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Comments

DEFERRED ACTION FOR CHILDHOOD ARRIVALS: WHY GRANTING DRIVER'S LICENSES TO DACA BENEFICIARIES MAKES CONSTITUTIONAL AND POLITICAL SENSE

KARI E. D'OTTAVIO*

On June 15, 2012, Secretary of Homeland Security Janet Napolitano announced a new immigration policy entitled Deferred Action for Childhood Arrivals ("DACA").[1] This initiative offers a renewable two-year grant of deportation relief along with work authorization and a social security number to eligible undocumented immigrants.[2] Deferred Action for Childhood Arrivals applicants must: be at least fifteen years old, have entered the United States before age sixteen, and have been under age thirty-one on the date of the DACA announce-

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1. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 18, 2013) [hereinafter DACA Initiative], http://www.uscis.gov/portal/site/uscis/menuitem.eb (follow "Humanitarian" hyperlink; then follow "Deferred Action Process for Young People Who Are Law Enforcement Priorities" hyperlink); *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, U.S. DEP'T OF HOMELAND SEC. (June 15, 2012), http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low.

2. DACA Initiative, *supra* note 1; *Social Security Number—Deferred Action for Childhood Arrivals*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/pubs/deferred_action.pdf (last visited Mar. 25, 2013). Applicants must not have lawful immigration status at the time of their application; they must have either (1) entered the United States without authorization, or (2) entered the United States lawfully (for example, with a visa) but their lawful status expired (for example, they overstayed the allotted time of their visa). DACA Initiative, *supra* note 1.

ment;[3] prove continuous residence in the United States;[4] be currently in school or have graduated from high school;[5] and pass a criminal background check.[6] United States Citizenship and Immigration Services ("USCIS") has made clear that DACA beneficiaries do not receive any sort of lawful immigration status,[7] though it has clarified that DACA beneficiaries are in fact lawfully present in the United States.[8]

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3. DACA Initiative, *supra* note 1. Note that granting deferred action is an act of prosecutorial discretion by United States Citizenship and Immigration Services. *Id.*

4. *Id.* Specifically, DACA applicants must prove continuous residence in the United States for five years prior to the date of the DACA announcement up until they submit their application, and that they were physically present in the United States on the date of the announcement. *Id.*

5. *Id.* Deferred Action for Childhood Arrivals applicants may fulfill this educational requirement by proving they obtained a General Educational Development ("GED") certificate or were honorably discharged from the U.S. Coast Guard or Armed Forces. *Id.*

6. *Id.* Specifically, DACA applicants must prove that they have not been convicted of any felonies, "significant misdemeanor[s]," or three or more non-significant misdemeanors, and "do not . . . pose a threat to national security or public safety." *Id.* "[S]ignificant misdemeanor[s]" include "offense[s] of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence," or "an offense . . . for which the individual was sentenced to time in custody of more than 90 days." *Id.* "[T]hreat to public safety or national security" includes, *inter alia*, "gang membership, participation in criminal activities, or participation in activities that threaten the United States." *Id.*; *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 18, 2013) [hereinafter DACA FAQs], http://www.uscis.gov/portal/site/uscis/menuitem.eb (follow "Humanitarian" hyperlink; then follow "Deferred Action Process for Young People Who Are Law Enforcement Priorities" hyperlink; then follow "Frequently Asked Questions" hyperlink).

7. DACA Initiative, *supra* note 1 ("Deferred action does not provide an individual with lawful status.").

8. DACA FAQs, *supra* note 6 ("An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect."). "Lawful presence" is often thought of as ceasing accrual of unlawful presence, or "period of stay not authorized." *See* Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int'l Operations Directorate, and Pearl Chang, Acting Chief, Office of Pol'y and Strategy, to USCIS Field Leadership, 9–11 (May 6, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF (explaining the difference between "unlawful status" and "unlawful

Soon after the announcement, thousands of young immigrants lined up at DACA clinics around the country.[9] At the same time, a number of states responded with powerful statements in opposition to DACA. For example, the governors of Arizona[10] and Nebraska[11] an-

presence"). Moreover, "[t]here are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence . . . [a]s a matter of policy . . . ." *Id.* at 33. Those granted deferred action fall within this category. *Id.* at 42.

9. Susan Carroll, *Young Immigrants Line Up for Break from Deportation Threat*, HOUS. CHRON. (Aug. 14, 2012, 8:16 PM), http://www.chron.com/news/houston-texas/article/Young-immigrants-line-up-for-break-from-3788047.php; Alan Gomez, *DREAMers Line Up as Deportation-Reprieve Program Begins*, USA TODAY (Aug. 16, 2012, 12:34 AM), http://usatoday30.usatoday.com/news/washington/story/2012-08-15/homeland-security-immigration-program/57065692/1; Julia Preston, *Young Immigrants, in America Illegally, Line Up for Reprieve*, N.Y. TIMES, Aug. 14, 2012, at A8. It is estimated that as many as 1.76 million undocumented immigrants could benefit from this program. JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POL'Y INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (Aug. 2012), *available at* http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

10. Arizona Governor Janice K. Brewer issued Executive Order 2012-06, which denied state benefits to DACA beneficiaries, two months after the DACA announcement. Ariz. Exec. Order 2012-06, *Re-Affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program* (Aug. 15, 2012), *available at* http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf. Eventually, the Arizona Motor Vehicle Division revised its list of identity documents for proving legal presence, a requirement to obtain an Arizona driver's license, to specifically exclude employment authorization documents ("EADs") obtained by DACA beneficiaries. *Identification Requirements*, MOTOR VEHICLE DIV., ARIZ. DEP'T OF TRANSP., http://mvd.azdot.gov/mvd/formsandpub/viewPDF.asp?lngProductKey=1410&lngFormInfoKey=1410 (last visited Mar. 25, 2013). The Motor Vehicle Division still accepted EADs from other individuals, including noncitizens who are beneficiaries of other types of deferred action. *Id.*; *see also Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?*, NAT'L IMMIGR. L. CTR. [hereinafter NILC DACA and Driver's Licenses], http://www.nilc.org/dacadriverslicenses.html (last updated Mar. 11, 2013) ("[T]he Arizona Motor Vehicle Division revised its list of identity documents to exclude EADs obtained by DACA recipients, while preserving eligibility for all other individuals with EADs."). The Arizona executive order is already the subject of litigation. *See* Cindy Carcamo, *Arizona Lawsuit Challenges Restrictions on Driver's Licenses*, L.A. TIMES (Nov. 29, 2012), http://articles.latimes.com/2012/nov/29/nation/la-na-arizona-licenses-20121130 ("A contingent of civil and immigrant rights organizations launched a lawsuit [on November 29, 2012] against Arizona Gov. Jan Brewer, chal-

nounced that DACA beneficiaries would not be eligible to receive state benefits, in particular driver's licenses.[12] Michigan's Secretary of State initially followed suit.[13] At first, Iowa's Department of Transportation also announced that it would not issue driver's licenses to DACA beneficiaries.[14]

The majority of states, however, confirmed that DACA beneficiaries were eligible for driver's licenses.[15] California even changed its law to reflect its approval.[16] After USCIS's clarification on the lawful pres-

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lenging an executive order she issued that denies driver's licenses to some youths who recently received immigration relief and work permits under a new Obama administration program.").

11. Nebraska Governor Dave Heineman announced his opposition to DACA and stated that Nebraska will not issue driver's licenses to DACA beneficiaries. Brent Martin, *Nebraska to Defy Obama Administration Deferred Action Program*, NEB. RADIO NETWORK (Aug. 20, 2012), http://nebraskaradionetwork.com/2012/08/20/nebraska-to-defy-obama-administration-deferred-action-program-audio/; *Heineman Stands by Driver's License Policy*, OMAHA.COM (Dec. 4, 2012, 1:00 AM), http://www.omaha.com/article/20121204/NEWS/121209866#heineman-stands-by-driver-s-license-policy.

12. Patrik Jonsson, *Obama's DREAM Act-lite Runs into Trouble as Nebraska, Arizona Go Rogue*, CHRISTIAN SCI. MONITOR (Aug. 18, 2012), http://www.csmonitor.com/USA/Politics/2012/0818/Obama-s-DREAM-Act-lite-runs-into-more-trouble-as-Nebraska-Arizona-go-rogue.

13. Jonathan Oosting, *Federal Program Allows Some Illegal Immigrants to Work, but They Won't Be Able to Drive in Michigan*, MLIVE (Oct. 18. 2012, 12:14 PM), http://www.mlive.com/politics/index.ssf/2012/10/federal_program_allows_some_il.html.

14. Dar Danielson, *DOT Won't Approve Licenses for Illegals on Deferred Action Status*, RADIO IOWA (Dec. 27, 2012), http://www.radioiowa.com/2012/12/27/dot-wont-approve-licenses-for-illegals-on-deferred-action-status/.

15. *See* NILC DACA and Driver's Licenses, *supra* note 10 (noting that governors and other officials in almost forty states have confirmed that DACA beneficiaries are eligible for driver's licenses).

16. *See* CAL. VEH. CODE § 12801.6 (West 2012) ("(a) Any federal document demonstrating favorable action by the federal government for acceptance of a person into the deferred action for childhood arrivals program shall satisfy the requirements of Section 12801.5. (b) The department may issue an original driver's license to the person who submits proof of presence in the United States as authorized under federal law pursuant to subdivision (a) and either a social security account number or ineligibility for a social security account number.").

ence of DACA beneficiaries, Michigan[17] and Iowa[18] reversed course and agreed to issue driver's licenses to DACA beneficiaries.[19]

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17. *See State to Issue Driver's Licenses to Qualified Deferred Action Program Participants After Federal Government Reversal*, MICH. DEP'T OF STATE (Feb. 1, 2013), http://www.michigan.gov/sos/0,4670,7-127—294244—,00.html (quoting Michigan Secretary of State Ruth Johnson: "The feds now say they consider these young people to be lawfully present while they participate in the DACA program, so we are required to issue driver's licenses and identification cards").

18. *See Iowa DOT Will Issue Driver's Licenses or Nonoperator IDs to Persons Granted Deferred Action for Childhood Arrivals Status*, IOWA DEP'T OF TRANSP. (Jan. 23, 2013), http://www.news.iowadot.gov/newsandinfo/2013/01/iowa-dot-will-issue-drivers-licenses-or-nonoperator-ids-to-persons-granted-deferred-action-for-child.html (determining that it can now issue driver's licenses to DACA beneficiaries).

19. Likewise, North Carolina's Division of Motor Vehicles initially showed some resistance to issuing driver's licenses to DACA beneficiaries, but quickly turned around after the State's Chief Deputy Attorney General issued a legal opinion on the lawful presence of DACA beneficiaries even before USCIS made this clear. *See* Letter from Grayson G. Kelley, N.C. Chief Deputy Attorney Gen., to J. Eric Boyette, Acting Comm'r of the N.C. Div. of Motor Vehicles (Jan. 17, 2013), *available at* http://www.latinamericancoalition.org/pdf/130117-NCAG-letter-to-DMV.pdf ("Based upon our review of the historical background and legal concepts applicable to prosecutorial discretion and deferred status in the enforcement of immigration laws, we believe that individuals who present documentation demonstrating a grant of deferred action by the United States government are legally present in the United States and entitled to a drivers license of limited duration, assuming all other criteria are met."); *see also* Bruce Siceloff and Anne Blythe, *NC Will Grant Driving Privileges to Immigrants in Federal Program*, NEWSOBSERVER (Feb. 14, 2013), http://www.newsobserver.com/2013/02/14/2680885/nc-will-grant-driving-privileges.html ("The state Division of Motor Vehicles will comply with a state attorney general's opinion and issue driver's licenses to thousands of young illegal immigrants who are eligible to drive because of a federal program that gives them temporary protection from deportation, Transportation Secretary Tony Tata said [on February 14, 2013]."). Soon after this turnaround, North Carolina's Division of Motor Vehicles announced that it would begin to issue newly designed driver's licenses to certain classes of non-citizens that clearly marked their lack of lawful status; DACA beneficiaries will be the first class to receive the new licenses. Bertrand M. Gutierrez, *New N.C. Driver's Licenses Will Flag Non-U.S. Citizens*, WINSTON-SALEM J. (Feb. 20, 2013, 8:19 PM), http://www.journalnow.com/news/state_region/article_c2edaaa8-7bc4-11e2-860d-0019bb30f31a.html ("Across the top of the new license is a pink strip. In the center, red capital letters say, "NO LAWFUL STATUS." On the side, another set of red capital letters say, "LIMITED TERM," referring to [DACA beneficiaries'] two-year reprieve from deportation.").

The overwhelming state support for licensing DACA beneficiaries exemplifies a rare success story in the area of immigrants and driver's licenses. Access to driver's licenses for undocumented immigrants has long been contested and became especially restrictive after the September 11th terrorist attacks.[20] Whether states should allow DACA beneficiaries to obtain driver's licenses is the most recent debate.[21] This Comment will discuss the legal trends surrounding the debate on issuing driver's licenses to undocumented immigrants,[22] analyze legal arguments that explain why states that deny driver's licenses to DACA beneficiaries would likely be defeated in court,[23] and explain why states that allow DACA beneficiaries to obtain driver's licenses made a wise policy decision.[24]

I. BACKGROUND

The Supreme Court of the United States has never heard a case on the legitimacy of a state restriction or prohibition on issuing driver's licenses to immigrants.[25] Lower federal and state courts, however, have ruled on various constitutional challenges to immigrant-

20. *See infra* notes 129–131 and accompanying text.

21. *See* MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL'Y INST. DEFERRED ACTION PROGRAM REVIVES DEBATE OVER DRIVER'S LICENSES FOR UNAUTHORIZED IMMIGRANTS (Dec. 18, 2012), *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=926 ("As the number of unauthorized immigrants granted benefits under the Obama administration's recent deferred action program reaches a critical mass, it has rekindled debate over an enduring contentious issue—the role that immigration status should play in the granting of driver's licenses."); Sylvia Cochran, *States Clash Over Driver's Licenses for Deferred Action Filers*, YAHOO!NEWS (Aug. 17, 2012), http://news.yahoo.com/states-clash-over-driver-licenses-deferred-action-filers-161000234.html (discussing Arizona's and California's opposite reactions to DACA); Corey Dade, *New Immigration Battle: Driver's Licenses*, NPR (Dec. 28, 2012, 6:50 PM), http://www.npr.org/blogs/itsallpolitics/2012/12/28/168214192/new-immigration-battle-drivers-licenses (discussing state opposition to DACA).

22. *See infra* Part I.

23. *See infra* Parts II.A–B.

24. *See infra* Part II.C.

25. In *Alexander v. Sandoval*, however, the Court struck down a non-English speaker's attempt to force the State of Alabama to provide a driver's license test in Spanish because it determined there was no private right of action to enforce disparate-impact regulations under Title VI of the 1964 Civil Rights Act. 532 U.S. 275, 278–79, 293 (2001).

restrictive driver's license laws.[26] Part I.A discusses the prevalence of equal protection challenges to immigrant-restrictive driver's license laws. Part I.B discusses the less prevalent but equally important preemption challenges to such laws.

A. *Equal Protection Challenges*

The Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[27] Thus, all forms of state action must comply with this clause.[28] Depending on the classification they draw and the kind of right they affect, state laws are subjected to different levels of scrutiny when challenged on equal protection grounds: strict scrutiny, intermediate scrutiny, or rational basis review. The level of scrutiny used can dictate the success of an equal protection claim. Strict scrutiny is used if a statute classifies a suspect class or impinges on a fundamental right.[29] A court using strict scrutiny review will uphold a law only if the state can prove that the law is narrowly tailored to achieve a compelling state interest.[30] This is a very high burden for the state to meet; thus the use of strict scrutiny usually results in invalidation of the challenged law.[31] If a statute classifies individuals on the basis of

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26. *See infra* Parts I.A–B.

27. U.S. CONST. amend. XIV, § 1, cl. 4.

28. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (concluding that "State action of every kind" is subject to the Equal Protection Clause of the Fourteenth Amendment). The most obvious form of state action is passing, amending, or implementing a state law. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 29 (1968) (holding that no state may pass election laws that violate the Equal Protection Clause). An executive order is also a form of state action, as it has the same force of a law although it involves no action by the state legislature. *See, e.g.*, Ill. State Emps. Ass'n v. Walker, 315 N.E.2d 9, 10–13 (Ill. 1974) (determining that the Illinois governor's executive order requiring state employees to file financial disclosure statements did not violate the Equal Protection Clause).

29. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (discussing strict scrutiny for laws that make classifications based on race, alienage, and national origin); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 & n.3 (1976) (explaining that strict scrutiny must be applied to laws interfering with fundamental rights, such as voting).

30. *See Cleburne*, 473 U.S. at 440 ("[Such] laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.").

31. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (striking down a Virginia miscegenation law using strict scrutiny). *But see* Korematsu v. United States, 323 U.S. 214,

gender or illegitimacy, it is subject to intermediate scrutiny and will be upheld if the state can prove that it is substantially related to an important state interest.[32] This burden on the state is not as high as the burden for strict scrutiny, but still often results in invalidation of the challenged law.[33] Any statute that does not require more stringent scrutiny is subject to rational basis review.[34] Under this standard, a statute is entitled to a presumption of validity if the classification it draws is rationally related to a legitimate state interest.[35] To overcome this presumption, the challenger has the burden of negating all possible rational justifications for the classification.[36] Thus, rational basis review is very deferential to the state.[37]

Part I.A.1 discusses undocumented immigrants' frequent but often unsuccessful attempts to argue for heightened scrutiny based on the Supreme Court's ruling in *Plyler v. Doe*,[38] the first and only time

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215–16, 218–20 (1944) (upholding an executive order to intern Japanese-Americans during World War II using strict scrutiny).

32. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (reasoning that illegitimacy warranted intermediate scrutiny because it is "a characteristic determined by causes not within the control of the illegitimate individual" and imposing disabilities on an illegitimate child defies the basic principle that "legal burdens should bear some relationship to individual responsibility or wrongdoing" (citations omitted) (internal quotation marks omitted)).

33. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 519, 534 (1996) (concluding that the State of Virginia failed to provide an "exceedingly persuasive justification" for excluding women from the Virginia Military Institute).

34. *See Cleburne*, 473 U.S. at 440 (noting that the general rule of rational basis review gives way only to the narrow categories that trigger heightened scrutiny).

35. *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

36. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (citation omitted)).

37. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 298–99, 304–05 (1976) (per curiam) (determining a city ordinance, which prohibited new food cart vendors from operating in New Orleans' French Quarter, was rationally related to a legitimate state interest—preserving the appearance of the area).

38. 457 U.S. 202 (1982).

the Court has ruled on an equal protection challenge brought by undocumented immigrants.[39] Part I.A.2 discusses commonly proffered state interests in restricting undocumented immigrants from obtaining driver's licenses and courts' repeated deference to the state.

1. *Level of Scrutiny Used for Equal Protection Challenges to Immigrant-Restrictive Driver's License Laws Brought by Undocumented Immigrants*

The Supreme Court has long recognized that the Equal Protection Clause protects "all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality . . . ."[40] In striking down a Texas statute that denied free public education to children who were in the country illegally,[41] the Court in *Plyler* acknowledged for the first time in American jurisprudence that the Equal Protection Clause protects undocumented immigrants.[42] The Court rejected a strict scrutiny analysis,[43] but it required the State of Texas to demonstrate more than a rational basis for the challenged statute.[44] According to the Court, Texas failed to show that denying "innocent children the free public education that it offers to other children residing within its borders furthers some substantial state interest."[45] Although the Court did not acknowledge

39. *See id.* at 205 ("The question presented . . . is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.").

40. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

41. *Plyler*, 457 U.S. at 205, 230–31.

42. *See id.* at 215 ("That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. . . . And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws . . . .").

43. *See id.* at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.' . . . Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a 'constitutional irrelevancy.'").

44. *See id.* at 224 ("[T]he discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some *substantial goal* of the State." (emphasis added)).

45. *Id.* at 230.

it at the time, it is now widely understood that the Court used intermediate scrutiny to reach its decision.[46]

Based on the Court's analysis in *Plyler*, undocumented immigrants have often argued that strict scrutiny, or at least intermediate scrutiny, is the proper level of scrutiny to use for an equal protection analysis of immigrant-restrictive driver's license laws.[47] Courts, however, have generally refused to extend *Plyler* any further than its limited facts. Instead, courts have used rational basis review and, accordingly, have upheld the state laws. For example, the U.S. District Court for the Northern District of Georgia in *John Doe No. 1 v. Georgia Department of Public Safety*[48] underscored the distinction the *Plyler* Court drew between "illegal aliens and their children": the parents voluntarily decided to enter the class of undocumented immigrants, while it was beyond the children's control.[49] Quoting *Plyler*, the court said:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children

46. *See, e.g.*, Sudomir v. McMahon, 767 F.2d 1456, 1464–65 (9th Cir. 1985) (reading *Plyler* as using intermediate scrutiny); League of United Latin Am. Citizens v. Bredesen (*LULAC I*), No. 3:04–0613, 2004 WL 3048724, at *3 (M.D. Tenn. Sept. 28, 2004) (noting that some commentators have read *Plyler* as using intermediate scrutiny); *see also infra* notes 54, 57.

47. *See, e.g.*, *LULAC I*, 2004 WL 3048724, at *3 ("Plaintiffs argue that strict scrutiny analysis, or at the very least, intermediate scrutiny analysis, is required by the Supreme Court's decision in *Plyler v. Doe* . . . ."); Doe v. Edgar, No. 88 C 579, 1989 WL 91805, at *3 (N.D. Ill. Aug. 4, 1989) ("The plaintiffs, in reliance on the Supreme Court's decision in *Plyler*, argue for the application of the intermediate standard of review . . . ."); Cubas v. Martinez, 819 N.Y.S.2d 10, 24 (N.Y. App. Div. 2006) (noting plaintiffs' reliance on *Plyler* in their equal protection challenge), *aff'd*, 870 N.E.2d 133 (N.Y. 2007). Undocumented immigrants have also argued for strict scrutiny under the fundamental right to travel; courts, however, have quickly dismissed such claims. *See, e.g.*, *LULAC I*, 2004 WL 3048724, at *4 ("[G]iven their status, illegal aliens do not have a constitutional right to move freely about the country or the state."); John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1373 (N.D. Ga. 2001) ("Illegal aliens are subject to immediate arrest and ultimate deportation. It strains all bounds of logic and reason to say that such a person has a fundamental right of interstate travel."); *see also* Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999) (finding no "fundamental right to drive a motor vehicle").

48. 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

49. *Id.* at 1372–73.

> of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated.[50]

The court used this reasoning to stress that the undocumented immigrants challenging an immigrant-restrictive Georgia driver's license law[51] were not a suspect class.[52] The U.S. District Court for the Middle District of Tennessee in *League of United Latin American Citizens v. Bredesen*[53] (*LULAC I*) also used the same distinction to reject the plaintiffs' claim that a strict scrutiny analysis was warranted for a Tennessee law limiting undocumented immigrants to temporary driving certificates rather than driver's licenses.[54] Similarly, New York's intermediate court in *Cubas v. Martinez*[55] distinguished *Plyler* by emphasizing that the undocumented immigrants challenging an immigrant-restrictive New York driver's license law[56] were all adults, not innocent

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50. *Id.* at 1373 (quoting Plyler v. Doe, 457 U.S. 202, 219–20 (1982)).

51. The challenged Georgia law forbade anyone not a U.S. citizen or a legally authorized alien from obtaining a Georgia driver's license. *See* GA. CODE ANN. § 40-5-1(15)(B) (2011) (stating that only U.S. citizens or legally authorized aliens may be Georgia residents); *Id.* § 40-5-20(a) (2011) ("Any person who is a resident of this state for 30 days shall obtain a Georgia driver's license before operating a motor vehicle in this state.").

52. *See John Doe No. 1*, 147 F. Supp. 2d at 1373 ("Following *Plyler*, it is clear that illegal aliens are not a 'suspect class' that would subject the Georgia statute to strict scrutiny.").

53. No. 3:04-0613, 2004 WL 3048724 (M.D. Tenn. Sept. 28, 2004).

54. *Id.* at *1, *4–5 (M.D. Tenn. Sept. 28, 2004) ("Membership in this class is voluntary, and does not resemble the class of children described in *Plyler*. Therefore, the heightened scrutiny analysis that was applied in *Plyler* is not warranted here."). The challenged Tennessee law allowed undocumented immigrants to receive a driving certificate valid for one year, while those lawfully present could receive a driving certificate valid for up to five years. *Id.* at *1. Only U.S. citizens and lawful permanent residents could receive Tennessee driver's licenses. *Id.* Note that, under current Tennessee law, only lawfully present immigrants are eligible for temporary driver's licenses; the law no longer makes reference to driving certificates. TENN. CODE. ANN. § 55-50-331(g) (2012). It is still the case that only U.S. citizens and lawful permanent residents may receive permanent driver's licenses. *Id.* § 55-50-321(c)(1)(C) (2012).

55. 819 N.Y.S.2d 10, 13–14 (N.Y. App. Div. 2006), *aff'd*, 870 N.E.2d 133 (N.Y. 2007).

56. The challenged New York law required a social security number to obtain a driver's license. N.Y. VEH. & TRAF. LAW § 502(1) (2011). On its face, the law did not discriminate against a particular class, but because undocumented immigrants do not have social security numbers, the law, by its terms, drew a distinction between those illegally and legal-

children.[57] Finally, in *Doe v. Edgar*,[58] the U.S. District Court for the Northern District of Illinois distinguished *Plyler* by comparing the lifetime hardship caused by the deprivation of a free basic education with the marginal harm caused by the deprivation of a driver's license.[59]

At least one court has applied strict scrutiny in an equal protection analysis of an immigrant-restrictive driver's license law, although its decision was later overturned.[60] In *People v. Quiroga-Puma*,[61] an undocumented immigrant was charged with unlicensed operation of a motor vehicle and failure to provide proof of valid insurance.[62] The New York Justice Court for the Village of Westbury raised, *sua sponte*, an equal protection challenge of the immigrant-restrictive New York statute that prevented the defendant from obtaining a driver's license in the first place.[63] Although the court only cited and did not actually rely on *Plyler*,[64] it found that the defendant was a member of a suspect class.[65] The court stressed that because immigrants cannot vote,

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ly in the country. *See Cubas*, 819 N.Y.S.2d at 13–15 (quoting the challenged law, which makes no reference to a particular class of persons, but explaining that "only applicants who are authorized to remain in the country for more than one year . . . are generally eligible for licensing").

57. *Cubas*, 819 N.Y.S.2d at 24 ("[T]he [*Plyler*] Court seems to have reasoned that somewhat stricter scrutiny was required because the children of undocumented aliens lack any control over their illegal entry into the United States. Here, plaintiffs are all adults." (citations omitted)).

58 No. 88 C 579, 1989 WL 91805 (N.D. Ill. Aug. 4, 1989).

59. *Id.* at *4 (N.D. Ill. Aug. 4, 1989) ("[T]he harm caused by the deprivation of a drivers license, while not insubstantial, pales in comparison to the extreme harm caused by the denial of a basic education.").

60. *See infra* note 68.

61. 848 N.Y.S.2d 853 (N.Y. Just. Ct. 2007), *rev'd*, 884 N.Y.S.2d 567 (N.Y. App. Term 2009).

62. *Id.* at 854–55.

63. *Id.* at 856–57, 859. "The Commissioner [of the Department of Motor Vehicles] has in fact set requirements in such a way that VTL § 502-1 discriminates against undocumented aliens. It is impossible for an undocumented immigrant to prove their identity under the current scheme established by the Commissioner." *Id.* at 862. The challenged New York law is the same as in *Cubas*. *See supra* note 56.

64. *Quiroga-Puma*, 848 N.Y.S.2d at 861.

65. *Id.* at 862 ("The Court finds that the defendant is a member of a suspect class. He is an alien, and a non-citizen. As such, he triggers the appropriate consideration under Equal Protection analysis.").

"[t]hey are silenced and shut out of our legal debate."[66] According to the court, this fact undermines any argument that undocumented immigrants are not a suspect class since they do not have the political power to protect themselves.[67] Thus, the court applied strict scrutiny and found the challenged New York statute violated the Equal Protection Clause.[68] With the exception of this court, though, most courts have indicated that the heightened scrutiny used for the undocumented immigrants in *Plyler* is fairly limited in application. Accordingly, equal protection challenges to immigrant-restrictive driver's license laws brought by undocumented immigrants have only been afforded rational basis review.

2. *State Interests in Denying Driver's Licenses to Undocumented Immigrants*

Once a court rejects a heightened level of scrutiny for an immigrant-restrictive driver's license law, it will uphold the law if the classification drawn is rationally related to a legitimate state interest.[69] In *Doe No. 1*, the court recognized three legitimate state interests in Georgia's immigrant-restrictive driver's license law: (1) preventing governmental machinery from facilitating the concealment of illegal aliens; (2) preserving scarce resources by not giving driving tests to il-

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66. *Id.* at 863–64.

67. *See id.* ("This particular fact is most important—they cannot better their situation and must rely on citizens to take up their causes.").

68. *Id.* at 865. The New York Supreme Court, Appellate Term reversed the justice court on the grounds that it should not have raised constitutional claims *sua sponte*, when there was no evidence that the defendant had standing to assert the claims raised on his behalf:

> [T]he record does not indicate that defendant ever applied for a driver's license and, even assuming that he did apply and was denied a license, that the grounds for the denial were unrelated to age, the ability to pass the visual, written and performance test requirements, or some other civil or physical impediment to obtaining a license that is unrelated to the constitutional issues herein raised, much less that the denial was, in fact, based on his failure to produce the required documentation. It is axiomatic that there is no standing to complain where an alleged defect in or violation of a statute does not injure the party seeking redress . . . .

People v. Quiroga-Puma, 884 N.Y.S.2d 567, 568–69 (N.Y. App. Term 2009) (citations omitted) (internal quotation marks omitted).

69. *See supra* notes 34–36 and accompanying text.

legal aliens subject to immediate deportation; and (3) promoting economic safety because "persons subject to immediate deportation will not be financially responsible for property damage or personal injury" resulting from car accidents.[70] Thus, the court did not find the law in violation of the Equal Protection Clause.[71] In *Sanchez v. State*,[72] a class action lawsuit brought by undocumented immigrants and licensed drivers[73] against Iowa's immigrant-restrictive driver's license law,[74] the State of Iowa proffered the same or similar interests as Georgia plus more: (1) preventing its governmental machinery from facilitating the concealment of illegal aliens; (2) limiting Iowa's services to citizens and legal residents; (3) restricting Iowa driver's licenses to those who are not subject to deportation; and (4) discouraging illegal immigration.[75] The Supreme Court of Iowa found that the plaintiffs did not sufficiently negate the first proffered interest;[76] thus it did not reach the legitimacy of the other three interests.[77] Accordingly, the court did not find the law in violation of the Equal Protection Clause.[78]

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70. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1376 (N.D. Ga. 2001).

71. *See id.* ("[The law] is a legitimate exercise of the police power . . . .").

72. 692 N.W.2d 812 (Iowa 2005).

73. *Id.* at 815 ("Juan and Maria Sanchez represent a class of illegal, undocumented aliens present in the state who want to obtain driver's licenses. John and Jane Doe represent a class of licensed drivers in the state who want the [Iowa Department of Transportation] to license the Sanchez class to make it safer for members of the Doe class to drive on the state's roads.").

74. The challenged Iowa law, like in *Cubas* and *Quiroga-Puma*, required driver's license applicants to provide social security numbers. IOWA CODE § 321.182(1)(a) (2009). Iowa's Department of Transportation could waive this requirement, *id.*, but only for immigrants who were authorized by the federal government to be in the country. *Id.* § 321.196(1). Undocumented immigrants, consequently, could not obtain Iowa driver's licenses.

75. *Sanchez*, 692 N.W.2d at 818.

76. *Id.* at 819; *see also supra* note 36 and accompanying text.

77. *Sanchez*, 692 N.W.2d at 819 ("We conclude the state's licensing scheme is rationally related to the legitimate state interest of not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. Thus, the classes have failed to carry their burden of negating all reasonable bases that could justify the challenged statute. Furthermore, we need not address the legitimacy of the other state interests proffered in this case." (citation omitted) (internal quotation marks omitted)).

78. *Id.*

The court in *Cubas* found that New York's "successful regulation of motor vehicle operations and the assurance of the integrity of identification documents" were legitimate state interests advanced by its immigrant-restrictive driver's license law.[79] The court explained that the new identification procedures "serve a vital governmental purpose in preventing the abuse of identification documents to commit acts of fraud or, as tragically illustrated by the events of September 11, 2001, acts of terrorism."[80] Similarly, in *LULAC I*, the court found that "making the state safe from crime and terrorism" was a legitimate basis for Tennessee's law limiting undocumented immigrants and temporary legal aliens to temporary driving certificates.[81] Both courts found that the state laws did not violate the Equal Protection Clause.[82]

In contrast, the court applying strict scrutiny in *Quiroga-Puma* did not find the two state interests raised sua sponte—national security and the economy—compelling enough to justify denying driver's licenses to undocumented immigrants.[83] Although the court acknowledged the U.S. Supreme Court's recognition of national security as a compelling state interest,[84] it reasoned that:

> Curtailing the action of immigrants by not permitting them to drive has no rational connection to national security. If anything, granting licenses to drive increases our domestic safety by insuring that immigrants are certified to drive. Denying immigrants, regardless of their legal status, a driv-

79. Cubas v. Martinez, 819 N.Y.S.2d 10, 24 (N.Y. App. Div. 2006), *aff'd*, 870 N.E.2d 133 (N.Y. 2007).

80. *Id.* at 25.

81. League of United Latin Am. Citizens v. Bredesen (*LULAC I*), No. 3:04–0613, 2004 WL 3048724, at *6 (M.D. Tenn. Sept. 28, 2004). "The State of Tennessee contends that homeland security is the basis for limiting illegal aliens and temporary legal aliens to issuance of a drivers' certificate covering a shorter period of time than a drivers' license, and stating on the face of the certificate 'not valid for identification.'" *Id.* at *5.

82. *Id.* at *6; *Cubas*, 819 N.Y.S.2d at 24. The *Cubas* court was "not unsympathetic" to otherwise law-abiding undocumented immigrants who, without driver's licenses, "face[] difficulty in pursuing employment, commuting to a place of employment or elsewhere, or obtaining financial or other services." *Id.* at 25. The court, however, found the State's interest in verifying identity outweighed the plaintiffs' inconvenience in not being able to obtain driver's licenses. *Id.*

83. People v. Quiroga-Puma, 848 N.Y.S.2d 853, 864–65 (N.Y. Just. Ct. 2007), *rev'd*, 884 N.Y.S.2d 567 (N.Y. App. Term 2009).

84. *Id.* at 864 (citing Korematsu v. United States, 323 U.S. 214 (1944)).

> er's license in no way constitutes a necessary means for achieving national security.[85]

The court found economic arguments, such as undocumented immigrants taking away jobs from U.S. citizens, equally unpersuasive; moreover, "the Supreme Court has been silent on the issue of whether the economic concerns of a state government, much less the concerns of public opinion, qualify as a compelling state interest."[86] Again, with the exception of this decision, courts have indicated that state interests in crime prevention, national security, and state resource preservation satisfy rational basis review.

B. Pre-emption Challenges

The Supremacy Clause provides that the United States Constitution, and laws and treaties made pursuant to it, "shall be the supreme Law of the Land."[87] The Supreme Court has declared: "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[88] The Court has recognized three major ways of finding pre-emption: (1) a federal law expressly pre-empts a state or local law;[89] (2) federal regulation has wholly occupied a field;[90] or (3) a state law conflicts with federal law—either the state law makes it physically impossible to comply with federal law, or the state law frustrates the objectives of a

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85. *Id.* at 865.

86. *Id.* at 864.

87. U.S. CONST. art. VI, cl. 2.

88. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (citations omitted) (internal quotation marks omitted).

89. *See* Arizona v. United States, 132 S. Ct. 2492, 2500–01 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."); *Gade*, 505 U.S. at 98 ("Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." (citations omitted) (internal quotation marks omitted)).

90. *See Arizona*, 132 S. Ct. at 2502 ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."); *Gade*, 505 U.S. at 98 ("[F]ield preemption [occurs] where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." (citation omitted) (internal quotation marks omitted)).

federal scheme.[91] There is, however, a presumption against pre-emption of state laws that regulate a field the states have traditionally occupied.[92] *Arizona v. United States*[93]—the Court's most recent articulation of its pre-emption doctrine in the area of immigration law—helped define these principles.[94] There, the Court considered four provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, a state immigration enforcement policy commonly known as S.B. 1070, and found all but one pre-empted by federal immigration law.[95]

Part I.B.1 discusses unsuccessful attempts to argue that pre-emption principles bar immigrant-restrictive driver's license laws because the federal government has exclusive authority over regulating immigration.[96] Part I.B.2 discusses the Real ID Act, a federal licensing

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91. *See Arizona*, 132 S. Ct. at 2501 (maintaining that conflict pre-emption occurs where "compliance with both federal and state regulations is a physical impossibility" and where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (citations omitted) (internal quotation marks omitted)); *Gade*, 505 U.S. at 98 (same); *see also Arizona*, 132 S. Ct. at 2505 (recognizing that a "'[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy'" (quoting Motor Coach Emps. v. Lockridge, 403 U.S. 274, 287 (1971))).

92. *See Arizona*, 132 S. Ct. at 2501 ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

93 132 S. Ct. 2492 (2012).

94. *Id.* at 2500–05.

95. *Id.* at 2497, 2510. Section 3, which created a new state misdemeanor for failing to carry registration papers, was found pre-empted because the Court concluded that Congress intended to wholly occupy the field of alien registration and foreclose any state regulation in the area. *Id.* at 2501–03. Section 5(C), which likewise created a new state misdemeanor for working without proper authorization, was found pre-empted as frustrating federal objectives. *Id.* at 2503–05. According to the Court, Congress debated, discussed, and ultimately rejected proposals to make such conduct a criminal offense. *Id.* at 2504. Section 6, which authorized state officers to make warrantless arrests for removable offenses, was found pre-empted for similar reasons: the Court found that it created an obstacle to Congress's objectives by providing state officers wide, unilateral authority to arrest immigrants without any input from or cooperation with the federal government. *Id.* at 2505–07. The only provision upheld was section 2(B), also known as the "Show Me Your Papers" provision, which requires state officers to investigate the immigration status of suspected undocumented persons. *Id.* at 2507–10.

96. Note that these cases were decided before the Real ID Act was passed.

scheme passed by Congress in 2005, which likely complicates pre-emption challenges.

1. *Failed Pre-emption Challenges to Immigrant-Restrictive Driver's License Laws*

Although the power of the federal government to regulate immigration has long been established,[97] courts have consistently denied pre-emption challenges to immigrant-restrictive driver's license laws. For example, the plaintiff in *Doe No. 1* argued that the U.S. Constitution pre-empts the entire field of immigration law, and thus a Georgia law restricting undocumented immigrants from obtaining a Georgia driver's license should be pre-empted.[98] The court disagreed, reasoning that "the Georgia statutes mirror federal objectives by denying Georgia driver's licenses to those who are in this country illegally according to federal law."[99] Moreover, "[i]t is a legitimate exercise of the police power to regulate and supervise those authorized to exercise the privilege of driving automobiles on the highways of Georgia."[100] Based on this reasoning, the court declined to find the Georgia statute pre-empted.[101]

Similarly in *LULAC I*, the plaintiffs argued that the federal government's regulation of immigration pre-empted Tennessee's immigrant-restrictive driver's license laws.[102] The court found otherwise, reasoning that the Tennessee legislation did not attempt to regulate immigration; rather, it "relie[d] on federal immigration standards in determining whether a person is eligible for a drivers' license or a drivers' certificate."[103] Furthermore, the court reasoned that "there [was] no indication that the federal government intend[ed] to com-

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97. *See* Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." (citing Mathews v. Diaz, 426 U.S. 67 (1976); Graham v. Richardson, 403 U.S. 365, 377–80 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948); Hines v. Davidowitz, 312 U.S. 52, 62–68 (1941); Truax v. Raich, 239 U.S. 33, 42 (1915)).

98. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1375–76 (N.D. Ga. 2001).

99. *Id.*

100. *Id.* at 1376.

101. *Id.*

102. League of United Latin Am. Citizens v. Bredesen (*LULAC I*), No. 3:04–0613, 2004 WL 3048724, at *6–7 (M.D. Tenn. Sept. 28, 2004).

103. *Id.*

pletely occupy the field of drivers' license issuance for immigrants" as this function "has traditionally been left to state governments."[104] Accordingly, the court declined to find the Tennessee statutes preempted.[105] Such cases demonstrate the tendency of courts to deny the argument that federal immigration laws pre-empt immigrant-restrictive state driver's license laws, focusing instead on how such laws complement federal law.

2. *The Real ID Act*

The issuance of driver's licenses has traditionally been a state function.[106] Prior to September 11, 2001, the prevailing view was that each state determined its own issuance standards.[107] This view changed when the final report of the National Commission on Terrorist Attacks upon the United States recommended that "[t]he federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers licenses."[108] In response, Congress passed the Real ID Act in May 2005.[109] This Act provides federal standards for issuing driver's licenses and identification cards, including minimum issuance standards[110] and evidence of

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104. *Id.* at *7; *see also supra* note 92 and accompanying text.

105. *LULAC I*, 2004 WL 3048724, at *6–7.

106. *See* United States v. Best, 573 F.2d 1095, 1103 (9th Cir. 1978) ("[T]here is little question that licensing of drivers constitutes an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." (citation omitted) (internal quotation marks omitted)); *see also* ALISON M. SMITH, CONG. RES. SERV., RL 32127, SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED ALIENS 1 (2004), *available at* http://www.hsdl.org/?view&did=450403 ("Eligibility for driver's licenses is first and foremost a matter of state law.").

107. TODD B. TATELMAN, CONG. RES. SERV., RL 34430, THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 1 (2008), *available at* http://www.fas.org/sgp/crs/misc/RL34430.pdf.

108. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 390 (2004), *available at* http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT.pdf.

109. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 201–07, 119 Stat. 231, 310–16 (2005) [hereinafter Real ID Act] (to be codified at 49 U.S.C. § 30301).

110. Before they can issue a driver's license or identification card, states are required, at a minimum, to verify: (1) a photo or non-photo document that includes the legal name and date of birth of the individual; (2) a valid document stating the date of birth of the

lawful status.[111] The Act wholly restricts undocumented immigrants from obtaining driver's licenses and limits certain noncitizens, including deferred action recipients, to temporary driver's licenses.[112]

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individual; (3) a valid social security number or an explanation of non-eligibility for a social security number; and (4) a valid document showing the address and name of the individual at their principal residence. *Id.* at § 202(c)(1).

111. The Act states:

> A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person—(i) is a citizen or national of the United States; (ii) is an alien lawfully admitted for permanent or temporary residence in the United States; (iii) has conditional permanent resident status in the United States; (iv) has an approved application for asylum in the United States or has entered into the United States in refugee status; (v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States; (vi) has a pending application for asylum in the United States; (vii) has a pending or approved application for temporary protected status in the United States; (viii) *has approved deferred action status*; or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent resident in the United States or conditional permanent resident status in the United States.

Id. § 202(c)(2)(B) (emphasis added).

112. *See id.* § 202(c)(2)(C) (allowing only individuals with statuses in clauses (v) through (ix) in § 202(c)(2)(B), *supra* note 111, to receive a temporary driver's license or temporary identification card set to expire on the date the individuals' authorized stay in the United States expires). Currently, only two states—Washington and New Mexico—allow any qualified driver to obtain a driver's license, regardless of their immigration status. *See* N.M. STAT. ANN. § 66-5-9(B) (2011) (allowing driver's license applicants to provide a tax identification number in lieu of a social security number); *Proof of Identity*, WASH. ST. DEP'T OF LICENSING, http://www.dol.wa.gov/driverslicense/idproof.html (last visited Mar. 25, 2013) (allowing driver's license applicants to provide proof of Washington residence in lieu of a social security number). Utah allows those who cannot prove lawful presence to obtain "Driving Privilege Cards," though "DPCs" cannot be used for identification purposes. *See Driver License Division - Obtaining a Utah Driving Privilege Card (DPC)*, UTAH DEP'T OF PUB. SAFETY, http://publicsafety.utah.gov/dld/drivingprivilegecard.html (last updated Mar. 8, 2013). Earlier this year, Illinois passed a bill that allows undocumented immigrants to obtain temporary driver's licenses. S.B. 957, 97th Gen. Assemb. (Ill. 2013), *available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=957&GAID=11&DocTypeID=SB&SessionID=84&GA=97. Likewise, Maryland recently passed a bill that repeals a lawful status requirement for driver's license applications. H.B. 789, 433rd Gen. Assemb. (Md. 2013), *available at* http://mgaleg.maryland.gov/2013RS/bills/hb/hb0789f.pdf. Other states are considering similar legislation. *See, e.g.*, Assemb. B. 60, 2013–2014 Leg.,

State compliance with the Real ID Act is voluntary.[113] If states opt not to comply with the federal standards, however, their state driver's licenses will not be recognized for federal identification purposes.[114] Moreover, non-compliant states will not participate in the information-sharing system the Real ID Act purports to create.[115] Residents of non-compliant states may run into problems if their driver's licenses are not accepted in compliant states, and vice versa.[116] Although there are strong incentives for states to comply with the Real ID Act for the convenience of their residents, many states have nonetheless opposed it;[117] states might regard the Real ID Act as an impractical and unfunded mandate.[118]

Among other things, the Real ID Act has caused concern over whether it pre-empts state laws that set contrary standards for the issuance of driver's licenses to immigrants.[119] Given the voluntary nature of the Real ID Act, the decision to issue or not to issue driver's licenses to immigrants should remain entirely with the states.[120] At least one court, however, used the Real ID Act to pre-empt an immigrant-restrictive state driver's license law. In *League of United Latin*

Reg. Sess. (Cal. 2013) (proposing to repeal provisions of existing law that require proof of lawful presence); S.B. 68, 2013 Gen Assemb., Jan. Sess. (Conn. 2013) (proposing to allow qualified Connecticut residents to obtain driver's licenses regardless of immigration status).

113. *See* Real ID Act, *supra* note 109, § 202(a) (providing the process by which the Department of Homeland Security determines whether states complied with the requirements of the Act); TATELMAN, *supra* note 107, at 19 (stating that the REAL ID Act is not binding on states).

114. *See* Real ID Act, *supra* note 109, § 202(a)(1) ("[A] Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State . . . unless the State is meeting the requirements of this section."). For example, residents of non-compliant states cannot use their state driver's licenses to board airplanes or enter federal buildings. TATELMAN, *supra* note 107, at 19.

115. TATELMAN, *supra* note 107, at 20.

116. *See id.* at 19–20 (discussing possible ramifications for residents of non-compliant states).

117. *See id.* at 17–19 (discussing states' opposition to the Real ID Act).

118. *See What's Wrong with REAL ID?*, REALNIGHTMARE.ORG, www.realnightmare.org (last visited Mar. 25, 2013) (describing the costs of the Real ID Act).

119. *See* TATELMAN, *supra* note 107 at 29–30 (addressing whether states still have ultimate control over the issuance of driver's licenses with the Real ID Act in place).

120. *Id.* at 30.

American Citizens v. Bredesen[121] (*LULAC II*), the plaintiffs challenged a Tennessee statute that prohibited using *matrícula consular* cards as proof of identification for obtaining a Tennessee driver's license.[122] The U.S. District Court for the Middle District of Tennessee found that the Real ID Act, which similarly forbids using *matrícula consular* cards,[123] pre-empted the Tennessee statute, rendering the lawsuit moot.[124] Although the Real ID Act is voluntary, the court reasoned, non-compliant states' driver's licenses "could not be used to access federal facilities, board federally regulated commercial aircraft, or for 'any other purposes the Secretary [of Homeland Security] shall determine,'" and thus "states are likely to comply with the Act."[125] "[G]iven the broad scope of the phrase 'official purpose' for which compliance with the Act is required, and that the federal interest in national security is one of the goals of the Act," the court concluded that "Congress intended to preempt state law in this area of identity verification documentation for drivers' licenses."[126] Thus, the court upheld the pre-emption challenge and, in so doing, upheld the restriction on immigrants.[127] This reasoning has not been used often, but with an increasing number of Real ID-compliant states,[128] it is likely that pre-emption challenges focusing on the federal licensing scheme, rather than the federal immigration scheme, will arise.

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121. No. 3:04-0613, 2005 WL 2034935 (M.D. Tenn. Aug. 23, 2005).

122. *Id.* at *1; TENN. CODE ANN. 55-50-321(g) (2012) ("The department [of motor vehicles] shall not accept matricula consular cards as proof of identification for driver license application and issuance purposes."). *Matrícula consular* cards are identification cards issued by the Mexican Government to Mexican nationals residing outside of Mexico. KEVIN O'NEIL, MIGRATION POL'Y INST., CONSULAR ID CARDS: MEXICO AND BEYOND (Apr. 2003), *available at* http://www.migrationinformation.org/feature/display.cfm?ID=115.

123. *See* Real ID Act, *supra* note 109, § 202(c)(3)(B) (providing that complying states, in deciding whether to issue driver's licenses, shall not accept any foreign documents other than official passports).

124. *LULAC II*, 2005 WL 2034935, at *1, *3.

125. *Id.* at *2 (quoting Real ID Act, *supra* note 109, § 201(3)).

126. *Id.*

127. *Id.* at *3.

128. *DHS Determines 13 States Meet REAL ID Standards*, U.S. DEP'T OF HOMELAND SEC. (Dec. 20, 2012), http://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards.

II. ANALYSIS

After the September 11, 2001 terrorist attacks, the federal and state governments acted quickly to strengthen security laws, including restricting immigrants' ability to obtain driver's licenses.[129] Numerous states passed laws restricting immigrants' access to driver's licenses specifically for security purposes.[130] The Real ID Act represented the peak of these restrictions, as it limited many noncitizens to temporary driver's licenses and prohibited undocumented immigrants from obtaining driver's licenses altogether.[131]

The new Deferred Action for Childhood Arrivals program raises a new question in the debate over licensing immigrants—whether states should allow DACA beneficiaries to obtain driver's licenses. Parts II.A and II.B discuss equal protection arguments and preemption arguments, respectively, that support the issuance of driver's licenses to DACA beneficiaries and suggests why states that deny driver's licenses to DACA beneficiaries erred. Likewise, Part II.C addresses policy arguments for why states that allow DACA beneficiaries to obtain driver's licenses are headed in the right direction.

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129. *See, e.g.*, *Immigrant Driver's License Restrictions Challenged In Some States*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigr. L. Ctr., Los Angeles, Cal.), Oct. 21, 2002, at 13 ("Nationwide, approximately 63 bills introduced during the 2001–02 state legislative sessions addressed immigrants' ability to obtain a driver's license . . . . [A]lmost 50 of these proposals sought to limit access for immigrants . . . ."); *see also* H.R. 4633, 107th Cong. (2002) (requiring that a computer chip be embedded in a driver's license or identification card with encoded biometric data matching the license holder). With widespread attention on terrorists' ability to obtain driver's licenses, it is often overlooked that all of the 9/11 terrorists could have gotten through airport security using their Saudi passports. Margaret D. Stock, *License Policy a Win for Security*, NEWSDAY (Oct. 1. 2007, 8:00 PM), http://www.newsday.com/opinion/license-policy-a-win-for-security-1.667541.

130. *See, e.g.*, Jewish Cmty. Action v. Comm'r of Pub. Safety, 657 N.W.2d 604, 606, 609 (Minn. Ct. App. 2003) ("The [Minnesota Department of Public Safety] determined that the rules [requiring driver's license applicants to prove lawful presence in the United States] will tighten homeland security in Minnesota, noting that some of the terrorist activity in the United States is carried out by foreign nationals and that many foreign nationals are illegally present in this country." (internal quotation marks omitted)); *see also supra* notes 80–81 and accompanying text.

131. *See supra* note 112 and accompanying text.

A. *Equal Protection Arguments as Applied to DACA Beneficiaries*

The success of an equal protection challenge to a state restriction[132] on issuing driver's licenses to DACA beneficiaries depends in large part on the level of scrutiny a court uses and the interests the state proffers.[133] Part II.A.1 analogizes the position of DACA beneficiaries to the position of undocumented children in *Plyler* and underscores why this comparison would likely lead a court to apply intermediate scrutiny to the state restriction. Part II.A.2 highlights why past state interests in denying driver's licenses to undocumented immigrants are inapplicable to the case of DACA beneficiaries.

1. *State Driver's License Restrictions on DACA Beneficiaries Should Be Afforded Intermediate Scrutiny*

Most courts have distinguished *Plyler* on the grounds that undocumented immigrants denied driver's licenses are not similarly situated to the innocent children in *Plyler* who were denied a free public education.[134] DACA beneficiaries, however, are similarly situated to the *Plyler* children. The court in *Doe No. 1* reasoned that the children in *Plyler* could not affect "their parents' conduct []or their own status."[135] Similarly, DACA is directed at undocumented immigrants who were brought into the United States as children by their parents,[136] bearing virtually no responsibility for their undocumented status. In fact, one of the objective threshold requirements for DACA is that the appli-

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132. A state restriction can be a law, executive order, or any other form of state action that is subject to the Equal Protection Clause. *See supra* note 28.

133. *See supra* notes 29–37 and accompanying text.

134. *See supra* Part I.A.1.

135. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1372–73 (N.D. Ga. 2001) (citation omitted) (internal quotation marks omitted).

136. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r of U.S. Customs and Border Prot., Alejandro Mayorkas, Dir. of U.S. Citizenship and Immigr. Servs., and John Morton, Dir. of U.S. Immigr. and Customs Enforcement (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf ("By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home."). An argument could be made that DACA beneficiaries are similarly situated to illegitimate children, a classification that has traditionally been afforded intermediate scrutiny. *See supra* note 32.

cant must have entered the United States before age sixteen.[137] A court analyzing an equal protection challenge of a state driver's license restriction on DACA beneficiaries would likely make this comparison and, accordingly, apply intermediate scrutiny to the restriction.

In addition, DACA beneficiaries are technically documented; they have provided ample documentation to the federal government to meet DACA eligibility requirements and, for this reason, are not subject to immediate deportation.[138] Courts that have used rational basis review for driver's license laws restricting undocumented immigrants were considering cases where the plaintiffs never submitted documentation to, nor were cleared by, the federal government.[139] Thus, DACA beneficiaries are different from the plaintiffs in those cases.

Although there are obvious similarities between the *Plyler* plaintiffs and DACA beneficiaries, a court would likely emphasize the differences between the benefit denied—a free basic education versus a driver's license. The *Plyler* Court equally focused on the innocent children harmed and the education they were denied, noting that "[t]he inestimable toll of that deprivation [of education] on the social economic, intellectual, and psychological well-being of the individual . . . ma[de] it most difficult to reconcile" an immigration status-based denial of basic education with the equality guaranteed in the Equal Protection Clause.[140] As the court articulated in *Edgar*, "the harm caused by the deprivation of a drivers license . . . pales in comparison to the extreme harm caused by the denial of a basic education."[141] While this distinction may hold weight in theory, in reality, being unable to drive often translates into lack of access to better schools, better jobs, better health care, and even better grocery stores,[142] especially in rural areas where public transportation is either

137. *See supra* text accompanying note 3.

138. *See supra* notes 3–6 and accompanying text.

139. *See supra* Part I.A.1.

140. Plyler v. Doe, 457 U.S. 202, 222 (1982).

141. Doe v. Edgar, No. 88 C 579, 1989 WL 91895, at *4 (N.D. Ill. Aug. 4, 1989).

142. *See* María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 96–97 (2004) (asserting that because the automobile is "the most important mode of transportation in the United States, the lack of a driver's license directly threatens [immigrants'] livelihood"); Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & POL. 435, 448 (2008) ("[O]utside of a few metropolitan areas, it is difficult, if not impossi-

inadequate or non-existent.[143] In the end, those who are denied a driver's license are also being denied access to better opportunities.[144] The negative impact of being denied a driver's license therefore does not "pale in comparison" to being denied a basic education, but rather is indirectly similar.

2. *Past State Interests in Denying Driver's Licenses to Undocumented Immigrants Are Inapplicable to the Case of DACA Beneficiaries*

Most courts have consistently found legitimate state interests in denying driver's licenses to undocumented immigrants;[145] these interests, however, do not apply to DACA beneficiaries. For example, the courts in *Doe No. 1* and *Sanchez* found that preventing "governmental machinery [from being] a facilitator for the concealment of illegal aliens" was a legitimate state interest.[146] This interest is inapplicable to DACA beneficiaries because, by nature of having applied for deferred action status, they are not "concealed."[147] In fact, DACA operates as a mechanism to encourage individuals to identify and document themselves.[148] Moreover, there would be no reason for a DACA beneficiary to attempt to conceal his identity when the federal government has already verified his identity through the application process.

Similarly, the court in *Cubas* found "the assurance of the integrity of identification documents" was a legitimate state interest in that the challenged driver's license law allowed the Department of Motor Vehicles "to verify that the applicant is, in fact, who s/he purports to

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ble, to function in the United States without a car. . . . Prohibiting one from driving thus diminishes her ability to participate in everyday life.").

143. *See* Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 300–23 (2003) (discussing how those living in rural areas are isolated from better jobs, schools, and services, all of which is exacerbated by the lack of public transportation).

144. *See id.* (highlighting the opportunities available to those not limited to rural areas); *see also supra* note 82.

145. *See supra* Part I.A.2.

146. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1376 (N.D. Ga. 2001); Sanchez v. State, 692 N.W.2d 812, 818 (Iowa 2005) (citation omitted) (internal quotation marks omitted).

147. DACA applicants must provide ample documentation to USCIS to meet DACA eligibility criteria. *See supra* notes 3–6 and accompanying text.

148. For a description of the major benefits of the DACA program, see *supra* text accompanying note 2. See *supra* notes 2–6 and accompanying text for a description of the DACA eligibility requirements.

be."[149] This reasoning, again, does not apply with full effect to DACA beneficiaries—not only because the federal government has verified their identity, but also because the federal government, through the Real ID Act, permits those with deferred action status to obtain a temporary driver's license.[150] Thus, there is little incentive for DACA beneficiaries to use false documentation to obtain a driver's license when the federal government—the only entity that has the authority to remove them from the country—has granted them deferred action status.

State interests in national security are likewise inapplicable to the case of DACA beneficiaries. The courts in *Cubas* and *LULAC I* both found that the challenged driver's license laws served a legitimate state interest in preventing acts of crime and terrorism.[151] DACA beneficiaries, by virtue of being granted deferred action status, have been characterized by the federal government as nonthreats to national security or public safety.[152] Thus, denying them driver's licenses for national security purposes is not a legitimate state interest when the federal government has already determined the individual poses no national security risk.[153]

Finally, the courts in *Doe No. 1* and *Sanchez* found that denying driver's licenses to those subject to immediate deportation was a legitimate economic interest of the state.[154] The main purpose of granting deferred action is to defer deportation;[155] DACA beneficiaries, as long as they obey the law (just like any other noncitizen), are protected

149. Cubas v. Martinez, 819 N.Y.S.2d 10, 20, 24–25 (N.Y. App. Div. 2006) (internal quotation marks omitted), *aff'd*, 870 N.E.2d 133 (N.Y. 2007).

150. Real ID Act, *supra* note 109, § 202(c)(2)(C).

151. *See Cubas*, 819 N.Y.S.2d at 25 (noting that preventing fraud and terrorist acts "serve a vital governmental purpose"); League of United Latin Am. Citizens v. Bredesen (*LULAC I*), No. 3:04–0613, 2004 WL 3048724, at *6 (M.D. Tenn. Sept. 28, 2004) (suggesting that "making the state safe from crime and terrorism" provides a rational basis for Tennessee's immigrant-restrictive driver's license law).

152. *See supra* note 6 and accompanying text.

153. A court could follow the position of the court in *Quiroga-Puma* that denying driver's licenses to immigrants has nothing to do with national security, *see supra* text accompanying note 85, though this view seems to be rare.

154. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1376 (N.D. Ga. 2001); Sanchez v. State, 692 N.W.2d 812, 818 (Iowa 2005).

155. *See* DACA Initiative, *supra* note 1 ("Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.").

from deportation.[156] This state interest, therefore, also does not apply to DACA beneficiaries.

Although there are persuasive arguments for the inapplicability of past state interests to the specific case of DACA beneficiaries, a court using rational basis review may still uphold a state driver's license restriction on DACA beneficiaries because of the extreme deference given to the state: state interests are deemed legitimate so long as a "state of facts reasonably may be conceived to justify it."[157] But, taking into consideration the similarities between DACA beneficiaries and the *Plyler* plaintiffs, and the differences between DACA beneficiaries and the plaintiffs in past cases where the court used rational basis review, there are stronger arguments for the use of intermediate scrutiny.[158]

B. Pre-emption Arguments as Applied to DACA Beneficiaries

Pre-emption arguments generally fail when they seek to maintain that states have no authority to promulgate immigrant-restrictive driver's license laws because the federal government has exclusive authority over immigration.[159] The Real ID Act, however, provides a promising foundation for a pre-emption argument in the case of state driver's license restrictions on DACA beneficiaries. Out of the three ways of finding pre-emption,[160] only one is potentially viable. There is no express pre-emption language in the Real ID Act, nor is the issuance of driver's licenses, unlike alien registration,[161] a field in which Congress sought to regulate wholly since it made the Act voluntary.[162] That leaves conflict pre-emption.

The first form of conflict pre-emption—physical impossibility—is inapplicable; given that state compliance with federal standards is not

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156. *See id.* (stating that DACA beneficiaries' cases "will not be placed into removal proceedings or removed from the United States for a period of two years, *unless terminated*" (emphasis added)).

157. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

158. *See supra* Part II.A.1.

159. *See supra* Part I.B.1.

160. *See supra* notes 89–91 and accompanying text.

161. *See supra* note 95.

162. *See supra* notes 90, 113 and accompanying text. *But see* League of United Latin Am. Citizens v. Bredesen (*LULAC II*), No. 3:04–0613, 2005 WL 2034935, at *2 (M.D. Tenn. Aug. 23, 2005) (holding that "Congress intended to preempt state law in this area of identity verification documentation for drivers' licenses").

mandatory, a resident of a state can have a non-compliant driver's license and use another form of accepted identification, such as a passport, for federal identification purposes.[163] While this route is inconvenient for residents of non-complying states,[164] it is not physically impossible to comply with state and federal law.

The second form of conflict pre-emption—frustrates Congress' objectives—provides a better argument. In the Real ID Act itself, Congress recognized deferred action as a status in which one can get a temporary driver's license.[165] Congress also referred to those with deferred action status as having "authorized stay"—that is, lawful presence, in the United States.[166] Thus, an argument can be made that Congress intended for persons with deferred action status to obtain driver's licenses, and states that deny driver's licenses to DACA beneficiaries frustrate Congress' objectives.

Conversely, the Real ID Act was a promulgation of federal driver's license issuance standards in the name of national security;[167] while Congress' intent in the Real ID Act to allow those with deferred action status to receive temporary driver's licenses is fairly direct, the argument that denying driver's licenses to DACA beneficiaries frustrates Congress' national security objectives is fairly attenuated, especially given that compliance with the Act is voluntary.[168] Moreover, traditional state functions, such as issuing driver's licenses, are afforded a presumption against pre-emption unless pre-emption was "the clear and manifest purpose of Congress."[169] Nevertheless, USCIS's recent interpretation of "lawful presence" as it relates to DACA benefi-

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163. TATELMAN, *supra* note 107, at 19.

164. *Id.*

165. Real ID Act, *supra* note 109, § 202(c)(2)(C)(i).

166. *See id.* § 202(c)(2)(C)(ii) ("A temporary driver's license or temporary identification card issued pursuant to this subparagraph shall be valid only during the period of time of the *applicant's authorized stay in the United States* or, if there is no definite end to the period of authorized stay, a period of one year." (emphasis added)).

167. *See* TATELMAN, *supra* note 107, at 3 (explaining that provisions of the Real ID Act aimed to improve security).

168. *Cf.* Arizona v. United States, 132 S. Ct. 2492, 2505–07 (2012) (finding that section 5(C) of S.B. 1070 "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens," and section 6 would fall under "no coherent understanding" of Congress' intent for state officers' cooperation with federal law in the arrest of aliens).

169. *Id.* at 2501 (citations omitted) (internal quotation marks omitted).

ciaries,[170] along with its clarification on the lack of difference between "deferred action" and "deferred action for childhood arrivals,"[171] helps support the idea that Congress intended noncitizens such as DACA beneficiaries to be able to obtain temporary driver's licenses, and state laws to the contrary should be pre-empted.

C. *Policy Arguments for Allowing DACA Beneficiaries to Obtain Driver's Licenses*

Perhaps the best arguments for why DACA beneficiaries should be able to obtain driver's licenses are policy-based. Parts II.C.1 and II.C.2 argue that increased public safety and reduced insurance costs, respectively, support the licensing of all qualified drivers, regardless of immigration status. Both of these arguments apply with full force to DACA beneficiaries. Part II.C.3 explains why the ability to drive is necessary to secure employment; this argument is especially pertinent to DACA beneficiaries since they are authorized and encouraged to work. Beyond these safety, financial, and employment rationales lies pure politics. After the 2012 presidential election, it is clear that minority voters, particularly Latinos, have a powerful voice in election outcomes.[172] Although DACA beneficiaries do not have voting privileges, U.S. citizens who support them do. Thus, immigrant-friendly policies will likely translate to smart political moves post-2012.

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170. *See supra* note 8 and accompanying text.

171. *See* DACA FAQs, *supra* note 6 ("Deferred action for childhood arrivals is one form of deferred action. The relief an individual receives pursuant to the deferred action for childhood arrivals process is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.").

172. *Latino Voters Showing Strong Turnout in Election 2012*, WASH. POST (Nov. 6, 2012), http://articles.washingtonpost.com/2012-11-06/politics/35505575_1_latino-voters-hispanic-voter-turnout-mi-familia-vota; Elizabeth Llorente, *Election 2012: Obama Wins Re-Election, Clinches Latino Vote*, FOX NEWS LATINO (Nov. 6, 2012), http://latino.foxnews.com/latino/politics/2012/11/06/election-2012-obama-wins-re-election-after-clinching-ohio/; Jose Antonio Vargas, *Viewpoint: The Power of the Asian and Latino Vote*, TIME.COM (Nov. 8, 2012), http://ideas.time.com/2012/11/08/viewpoint-the-power-of-the-asian-and-latino-vote/; *see also* Julia Preston, *Republicans Reconsider Positions on Immigration*, N.Y. TIMES, Nov. 10, 2012, at A12 ("One of every 10 voters who cast ballots on Tuesday was a Latino, and they favored President Obama, with 71 percent of their votes, compared with 27 percent for Mitt Romney, forcing Republican leaders to wonder if they could ever regain the presidency without increasing their appeal to Hispanic Americans.").

1. *Increased Licensing for All Qualified Drivers Increases Safety on the Roads*

The basic purpose for issuing driver's licenses is to promote public safety by ensuring competent drivers.[173] Generally, to obtain a driver's license, an applicant must pass a written test on the state's driving rules, a road test, and often a vision test.[174] According to the American Association of Motor Vehicle Administrators, the testing of drivers is "an effective highway safety tool."[175] Because of public safety concerns, many law enforcement officials have expressed support for increased licensing.[176] For example, Rudy Landerso, Assistant Chief of Police in Austin, Texas, testified in 2003 in support of H.B. 396,[177] a Texas bill that would have increased immigrants' access to driver's licenses:

> [W]e strongly believe it would be in the public interest to make available to these communities the ability to obtain a drivers license. In allowing this community the opportunity to obtain drivers licenses, they will have to study our laws and pass a driver's test that will make them not only informed drivers but safe drivers.[178]

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173. *See* ALBERT HARBERSON, COUNCIL OF STATE GOV'TS, LICENSED BY THE STATES 21 (2002), http://www.csg.org/knowledgecenter/docs/infra/sgn0208LicensedByTheStates.pdf ("Driver's licenses were created for the purpose of protecting public safety by recognizing those individuals who met the necessary standards . . . includ[ing] age, knowledge of traffic laws, physical capability to drive and practical driving competence.").

174. *See* Odegaard, *supra* note 142, at 446 (discussing driver's license testing requirements); Spencer Garlick, Note, *License to Drive: Pioneering a Compromise to Allow Undocumented Immigrants Access to the Roads*, 31 SETON HALL LEGIS. J. 191, 200 (2006) (same).

175. *Policy Positions of the American Association of Motor Vehicle Administrators*, AM. ASS'N OF MOTOR VEHICLE ADM'RS 3, http://www.aamva.org/AAMVA-Policy-Positions/ (follow "Download the AAMVA Policy Positions" hyperlink) (last visited Mar. 25, 2013); *see also* Garlick, *supra* note 174, at 200 ("Individuals with a driver's license are likely to be better drivers than those without because access to driver's licenses provides access to driver's education, which provides knowledge of laws and public safety.").

176. *See Driver's Licenses for All Immigrants: Quotes from Law Enforcement*, NAT'L IMMIGR. L. CTR. (Oct. 2004) [hereinafter *Quotes from Law Enforcement*], http://v2011.nilc.org/immspbs/DLs/DL_law_enfrcmnt_quotes_101404.pdf (quoting thirteen law enforcement officers from various states on the importance of licensing all drivers).

177. H.B. 396, 77th Leg. (Tex. 2001) *available at* http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=77R&Bill=HB396.

178. *Quotes from Law Enforcement*, *supra* note 176.

Many religious community members feel the same.[179] In a letter to the California State Assembly in 2003, Elizabeth Sholes, Director of Public Policy at California Council of Churches, wrote: "Assuring that people who drive are qualified to do so will help diminish accidents and ensure higher standards of responsible behavior by those with motor vehicles."[180] After Illinois passed a bill that will allow undocumented immigrants to receive temporary driver's licenses,[181] Governor Pat Quinn affirmed that "Illinois roads will be safer if we ensure every driver learns the rules of the road and is trained to drive safely."[182] According to a DACA applicant from Michigan, allowing DACA beneficiaries to obtain driver's licenses "should be a peace of mind for the public."[183] Clearly, a broad spectrum of community members recognizes that increased licensing will improve public safety for everyone else. Accordingly, DACA beneficiaries should be able to obtain driver's licenses.

2. *Insured Drivers Reduce Insurance Costs for Other Insured Drivers*

Each year, accidents caused by uninsured drivers cost more than $4.1 billion in insurance losses.[184] Insured drivers must therefore pay higher premiums for accidents and injuries caused by uninsured driv-

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179. *See Driver's Licenses for All Immigrants: Quotes from Religious Organizations and Leaders*, NAT'L IMMIGR. L. CTR. (Dec. 2004), http://v2011.nilc.org/immspbs/DLs/DLquotes_relig_leaders_120804.pdf (quoting ten religious leaders from various states on the importance of licensing all drivers).

180. *Id*; *see also* Ben Poston, *DMV Report Adds to License Debate*, L.A. TIMES (Jan. 16, 2013), http://articles.latimes.com/2013/jan/16/local/la-me-unlicensed-20130116 (discussing a recent study conducted by California's Department of Motor Vehicles that found unlicensed California drivers to be three times more likely to cause a fatal crash as licensed drivers, and suggested that "merely meeting the modest requirements necessary to get a license . . . could improve road safety and help reduce the several thousand fatalities that occur in the state each year").

181. *See supra* note 112.

182. Gustavo Valdes & Catherine E. Shoichet, *Illinois Approves Driver's Licenses for Undocumented Immigrants*, CNN (Jan. 8, 2013, 8:34 PM), http://www.cnn.com/2013/01/08/us/illinois-immigrant-drivers-licenses/index.html.

183. Interview 6 (Oct. 15, 2012) (on file with author); *see also supra* note 73.

184. *Fact Sheet: Why Denying Driver's Licenses to Undocumented Immigrants Harms Public Safety and Makes Our Communities Less Secure*, NAT'L IMMIGR. L. CTR. 2 & n.7 (Jan. 2008) [hereinafter NILC Fact Sheet], http://v2011.nilc.org/immspbs/DLs/FactSheet_DLs_2008-01-16.pdf (citing a 2006 Insurance Research Council news release).

ers.[185] Another argument underlying increased licensing is that it will increase the percentage of drivers who are insured, as many insurance companies require proof of a driver's license before they will insure drivers;[186] this increase will, in turn, reduce insurance costs for all drivers.

Some states saw a dramatic decrease in the number of uninsured drivers soon after they implemented policies that allowed all qualified drivers to obtain driver's licenses, regardless of their immigration status. For example, upon changing its law in 1999, Utah saw its uninsured driver rate drop from 10% in 1998 to 5.1% in 2007.[187] Similarly, when New Mexico changed its law in 2003, the uninsured driver rate dropped from 33% in 2002 to 10.6% in 2007.[188] When New York considered issuing driver's licenses to undocumented immigrants, "the State Department of Insurance estimated that expanded license access would reduce the premium costs associated with uninsured motorist coverage by 34 percent," in turn saving New York drivers $120 million each year.[189] Based on this empirical data, it is evident that in-

185. *See* Stephanie K. Jones, *Uninsured Drivers Travel Under the Radar*, INS. J. (Aug. 18, 2003), http://www.insurancejournal.com/magazines/coverstory/2003/08/18/31590.htm (quoting Carolyn Gorman of the Insurance Information Institute: "The prices for uninsured motorist coverage are going up at a faster rate than any other part of the auto insurance policy. Everyone pays for it through higher premiums, because you have to insure yourself for an act that another person should be paying for."); *see also* Garlick, *supra* note 174, at 202–03 ("When an at-fault driver flees an accident or is uninsured, the not-at-fault driver must then turn to his own insurance company, which, after paying for damages, will often raise the premium for that driver. Some insurance companies offer a no-fault insurance policy to protect drivers who are involved in accidents with uninsured drivers, but again, such a policy raises costs for the ordinary driver.").

186. *See* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 220 (2004) (noting that "insurance companies generally require drivers to be licensed before they will insure them" and "[i]n most states, liability insurance must be established in order to register a motor vehicle").

187. NILC Fact Sheet, *supra* note 184, at 2. Utah allows those who cannot prove lawful presence to obtain a Driving Privilege Card. *See supra* note 112.

188. NILC Fact Sheet, *supra* note 184, at 2. According to a 2011 report from the Insurance Research Council, however, New Mexico was among the top five states with the highest number of uninsured motorists in 2009 (26%). INS. RES. COUNCIL, RECESSION MARKED BY BUMP IN UNINSURED MOTORISTS: IRC ANALYSIS FINDS ONE IN SEVEN DRIVERS ARE UNINSURED (2011), *available at* http://www.insuranceresearch.org/sites/default/files/downloads/IRCUM2011_042111.pdf.

189. Odegaard, *supra* note 142, at 445–46 & n.70; NILC Fact Sheet, *supra* note 184, at 2.

creasing access to driver's licenses reduces the amount of uninsured drivers, in turn making accidents and insurance premiums less costly for other insured drivers. For these reasons, DACA beneficiaries should be able to obtain driver's licenses.

3. Having a Driver's License Will Increase Employment Opportunities for DACA Beneficiaries

In most parts of the United States, the ability to drive is necessary to obtain and maintain employment.[190] In 2009, 76.1% of workers drove themselves to work.[191] In only three locations did at least 10% of the workforce use public transportation to get to work,[192] and in almost a third of the states, most notably in the South and Midwest, less than 1% of the workforce used public transportation.[193] Thus, driving is often a necessity for employment in areas that do not have adequate mass transit systems.[194] As more jobs are found in suburban areas, the negative effects of being denied a driver's license are exacerbated for immigrants who settle in those areas and for those who commute from urban areas.[195]

The fact that the federal government offers DACA beneficiaries work authorization is good reason to believe that it wants young im-

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190. Garlick, *supra* note 174, at 203.

191. *Transportation Statistics Annual Report*, BUREAU OF TRANSP. STATS. 95 (2010) [hereinafter TSAR 2010], http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/transportation_statistics_annual_report/2010/pdf/entire.pdf; *see also Most of Us Still Drive to Work—Alone*, U.S. CENSUS BUREAU (June 13, 2007), http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb07-cn06.html (showing that 87.7% of Americans in 2005 drove to work and 4.7% used public transportation).

192. *See* TSAR 2010, *supra* note 191, at 98 (providing a figure of the percentage of workers using public transportation in 2009). The three locations were New York, District of Columbia, and New Jersey. *Id.*

193. *Id.* Those states were Alabama, Arkansas, Kansas, Maine, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Vermont. *Id.*

194. *See supra* note 143 and accompanying text.

195. *See* Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 175 (2001) ("Due in large part to the suburbanization of the American economy, inadequate transportation drastically limits the job prospects of low-income individuals, especially those who live in inner-city neighborhoods."); Pabón López, *supra* note 142, at 97 (providing examples of difficulties immigrants face when living in suburban or rural areas where driving to work is a necessity).

migrants to contribute to the economy. According to a DACA applicant from Maryland, the ability to work without the ability to drive is like "having only half of what's promised."[196] After learning that Michigan announced it would not allow DACA beneficiaries to obtain driver's licenses, a DACA applicant from Michigan questioned, "Why would we even apply for [DACA] if we can't have a license?"[197] By prohibiting DACA beneficiaries from obtaining driver's licenses, states are limiting their employment prospects, especially if they live in areas with limited access to public transportation.[198] A DACA applicant from Maryland explained that if she could not drive, she would have to get a job within walking distance from her house, and those do not pay well; but if she could drive, she explained, "I would have access to more jobs that would pay more."[199] An applicant from Michigan said, "Who is going to hire you if you have no form of transportation to get to work and back? . . . It's not like everybody lives next to their job."[200] Thus, granting DACA beneficiaries authorization to work but denying them licenses to drive is counterproductive. For this reason especially, DACA beneficiaries should be able to obtain driver's licenses.

III. CONCLUSION

The new Deferred Action for Childhood Arrivals program has brought the debate over immigrants' access to driver's licenses into a new light. The legal precedents in this field do not provide an encouraging framework for DACA beneficiaries.[201] But, considering the similarities between DACA beneficiaries and the *Plyler* plaintiffs,[202] and the differences between DACA beneficiaries and undocumented immigrants generally,[203] it is likely that a state denying driver's licenses to DACA beneficiaries will have a difficult time in court. Both the legis-

196. Interview 5 (Oct. 9, 2012) (on file with author).

197. Interview 7 (Oct. 13, 2012) (on file with author).

198. *See* Bassett, *supra* note 143, at 303–04 (noting that most rural areas offer mainly low-wage jobs because there are fewer job opportunities in industries that pay higher wages).

199. Interview 2 (Oct. 3, 2012) (on file with author).

200. Interview 6 (Oct. 15, 2012) (on file with author).

201. *See supra* Part I.

202. *See supra* Part II.A.1.

203. *See supra* Parts II.A.1–2.

lature—through the Real ID Act[204]—and the executive—through the USCIS regulations[205]—help make this clear. Fortunately, most states will not have to encounter any potential legal battles since they allow DACA beneficiaries to obtain driver's licenses.[206] A close inquiry into the policy reasons for licensing DACA beneficiaries helps explain why these states made the right decision.[207]

204. *See supra* notes 165–166 and accompanying text.

205. *See supra* notes 170–171 and accompanying text.

206. *See supra* notes 15–19 and accompanying text.

207. *See supra* Part II.C.