID Act, in order to issue a driver's license or identification card, the applicant must present documents that show their photo identity, date of birth, social security number, name, and address of principle residence.⁹⁰ Section 37.11 also requires that the applicant provide evidence of lawful status.⁹¹

The Real ID Act also sets the standard required practice in the issuance of driver's licenses.⁹² These include common practices in issuing state driver's licenses such as: establishing an effective procedure to verify a renewal and reissuance of applicants' information,⁹³ ensuring the physical security of locations where the cards are produced,⁹⁴ and subjecting the card-issuing employees to appropriate security clearance requirements.⁹⁵ Newly introduced

limits for temporary workers. See Real ID Act of 2005, Pub. L. No. 109-13, §§ 101–106, 119 Stat. 231, 302–311 (2005). For the purposes of this Note, the discussion will only be based on the provision regarding state driver's licenses. Real ID Act, *supra* note 6.

85. Real ID Act Driver's Licenses and Identification Cards, 6 C.F.R. §§ 37.15, 37.17, 37.19 (2014).

86. *Id.* §§ 37.11, 37.13.

87. *Id.* §§ 37.23, 37.31, 37.33, 37.41, 37.43, 37.45.

88. *Id.* § 37.17 (a–h).

89. *Id.* § 37.17 (i).

90. *Id.* § 37.11 (c–f).

91. *Id.* § 37.3. Lawful status to have a full license requires that the holder of the license is a United States citizen. *Id.* A permanent or temporary lawful alien “has conditional permanent resident status,” an approved asylum application or refugee status, a valid nonimmigrant visa, or a pending application for asylum. *Id.* Lawful status of only being allowed a temporary license includes an applicant who has pending or approved temporary protected status, “has approved deferred action status,” or has a pending application of a lawful alien admitted for permanent residence status. *Id.*

92. *Id.* §§ 37.23, 37.25, 37.29, 37.31, 37.33, 37.41, 37.43, 37.45.

93. *Id.* §§ 37.23, 37.25.

94. *Id.* § 37.43.

95. *Id.* § 37.45.

and controversial practices include: retaining paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of ten years,⁹⁶ establishing fraudulent document recognition training programs for appropriate employees,⁹⁷ and maintaining information⁹⁸ in a state motor vehicle database.⁹⁹

The Department of Homeland Security determines whether a state has or has not met the requirements and whether federal agencies may or may not accept the driver's licenses issued by the state for federal purposes.¹⁰⁰ Section 37.63 of the Real ID Act further allows the Secretary of Homeland Security to grant extensions to noncompliant states at his or her discretion.¹⁰¹

B. *State Opposition to the Real ID Act*

Soon after George W. Bush signed the Real ID Act into law in May of 2005, the Real ID Act faced a considerable amount of criticism.¹⁰² By August of 2005, more than six-hundred organizations had expressed concern over the Real ID Act.¹⁰³ The National Governors Association, National Council of State Legislatures, and American Association of Motor Vehicle Administrators concluded that the Real ID Act “impose[s] unrealistic burdens on states to comply with the [A]ct”¹⁰⁴

96. *Id.* § 37.31.

97. *Id.* § 37.41(b)(5).

98. *Id.* § 37.33. The database information must minimally contain all data fields printed on drivers' licenses and identification cards issued by the state and motor vehicle drivers' histories, including motor vehicle violations, suspensions and points on licenses. *Id.*

99. *Id.* §§ 37.11, 37.13(b), 37.29, 37.5(a), 37.71. Other procedural standards include: mandating applicants to a facial image capture, confirming an applicant's Social Security number with the Social Security Administration, refusing to issue a driver's license issued by another state without confirmation that the applicant is terminating the license, and limiting the period of all drivers' license validity to a maximum of eight years. *Id.* If the state issues a driver's license that does not satisfy the requirements of the Real ID Act, that license must clearly state that it may not be accepted for federal identification and have a unique design to alert a federal agency. *Id.*

100. *Id.* § 37.3.

101. *Id.* § 37.63(c).

102. *See, e.g.*, Ramasastry, *supra* note 81.

103. *Id.* (listing the American Association of Motor Vehicle Administrators, the American Library Association the Association for Computing Machinery, the National Council of State Legislatures, the American Immigration Lawyers Association, and the National Governors Association are among them).

104. NATIONAL GOVERNORS ASSOCIATION ET AL., THE REAL ID ACT: NATIONAL IMPACT ANALYSIS (Sept. 2006), http://www.ncsl.org/print/statefed/real_id_

The states soon followed suit with their own critiques of the Real ID Act.¹⁰⁵ Montana became one of the strongest voices of opposition.¹⁰⁶ Then Governor Brian Schweitzer, referencing the impact of the Montana legislature's vote, "not to implement any provisions of the Real ID," told National Public Radio, "[w]e're fed up with the federal government coming up with kookie IDs¹⁰⁷ that do not make us more secure. This is the federal government telling a state [that it] must do something and you must pay for it. Well, thanks for playing. Montana's not in."¹⁰⁸

1. Rebellious State Action

States were required to bring their driver's licenses into compliance with the Real ID Act by May 2008, or face the reality of not having such licenses recognized by the federal government.¹⁰⁹ In 2007, twenty-one states passed measures that either prohibited state compliance with the Real ID Act or urged members of their congressional delegation to amend or repeal it.¹¹⁰ Many of these states protested the Real ID Act through statutory opposition that proclaimed noncompliance with the Act.¹¹¹

In 2007, Maine's anti-Real ID law was the first to be enacted.¹¹² The title of the Maine statute is "Prohibition against participation in the federal REAL ID Act of 2005," which makes the state's opinion abundantly clear.¹¹³ It states that Maine "may not participate in the federal REAL ID Act The Secretary of

impact_report_final_sept19.pdf [http://perma.cc/Z3CA-2JX2].

105. See, e.g., Interview by Melissa Block with Brian Schweitzer, Governor, Montana, NPR (Mar. 7, 2008), <http://www.npr.org/templates/story/story.php?storyId=87991791>.

106. See *id.*

107. See *id.* The phrase, "kookie IDs" is meant to describe driver's licenses under the Real ID Act. *Id.*

108. *Id.*

109. Real ID Act of 2005, Pub. L. No. 109-13, § 202 (a) (1) ("Beginning 3 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.").

110. Sundeen, *supra* note 80.

111. ALASKA STAT. ANN. § 44.99.040 (West 2014); ARIZ. REV. STAT. ANN. § 28-336 (2008); IDAHO CODE ANN. § 40-322 (West 2008); ME. REV. STAT. TIT. 29-A, § 1411 (2013); MONT. CODE ANN. § 61-5-128 (West 2013); OKLA. STAT. ANN. tit. 47, § 6-110.3 (West 2014); 74 PA. STAT. ANN. § 301 (West 2012); S.C. CODE ANN. § 56-1-85 (2007); VA. CODE ANN. § 2.2-614.2 (West 2009); WASH. REV. CODE ANN. § 43.41.390 (West 2007).

112. See ME. REV. STAT. TIT. 29-A, § 1411 (2013).

113. *Id.*

State may not amend the procedures for applying for a driver's license or nondriver identification card under this chapter in a manner designed to conform to the federal REAL ID Act of 2005."¹¹⁴

Most state statutes opposing the Real ID Act follow the format of Maine's anti-Real ID law.¹¹⁵ Although there is some variance—some opposing states require a greater amount of federal funds to help cover state costs¹¹⁶—a number of opposing states proclaim that complying would violate principles of federalism contained in the Tenth Amendment.¹¹⁷ Several states go further and not only prohibit state officials from complying with the Real ID Act, but also require that state transportation officials report to the governor and legislature if there is any effect of persuasion of compliance from the Department of Homeland Security.¹¹⁸

2. Department of Homeland Security Response

State rebellion against the Real ID Act puts pressure on both Congress and the Department of Homeland Security to make changes.¹¹⁹ In 2009, then Senator Daniel Akaka of Hawaii introduced the Pass ID Act.¹²⁰ The Pass ID Act would repeal and replace the Real ID Act with measures that would “better protect the security, confidentiality, and integrity of personally identifiable information collected by States when issuing driver's licenses and identification documents”¹²¹ Unfortunately, the Pass ID Act never came up for vote.¹²²

114. *Id.*

115. ALASKA STAT. ANN. § 44.99.040 (West 2014); 74 PA. STAT. ANN. § 301 (West 2012); S.C. CODE ANN. § 56-1-85 (2007).

116. VA. CODE ANN. § 2.2-614.2 (West 2009); WASH. REV. CODE ANN. § 43.41.390 (West 2007).

117. IDAHO CODE ANN. § 40-322 (West 2008); MONT. CODE ANN. § 61-5-128 (West 2013); OKLA. STAT. ANN. tit. 47, § 6-110.3 (West 2014).

118. ARIZ. REV. STAT. ANN. § 28-336 (2008); MONT. CODE ANN. § 61-5-128 (West 2013); OKLA. STAT. ANN. tit. 47, § 6-110.3 (West 2014).

119. See, e.g., S. 1261, 111th Congress (2009), <https://www.congress.gov/bill/111th-congress/senate-bill/1261> [<https://perma.cc/J7YF-WLZ8>]; John Dinan, *The State of American Federalism 2007-2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 PUBLIUS: JOURNAL OF FEDERALISM 381, 384 (Summer 2008).

120. S. 1261, 111th Congress (2009), <https://www.congress.gov/bill/111th-congress/senate-bill/1261> [<https://perma.cc/J7YF-WLZ8>].

121. *Id.*

122. Shaun Waterman, *Reality Sets in for States on Real ID*, WASH. TIMES (Aug. 4, 2010), <http://www.washingtontimes.com/news/2010/aug/4/reality-sets-in-for->

The most important and effective consequence of the state rebellion against the Real ID Act was a result of pressure placed on the Department of Homeland Security to issue administrative rules giving states more time to comply with the Act.¹²³ In March 2007, Department of Homeland Security Secretary Michael Chertoff announced that states would have twenty additional months to bring their licenses into compliance.¹²⁴

In January 2008, final regulations provided for an even greater amount of time for states to comply with the law.¹²⁵ According to the Department of Homeland Security, the final regulations incorporated many of the recommendations made by the rebelling states.¹²⁶ The final regulations allowed states to apply¹²⁷ for initial extensions until May 2011, and additional extensions until 2017, to bring their licenses into full compliance.¹²⁸ The Department of Homeland Security's intention was for states to receive the extensions so long as they agreed to comply with the Real ID Act.¹²⁹ However, the Department of Homeland Security was so willing to give extensions that it even granted them to states that had statutes vowing not to comply with the Real ID Act.¹³⁰ As a result, as of December 22, 2015, the Department of Homeland

states-on-real-id/?page=all#pagebreak [http://perma.cc/AHW6-NFZL] (explaining that David Quam, Director of Federal Relations for the National Governors Association, told the Washington Times "Pass ID is not moving forward").

123. See John Dinan, *The State of American Federalism 2007-2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 PUBLIUS: JOURNAL OF FEDERALISM 381, 384 (Summer 2008).

124. *Id.* The move, in effect, changed the original May 2008 deadline to December 2009. *Id.*

125. Minimum Standards for Driver's Licenses and Identifications Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01 (Jan. 29, 2008) (codified at 6 C.F.R. § 37.63), <http://www.gpo.gov/fdsys/pkg/FR-2008-01-29/html/08-140.htm> [http://perma.cc/H3SN-WX4P].

126. Sundeen, *supra* note 80.

127. Minimum Standards for Driver's Licenses and Identifications Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01 (Jan. 29, 2008) (codified at 6 C.F.R. § 37.63), <http://www.gpo.gov/fdsys/pkg/FR-2008-01-29/html/08-140.htm> [http://perma.cc/H3SN-WX4P].

128. *Id.*

129. *Id.* "States . . . may file a request for an additional extension . . . by submitting a Material Compliance Checklist demonstrating material compliance" *Id.*

130. See *Real ID Enforcement in Brief*, *supra* note 13. Montana was granted an extension by the Department of Homeland Security to comply with the Real ID Act while concurrently having a statute, MONT. CODE ANN. § 61-5-128 (West 2013), that reads, "The state of Montana will not participate in the implementation of the REAL ID Act of 2005." See *Real ID Enforcement in Brief*, *supra* note 13.

Security has given extensions to nineteen states¹³¹ and eight states are under review for an extension renewal.¹³²

C. *The Real ID Act Enforcement Schedule*

Five years after granting extensions, and eight years after the enactment of the Real ID Act, the Department of Homeland Security announced the phasing in of the enforcement of the Real ID Act.¹³³ The Department of Homeland Security's rationale for choosing December 20, 2013,¹³⁴ to announce the enforcement schedule was because "forty-one states and territories are either fully compliant with the REAL ID standards or have made sufficient progress to qualify for an extension."¹³⁵ The Department of Homeland Security stated in a press release that the Real ID Act enforcement would be completed in a "measured, fair, responsible, and achievable way."¹³⁶ The enforcement schedule would consist of four phases, beginning with a notification period for each phase followed by a full enforcement period for each phase.¹³⁷

The notification period for Phase 1 began January 20, 2014, and included restricted areas for the Department of Homeland Security's Nebraska Avenue Complex headquarters.¹³⁸ Full enforcement of Phase 1 began April 21, 2014, and Phase 2 enforcement began shortly thereafter on July 21, 2014.¹³⁹ Phase 2 included restricted areas for federal facilities¹⁴⁰ and nuclear power

131. *Id.* (noting the states that have an extension are Arizona, Arkansas, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Montana, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia).

132. *Id.* (noting the states that are under review for an extension renewal are Alaska, California, Illinois, Missouri, New Jersey, New Mexico, South Carolina, and Washington).

133. Press Release, DHS Press Office, DHS Releases Phased Enforcement Schedule for REAL ID (December 20, 2013) (on file with author), <http://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id> [<http://perma.cc/RLJ8-VZ7M>].

134. *Id.*

135. *Id.* (explaining that twenty-one of these states met the Real ID Act's minimum standards while twenty states and territories had received extensions).

136. *Id.*

137. *Real ID Enforcement in Brief*, DHS (U.S. Department of Homeland Security, Washington, D.C.) (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf [<http://perma.cc/Z647-9NJU>].

138. Restricted areas include areas accessible by agency personnel, contractors and their guests. *Id.*

139. *Id.*

140. Meyers, *supra* note 1 (including the National Oceanic Atmospheric Administration Building).

plants.¹⁴¹ Phase 3's full enforcement began January 19, 2015, and includes semi-restricted areas¹⁴² for all federal facilities at security levels one and two.¹⁴³ The most recent, Phase 3's full enforcement for federal facilities at security levels three, four, and five began on October 10, 2015.¹⁴⁴

Phase 4 will not begin until the Department of Homeland Security has conducted an evaluation to inform a "fair and achievable timeline."¹⁴⁵ The evaluation will "be used to inform the nature and timing of subsequent phases and to inform the pathway to full enforcement."¹⁴⁶ The date for implementing Phase 4 will be set after the evaluation has been completed and will not occur sooner than 2016, eleven years after George W. Bush signed the Real ID Act into law.¹⁴⁷

II. THE REAL ID ACT ENFORCEMENT'S NEGATIVE IMPACT ON MASSACHUSETTS DRIVER'S LICENSES

The Real ID Act, on its face, does not impose a direct federal order for states to comply.¹⁴⁸ A state's choice not to comply with federal programs, when there is no direct order, usually results in a loss in funding from the federal government.¹⁴⁹ However, in this case, the designated penalty for not complying with the Real ID Act concerns the states' residents and the validity of their driver's

141. *Real ID Enforcement in Brief*, *supra* note 13.

142. Semi-restricted areas include "areas available to the general public but subject to ID-based access control." *Id.* Most federal facilities do not include facilities that do not currently require individuals to present identification or activities directly "relating to safety and health or life preserving services, to law enforcement, and to constitutionally protected activities, including legal and investigative proceedings. . . ." *Id.*

143. *Real ID Enforcement in Brief*, DEP'T OF HOMELAND SEC., Washington, D.C.) (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf [<http://perma.cc/Z647-9NJU>].

144. *Id.*

145. *Real ID Enforcement in Brief*, *supra* note 13.

146. *Id.*

147. *Id.*

148. *See* Real ID Act, *supra* note 6.

149. *E.g.*, Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2(b), 87 Stat. 1046 (1974) (forcing states that declined to lower their speed limit to fifty-five miles per hour in the 1970s to suffer a loss in federal highway funding); Highway Safety Amendments, Pub L. No. 98-363, § 158, 98 Stat. 435, 437 (1984) (forcing states that declined to raise their drinking age to twenty-one in the 1980's to suffer a loss in federal highway funding); Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 106-346, § 351, 114 Stat. 1356, 1356A-34 (2000) (forcing states that declined to lower their blood-alcohol limit for drunk driving to .08 to suffer a loss in federal highway funding).

license federally.¹⁵⁰

A. *The Effects of the Real ID Act Enforcement upon Massachusetts Residents*

Since the Real ID Act enforcement began, the Department of Homeland Security has been periodically updating which state driver's licenses are recognized for federal purposes.¹⁵¹ Massachusetts' federal status has changed since January 2014—from not being federally recognized to now being federally recognized.¹⁵² However, since the change in status was the result of an extension, it is still undetermined what the status will be when the extension has terminated on October 10, 2016.¹⁵³

1. The Previous Status of Massachusetts Licenses

Prior to the Real ID Enforcement Schedule, Massachusetts had decided not to comply with the Real ID Act.¹⁵⁴ Even a month prior to full enforcement of Phase 1, Republican members¹⁵⁵ of the Massachusetts Senate were requesting that then Governor Deval Patrick comply with the Real ID Act.¹⁵⁶ However, Massachusetts did not take immediate steps to do so.¹⁵⁷ Officials in Massachusetts criticized the Real ID Act by calling the requirements “expensive

150. See *Real ID Enforcement in Brief*, *supra* note 13.

151. *Id.*

152. Compare Jessica Meyers, *Mass. IDs at Odds with Federal Law: Federal Agencies Blocking Entry, Citing Compliance*, BOSTON GLOBE (Aug. 26, 2014), at A1, <http://www.bostonglobe.com/news/nation/2014/08/25/massachusetts-licenses-rejected-parts-washington/iQ15H871MxTHAqpnN1Rj7N/story.html>, with Jessica Meyers, *Massachusetts Granted REAL ID Extension*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/metro/2014/10/15/massachusetts-granted-real-extension/9MIFUBBU4zLwMJOOvd3igI/story.html>.

153. *Real ID Enforcement in Brief*, *supra* note 13.

154. Kimberly Railey, *State prodded on ID security: U.S. Could Reject Driver's Licenses as Credentials*, BOSTON GLOBE (Feb. 7, 2014), <http://www.bostonglobe.com/news/nation/2014/02/07/massachusetts-other-states-defy-federal-rules-with-looming-consequences-for-residents/KUYDtWTQXHx0E0I2OmQTWJ/story.html>.

155. Letter from Bruce E. Tarr, Massachusetts State Senator, et al., to Deval Patrick, Governor of Massachusetts (Feb. 27, 2014), <http://www.scribd.com/doc/209605208/MA-REAL-ID-Compliance-Letter-2-27-2014> [http://perma.cc/GD3U-8WHM]. Members include Bruce Tarr, Robert Hedlund, Michael Knapik and Richard Ross. *Id.*

156. *Id.*

157. See *Real ID Enforcement in Brief*, DEP'T OF HOMELAND SEC., Washington, D.C.) (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf, [http://perma.cc/Z647-9NJU] (proving at the time of the Department of Homeland Security publication, April 18, 2014, Massachusetts was listed as a noncompliant state).

to adopt, burdensome, and an encroachment of state's rights."¹⁵⁸

When the Department of Homeland Security released its final regulations of the Real ID Act, it estimated that during the first eleven years of implementation costs would total \$9.9 billion.¹⁵⁹ Of this total cost, \$3.9 billion is the cost to each state, \$5.8 billion is the cost to the state residents for lost time and miscellaneous expenses necessary to obtain the proper documentation, and about \$171 million is the cost to the federal government.¹⁶⁰ This demonstrates the lack of federal funding, which passes the majority of Real ID Act costs on to the states and their citizens.¹⁶¹ This was especially problematic for Massachusetts, which was in the midst of facing state budget cuts during the 2013 fiscal year.¹⁶²

As of September 4, 2013, Massachusetts had only met eight of over thirty requirements of the Real ID Act regulations.¹⁶³ Massachusetts did not meet some of the simplest requirements, such as the "lawful presence in the United States" requirement.¹⁶⁴ In order to be in compliance, Massachusetts would need to undertake significant statutory change,¹⁶⁵ forcing implementation of

158. Railey, *supra* note 154.

159. Minimum Standards for Driver's Licenses and Identifications Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-5330 (Jan. 29, 2008) (codified at 6 C.F.R. § 37.63), <http://www.gpo.gov/fdsys/pkg/FR-2008-01-29/html/08-140.htm> [<http://perma.cc/H3SN-WX4P>].

160. *Id.*; see also Dinan, *supra* note 123.

161. Minimum Standards for Driver's Licenses and Identifications Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-5330 (Jan. 29, 2008) (codified at 6 C.F.R. § 37.63), <http://www.gpo.gov/fdsys/pkg/FR-2008-01-29/html/08-140.htm> [<http://perma.cc/H3SN-WX4P>]. Department of Homeland security in the final regulations stated "DHS also recognizes that compliance with the rule carries with it significant costs and logistical burdens, for which Federal funds are generally not available." *Id.*

162. Governor's FY13 9C Filing Letter, <http://www.mass.gov/anf/budget-taxes-and-procurement/state-budget/fy13-budget-info/fy13-budget-cut-information/gov-fy13-9c-filing-letter.html>. Massachusetts had a budget shortfall of \$540 million in the 2013 Fiscal Year. Letter from Deval Patrick, Governor of Massachusetts, to Senate and House of Representatives of Massachusetts (Dec. 4, 2012), <http://www.mass.gov/anf/budget-taxes-and-procurement/state-budget/fy13-budget-info/fy13-budget-cut-information/gov-fy13-9c-filing-letter.html> [<http://perma.cc/XJ9L-BY89>].

163. Letter from Bruce E. Tarr, *supra* note 155.

164. ALISON M. SMITH, CONG. RESEARCH SERV., RL 32127, SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED ALIENS 10 (2005). The lawful presence requirement demands evidence of legal presence in the United States. *Id.* at 2.

165. See Real ID Act Driver's Licenses and Identification Cards, 6 C.F.R. § 37.3 (2014) (requiring evidence a person is in lawful status is a citizen or national of the United States; or an alien).

a complex verification requirement¹⁶⁶ in addition to reissuing every currently valid driver's license in Massachusetts.¹⁶⁷

These changes would be especially burdensome due to the fact that Massachusetts has previously established a secure system for the issuance of driver's licenses.¹⁶⁸ Massachusetts requires driver's license applicants to show their social security card and requires the confirmation of the number with the Social Security Administration.¹⁶⁹ The Massachusetts social security card requirements, already in place, would have prevented 9/11 hijackers from obtaining state identification.¹⁷⁰ Therefore, Massachusetts' current licensing laws already serve the primary purpose of the Real ID Act.¹⁷¹

The Real ID Act also infringes on the states' rights of autonomy in issuing driver's licenses.¹⁷² Traditionally, the federal government has left regulation of driver's licenses to the states.¹⁷³ The states derive this power from the police power doctrine.¹⁷⁴ The

166. See *id.* §§ 37.23, 37.25, 37.29, 37.31, 37.33, 37.41, 37.43, 37.45.

167. See *id.* § 37.17(h)–(i) (referring to licenses needing a physical security features and a common machine-readable technology); *id.* § 37.71 (referring to licenses issued that do not meet the Real ID requirements, the need to clearly state that licensed that do not meet the Real ID requirements may not be accepted for federal identification, and identifies a unique design to alert federal agencies of these licenses).

168. 540 Mass. Code Regs. 2.06(3)(b) (2014).

An applicant for a license or learner's permit shall submit satisfactory proof of age, signature and residency within the Commonwealth, in a form acceptable to the Registrar. For purposes of establishing proper identity, an applicant shall also provide his or her social security number, the validity of which the Registrar may confirm with the U.S. Social Security Administration.

Id.

169. *Id.*

170. *Border Security and Enforcement: The 9/11 Commission Staff Report on Training for Border Inspectors, Document Integrity, and Defects in the U.S. Visa Program: Hearing on Terrorist Travel Before the Subcomm. on Terrorism, Technology, and Homeland Security and Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 15 (2005) (statement of Janice L. Kephart).

171. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 390 (W.W. Norton & Co. 2004) (providing the purpose of the Real ID Act was to set a standard for driver's licenses that would make them more secure and more difficult for terrorists to fraudulently obtain).

172. Raymond J. Kenney Jr. and Teresa J. Farris, § 21:2. *Driver's Licenses and the Real ID Act of 2005*, 12 MASS. PRACTICE *Motor Vehicle Law And Practice* § 21:2 (4th ed. 2013).

173. David Rosenfield, *From California to Illinois to Florida, Oh My!: The Need for a more Uniform Driver's License Renewal Policy*, 12 ELDER L.J. 449, 456 (2004).

174. U.S. CONST. amend. X. The police power doctrine is derived from the Tenth Amendment. *Id.*

police power doctrine grants the states the right to enact and enforce laws in order to protect the health, safety, and welfare of its citizens.¹⁷⁵ Few cases have directly challenged this right, but the Supreme Court has hinted that such a challenge by a party would likely be unsuccessful.¹⁷⁶ The Real ID Act deprives the states of their police power by creating a national standard for issuing driver's licenses and identification cards.¹⁷⁷

When the Real ID Act Enforcement Schedule began Phase 1 of full enforcement on April 21, 2014, Massachusetts was one of eleven states whose driver's licenses were not valid for federal purposes.¹⁷⁸ This meant that residents with only a Massachusetts driver's license could not enter restricted areas of the Department of Homeland Security Nebraska Avenue Complex headquarters.¹⁷⁹ Phase 1 appeared to have minimal impact on Massachusetts residents, as some residents did not even know about the current status of their driver's license.¹⁸⁰

Phase 2 of the Real ID Act Enforcement Schedule had more of an impact on Massachusetts residents because of the enforcement expansion.¹⁸¹ When Phase 2 began, Massachusetts was one of six states whose driver's licenses and identification cards were not valid for federal purposes.¹⁸² After August 2014, the story of Susan Podziba was published in the Boston Globe and the issue became even more widely recognized by Massachusetts residents.¹⁸³

175. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

176. *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (“[I]n the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways.”).

177. See Real ID Act, *supra* note 6.

178. Other states that were on the non-compliant list during Phase 1 of the enforcement include: Alaska, Arizona, Kentucky, Louisiana, Maine, Minnesota, Montana, New York, Oklahoma and Washington. *Real ID Enforcement in Brief*, U.S. DEP'T OF HOMELAND SEC., Washington, D.C. (Apr. 18, 2014), at 1, http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20140418_5.pdf [<http://perma.cc/Z647-9NJU>].

179. *Real ID Enforcement in Brief*, *supra* note 13.

180. Meyers, *supra* note 1. Podziba, who has a long history of working with the Federal Government, did not know about the status of her Massachusetts license until Phase 2 of the enforcement schedule. *Id.*

181. See *id.*

182. *Id.* Other states that were on the noncompliant list during Phase 2 of the enforcement include: Maine, Oklahoma, Alaska, Arizona and Louisiana. *Id.*

183. See, e.g., *id.*; Editorial, *Mass. Must Take Steps to Comply with Federal Driver's License*, BOSTON GLOBE (Sept. 16, 2014), <http://www.bostonglobe.com/opinion/editorials/2014/09/16/real-mass-must-take-steps-comply-with-problematic-law/HA1SCc1BRC9ynIN2QN1PiN/story.html>; Editorial, *Mass. Missteps with REAL*

2. Massachusetts' Present Status

Massachusetts applied for an extension to comply with the Real ID Act after the problem had affected many Massachusetts residents.¹⁸⁴ The extension would allow federal agencies to accept Massachusetts driver's licenses for the duration of the extension.¹⁸⁵ The Department of Homeland Security would only grant an extension if it determined that Massachusetts had adequate justification for noncompliance.¹⁸⁶ The Department of Homeland Security looked at factors specific to Massachusetts that included: progress made by Massachusetts in implementing the minimum standards of the Real ID Act, plans for implementing any unmet requirements, and existence of external factors.¹⁸⁷

On October 15, 2014, the Department of Homeland Security granted Massachusetts a Real ID compliance extension.¹⁸⁸ However, Massachusetts failed to meet the one-year deadline to fulfill all the requirements of the Real ID Act.¹⁸⁹ Subsequently, Massachusetts reapplied and was granted an additional year extension.¹⁹⁰ Should Massachusetts fail to comply by October 10, 2016, it may reapply for another additional one-year extension.¹⁹¹

3. Massachusetts' Uncertain Future

Whether Massachusetts driver's licenses will remain valid for federal purposes in the future is uncertain.¹⁹² The chances of continued renewal of the extension are unclear, as it is at the

ID, THE RECORDER (Aug. 28, 2014), <http://www.recorder.com/home/13292807-95/editorial-mass-missteps-with-real-id> [<http://perma.cc/84DH-EF9L>].

184. See Editorial, *Mass. Must Take Steps to Comply with Federal Driver's License*, BOSTON GLOBE (Sept. 16, 2014), <http://www.bostonglobe.com/opinion/editorials/2014/09/16/real-mass-must-take-steps-comply-with-problematic-law/HA1SCc1BRC9ynIN2QN1PiN/story.html>.

185. *REAL ID Frequently Asked Questions for States*, U.S. DEP'T OF HOMELAND SECURITY (Aug. 19, 2015), <http://www.dhs.gov/real-id-faqs-states> [<http://perma.cc/975W-S94W>].

186. *Id.*

187. *Id.* External factors include resources, contract cycles and operations issues that would delay full implementation among others. *Id.*

188. *Massachusetts Granted Real ID Compliance Extension*, MASS. REGISTRY OF MOTOR VEHICLES (Oct. 17, 2014), <https://www.massrmv.com/tabid/1609/ctl/detail/mid/4285/itemid/500/Massachusetts-Granted-Real-ID-Compliance-Extension.aspx> [<https://perma.cc/GQ8F-VRUL>].

189. See *Real ID Enforcement in Brief*, *supra* note 13.

190. *Id.*

191. *Id.*

192. See *id.*

discretion of the Secretary of Homeland Security.¹⁹³ As a result, there is a great possibility that Massachusetts could fall back into noncompliance after receiving the extension.¹⁹⁴

Even if Massachusetts chooses to achieve full compliance with the Real ID Act, it could take three to four years to meet all the requirements.¹⁹⁵ By that time, the necessity of a Real ID compliant license to board a federally regulated commercial aircraft could be in effect.¹⁹⁶ Hence, this uncertainty of future federal validity in Massachusetts licenses will have much larger ramifications to Massachusetts residents as the enforcement schedule continues.¹⁹⁷

B. *Massachusetts Driver's Licenses Current Federal Status Negatively Impacts Residents' Ability to Travel.*

The uncertainty of whether Massachusetts driver's licenses will be federally recognized in the future will have a negative impact on many aspects of Massachusetts residents' lives.¹⁹⁸ It will affect the employment of any Massachusetts resident who only possesses a driver's license and who works at a federal facility, nuclear power plant, or on an aircraft.¹⁹⁹ This uncertainty will also affect recreational activities of any Massachusetts residents who want to visit a federal facility, such as the White House, for a tour.²⁰⁰ But, the most widely concerning area is the ability to travel on a commercial plane.²⁰¹

193. *Secure Driver's Licenses*, U.S. DEP'T OF HOMELAND SEC. (Nov. 12, 2015), <http://www.dhs.gov/secure-drivers-licenses> [<http://perma.cc/F6PG-9H7C>]. "Extensions are renewable at the discretion of the Secretary provided there is adequate justification for continued noncompliance. Renewal is not automatic and state should provide DHS with information about their progress in implementing any outstanding standards." *REAL ID Frequently Asked Questions for States*, *supra* note 185.

194. *See Real ID Enforcement in Brief*, *supra* note 13.

195. Meyers, *supra* note 1.

196. *Real ID Enforcement in Brief*, *supra* note 13.

197. *See id.*

198. *See* Meyers, *supra* note 1; Jessica Meyers, *Massachusetts Granted REAL ID Extension*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/metro/2014/10/15/massachusetts-granted-realextension/9MIFUBBU4zLwMJOOvd3igI/story.html>.

199. *See* Meyers, *supra* note 1.

200. Jessica Meyers, *Massachusetts Granted REAL ID Extension*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/metro/2014/10/15/massachusetts-granted-real-extension/9MIFUBBU4zLwMJOOvd3igI/story.html> ("If [Massachusetts] did not comply—or does not get a renewal—residents would eventually lose the ability to use Massachusetts identification to tour the White House . . .").

201. *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY, 55 (O'Reilly & Associates, 2000) ([I]n the United States, the photo driver's license is the most common form of identification for both private

According to the Bureau of Transportation Statistics, approximately 760 million passengers in the United States flew on a federally regulated commercial aircraft in 2014.²⁰² Adult passengers need to show valid identification at the airport in order to board a federally regulated aircraft.²⁰³ One of the most common forms of valid identification is a state-issued driver's license.²⁰⁴ With the future validity of Massachusetts driver's licenses being uncertain, this creates a burden to Massachusetts residents that are traveling on a plane with the most common form of identification.²⁰⁵

Massachusetts residents could potentially begin to experience the impact that the Real ID Act enforcement has on their ability to travel before the starting date of Phase 4.²⁰⁶ When booking flights, many travelers book in advance to get the cheapest fare.²⁰⁷ Hence, with Massachusetts' extension up for renewal on October 10, 2016,²⁰⁸ Massachusetts residents that are booking flights for spring break could be turned away by a federal official because they hold an invalid Massachusetts form of identification.²⁰⁹ Therefore, the

industry and government.”); *see also* *Identification*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/travel/security-screening/identification> (last visited Nov. 09, 2015) (listing driver's license or other state photo identity cards issued by the Department of Motor Vehicles as valid identification at the airport checkpoint in order to travel).

202. Bureau of Transp. Statistics, *Passengers All U.S. Carriers - All Airports*, DEP'T OF TRANSP., http://www.transtats.bts.gov/Data_Elements.aspx?Data=2 [<http://perma.cc/9UUW-QN6R>] (last visited Nov. 09, 2015).

203. *Identification*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/acceptable-ids> [<https://perma.cc/W89X-MRZH?type=source>] (last visited Nov. 09, 2015).

204. *See id.*; *see also* SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY*, 55 (O'Reilly & Associates, 2000).

205. *Id.*

206. *Real ID Enforcement Act in Brief*, *supra* note 13. Phase 4 of the Real ID Act Enforcement will begin no sooner than 2016 and a date will be set after an evaluation by the Department of Homeland Security has been completed. *Id.*

207. *See* Paige Cooperstein, *Here's How Far In Advance You Should Book A Flight*, BUSINESS INSIDER (Mar. 11, 2014, 5:11 PM), <http://www.businessinsider.com/how-far-in-advance-to-book-flights-2014-3> [<http://perma.cc/2GDM-K3C6>]. Travelers are able to book flights up to around eleven months in advance. *See, e.g.*, flights from Boston, MA Logan Int'l Airport, to Los Angeles, CA LAX Airport, EXPEDIA FLIGHTS, <http://www.expedia.com/Flights?v=a> [<http://perma.cc/9HYD-YXF7>] (last visited Nov. 09, 2015) (search “Flying from:” for “Boston, MA” and search “Flying to:” for “Los Angeles, CA”; then follow “Departing:” to “10/04/2016” which is the farthest booking date as of Nov. 09, 2015).

208. *Real ID Enforcement Act in Brief*, *supra* note 13.

209. Spring break (varying weeks in March and April) is among the most popular time periods for travelers to fly. Caroline Costello, *The Best and Worst Days to Fly*, INDEPENDENT TRAVELER, <http://www.independenttraveler.com/travel-tips/air->

outcome of this uncertainty may deter Massachusetts residents from booking a commercial flight.

The federal government's offered solution to this burden is to allow other forms of identification for residents who possess a noncompliant state driver's license, such as a U.S. passport.²¹⁰ However, only thirty-eight percent of Americans have a valid U.S. passport.²¹¹ Therefore, it is likely that a Massachusetts resident will be forced to purchase a U.S. passport in order to securely travel on a federally regulated commercial aircraft.²¹² A first time applicant for a U.S. passport will pay \$165 for a passport and card.²¹³ Thus, the federal government's solution creates another obstacle for Massachusetts residents who now face these additional costs to travel on a plane as Phase 4 of the enforcement of the Real ID Act approaches.

III. THE FEDERAL GOVERNMENT VIOLATES MASSACHUSETTS RESIDENTS' RIGHT TO TRAVEL THROUGH THE ENFORCEMENT OF THE REAL ID ACT

The ability to travel freely from state to state is one of the few un-enumerated constitutional rights that are met without opposition.²¹⁴ In fact, no Supreme Court Justice has expressed any opposition to the general concept of a right to travel.²¹⁵ This makes the federal government's violation of the right to travel with the enforcement of the Real ID Act that much more inexcusable.

travel/the-best-and-worst-days-to-fly [https://perma.cc/N43N-849Q?type=source] (last visited Nov. 09, 2015).

210. *Real ID Enforcement in Brief*, supra note 13.

211. Ian Livingston, *Americans are Finally Traveling Abroad; number of passport holders has increased 35%*, USA TODAY TRAVEL (Fed. 21, 2015, 2:00 PM), <http://roadwarriorvoices.com/2015/02/21/this-infographic-shows-the-percentage-of-americans-with-passports-is-up-35/> (depicting the extremely low number of citizens who have a form of federal identification other than their drivers license).

212. *See Real ID Enforcement in Brief*, supra note 13.

213. Bureau of Consular Affairs, *Fees*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/passports/english/passports/information/costs.html> [http://perma.cc/JQ62-JQXD] (last visited Nov. 09, 2015). Adult first time applicants, age sixteen years and older, \$140 for the Application Fee and \$25 for the Execution Fee. *Id.*

214. Philip J. Prygoski, *Abortion and the Right to Die: Judicial Imposition of A Theory of Life*, 23 SETON HALL L. REV. 67, (1992). Contrast with un-enumerated constitutional rights such as right to abortion and the right to die that are not shared in common agreement. *Id.*

215. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-32 (1969) (deciding 6-3 the right to travel bars a state from imposing a one-year durational residency requirement for eligibility to welfare). However, Supreme Court Justices have differed on the proper scope of the right to travel. *Id.*

A. *The Privileges or Immunities Clause's Right to Travel*

Early interpretations of the Privileges or Immunities Clause following the passage of the Fourteenth Amendment took the view that the terms *privileges* and *immunities* referred to fundamental rights.²¹⁶ However, the United States Supreme Court greatly restricted the Privileges or Immunities Clause five years after the passage of the Fourteenth Amendment with the *Slaughter-House Cases*²¹⁷ and eight years later in *U.S. v. Cruikshank*.²¹⁸

In a 5-4 decision, the Court in the *Slaughter-House Cases* rejected the contention by New Orleans butchers that a state-sanctioned monopoly violated their right to work.²¹⁹ Justice Samuel Miller wrote for the majority that the clause “speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several [s]tates.”²²⁰ Hence, the clause was narrowed to only protect the privileges or immunities of matters that “own their existence to the Federal government, its National character, its Constitution, or its laws.”²²¹ Three years later, in *U.S. v. Cruikshank*, the Court ruled that the Fourteenth Amendment did not incorporate the First Amendment against the States.²²² As a result, the Privileges or Immunities Clause has been mostly inactive since 1875.

While the Privileges or Immunities Clause disappeared for the majority of the twentieth century, the right to travel emerged as a concept of its own.²²³ In *United States v. Guest*, the Supreme Court recognized that although *travel* is not written in the Constitution, it is a fundamental right.²²⁴ It has been stated that, “[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly

216. See Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1089 (2000).

217. See *Slaughter-House Cases*, 83 U.S. 36, 36 (1872) (the Supreme Court’s decision consolidated several cases involving identical issues and is thus referred to as the *Slaughter-House Cases*).

218. See *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1875).

219. *Slaughter-House Cases*, 83 U.S. 36, 36 (1872).

220. *Id.* at 74.

221. *Id.* at 79.

222. *Cruikshank*, 92 U.S. at 552 (reversing convictions of defendants convicted under the Civil Rights Enforcement Act of 1870 for interfering with the black citizens’ rights to assemble and to bear arms).

223. See *United States v. Guest*, 383 U.S. 745, 757 (1966).

224. *Id.*

recognized.”²²⁵ Three years after the decision in *United States v. Guest, Shapiro v. Thompson* held that “[s]ince the [issue] here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.”²²⁶ The Court emphasized that the right to travel is “a virtually unconditional personal right, guaranteed by the Constitution to us all.”²²⁷

In *Saenz v. Roe*, the Supreme Court ruled that the Privileges or Immunities Clause includes the right to travel.²²⁸ In a 7-2 decision, the Court used the Clause as a basis for review to strike down laws that gave preference to long-time residents of a state over newly arrived citizens.²²⁹ The equality interest at issue was so sufficiently important that if it were denied, its consequence could significantly derail the exercise of the right to travel.²³⁰ Justice Stevens provided three different aspects of a fundamental right to travel, including:

[T]he right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of the State.²³¹

The *Saenz* holding not only suggests that the Constitution still offers protection for the right to travel, but also that the Constitution prohibits the federal government from allowing states to impose a burden on such rights.²³² The Court noted that while Congressional decisions will be given some deference, “neither Congress nor a State can validate a law that denies the rights

225. *Id.*; see also *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); *New York v. O’Neill*, 359 U.S. 1 (1959).

226. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (applying strict scrutiny to a provision in a statute that denies welfare aid based on a durational residency requirement).

227. *Id.* at 643 (footnote omitted).

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

229. *Id.* at 492 (striking down a California “statute limiting the maximum welfare benefits . . . payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family’s prior residence”).

230. *Id.* at 502–03.

231. *Id.* at 500.

232. *Id.* at 508. “Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.” *Id.*

guaranteed by the Fourteenth Amendment.”²³³

B. *The Enforcement of the Real ID Act Interferes with Massachusetts Residents’ Right to Travel*

The federal government has violated Massachusetts residents’ right to travel under the Privileges or Immunities Clause through the enforcement method of the Real ID Act.²³⁴ The enforcement method questions the validity of a Massachusetts driver’s license because of the likelihood that Massachusetts’ extension towards compliance will not be renewed.²³⁵ The uncertainty surrounding the validity of a Massachusetts residents’ driver’s licenses will affect their ability to travel when the final phase of the Real ID enforcement goes into effect. A state-issued driver’s license is the most common form of identification used for boarding a plane,²³⁶ and flying is also the most common way of traveling from state to state because of the time convenience.²³⁷

The Privileges or Immunities Clause protects the right to travel.²³⁸ The federal government is violating Justice Stevens’s first aspect of the right to travel: “the right of a citizen of one state to enter and to leave another state”²³⁹ The federal government is doing so by compromising a Massachusetts resident’s key use of identification for boarding a plane, which affects his or her ability to travel from state to state in the most common manner.²⁴⁰

A counterargument made by the federal government actually invokes the language of the Privileges or Immunities Clause of the

233. *Id.*

234. *See Real ID Enforcement in Brief, supra* note 13.

235. *See id.*

236. *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY, 55 (O’Reilly & Associates, 2000) (“In the United States, the photo driver’s license is the most common form of identification for both private industry and government.”); *see also Identification*, TRANSP. SEC. ADMIN. <http://www.tsa.gov/traveler-information/acceptable-ids> [<https://perma.cc/W89X-MRZH?type=source>] (last visited Nov. 09, 2015) (listing driver’s license or other state photo identity card issued by the Department of Motor Vehicles as valid identification at the airport checkpoint in order to travel).

237. *See* Bill McGee, *Train or Plane? Which is the Better Choice?*, USA TODAY (Mar. 26, 2014, 2:59 PM), <http://www.usatoday.com/story/travel/columnist/mcgee/2014/03/26/planes-vs-trains/5933633/> [<http://perma.cc/LN86-5WD7>].

238. *See generally*, *Saenz v. Roe*, 526 U.S. 489 (1999).

239. *Id.* at 500.

240. *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY, 55 (O’Reilly & Associates, 2000); *see also Identification*, TRANSP. SEC. ADMIN. <http://www.tsa.gov/traveler-information/acceptable-ids> [<https://perma.cc/W89X-MRZH?type=source>] (last visited Nov. 09, 2015).

Fourteenth Amendment.²⁴¹ The clause states that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”²⁴² It does not mention the federal government having restrictions in regards to privileges or immunities.²⁴³ However, the Privileges or Immunities Clause was not meant to only restrict the states and has not been applied in that manner.²⁴⁴ The Court in *Saenz* stated, “neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”²⁴⁵ Presently, the federal government validates and imposes a law on the states that impairs the guaranteed right to travel, which invokes the Privileges or Immunities Clause.²⁴⁶

The federal government has a compelling governmental interest of fighting terrorism.²⁴⁷ However, this compelling interest would not survive under a strict scrutiny standard.²⁴⁸ The strict scrutiny standard is the appropriate standard to determine if the enforcement method of the Real ID Act is constitutional because of the holding in *Shapiro* that the right to travel is a fundamental right.²⁴⁹ Additionally, Justice O’Connor’s dissent in *Gonzales v. Raich* notes how it is necessary for the courts to create “objective markers” for confining federal authority over the States.²⁵⁰

Although the federal government has a compelling governmental interest, it is not narrowly drawn. The purpose of the Real ID Act was to set a standard for driver’s licenses that would make them more secure and more difficult for terrorists to fraudulently obtain.²⁵¹ Forcing Massachusetts to change its standards when it already has a secure driver’s license is a poor example of narrowly applying the means to fight terrorism.²⁵² The

241. See U.S. CONST. amend. XIV, § 1.

242. *Id.* (emphasis added).

243. See *id.*

244. See *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

245. *Id.*

246. Real ID Act, *supra* note 6.

247. See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 390 (W.W. Norton & Co. 2004).

248. To survive a strict scrutiny standard of review it must be “necessary” or “narrowly tailored” to achieve a “compelling” governmental purpose. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

249. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

250. *Gonzales v. Raich*, 545 U.S. 1, 48 (2005) (O’Connor, J., dissenting) (discussing the Commerce Clause needs “objective markers” in its analysis).

251. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 390 (W.W. Norton & Co. 2004).

252. See 540 MASS. CODE REGS. 2.06(3)(b) (2014).

enforcement method to compel states to abide by the Real ID Act violates Massachusetts residents' right to travel. The Real ID Act is a poorly conceived and executed statute that broadly serves the purpose of fighting terrorism. The federal government can surely fight terrorism through means that do not provide sanctions that hold their own citizens hostage.²⁵³

IV. THE FEDERAL GOVERNMENT VIOLATES THE TENTH AMENDMENT THROUGH REAL ID ACT ENFORCEMENT SANCTIONS

The Tenth Amendment divides sovereign power between those delegated to the Federal and State Governments.²⁵⁴ By doing so, the Tenth Amendment limits the federal government's power that is reserved to the states.²⁵⁵ The Real ID Act violates the Tenth Amendment by forcing the states to conform to a federal rule on driver's licenses or have their residents face the ramifications including denial of the right to travel.²⁵⁶

A. *The Tenth Amendment*

The Supreme Court in *New York v. United States* held an exception to the federal government's broad power through the Commerce Clause was the Tenth Amendment.²⁵⁷ The Court in *New York* struck down a "take title" provision in the Low-Level Radioactive Waste Policy Amendments Act of 1998.²⁵⁸ The federal statute required states to either take the title of radioactive waste or regulate it according to Congress's instructions.²⁵⁹ The statute coerced state legislatures to take action by essentially giving them no choice at all.²⁶⁰

The holding in *New York* interprets the Tenth Amendment as a limitation on Congress's power over states establishing that:

The Federal Government may not compel the States to enact or

253. See NATIONAL GOVERNORS ASSOCIATION ET AL., THE REAL ID ACT: NATIONAL IMPACT ANALYSIS (Sept. 2006), http://www.ncsl.org/print/statefed/real_id_impact_report_final_sept19.pdf [<http://perma.cc/Z3CA-2JX2>] (recommending that DHS "should have the discretion to recognize state practices and innovations that accomplish the goals of the act").

254. U.S. CONST. amend. X.

255. *New York v. United States*, 505 U.S. 144, 156 (1992).

256. See *Real ID Enforcement in Brief*, *supra* note 13.

257. *New York v. United States*, 505 U.S. 144, 156–57 (1992).

258. *Id.* at 188.

259. *Id.* at 153.

260. *Id.* at 176.

administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.²⁶¹

The Court reinforced this rationale in *Printz v. United States* by rejecting as a whole any law that compels states to enact a federal regulatory program.²⁶²

The Court in *Printz* struck down a Brady Bill²⁶³ requirement that provided that local law enforcement officers perform background checks on prospective purchasers of handguns in order to execute federal law.²⁶⁴ The Court viewed the requirement as Congress commanding the States to administer a federal regulatory program, thereby “commandeering” the States into federal government service.²⁶⁵

Justice Scalia broadly interpreted the *New York* opinion as a clear-cut rule against federal “commandeering” of the states.²⁶⁶ He noted that the dual-sovereignty system reduces the “risk of tyranny and abuse from either front.”²⁶⁷ This is exemplified when Congress forces the states to absorb the financial burden of implementing a federal regulatory program and take accountability of any excessively “burdensome” or “defective” federal laws that would unfairly fall upon the states.²⁶⁸

B. *The Sanctions of the Enforcement Schedule Coerce the States into Implementing the Real ID Act*

The Real ID Act, which failed to pass Congress as a standalone bill and was imposed upon states without full debate, raises Tenth Amendment concerns regarding federal intrusion into

261. *Id.* at 188.

262. *Printz v. United States*, 521 U.S. 898, 935 (1997).

263. 18 U.S.C. § 922. “Brady Bill” refers to the Brady Handgun Violence Prevention Act provisions. *Id.* The purpose of the Brady Bill was to establish a national system for instantly checking prospective handgun purchasers’ backgrounds. *Printz*, 521 U.S. at 898.

264. *Printz*, 521 U.S. at 935.

265. *Id.* at 926–28.

266. *Id.* at 935.

267. *Id.* at 921.

268. *Id.* at 930.

traditionally state-held areas.²⁶⁹ The Real ID Act has been characterized as both burdensome and defective.²⁷⁰ It impacts all fifty states and more than 240 million applicants of state-DMV issued driver's licenses.²⁷¹

Although Massachusetts has the option to comply with the Real ID Act, it risks the sanctions that affect its residents.²⁷² The Real ID sanctions upon Massachusetts issued under the method of enforcement are more inferior to the sanctions that affected *New York* because Real ID sanctions personally affect Massachusetts residents by violating their right to travel.²⁷³ Meaning Massachusetts has no choice and is “commandeered” into the sort of federal government service that is prohibited by *New York* and *Printz*.²⁷⁴

The federal government played a similar role in *United States v. Windsor*, a case dealing with marriage.²⁷⁵ Traditionally, marriage has been left to the control of the state.²⁷⁶ However, the federal government had set a standard of what constituted marriage in the Defense of Marriage Act (“DOMA”).²⁷⁷ Section 3 of DOMA defined marriage as between one man and one woman.²⁷⁸ In *Windsor*, a same-sex couple that married in Canada was recognized as married in New York, but not federally.²⁷⁹ Therefore, when one of the spouses died, the living spouse expected that when she received the deceased estate by will she would not have to pay taxes since her marriage was recognized in New York.²⁸⁰ However, since the federal government at the time did not recognize the

269. See U.S. CONST. amend. X.

270. Railey, *supra* note 154.

271. Minimum Standards for Driver's Licenses and Identifications Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01 (Jan. 29, 2008) (codified at 6 C.F.R. § 37), http://www.dhs.gov/xlibrary/assets/nprm_realid.pdf [<http://perma.cc/H3SN-WX4P>].

272. See *Real ID Enforcement in Brief*, *supra* note 13.

273. Unlike Massachusetts' sanctions that violate a personal rights of all citizens, New York faced sanctions regarding “tak[ing] title to the waste, be[ing] obligated to take possession of the waste, and [being] liable for all damages” *New York v. United States*, 505 U.S. 144, 153 (1992).

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

275. See *generally*, *United States v. Windsor*, 133 S. Ct. 2675 (2013).

276. *Id.* at 2680.

277. *Id.* at 2682.

278. *Id.* at 2683.

279. *Id.* at 2682.

280. *Id.* at 2680.

marriage,²⁸¹ the widow had to pay a high estate state tax.²⁸² The Federal Government created the circumstance for the couple, not the state in choosing to recognize the marriage. Therefore, under an equal protection analysis the Court found Section 3 of DOMA unconstitutional.²⁸³

Like *Windsor*, the federal government is telling the states what to do through Real ID Act enforcement.²⁸⁴ The choices were to either have Massachusetts issued driver's licenses abide by the national minimum standards or face the sanctions that will affect their residents' right to travel.²⁸⁵ It is a choice that essentially leaves no choice.²⁸⁶ Therefore the federal government is compelling Massachusetts to enact laws to implement the federal standards and conform their practices to the federal standards. This is a clear violation of the Tenth Amendment.²⁸⁷

CONCLUSION

The purpose of the Real ID Act, "to improve the reliability and accuracy of state-issued identification documents, which should inhibit terrorists' ability to evade detection by using fraudulent identification" is an important issue that should be dealt with appropriately.²⁸⁸ In 2013, a total of 9,707 terrorist attacks occurred worldwide, resulting in more than 17,800 deaths and more than 32,500 injuries.²⁸⁹ In addition, more than 2,990 people were kidnapped or taken hostage.²⁹⁰ Thus, this is an issue that should not be overlooked.²⁹¹

However, it is crucial that the federal government must accomplish their goal of fighting terrorism through means that do not sacrifice the freedoms of the individual states and their citizens.

281. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty).

282. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

283. *Id.* at 2679.

284. See Real ID Act, *supra* note 6.

285. See *id.*

286. See *id.*

287. See U.S. CONST. amend. X.

288. *Real ID Frequently Asked Questions for the Public*, *supra* note 9.

289. *National Consortium for the Study of Terrorism and Responses to Terrorism: Annex of Statistical Information*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/crt/2013/224831.htm> (last visited Nov. 09, 2015).

290. *Id.*

291. *Id.*

The federal government needs to consider the hardships Massachusetts and many other states will face when the final phase of enforcement begins, and determine a less intrusive means of fighting terrorism.