

A SAFER NATION?: HOW DRIVER'S LICENSE RESTRICTIONS HURT IMMIGRANTS & NONCITIZENS, NOT TERRORISTS

ALEXANDER L. MOUNTS*

INTRODUCTION

After the tragic events of September 11, 2001, federal and state government officials called for sweeping reforms of the nation's and states' security laws.¹ This reform has been ongoing and has impacted the daily lives of people living in the United States by affecting everything from increasing luggage screening in airports to reviewing the validity of visas held by noncitizens. In this process of reform to help prevent terrorism, accessibility to a driver's license has been a targeted issue which has led to heated discussions from many different groups representing many different points of view.² Why driver's licenses? Apparently, several of the terrorists involved in the September 11 attacks had United States state-issued driver's licenses that allowed them to board the airplanes.³ However, what officials failed to mention was that none of the hijackers needed driver's licenses to accomplish their goal; all of the hijackers had foreign passports that served as valid identification at airports.⁴ While increasing national security is critical in the current world *milieu*, restricting driver's licenses is an ineffective way to enforce immigration laws and prevent terrorism.

An additional policy justification officials give for imposing increased restrictions on driver's licenses is to protect the public from identity theft.⁵ In

* J.D. Candidate, 2004, Indiana University School of Law—Indianapolis; B.A., 2001, Taylor University, Upland, Indiana. I would especially like to thank my wife Whitney who continually inspires me to strive for excellence with her unconditional love, support and encouragement.

1. During the 2001-2002 state legislative sessions, sixty-three bills were introduced addressing the ability of the immigrants to obtain a driver's license. *Immigrant Driver's License Restrictions Challenged in Some States*, NATIONAL IMMIGRATION LAW CENTER, Vol. 16, No. 6 (Oct. 21, 2002), available at <http://www.nilc.org/immspbs/DLs/DL004.htm>.

2. *Immigrant Driver's License Proposals and Campaigns: Surprising Progress Since 9/11*, NATIONAL IMMIGRATION LAW CENTER (May 14, 2002), at <http://www.nilc.org/immspbs/DLs/DL002.htm>.

3. Albert Harberson & Eileen Doherty, *Driver's License Integrity*, THE COUNCIL OF STATE GOVERNMENTS AND THE NATIONAL CONFERENCE OF STATE LEGISLATURES (June 25, 2002), available at http://www.aamva.org/documents/idsNCSL_CSGWhitepaperToHomelandSecurity.pdf; *Driver's License Fact Sheet: Protecting the Public Safety and National Security of Everyone—Driver's Licenses, National Security, and Terrorism*, NATIONAL COUNCIL OF LA RAZA, available at <http://nclr.policy.net/proactive/newsroom/release.vtml?id=19942> [hereinafter *Driver's License Fact Sheet: Protecting the Public Safety and National Security of Everyone*].

4. *Drivers License Fact Sheet: Protecting the Public Safety and National Security of Everyone*, *supra* note 3.

5. Identity theft occurs when someone uses the “identifying information [of another person]—name, social security number, mother's maiden name, or other personal information—to commit fraud or engage in other unlawful activities.” *Prepared Statement of the Federal Trade*

2000, an estimated 500,000 to 700,000 Americans were victims of identity theft.⁶ With the advent of the Internet and ever-increasing technology, thieves are constantly finding new ways to steal personal information and fraudulently use it to access accounts or credit lines. Many states assert that requiring additional forms of identification when applying for a license will prevent identity theft by making people prove their identities.⁷ This policy justification assumes that requiring more papers, not better verification, is the solution to preventing identity theft.

Increased driver's licenses restrictions, as passed and as previously existing, do not apply exclusively to a handful of terrorists living in sleeper cells in this country. According to the 2000 United States Census, there are over thirty million immigrants in the United States, representing 11% of the total population.⁸ Between 1970 and 2000, the naturalized citizen population increased by 71%.⁹ It is axiomatic that the immigrant population is not only substantial, but is also on the rise. Despite the myth that immigrants are a drain on the United States economy, in the year 2000, the foreign-born population accounted for 12.4% of the total civilian labor force.¹⁰ These immigrants collectively earned \$240 billion a year, paid \$90 billion a year in taxes and received \$5 billion in welfare.¹¹ Offsetting the amount immigrants contributed in taxes, the use of public benefits by legal immigrant families with children who earn less than 200% of the federal poverty level fell sharply between 1994 and 1999.¹²

Commission on Identity Theft Before the Subcommittee on Technology, Terrorism and Government Information of the Committee on the Judiciary, U.S. Senate (statement of Jodie Bernstein, who was at the time Director, Bureau of Consumer Protection), available at <http://www.ftc.gov/os/2000/03/identitytheft.htm>.

6. *Identity Theft: How It Happens, Its Impact on Victims, and Legislative Solutions*, Hearing on Pub. Law 105-318 Before the S. Subcomm. on Tech., Terrorism, and Gov't Info. of the Subcomm. on the Judiciary, 106th Cong. 31-32 (statement of Beth Givens, Director, Privacy Rights Clearinghouse), available at http://www.privacyrights.org/ar/id_theft.htm. *But see* Harberson & Doherty, *supra* note 3, at 6. Harberson and Doherty feel that the 500,000 figure is inflated by as much as 500% due to the way fraud was reported by consumers. The General Accounting Office has since changed the way it collects data, which has reduced the instances of "identity theft" from 500,000 cases to approximately 100,000 cases per year.

7. See Erin Gartner, *Driver's License Now Harder to Get; To Deter Terrorism and I.D. Theft, BMV Tells Newcomers to Furnish More Proof*, INDIANAPOLIS STAR, July 13, 2002, at A1, available at 2002 WL 2390485.

8. Michael Fix et al., *The Integration of Immigrant Families in the United States*, URB. INST. (July 2001), available at http://www.urban.org/UploadedPDF/immig_integration.pdf.

9. United States Census Bureau, *Profile of the Foreign-Born Population in the United States: 2000*, U.S. DEPARTMENT OF COMMERCE, Dec. 2001.

10. *Id.*

11. *Immigration Myths and Facts: Five Immigrations Myths Explained*: AMERICAN IMMIGRATION LAWYERS ASSOCIATION, at <http://www.aila.org/contentViewer.aspx?bc=17,142> (copyright 2003).

12. Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant*

Part I of this Note addresses the foundation and evolution of driver's license restrictions in the United States. Part II of this Note analyzes two current justifications given by states for the restrictions. The first of these justifications is maintaining the integrity of license issuance: ensuring that the person receiving a license meets necessary driving competency standards and has a verifiable identity. The second justification is prevention of identity theft: providing appropriate law enforcement officials the ability to verify the authenticity of the license document, driving history and identity of the license holder. Part III addresses two constitutional concerns that have arisen with the increased restrictions. The first potential concern is an Equal Protection Clause dilemma, while the second potential concern is a Supremacy Clause dilemma. Finally, after weighing the strengths and weaknesses of the justifications and constitutional concerns, Part IV of this Note addresses the public policy reasons why increased restrictions for driver's licenses are an ineffective way to prevent identity fraud and terrorism.

I. DRIVER'S LICENSE HISTORY

A. *The Foundation*

The issuance of driver's licenses has always been a function of the individual states. The authority for control over the issuance of driver's licenses is derived from the Tenth Amendment to the U.S. Constitution. The Amendment reads, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹³ Historically, the federal government has not threatened to disturb the states' power in this area; however, the federal government has limited the states' power in the area of commercial driver's licenses (CDLs).¹⁴ CDLs represent approximately 5% of the total number of licenses issued in the United States.¹⁵ The Commercial Motor Vehicle Act of 1986 (CMVSA) established the Commercial Driver's License Program, which requires states to ensure that drivers with certain serious driving violations be prohibited from operating a Commercial Motor Vehicle (CMV).¹⁶ Should the states not comply with federal government requirements, sanctions can be imposed.¹⁷

The first state-driven driver's license law was passed by Rhode Island in

Provisions, URB. INST. 16 (Jan. 2002), available at http://www.urban.org/uploadedPDF/410412_discussion02-03.pdf.

13. U.S. CONST. amend. X.

14. 49 U.S.C. § 31102 (2003).

15. Harberson & Doherty, *supra* note 3, at 2. There are 190 million licensed drivers in the United States.

16. Memorandum from the Texas State Office of Risk Mgmt. to the State Risk Managers (Sept. 4, 2002) at <http://www.sorm.state.tx.us/Notices/FedDriverLicStandards090402.htm>.

17. *Id.*

1908.¹⁸ From that time to the present, every territory and state has passed statutory provisions and administrative regulations to govern the privilege of driving.¹⁹ Standards were immediately developed to protect public safety by recognizing those individuals who met the prescribed standards. These standards generally include a minimum age requirement, a physical ability requirement, a practical driving competency requirement and a requirement for knowledge of traffic laws.²⁰

B. *The Evolution*

The modern use of the driver's license has expanded to include ancillary uses such as cashing checks, obtaining library cards and boarding airplanes; however, the primary purpose of the license has remained unchanged: to provide state sanctioning in order to operate a vehicle. As previously mentioned, the states' power of control over the license has remained relatively unscathed. One reason for the lack of involvement of the federal government can be attributed to the proactivity of the states.

The states have traditionally had the primary responsibility for building and regulating the nation's highways. Because a driver's license allows the public to move easily between states, two interstate compacts have been formed. These contractual agreements among the states are the Driver License Compact (DLC) and the Nonresident Violator Compact (NRVC).²¹ The DLC, created in 1961, ensures that a driver's home state receives and processes information about traffic violations committed by the driver in another state. A total of forty-five states have adopted the DLC.²² The NRVC standardizes methods used by different jurisdictions to process traffic citations received by out of state drivers. Both compacts are administered by the American Association of Motor Vehicle Administrators (AAMVA).²³ While the states have enjoyed a large degree of freedom in their control over driver's licenses, Congress is currently considering three pieces of legislation that would "federalize" the driver's license, thus, preempting states' control over the issuance of driver's licenses.²⁴

18. Harberson & Doherty, *supra* note 3, at 1.

19. Since 1954, all states have required drivers to be licensed. *Id.* at 2.

20. *Id.* at 1.

21. See THE COUNCIL OF STATE GOVERNMENTS, THE DRIVER'S LICENSE COMPACT AND THE VEHICLE EQUIPMENT SAFETY COMPACT, IN INTERSTATE COMPACTS FOR TRAFFIC SAFETY (1962).

22. Harberson & Doherty, *supra* note 3, at 2.

23. *Id.*

24. The Commerce Clause and spending power of Congress would likely not preclude federal activity in the area of licensing individuals. The Commerce Clause would likely apply because our roads and highways are crucial to commerce and travel between states. In a Commerce Clause analysis, the court must defer to congressional findings that the regulated activity substantially affects interstate commerce, as long as there is any rational basis for such finding and, given such finding, the only remaining question for judicial inquiry is whether there is reasonable connection between the regulatory means selected and the asserted ends. See U.S. CONST. art. I, § 8, cl. 3; *Houston, E & W.T.R. Co. v. United States*, 234 U.S. 342 (1914) (appeal from the United States

While it is axiomatic that no state licensing agency would voluntarily issue a license to a terrorist or identity thief, it is impossible to imagine an issuance system that could contemplate every intended use for the license in an effort to screen out some individuals. For example, licensing agencies would not have been able to predict the case of Lucas Helder, the clean-cut, twenty-one year old college student, who admitted to planting eighteen pipe bombs in five states during a weekend cross-country spree.²⁵ Some have even suggested that “federalizing” the sale of box cutters would be a more relevant response to the September 11 attacks than “federalizing” the driver’s license.²⁶

The first piece of proposed federal legislation is the Driver’s License Modernization Act of 2002 (DLMA), introduced by Representatives Jim Moran and Tom Davis of Virginia.²⁷ The proposed legislation would require driver’s licenses to become “smart cards” with computer chips. Biometric data would be collected to match the license with the owner. States’ participation would be required. Tamper-resistant security features would be incorporated into all license documents. Lastly, states would be required to adopt and implement procedures for accurately documenting the identity and residence of an individual before issuing a license.²⁸

The second piece of legislation, the Driver’s License Integrity Act of 2002, is similar to the Driver’s License Modernization Act. Illinois Senator Richard Durbin’s legislation would require minimum uniform standards for issuance and administration of state-issued driver’s licenses, sharing of driving information between the states for verification, with enhanced privacy protection, enhanced capabilities for authentication and verification of licenses, penalties for internal fraud, and similar state funding allocation.²⁹ The final piece of legislation was introduced by Representative Jeff Flake of Arizona and would bar any federal agency from accepting a state-issued driver’s license as a valid identification unless the state requires licenses issued to nonimmigrant noncitizens to expire upon the expiration of the alien’s nonimmigrant visa.³⁰

It is unlikely that a federally mandated solution will emerge because a

Commerce Court to review judgments dismissing the petitions in suits to set aside an order of the Interstate Commerce Commission regulating railway rates). Congress’ spending power could be used to condition funds, such as those used for highways, on the state’s willingness to comply with the federal guidelines set forth. *See South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (federal statute conditioning states’ receipt of portion of federal highway funds on adoption of minimum drinking age of twenty-one).

25. Charles Feldman et al., *Feds: Suspect Admitted Pipe Bomb Spree*, CNN.COM (May 9, 2002), available at <http://www.cnn.com/2002/US/05/08/mailbox.pipebombs/>. It is interesting to note that Lucas Helder was stopped three times by the police during the weekend and only the last police officer realized he was driving with an expired license. Helder was issued a ticket and allowed to go on his way.

26. Harberson & Doherty, *supra* note 3, at 5.

27. *Id.* at 10.

28. *Id.* at 10-11.

29. *Id.* at 11.

30. *Id.*

significant number of weaknesses exist. One weakness is that any federal legislation would potentially be subject to years of constitutional legal challenges and might be struck down.³¹ A second weakness is one of time constraints. It took the federal government six years to implement the commercial driver's license after passing the enacting legislation.³² Moreover, Daniel Hartman, manager of the division over CDLs at the United States Department of Transportation, stated in May 2002 that the most significant problem that system faces after sixteen years in existence is fraud in the licensing authority offices.³³ A third weakness is that federal legislation requires the setting of standards without making funds available to pay the costs.³⁴

Now that a holistic examination has been performed on the origin of driver's licenses, who has control over the licenses, from where the power to control the licenses came and what attempts on control have been performed by the states and by the federal government, a solid foundation exists to begin to analyze the legitimacy of the current driver's licenses restrictions imposed by states in reaction to September 11, 2001.

II. CURRENT JUSTIFICATIONS FOR THE RESTRICTIONS

"For many individuals, a Driver[']s] License . . . issued by the Indiana Bureau of Motor Vehicles (BMV) is the most important means of proving their identity. The Bureau of Motor Vehicles endeavors to safeguard the integrity of driver documents and to protect the public from false and/or fraudulent applications."³⁵ This statement came from the Commissioner of the Indiana Bureau of Motor Vehicles. Indiana's response is typical of other states in its current approach to licensing standards. In fact, the preceding quotation was made in response to revised requirements the state was implementing on September 30, 2002. States provide two main justifications in response to questions concerning new restrictions placed on licenses. The first justification is the need to maintain integrity of license issuance, and the second justification is the need to prevent identity theft.

A. Maintain Integrity of License Issuance

The states' first justification for restrictions on driver's licenses, which is really a disguise for the prevention of terrorism, is the need to maintain integrity of license issuance by ensuring that the person receiving a license meets necessary driving competency standards and has a verifiable identity. The competency standards requirement has no bearing on the increased restrictions because no new competency requirement was added. These standards, as

31. *Id.* at 12.

32. *Id.*

33. *Id.*

34. *Id.*

35. INDIANA BUREAU OF MOTOR VEHICLES, *Driver License Identification Requirements*, at <http://www.in.gov/bmv/driverlicense/idreq.html> (last visited Feb. 18, 2003).

previously mentioned in Part I of this Note, include meeting the proper age requirement, passing a standardized test and meeting certain physical requirements.³⁶ Each state varies in its specific competency requirements, but the aforementioned core requirements usually remain unchanged.³⁷ Because nothing regarding this component has been changed, opponents to the new driver's license restrictions have not made mention of any problems with this requirement.

However, the second portion of maintaining the integrity of license issuance has been the subject of much controversy because it is the primary area affected by the increased restrictions. States that imposed increased restrictions pertaining to whether a person has a verifiable identity did so in three areas: a social security number requirement, a proof of identity requirement, and a proof of residency requirement/legal immigration status requirement. Each of the three areas will be explored in depth to discover how each is related to the purported justification given.

1. *The Social Security Requirement.*—The Social Security Number (SSN) was created under the Social Security Act and was originally designed to keep track of an individual's earnings and eligibility benefits. It is now used by both governmental and nongovernmental entities for numerous purposes.³⁸

Social Security Requirements for Each State³⁹

States that require a SSN for a driver's license (DL) without exceptions (5):	Alabama, District of Columbia, Hawaii, New Jersey and West Virginia
States that do not require a SSN for a DL (7):	Georgia, Kansas, Maryland, Minnesota, Mississippi, Oregon and Vermont
States that require a SSN for a DL only of people who have been assigned one or are eligible for one (34):	Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Indiana, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming
States that require a SSN but have other exceptions to the rule (5):	Connecticut, New Hampshire, Illinois, Kentucky and Iowa

36. Harberson & Doherty, *supra* note 3, at 1.

37. *Id.*

38. *Driver's License Fact Sheet: Ensuring Immigrant Access to Driver's Licenses: Alternatives to Social Security Number Requirements*, NATIONAL COUNCIL OF LA RAZA, at <http://www.nclr.policy.net/proactive/newsroom/release.vtml?id=19940> (last visited Nov. 14, 2002) [hereinafter *Driver's License Fact Sheet: Ensuring Immigrant Access to Driver's Licenses*].

39. *Driver's Licenses for Immigrants: Broad Diversity Characterizes States' Requirements*, NATIONAL IMMIGRATION LAW CENTER (Nov. 6, 2002), at <http://www.nilc.org/immspbs/DLs/DL005.htm> (last visited Oct. 1, 2003).

Of the thirty-four states that only require a SSN from people who have been assigned one or are eligible for one, some allow for the submission of an affidavit stating that they are ineligible for one or have never received one.⁴⁰ Others require submission from the Social Security Administration that no SSN has been assigned or that the application for one has been denied.⁴¹ A few states allow applicants without a SSN to submit an individual taxpayer identification number. Lastly, three of the states require applicants without SSNs to verify lawful presence.⁴² Prior to March 1, 2002, the Social Security Agency would assign numbers to lawful residents who did not have work authorization but still needed a SSN for non-work related reasons, such as acquiring a driver's license.⁴³ Since March 1, 2002, the Social Security Agency no longer assigns SSNs when the sole reason for issuing a SSN is to obtain a driver's license. Some people who are lawfully present in the United States but who are not authorized to work are not able to gain access to a SSN, which is a prerequisite for a driver's license in some states.

In 1996, two pieces of federal legislation were introduced that addressed SSN use for the purpose of obtaining a state-issued driver's license. The first was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), otherwise known as "Welfare Reform."⁴⁴ The second was the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), otherwise known as "Immigrant Reform."⁴⁵

The "Welfare Reform" Act contained a provision requesting corresponding state agencies in charge of driver's license issuances to record the SSN of applicants for certain licenses.⁴⁶ The Act also requested SSNs be recorded for medical documents and certain court-issued documents for child support enforcement purpose. Section 466(a)(13)(A) of the Act required a SSN for any commercial driver's license applications.⁴⁷ Subsequent legislation was enacted applying the SSN requirement for all driver's licenses, not just commercial driver's licenses.⁴⁸

Implementation of the expanded requirement of Section 466(a)(13)(A) was difficult for Departments of Public Safety and Motor Vehicles because they were uncertain of the proper relationship between the expanded requirement and accessibility to a driver's license.⁴⁹ The staff persons and advocates requested

40. *Id.*

41. *Id.*

42. *Id.*

43. Michele L. Waslin, Ph.D., *Safe Roads, Safe Communities: Immigrants and State Driver's License Requirements*, NATIONAL COUNCIL OF LA RAZA, No. 6, May 2003, at 3, available at <http://www.nclr.org/policy/briefs> (last visited Nov. 21, 2002).

44. *Driver's License Fact Sheet: Ensuring Immigrant Access to Driver's Licenses*, *supra* note 38, at 1.

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.* at 1-2.

49. *Id.* at 2.

a proper interpretation from the appropriate governing agency, the United States Department of Health and Human Services, because the section dealt with child support enforcement.⁵⁰ In response, Commissioner David Gray Ross of the Department of Health and Human Services offered this interpretation: “We interpret Section 466(a)(13)(A) to require that States have procedures, which require an individual to furnish any Social Security Number that he or she may have. [However,] Section 466(a)(13)(A) does not require that an individual have a social security number as a condition of receiving a [driver’s] license.”⁵¹ Whether state licensing agencies were aware of the proper interpretation of Section 466(A)(13)(A) or not, many state driver’s licensing administrators currently require a SSN as a condition to apply for a license.⁵²

The second piece of legislation, “Immigrant Reform,” required all state driver’s licensing agencies to request the SSNs of all driver’s license applicants and place the SSN on the driver’s license.⁵³ The effect of this legislation was to create a *de facto* national identification card. Various advocacy groups joined with states in opposition to this provision on the grounds that it would violate privacy rights, lead to increased discrimination against immigrants and certain ethnic groups and lead to an increase in identity theft.⁵⁴ Section 656(b) of IIRIRA of 1996 was repealed in October 1999 due to overwhelming opposition.⁵⁵

2. *The Proof of Identity Requirement.*—A second heightened restriction aimed at maintaining the integrity of license issuance is the addition or strengthening of a proof of identity requirement. Every state has a list of redundant documents that it accepts to verify the identity of noncitizens. However, many individuals, who are lawfully in the United States, can be excluded at various stages of the immigration process. Some immigrants are unable to produce the required documentation to prove their identity because they do not have any, or enough, of the acceptable documents. Most states have similar requirements for the documents required for proper verification to exist. Generally, a combination of what a state deems as a primary and a secondary document is needed.⁵⁶ Some examples of acceptable documents include: U.S. passports, U.S. original state birth certificates, driver’s licenses issued by other countries, student identification cards, original Social Security Cards, tribal photo ID, United States military photo identification card, some Immigration and Naturalization Services (INS) documents (Certificate of Naturalization, an Arrival-Departure Record (I-94), an Alien Registration Receipt Card (I-551)), a

50. *Id.*

51. *Id.*

52. *Id.* at 2.

53. *Id.* at 1.

54. *Id.*

55. *Id.*

56. Foundation documents, or primary documents, are used to provide the building blocks of personal information on which the license is issued. These documents range from birth certificates, to passports, to other state driver’s licenses. Secondary documents, although they vary from state to state, include W-2 tax forms, a school report card, a consulate-issued identification card or a major credit or bank card.

letter of authorization issued by the INS, a Visa, or a Valid Employment Authorization Card (I-688 A or B) or a Matricula Consular.⁵⁷

A Matricula Consular is an identity document issued by the Mexican Consulate; currently thirteen states accept this as a valid form of identification.⁵⁸ Before a Mexican citizen can obtain a Matricula Consular, he or she must present a certified copy of his or her birth certificate and picture identification to the Consulate.⁵⁹ This type of document is gaining recognition in the United States.⁶⁰ On November 7, 2001, the Consulate General of Mexico and Wells Fargo announced that the Matricula Consular is an acceptable form of primary identification for opening new accounts and over-the-counter transactions at its more than 3000 banking locations in twenty-three states.⁶¹ Bank One and Fifth Third Bank followed suit in September 2002.⁶²

3. *The Proof of Residency/Legal Immigration Status Requirement.*—States vary in the last area of maintaining integrity of license issuance, the proof of residency and legal immigration status requirement. California, for example, explicitly requires proof of legal immigration status or proof of legal residency in the United States.⁶³ Other states are not as explicit. The South Carolina Department of Motor Vehicles interprets its state statute more narrowly by not granting driver's licenses to immigrants without green cards or valid student visas.⁶⁴

57. Waslin, *supra* note 43, at 3-4.

58. NATIONAL IMMIGRATION LAW CENTER, *supra* note 39. States that accept the Matricula Consular as a valid form of identification (13): Idaho, Indiana, Michigan (accepted on a case-by-case basis), Nebraska, North Carolina, New Mexico, Oregon, South Dakota, Tennessee, Texas, Utah, Washington and Wisconsin.

59. Waslin, *supra* note 43, at 12.

60. One such example is Chicago's adoption of the document. See Cook County, IL, Ordinance Recognizing Matricula Consular as Legal Identification, Section 5-4 (Sept. 19, 2002).

61. Press Release, Wells Fargo, Wells Fargo To Accept Matricula Consular Card As Identification For New Account Openings: Consulate General of Mexico and Wells Fargo Make Announcement in Los Angeles (Nov. 9, 2001), at <http://www.wellsfargo.com/press/article.jhtml?path=eis%2Fpress%2Fmatricula20011109b.jhtml&year=2001>.

62. John C. Ashe, *Bank One, Fifth Third Bank Now Accept Mexico ID Card, Open Doors to New Business*, MICHIGAN BANKER, Sept. 11, 2002, available at <http://www.michiganbankermag.com/14691.htm>.

63. Waslin, *supra* note 43, at 4.

64. *Id.* South Carolina Code section 56-1-40(7) (2002) denies a license to anyone who is not a resident, but includes in its definition of a resident "all persons authorized by the United States Department of Justice, the United States Immigration and Naturalization Service, or the United States Department of State to live, work, or study in the United States on a temporary or permanent basis who present documents indicating their intent to live, work, or study in South Carolina."

States' Lawful Presence Requirements⁶⁵

States that have lawful presence requirements (27):	Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia and Wyoming
States that do not have lawful presence requirements (24):	Alaska, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington and Wisconsin

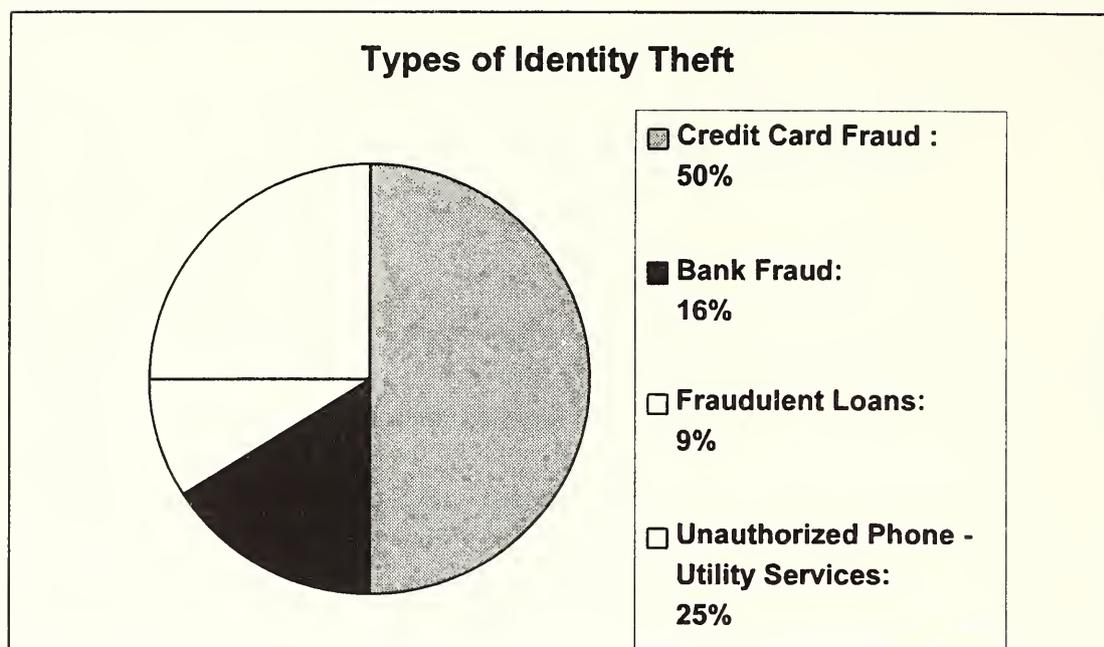
As a result of states' impositions of increased requirements to protect the maintenance of the license issuance (meeting necessary driving competency standards and having verifiable identity: social security requirement, proof of residency requirement and legal immigration status) many legal immigrants without proper documentation are currently being denied access to driver's licenses because they cannot meet the increased requirements.

B. Prevention of Identity Theft

The second justification for restrictions on driver's license issuance is the need to prevent identity theft by providing appropriate state law enforcement officials the ability to verify the authenticity of the license document, the driving history and the identity of the license holder. In analyzing this justification, it is first important to look at data concerning the growing trend of identity theft in the United States. The Federal Trade Commission provides a break down of compiled statistics collected nationwide on identity theft.⁶⁶

65. NATIONAL IMMIGRATION LAW CENTER, *supra* note 39, at 2.

66. *Identity Theft Complaint Data: Figures and Trends on Identity Theft January 2000 through December 2000*, IDENTITY THEFT DATA CLEARING HOUSE, FEDERAL TRADE COMMISSION 2, available at http://www.ftc.gov/bcp/workshops/idtheft/trends-update_2000.pdf.



Of the percentages listed on the chart, only eight percent (8%) of the victims reporting identity theft indicated that his or her identity had been obtained from a government document (e.g., a forged driver's license, a fraudulently filed document, such as a tax return, or a conversion of his or her government benefits).⁶⁷ Of the persons indicating identity fraud in this way, only .22% of the cases were reported due to fake driver's licenses.⁶⁸ A small percentage of the reported identity theft from driver's licenses is not trivial, and states should continue to seek ways to protect their citizens from different sources of potential harm, including driver's license fraud. Nevertheless, the question must be asked whether states' efforts to fortify this weakness are really effective.

While many states believed that requiring more documents would help to prevent identity theft, a growing dissent has formed among activist groups. The principal challenge related to foundation documents is states' ability to verify their authenticity and validity. Dr. Richard Varn, Chief Information Officer for the State of Iowa,⁶⁹ recently expounded on this very issue in his testimony before the Senate Subcommittee on Oversight of Government Management:

Identity security is a critical component of ensuring accuracy, preventing fraud, and granting privileges and benefits in many programs and processes The identity system [referring to driver's license system] . . . is broken and is more likely to actually enable identity theft and fraud

67. *Id.*

68. Harberson & Doherty, *supra* note 3, at 6.

69. NASCIO STATE PROFILES IOWA, available at <http://www.nascio.org/aboutNascio/profiles/iowa.cfm> (last visited Jan. 24, 2003). Dr. Varn is responsible for information technology operations and policy for the state of Iowa and works directly for Iowa Governor Tom Vilsack.

rather than prevent it As a result, facts such as social security number, address, birth day, and mother's maiden name . . . can be used to create identity and extend privileges and benefits fraudulently. It is not these facts or our inability to keep them secret that is the problem: it is that we rely on them alone to establish identity.

[O]ur driver identity systems, card, systems, security measures, and issuance processes are not uniformly and adequately conducted and coordinated to ensure transportation safety let alone the myriad of their other uses on which we have come to depend.⁷⁰

Only a handful of states actively verify foundation documents; however, even if states do attempt to verify the documents, it is nearly impossible to rely on state employees' ability to recognize an authentic foundation document. An extreme example of this is the 16,000 different U.S. birth certificates.⁷¹

Linda Foley, director of the Identity Theft Resource Center based in San Diego, California, believes the problem with driver's licenses is that they have become universally accepted as positive identification.

[T]he social security card and birth certificates—do not directly prove the holder is the person of record. Birth certificates only verify birth records. Both are easily forged or purchased by anyone. Both are public records and not protected nor private. Neither definitely link through photo or fingerprints with the cardholder. I think you see the problem. We have a positive identifier [foundation document] that is built on sand—nothing solid or confirmable.⁷²

Department of Motor Vehicle offices throughout the country are prime targets for those who commit identity fraud and theft. *Dateline NBC*, a news program, featured an undercover investigation to demonstrate the ease of fraudulently obtaining a driver's license.⁷³ The program highlighted how "brokers" provide customers with fake SSNs and walk them through the licensing process.⁷⁴ The investigative report participant was able to fraudulently obtain a

70. *Test. before the S. Subcomm. on Oversight of Gov't Mgmt., Restructuring and the D.C.: A Hearing Regarding: A License to Break the Law? Protecting the Integrity of Driver's Licenses*, Apr. 16, 2002, available at http://www.itd.state.ia.us/Varn_presentations/testimony_narrative.htm (presented by Richard J. Varn, CIO, State of Iowa, on behalf of the Nat'l Ass'n of State Chief Info. Officers (NASCIO), the Nat'l Gov's Ass'n (NGA), and the Info. Tech. Dept. (ITD), State of Iowa).

71. Harberson & Doherty, *supra* note 3, at 3.

72. *Test. for Cal. Leg. S. Comm. On Transp.: Special Oversight Hr'g on Identity Theft—Cal. Dep't of Motor Vehicles* (Nov. 16, 2000) (presented by Linda Foley, director of the Identity Theft Resource Center).

73. *Dateline NBC: Dateline Hidden Camera Investigation: Identity Crisis: How Easily False Driver's Licenses Can Be Obtained* (NBC television broadcast, Oct. 26, 2001), available at WL24017777.

74. *Id.*

California driver's license, even though the SSN belonged to a Florida doctor.⁷⁵ California is not the only state suffering from problems with integrity of license issuance. North Carolina estimates that 388,000 people in its motor vehicle system have given 999-99-9999 as their SSN.⁷⁶

Other states have faced internal fraud problems from their employees. The *Star-Ledger* of Newark, New Jersey reported in the summer of 2002 that eight New Jersey Department of Motor Vehicle employees were being indicted as part of various rings selling fake driver's licenses.⁷⁷ In response to this internal fraud problem, Eric Shuffler, Chief of Staff for the New Jersey State Transportation Commissioner, said, "New Jersey's driver's license is, however, one of the easiest in the nation to counterfeit, and document fraud is a rampant problem in the state."⁷⁸ The *Orange County Register* reported in 2000 that the California Department of Motor Vehicle employees were selling driver's licenses for up to \$4000 each and that sixty active cases of fraud existed.⁷⁹ With the recent discovery of internal fraud among state departments, it is difficult to determine just how many people lost their identity, not due to immigrants fraudulently giving documents, but rather by a government worker making money on the side issuing fraudulent documents.

III. CONSTITUTIONAL PROBLEMS ARISING FROM DRIVER'S LICENSE RESTRICTIONS

Over the past century, three principles have been formed by judicial decisions regarding immigration, federalism, and equal protection for immigrants. The first of these principles is that the federal power, in regard to immigration, is plenary and not bound by foreign affairs or national security and is immune from judicial scrutiny.⁸⁰ The second principle is that noncitizens fall within "persons" protected by the Equal Protection Clause of the Fourteenth Amendment.⁸¹ The

75. *Id.*

76. Tracey Lackman, Comment, *Welfare Reform Conflict: An Analysis of 42 U.S.C.A. § 666(A)(13)(a) of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 19 T.M. COOLEY. L. REV. 105, 123 (2002).

77. Robert Schwaneberg, *State Vows to End DMV Neglect-User Friendly Services and Tighter Security Via Digital Licenses in Works*, STAR-LEDGER, Aug. 8, 2000, at 2, available at 2002 WL 25387972.

78. Brian Donohue & Mark Mueller, *Hijackers Lose Spot in DMV Sale Pitch—Administration Admits Lack of Fraud Proof*, STAR-LEDGER, Dec. 15, 2002, at 1, available at 2002 WL 103818305.

79. Harberson & Doherty, *supra* note 3, at 4.

80. Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 501 (May 2001).

81. *Id.* The pertinent part of the Fourteenth Amendment reads, "nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection

last principle is that the federal government grants states no similar plenary power in regard to regulating or overseeing immigration.⁸² This part of the note will focus on the last two principles.

A. Equal Protection Problem

Immigrants may bring Fourteenth Amendment equal protection challenges to discriminatory state actions.⁸³ Many of these discriminatory actions, such as the imposition of greater restrictions on obtaining a driver's license, knowingly or unknowingly, cause discrimination between two different groups of people: American citizens and certain classes of noncitizens. "[L]egal immigrants may invoke the Fourteenth Amendment's Equal Protection Clause against discriminatory state measures, and the plenary power doctrine⁸⁴ does not shield states from more searching scrutiny."⁸⁵

In agreement, the U.S. Supreme Court in *Graham v. Richardson*⁸⁶ found that permanent resident noncitizens are a "discrete and insular minority."⁸⁷ In *Graham*, Justice Blackmun, for the Supreme Court, held that provisions of state welfare laws conditioning benefits on citizenship and imposing durational residency requirements on noncitizens were violative of the Equal Protection Clause of the Fourteenth Amendment.⁸⁸ Because this group of persons has

of equal laws"). *Id.* The Court went on to hold that San Francisco had violated the Fourteenth Amendment by engaging in impermissible discrimination based on "hostility to the race and nationality" of Chinese immigrants. *Id.* at 374. *See also* *Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 427 (1948).

We should not blink at the fact that § 990 [the statute in question], as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension We need but unbutton the seemingly innocent words of § 990 to discover beneath them the very negation of all the ideals of the Equal Protection Clause.

Id. at 427. *See also* *Truax v. Raich*, 239 U.S. 33, 39 (1915). For a more complete analysis of the United States Supreme Court's equal protection analysis with regard to immigrants, see *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1299-1302 (1983).

82. Wishnie, *supra* note 80.

83. *Id.*

84. The plenary power doctrine, read broadly, is interpreted to mean that exercises of federal immigration power are bound up in national security and foreign affairs. This interpretation allows the federal government to be largely immune from searching judicial review. *Id.*; see also Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) for a thoughtful analysis of the plenary power doctrine.

85. Wishnie, *supra* note 80, at 501 (footnote added).

86. 403 U.S. 365 (1971).

87. *Id.* at 371-72 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 114, 152 n.4 (1938)).

88. *Id.* at 376.

historically been discriminated against and unable to protect itself from this discrimination, courts have closely scrutinized any state discrimination against legal immigrants and have frequently invalidated it.⁸⁹

Because permanent residents (noncitizens and certain legal immigrants) have important civic responsibilities, such as paying taxes and subjection to military conscription, on an equal basis with citizens, laws that treat permanent residents differently should come under close scrutiny.⁹⁰ In undertaking this scrutiny, “the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.”⁹¹ With driver’s license restrictions, the question the courts should ask is whether increased restrictions on driver’s licenses are “necessary and precisely drawn” to prevent terrorism and identity theft in the United States.

In beginning an equal protection analysis, a court must first determine whether the new restriction discriminates between two groups.⁹² Advocates in support of increased restrictions could argue that two distinct groups do not exist because not all immigrants or noncitizens are hurt by the statute; therefore, they argue, the statute does not discriminate against the class. However, the court in *Nyquist* said, “[t]he important points are that . . . [the ‘discriminatory’ statute being challenged] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.”⁹³ Today, some revised statutes do not even mention immigrants or noncitizens. Nevertheless, the practical effect of the revised statutes coupled with the policy justifications mentioned in Part II of this Note and given by department of motor vehicle branches are that the revised statutes are equally aimed at discriminating between citizens and lawfully present immigrants and noncitizens.⁹⁴ When these factors are viewed holistically, the effect of the statutes is such that the revision might as well have been implemented with immigrants and noncitizens in mind.

The second step in the equal protection analysis requires undertaking whether the governmental interest justifying the discrimination is substantial and

89. Wishnie, *supra* note 80, at 502; *see, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7-8 (1977); *Graham*, 403 U.S. at 365.

90. *Graham*, 403 U.S. at 376; Wishnie, *supra* note 80, at 505.

91. *Nyquist*, 432 U.S. at 7 (quoting *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 605 (1976)). It is interesting to note that in *Nyquist*, the New York statute in question barred both loans and scholarships for higher education to some groups of noncitizens while allowing certain other groups of noncitizens to receive the scholarships. This is comparable to allowing some noncitizens or immigrants to possess a driver’s license while disallowing others. *See also* *Sugarman v. Dougall*, 413 U.S. 634 (1973) (striking down a civil service law provision that only citizens could be eligible for certain levels of civil service employment).

92. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

93. *Nyquist*, 432 U.S. at 9.

94. An important reminder is that the majority of these restrictions have been proposed in response to the September 11 attacks.

legitimate.⁹⁵

In viewing the two policy justifications for increased driver's license restrictions given by states, prevention of terrorism and identity theft, both facially appear to serve a legitimate and substantial interest. The ultimate state interest in licensing drivers is "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard."⁹⁶ If departments of motor vehicles are attempting to achieve their policy justifications by ensuring identity, it is unclear why noncitizens, who are in the country lawfully, meaning that this citizen has documentation that satisfies the federal government's requirements, are potentially more of a hazard to license than a United States citizen.⁹⁷ The rule is not narrowly tailored to meet the state's interest in assuring safety on the roads.

If states, by way of increased restrictions, are attempting to verify identification for either the prevention of terrorism or identity theft, they may be performing a function reserved for the federal government. "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."⁹⁸

The previously cited cases in this section all involved state-invoked discrimination against noncitizens who were legally in the United States. In these cases, the courts applied strict or close scrutiny. Had the discrimination existed on a federal level, the discrimination would have likely been upheld in accordance with plenary power doctrine that would invoke a "narrow standard of review of decisions made by the Congress or the President in the area of immigration"⁹⁹ The double standard between the state and federal application has been a point of contention with critics who argue that all non-citizen classifications should be treated under a single standard.¹⁰⁰

Nonetheless, some noncitizens or immigrants who are unlawfully present in the United States are not members of a suspect class.¹⁰¹ Discrimination against these persons will be analyzed by the standard "that the classification at issue bears some fair relationship to a legitimate public purpose."¹⁰² This is an easier

95. *Nyquist*, 432 U.S. at 7 (quoting *Examining Bd.*, 426 U.S. at 605).

96. *Dixon v. Love*, 431 U.S. 105, 114 (1977).

97. Taking Indiana's safety interest as an example, Indiana Code section 9-25-4-1 (2002) only requires that potential drivers pass the prescribed test and that the potential drivers obtain insurance.

98. *Nyquist*, 432 U.S. at 10.

99. *Matthews v. Diaz*, 426 U.S. 67, 82 (1976).

100. *Wishnie*, *supra* note 80, at 508.

101. *See Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (a Texas statute which withheld from local school districts any state funds for education of children who were not "legally admitted" into the United States and which authorized local school districts to deny enrollment to such children). The Court noted that "[u]ndocumented aliens cannot be treated as a suspect class" *Id.* at 223. The Court then acknowledged that education is not a fundamental right. *Id.* Nevertheless, the Court recognized that the Texas statute imposed "a lifetime hardship on a discreet class of children not accountable for their disabling status." *Id.*

102. *Id.* at 216.

standard for states to meet in an effort to defend their actions. A judge or jury would probably not find it difficult to prove that a state government's restrictions have a fair relationship to a legitimate state-interest in verifying the identity of a potential driver's license holder. In fact, in 2001 a judge found such an interest in *Doe v. Georgia Department of Public Safety*.¹⁰³ The ruling upheld the constitutionality of denying licenses to illegal immigrants and emphasized the existence of a legitimate interest.¹⁰⁴

It is possible, but not likely, that a court could find that a legitimate relationship does not exist between restricting driver's licenses to noncitizens here unlawfully and state interests in assuring safety and protecting identity. Noncitizens could unlawfully, if provided the chance, take the required written and driving tests and obtain insurance. If allowed to do so, the increased restrictions would not rationally relate to the safety objective because it would not be clear why noncitizens would pose a greater hazard than citizens. However, to be successful in arguing that the discrimination does not bear a fair relationship to a legitimate state interest,¹⁰⁵ a judge or jury would also have to be convinced that proof of identification bears no relation to citizenship status. This argument would likely fail because, as previously mentioned, a lesser standard of review is applied when reviewing cases involving illegal immigrants.

B. The Supremacy Clause Problem and Preemption by Congress

The second potential constitutional problem that might be encountered with the imposition of driver's license restrictions relates to the principle that the federal government grants states no similar plenary power in regard to regulating or overseeing immigration.¹⁰⁶ The Supremacy Clause of the United States Constitution reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

103. 147 F. Supp. 2d 1369 (11th Cir. 2001).

104. *Id.* at 1376. The court listed three reasons for finding a legitimate purpose: because Georgia has a legitimate interest in limiting its services to citizens and legal residents; second, Georgia has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal noncitizens; and third, Georgia has a legitimate interest in restricting Georgia driver's licenses to those who are citizens or legal residents because of the concern that persons subject to immediate deportation will not be financially responsible for property damage or personal injury due to automobile accidents. *Id.*

105. *Plyer*, 457 U.S. at 216.

106. *Wishnie*, *supra* note 80, at 501. *See also* *F.M.C. Corp. v. Holliday*, 498 U.S. 52, 56-7 (1990). When looking to see if a federal law pre-empts a state statute, the courts look to congressional intent. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.*

the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰⁷

Michael J. Wishnie, Assistant Professor of Clinical Law at New York University, commented on immigration and federalism in his article, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*. He noted:

In immigration . . . the federal government has reigned supreme for over a century. Even before the federal government expanded its own regulation of immigration in the 1880s, the Supreme Court invalidated state and local efforts to regulate immigration or legal immigrants when those measures conflicted, expressly or implicitly, with federal immigration policy.¹⁰⁸

It would appear that any state regulation of noncitizens was an ipso facto regulation of immigration and was thus preempted; however, this is not the case. In *DeCanas v. Bica*,¹⁰⁹ the Court unanimously noted otherwise, pointing out that

[e]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action [the local statute] . . . would not be an invalid state incursion on federal power.¹¹⁰

Although states are free to regulate in some situations where Congress has not, there are times when the state regulation, even though harmonious with federal regulation, must give way to paramount federal legislation. In *Michigan Cannery & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*,¹¹¹ the Court repeated that three ways exist in which federal law may pre-empt state law.¹¹²

First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law.¹¹³ Second, even in the absence of express pre-emptive language, Congress may indicate an

107. U.S. CONST. art. VI. *See also* U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have the Power . . . To establish an uniform Rule of Naturalization . . .”).

108. Wishnie, *supra* note 80, at 510 (internal citations omitted).

109. 424 U.S. 351 (1976) (8-0 decision) (Stevens, J., not participating).

110. *Id.* at 355-56 (holding that the California Labor Code provision which prohibited unlawfully present persons from being knowingly employed if the employment would injure lawfully present workers was not preempted under the Supremacy Clause as a regulation of immigration).

111. 467 U.S. 461 (1984) (holding that the extent the Michigan Agricultural Marketing and Bargaining Act conflicted with the Federal Agricultural Fair Practices Act by establishing “accredited” associations which wielded the power to coerce producers to sell their products according to terms established by the association and to force producers to pay a service fee for the privilege, it was preempted by the federal act).

112. *Id.* at 469.

113. *Id.*; *see also* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983).

intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government.¹¹⁴ Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, . . . or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹⁵

1. *Congress May Explicitly Define the Extent to Which It Intends to Preempt State Law.*—In this case the applicable federal laws would be the Immigration and Nationality Act (INA).¹¹⁶ Because the federal government has historically refrained from involvement with state-issued driver’s licenses, it is not likely that a court would find that the Constitution or the INA explicitly preempts state action in this area.¹¹⁷

2. *Congress May Intend to Occupy an Entire Field of Regulation.*—Using the second way to show preemption, even in the absence of express preemptive language, Congress may intend to occupy an entire field of regulation since

[T]he Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.¹¹⁸

Even if the state law is a permissible regulation of immigration, it may still be preempted if there is a showing that it was the “clear and manifest purpose of Congress” to effect a “complete ouster of state power, including state power to promulgate laws not in conflict with federal laws” with respect to the subject

114. *Mich. Cannery & Freezers Ass’n*, 467 U.S. at 469 (citations omitted); see also *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

115. *Mich. Cannery & Freezers Ass’n*, 467 U.S. at 469; see also *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

116. Immigration and Nationality Act, 8 U.S.C.A. § 1101 (2003).

117. See *supra* text accompanying note 24. This is not to say, however, that the federal government could not use the Commerce Clause and the Spending Power to interfere with state control of the driver licensing system. Should such an event take place and states had primary control, then preemption might take place.

118. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (internal citations omitted); see also *Hines*, 312 U.S. at 66.

matter which the statute attempts to regulate.¹¹⁹

Advocates of increased driver's license restrictions argue that even though it is apparent that Congress intends to occupy the entire field of immigration, imposing increased restrictions on driver's licenses does not bring such an action within such intent. In *DeCanas*, the Court noted that California Labor Code section 2805, which prevented an employer from knowingly employing an illegal alien if such employment would have an adverse effect on lawful resident workers, was constitutional as a regulation of immigration even though it dealt with noncitizens,¹²⁰ because states have broad authority under their police power to regulate employment relationships to protect workers within the state.¹²¹

Additionally, assuming that increased driver's license restrictions do come under the field of immigration, advocates of further restriction would argue either that the regulation was within their police power or that even if it were not within their police power, the increased restrictions do not burden the entrance or residence of noncitizens as prescribed.¹²² If either case were proven, then advocates would have support that a complete ouster has not taken place.¹²³ Advocates would further contend that the restrictions do not burden the entrance or residence of noncitizens. In their support they might contend that not all noncitizens are prevented from obtaining a driver's license. In fact, since the number of lawfully present noncitizens who would be denied a license is likely to be such a small number, it would definitely not be a burden to entrance, and would not likely be a burden to residence.

Opponents of the increased restrictions would first counter by claiming that the increased restrictions do not come within the police powers of the states. *DeCanas* dealt with employment and illegal noncitizens, not the denial of a driver's license to lawfully present noncitizens.¹²⁴ In that case, it was clear that the employment of illegal noncitizens in a tight economic time could have an adverse economic impact on the citizens. With the current regulations, it is not clear what, if any, adverse economic impact would take place by allowing certain classes of noncitizens to obtain a driver's license.

Opponents might also argue that the regulation would "burden the entrance or residence of noncitizens."¹²⁵ States that have a "lawful presence" requirement clearly do burden immigrants and noncitizens. If noncitizens are unable to obtain a driver's license then they cannot freely commute to work, the store or any other

119. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

120. *Id.* at 365.

121. *See id.* at 356-57. Because illegal immigrants were the subject of the regulation, the Court did not even touch on whether the regulations burdened the entrance or residence of noncitizens.

122. *See DeCanas*, 424 U.S. at 356-57.

123. *Id.*

124. *Id.*

125. Michael S. James, *Parked: Rhode Island Foreign Students Unable to Obtain New Driver's Licenses*, ABC NEWS.COM, Feb. 11, 2002, at http://www.abcnews.go.com/sections/us/Daily/news/drivers_licenses020211.html.

place they may need to travel. Opponents argue that it should not matter how many noncitizens are affected, so long as there is a potential that the class may be burdened. They also point to the increase in the number of required documents necessary to obtain a driver's license and label this practice a state-imposed discriminatory burden.¹²⁶ It is not clear why requiring additional documents prevents those who are lawfully present in the United States according to the federal government from obtaining a driver's license. If the federal government is satisfied that the person has proven his or her identity and reason for being in the country, why should states be permitted to deny them a driver's license? This is clearly a discriminatory burden.

In regards to the second way of showing preemption, a court would likely find that the current driver's license restrictions are permissible regulations of immigration. However, it is not clear whether there is a showing that it was the "clear and manifest purpose of Congress"¹²⁷ to effect a "complete ouster of state power, including state power to promulgate laws not in conflict with federal laws."¹²⁸ Advocates and opponents of the restrictions offer strong arguments for the legitimacy of their position. What will likely be the deciding factor under this analysis is the current attitude of the nation with respect to noncitizens. In light of the events September 11, a court would likely side with tougher restrictions even if the rights of some immigrants and noncitizens are trampled.

3. *Congress May Preempt State Law That Conflicts with Federal Law.*—The last way to demonstrate that a state law is preempted is if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹²⁹ Stated differently, a statute is preempted under the third scenario if it conflicts with federal law, making compliance with both state and federal law impossible.¹³⁰ If a court determines that driver's license restrictions are an enactment of immigration policy by the states, then the regulations would be preempted. However, it is not certain how a court would rule on this issue. Courts have dealt with the rights of illegal immigrants to driver's licenses,¹³¹ but none has specifically dealt with the rights of lawfully present noncitizens and their access to driver's license.

It is possible that courts could follow the line of reasoning extended by the U.S. Supreme Court in *DeCanas*, finding validity of the state action under the police power.¹³² If this view is accepted then the validity of the regulations would be upheld. However, if courts followed the line of reasoning extended by the

126. State regulation not congressionally sanctioned that discriminates against noncitizens lawfully admitted to the United States is impermissible if it imposes additional burdens not contemplated by Congress. 8 U.S.C. § 1101 (2003).

127. *DeCanas*, 424 U.S. at 357 (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

128. *Id.*

129. *Id.* at 363 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

130. *Mich. Cannery & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984); see also *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

131. *Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (11th Cir. 2001).

132. *DeCanas*, 424 U.S. at 356-57.

U.S. Supreme Court in *Graham* that struck down state welfare laws which conditioned benefits on citizenship, then the validity of the regulations would be preempted.¹³³

IV. POLICY REASONS WHY INCREASED RESTRICTIONS TO DRIVER'S LICENSES ARE AN INEFFECTIVE WAY TO PREVENT TERRORISM AND IDENTITY FRAUD

States' justifications for restrictions on driver's licenses are the prevention of terrorism and identity theft.¹³⁴ While increasing national security is critical, restricting driver's licenses is an ineffective way to prevent terrorism and identity theft. In fact, it is conceivable that denying driver's licenses to lawfully resident immigrants or noncitizens makes everyone less safe. Four guiding principles should be considered by states when drafting or modifying legislation pertaining to driver's license restrictions.¹³⁵

A. *Are the Restrictions Effective?*

The first principle is that the driver's license restrictions must be effective.¹³⁶ Do the restrictions actually make us safer or are they just giving us a false sense of security? Is the proposal cost-effective or would a great amount of resources be expended for uncertain results? The ultimate question is whether the proposals achieve what was intended. The answer to this question is an emphatic no.

1. *Ineffective in Their Prevention of Terrorism.*—Restricting driver's licenses is an inefficient and ineffective measure to prevent terrorism. While it is true that many of the September 11 hijackers had obtained driver's licenses, the fact remains that they could have achieved their purposes without the licenses. Each hijacker had a foreign passport that allowed them to board the plane. It is unlikely that the federal government would not continue to allow passports as valid forms of identification to board planes because the United States receives a large volume of tourists and other visitors.

2. *Ineffective Because of a Supremacy Clause Claim.*—The license restrictions are also ineffective because of a supremacy clause claim, which renders the restrictions ineffective. There are three ways to show preemption in a supremacy clause analysis. The most likely means of preempting driver's license restrictions is the second test. Even if the state law is a permissible regulation of immigration, it may still be preempted if there is a showing that it

133. *Graham v. Richardson*, 403 U.S. 365, 378 (1971). The state statutes at issue in the instant cases impose auxiliary burdens upon the entrance or residence of noncitizens that suffer the distress, after entry, of economic dependency on public assistance. State laws that impose discriminatory burdens upon the entrance or residence of noncitizens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid.

134. See *supra* notes 35-79 and accompanying text.

135. Waslin, *supra* note 43, at 5.

136. *Id.*

was the “clear and manifest purpose of Congress”¹³⁷ to effect a “complete ouster of state power, including state power to promulgate laws not in conflict with federal laws”¹³⁸ with respect to the subject matter which the statute attempts to regulate.¹³⁹ “State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”¹⁴⁰

Because courts have tended to disfavor restrictions that burden the entrance or residence of noncitizens, it is possible that state-imposed restrictions could be preempted by Congress’ intent to fill the entire area of regulation of immigrants and noncitizens. One story of how the restrictions discourage the entrance or residence of noncitizens came from a British woman.

Carol Thornley lives off the southern coast of England. She had visited Florida thirty-eight times in the past five years and was planning on spending a large portion of her retirement there. She is now considering selling her retirement home because of the new restrictions on U.S. visas and Florida driver’s licenses. The new restrictions have left her feeling unwanted and angry.¹⁴¹ In the case of Thornley and other immigrants, immigration officials can restrict visas to as little as thirty days. When the visa expires, so does the immigrant’s driver’s license. The process for getting a new license requires so much additional paperwork that it could take up to a month to receive it in the mail.¹⁴² This is but one story of persons lawfully in the United States but prevented from receiving a license.

Some of the other groups of immigrants who are here lawfully but could still be denied a license under the current restrictions are: refugees of special humanitarian concern, admitted into the United States;¹⁴³ persons who have been granted withholding of removal because of a likelihood of harm if returned to their country; asylees seeking refuge in the United States;¹⁴⁴ and professionals in a specialty occupation¹⁴⁵ who originally entered the United States as visitors and

137. *DeCanas*, 424 U.S. at 357 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

138. *Id.*

139. *Id.*

140. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948); *see also Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

141. Melissa Harris, *Red Tape Frustrates Foreign Drivers; New Restrictions Since Sept. 11 Are So Inconvenient for Immigrants That Some May Drive Without a Valid State License*, ORLANDO SENTINEL, Aug. 19, 2002, at B1.

142. *Id.*

143. *See* 8 U.S.C. § 1157 (2003).

144. *See id.* § 1158(a).

145. *Id.* § 1101(a)(15)(H)(i)(b). This statute reads,

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to

then changed status. Persons in these groups will not have a visa, but are nonetheless lawfully present in the United States.

It is clear that driver's license restrictions can place a heavy burden on the entrance or residence of immigrants or noncitizens in the United States. However, even if a court rules that the restrictions are not preempted, the constitutionality of the restrictions should not encourage states to further support bad policy. If a court deals with unlawfully present immigrants under a preemption analysis, it is nearly certain that the court will not preempt the restrictions imposed by states.

B. Do the Restrictions Create Negative Unintended Consequences?

When states imposed the current restrictions aimed at preventing terrorism and identity theft, they did not do so with the intent of preventing legal immigrants from obtaining a license. Unfortunately, groups of these persons have been excluded. Sevilla Sanz, for example, was a twenty-eight year old international student who was unable to obtain a U.S. driver's license after her international driver's license expired. Although she passed the written and road tests, she was still denied. "They said basically if I was an international student I couldn't get my license."¹⁴⁶ Foreign students at the University of New Hampshire must travel (without a license) to the state capital to obtain a license, rather than to their local motor vehicle office. Once there, foreign students without valid foreign driver's licenses must obtain official forms from their home countries asserting they have never had a suspended license or revoked license there.¹⁴⁷ Sevilla Sanz is a representative of just one group of many affected by the restrictions. Many more excludable groups exist.

Driving is a necessity for many persons residing in the United States. Immigrants and noncitizens who are denied licenses still must find transportation to work, stores and school. Lawmakers would be naive to believe that all of these persons simply accept that they are not permitted to drive. Many of these persons drive unlicensed, ignorant of state driving rules and unlikely to be insured. The ultimate state interest in licensing drivers is "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard."¹⁴⁸ The combination of unlicensed, uneducated and uninsured drovers not only significantly increases the number of traffic violations and accidents but also causes \$4.1 billion in insurance losses per year.¹⁴⁹

the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

Id.

146. James, *supra* note 125.

147. *Id.*

148. Dixon v. Love, 431 U.S. 105, 114 (1977).

149. *State Issues: Immigrants—Driver's Licenses*, STATE ACTION, available at <http://www>.

Lastly, by making people supply their SSNs, the risk of identity theft is increased, not decreased. Dishonest employees, like those who were caught in New Jersey,¹⁵⁰ can obtain the SSNs in the workplace and use them to apply for credit and assume the person's identity. States could allow individuals to apply for driver's licenses without having to provide a SSN; substitutions of an Individual Taxpayer Identification Number or an L-676 letter would suffice.¹⁵¹

It is self-evident that states would not intentionally prevent persons lawfully present in the United States from receiving a driver's license, increase hazards on the roadways, or make it easier for an identity thief to steal someone's SSN. Unfortunately, the states' choices did not have the intended effect but instead created negative consequences.

C. Do the Restrictions Single People out for Abuse and Discrimination?

To determine if people are being singled out for abuse and discrimination, a constitutional analysis will be applied. As noted in Part III of this note, an equal protection claim will be governed by the standard that "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn."¹⁵² If departments of motor vehicles are attempting to achieve their policy justifications by insuring identity, it is unclear why lawfully resident noncitizens who possess documentation that satisfies federal government requirements, are potentially more of a hazard to license than a United States citizen. The rule is not narrowly tailored to meet the state's interest in assuring safety on the roads.

If states, by way of increased restrictions, are attempting to verify identification for the prevention of either terrorism or identity theft, they may be performing a function reserved for the federal government. "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."¹⁵³ Once again, the statute is not narrowly tailored to meet the state's interest. However, it is conceivable that a court could find that restricting driver's licenses is a legitimate state interest and the means adopted to achieve the goal are necessary. If such a position was taken by the courts then the restrictions would be upheld.

D. Are the Regulations Based on Accurate Information?

Immigrant restrictions do not address the issue of false documents.¹⁵⁴ States' second justification for restrictions on driver's license is the need to prevent

cfpa.org/issues/immigrantdriving/index.cfm.

150. *See supra* note 66.

151. Waslin, *supra* note 43, at 12. An L-676 letter can be obtained by persons who can prove their age, identity and ineligibility to obtain a SSN.

152. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (quoting *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 605 (1976)).

153. *Id.* at 10.

154. Waslin, *supra* note 43, at 11.

identity theft by providing to appropriate law enforcement officials the ability to verify the authenticity of a license document, as well as identity of the license holder. The information on a driver's license is only as good as the information provided. Preventing immigrants and noncitizens from obtaining the licenses to which they are entitled encourages the use of false documents. This not only negates the policy justification but creates a false sense of security without addressing the real issues of identity fraud and theft.

E. Scope of the Solution

Safety and security goals are not mutually exclusive. Both can be accomplished through initiatives that combine effectiveness, accuracy, explicit civil rights protections, and prevention of discriminatory efforts.¹⁵⁵ "By arguing that driver's licenses are more than they are and that any possible 'fix' to the current driver's license system must address a range of unrelated collateral matters, advocates for an enhanced 'identity security' system cloud the real issues and hamper an appropriate and effective solution."¹⁵⁶ States should be striving to maintain the integrity of the license issuance and the verifiability of the license.

Better license management yields greater public safety and will improve the license use for other permissive uses. Steps must be taken to ensure that new policies are effective and make the country safer. Areas for state improvement include, but are not limited to, non-discriminatory issuance standards; driver information, including collection, sharing and exchange; state operation and enforcement; tamper- and counterfeit-proof features; accurate and reliable personal identifiers; and verifiability (enhancing communications and information infrastructure to allow real time access to driving history and authenticity of driver's license documents).¹⁵⁷

CONCLUSION

After the September 11 attacks, the United States, collectively as a federal government and individually as states, became aware of potential security weaknesses. To rub salt in a devastating wound, it was discovered that several of the terrorists who wreaked havoc on this nation used our licensing system to help advance their purposes. This was a tragedy; and future attacks need to be stopped. On another front, invisible enemies, identity thieves, are attacking the citizens of this country. People's lives are being stolen and ruined by the simple act of SSN theft. These crimes, which are increasing in frequency, must be stopped.

The driver licensing system in the United States needs help. States believed they could alleviate the problems of terrorism and identity theft by increasing driver's license restrictions, but they were wrong. As a result of hasty action on the part of the states, Equal Protection Clause and Supremacy Clause violations

155. *Id.* at 14.

156. Harberson & Doherty, *supra* note 3, at 7.

157. *Id.* at 12.

have potentially risen. A state-issued driver's license offers proof of authorization to drive a motor vehicle in this country. Expanding the use of the license to prevent security concerns is not wise, especially when segments of the population, who are present lawfully in the United States, are prevented access to a license by such security concerns.

In enacting policies concerning driver's licenses, states should ask four questions: 1) are the restrictions effective?; 2) do the restrictions create negative unintended consequences?; 3) do the restrictions single people out for abuse and discrimination?; and 4) are the regulations based on accurate information? When states can answer no to all of these questions, the driver's license restrictions will be hurting terrorists, not immigrants and noncitizens.