

THE REAL ID ACT AND BIOMETRIC TECHNOLOGY: A NIGHTMARE FOR CITIZENS AND THE STATES THAT HAVE TO IMPLEMENT IT

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INTRODUCTION

Congress passed the Real ID Act (“the Act”) in 2005 and will require all states to implement much more stringent controls on the issuance of driver’s licenses and identification. The states face a number of obstacles in implementing the requirements including a lack of funding, lack of federal support and training, and a rapidly approaching implementation deadline. Under the Real ID Act, the Department of Homeland Security (“DHS”) could require that each state-issued driver’s license contain biometric technology, but it has not yet announced the exact requirements that must be included for all new driver’s licenses. On March 1, 2007, the DHS issued its Notice of Proposed Rulemaking (“NPRM”) for the Real ID Act. The NPRM is not a final rule but a proposal that was submitted for public comment. Opponents of the Real ID Act had predicted that the DHS may have chosen to require biometric technology to be included in all new driver’s licenses to make it more difficult for terrorists or criminals to obtain identification cards. However, in the DHS NPRM, a state does not have to include biometric technology in its driver’s licenses to comply with the Act, although they are free to do so. If the DHS amends the NPRM to require biometric technology in all new state-issued driver’s licenses and identification cards, the technology is likely to experience rapid growth. As a result, biometric technology might become more reliable as its producers address the challenges encountered in incorporating the technology into new identification cards for millions of Americans.

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Because of the difficulty that the states will have in implementing the Real ID Act, states will likely resist implementing the measures or, at a minimum, threaten the federal government with a lawsuit to pressure Congress to provide more support for the Act's mandates. Therefore, it is necessary to examine the legal challenges that states could mount against the Real ID Act to either avoid implementation or acquire more assistance and funding from the federal government.

There are several possible challenges. A state might challenge the Real ID Act under the Unfunded Mandate Reform Act ("UMRA"). This challenge is unlikely to succeed because of UMRA's exception for federal laws passed in the interests of security. However, a state might be able to mount a successful challenge under the Supreme Court's holding in *Printz v. United States*,¹ which upheld federalism principles that prevent the federal executive branch from imposing administrative enforcement requirements on the states. The Supreme Court held in *Printz* that under the principles of federalism the federal government cannot impose a federal regulatory program that must be implemented by state officers because imposing such a system violates state sovereignty.

A state might also raise a legal challenge to the Act as an unconstitutional form of conditional spending under the rationale set forth in *New York v. United States*.² In *New York*, the Supreme Court held that the federal government cannot coerce states into choosing between two alternatives, neither of which the federal government has the constitutional power to impose. Here, a state could argue that the federal government does not have the power to 1) force the states to adopt national driver's license standards under *Printz* or 2) to withhold federal benefits from the citizens of a state that does not comply under the germaneness test, where the federal spending must be related to the condition imposed.

Accordingly, a state should bring a claim opposing the Real ID Act and proceed by challenging the burdens placed on state department of motor vehicle workers as a violation of federalism and the separation of powers under *Printz*, or a federalism claim opposing the imposition of the Real ID Act as an unconstitutional form of conditional spending under *New York*.

1. *Printz v. United States*, 521 U.S. 898 (1997).
2. *New York v. United States*, 505 U.S. 144 (1992).

I. OVERVIEW OF THE REAL ID ACT

*He gazed up at the enormous face. Forty years it had taken him to learn what kind of smile was hidden beneath the dark mustache. O cruel, needless misunderstanding! O stubborn, self-willed exile from the loving breast! Two gin-scented tears trickled down the sides of his nose. But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother.*³

National ID cards have been proposed in the U.S. as a means of enhancing security and preventing illegal immigration; but Americans have historically rejected the idea.⁴ Many countries have national ID cards, including most European countries, Hong Kong, Malaysia, Singapore, and Thailand.⁵ However, there is not yet a standard European Union ID card, although there are proposals for such a card that would include biometric technology.⁶ The September 11th attacks renewed interest in a national ID card as a means of preventing terrorism.⁷ Larry Ellison, the founder of Oracle, was one of the first proponents of smart cards that contained a tamper-proof algorithm that could store an individual's thumbprint.⁸

In Part A of this section, I examine the history of the Real ID Act. Part B sets forth the requirements of the Real ID Act. Part C details the problems that a state might face in implementing the Act. Part D characterizes the leading arguments in opposition to the Act. Finally, Part E describes the arguments in favor of the Act.

A. *The History of the Real ID Act*

A bill similar to the Real ID Act⁹ was first legislatively proposed by Representative F. James Sensenbrenner, a Republican from Wisconsin, to comply with the findings of the 9/11 Commission, but the bill's

3. GEORGE ORWELL, 1984 300 (Harcourt Brace Jovanovich 1970) (1949).

4. Electronic Privacy Information Center, National ID Cards and REAL ID Act, <http://epic.org/privacy/id-cards> (last visited May 8, 2008) [hereinafter EPIC] (see text below the heading "History of National Identification Cards").

5. *Id.*

6. John Lettice, *UK EU Presidency Aims for Europe-wide Biometric ID Card*, THE REGISTER, July 13, 2005, available at http://www.theregister.co.uk/2005/07/13/uk_eu_id_proposal.

7. See Matthew Brzezinski, *Fortress America*, N.Y. TIMES MAG., Feb. 23, 2003, at SM38.

8. *Id.*

9. 9/11 Recommendations Implementation Act, H.R. 10, 108th Cong. (2004).

provisions requiring an ID card were taken out after several members of the 9/11 Commission publicly stated that the provisions would not contribute to security.¹⁰ Representative Sensenbrenner reintroduced the restrictive provisions in 2005, and the Real ID Act was passed by Congress on May 11, 2005, as part of an emergency appropriations bill for the wars in Iraq and Afghanistan.¹¹ By attaching the measures to this emergency military appropriations bill, Representative Sensenbrenner was able to obtain the votes of many members who might not have otherwise supported the bill because these members either wanted to provide adequate funding for the military operations or wanted to avoid looking weak on defense. As a result, the Real ID Act became a “must-sign” piece of legislation.¹² The House passed this bill without public hearings or debate.¹³

B. *The Real ID Act’s Requirements*

The Real ID Act requires the states to comply with a number of provisions that must be implemented by May 2008.¹⁴ If a state is unable to comply by May 2008, it may request a five-year extension by February 2008.¹⁵ All state licenses and identification cards held by individuals from a state must be compliant by May 10, 2013.¹⁶ No federal agency will be allowed to accept a driver’s license or identification card from any state that has not had its identification procedures certified by the DHS.¹⁷ At a minimum, the new IDs must contain the individual’s date of birth, gender, ID number, digital photograph, address of legal residence, signature, physical security features, and machine-readable

10. Noah S. Leavitt, *The Real ID Act: How it Violates Treaty Obligations, Insults International Laws, Undermines Our Security, and Betrays Eleanor Roosevelt’s Legacy*, FINDLAW’S WRIT, May 9, 2005, at <http://writ.news.findlaw.com/leavitt/20050509.html>.

11. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302-23 (codified in scattered sections of 8 and 49 U.S.C.).

12. Leavitt, *supra* note 10.

13. *Id.*

14. Real ID Act of 2005, H.R. 418, 109th Cong. § 202(a)(1) (2005). In the future, all passengers will be required to have an ID that complies with the Real ID Act to fly on any airline. Op-Ed., “*Real ID*” Program Will Be a Costly Chore, DENVER POST, Sept. 28, 2006, at B6.

15. David Abel, *Coakley Cites Cost in Opposing US Law on Driver’s Licenses*, BOSTON GLOBE, June 14, 2007, at 1B.

16. U.S. Department of Homeland Security, Real ID Proposed Guidelines: Questions and Answers, http://www.dhs.gov/xprevprot/laws/gc_1172767635686.shtm (last visited May 8, 2008).

17. H.R. 418 § 202(a)(1); *see also* National Conference of State Legislatures, Real ID Act of 2005: Driver’s License Summary, <http://www.ncsl.org/standcomm/sctran/realidsummary05.htm> (last visited May 8, 2008).

technology.¹⁸ It appears that all states currently meet the minimum standards for driver's license informational content.¹⁹

On March 1, 2007, the DHS issued its NPRM for the Real ID Act that detailed the minimum data elements required, which does not require a state to include biometric technology in its driver's licenses.²⁰ The NPRM is not a final rule but a proposal that was submitted for public comment and could still be amended to require that a state include biometric technology.²¹ Each state must require every ID applicant to present a photo identity document, documentation showing the individual's date of birth, proof of social security number, and documentation showing the person's name and address.²² States are required to verify the lawful status of the person and verify all required documentation needed to obtain the ID, including all social security cards and birth certificates, with the issuing agency.²³ States must also ensure the physical security of all locations where driver's licenses and identification cards are issued and produced, which includes all state Department of Motor Vehicle ("DMV") offices and branches.²⁴

To comply with the Real ID Act, states will have to reissue driver's licenses and identification to 245 million cardholders within the first five years of the Act's passage.²⁵ The Congressional Budget Office estimates that implementation will cost the states \$100 million over the next five years.²⁶ This amount, for implementing the policies at the state level, stands in sharp contrast to other cost estimates issued by state organizations that might be more familiar with their own cost structures, which run as high as \$1 billion initially with an ongoing cost of \$10.1 billion for the first five years.²⁷ Some of this cost will almost certainly be borne by the ID holder, with driver's license fees expected to increase nine to ten times—from a current fee of \$10-15 to \$90.²⁸

18. H.R. 418 § 202(b).

19. Serge Egelman & Lorrie Faith Cranor, *The Real ID Act: Fixing Identity Documents with Duct Tape*, 2 I/S: J. L. & POL'Y FOR INFO. SOC'Y 149, 174-75 (2006).

20. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, *Notice of Proposed Rulemaking*, 72 Fed. Reg. 10,820 (Dep't of Homeland Sec. Mar. 9, 2007).

21. Real ID Act Proposed Guidelines: Questions and Answers, *supra* note 16.

22. H.R. 418 § 202(c)(1).

23. *Id.* § 202(c)(3)(A).

24. *Id.* § 202(d)(7).

25. Press Release, Nat'l Governors Ass'n, Real ID Will Cost States More Than \$11 Billion (Sept. 21, 2006), *available* at <http://www.nga.org/portal/site/nga/menuitem.6c9a8a9ebc6ae07eee28aca9501010a0/?vgnxtoid=7aa10a8066bcd010VgnVCM1000001a01010aRCRD>.

26. Andrew Garber, *REAL ID's Cost Angers State Leaders*, SEATTLE TIMES, Aug. 17, 2005, at B1.

27. Press Release, Nat'l Governors Ass'n, *supra* note 25.

28. ANGELA FRENCH, CITIZENS AGAINST GOV'T WASTE, REAL ID: BIG BROTHER

Expected wait times at DMVs nationwide are predicted to increase up to 200 percent in some areas because DMV workers will be required to verify all documentation presented by individuals seeking new or renewal identification cards.²⁹ With the increase in wait time and the dramatic increase in price, the Real ID Act will have lasting ramifications for every American seeking an ID. It will also affect those individuals who do not have IDs or cannot obtain identification cards because they will no longer be able to access federal services.

C. *The Problems Faced by the States*

States face a number of problems in implementing the provisions of the Real ID Act. First, verifying all documentation with the issuing agency will be an enormous task and has the potential to be undermined by the fact that “breeder documents,”³⁰ such as birth certificates and social security cards, which an identification seeker must present are easily forged.³¹ The Real ID Act requires a DMV worker to verify the birth certificate with the issuing agency or hospital, which will likely consist of making a phone call to verify that the birth certificate that the identification seeker is presenting is in the official records of the issuing agency. However, there is no certainty that a person who is presenting a birth certificate is the person named in the birth certificate, only that the person named in the certificate exists.³² Requiring biometric technology on birth certificates, such as a DNA fingerprint, might be the only way to prevent this problem but this requirement is not yet in the Real ID Act.³³

States must also set up a national database to store records of these breeder documents for no less than ten years.³⁴ This database will be accessible by all fifty states, Canada, and Mexico, which creates a higher risk of identity theft if someone was able to hack into this database.³⁵ Also, encryption systems that adequately protect these databases are expensive and will have to be administered by state DMV employees that

COULD COST BIG MONEY 4 (2005), at http://www.cagw.org/site/DocServer/Real_ID_FINAL_with_cover.pdf?docID=1281.

29. Press Release, Nat'l Governors Ass'n, *supra* note 25.

30. A breeder document is a document that one might be required to present to obtain a legitimate identification card. MARGARET R. O'LEARY, *THE DICTIONARY OF HOMELAND SECURITY AND DEFENSE* 59 (2006). For example, a birth certificate is often required to obtain a driver's license. DENNIS BAILEY, *THE OPEN SOCIETY PARADOX: WHY THE 21ST CENTURY CALLS FOR MORE OPENNESS — NOT LESS* 47 (2004).

31. Raquel Aldana & Silvia R. Lazos Vargas, *“Aliens” in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1718 (2005).

32. Egelman & Cranor, *supra* note 19, at 176.

33. *Id.*

34. *Id.* at 175.

35. *Id.*

must be trained.³⁶ It is also unknown how long current driver's licenses will be valid and how minors will be treated under the Act.³⁷

D. Opposition to the Real ID Act

The Real ID Act has faced a great deal of opposition from the states and a number of privacy advocates. The National Governors Association, National Association of State Legislators, and the American Association of Motor Vehicle Administrators have all issued statements in opposition to the Act.³⁸ These groups have complained that the Act's provisions have not been funded by the federal government and that the states should be given eight years to comply.³⁹ Kentucky and the state of Washington have considered resolutions against the Act.⁴⁰ Maine lawmakers passed a resolution seeking repeal of the Act, citing the Act's \$185 million costs for the state, failure to increase security, and standards that put people at risk for identity theft.⁴¹

Since taking control of the House of Representatives and the Senate in the 2006 mid-term election, Democrats have argued that the Real ID Act must be overhauled.⁴² Democratic leaders have said that, unless the long-awaited regulations to be announced by the DHS provide adequate protections for privacy and individual rights, they will repeal the Act.⁴³ Two U.S. Senators, one a Republican and the other a Democrat, lead the opposition.⁴⁴ Senator Daniel Akaka, D-Hawaii, and Senator John Sununu, R-New Hampshire, have introduced a bill, the "Identification Security Enhancement Act of 2006," to address some of what they perceive as the shortcomings of the Real ID Act.⁴⁵ The proposed bill

36. Memorandum from the Am. Civil Liberties Union, *Administrative Burdens on the States Imposed by the REAL ID Act*, available at http://www.nclr.org/files/34498_file_ACLU_REAL_ID_Burdens_on_States.pdf.

37. *"Real ID" Program Will Be a Costly Chore*, supra note 14.

38. Pam Belluck, *Mandate for ID Meets Resistance from States*, N.Y. TIMES, May 6, 2006, at A1.

39. *Id.*

40. *Id.*

41. *Maine Calls For Repeal of National-ID Act*, WASH. POST, Jan. 26, 2007, at A6.

42. Shaun Waterman, *Analysis: Dems Plan Overhaul of Real ID*, UNITED PRESS INT'L, Dec. 13, 2006, available at http://www.upi.com/Security_Terrorism/Analysis/2006/12/12/analysis_dems_plan_overhaul_of_real_id/2207.

43. *Id.*

44. K.C. Jones, *Senators Threaten to Repeal Real ID Act Unless Changes Are Made*, INFO. WEEK, Dec. 16, 2006, available at <http://www.informationweek.com/security/showArticle.jhtml?articleID=196700298>.

45. Press Release, Sen. Daniel Akaka, Akaka Introduces Legislation Repealing the Real ID Act (Dec. 11, 2006), available at http://akaka.senate.gov/public/index.cfm?FuseAction=PressReleases.Home&month=12&year=2006&release_id=1461.

would provide \$300 million annually for driver's license and ID card security implementation.⁴⁶ The proposed bill would also create driver's license standards that would be developed collaboratively by all key stakeholders including state governments and privacy experts.⁴⁷ Finally, the proposed bill would extend the compliance deadline for states.⁴⁸ Aside from the Democratic opposition, Republican Senator Sununu believes that the Real ID Act undermines the states' right to determine eligibility for driver's licenses, raises serious privacy concerns, and imposes billions of dollars of expenses on the states.⁴⁹

The Act is also opposed by groups as diverse as the CATO Institute, a libertarian think tank,⁵⁰ and the American Civil Liberties Union ("ACLU"), an organization designed to defend and preserve the individual liberties guaranteed under the Constitution,⁵¹ both of which testified in opposition to the Real ID Act in New Hampshire.⁵² The CATO Institute's opposition is based on what it characterizes as the federal government blackmailing the states.⁵³ The CATO Institute has highlighted the fact that the states are being forced to comply with the Real ID Act because a noncompliant state's citizens will be barred from air travel, entry to federal courthouses, and other federal checkpoints.⁵⁴

ACLU opposition is based on the high cost of implementation being imposed on the states, its belief that it will not actually prevent terrorism, and the diminished privacy Americans will experience because of the compilation of personal information.⁵⁵ Barry Steinhardt, Director

46. *Id.*

47. *Id.*

48. *Id.*

49. Senator John E. Sununu, Real ID: Unnecessary, Unfunded, Unlikely to Make You Safer, <http://www.sununu.senate.gov/columns5-17-06.html> (last visited May 8, 2008).

50. Cato Institute, About Cato, <http://www.cato.org/about.php> (last visited May 8, 2008).

51. Am. Civil Liberties Union, About Us, <http://www.aclu.org/about/index.html> (last visited May 8, 2008).

52. Belluck, *supra* note 38.

53. Jim Harper, *NH Can Set A National Example by Opposing a Federal ID Card*, UNION LEADER, Apr. 5, 2006, available at http://www.cato.org/pub_display.php?pub_id=6358.

54. *Id.*

55. Press Release, Am. Civil Liberties Union, State Groups' Cost Estimate, Call for Revisions Should Be Final Straw For Real ID Act, ACLU Says (Sept. 21, 2006), available at <http://www.aclu.org/safefree/general/26820prs20060921.html>.

The sad thing is, the huge new burdens Real ID will impose on ordinary Americans will bring few actual benefits, since it will do little to protect us against terrorism . . . and everyone needs to remember that the burdens it brings won't just be long lines and higher fees - we will also pay the costs of diminished privacy, ID theft and the regimentation of our country through what amounts to America's first true system of national identity papers.

Id.

of ACLU's Technology and Liberty Project, stated:

It's likely the costs for Real ID will be billions more than today's estimate [\$11 billion] — but no matter what the real figure is, Real ID needs to be repealed. At a time when many state budgets and services are already stretched thin, it is clear that this unfunded mandate amounts to no more than a tax increase in disguise.⁵⁶

Opponents of the Act also fear that the Act turns DMV workers into agents of the DHS.⁵⁷ Former Governor of Arkansas and 2008 Republican Presidential Candidate, Michael D. Huckabee, questioned “whether this is a role that you really want to turn over to an entry-level, front-line, desk person at the D.M.V.”⁵⁸ The Act has also faced opposition at the state level from both the left and the right.⁵⁹

Privacy advocates such as the Electronic Privacy Information Center (“EPIC”) and the Electronic Frontier Foundation (“EFF”) have also spoken out against the Real ID Act.⁶⁰ EPIC opposes the Act because it believes the Act would create an incredible bureaucracy in requiring state DMVs to verify all documentation, and might result in “foreign-looking” individuals being discriminated against and having their documents more heavily scrutinized.⁶¹ Moreover, EPIC argues that the states compiling personal information into databases that could be accessed by other states’ DMVs to authenticate the documents presented by ID seekers would be highly susceptible to criminals who could hack into the database and steal the personal information of individuals to perpetrate identity theft.⁶² EFF opposition is based on the fact that the Real ID Act permits the surveillance of Americans because the machine-readable magnetic strip would allow the government to track an individual’s movements by following where the card has been swiped.⁶³

The Act also faces opposition from human rights advocates and some international organizations.⁶⁴ These groups have criticized the Real ID Act because it endangers asylum seekers by making asylum

56. *Id.*

57. Belluck, *supra* note 38.

58. *Id.*

59. *Id.* (quoting Ky. State Rep. Kathy W. Stein as saying that the Real ID Act “is one of those issues where the extreme left, which I’m always characterized as, and the extreme right meet”).

60. EPIC, *supra* note 4; Electronic Frontier Foundation, Real ID, <http://www.eff.org/Privacy/ID/RealID/> (last visited May 8, 2008) [hereinafter EFF].

61. EPIC, *supra* note 4.

62. *Id.*

63. EFF, *supra* note 60.

64. Nora Boustany, *U.N. Security Council Takes Up Discussion of Rights in Burma*, WASH. POST, Sept. 30, 2006, at A12.

procedures more difficult.⁶⁵ They claim that it does so by placing the burden of proving relief on the asylum seeker.⁶⁶ The Real ID Act also could face some international opposition because it might violate a number of international treaties by stripping immigrants of their right to habeas corpus review if they claim mistreatment on the part of DHS officials.⁶⁷

E. Arguments in Support of the Real ID Act

Defenders of the Real ID Act have been able to deflect some of the criticism from various groups by arguing that the Act is necessary to prevent illegal immigration and to prevent terrorism.⁶⁸ For instance, Representative Sensenbrenner referenced the fact that Muhammad Atta, one of the 9/11 hijackers, came over to the United States on a six-month visa, but still was able to obtain a six-year driver's license in Florida.⁶⁹ Supporters also argue that the Act will prevent illegal immigration by making it more difficult for illegal immigrants to get state driver's licenses.⁷⁰ Moreover, supporters contend that asylum seekers should bear the burden of proving a valid cause for asylum, which is required under the Real ID Act because a terrorist will not be able to easily gain residency status by claiming asylum.⁷¹ Supporters also argue that a true national database, which would be susceptible to hackers, is not required because the states will send electronic queries to each other that will be answered with the individual state's database.⁷² This position is supported because the DHS states that a federal database is not required in its NPRM.⁷³

There are also some supporters at the state political level who do not

65. *Id.*

66. Jared Joyce-Schleimer, Current Development, *The State of the Real ID Act of 2005*, 19 GEO. IMMIGR. L.J. 611 (2005).

67. Leavitt, *supra* note 10.

68. Aldana & Vargas, *supra* note 31.

69. 151 Cong. Rec. H460 (daily ed. Feb 9, 2005) (statement of Rep. Sensenbrenner).

70. Anne C. Mulkern, *Congress Appears Ready to Go Its Own Way on Immigration*, DENVER POST, Feb. 13, 2005, at A6.

71. 151 Cong. Rec. H468 (daily ed. Feb 9, 2005).

Many of those intent on doing our Nation harm claim political asylum as their Trojan horse to gain access to our borders. Individuals like the 1993 World Trade Center bomber, Ramzi Yousef, claimed political asylum and was ordered to appear at a hearing. Yet Yousef, like a majority of those given notices, failed to show up at the hearings. This bill will make it easier to deport suspected terrorists.

Id. (comments of Rep. Michael McCaul).

72. Belluck, *supra* note 38 (quoting Jeff Lungren, Spokesman for Rep. James Stennessenbrenner).

73. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, *Notice of Proposed Rulemaking*, 72 Fed. Reg. 10,820 (Dep't of Homeland Sec. Mar. 9, 2007).

want to see their state's citizens lose out on a plethora of federal benefits.⁷⁴ Then-Governor Eliot Spitzer agreed that New York would be the first large state in the country to comply with the Act's requirements.⁷⁵ This was a substantial victory for proponents of the Act.

II. OVERVIEW OF BIOMETRICS

*There is an evil tendency underlying all our technology — the tendency to do what is reasonable even when it isn't any good.*⁷⁶

The advancement of the digital age has businesses, the government, and individuals searching for alternatives to safeguard their digital communications; biometrics are one of the proposed solutions. Biometrics refers to a set of techniques that utilize physiological or behavioral characteristics to uniquely identify an individual.⁷⁷ Biometric information is a form of electronic signature that is stored digitally.⁷⁸ The identifier can consist of a fingerprint, voiceprint, retinal scan, fingerprint deconstruction, handwriting analysis, keyboard dynamics, video surveillance, or facial recognition.⁷⁹

Biometrics have already been incorporated into a number of public and private uses and have tremendous potential.⁸⁰ The biometric technology market grew by approximately 47% in 2006—to sales over \$2.2 billion, up from \$1.5 billion in 2005.⁸¹ The military is increasingly relying on biometric identifiers.⁸² For example, biometrics technology is

74. Belluck, *supra* note 38.

75. Nicholas Confessore, *Furor Persists, But License Plan Gets Support*, N.Y. TIMES, Oct. 29, 2007, at B1.

76. ROBERT M PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 63 (HarperTorch 2006) (1974).

77. International Biometric Group, <http://biometricgroup.com> (last visited May 8, 2008).

78. Thomas J. Smedinghoff, *Online Transactions: The Rules for Ensuring Enforceability in a Global Environment*, THE COMPUTER & INTERNET LAW., Apr. 1, 2006, at 6 n.45.

79. *Id.*; see also Timothy Quinn, *DNA Lite*, Z MAG. ONLINE, Mar. 2003, available at <http://www.zmag.org/zmag/viewArticle/13992>; Sarah Arnott, *UK Issues First Biometric Passport*, COMPUTING, Mar. 6, 2006, available at <http://www.computing.co.uk/computing/news/2151432/uk-issues-first-biometric>.

80. Brian R. Hook, *Biometric Technology: Thinkpad and Beyond*, TECHNEWSWORLD, Nov. 2, 2004, available at <http://www.technewsworld.com/story/37778.html> (quoting Dave Bixler, Info. Sec. Officer, Siemens Bus. Serv., as saying about biometric technology that “[a]ssuming the technology proves cost-effective and secure, this technology has the potential to dramatically improve information and physical security at almost all levels”).

81. William M. Buckeley, *How Biometric Security Is Far from Foolproof*, WALL ST. J., Dec. 21, 2006, at B3.

82. *Biometric Standards*, MIL. INFO. TECH., Mar. 13, 2006, available at <http://www.military-information-technology.com/article.cfm?DocID=1354>.

being utilized to identify suspected insurgents in Iraq.⁸³ Businesses are utilizing biometrics to decrease security expenses.⁸⁴ Fingerprint scanners are being incorporated into newer computer models as a solution for those users who are having a difficult time remembering all of their Internet passwords,⁸⁵ and the popularity of fingerprint readers is expected to grow.⁸⁶ The Internet banking industry is exploring biometric information as a solution for client verification.⁸⁷ Airports are experimenting with smartcards that are embedded with biometric data to allow frequent travelers the opportunity to avoid long security lines.⁸⁸ Biometric identifiers are being linked to consumers' credit cards to speed up the checkout process at gas stations and convenience stores.⁸⁹ Biometric technology is also being utilized by casinos to identify regular customers and to individually tailor casino services.⁹⁰

Moreover, biometric technology is currently being integrated into passports as countries seek to comply with standards set forth in international agreements. More than forty countries are introducing biometric technology in their passports as they seek to comply with the standards set forth by the International Civil Aviation Organization and the U.S. visa waiver scheme.⁹¹ By the end of 2006, all U.S. passports that are issued are required to have a radio-frequency identification ("RFID"), which includes an individual's name and a digitized photograph.⁹² In the future, RFID might also store biometric information such as fingerprints.⁹³

83. Dawn S. Onley, *Biometrics on the Front Line*, GOV'T COMPUTER NEWS, Aug. 16, 2004, available at http://www.gcn.com/print/23_23/26930-1.html.

84. Hook, *supra* note 80.

85. Yuki Noguchi, *Access Denied*, WASH. POST, Sept. 23, 2006, at D1.

86. *See* Buckeley, *supra* note 81.

87. Meiring de Villiers, *Free Radicals in Cyberspace: Complex Liability Issues in Information Warfare*, 4 NW. J. TECH. & INTELL. PROP. 13, 57 (2005); *see also* Roland Lim, *KPMG Wins Tender from IDA to Develop Security Framework*, BUS. TIMES SINGAPORE, Sep. 21, 2006.

88. Patty Donmoyer, *Reg. Traveler Test Ends: U.S. Considers Findings As Private Airport Programs Proliferate*, BUS. TRAVEL NEWS ONLINE, Oct. 3, 2005, at http://www.bnonline.com/businesstravelnews/search/article_display.jsp?vnu_content_id=1001219676; *see also* Hook, *supra* note 80 (biometric technology is also being utilized in international airports such as in Santiago, Chile).

89. Kristi Arellano, *Touch Tech Gizmo Lets Gas Purchasers Pump, Press, Go*, DENVER POST, Sept. 22, 2006, at C1 ("Feather Petroleum joins some 2,200 retailers in 44 states that use payment technology offered by San Francisco-based Pay By Touch.")

90. Chris Jones, *Hand Scanners Give Customers Easy Access To Safe Deposit Vaults*, LAS VEGAS SUN, June 3, 2002, at C1.

91. Arnott, *supra* note 79.

92. Bruce Schneier, *The ID Chip You Don't Want in Your Passport*, WASH. POST, Sept. 16, 2006, at A21.

93. *Id.*

III. INCORPORATING BIOMETRIC TECHNOLOGY INTO DRIVER'S LICENSES TO COMPLY WITH THE REAL ID ACT

*Those who would give up ESSENTIAL LIBERTY to purchase a little TEMPORARY SAFETY, deserve neither LIBERTY nor SAFETY.*⁹⁴

On March 1, 2007, the DHS issued its NPRM for the Real ID Act, a proposal that was submitted for public comment.⁹⁵ The NPRM does not require that a state include biometric technology in its driver's licenses to comply with the Act, although they are free to do so.⁹⁶ The NPRM could still be amended to include biometric technology and the states are waiting for the final proposal. The DHS has not offered a timetable for the final proposal.⁹⁷ States are delaying any implementation of procedures that meet the Real ID Act until the DHS releases its final requirements.⁹⁸

This delay has caused a number of problems for the states. States cannot solicit bids from firms who might issue the cards and they cannot finalize any related negotiations, contracts, or deals.⁹⁹ States also cannot acquire new materials, train their workers, or analyze new procedures to reduce the chance of error in either denying an authorized person from receiving a driver's license or permitting someone from obtaining a false driver's license.¹⁰⁰ Moreover, the Real ID Act, unlike the RFID required in the new U.S. passport, does not contain the same safety features.¹⁰¹ Additionally, the National Governors Association ("NGA") has requested that the technology, which will be required to be incorporated into the new identification cards, be based on actual functionality and not simply what is available on the market at the time.¹⁰² The NGA has taken this stance because biometric technology is advancing so rapidly that the DHS could require the states to utilize technology that exists, but has not been adequately tested, to ensure that it functions properly

94. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), *quoted in* SUZY PLATT, *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS* 201 (Barnes & Noble 1993).

95. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, *Notice of Proposed Rulemaking*, 72 Fed. Reg. 10,820 (Dep't of Homeland Sec. Mar. 9, 2007).

96. *Id.*

97. *Id.*

98. "Real ID" Program Will Be a Costly Chore, *supra* note 14.

99. Anush Yegyzarian, *Tech.gov: Real ID's Real Problems*, PC WORLD, Oct. 11, 2006, available at <http://www.pcworld.com/article/id,127419-c,techrelatedlegislation/article.html>.

100. *Id.*

101. Anita Ramasastry, *Why the 'Real ID Act' is a Real Mess*, CNN.COM, Aug. 12, 2005, at <http://www.cnn.com/2005/LAW/08/12/ramasastry.ids/index.html>.

102. Press Release, Nat'l Governors Ass'n, *supra* note 25.

and justifies a state's initial investment.¹⁰³

Currently, a test case for the implementation of the Real ID Act is taking place within the Transportation Security Administration ("TSA"). The program is known as the Transportation Worker Identification Credential Program ("TWIC") and requires maritime transportation workers to go through new identification procedures that provide them with identification cards that include biographic and biometric information.¹⁰⁴ Up to 850,000 workers were expected to participate in the program by the end of 2006, and the program has many aspects similar to the Real ID Act requirements.¹⁰⁵ For example, TWIC requires that IDs carry biometric identifiers, which is a potential requirement that the DHS could include in the Real ID standards.¹⁰⁶ Also, both plans share the goal of denying IDs to unauthorized parties to enhance security.¹⁰⁷ The new identification cards cost an estimated \$140 each.¹⁰⁸ Port workers are required to present the new identification cards at checkpoints where the workers' biometric identifiers are matched by a computer to those contained on the card. If the biometrics match, a worker is permitted to enter the port.¹⁰⁹ However, implementation of the program has been bogged down by maritime industry opposition, technology flaws, and evidence that the technology does not protect the worker's privacy.¹¹⁰ The program foreshadows the difficulty that the states might have in complying with similar requirements contained in the Real ID Act as they provide new identification cards to millions of Americans.¹¹¹

Biometric technology presents a number of problems.¹¹² Historically, the technology had a problem with accuracy because biometric readers failed to match a person's biometric information with the information of an authorized person contained in a database.¹¹³ Much of the accuracy issues have been resolved as the technology has

103. *Id.*

104. Transportation Security Administration, Transportation Worker Identification Credential (TWIC™), http://www.tsa.gov/what_we_do/layers/twic/index.shtm (last visited May 8, 2008).

105. *Id.*

106. *Id.*

107. *Id.*

108. "Real ID" Program Will Be a Costly Chore, *supra* note 14.

109. Jason Miller, *DOT, DHS to Test ID Cards at Port This Week*, WASH. TECH., Oct. 29, 2006, available at http://www.washingtontechnology.com/news/1_1/daily_news/28953-1.html.

110. Spencer S. Hsu, *Transit-Worker ID Program Stalled*, WASH. POST, Sept. 17, 2006, at A3.

111. *Id.*

112. Quinn, *supra* note 79.

113. *Id.*

progressed, but other problems have arisen.¹¹⁴ There is the problem of thwarting impersonation, which biometricians have termed “spoofing.”¹¹⁵ An individual may gain access to the information that a biometric machine reader is protecting by replicating the biometric information and scanning a well-copied fingerprint or a pair of contact lenses to replicate the biometric information of a person who has access.¹¹⁶ One way to prevent biometric spoofing, which is still in its nascent stages, is to have scanners that can test for “liveness,” which are signs that the finger being used to access a fingerprint scanner has a pulse, is sweating, or has a vein pattern.¹¹⁷ Because biometric technology can be thwarted irrespective of liveness tests, it does not necessarily provide the security that its proponents promise.

There are also privacy concerns raised by incorporating biometric technology into the Real ID Act. The Real ID Act requires the states to store data in a central database that can be accessed by federal officials and the employees of other states’ DMVs when they process the identifications of individuals who have moved or who are seeking to renew their driver’s license. If the DHS amends the NPRM to require biometric data to be incorporated into these new driver’s licenses, biometric information would also have to be centrally stored in a data base. Dave Bixler, an informational security officer at Siemens Business Services, an international provider of IT services and solutions, spoke about identity theft and stated that “it only takes one leak . . . to irreparably damage [someone’s] privacy—that is one genie that can never be put back in the bottle.”¹¹⁸ The problem of identity theft could be exacerbated if each state’s DMV is required to maintain a database containing biometric identifiers. A thief of biometric data would not only have access to an individual’s written personal records, but he or she could also combine spoofing to access any of the individual’s finances safeguarded by biometric technology. The database could be hacked into, or information could also be stolen by a state or federal official with

114. Buckeley, *supra* note 81.

115. *Id.*

116. *Id.*

In 2002, Tsutomu Matsumoto, a mathematician at Yokohama National University in Japan, reported he had fooled a number of fingerprint readers by creating fake fingers out of the kind of gelatin used in candy Gummy bears. Researchers at Biomedical Signal Analysis Laboratory at West Virginia University have reported they were able to fool various types of fingerprint readers between 40% and 94% of the time using cadaver fingers or fingers made of Play-Doh.

Id.

117. Michael Kanellos, *Scientists Pore Over Biometric-Spoofing Tests*, CNET NEWS.COM, Dec. 22, 2005, available at <http://news.zdnet.co.uk/emergingtech/0,1000000183,39243463,00.htm?r=1>.

118. Hook, *supra* note 80.

authority to access the database in the course of his employment.¹¹⁹ For example, in May of 2006, the personal information, including name, birth date, and social security number, of 26 million military veterans could have been stolen by identity thieves when a Department of Veterans Affairs laptop was stolen.¹²⁰

There will be a huge cost in creating an identification card that protects against forgery and a secure database that adequately protects against identity theft, and, so far, the federal government has not provided the necessary funding to implement a successful program.¹²¹

IV. LEGAL CHALLENGES

While states technically are not forced to accept the federal standards, any refusal to comply would mean that their residents could not get a job, receive Social Security, or travel by plane. So rather than imposing a direct mandate on the states, the federal government is blackmailing them into complying with federal dictates.¹²²

Opponents of the Real ID Act could raise a number of legal challenges. Besides making official requests for an amendment to the timeframe for implementation and lobbying for more federal funding, a state might examine the possibility of filing a lawsuit against the federal government. Part A of this section examines a possible claim under the Unfunded Mandate Reform Act. Part B analyzes the possibility of a challenge under the doctrine of federalism based on the rationale in *Printz v. United States*.¹²³ Part C explores a state claim under federalism arguments that driver's licenses should be regulated by the states as an area of traditional state concern. Part D considers a state's challenge to Congress' exercise of its spending power under the rationale set forth by the U.S. Supreme Court in *New York v. United States*.¹²⁴ Finally, Part E sets forth a state's most likely course to succeed in its challenge of the Real ID Act.

119. "Real ID" Program Will Be a Costly Chore, *supra* note 14.

A given state could spend millions of dollars on the very best of security systems and then have the private data of its citizens compromised by the employee of either another state or the federal government. It could take months to locate the source of such a breach, if at all.

Id. (quoting James McCoy, Joint Budget Comm. Analyst).

120. Steve Lohr, *Surgin Losses but Few Victims*, N.Y. TIMES, Sept. 27, 2006, at G1. It was later revealed that the laptop had been stolen by three teenagers who were merely committing a simple residential burglary and did not plan on committing identity theft.

121. Egelman & Cranor, *supra* note 19, at 180.

122. Posting of Rep. Ron Paul to LewRockwell.com, National ID Cards Won't Stop Terrorism or Illegal Immigration (May 10, 2005), <http://www.lewrockwell.com/paul/paul248.html>.

123. *Printz*, 521 U.S. 898.

124. *New York*, 505 U.S. 144.

A. A State Claim under the Unfunded Mandate Reform Act

The Unfunded Mandate Reform Act (“UMRA”) was passed by the 104th Congress as a part of increased recognition of states’ rights and as a part of the Republican “Contract with America.”¹²⁵ Prior to its passage, many states had protested federal policies that were imposed upon them without any funding from the federal government.¹²⁶ To prevent the imposition of unwanted mandates upon the states UMRA provides:

[T]o curb the practice of imposing unfunded Federal mandates on states and local governments; to strengthen the partnership between the Federal Government and State, local and tribal governments; to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding, in a manner that may displace other essential governmental priorities; and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations, and for other purposes.¹²⁷

UMRA includes a number of procedural safeguards designed to prevent Congress from passing an unfunded mandate.¹²⁸ It was designed to provide better information to Congress about the effects of legislation and, to that effect, the authorizing committee of a bill must include a report, most of which is prepared by the Congressional Budget Office (“CBO”), about any mandates in the bill.¹²⁹ The CBO must provide an estimate of the direct costs of any mandate that exceeds \$50 million or a report stating why it cannot give an estimate.¹³⁰

Critics have found that UMRA’s bite is limited in a number of ways.¹³¹ The definition of mandate is reserved for conditional provisions

125. Eileen M. Luna, *The Impact of the Unfunded Mandate Reform Act of 1995 on Tribal Governments*, 22 AM. INDIAN L. REV. 445 (1998).

126. *Id.*

127. Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

128. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113, 1136 (1997).

129. 2 U.S.C. § 658c(a) (2006).

130. 2 U.S.C. § 658c(a)(1).

131. UMRA is limited in at least three ways: “a narrow definition of intergovernmental mandate, an expansive list of exceptions to its coverage, and precisely specified triggering events for the disclosure and enforcement provisions.” Garrett, *supra* note 128, at 1138; *Passing the Buck: A Review of the Unfunded Mandates Reform Act: Hearing Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Government Affairs*, 109th Cong. (2005) (testimony of John Hurson, President of the Nat’l Conf. of State Legs.), available at http://hsgac.senate.gov/public/_files/HursonTestimony.pdf.

for which \$500 million or more in federal aid is provided to state and local governments, but even if \$500 million or more is given, it might not be a mandate if the state is provided enough flexibility to comply.¹³² There is also the good possibility that a court will find that the federal provision does not require an enforceable duty.¹³³ More troublesome for Real ID Act opponents is the specific exception for a mandate that “is necessary for the national security or the ratification or implementation of international treaty obligations.”¹³⁴ This exception, contained in UMRA for national security, is likely to be met by the Real ID Act because its proponents have characterized the Act as necessary to prevent terrorism. Opponents of the Act could argue that the provisions do not really increase national security and, therefore, UMRA should apply to the Act. However, the federal government has recently been able to find loopholes in UMRA to enact its policies and leave the states with the bill. For example, major pieces of legislation such as the “No Child Left Behind School Reform Act, legislation guaranteeing special-education benefits for disabled children, the Medicaid program and the post-2000-election law mandating improved voting equipment,”¹³⁵ were all passed by legislators who were able to find an exception to UMRA.¹³⁶ Given the fact that the Real ID Act likely fits within the security exception, or under a similar exception that legislators could utilize as they have with other recent pieces of legislation, it is unlikely that a challenge under UMRA would succeed.

Even if a state’s UMRA challenge fails, it is possible that a state could lobby for more funding. Intergovernmental lobbying done by the NGA or the National Council for State Legislators (“NCLS”) has historically proven effective in eliminating or altering unfunded mandates.¹³⁷ For example, in 1988, then Governor of Arkansas, Bill Clinton, who was also the chairman of the NGA, was asked about a welfare-reform bill by members of the Ways and Means Committee and how certain provisions would affect the states.¹³⁸ Moreover, state legislators opposed some of the stringent work requirements that were contained in President Bush’s reauthorization of the 1996 welfare law, and eventually the work restrictions that were passed were more

132. Garrett, *supra* note 128.

133. Nevada v. United States Dep’t of Energy, 133 F.3d 1201, 1207 (9th Cir. 1997).

134. 2 U.S.C. § 1503(5).

135. David S. Broder, *Those Unfunded Mandates*, WASH. POST, Mar. 17, 2005, at A25.

136. *Id.*

137. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 52 (2003).

138. *Id.*

flexible.¹³⁹ The NGA and the NCLS can be effective as lobbying associations because they represent elected officials who often share the same constituencies as senators and members of the House of Representatives.¹⁴⁰ However, the Real ID Act has already been passed, and these groups were unable to alter the Act prior to its passage, which limits much of their lobbying voice. Additionally, there is such a disparate set of estimates of the cost of implementation of the Real ID Act that it is unlikely that Congress will listen to the states, at least not until implementation is further under way.

B. Upholding Federalism: A State's Challenge under Printz

States could likely bring a challenge under the holding of *Printz v. United States*.¹⁴¹ Although this holding has been criticized by legal scholars,¹⁴² the Supreme Court seems firmly committed to the principles of federalism.¹⁴³ In *Printz*, interim provisions of the Brady Act, which restricted firearm purchases, were challenged as a violation of federalism. While a national database was established, the Brady Act required state law enforcement agents to conduct background checks on individuals purchasing handguns in their jurisdictions. The Supreme Court held that the federal government could not command a state's executive officers to administer or enforce a federal regulatory scheme.¹⁴⁴ Justice Scalia, writing for the majority, reasoned that requiring local law enforcement officers to conduct background checks was a violation of state sovereignty and found this provision of the Brady Act invalid because "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."¹⁴⁵ The Court also held that this provision of the Brady Act impermissibly gave too much power to the Executive Branch, by allowing it to utilize the services of law enforcement officers in all fifty states, thus violating separation of powers principles.¹⁴⁶ The Court struck down the interim provisions, but sustained the bulk of the Brady Act including the measures that later established a national database.¹⁴⁷

139. *Id.* at 53.

140. *Id.* at 54.

141. *Printz*, 521 U.S. 898.

142. Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953 (1999).

143. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); .

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

145. *Id.* at 922.

146. *Id.*

147. *Id.*

Opponents of the Real ID Act could argue that DMV agents should not be commandeered to enact the provisions of the Real ID Act, since the Supreme Court held that law enforcement officers could not be agents of the executive branch in *Printz*.¹⁴⁸ The federal government could be viewed as encroaching on state sovereignty in this case under *Printz*. This burden will be even more onerous if the DHS requires biometric technology to be incorporated because DMV workers will have to be trained and will have to implement policies to coordinate this rapidly evolving technology. Moreover, the DHS, part of the Executive Branch, would have the benefit of DMV workers in all 50 states. This utilization of the officials of a state's executive branch is likely unconstitutional under *Printz*. Numerically speaking, the effect of the Real ID Act is also greater than the interim provisions of the Brady Act because the identification background checks will have to be run on 245 million people,¹⁴⁹ as opposed to the much more limited number of people who were required to have a background check under the Brady Act. The burden that will be placed on DMV workers will increase further if the DHS amends the NPRM to require states to include biometric data in its driver's licenses. Employees will have to be retrained to implement the technology and put all of the biometric data into a database so that they can respond to informational queries from other states. Moreover, the compilation of breeder documents and the requirement that the states must store a digital copy of each document for ten years are burdens much greater than the burdens placed on law enforcement officers in *Printz*. Based on the holding in *Printz*, the states could bring a lawsuit against the federal government and the Supreme Court could potentially strike down the Real ID Act.

C. Federalism: Driver's Licenses as an Area of Traditional State Concern

Additionally, the Real ID Act could be viewed as federalizing an area of "traditional state concern."¹⁵⁰ Driver's licenses are primarily issued to ensure that drivers safely operate motor vehicles on local roads and byways. People want the security of knowing that their neighbors are safe drivers and rely on local police officers to enforce local driving provisions.¹⁵¹ The states could argue that the Act oversteps the bounds

148. See Norman C. Bay, *Executive Power and the War on Terror*, 83 DEN. U. L. REV. 335, 343 n.49 (2005).

149. Press Release, Nat'l Governors Ass'n, *supra* note 25.

150. See *United States v. Morrison*, 529 U.S. 598, 611 (2000) (finding that the Violence Against Women Act was a violation of the Commerce Clause because rape was an area of "traditional state concern").

151. See Aldana & Vargas, *supra* note 31, at 1714 (suggesting that regulating driver's

of federal power and violates state sovereignty. However, the federal government can counter that Congress acted within its Commerce Clause power in passing the Act because driver's license requirements substantially affect interstate commerce.¹⁵² The Court has held that there are three broad categories of activity that Congress may regulate under the commerce power.¹⁵³ These categories of interstate commerce include the power to regulate 1) the channels of interstate commerce, 2) the instrumentalities of interstate commerce, and 3) those activities that substantially affect interstate commerce.¹⁵⁴ It could be argued that driver's license standards fit within the second category because vehicles and drivers are instrumentalities in interstate commerce or under the third category as a regulation on the activity of driving. The Court gave some indication that driver's license standards could substantially affect interstate commerce in *Reno v. Condon*, when it held that lists of driver's personal information gathered by a state DMV were articles in interstate commerce because the DMV was selling this information to marketing groups who were then providing customized solicitation to the drivers.¹⁵⁵ Defenders of the Real ID Act could argue that the Act sets up a database where a driver's personal information will be transmitted between states if a driver moves, and thus, like in *Reno*, substantially affects interstate commerce.

In *United States v. Lopez*, the Supreme Court struck down a federal law that banned handguns in school zones as not substantially affecting interstate commerce.¹⁵⁶ The Court maintained that the aggregate economic impact of the activity would be examined, but that in the facts of *Lopez* the activity did not affect the economy enough in the aggregate.¹⁵⁷ Furthermore, in *Gonzalez v. Raich*, the Supreme Court found there was a rational basis for Congress regulating the production of marijuana for home consumption because it had a substantial effect on the supply and demand of the national market.¹⁵⁸ In *Raich*, only six cannabis plants were seized and destroyed.¹⁵⁹ In contrast, driver's licenses permit their holders to pursue economic opportunities in other states and have a billion dollar effect in the aggregate. The holder can live in one state and legally drive to another state as authorized by the driver's license to work either full or part-time in that other state. Truck drivers

license is a matter of local concern).

152. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

153. *Id.* at 558.

154. *Id.*

155. *Reno v. Condon*, 528 U.S. 141, 148 (2000).

156. 514 U.S. at 567-68.

157. *Id.* at 561.

158. *Gonzales v. Raich*, 545 U.S. 1, 19 (2005).

159. *Id.*

are a prime example of this phenomenon of living in one state but transporting goods throughout many other states. Therefore, one state's driver's license policies, where the truck driver lives for example, could substantially affect interstate commerce where that driver transports goods.

It can also be argued that the regulation of driver's license standards does not fall within Congress' commerce power because it is an area of traditional state concern and the aggregate impact is not great enough to fall within the power. However, the stronger argument rests with Congress, who would not only be regulating instrumentalities in interstate commerce, but also an activity, the transportation of goods and people, which would seem to substantially affect interstate commerce under the holdings in *Lopez* and *Raich*. Moreover, if the NPRM is amended and biometric technology is required by the DHS, the states will be sharing this information to verify the identification of drivers who have moved. This sharing between states makes it even more likely that the Act substantially affects interstate commerce.

D. A Challenge to Congress' Spending Power

Another challenge that the states might mount against the Real ID Act is that in implementing the Act, Congress abused its Spending Clause power.¹⁶⁰ Under the Tenth Amendment, which is the basis for federalism, Congress may not simply coerce a state to enact a federal regulatory program by "commandeer[ing] the legislative process of the States."¹⁶¹ In *Hodel*, a federal surface mining act was upheld because the States were not compelled to enforce the federal standards.¹⁶² The Court held that a state that did not wish to submit a program could choose not to and the regulatory burden would be borne by the federal government.¹⁶³ In other words, a state must have the discretion to turn down implementation of the federal regulatory scheme.

Congress may still encourage the states to act in a particular way by withholding incentives that influence the state's policy choices.¹⁶⁴ Federal incentives do not intrude on the sovereignty reserved to the states by the Tenth Amendment if the state has the choice not to expend any funds or participate in any federal program.¹⁶⁵ For example, in *New York v. United States*, federal incentives that provided payments to those states that complied with federal standards for the disposal of low-grade

160. U.S. CONST. art. I, § 8, cl. 1.

161. *Hodel v. Va. Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 288 (1981).

162. *Id.*

163. *Id.*

164. *New York*, 505 U.S. at 166.

165. *Id.* at 174.

radioactive waste were upheld by the Supreme Court.¹⁶⁶ Moreover, those states that failed to comply with federal disposal standards could also be charged a higher fee for the disposal of waste from that state because the Court deemed this an incentive.¹⁶⁷ However, Congress cannot coerce the states into making a choice between two alternatives, neither of which Congress has the power to implement alone.¹⁶⁸ In *New York*, another federal provision forced the states to choose between regulating the low-grade radioactive waste according to the federal standards or assuming liability for the waste.¹⁶⁹ The Court held that this provision was unconstitutional because it was actually a threat and not a choice.¹⁷⁰

The Court provided a clearer picture of what Congress must do to violate the principles set forth in *New York*, in *Reno v. Condon*.¹⁷¹ As mentioned earlier, this case involved a state's DMV selling drivers' personal information without the drivers' authorization.¹⁷² The Court found that Congress' regulation of this practice did not run afoul of the principles set forth in *New York* because the federal legislation did "not require the states in their sovereign capacity to regulate their own citizens" or require the states to assist in the enforcement of a federal statute.¹⁷³

Similarly, states opposing the Real ID Act could argue that the Act does not actually present them with a choice. The provisions of the Real ID Act stand in contrast to the incentives that were held to be constitutional in *New York*. The states are not being offered grants if they choose to enact the requirements of the Act. Nor are the states allowed to choose not to implement the Act and simply allow their citizens to get the proper identification from a federal regulatory agency with the consequence that the citizens must pay a higher fee as a result. Rather, the states could argue that the Real ID Act more closely resembles the threats that were unconstitutional in *New York*. If the states do not implement licensing requirements that comply with the Real ID Act, their citizens will not be able to receive a number of federal benefits. Like the threat of liability imposed on the states if they did not regulate the low-grade nuclear waste, the states would, in effect, be liable to its citizens for the federal benefits that the citizens could not obtain without a license that complied with the Act. Accordingly, the states have a plausible challenge based on the rationale of the Supreme Court

166. *Id.* at 152.

167. *Id.* at 153.

168. *Id.* at 176.

169. *Id.*

170. *New York*, 505 U.S. at 176.

171. *Reno*, 528 U.S. 141.

172. *Id.*

173. *Id.* at 151.

in *New York*.

Another component of Congress' ability to provide conditional spending to the states is that the spending must be germane to the regulatory scheme that Congress wants to enact.¹⁷⁴ For example, in *South Dakota v. Dole*, Congress' ability to withhold federal highway funds was held to be germane to its policy of tying funding to a state's minimum drinking age of 21 because drinking and driving was reasonably calculated to make highway travel safer.¹⁷⁵ The Supreme Court has not defined the outer bounds of germaneness, which would make conditional spending unconstitutional if it was not reasonably related to the policy to be enacted.¹⁷⁶ In writing the opinion for the majority in *South Dakota*, Chief Justice Rehnquist wrote in dicta that it was not necessary to define the germaneness of the conditional spending because in that case the petitioner did not argue for such a restriction and the Court found that the test was met anyway.¹⁷⁷ The Supreme Court has not further elaborated on this germaneness test or applied it in any case, so the analysis is guided only by the dicta in *South Dakota*.

It is further possible that the states could challenge Congress' utilization of its spending power under the germaneness test, although the Supreme Court has not adequately defined the germaneness test to make this argument the sole basis of a claim. The states could argue that the condition that they enact new driver's license standards is not reasonably related to the federal benefits that would be withheld if they did not comply. For example, withholding federal welfare benefits does not seem to be reasonably related to the states' enacting standards for driving, or at least not as closely related as the withholding of highway funding and the minimum drinking age in *South Dakota*. However, since the Supreme Court has not yet established a firm standard for the germaneness test, the states should only rely on this argument as an additional avenue for relief in a case that should rely more heavily on the precedents of *Printz* and *New York*.

State claims under the Unfunded Mandate Reform Act do not seem as likely to succeed as Tenth and Eleventh Amendment challenges under the *Printz* holding. The current makeup of the Supreme Court makes a challenge to the Real ID Act, as a violation of federalism and the separation of powers, a plausible route for states to pursue. Yet, any optimism related to the success of this claim must be tempered by the treatment of each state's DMV records as interstate commerce as set forth in *Reno*, although the decision was beneficial for consumer

174. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

175. *Id.* at 209.

176. *Id.*

177. *Id.*

protection.

E. A State's Course to Success

It is my recommendation that a state should challenge the implementation of the Real ID Act. The state claim that is most likely to succeed is that in imposing the Act on the states, Congress violated the principles of federalism as set forth in *Printz* and *New York*. First, the Real ID Act turns state DMV workers into agents of the federal government, specifically the DHS, which seems to be unconstitutional under the holding in *Printz* because it is a violation of state sovereignty. Next, under the holding in *New York*, a state would have a plausible claim that Congress overstepped its powers by not providing adequate funding for the Act's provisions and then imposing a punishment on that state's citizens. A state's claim that Congress imposed an unfunded mandate under UMRA does not seem likely to succeed because of the security exception and the other loopholes of UMRA that Congress has become adept at exploiting. Finally, there does not seem to be a colorable claim that Congress lacks the power to impose the Real ID Act on the states under the interstate commerce clause because driver's license standards are likely to be characterized as having a substantial effect on interstate commerce.

CONCLUSION

The Real ID Act was implemented as a means of improving national security and preventing illegal immigration. Yet, its provisions establish a de facto national identity card that is being vehemently opposed by the states. The provisions requiring state DMVs to verify breeder documents and to establish informational databases will likely prove costly. The timeframe for implementation is approaching rapidly and yet the states have not received the final guidelines from the DHS. These guidelines could still require the states to include biometric data on their driver's licenses and identity cards, although the DHS has only released the NPRM and has not yet issued the final guidelines. Biometric technology is already being included in U.S. passports and at seaports through the TWIC program. These programs could be used as a model for integrating the technology.

The states should bring a claim opposing the Real ID Act. The most promising claims are to pursue a challenge under *Printz* to the burdens placed on state DMV workers as a violation of federalism and the separation of powers, or to the imposition as an unconstitutional form of conditional spending under *New York*. Any state challenge under the Unfunded Mandate Reform Act is likely to be undermined by

the security exception contained in UMRA. The Real ID Act could reshape the role of the states in national security, whether they comply willingly or not. Regardless, if all state challenges fail, it seems that the U.S. will at last have a national ID, even if it is only a de facto one.