

Pace University

DigitalCommons@Pace

Elisabeth Haub School of Law Faculty
Publications

School of Law

Summer 2009

States of Resistance: The REAL ID Act and the Limits of Federal Deputization of State Agencies in the Regulation of Non-Citizens

Shirley Lin

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Elisabeth Haub School of Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

STATES OF RESISTANCE: THE REAL ID ACT AND CONSTITUTIONAL LIMITS UPON FEDERAL DEPUTIZATION OF STATE AGENCIES IN THE REGULATION OF NON-CITIZENS

*Shirley Lin**

INTRODUCTION

Present-day conceptions of states' rights hardly evoke associations with non-citizens' rights in the United States. Yet currently, all fifty states have taken up a war of attrition over whether the federal government can require them to enact sweeping and prohibitively expensive changes to their driver's licensing practices through state departments of motor vehicles ("DMVs"). These changes, mandated four years ago under legislation known as the "REAL ID Act,"¹ are primarily designed to bar undocumented immigrants from receiving DMV-issued identification cards ("IDs"); require that only distinctly marked forms of state identification be issued to certain categories of non-citizens with legal presence in the United States; create a fully interconnected fifty-state motorist database; and embed new security features into motorist IDs. States' fierce opposition to the measure—developed within and juxtaposed against the wholly federalist framework of U.S. immigration law—may offer a legal foothold in the debate over the proper role, if any, of states in immigration enforcement. The controversy over the REAL ID Act may yield one of the first viable legal challenges to the array of irrational and structurally flawed policies through which the federal government has sought to deputize state apparatus for immigration enforcement purposes after the September 11, 2001 terrorist attacks.

This Article applies a legal and political analysis of the problems that consistently arise whenever states actively "police" the citizenship of their residents, and proceeds outside of the conservative/progressive dichotomy in "states' rights" debates. In

* J.D. Candidate, 2010, City University of New York School of Law; B.A., Dartmouth College. I would like to thank my husband Ken Lee, whose love and continual encouragement has made endeavors such as this article possible. I am also indebted to my family, and to my classmates and professors at CUNY School of Law for their generous support and inspiration.

¹ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 and 49 U.S.C. (2006)).

stead, the common concern underlying the states' rights and immigrants' rights opposition to the REAL ID Act is the elusiveness of political accountability. The REAL ID Act originated as a standalone bill to introduce changes that purport to disrupt terrorist travel and prevent another 9/11-type terrorist attack; the bill passed the House but failed to pass the Senate in 2004.² Then, under a legislative compromise Congressional leaders imposed the Act upon the states with minimal debate in the Senate by guaranteeing its attachment to an unrelated, must-pass appropriations bill.³ In 2005, the REAL ID Act was inserted into a bill funding the war in Iraq and aid for tsunami victims in Southeast Asia.⁴

Immigration law has played the stepchild to foreign policy, labor policy, economic policy, and social services for more than century, generating federal policies (and politics) regarding non-citizens that are in continuous flux and typically fail to provide clear guidance to states.⁵ The REAL ID Act and other post-9/11 policies signaled a critical shift in the post-1890s conception of immigration law and policy, traditionally seen as completely federal in jurisdiction and exclusive of state interference.⁶ During the administration of President George W. Bush, the century-old presumption that immigration is essentially a federal foreign policy concern, and therefore outside the jurisdiction of states, has been undermined by recent efforts to bureaucratically restructure immigration within a new Department of Homeland Security ("DHS"), the agency responsible for recent state-by-state "federation" (or nationalization) of traditional state functions and personnel.⁷ In the

² Rep. James Sensenbrenner introduced the bill in an effort to implement more general recommendations from the 9/11 Commission for improving travel security and preventing ID fraud. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S.; THE 9/11 COMMISSION REPORT 383–90 (Norton 2004).

³ Nicole Gaouette, *National ID Requirements Postponed Under Criticism*, L.A. TIMES, Mar. 7, 2007, at A16.

⁴ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005) [hereinafter REAL ID Act].

⁵ See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1557 (2008); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 1–14 (2004) (also examining the role of race in U.S. immigration policy).

⁶ See discussion *infra* Part I.

⁷ On March 1, 2003, the Department of Homeland Security assumed operational control of a wide cross-section of functions, including intelligence operations and the Immigration and Naturalization Services (formerly housed within the Department of Justice). "The nature of American society and the structure of American governance make it impossible to achieve the goal of a secure homeland through federal Executive Branch action alone. . . . The Department of Homeland Security would coordi-

absence of stringent equal protection and due process safeguards against discriminatory governmental policies that target non-citizens and undocumented immigrants, the residual nature of states' authority over its non-citizen residents raises viable Tenth Amendment concerns when poorly designed, Congressionally-imposed policies of this kind fail.⁸

As a federal administrative agency, DHS is paying dearly for Congress' failure to fully debate the requirements of the REAL ID Act. Implementation of the licensing requirements will affect all fifty-six U.S. jurisdictions, more than 240 million applicants for and holders of state driver's licenses, and is estimated to more than double DMV workloads (a 132% increase, according to industry estimates).⁹ To date, lawmakers in forty-two states have considered legislation asserting their opposition to the REAL ID Act or urging Congress to amend or repeal the Act. As of April 2008, opposition measures passed in twenty-one of those states' legislatures, seven of which expressly forbid their state from complying with REAL ID, while a mere five states have passed bills allowing compliance with REAL ID¹⁰ despite the fact that the federal government clearly anticipated closer to fifty states would do so. Not a single state has become fully compliant with its requirements.

Within DHS, implementation of the REAL ID Act has also absorbed implementation of a related mandate, the Western Hemisphere Travel Initiative ("WHTI"), which encourages border states to develop and issue a first-in-kind hybrid driver's license and border-crossing card known as an "enhanced driver's license" ("EDL").¹¹ DHS warned of new burdens upon tourism and border-

nate, simplify, and where appropriate consolidate government relations on its issues for America's state and local agencies." PRES. GEORGE W. BUSH, THE DEP'T OF HOMELAND SECURITY 16 (June 2002) available at <http://www.dhs.gov/xlibrary/assets/book.pdf>. See, e.g., the 287(g) program, discussion *infra* Part I.C. See also ICE Operations, <http://www.ice.gov/about/operations.htm> (describing Office of State/Local Coordination and Operation Secure Communities).

⁸ See TODD B. TATELMAN, CONG. RESEARCH SERV., THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 6-8 (2008).

⁹ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5286 (Jan. 29, 2008).

¹⁰ *The Impact of Implementation: A Review of the REAL ID Act and the Western Hemisphere Travel Initiative*, Hearing Before the Sen. Subcomm. on Oversight of Government Mgmt., the Fed. Workforce, & the District of Columbia, 110th Cong. 5 (2008) (statement of Rep. Donna Stone, Del. General Assembly, Nat'l Conference of State Legislatures) [hereinafter *NCSL Congressional Testimony 2008*].

¹¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, Title VII, § 7209, (2004), 118 Stat. 3823, as amended by Pub. L. 109-295, Title V, § 546, (2006), 120 Stat. 1383; and Pub. L. 110-53, Title VII, § 723, (2007), 121 Stat. 349.

state trade unless states and Canadian provinces worked with the federal agency to develop and issue EDLs.¹² Coincidentally, federal certification of EDL compliance essentially requires (and accelerates) state agency compliance with REAL ID Act standards.¹³

The goal of this Article is to discuss the justiciability of issues arising under immigration federalism by examining the constitutionality of the REAL ID Act. Part I discusses states' authority over non-citizens and the history of "immigration federalism" jurisprudence. Part II explores key provisions of the REAL ID Act, the WHTI, and similar attempts by the federal government to deputize states to engage in citizenship-policing and immigration enforcement. It describes the acute social and economic segregation that the denial of driver's licenses to non-citizens engenders, and examines a number of theories that attempt to capture the impact of the current immigration federalism framework or prescribe alternate approaches. Part III analyzes previous legal challenges under the Equal Protection Clause involving similar measures, and the viability of potential challenges under the Tenth Amendment and international human rights laws. The Tenth Amendment discussion in particular elaborates on the "dual sovereignty" framework for federalism in the immigration context that the Supreme Court articulated in *Printz v. United States*,¹⁴ and questions the fate of future Congressional legislation that may be described as irrational, xenophobic, and untethered to political accountability.

I. STATE AUTHORITY OVER NON-CITIZEN "ALIENS": "IMMIGRATION FEDERALISM" JURISPRUDENCE

The passage of the REAL ID Act and the creation of a passport-like driver's license signals the federal government's recognition that its capacity and jurisdiction over the movement of non-

¹² According to then-Secretary of Homeland Security Michael Chertoff, DHS would "develop a glide path to get this implemented in a way that gets it done in real time but doesn't jam it in a way that causes an enormous amount of disruption. . . . But we will need cooperation from others. Early planning on travel and early applications are going to make this process smoother. And of course working with states and getting alternatives in terms of drivers' licenses is going to make it less expensive and more convenient for travelers." Press Release, Department of Homeland Security, Homeland Security Secretary Michael Chertoff at a Press Conference on the Western Hemisphere Travel Initiative Land and Sea Notice of Proposed Rule Making (June 20, 2007) available at http://www.dhs.gov/xnews/speeches/sp_1182430462235.shtm.

¹³ *NCSL Congressional Testimony 2008*, *supra* note 10, at 8 (warning that "DHS seems to conflate REAL ID and WHTI, blurring lines between the programs, and encouraging states who have legislatively opposed REAL ID to implement REAL ID by way of WHTI-compliant IDs.").

¹⁴ 521 U.S. 898 (1997).

citizens is largely limited to its power to regulate their status and movement between countries, and that its power does not logistically extend to their movement within and between the several states of the United States. Federal attempts to overcome this limitation via political channels is apparent in coercive legislation such as the REAL ID Act and opt-in initiatives such as DHS's revitalized section 287(g) program to train and deputize state and local law enforcement officials to enforce immigration law.¹⁵

In practice, federal authority over the day-to-day lives of non-citizens is "essentially interstitial," such that "the lives and affairs of foreign nationals and the transnational business of citizens remains largely subject to state laws and legal institutions."¹⁶ States—and by extension, localities—are responsible for critical areas of daily public life, including schools, the workplace, public health, policing, and professional licensing.¹⁷ The role of state laws in addressing immigration concerns has grown in recent years: in 2007, the number of enacted state laws addressing immigration was 240, approximately three times the number of such laws in 2006.¹⁸ The numbers are even more startling at earlier stages in the political process: 1,562 immigration-related state bills were introduced nationwide in 2007,¹⁹ an increase of 174% over 2006.²⁰ In 2007, the three most commonly enacted immigration-related laws involved identification/licenses (40), employment (29), and public benefits (33).²¹ Although the reach of states' authority in this area has vacillated largely in response to national sovereignty concerns, the REAL ID Act represents a clear political shift within the Executive branch and factions within Congress to now expand it.

During the nation's infancy, immigration policies were handled by individual states, without major federal intervention until

¹⁵ 8 U.S.C. § 1357(g) (2006).

¹⁶ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 150 (2d ed. Clarendon Press 2002).

¹⁷ Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581 (2008).

¹⁸ Nat'l Conference of State Legislatures, 2007 Enacted State Legislation Related to Immigrants and Immigration (2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf> [hereinafter *State Immigration Legislation 2007*]; cf. Nat'l Conference of State Legislatures, 2006 State Legislation related to Immigration: Enacted and Vetoed, <http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm> (last visited Apr. 15, 2009) [hereinafter *State Immigration Legislation 2006*].

¹⁹ *State Immigration Legislation 2007*, *supra* note 18.

²⁰ *Cf. id.*; *State Immigration Legislation 2006*, *supra* note 18.

²¹ *State Immigration Legislation 2007*, *supra* note 18.

the 1798 Alien and Sedition Laws.²² Since then, the Supreme Court has established and maintained a “federal exclusivity” principle asserting that immigration law is the sole province of the federal government. The notion that states may not regulate or interfere with federal immigration policy was illustrated early on in *Chae Chan Ping v. United States* (“The Chinese Exclusion Case”), where in 1889 the Court held that Congressional control over immigration—described as “the power of exclusion of foreigners”—was an essential component of national sovereignty.²³ Congress’s plenary power over immigration has some textual support in the Constitution, to “establish a uniform Rule of Naturalization.”²⁴ But one commentator has noted that the Court’s sweeping claim of exclusive federal power in *The Chinese Exclusion Case*—reaching beyond issues of naturalization—could itself violate the Tenth Amendment’s guarantee that “the powers not delegated to the United States are reserved to the states.”²⁵

Federal exclusivity over immigration policies, laws, and the regulation of aliens within U.S. borders remained, conceptually, a foreign-relations concern ninety years after *The Chinese Exclusion Case*. In *Narenji v. Civiletti*, a D.C. Court of Appeals case, Iranian non-citizens challenged an alien registration regulation issued in response to the Iran-Contra Affair.²⁶ The U.S. Attorney General argued that it is “an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to actions by foreign countries.”²⁷ The intent or desire of the regulated individual to remain in the United States is immaterial by virtue of his or her non-citizen status.²⁸ Circuit Judge George MacKinnon, in his concurrence, wrote:

²² BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 13–18 (Temple University Press 2004).

²³ 130 U.S. 581, 603–4, 609 (1889) (“Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”).

²⁴ U.S. CONST., art. I, § 8, cl. 4.

²⁵ HENKIN, *supra* note 16, at 16.

²⁶ *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

²⁷ *Id.* at 748.

²⁸ *Cf.* IRA. J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* 773 (11th ed. Am. Immigr. Law Found. 2008); *see* Immigration and Nationality Act (INA) Section 101(a)(15), 8 U.S.C. § 1101(a)(15)(F)(i); (a)(15)(M)(i); (a)(15)(O)(ii)(IV); (a)(15)(P); (a)(15)(Q) (2006) (specifying that an “immigrant” does not include a person “having a residence in a foreign country which he has no intention of abandoning” or a person “having a residence in a foreign country which he has no intention of abandoning.”).

Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment. . . . That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.²⁹

The U.S. registration requirement applied to several thousand Iranian students,³⁰ and the subsequent deportation of a significant number of these students was thus considered a wholly diplomatic move.³¹

States are also generally prohibited from setting new immigration standards and policies. The Supreme Court, in *Hines v. Davidowitz*, held that federal preemption in immigration matters meant that states cannot impose additional restrictions on non-citizen residents unless they pertain to an area within states' constitutionally delegated powers.³² *Hines* struck down a Pennsylvania law requiring aliens to register annually with the Department of Labor and show a specific card whenever demanded by a police officer or state labor official; failure to do so would result in a fine or imprisonment.³³ Underlying the Court's activism was its concern that the Pennsylvania statute directly conflicted with federal policies articulated during passage of Congress's Alien Registration Act, through which federal officials sought "to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against."³⁴ Unlike the Alien Registration Act, however, the REAL ID Act clearly evinces Congress' intent (albeit only through a maneuver that avoided a full floor vote on the bill as a stand-alone measure) that states play a

²⁹ *Narenji*, 617 F.2d at 749 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-88(1951)).

³⁰ *Id.* at 748.

³¹ See, e.g., *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983) (upholding the deportation of an Iranian student for failing to comply with the new regulation discussed in *Narenji*); see also U.S. DEP'T OF JUSTICE, INS, 1979 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE, Tables 24A and 24B (1980) (indicating 484 Iranians required to depart, and 41 Iranians deported, although basis for departure not noted).

³² *Hines*, 312 U.S. at 52.

³³ *Id.* at 59.

³⁴ *Id.* at 74.

role in screening out and excluding non-citizens, even if denying them licenses under REAL ID's regime may result in fines, imprisonment, or deportation.³⁵ The distinct political climates in our nation in 1941 and 2005 bear legally on the question of whether immigration federalism requires federal preemption of state immigration enforcement activities beyond the literal, textual requirements of the REAL ID Act to deny licenses to large classes of non-citizens.

If anything, the Supreme Court has cautioned the judicial branch to exercise judicial *deference* to the federal executive in matters of immigration law because of federalism concerns. In *Harisiades v. Shaughnessy*, Justice Jackson wrote:

Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.³⁶

Federal exclusivity within the context of immigration power ends where the Court is dealing with "matters firmly within a State's constitutional prerogatives."³⁷ Even then, the state need only justify its classification by a showing of some rational relationship between the state's goals and the classification.³⁸

Thus, for more than a century, U.S. immigration policy has been characterized by "immigration federalism," in which immigration decision-making and implementation rests solely at the federal level. "Immigration federalism" jurisprudence has only recently begun to respond to attempts by the Executive Branch to deputize states into regulating non-citizens and their movements.

II. THE REAL ID ACT AND THE RESURGENCE OF STATE IMMIGRATION AUTHORITY

Other provisions within the REAL ID Act sought to clamp down on immigration through other first-in-kind amendments. In addition to nationalizing standards for driver's licenses and other IDs issued by state departments of motor vehicles, the key provisions of the REAL ID Act also waived laws barring construction of

³⁵ See discussion *infra* Part II.C.

³⁶ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936)).

³⁷ *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973).

³⁸ *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978).

physical barriers at U.S. borders, modified asylum law to impose more rigorous standards for proving asylum claims, and defined issues related to terrorism.³⁹ By imposing the driver's license requirements upon the states, the REAL ID Act purposefully sought to expand the role that states would play in assisting the federal government in disrupting and dislocating non-citizens without lawful presence in the United States.

A. *Congress Demands Uniformity of State Licensing Standards*

Under the Act, states must implement new eligibility criteria restricting the issuance of driver's licenses to U.S. citizens and certain categories of legally present non-citizens and temporary residents.⁴⁰ To be in compliance with the Act, states must verify the validity of each document proving an applicant's identity, including immigration documents, by consulting DHS databases and the Social Security Administration database.⁴¹ The state would also have to issue different licenses for U.S. citizens and non-citizens, such that the non-citizens' licenses must indicate that they are temporary licenses valid only during the period of time the applicant is authorized to stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.⁴² As a result, the expiration date of the license would, in the majority of cases, also indicate the date on which the holder's lawful presence in the United States is believed to end. The Act also requires the states to maintain and share their motorist databases with each other,⁴³ a measure that privacy advocates oppose on the grounds that it will lead to the creation of a national ID card system.

However, a state's "compliance" with the REAL ID Act driver's license requirements is only optional on its face. If a state fails to

³⁹ REAL ID Act of 2005, 49 U.S.C. § 30301 (2005). REAL ID's detailed licensing requirements are curiously codified in full within this "Definitions" section of the federal statutory scheme.

⁴⁰ *Id.* REAL ID's list of approved non-citizens excludes vulnerable groups such as persons granted withholding of removal or withholding of deportation; persons paroled into the United States; applicants for nonimmigrant visas (such as trafficking victims); Cuban/Haitian entrants paroled in the United States; certain battered spouses and their children, and battered children and their parents; persons granted Family Unity status; persons granted deferred enforced departure status; applicants for suspension of deportation or cancellation of removal; and persons under an order of supervision. Joan Friedland, *Final REAL ID Regulations Fail to Ease New Burdens on Immigrants*, IMMIGRANTS' RIGHTS UPDATE, Feb. 27, 2008, <http://www.nilc.org/immspbs/DLs/DL039.htm> (last visited Apr. 21, 2009).

⁴¹ 49 U.S.C. § 30301 (2006).

⁴² *Id.*

⁴³ *Id.*

or decides not to comply with the REAL ID Act minimum requirements before certain deadlines, its residents may not use their state DMV-issued cards for “any federal purpose,” including boarding commercial airplanes, accessing federal courts, and using any other federal facilities.⁴⁴

DHS, the agency responsible for implementing REAL ID, issued final regulations in January 2009 that permit each state to apply for extensions if it can “demonstrat[e] material compliance with the core requirements of the Act and this rule” within three and one-half years; states must be in “material compliance” with REAL ID’s requirements by January 1, 2010 to receive an additional extension until no later than May 10, 2011.⁴⁵ By December 1, 2014, federal agencies will require all individuals under fifty years of age to present a “REAL ID” if that state-issued ID is being used for official purposes.⁴⁶ (However, individuals aged fifty or older would have a grace period of three years in which to apply for and receive a REAL ID from their state.)⁴⁷

Contrary to the government’s claim that REAL ID’s licensing requirements are voluntary and not coercive, the 2009 regulations clearly require that states that choose not to comply with the REAL ID Act must nevertheless “ensure that such license or identification card—(A) clearly states on its face that it may not be accepted by any Federal agency for identification or any other official purpose; and (B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.”⁴⁸ Essentially, states that choose to opt out of DHS’s campaign to implement REAL ID are still told what their licenses must look like if they wish for their residents to enter any space maintained under federal jurisdiction.

Finally, if any states choose to resist complying with the REAL ID’s putatively non-coercive licensing requirements—as several states have already declared they would do—it would reveal the REAL ID Act’s fundamental design flaw and undercut the basic, rational basis of Congress’ intent: to implement a “uniform” nationwide licensing system and a restrictive fifty-state database.

⁴⁴ *Id.*

⁴⁵ REAL ID Driver’s Licenses and Identification Cards, 6 C.F.R. § 37.51 (2008).

⁴⁶ 6 C.F.R. § 37.27 (2008).

⁴⁷ *Id.*

⁴⁸ 49 U.S.C. § 30301 (2006).

B. *The Western Hemisphere Travel Initiative and “Enhanced Driver’s Licenses” (“EDLs”)*

Under the Department of Homeland Security, the REAL ID Act has also absorbed implementation of a related mandate, the Western Hemisphere Travel Initiative (“WHTI”), under which states are encouraged to adopt new quasi-federal roles. In 2004, Congress authorized the WHTI to goad border states into creating hybrid ID cards resembling both driver’s licenses and passports known as “enhanced driver’s licenses,” while ending the practice of allowing U.S. and foreign travelers coming from Canada, the Caribbean, Bermuda, and Mexico to pass customs without showing proof of identity and nationality.⁴⁹ After January 2008, all such travelers must produce a passport or document or combination of documents deemed by DHS to “sufficiently denote both identity and citizenship.”⁵⁰ DHS has warned border states that implementation of new rules under WHTI would create new burdens upon tourism and border-state trade unless those states collaborated with federal officials to develop and issue EDLs.⁵¹

The statute that established the WHTI appears to provide series of safeguards passed to prevent terrorists from entering the United States. It called for an end to the practice of waiving the requirement to show documentation by tourists and travelers to the United States from North American and Caribbean destinations, and requires the implementation of a plan that nevertheless expedites the border-crossing of frequent travelers.⁵² However, DHS has seized upon the law to leverage state buy-in and implementation of REAL ID standards by appealing to border states in their traditional de facto capacity of regulating national borders.⁵³ As a result, two states that previously had publicly and vigorously

⁴⁹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, Title VII, § 7209, Dec. 17, 2004, 118 Stat. 3823 (2004), amended by Pub. L. 109-295, Title V, § 546, Oct. 4, 2006, 120 Stat. 1383 (2006); Pub. L. 110-53, Title VII, § 723, Aug. 3, 2007, 121 Stat. 349 (2007).

⁵⁰ Intelligence Reform and Terrorism Prevention Act § 7209(c) (2) (2004).

⁵¹ *NCSL Congressional Testimony 2008*, *supra* note 10, at 8.

⁵² Card Format Passport, Changes to Passport Fee Schedule, 72 Fed. Reg. 74169-01 (Dec. 31, 2007) (“[IRTPA] requires that the Department of Homeland Security (DHS) and the Department of State seek to facilitate the frequent travel of those living in border communities.”).

⁵³ For example, states and local authorities have entered into agreements with foreign authorities to coordinate “roads, police cooperation, and border control” after the Supreme Court held in *Virginia v. Tennessee*, 148 U.S. 503 (1893), that such state agreements only require Congressional consent where they tend to increase the political power of the states vis-à-vis the federal government. HENKIN, *supra* note 16, at 155.

opposed to complying with REAL ID—New York⁵⁴ and Washington⁵⁵—have joined the ranks of border states Michigan, Vermont, and Arizona, in implementing an EDL pilot program for its residents. Coincidentally, EDL compliance requires state agencies to implement measures that exceed the already stringent requirements of the REAL ID Act in two aspects: 1) EDLs may only be issued to U.S. citizens; and 2) EDLs will implement radio-frequency identification technology, an even more developed technology than the two-dimensional bar code. Thus, compliance with WHTI will bring a state significantly closer to compliance with the REAL ID Act.⁵⁶

Immigration advocates have argued that EDL requirements, as in REAL ID, impose upon states an unnecessary “redundancy” and raise constitutional concerns regarding federal preemption because WHTI deals with the issue of documenting citizenship and applying federal immigration laws.⁵⁷

C. Federal “Deputization” of States: Driving Immigrants Underground

After a decade of false starts, the federal government has made a concerted effort after 9/11 to use its plenary power over immigration to expand the role that states may play in assisting with federal immigration enforcement. Initiatives such as the REAL ID Act and DHS’s section 287(g) program deputizing local police to enforce immigration laws have signaled a modern resurgence of states’ and localities’ involvement in directly restricting immigration, rather than indirectly through areas of traditional state authority such as punitive criminal, housing, and public benefits laws focused on immigrant residents.

The REAL ID Act arguably “deputizes” states to engage in the screening and classification of immigrants in three ways: (1) DHS’s final regulations for REAL ID require states that refuse to

⁵⁴ See Jennifer 8. Lee, *A New License, for More Than Just Driving*, N.Y. TIMES, Sep. 17, 2008, <http://cityroom.blogs.nytimes.com/2008/09/17/a-new-license-for-more-than-just-driving>.

⁵⁵ NCSL *Congressional Testimony 2008*, *supra* note 10, at 5.

⁵⁶ See TATELMAN, *supra* note 8, at 32 (noting “some EDLs will comply with REAL ID, but not all REAL IDs will qualify as WHTI-compliant EDLs.”); NCSL *Congressional Testimony 2008*, *supra* note 10, at 8 (warning that “DHS seems to conflate REAL ID and WHTI, blurring lines between the programs, and encouraging states who have legislatively opposed REAL ID to implement REAL ID by way of WHTI-compliant IDs.”).

⁵⁷ *Ensuring Homeland Security While Facilitating Legitimate Travel: The Challenge at America’s Ports of Entry*, Hearing Before H. Comm. on Homeland Security, 109th Cong. 9 (2007) (statement of Kathleen Campbell Walker, Am. Immigr. Lawyers Ass’n), available at <http://homeland.house.gov/SiteDocuments/20080103121523-96130.pdf>.

comply with the REAL ID Act to nevertheless abide by federal requirements of a color or design that it is distinct from REAL ID-compliant licenses, thus raising suspicions against residents of such a state traveling interstate; (2) the final regulations require that all holders of REAL-ID-compliant temporary licenses (i.e., a substantial number of immigrant licensees) to renew in person at DMV offices, but waives this requirement for permanent U.S. residents;⁵⁸ (3) the final regulations vaguely require a state to “refer” non-citizen license applicants who may be out-of-status to a DHS agency: “In the event of a non-match in the Systematic Alien Verification for Entitlements (“SAVE”) database, the DMV must not issue a REAL ID driver’s license or identification card to an applicant, and *must refer the individual to U.S. Citizenship and Immigration Services for resolution.*”⁵⁹

Under the last regulatory mandate, there is no guarantee that an individual identified by a state DMV as potentially unlawfully present or out-of-status would not be reported to DHS’s enforcement agency, Immigration and Customs Enforcement (“ICE”). The law’s silence with respect to what a state employee may or may not do with individuals whose information is rejected by DHS databases means that interactions within a REAL ID-compliant state with other state authorities may be left up to inexpert state discretion and result in a “function creep” that may lead to tragic results.⁶⁰ State officials at the DMV or other agencies, without additional guidance or accountability guidelines, may feel compelled to act in a personal or official capacity to notify DHS about undocumented immigrants who present themselves, as has been increasingly documented in recent years through the section 287(g) program and state copycat initiatives.

The actions of state executives who took their cues from congressional talk about the REAL ID Act offer a glimpse of what may come if state legislatures choose to implement REAL ID licensing. In New York, Governor George Pataki ordered the state DMV to deny licenses for undocumented immigrants in 2004, months prior to the enactment of REAL ID.⁶¹ Its impact upon a state with undocumented immigrants became immediately apparent. A Korean immigrant worker who continued to make his newspaper delivery rounds—despite losing his driver’s license after Pataki imple-

⁵⁸ 6 C.F.R. § 37.21 (2008).

⁵⁹ 6 C.F.R. § 37.13(b)(1) (2008) (emphasis added).

⁶⁰ See notes 61–64 *infra* and accompanying text.

⁶¹ Nina Bernstein, *Immigrant Group to Sue State Over License Crackdown*, N.Y. TIMES, Aug. 27, 2004, at B5.

mented new exclusionary DMV policies—was pulled over for a minor traffic violation and thereafter deported.⁶² In Queens, New York, an otherwise law-abiding Bangladeshi immigrant mother reported to a DMV office, in response to a letter suspending her license based on a Social Security number mismatch, was arrested and ultimately deported by ICE after what she believed was a tip from DMV employees.⁶³

In 2007, New Jersey's Attorney General Anne Milgram issued a policy requiring local police to interrogate individuals arrested for certain crimes about their immigration status and to report out-of-status persons to immigration authorities.⁶⁴ Eight months later, such referrals to DHS doubled from 4,589 to 8,874, including one undocumented immigrant passenger (i.e., not a driver) from Mexico who was arrested after police observed the car he was riding in fail to stop at a stop sign and then asked all of the car's occupants to produce identification.⁶⁵ It is therefore entirely possible to predict how a state or locality's overbroad interrogation policy would coordinate with REAL ID implementation if New Jersey were to comply with REAL ID Act's licensing regulations.⁶⁶

In addition to REAL ID, the Department of Justice ("DOJ"), as predecessor to DHS, developed agreements under section 287(g) of the Immigration and Nationality Act after the 9/11 attacks to deputize local law enforcement authorities to investigate, apprehend, and detain undocumented residents.⁶⁷ As of November 17,

⁶² Kelly Smith, *Group Wants DMV to Stay out of Immigration Enforcement Business*, THE LEGISLATIVE GAZETTE.COM, Feb. 21, 2006, http://www.legislativegazette.com/read_more.php?story=999 (last visited Apr. 22, 2009).

⁶³ See generally Arthur J. Pais, *Undocumented Immigrants in New York to Get Drivers' Licenses*, INDIA ABROAD, Oct. 5, 2007, at A8; Driver's Licenses for All in NY, <http://malangbaba.blogspot.com/2007/09/drivers-licenses-for-all.html> (last visited Sept. 24, 2007). In 2005, as a community organizer, I worked in coalition with the Jackson Heights-based advocacy group Desis Rising Up and Moving ("DRUM") on a campaign opposing state compliance with the REAL ID Act, during which Shilpi Thakur's story comprised legislative testimony.

⁶⁴ Kareem Fahim, *Immigration Referrals by Police Draw Scrutiny*, N.Y. TIMES, Mar. 23, 2008, at A21.

⁶⁵ *Id.*

⁶⁶ In Danbury, Conn., a federal lawsuit alleges that the mayor and police chief have implemented a discriminatory city policy in which police officers engage in traffic stops for the purpose of investigating the immigration status of Latino drivers, by conducting a search for drivers' names on the FBI's National Crime Information Center database and arresting drivers if any civil immigration violations are discovered. Compl. ¶ 151, *Barrera v. Boughton*, No. 3:07-CV-01436 (D. Ct. Conn. Sept. 26, 2007), available at <http://www.aif.org/lac/chdocs/barrera-complaint.pdf>.

⁶⁷ Liz Boch, *Rogers Panel Debates Plan for Police Training: Enforcing Immigration Laws at Issue*, AK DEMOCRAT-GAZETTE, Jan. 24, 2007.

2008, ICE has active agreements with 63 local law enforcement agencies in 20 states.⁶⁸ ICE reports that the program has, since January 2006, led to the identification of more than 70,000 individuals “suspected of being in the country illegally.”⁶⁹ After entering into a section 287(g) agreement, Maricopa County, Arizona Sheriff Joe Arpaio has sent officers through Latino neighborhoods, pulling cars over for broken taillights or turn-signal violations, checking drivers’ and passengers’ papers and arresting scores of undocumented immigrants.⁷⁰ After receiving months of complaints, DOJ launched a civil rights investigation of the police department, focusing on “patterns or practices of discriminatory police practices and unconstitutional searches and seizures.”⁷¹ The section 287(g) deputization program actively encourages states and localities to opt into immigration enforcement without providing protections against racial profiling and other forms of discriminatory harassment.

D. Stemming the Tide, or Extinguishing State Experimentation?

Groups that oppose expanding—or more accurately, restoring—immigrants’ eligibility for driver’s licenses largely believe that REAL ID’s measures can play a key role in deterring and disrupting undocumented immigrant populations.⁷² Prior efforts over the past decade similar to REAL-ID had explicitly sought—but failed—to use of state’s licensing of motorists to uproot non-citizens. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”) requiring states to include Social Security numbers on driver’s licenses; the provision was

⁶⁸ U.S. Immigr. and Customs Enforcement, Delegation of Immigration Authority Section 287(g): Immigration and Nationality Act (2008), available at http://www.ice.gov/partners/287g/Section287_g.htm (last visited Dec. 28, 2008).

⁶⁹ *Id.*

⁷⁰ Editorial, *Immigration, Outsourced*, N.Y. TIMES, Apr. 9, 2008, at A24, available at <http://www.nytimes.com/2008/04/09/opinion/09wed1.html>.

⁷¹ Daniel González, *Arpaio to Be Investigated Over Alleged Violations*, ARIZ. REPUBLIC, Mar. 11, 2009, at 1.

⁷² *E.g.*, “All illegal aliens shall be barred from access to . . . driver’s licenses and identification cards. Under federal law, illegal aliens are barred from forming the requisite legal intent to establish state domicile or residency under state law.” Fed’n for Am. Immigr. Reform, *Guiding Principles for Driver’s License Reforms*, Apr. 2003, <http://www.fairus.org/site/News2?page=newsArticle&id=16904> (last visited Nov. 10, 2008). See also James Jay Carafano, Heritage Found., *Immigration Amendments Undermine REAL ID and Workplace Enforcement* (2007), available at http://www.heritage.org/research/immigration/upload/wm_1516.pdf (“Eliminating REAL ID requirements now, in the midst of a national debate on strengthening border security and immigration law enforcement, makes no sense.”).

repealed four years later on account of privacy concerns and fears that it would create a national ID card.⁷³ Nevertheless, IIRAIRA included a provision permitting states to conduct a pilot program for denying drivers' licenses to the undocumented.⁷⁴ Private actors such as employers responded to immigration reform measures that increased the use of driver's licenses as proof of identity acceptable for employment,⁷⁵ especially after the 1986 Immigration Reform and Control Act, which for the first time in U.S. history prohibited the hiring of undocumented immigrants.⁷⁶

Unlike the section 287(g) deputization program, the REAL ID Act licensing regime is the first fifty-state attempt by the U.S. federal government to undermine the relief that states may provide to immigrants under a "steam valve" theory. Professor Peter J. Spiro proposed a "steam-valve" theory to describe how states "desiring stricter enforcement of immigration laws could pursue that objective without imposing their preference on states in which immigration might be considered a neutral or positive factor" because it would be better for aliens "to be driven from a hostile California to a receptive New York than to be shut out of the United States altogether."⁷⁷ Spiro's theory, however, might be updated to address the limits of perceived long-term relief within states given the political incentive of local and state officials anywhere to propose, pass, or simply announce their preferences regarding federal immigration policy as an explicit overture to voters to elect them to federal office, as may have been the case with New York's Governor Pataki.⁷⁸ The REAL ID Act's logic rests on its ability to extinguish "sanctuary" cities, states, and other sub-federal political divisions.

From an immigrant advocate's perspective, the REAL ID Act countermands many states' and localities' efforts to integrate immigrants within their populace, such as expanding employment opportunities and protections for immigrants, by operating as a measure to curb the social and economic mobility of non-citizens

⁷³ Pub. L. No. 104-208, § 656(b), 110 Stat. 3009, 3009-716-18 (1996), repealed by Department of Transportation and Related Agencies Appropriations Act of 2000, Pub. L. No. 106-69, § 355, 113 Stat. 986, 1027 (2000).

⁷⁴ Pub. L. No. 104-208, § 502.

⁷⁵ Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L. J. 213, 227 (2004).

⁷⁶ Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 193 (2007).

⁷⁷ Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635-36 (1997) (generally promoting the "virtues" of immigration federalism).

⁷⁸ See Bernstein, *supra* note 61 and accompanying text.

such as the undocumented.⁷⁹ The natural arc of such a program is the exclusion of immigrants from more than just roadways, and the multiplication of border line-drawing within states themselves. REAL ID, if implemented, excludes undocumented immigrants from a wide range of economic and social activity in which a driver's license serves as a vital identification function: opening a bank account,⁸⁰ purchasing a home,⁸¹ renting an apartment,⁸² accessing financial credit,⁸³ and traveling by major alternative modes of transportation.⁸⁴ Ubiquitous demands for their presentation render what is legally considered a "privilege" into a deprivation of necessities, geographic segregation, and the denial of an identity for many immigrants.

Because 86% of all trips within the United States are made by car, loss of driving privileges can make it difficult or nearly impossible for individuals to keep their jobs, reach a hospital during an emergency, and participate in public activities.⁸⁵ Myriad driving-dependent job opportunities, including taxi and livery, trucking, delivery, and parking services, will vanish, along with jobs in suburban and rural areas that are only accessible by car. In some states, any individuals who insist on driving unlicensed as undocumented immigrants risk arrest and criminal sanctions and, in most instances, deportation.⁸⁶

Some legal scholars have argued that the past two decades of

⁷⁹ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2079 (2008) ("Unauthorized migrants then lack access to the autonomous spheres created by private actors in which they might otherwise be able to live. In short, these measures limit the number and size of the communities to which immigrants without lawful status can belong.").

⁸⁰ Nina Bernstein, *Routine Check on License Can Mean Deportation*, N.Y. TIMES, May 5, 2005, at B1.

⁸¹ *Id.*

⁸² Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 87–90 (noting a practice among landlords of attempting to ascertain a prospective tenant's legal status, especially in localities with anti-immigrant housing ordinances and potential Fair Housing Act violations attending such inquiries).

⁸³ Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in our Midst Post-9/11: Legislating Outsideness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1719 (2005).

⁸⁴ See Amtrak: Passenger Identification, <http://www.amtrak.com> (in Search engine, type "passenger identification") (last visited Feb. 28, 2009); Greyhound: Tickets & Travel Info, <http://www.greyhound.com/HOME/en/TicketsAndTravel/TicketsAndTravelInfo.aspx>, (last visited Feb. 28, 2009) (requiring all reserved-seat "will call" ticket holders to proffer valid photo ID).

⁸⁵ MELISSA SAVAGE AND JAMES B. REED, NAT'L CONFERENCE OF STATE LEGISLATURES, ECONOMIC HARDSHIPS OF LOSING A DRIVER'S LICENSE I (Nov./Dec. 2008).

⁸⁶ Johnson, *supra* note 75, at 224–25; but see John K. Blake, *Examining Louisiana's Prevention of Terrorism on the Highways Act*, 35 S. U. L. REV. 223, 244–45 (2007) (discuss-

immigration reform have required activists to extol the virtues of clear-cut federalism, and in the alternative, localism, in immigration policy where it comes to demographic expertise and experimentation.⁸⁷ Professor Kathleen M. Sullivan has argued that the Rehnquist Court's revival of federalism, and the elevation of judicial intervention on behalf of states' rights, protects opportunities for states or localities to engage in social experimentation for projects that would not be viable at the national level: from legalizing same-sex marriage to authorizing physician-assisted suicide.⁸⁸ Professor Clare Huntington suggests that allowing for a range of immigration regulation (perhaps even where state policies conflict with federal law and would not exist but for the grace of federal inaction) "would let other countries know that there is a diversity of opinion among U.S. citizens with regard to non-citizens."⁸⁹

After REAL ID, the absence of a driver's license is certain to arouse suspicions that an individual is undocumented, and will have certain effects documented under section 287(g): discouraging immigrant individuals and households from contacting the police, even as witnesses to a crime,⁹⁰ and increased racial profiling by police of "foreign-looking" citizens and non-citizens alike.⁹¹ Some

ing a statute, since found to be preempted by federal law, making operation of a motor vehicle in the state as an immigrant without lawful presence a crime).

⁸⁷ See, e.g., Rodriguez, *supra* note 17.

⁸⁸ Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism after the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 801-802 (2006). Sullivan notes that the Court's other doctrines continue to operate as limits on state power such as: (1) declining to revive the notion that "state autonomy over traditional and integral governmental functions that are absolutely immunized from federal control"; (2) Congress could condition its spending on the states contingent to states' conformity with Congressional goals rationally related to the spending; (3) declining to overrule *Ex parte Young* suits against state officials; and (4) declining to roll back the Dormant Commerce Clause's bar against state regulations injurious to interstate commerce even when Congress has not expressly preempted them. *Id.* at 805-08.

⁸⁹ Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 *VAND. L. REV.* 787, 837 (2008).

⁹⁰ Monica Varsanyi, *Should Cops Be La Migra? Most U.S. Police Chiefs Don't Want the Job of Enforcing Immigration Laws*, *L.A. TIMES*, Apr. 20, 2008, at 9 (discussing a national survey in which approximately three in four police chiefs who considered but decided against training officers to do immigration duty did so out of "a concern that it would decrease overall public safety because undocumented residents, fearing deportation, would be less likely to contact the police if they were a victim of, or witness to, a crime.")

⁹¹ See, e.g., BASSINA FARBENBLUM & JESSICA JANSYN, CTR. FOR SOCIAL JUSTICE, SETON HALL UNIVERSITY SCHOOL OF LAW, *CROSSING THE LINE: DAMAGING IMMIGRATION ENFORCEMENT PRACTICES BY NEW JERSEY POLICE FOLLOWING ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2007-3* (2009) available at http://law.shu.edu/csj/crossing_the_line.pdf (analyzing data from 68 incidents from 2008-2009 indicating racial profiling of Latino drivers, pedestrians and even a train station patron, all of whom police

cities and police departments have instituted policies that prohibit city employees, such as police officers, from inquiring about an individual's immigration status.⁹² If the resurgence of states' involvement in immigration issues through traditional state functions continues apace without federal checks and safeguards, state officials across an array of agencies will likely otherwise receive a great deal of latitude in implementation. Given developments in the states of New York, New Jersey, and Arizona—among other states and localities—it will inevitably produce state practices permitting or officially sanctioning local officials to directly engage in discriminatory and racist actions against state residents who may appear “foreign.”

IV. POSSIBLE LEGAL CHALLENGES TO THE REAL ID ACT

There are currently no special equal-protection prohibitions against discriminatory actions that target non-citizens and undocumented immigrants under current case law, although some legal analysts have voiced concerns regarding post-REAL ID barriers to the substantive fundamental right to travel of both citizens and non-citizens.⁹³ Instead, the residual nature of states' authority over its non-citizen residents renders Tenth Amendment challenges to REAL ID concerning federalism and political accountability for failures of such congressionally imposed policies more likely to succeed. International human rights instruments may also be persuasive, but they may not be considered binding upon U.S. courts.

A. Equal Protection Challenges

Equal protection law currently does not protect undocumented immigrants as a “suspect class” that requires a court's active protection. In *Plyler v. Doe*, the Supreme Court affirmed the right of undocumented children to receive public education

turned over to immigration authorities); Daniel González, *Citizens Claim Profiling, Join Suit Against Arpaio*, ARIZ. REPUBLIC, July 17, 2008, at 1 (reporting Ariz. Sheriff Joe Arpaio's deputies asked Latino U.S. citizens to show a Social Security card, driver's license, registration, and insurance, but did not ask for documentation of other drivers at roadblock); Paul Pupura, *La. Law on Foreign Drivers Tossed: Judge Says It Pre-empts U.S. Immigration Law*, TIMES-PICAYUNE, Feb. 2, 2007, at 2 (reporting a U.S. citizen's challenge to a new state statute, under which she was criminally charged with driving without lawful immigration status).

⁹² E.g., Los Angeles Police Department, Office of the Chief of Police, Special Order No. 40, Undocumented Aliens (Nov. 27, 1979), www.judicialwatch.org/archive/2006/so40-gates.pdf; New York City Office of the Mayor Executive Order 41 (Sept. 17, 2003), www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

⁹³ TATELMAN, *supra* note 8, at 8–9.

funded by the state of Texas despite finding they did not constitute a “suspect class” because a state effort to bar undocumented immigrant children from the classroom was irrational in its clear effect of producing illiterate and “stigmatized” students.⁹⁴ An argument that federal or state implementation of the REAL ID Act or similar DMV policies violates the equal protection guarantees of the Fourteenth Amendment to the undocumented, on account of the stigma of not being able to carry state-issued identification, has yet to be successfully litigated.⁹⁵ One weakness underlying either a “stigma” or “burden” argument is that under REAL ID, individuals are not prohibited from using an international or foreign license to drive within the states, or using consular identification or passports as identification for travel or other purposes.

In 2007, the Sixth Circuit held in *League of United Latin Americans Citizens v. Bredesen* that a Tennessee statute that denied driver’s licenses to any applicants who were not U.S. citizens or lawful permanent residents, and permitted only driving “certificates” to temporary residents with lawful presence, did not violate the Equal Protection Clause.⁹⁶ Thus, unlike *Plyler*, the suspect class involved immigrants with temporary status, not the undocumented. The court applied rational-basis scrutiny and found that Tennessee’s interest in not vouching for the identity of aliens who had not been granted lawful permanent status was rationally supported by the statute’s DMV policy.⁹⁷ Furthermore, the court rejected the plaintiffs’ claim that denial of a driver’s license burdened their fundamental right to travel because the court failed to find any authority for the proposition that lawful temporary resident aliens enjoy the same fundamental right to travel as U.S. citizens, and also found that the state’s issuance of alternative “certificates” did not impermissibly burden plaintiff’s movements.⁹⁸

B. *A Potential Tenth Amendment Challenge Asserting States’ Rights*

Three years after the passage of the REAL ID Act, a Delaware

⁹⁴ 457 U.S. 202, 222–24 (1982).

⁹⁵ *See, e.g.*, *Cubas v. Martinez*, 870 N.E.2d 133 (2007). The New York State Court of Appeals held that the state DMV’s pre-REAL ID Act policy requiring proof of identity establishing, among other things, lawful presence did not violate the equal protection rights of the undocumented immigrants as a class because the classification only drew a line between those who can present DHS documentation along with a Social Security letter, and those who cannot. *Id.* at 619.

⁹⁶ *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007).

⁹⁷ *Id.* at 533–34.

⁹⁸ *Id.* at 535.

lawmaker representing the National Conference of State Legislatures frankly testified before Congress that “REAL ID substituted coercive federalism for collaborative federalism.”⁹⁹ For states, the controversy over the REAL ID Act appears to strain the “dual sovereignty” federalism framework the Supreme Court articulated in *Printz v. United States*, for reasons beyond the issues involved in shared immigration power.¹⁰⁰ Dual sovereignty allows states to maintain their near-exclusive jurisdiction over certain issues and provides each citizen with “two political capacities, one state and one federal.”¹⁰¹ REAL ID’s rules impermissibly “commandeer” and coerce states to serve federal objectives, an unconstitutional encroachment by the federal government under the Tenth Amendment.¹⁰²

In *New York v. United States*, the Supreme Court interpreted the Tenth Amendment as an independent constraint on Congress’s power over states in their sovereign capacity. The Court held that a federal statute requiring states to either take title of radioactive waste or regulate according to Congress’s instructions was unconstitutional:

Either type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress’ direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.¹⁰³

Similarly, in *Printz v. United States*, the Court struck down a Brady Bill provision that required state chief law enforcement officials conduct background checks of handgun purchasers in order

⁹⁹ NCSL *Congressional Testimony 2008*, *supra* note 10, at 6.

¹⁰⁰ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁰¹ *Id.* at 920, (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

¹⁰² *New York v. United States*, 505 U.S. 144, 161 (1992) (“As an initial matter, Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”) (quoting *Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. 264, 288 (1981)). For a detailed analysis regarding the unconstitutionality of the REAL ID Act under *New York* and *Printz*, see Michael J. Allen, *A Choice That Leaves No Choice: Unconstitutional Coercion Under REAL ID*, 32 SEATTLE U. L. REV. 231, 243–56 (2008).

¹⁰³ *New York*, 505 U.S. at 175–176.

to execute federal law.¹⁰⁴ Quoting *Gregory v. Ashcroft*, Justice Scalia noted that the dual-sovereignty system reduces the “risk of tyranny and abuse from either front.”¹⁰⁵ For example, where Congress forces state governments to bear the financial costs and implementation of a federal regulatory program, then budgetary issues and political accountability of any excessively “burdensome” or “defective” federal laws would unfairly fall upon the states.¹⁰⁶ The REAL ID Act has been characterized as both unwieldy and defective.

Implementing the REAL ID Act will impact all fifty-six U.S. jurisdictions and more than 240 million applicants for and holders of state DMV-issued IDs.¹⁰⁷ The non-profit American Association of Motor Vehicle Administrators estimated that DMV workloads will increase by 132% and that transaction times for license renewals will double.¹⁰⁸ DHS most recently estimated that it will cost the states \$3.9 billion to implement the program over eleven years, including \$970 million in customer service, and \$953 million to produce and issue the cards.¹⁰⁹ These costs appear to be primarily borne by the states, with the exception of a few limited federal grants for states to transition their infrastructure and link their databases.¹¹⁰

Licensing drivers is a traditional state function under its police, health, and safety powers. DHS itself conceded in remarks accompanying the final regulations for REAL ID that states possess “autonomy to govern an inherently State function—the driver’s license issuance process.”¹¹¹ DHS responded to state-sovereignty concerns from the comment period by simply ignoring Tenth Amendment jurisprudence through a vague, possibly inaccurate statement in light of the strict regulations it issued for implementation: “DHS has welcomed and encouraged State participation in this process and, where possible, drafted these rules in such a way as to maximize State discretion.”¹¹²

Although states have the option not to comply with REAL ID, they risk having their residents forced to use IDs other than their

¹⁰⁴ *Printz*, 521 U.S. at 930.

¹⁰⁵ *Id.* at 921.

¹⁰⁶ *Id.* at 930.

¹⁰⁷ Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5286 (Jan. 29, 2008).

¹⁰⁸ *Id.*

¹⁰⁹ Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5324–25 (Jan. 29, 2008).

¹¹⁰ 2008 NCSL Congressional Testimony, *supra* note 10, at 2.

¹¹¹ 73 Fed. Reg. 5284 (Jan. 29, 2008).

¹¹² *Id.*

state-issued IDs for boarding planes and accessing courthouses. The REAL ID Act's recently-issued implementing regulations require states that do not comply—for reasons of federalism, privacy, or immigrants' rights concerns—nevertheless change the appearance of their states' DMV-issued IDs to indicate that they are not in compliance and therefore unavailable to be used for federal purposes. Imposing such requirements upon states whether or not they comply with the licensing regulations would violate the Tenth Amendment. State officials face the real possibility of U.S. citizens who comprise their electorate encountering significant barriers in the exercise of their right to travel—a “privilege and immunity of national citizenship under the Constitution”¹¹³—and their First Amendment right to access to the courts,¹¹⁴ unless they sacrifice their sovereignty.

The REAL ID Act requires states to implement the sheer majority of its regulatory scheme, also arguably in violation of the Tenth Amendment. In some states, requiring States to adopt the practice of linking license expiration dates with an individual's immigration status requires approval of the state legislature because DHS admits it lacks the authority to directly mandate this change.¹¹⁵ States that do comply must commit a significant amount of resources to conduct immigration document verifications, including paying for each document validation query to DHS databases, and have no discretion to use the exceptions process outlined in DHS regulations to permit non-citizens to use alternate documents to prove their lawful status in the United States and thus alleviate the administrative burdens upon their residents.¹¹⁶

These two issues most directly interfere with a state's exercise of its sovereign capacity and would effectively “commandeer” state legislatures in the service of a federal law, prohibited under *New York* and *Printz*. The REAL ID Act, which failed to pass Congress as a standalone bill and imposed upon states without full debate, thus

¹¹³ *United States v. Guest*, 383 U.S. 745, 764 (1966) (Harlan, J., concurring) (citing *Corfield v. Coryell*, 4 Wash. C.C. 371) (1825); see also U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

¹¹⁴ An individual's right of access to the courts has been protected under the First Amendment's “right to petition for a redress of grievances.” U.S. CONST. amend. I. Moreover, advocates have pointed out that “[l]ack of a Real ID compliant license would bar a citizen from a face-to-face meeting with his or her elected or appointed government representatives,” also implicating right-to-petition concerns. ACLU, REAL ID SCORECARD 22, Jan. 17, 2001, available at http://www.aclu.org/images/general/asset_upload_file162_33700.pdf.

¹¹⁵ 73 Fed. Reg. 5299 (Jan. 29, 2008).

¹¹⁶ 6 C.F.R. § 37.11 (2008).

raises substantive Tenth Amendment concerns regarding federal intrusion into state licensing and public safety, both traditional areas of state sovereignty.

C. *REAL ID and Standards Expressed in International Conventions*

More than half a century ago, the United States spearheaded efforts to draft the Universal Declaration of Human Rights, which recognizes a “right to freedom of movement and residence within the borders of each state.”¹¹⁷ However, although the U.N. General Assembly ratified the declaration by proclamation, it is not a treaty and thus not legally binding as there are technically no signatories to the Declaration.¹¹⁸

Another international instrument, the U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, recognizes the “right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.”¹¹⁹ However, the United States is not a ratifying nation nor a signatory to the Convention.¹²⁰ Even if the United States had ratified it, the Convention permits a nation to justify restricting a person’s movement if “necessary to protect national security.”¹²¹

It has been suggested by Professors Raquel Aldana and Sylvia Lazos Vargas that the REAL ID Act’s denial of driver’s licenses infringes upon the right of every individual to be recognized as a person under the International Covenant on Civil and Political

¹¹⁷ See Article 13 of the Universal Declaration on Human Rights, G.A. Res. 217A(III), U.N. Doc. A/1810 at 71 (1948).

¹¹⁸ Douglas Cassell, *The Globalization of Human Rights: Consciousness, Law, and Reality*, 2 Nw. U. J. INT’L HUM. RTS. 6, 50 (2004) (noting Human Rights Commission Chair Eleanor Roosevelt was instructed by the U.S. State Department to declare the Declaration not binding upon the United States); *The United Nations and Human Rights*, <http://www.un.org/rights/dpil774e.htm> (last visited Apr. 17, 2009). However, Cassell argues that with the first Optional Protocol to the Civil and Political Covenant (collectively the International Bill of Human Rights), most of the rights named have attained the status of customary international law, binding even on states not party to the Covenants. *Id.* at 56. See also *Filártiga v. Peña-Irala*, 630 F.2d 876, 882 (noting that the U.N. General Assembly declared that the U.N. Charter precepts embodied in the Universal Declaration “constitute *basic principles* of international law.”) (citing G.A.Res. 2625 (XXV) (Oct. 24, 1970)) (emphasis added).

¹¹⁹ Article 39 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, at 266, U.N. Doc. A/45/49 (1990).

¹²⁰ See United Nations Treaty Collection, <http://treaties.un.org/Pages/UNTSOnline.aspx?id=1> (click on “Title Search”; then type “Rights of All Migrant Workers”; below Participants, select “See Details”).

¹²¹ *Id.*

Rights (“ICCPR”), which has been ratified by the United States.¹²² Given the discussion above regarding the pervasive nature of driver’s licenses as identification, there is an argument that states have responsibility for implementing the ICCPR in its ratification instrument.¹²³ A major hurdle, however, is that the Senate declared that “provisions of Article 1 through 27 of the Covenant are not self-executing” and therefore does not automatically become binding U.S. domestic law.¹²⁴

CONCLUSION

States that comply with REAL ID do so at the risk of losing the only formal and accurate relationship they may have with potentially hundreds of thousands of their residents who are undocumented immigrants or immigrants who cannot, after reasonable effort, substantiate their identity. Where the federal government has by infrastructural necessity abdicated its day-to-day interaction with non-citizens, driving more than 13 million immigrants further underground under the REAL ID Act has meant that the government also loses the opportunity to form any relationship with non-citizens actually present in the United States and to advance the national security objectives it boldly articulated after 9/11. As discussed earlier, the lack of any state-issued driver’s license may itself become a scarlet letter that facilitates abuse outside of public view.

For non-citizens with lawful status, if states and the federal government sincerely desire to assimilate them, providing them with a different, “temporary” license instantly brands them as outsiders. In Texas, where the state has begun to issue vertically-oriented driver’s IDs to such individuals, Edwin Palacio, a political asylee from the Philippines who has resided in the United States since the early 1990s, told a reporter that the new Texas rules have created “confusion instead of clarity” and “suspicion instead of trust”: “‘I strove to build a new life here,’ said Mr. Palacio, who works as an information systems auditor in Austin. ‘Imagine my shock, my dismay, my fear, to find that these rules . . . designated me a mere

¹²² Aldana & Lazos Vargas, *supra* note 83, at 1721–22 (2005); Article 16 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (“Everyone shall have the right to recognition everywhere as a person before the law.”).

¹²³ S. Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 652 (1992) (“Article 50 extends the provisions of the Covenant to all parts of federal states.”).

¹²⁴ 138 CONG. REC. S4781–84 (1992).

temporary visitor to the U.S.’”¹²⁵

The ideological debates arising from a Tenth Amendment federalism analysis involving an immigrants’ rights issue is ripe for future discussion, but it is worth noting here that states’ arguments that Congress has overstepped its authority mainly focus on states’ fiscal burdens and on defects in REAL ID implementation—i.e., political responsibility to states in their sovereign capacity—while the interstitial jurisdictional vacuums in our nation’s current immigration federalism framework do not place state voters and non-voting non-citizens on equal footing. The provision of additional federal funds and flexibility in REAL ID Act implementation, for example, will not cure the law of its significant immigration federalism concerns. This Article is an initial step to theoretically connect the behavior of self-interested state officials with an ethos of non-discrimination toward non-voting immigrant populations. In 2009, it remains to be seen whether President Barack Obama and a new Congress take up this opportunity for lawmakers to re-examine whether an ill-conceived and poorly designed act of Congress is legally sound, materially feasible, and politically accountable.

¹²⁵ Emily Ramshaw, *Opponents Call New Driver’s License Rules for Foreign Nationals ‘Institutionalized Racism,’* DALLAS MORNING NEWS, Dec. 9, 2008, available at www.dallasnews.com (search “Emily Ramshaw and Driver’s Licenses,” then click on article title hyperlink).