

DRIVER'S LICENSES AND UNDOCUMENTED IMMIGRANTS: THE FUTURE OF CIVIL RIGHTS LAW?

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In the United States, efforts to end racial discrimination have generally been viewed as struggles for basic civil rights. The anti-discrimination aim of the civil rights movement of the 1950s and 1960s might be considered the primary civil rights concern. With the help of cases like *Brown v. Board of Education*,¹ officially sanctioned school and housing segregation was dismantled. The triumph of the ban on racial discrimination can be seen in a myriad of laws, including the Civil Rights Act of 1964,² the Voting Rights Act of 1965,³ and the Fair Housing Act of 1968.⁴

As immigration has dramatically transformed the racial demographics of this nation, the United States today is seeing a new generation of civil rights grievances emerge. This Article analyzes how immigration generates, and will for the foreseeable future continue to generate, new civil rights controversies in the United States.⁵ The nation has only begun to appreciate how Mexican migration, combined with that from the rest of the world, has changed the entire country, not just the region known as the American Southwest. Issues associated with immigration and border enforcement, language regulation, cultural difference, and equal citizenship and full membership, are arising with increasing frequency and will likely continue to do so in the future.

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¹ 347 U.S. 483 (1954).

² Pub. L. No. 88-352, 78 Stat. 241 (1964).

³ Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁴ Pub. L. No. 90-284, 82 Stat. 81 (1968).

⁵ See Kevin R. Johnson, *The End of "Civil Rights" as We Know It? Immigration and Civil Rights in The New Millennium*, 49 UCLA L. Rev. 1481 (2002).

The nexus between immigration and civil rights has tightened as the overlap between immigrant and minority status has grown. From the late 1800s through 1965, the U.S. immigration laws preferred immigrants from northern Europe. In 1965, Congress repealed the discriminatory national origins quota system, which greatly increased migration from the developing world to the United States.⁶

The globalizing world economy, facilitated by improvements in technology and transportation, has accelerated the demographic changes in the United States. It is much more likely today that labor travels across national borders than a century ago. Many people of color from developing nations migrate to the developed world for jobs. The international labor market has created workers with ties and allegiances to more than one nation. For example, associations of Mexican immigrants from the same town, but living in this country – known as hometown associations, have become politically active in both the United States and Mexico.⁷ Global citizens with transnational identities pose challenges to the nation-state as it previously existed.⁸

Liberalization of the immigration laws, combined with globalization, has contributed to the fact that the vast majority of immigrants to the United States since 1965 are people of color.⁹ Many major U.S. civil rights laws do not, however, address discrimination based on immigration status. Indeed, discrimination against immigrants often is legally acceptable.¹⁰ Although the law ordinarily tolerates discrimination against immigrants within limits,¹¹ it generally condemns racial discrimination.¹² For example, although the requirement that

⁶ See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (analyzing demographic impacts on 1965 law and congressional understanding of those impacts).

⁷ See Johnson, *supra* note 5, at 1494, n. 80; see also Michael Peter Smith, *The Social Construction of Transnational Citizenship*, 9 U.C. DAVIS J. INT'L L. & POL'Y 105 (2003) (analyzing emergence of transnational citizenship of Mexican citizens who migrate to the United States).

⁸ See generally Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001) (analyzing how global diasporas of people creating multinational allegiances have undermined the nation-state concept).

⁹ For example, for fiscal years 2000 through 2002, the largest percentages of immigrants to the United States came from Mexico, India, China, the Philippines, and Vietnam. See U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2002 YEARBOOK OF IMMIGRATION STATISTICS 8 (Table B), available at <http://uscis.gov/graphics/shared/aboutus/statistics/Immigs.htm> (last visited Oct. 29, 2004).

¹⁰ See *infra* text accompanying note 11 (citing authorities).

¹¹ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens The fact that an Act of Congress treats aliens differently from citizens does not itself imply that such disparate treatment is 'invidious.'"); see also *Demore v. Kim*, 538 U.S. 510, 521-22 (2003) (quoting *Mathews v. Diaz* and upholding mandatory detention of immigrants convicted of certain crimes pending deportation hearing).

¹² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (holding that all racial classifications, including those in public university's affirmative action program, are subject to strict scrutiny and can be justified only by a compelling state interest); *Gratz v. Bollinger*, 539 U.S. 244, 270-72 (2003) (same).

a police officer be a U.S. citizen has withstood legal scrutiny,¹³ a racial prerequisite would not. Conceptions of civil rights, as well as legal remedies, must adapt to ensure that discrimination on the basis of immigration status does not effectively amount to discrimination on account of race. In other words, the law must police governmental conduct based on immigration status to ensure that it does not serve as a proxy for race and allow for circumvention of the core ban on anti-discrimination.

More generally, this article contends that the United States must reconceptualize "civil rights" to comport with modern realities.¹⁴ As race and races evolve in the national consciousness,¹⁵ the civil rights challenges facing racial minorities will change as well. U.S. society unquestionably is changing dramatically. High levels of immigration of diverse peoples of color have literally transformed the face of this nation. Latina/os have emerged as the largest minority in the United States. Change, as can be expected, has brought tension.¹⁶ Recognition of new civil rights concerns may arise from, as well as be symptomatic of, this tension.

To begin the task of reconsidering the expansion of the civil rights agenda in the United States, this article considers a matter that appears routine to most U.S. citizens, but which amounts to a serious civil rights issue for certain immigrant communities. The ability to obtain a driver's license has civil rights implications for undocumented Mexican immigrants.¹⁷ The denial of licenses to undocumented immigrants generally increases fears of arrest and deportation, limits access to jobs, and increases immigrant vulnerability to exploitation by unscrupulous employers. Without acknowledging the impacts of the state policy at stake, the United States Supreme Court in 2001 rejected a class action challenge brought by a lawful immigrant from Mexico who primarily speaks Spanish, to Alabama's new English language requirement for driver's license tests.¹⁸

The state laws governing immigrant eligibility for driver's licenses follows a fascinating trajectory. As anti-immigrant sentiment hit a fever pitch in the early 1990s,¹⁹ states began limiting undocumented immigrant eligibility for driver's licenses. Over the last decade, civil rights activists in many states have pressed for undocumented immigrant eligibility for driver's licenses.²⁰ Opposition to the calls for restoration of driver's license eligibility intensified with

¹³ See, e.g., *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state law requiring that police officers be citizens); *infra* text accompanying notes 169-71 (analyzing Supreme Court's refusal to disturb California's citizenship requirement for probation officers).

¹⁴ See Johnson, *supra* note 5, at 1491-1510.

¹⁵ See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994) (analyzing social construction of races).

¹⁶ See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1995).

¹⁷ See *infra* text accompanying notes 22-147.

¹⁸ See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁹ See generally IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) (collecting essays analyzing growth of nativist sentiment in 1990s).

²⁰ See *infra* text accompanying notes 22-24.

the fears generated by the tragic loss of life on September 11, 2001, which was perpetrated by noncitizens, many of whom had state-issued driver's licenses.²¹

This article contends that driver's license eligibility constitutes an important civil rights concern for Latina/os. As we will see, the driver's license controversy is part of a larger phenomenon, the proverbial tip of a civil rights iceberg. After analyzing the stakes in the driver's license debate, this article studies the impact of the changing immigrant-driven racial demographics generally on civil rights grievances in a multiracial United States. Although the vast majority of today's immigrants are people of color, the courts, including the Supreme Court, have failed to acknowledge the overlap between immigrant and minority status in the modern United States. Because of this overlap, discrimination based on alienage status may mask unlawful racial discrimination. Alienage status, as well as language, may serve as a proxy for race. Under modern circumstances, a desire to discriminate against noncitizens may be a conscious or unconscious way of engaging in racial discrimination. To this point, however, the courts have failed to carefully consider the immigrant/racial minority overlap in the interpretation and application of the anti-discrimination laws.

As modern sensibilities have evolved, racism has become more sophisticated and covert. Civil rights law has been slow in responding. However, the overlap between immigrant status and race has not been lost on communities of color, policy-makers, and law-makers. The political debates on issues such as immigration, language regulation, bilingual education, and driver's license eligibility often reveal deep racial schisms, with certain minority communities deeply interested in the outcomes.

Although often submerged in political debates, the issue of race and identity politics is of tremendous practical relevance to policymakers, advocates, scholars, and the media. A full understanding of the ongoing controversies is possible only if the depth of Latina/o sentiment about the importance of the policy issue in question is fully appreciated. Part I of the article analyzes the brewing controversy in states across the nation over undocumented immigrants' ability to obtain driver's licenses. Part II considers the more general issue implicated by driver's license eligibility – the expanding frontier of “civil rights” for immigrant communities.

I. DRIVER'S LICENSES AS A CIVIL RIGHTS ISSUE?

In recent years, states across the nation, from Georgia to California and Idaho to Rhode Island, have experienced political controversy over whether undocumented immigrants should be able to obtain driver's licenses.²² In Cali-

²¹ See *infra* text accompanying notes 25-32.

²² See Sylvia R. Lazos Vargas, *Missouri, the “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 800-02 (2002); Ricardo Alonso-Zaldivar, *States Take the Lead on Policies for Immigrants*, L.A. TIMES, June 9, 2003, at 1 (“In recent months, at least 39 states have considered more than 100 bills that affect immigrants’ access to driver’s licenses.”); see, e.g., Tatiana Pina, *Driver’s License Bills Draw Capitol Crowd*, PROVIDENCE J.-BULL., Mar. 27, 2003, at B4 (Rhode Island); David Cho, *Driver’s License Legislation Pushes Hispanics into Va. Politics*, WASH. POST, Mar. 23, 2003, at C4 (Virginia); Ivan Penn, *Effort to Help Illegal Immigrants Get Driver’s Licenses Draws Protest*,

fornia, for example, Latina/o legislators pressed aggressively for several years for a law that would permit certain undocumented immigrants to be eligible for a license and, after the law was passed, political controversy continued.²³ States with burgeoning Latina/o populations across the nation have seen similar controversies. About thirty states, including Arizona, Colorado, Florida, Georgia, and Virginia, currently limit driver's license eligibility to lawful immigrants.²⁴

Immediately after September 11, driver's license eligibility became an important national security issue. In short,

[t]he question of issuance of driver's licenses to nonimmigrant aliens has once again arisen in state legislatures and in Congress, as a disparate group of lawmakers, civil liberties advocates, public safety officials, representatives of the insurance industry and immigration advocacy groups attempt to balance national security and immigration enforcement interests with civil liberties concerns and basic issues of mobility and traffic safety.²⁵

National security concerns understandably took on new urgency in the wake of the horrible loss of life that occurred on September 11, 2001.²⁶ Most of the noncitizen hijackers had obtained state driver's licenses or identifications; as a consequence, fears of identify fraud came to dominate the debate over driver's license eligibility.²⁷ In response, many states tightened the rules

BALT. SUN, Mar. 6, 2003, at 4 (Maryland); Caitlin Copple, *Immigrant Licenses Debate Heats Up*, IDAHO STATESMAN, Feb. 14, 2003, at 4 (Idaho); Mark Bixler, *License Debate Looms*, ATLANTA J. & CONST., Dec. 24, 2001 (Georgia); Jim McLean, *License Law Riles Hispanics*, TOPEKA CAPITAL-J., Aug. 22, 2001 (Kansas). For a list of the status of driver's license proposals in various states as of April 2003, see National Immigration Law Center, 2003 State Driver's License Proposals (unpublished document on file with author). In 2003, Nevada tightened its driver's license eligibility and denied access of undocumented immigrants to licenses. See S.B. 483, 2003 Leg., 72nd Sess. (Nev. 2003) (added as Chapter 232 to Nevada Revised Statutes).

²³ See *infra* text accompanying notes 122-47.

²⁴ See National Immigration Law Center, *Immigrants & Public Benefits: Driver's Licenses, Overview of State's Driver's License Requirements*, at http://www.nilc.org/immspbs/DLs/Overview_list.htm (Updated Feb. 6, 2003).

²⁵ Austin T. Fragomen, Jr. & Steven C. Bell, *Federal and State Lawmakers Again Address Driver's Licenses for Foreign Nationals*, INT'L BUS. NEWS & COMMENT, Oct., 1, 2002; see Daniel B. Wood, *Should Illegals Be Given Driver's Licenses?*, CHR. SCI. MON., Apr. 28, 2003, at 2.

²⁶ See, e.g., Rich Stanek, *Terrorism: Minnesota Responds to the Clear and Present Danger*, 29 WM. MITCHELL L. REV. 739 (2003) (discussing Minnesota's efforts to limit access to driver's licenses).

²⁷ See Yilu Zhao, *A Nervous State Looks to Limit Licenses*, N.Y. TIMES, Apr. 6, 2003, at 1 ("Sixteen of the 19 suicide attackers [of September 11] held valid driver's licenses or non-driver's identification cards from states including Virginia and Florida, and these cards enabled them to board planes, open bank accounts and rent apartments."); see also James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 419, 438-48 (2002) (discussing circumstances of September 11 hijackers entry into the United States). See generally THE 9/11 COMMISSION REPORT; FINAL REPORT OF THE COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) (documenting the circumstances leading up, and responses, to September 11 attacks).

for obtaining driver's licenses.²⁸ Congress held hearings on the issue,²⁹ ultimately introducing a bill that would have required states to issue high tech driver's licenses.³⁰

National identification cards previously had been rejected on civil liberties grounds, with the primary concern being that such identifications would give the government undue power to violate the privacy of individuals.³¹ In light of the public's apparent willingness to trade off civil liberties for heightened security, national identity card proposals enjoyed a revival after September 11. In a new world preoccupied with security, a national identity card once again surfaced as a serious policy option.³²

Driver's license eligibility, however, was an important policy matter long before September 11. A number of states previously barred undocumented immigrants from securing a driver's license.³³ The debate over the issue has been heated and racially divisive, which, at first glance, might seem surprising. Licensing schemes would not seem likely to evoke much controversy. Although a public safety regulation enforced in a racially discriminatory manner might be expected to provoke criticism,³⁴ that generally has not been the case with the driver's license eligibility requirements.

Importantly, the controversy over undocumented immigrant access to driver's licenses has not emerged on a clean slate. Nativism and anti-immigrant sentiment historically have influenced federal, state, and local laws.³⁵ Although no widespread problems of identity fraud had resulted from issuing

²⁸ See Lazos, *supra* note 22, at 800-01 (summarizing state laws limiting eligibility for driver's licenses enacted in 2002); Zhao, *supra* note 27 (noting this trend in the states). Security concerns have generally resulted in more rigorous enforcement of driver's license laws. See, e.g., *Freeman v. State*, 2003 WL 21338619, at *7 (Fla. Cir. Ct. June 6, 2003) (requiring that Muslim woman take a driver's license photograph without her veil and emphasizing that, since September 11, "there are new threats to public safety, including both foreign and domestic terrorism").

²⁹ See *A License to Break the Law? Protecting the Integrity of Driver's Licenses: Hearing on H.R. 4633 before the U.S. Senate Comm. on Gov't Affairs*, 107th Cong., 2d Sess. (2002).

³⁰ See *Driver's License Modernization Act*, H.R. 4633, 107th Cong., 2d Sess. (2002) (requiring driver's licenses to require computer chip embedded in state license or identification with biometric data on the holder of the identification).

³¹ See, *infra* note 32 (citing authorities).

³² See Ben Quarmby, *iBrief/Biotechnology: The Case for National DNA Identification Cards*, 2003 DUKE L. & TECH. REV. 2 (2003). For the contention that a loose-knit national identification system has in fact emerged in the United States, see Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319 (2002).

³³ See Mary A. Celeste, *Coming to a Court Near You: An Unlicensed Immigrant Driver*, 38 CT. REV. 6 (2001); see, e.g., GA. CODE ANN. § 40-5-15(15)(2001); see also National Immigration Law Center, *supra* note 22 (listing rules in different states on immigrant eligibility for driver's licenses). Texas considered a variation, stamping the words "Non-Citizen" on driver's licenses issued to noncitizens. See S.B. No. 944 § 11(4), 78th Legis. (Tex. 2003).

³⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding that enforcement of San Francisco law regulating laundries that was enforced only against Chinese laundries violated the Equal Protection Clause of the Fourteenth Amendment).

³⁵ See generally JOHN HIGHAM, *STRANGERS TO THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (3d ed. 1992); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (1989).

licenses to undocumented immigrants, the California Legislature enacted a new law in 1993 making only citizens and lawful immigrants eligible for driver's licenses, thus denying them to undocumented immigrants.³⁶ This law came shortly before voters overwhelmingly approved the anti-immigrant initiative known as Proposition 187, which was marred by a campaign with distinctly anti-Mexican overtones and came to be seen as the embodiment of the nativist outburst of the early 1990s.³⁷ The driver's license bill was one of many hotly contested matters such as undocumented immigrant access to public benefits, public education, bilingual education, and language rights during a sustained period in which California's Latina/o community felt under attack.³⁸

California was not alone. Even though the federal government has primary authority for regulating immigration, many states passed laws designed to discourage undocumented immigration. Race inevitably influenced the debates, with Latina/os and Anglos often finding themselves taking radically different positions. Limits on eligibility for driver's licenses also came at a time when the federal immigration laws, in no small part due to major reform efforts in 1996,³⁹ were generally viewed as having negative impacts on immigrants. The 1996 immigration reforms, for example, resulted in record levels of deportations, with the vast majority of those removed from the country coming from Mexico.⁴⁰

Courts historically have been deferential to the federal government's decisions to discriminate against noncitizens.⁴¹ Courts also have given considerable latitude to the states in the treatment of immigrants so long as there is no direct conflict with federal policy and the state law does not purport to regulate immigration.⁴² Supreme Court decisions, however, suggest possible grounds for constitutional challenges to the laws barring undocumented immigrants from obtaining a driver's license.⁴³ To this point, however, no court has actu-

³⁶ See *infra* text accompanying notes 122-26.

³⁷ See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-61 (1995); Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration*, 17 CHICANO-LATINO L. REV. 118, 129-42 (1995).

³⁸ See, e.g., Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1247-68 (2000) (analyzing impacts on Latina/os of voter initiative that eliminated bilingual education in California); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1541-53 (1995) (analyzing racial impacts of Proposition 187, which would have denied public benefits to undocumented immigrants, including access to public education).

³⁹ See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA]; Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁴⁰ See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 853-55 (2003).

⁴¹ See, e.g., *Demore v. Kim*, 538 U.S. 510, 521 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

⁴² See, e.g., *Bernal v. Painter*, 467 U.S. 216 (1984); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1979).

⁴³ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (invalidating Texas law barring undocumented children from public schools); *Graham v. Richardson*, 403 U.S. 365, 382

ally invalidated a state law precluding undocumented immigrants from access to driver's licenses. In fact, one court upheld a state law barring undocumented immigrants from driver's licenses.⁴⁴

In the end, driver's license eligibility is not simply a public safety issue. It is about the status and security of Latina/os, particularly undocumented immigrants, in U.S. society. Unless that fact is acknowledged and addressed by policy-makers, it will remain a heated issue riddled by controversy and racial divisiveness.

A. *The Evolution of Driver's Licenses in Modern U.S. Society: From Ensuring Safety to Providing Identification*

On its face, access to a driver's license would seem to be a mundane issue dealing with public safety, having nothing to do with civil rights, racial discrimination, and immigration. As automobiles emerged as the preferred mode of transportation in the United States in the early years of the twentieth century, state legislatures across the country originally passed driver's license laws to improve public safety. Testing and licensing were generally believed to be ways of ensuring that drivers on the road knew the basic rules of traffic safety. With a license necessary to drive in most states, driver's license schemes mandate testing on traffic and safety rules.

The justification for licensing schemes is to ensure that only safe drivers are on the roads.⁴⁵ To this end, insurance companies generally require drivers to be licensed before they will insure them. In most states, liability insurance must be established in order to register a motor vehicle.⁴⁶

Because of safety concerns, the original idea was to ensure licensing of *all* drivers.⁴⁷ The reasoning was that, in order to protect the public safety, we should encourage any person – lawful and undocumented immigrant, as well as

(1971) (applying strict scrutiny to state alienage classification); *see also* Lazos, *supra* note 22, at 798-807 (suggesting reasons for constitutional concerns with denying driver's licenses based on immigration status).

⁴⁴ *See* John Doe No. 1 v. Georgia Dep't of Public Safety, 147 F. Supp. 2d 1369, 1376 (N.D. Ga. 2001); *see also* Lauderbach v. Zolin, 41 Cal. Rptr. 434, 439 (Cal. Ct. App. 1995) (holding that state could deny driver's licenses to immigrants without Social Security numbers who were unlawfully in the country but not to immigrants without Social Security numbers who were lawfully in the country).

⁴⁵ *See* AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, DRIVER LICENSE EXAMINATIONS: A MANUAL FOR DRIVER-LICENSING AUTHORITIES IN THE EXAMINING OF APPLICANTS FOR DRIVERS' LICENSES 1 (1959) ("The main purpose of driver examining is to determine whether an applicant for a license has the abilities, knowledge, and skills needed by the driving task for safe operation. A driver examination, successfully passed, means that the driver meets established standards of what he must know and be able to do regarding certain aspects of motor vehicle operation."); EDWARD C. FISHER, VEHICLE TRAFFIC LAW 368-70 (1961) (summarizing safety rationale for driver's licensing); 7A AM. JUR. 2d, *Automobile and Highway Traffic* § 105 (1997) (stating that driver's license laws "are designed to promote safe driving and to protect the traveling public") (footnote omitted).

⁴⁶ *See, e.g.,* ALASKA STAT. § 28.22.0111 (Michie 1998); CAL. VEHICLE CODE § 1656.2 (West 2004); W. VA. CODE § 17A-3-3 (2000).

⁴⁷ *See* AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, *supra* note 45, at 1 ("The legal basis for driver licensing is found in the state's power to legislate for the welfare and safety of its citizens. *Such laws may not be discriminatory . . .*") (emphasis added); *see also* Alexander L. Mounts, *A Safer Nation?: How Driver's License Restrictions Hurt*

citizen – who drives to take the tests necessary to secure a driver's license.⁴⁸ This, in turn, would tend to maximize the number of drivers able to secure liability insurance. Public safety often dominates analysis of any proposed reforms to the driver's license eligibility requirements. Debates about testing requirements for the elderly⁴⁹ and efforts to reduce alcohol-related traffic accidents⁵⁰ are two contemporary examples. Although there is no right to drive, it generally has been a privilege extended to persons believed to be safe drivers.

From a law enforcement perspective, licensing of as many drivers on the road as possible makes the most sense. Allowing undocumented immigrants to obtain a driver's license if they pass a driving test should promote traffic safety. It also might encourage undocumented immigrants to cooperate with police and not to flee when approached by law enforcement because they lack a license.⁵¹ This explains why some local police departments prohibit officers from inquiring about immigration status.⁵² Consequently, some law enforcement leaders have endorsed measures that would ensure that undocumented immigrants are eligible to obtain driver's licenses.⁵³

It may seem obvious that the states initially enacted driver's licensing schemes to promote public safety. However, in modern times, a driver's license also is the primary form of identification in a country, that for civil liberties reasons, has not adopted a national identification system.⁵⁴ Despite their foundation in public safety, driver's licenses have evolved into much more. Today, an accepted form of identification is necessary for full access to U.S. society, from opening a bank account to renting an apartment, as well as to avoid instant suspicion as a law breaker in interactions with the police and virtually any governmental official.

Indeed, driver's licenses issued by the states in some ways are de facto national identification cards, the denial of which injures immigrants. Given that the United States lacks a national identification card, a driver's license and a Social Security card often are the only forms of identification generally accepted by employers, banks, landlords, and other economic actors and institutions. To an undocumented immigrant, a driver's license means the ability to live in a way that most Americans take for granted. "[T]he denial of drivers'

Immigrants & Noncitizens, Not Terrorists, 37 IND. L. REV. 247 (2003) (offering public safety arguments for licensing undocumented immigrants).

⁴⁸ See *supra* note 45 (citing authority).

⁴⁹ See, e.g., Vasiliki L. Tripodis, *Licensing Policies for Older Drivers: Balancing Public Safety with Individual Mobility*, 38 B.C. L. REV. 1051 (1997); Jennifer L. Klein, *Elderly Drivers: The Need for Tailored License Renewal Procedures*, 3 ELDER L.J. 309 (1995).

⁵⁰ See, e.g., Suzanne Graves, *Checkpoints and the Fourth Amendment: Saving Grace or Constitutional Martyr?*, 32 CONN. L. REV. 1487 (2000) (analyzing constitutional implications of sobriety checkpoints and other police practices designed to enforce drunk driving laws); Elizabeth F. Rubin, *Trying to Be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. CIN. L. REV. 1105 (1994) (same); see also *infra* note 73 (citing authority reviewing cases dealing with deportation of immigrants convicted of driving under the influence of alcohol).

⁵¹ See *infra* text accompanying notes 80-81.

⁵² *Id.*

⁵³ See Mark Bixler, *Illegal Immigrant Driver's Licenses Endorsed: 2 Metro Police Chiefs Support Bill*, ATLANTA J. CONST., Dec. 17, 2002, at 1A.

⁵⁴ See *supra* text accompanying notes 31-32.

licenses to undocumented Mexicans exacerbates immigrant fears of arrest and deportation, limits access to jobs, and generally increases immigrant vulnerability to exploitation in the workplace and elsewhere.”⁵⁵

Employers fearing sanctions under federal law for hiring undocumented workers may request to see driver's licenses from prospective employees.⁵⁶ The lack of a license, however, does not mean that an undocumented immigrant will not find a job. Rather, it more likely relegates a person to the secondary labor market, with low wages and poor conditions, reserved primarily for undocumented immigrants.⁵⁷ This underground market flourishes, even though such employment is unlawful.⁵⁸ Between five and fifteen million undocumented immigrants live and work in the United States.⁵⁹ The lack of driver's licenses thus facilitates the exploitation of undocumented immigrants in the secondary labor market.⁶⁰

Even under the current workplace enforcement system, *legal* immigrants of certain national origins suffer discrimination by employers who fear violating the employer sanctions law. Discrimination against lawful immigrants does not violate Title VII of the Civil Rights Act of 1964, the major piece of employment discrimination legislation in the United States.⁶¹ Although such discrimination violates the Immigration Reform and Control Act of 1986, the prohibition has proven largely ineffective; evidence shows that employers often discriminate against persons of Latina/o and Asian ancestry because of fears of hiring an undocumented worker and violating the law.⁶²

1. Race, Immigration Status, and Driver's Licenses

There is a significant overlap, which is more pronounced in some regions of the country, between immigration status, race, and national origin.⁶³ Most lawful immigrants and undocumented immigrants in the United States are peo-

⁵⁵ Johnson, *supra* note 5, at 1504 (footnote omitted).

⁵⁶ See *infra* text accompanying notes 84-88.

⁵⁷ See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94); Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 U. MIAMI L. REV. 1045 (1999); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER, RACE, & JUST. 405 (1998).

⁵⁸ See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 226-30 (2003).

⁵⁹ See *infra* note 64 (citing authorities) and text accompanying note 90.

⁶⁰ See Johnson, *supra* note 58, at 226-30.

⁶¹ See *Espinoza v. Farah Mfg Co.*, 414 U.S. 86, 95 (1973); see also Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (advocating amendment of Title VII to prohibit discrimination against immigrants authorized for employment under the law).

⁶² See U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 52 (1994) (referring to "studies of discriminatory practices against foreign-sounding and foreign-looking applicants for employment" due to employer sanctions in 1996 immigration reform).

⁶³ See Johnson, *supra* note 5, at 1505-08.

ple of color.⁶⁴ This means that any change to the immigration laws, or in the treatment of immigrants, will disparately impact people of color. This is why, in the modern United States, every immigration issue has racial and civil rights components.

According to the best current estimates, over one-half of the millions of undocumented immigrants living in the United States are from Mexico, making it by far the largest sending country of immigrants to this country.⁶⁵ The percentage of undocumented immigrants from Mexico is higher in some states in the border region, such as Texas, Arizona, and California. Consequently, a driver's license law that does not allow undocumented immigrants to obtain a driver's license will have a disparate impact on persons of Mexican ancestry. This helps explain why the issue is of such importance to Latina/os (two-thirds of whom are of Mexican ancestry), and thus to national Latina/o civil rights organizations.⁶⁶

In some ways, the fact that race – and the related volatile issue of immigration control⁶⁷ – is at issue in the driver's license controversy may explain the ferocity of the political debate. All states and all drivers presumably would rather have licensed, safety-tested, drivers on the road than unlicensed drivers. State and local governments, concerned with safety and costs of medical care and emergency services for accidents, generally would support expanding eligibility for driver's licenses for public safety reasons. For precisely these types of reasons, the City of San Jose opposed passage of the California law in 1993 that denied licenses to undocumented immigrants:

We believe the safety of the public is not served by denying driver's licenses to an entire segment of the population. It is to California's advantage to ensure that drivers are licensed and have proven their skills and knowledge of the vehicle code. By prohibiting licensing, registration and insuring of some immigrants, the public will be exposed to greater numbers of unsafe drivers. Further, the bill will not result in a curtailment of illegal immigration into California⁶⁸

⁶⁴ See U.S. DEP'T OF HOMELAND SEC., *supra* note 9, at 214 (Table Q) (compiling data estimating that, as of 2000, 7 million undocumented immigrants resided in the United States with over 68 percent from Mexico and other top five undocumented immigrant sending countries being El Salvador, Guatemala, Columbia, Honduras, and China). The Urban Institute estimated that, as of March 2002, 9.3 undocumented immigrants lived in the United States, with 57 percent from Mexico. See JEFFREY S. PASSEL ET AL., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (Jan. 12, 2004).

⁶⁵ See U.S. DEP'T OF HOMELAND SEC., *supra* note 9, at 214 (Table Q).

⁶⁶ See Michele L. Waslin, *Safe Roads, Safe Communities: Immigrants and State Driver's License Requirements*, National Council of La Raza Issue Brief, May 2002; Mexican American Legal Defense & Education Fund, 2002 Legislative Advocacy Newsletter 4. Similar issues arise over immigrant identification in Canada. See Sherene H. Razack, "Simple Logic": Race, the Identity Documents Rule, and the Story of a Nation Besieged and Betrayed, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 199 (Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris eds., 2002).

⁶⁷ See *infra* text accompanying notes 82-101.

⁶⁸ Letter from Roxanne L. Miller, Legislative Representative for City of San Jose, to Assembly Member John Vasconcellos, Chair, Assembly Ways and Means Committee (Aug. 23, 1993) (on file with author); see *infra* text accompanying notes 122-47 (discussing developments in California over undocumented immigrants eligibility for driver's licenses).

Liability insurance companies naturally would favor maximizing the number of holders of driver's licenses, which in turn would improve driver safety and increase the market for insurance.

The denial of driver's licenses to undocumented immigrants does not make sense, even in a post-September 11 world.⁶⁹ The United States currently lacks a complete record of the identifications of undocumented immigrants in the country. Given that today's driver's licenses serve more of an identification than a safety function in modern circumstances, allowing undocumented immigrants to secure a license would further national security concerns. If licenses were open to all, driver's license records would create a fuller record of the identity of all U.S. residents. Such records, if accurate, would assist law enforcement authorities in fighting crime and combating terrorism.

2. Criminal Justice Implications

The lack of an identification deeply affects the nature of undocumented immigrants' interactions with law enforcement officers. Lacking a license, an undocumented immigrant may want to avoid any interaction with the police and worry about possible deportation from the country for something as minor as a burned out taillight. Fear of deportation runs especially deep in immigrants with roots in the United States, such as those with U.S. citizen children; if deported, they may face loss of family, friends, and a job.

Driving without a license is a crime in many states⁷⁰ and, under certain circumstances, can result in deportation of an immigrant under the immigration laws.⁷¹ The Supreme Court has held that a state law may constitutionally allow for the arrest of a person for a minor traffic violation.⁷² Resisting arrest and other crimes resulting in possible deportation are more likely to occur as well if an undocumented immigrant fears arrest and deportation.⁷³

In some states, driving without a license may also be grounds for impoundment of the motor vehicle.⁷⁴ At the same time, driving is a necessity

⁶⁹ See *supra* text accompanying notes 25-32 (discussing increased concerns with driver's licenses after September 11).

⁷⁰ See, e.g., CAL. VEH. CODE § 40302(a) (West 2003).

⁷¹ See Sylvia R. Lazos Vargas, "*Latina/o-ization*" of the Midwest: *Cambio de Colores* (Change of Colors) as *Agromaquilas* Expand into the Heartland, 13 LA RAZA L.J. 343, 363 (2002).

⁷² See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that police did not violate Constitution in arresting a woman for violating seat belt law).

⁷³ See Immigration & Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2); see also Stacia A. Kiehl, *Deporting Legal Aliens Convicted of Drunk Driving: Analyzing the Classification of Drunk Driving as a "Crime of Violence,"* 86 MARQ. L. REV. 797 (2003) (reviewing cases on whether noncitizens could be deported from the country for criminal convictions for driving a motor vehicle under the influence); Kelly L. Lancaster, *Felony Drinking and Driving Convictions as Crimes of Violence Under 18 U.S.C. § 16(b): What the Words Really Mean for Aliens*, 37 NEW ENG. L. REV. 395 (2003) (same). The Board of Immigration Appeals has been aggressive in seeking to deport noncitizens convicted of driving under the influence. See, e.g., *Matter of Ramos*, 23 I. & N. Dec. 336 (2002) (ruling that, after reversals by several courts of appeals, driving under the influence can only be a "crime of violence," and thus subject a person to removal, only if it is committed recklessly).

⁷⁴ See, e.g., ALA. CODE § 32-5A-203(c)(1); CAL. VEH. CODE § 22651(p) (West 2003); WASH. REV. CODE ANN. § 46.20.435(1).

for many people, including undocumented immigrants, who live and work in the United States. Consequently, we should assume that some undocumented immigrants will drive with or without a driver's license. It has been estimated that hundreds of thousands of unlicensed (and thus uninsured) drivers regularly drive in the state of California.⁷⁵

State and local law enforcement have allegedly engaged in racial profiling of Latina/o, African American, and other minority drivers in traffic stops.⁷⁶ If Latina/os are profiled for traffic stops, we can expect that more undocumented immigrants will suffer not just the indignity and embarrassment of a stop and possible arrest, but also criminal sanction – and possible deportation – for not having a driver's license than their numbers on the road might indicate.

Efforts in recent years to enforce driver's license laws have adversely affected undocumented Latina/o immigrant workers. For example, in a small Kentucky town that had seen a rapid growth in its Latina/o population, local police, in the name of public safety, set up roadblocks on the road to a poultry processing plant, which employed many undocumented Mexican immigrants, to verify driver's licenses and motor vehicle registrations; many arrests resulted and the Immigration and Naturalization Service instituted deportation proceedings against some immigrants.⁷⁷

⁷⁵ See Michael Cabanatuan & Erin McCormick, *California's Hit-and-Run Crisis: More Flee Fatal Accidents Here Than Any Other State*, S.F. CHRON., July 27, 2003, at A1 (citing California Department of Motor Vehicles report estimating that California had one million unlicensed drivers on the road, including many undocumented immigrants).

⁷⁶ See, e.g., *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2000); *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), modified, 548 F.2d 715 (7th Cir. 1977) (en banc); *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000). For example, a class action was brought in 2003 alleging that police in Rogers, Arkansas "operate pursuant to a policy, practice or custom of racial profiling that results in stops, detentions, investigations, searches and seizures of Latinos or Latino-looking individuals" in violation of the U.S. Constitution. See *Lopez v. City of Rogers*, 2003 U.S. Dist. LEXIS 14570, at 2 (W.D. Ark. Aug. 8, 2003). Racial profiling also has long been a problem in immigration enforcement. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000); *Hodgers-Durkin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985); *Ramirez v. Webb*, 787 F.2d 592 (6th Cir. 1986) (per curiam). See generally Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675 (2000) (analyzing the problems with racial profiling in the enforcement of the immigration laws).

⁷⁷ See Ty Tagami, *Roadblock Reveals Problem for Courts*, HERALD-LEDGER (Kentucky), Nov. 26, 2000. In Southern California, Latina/os voiced disapproval of police arrests of Mexican immigrants for minor crimes, such as selling goods on the street without necessary licenses, and delivering them to the INS for their removal from the country. See H.G. Reza, *Minor Offenders in Orange County Taken to Border Patrol*, L.A. TIMES, Feb. 12, 2001, at B1 (reporting that local police agencies were arresting Latina/o immigrants on minor criminal matters and, rather than prosecuting them, transporting them to nearest INS checkpoint to facilitate their deportation); Kimi Yoshino, *Soto Urges Anaheim to Restore Trust of The Latino Residents*, L.A. TIMES (Orange County ed.), Mar. 21, 2002, at B3 (discussing tensions arising from local police assisting federal immigration officers in removing undocumented immigrants arrested on minor crimes). Anaheim, a city in Orange County, California, has been the site of much anti-immigrant activity, including police conduct of this type, as it experienced the growth of its Latina/o population. See Rick Hampson, *New Brooklyns Replace White Suburbs*, USA TODAY, May 19, 2003, at 1A.

Thus, police practices make driver's licenses all the more important for Latina/o immigrants. State and local police have been implicated in serious deprivations of civil rights of Mexican immigrants.⁷⁸ Local enforcement of the immigration laws has been on the upswing in the aftermath of September 11, a development that increases the likelihood of civil rights abuses.⁷⁹ This, in turn, has increased the importance of driver's licenses to undocumented immigrants who will have even greater reason to fear arrest and deportation if they lack a license and come into contact with police.

To facilitate law enforcement, many state and local police departments have worked for years to gain the trust and respect of the undocumented immigrant community. Effective law enforcement requires a good relationship between police and the immigrant community. To help encourage immigrants to cooperate with police, many departments prohibit its officers from inquiring into the immigration status of any person – victim, witness, or perpetrator – and have resisted any involvement in immigration enforcement.⁸⁰ Indeed, after September 11, some local police departments refused to cooperate with the federal government in interviewing Arab and Muslim noncitizens because of local policies precluding the inquiry into the immigration status of any person.⁸¹ In a system in which undocumented immigrants are denied driver's licenses, arrests for lack of a license will appear to the immigrant community as if the police are enforcing the immigration laws; such perceptions will thwart law enforcement efforts to gain the trust and cooperation of that community.

3. The Immigration Control Arguments Against Driver's License Eligibility for Undocumented Immigrants

Rather than only protecting public safety, driver's licenses could also be seen as an immigration control device.⁸² Indeed, the most consistently vociferous objections to expanding license eligibility to undocumented immigrants center on the need to help enforce the immigration laws. The truth of the matter, however, is that millions of undocumented immigrants live and work in the United States. This is true even though they are in the country in violation of the law and employers are prohibited from employing them.⁸³

⁷⁸ See Johnson, *supra* note 40, at 863-64 (discussing adverse civil rights impacts resulting from increased state and local involvement in immigration enforcement); *supra* text accompanying notes 70-75.

⁷⁹ See *supra* text accompanying notes 25-32; see also Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (offering legal and policy arguments against state and local enforcement of the immigration laws); Michael J. Wishnie, *Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (same).

⁸⁰ For example, the Los Angeles Police Department has a policy of not inquiring into a person's immigration status, although the policy is often violated. See Theodore W. Maya, *Comment, To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611 (2002).

⁸¹ See Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURVEY AM. L. 371, 372-74 (2002).

⁸² See Maria Pabón Lopez, *States Driver's License Regulations as Immigration Control* (Jan. 30, 2004) (unpublished manuscript on reserve with author).

⁸³ See Johnson, *supra* note 58, at 245-52.

Reforms to the federal immigration laws generally have increased the importance of driver's licenses to undocumented immigrants. The Immigration Reform and Control Act of 1986,⁸⁴ which allows employers of undocumented immigrants to be sanctioned, placed greater importance on access to driver's licenses.⁸⁵ Employers can accept driver's licenses as identification in attempting to verify identity and work authorization.⁸⁶

Without a driver's license, undocumented immigrants may be unable to secure work from law-abiding employers. However, unscrupulous employers who do not comply with the law may surmise that an employee without a license is undocumented and subject to exploitation.⁸⁷ The law does little to prevent such exploitation. For example, federal labor law does not provide full relief to an undocumented worker who was unlawfully discharged for engaging in union organizing activities, although it does for citizen and lawful immigrant workers.⁸⁸

As many studies show, undocumented immigrants come to the United States for jobs and family.⁸⁹ They have been a normal feature of the U.S. economy for most of the twentieth century. Millions of undocumented immigrants live and work in the United States.⁹⁰ The critical question is how they will be treated – in a humane way worthy of contributing members of society, or as a caste of disposable labor that is slighted at every turn. In this way, the issue of driver's licenses is a struggle over inclusion of undocumented immigrants in U.S. society.⁹¹

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act required states to include social security numbers on driver's licenses.⁹² Although ultimately repealed because of privacy concerns,⁹³ the measure reflects the political pressures for more uniform national identification to assist in immigration enforcement. The 1996 immigration reforms also encouraged

⁸⁴ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁸⁵ For questioning of the effectiveness of employer sanctions, see U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 62, at 50-76; Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 678-96 (1997).

⁸⁶ See Immigration & Nationality Act § 274A(5)(D), 8 U.S.C. § 1324a(5); 8 C.F.R. § 274a.2(b)(1)(v)(A) (as amended by the Immigration Reform and Control Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

⁸⁷ See *supra* text accompanying notes 56-60.

⁸⁸ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). For criticism of *Hoffman Plastic*, see Christopher David Ruiz Cameron, *Borderline Decisions: How the Supreme Court Uses Marginal Cases Like Hoffman Plastic Compounds to Make Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 LA RAZA L.J. 103 (2003).

⁸⁹ See Johnson, *supra* note 58, at 230-32, 245-52.

⁹⁰ See *supra* text accompanying notes 56-60.

⁹¹ See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1051 (1994). See generally Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998) (analyzing barriers to Latina/os' efforts to secure full benefits and privileges of citizenship).

⁹² Pub. L. 104-208 § 656(b), 110 Stat. 3009, 3009-716-18 (1996).

⁹³ See Department of Transportation and Related Agencies Appropriations Act of 2000, Pub. L. No. 106-69, 113 Stat. 986, 1027 (2000).

states to conduct pilot programs in denying licenses to undocumented immigrants.⁹⁴

In this way, the United States, in the words of one observer, "is moving toward a system of national identification numbers, databanks, and identity cards"⁹⁵ States, through the issuance of driver's licenses, help implement a loose system of national identification. The system that has emerged, however, excludes undocumented immigrants.

If immigration control is the primary reason for limiting undocumented immigrant access to driver's licenses, then an issue of federal preemption arises.⁹⁶ The federal government is entrusted with the regulation of immigration.⁹⁷ State laws, such as California's anti-immigrant Proposition 187, have been invalidated for intruding on federal powers.⁹⁸ The problem with this argument is that federal law, at least since 1996, has encouraged the states to limit driver's license eligibility to lawful immigrants.⁹⁹

Identity fraud as well as immigration enforcement concerns have motivated the calls for national identification systems.¹⁰⁰ Fraud is a frequently asserted objection to extending driver's license eligibility to undocumented persons.¹⁰¹ Any driver's license law obviously must include provisions that minimize the potential for fraud. Acceptance of reliable foreign identification cards would help safeguard against identity fraud.

4. *Ready Alternative to Driver's Licenses: The Mexican Identification Card*

Recognition of another form of identification available to undocumented Mexican immigrants might cure some of the problems associated with denial of driver's licenses. In recent years, major banks and some state and local government agencies have begun to accept the *matricula consular*, an identification issued by the Mexican government to its citizens. Among other things, this has allowed undocumented Mexican immigrants to open bank accounts, write

⁹⁴ See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 § 502, 110 Stat. 3009-671 (1996); see also Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 759 n.126 (1997) (viewing this and other provisions of 1996 immigration reform law as subordinating immigrants).

⁹⁵ Richard Sobel, *The Degradation of Political Identity Under a National Identification System*, 8 B.U. J. SCI. & TECH. L. 37, 39 (2002); see also Sobel, *supra* note 32 (analyzing growing pressures for national identification because of security concerns after September 11); R. Brian Black, Note, *Legislating U.S. Data Privacy in the Context of National Identification Numbers: Models from South Africa and the United Kingdom*, 34 CORNELL INT'L L.J. 397, 402-24 (2001) (analyzing privacy concerns with U.S. consideration of national identification systems).

⁹⁶ See Lazos, *supra* note 22, at 782-90; *supra* text accompanying notes 41-44.

⁹⁷ See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (citation omitted).

⁹⁸ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that Proposition 187 was pre-empted by federal law).

⁹⁹ See *supra* text accompanying notes 92-94.

¹⁰⁰ See, e.g., Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 TEX. L. REV. 89 (2001).

¹⁰¹ See *infra* text accompanying notes 127-28 (discussing California Governor's objections to driver's license bill that he vetoed in 2002).

checks, use automated teller machines, and bank on the internet.¹⁰² A few states that allow undocumented immigrants to obtain a driver's license accept *matriculas* for driver's license purposes.¹⁰³ In light of the growing acceptance of the Mexican identification in the United States, other Latin American nations are considering issuing similar forms of identification.¹⁰⁴

Even after the focus on national security and identity fraud after September 11, the federal government has been willing to sanction foreign identifications for certain purposes. Section 326 of the USA PATRIOT Act provides that the Treasury Department will establish regulations governing bank standards for the verification of customer identities, the concern being the secret diversion of funds for terrorist ends.¹⁰⁵ The Department's regulations, after generating controversy, allow for banks to accept foreign identifications, such as the *matricula consular*.¹⁰⁶ This agency action confirms that the federal government does not consider identity fraud to be a serious concern with *matriculas* and that their acceptance for purposes of securing driver's licenses will not undermine the "war on terror."

Growing acceptance of the *matricula consular* has meant a great deal to the undocumented immigrant community. Consider access to banking services. It is well-known that Mexican migrants send billions of dollars annually to friends and family in Mexico.¹⁰⁷ Before being sued in a class action, some wire transfer companies charged exorbitant rates to wire funds to Mexico,¹⁰⁸ exploiting undocumented Mexicans who had no alternative for sending money home. When banks began accepting the *matricula consular*, undocumented immigrants were able to open checking accounts and directly send checks, or

¹⁰² See Kathryn Lee Holloman, *USA PATRIOT Act Customer Identification Programs and the Matricula Consular as Primary Identity Verification for Mexican Nationals*, 7 N.C. BANKING INST. 125 (2003); see also Seema Mehta, *L.A. to Honor Identity Cards from Mexico*, L.A. TIMES, May 15, 2002, at B4; E. Scott Reckard, *B of A to Vie for a Piece of Immigrant Market*, L.A. TIMES, Apr. 23, 2002, at C1; Jennifer Mena, *Mexican ID Card Gains Status, and Long Lines of Applicants*, L.A. TIMES, Jan. 20, 2002, at B6; John M. Glionna, *Solving a Bureaucratic Identity Crisis: Immigrants: San Francisco Accepts Mexican Consular Card as Official ID, Drawing Critics' Ire*, L.A. TIMES, Dec. 8, 2001, at B1; see also Evan Pondel, *California Health Insurer to Accept Alien ID Cards*, DAILY NEWS (Los Angeles), June 27, 2003, at A2 (reporting that major health insurer announced that it would accept foreign identifications).

¹⁰³ See, e.g., N.M. STAT. ANN. § 66-5-5 (2002); Kate Nash, *Immigration Hot Topic for Gov.*, ALBUQUERQUE J., June 25, 2003, at A2; see also Carl Ingram, *Panel OKs Use of Identity Cards*, L.A. TIMES, June 18, 2003, at B6 (reporting that legislative committee had approved bill that would require California state agencies to accept Mexican and other foreign identification cards).

¹⁰⁴ See Seth Kugel, *Iffy Prospects for a New Dominican ID Card*, N.Y. TIMES, May 4, 2003, at sec. 14, p. 7; Jennifer Mena, *Central American Nations Plan IDs for Immigrants*, L.A. TIMES, Sept. 7, 2002, at B1.

¹⁰⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56 § 326, 115 Stat. 272, 317-18 (2001).

¹⁰⁶ See Customer Identification Programs for Financial Institutions, 68 Fed. Reg. 55, 335 (Sept. 25, 2003) (to be codified at 31 C.F.R. pt 103).

¹⁰⁷ See Johnson, *supra* note 5, at 1503 n.121.

¹⁰⁸ See *In re Mex. Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001) (approving settlement in class action).

otherwise transfer funds, to family and friends in Mexico and avoid exploitation at the hands of the wire transfer companies. Undocumented immigrants also were not forced to hoard cash in their residences, which subjected them to increased risks of crime.

With the denial of an identification to many immigrants, the document fraud industry has flourished. In addition, unscrupulous *notarios* (notaries) have exploited undocumented immigrants with false promises of offering them legal status.¹⁰⁹ In sum, seeking a degree of security in this country, undocumented immigrants have been defrauded by those falsely promising proper immigration and other legal documentation. Such exploitation may be avoided to a certain extent with the growing acceptance of foreign identifications.

Acceptance of foreign identifications has generated considerable controversy among advocates of stronger immigration controls. Critics claim that recognition of the Mexican identification card, for example, will inappropriately encourage illegal immigration and condone violation of the U.S. immigration laws.¹¹⁰ Tom Tancredo, a member of Congress who has championed a variety of measures to restrict immigration and bolster enforcement,¹¹¹ as well as the deportation of an undocumented high school honors student and his family who were featured in a news story,¹¹² introduced a bill that would limit acceptance of foreign identifications.¹¹³ The arguments against the acceptance of foreign identifications ranged from the unreliability of the identification to concerns with immigration control and terrorists.¹¹⁴

The popularity of the *matricula consular* demonstrates the importance of an accepted identification card to undocumented immigrants who live and work in the United States. Denial of an identification sends a message of exclusion and effectively excludes undocumented immigrants from many amenities available to U.S. citizens. The lack of an identification makes criminal law enforcement, including that in connection with the "war on terror," more, not less,

¹⁰⁹ See Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REF. 639, 652-53 (1994); Milagros Cisneros, *Legislative Review, H.B. 2659: Notorious Notaries — How Arizona Is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287 (2000).

¹¹⁰ See Michelle Mittelstadt & Alfredo Corchado, *Mexican ID Opens Doors for Undocumented Workers in U.S.*, DALLAS MORNING NEWS, Feb. 18, 2003, at 1A; see also *supra* text accompanying notes 82-101 (outlining immigration control arguments for limiting access to driver's licenses).

¹¹¹ See Jon Frandsen, *House Members Press Case for Using Troops for Border Security*, GANNETT NEWS SERV., Oct. 9, 2002.

¹¹² See Katie Kerwin McCrimmon, *Tancredo: Deport Teen; Lawmaker Says Honor Student is in the U.S. Illegally*, ROCKY MOUNTAIN NEWS, Sept. 14, 2002, at 17A (reporting on Tancredo's efforts to have undocumented immigrant honors student and his family deported).

¹¹³ See H.R. 502, 108th Cong., (2d Sess. 2003); Tyche Hendricks, *House Bill Would Outlaw Accepting Foreign IDs*, S.F. CHRON., Jan. 30, 2003, at A4. In May 2003, Colorado's Governor signed into law a bill that bars state and local government from accepting *matriculas consulares*. See Colo. H. B. 03-1224 (2003) (adding COLO. REV. STATS. ART. 72.1). The law was attacked by one state senator as anti-Mexican. See Sen. Ron Tupa, *Thinly Veiled Attack on Mexican Immigrants Impractical and Actually More Dangerous*, ROCKY MOUNTAIN NEWS, July 5, 2003, at 8C.

¹¹⁴ See Audrey Hudson, *House Panel Probed ID Cards; Foe Cites 'Opportunity for Terrorists'*, WASH. TIMES, June 20, 2003, at A5.

difficult because millions of undocumented immigrants are unaccounted for in any official governmental record-keeping system.¹¹⁵

B. The Supreme Court Leads the Way? Alexander v. Sandoval (2001)

To this point, the courts, including the United States Supreme Court, have not been particularly sensitive to the importance of driver's licenses to the immigrant community. In 1990, Alabama passed a law making English the official state language, which prompted the state to stop driver's testing in languages other than English.¹¹⁶ Previously, Alabama had administered examinations in over a dozen languages without incident for more than twenty years.

In *Alexander v. Sandoval*,¹¹⁷ the Supreme Court failed to consider the racial and national origin impacts of Alabama's new requirement that driver's license testing be in English. This is true despite the fact that the new policy "disproportionately impacted minority communities [and] the state refused to make the testing accommodations [for non-English-speakers] that it did for illiterate and disabled English-speakers."¹¹⁸ The Court decided the class action brought by Martha Sandoval, a legal immigrant from Mexico, on procedural grounds – that an implied private right of action did not exist under Title VI of the Civil Rights Act of 1964 – and emphasized that it did not decide "whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin."¹¹⁹

The Alabama testing requirement did not expressly target immigrants or Latina/os. However, one could certainly understand that Alabama's change in its driver's license law to bar testing in any language other than English would primarily affect foreigners, including Latina Spanish speakers such as Martha Sandoval. The communities that would be affected reasonably should have been known to the law's supporters given the close nexus between immigration status, national origin, and English language proficiency in modern U.S. society.¹²⁰ Nor was it a coincidence that the law was enacted at a time of high

¹¹⁵ See *supra* text accompanying notes 56-60.

¹¹⁶ For discussion of the impacts of English language requirements on Latina/os, see Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 433-47 (1999); see also Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997) (analyzing how language regulation by government contributes to discrimination against Latina/os by private citizens).

¹¹⁷ 532 U.S. 275 (2001).

¹¹⁸ Johnson, *supra* note 5, at 1504-05 (footnote citing, *inter alia*, *Sandoval v. Hagan*, 197 F.3d 484, 489-91 (11th Cir. 1999) and *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1280-91 (M.D. Ala. 1998)).

¹¹⁹ *Alexander*, 532 U.S. at 279. The Court only addressed whether a private right of action could be implied into the statute, not whether the government could take actions to enforce its provisions. See *id.* at 287-91.

¹²⁰ See Hing, *supra* note 16, at 874 ("Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not white and who in

Latina/o immigration to the United States when nativist sentiment captured the nation.¹²¹

In *Sandoval*, the Supreme Court wrestled with whether private parties could sue to enforce the provisions of a major civil rights law. The serious civil rights issues at stake to Latina/o immigrants were lost in legalisms. It was left for another day to analyze the discriminatory impacts of driver's license eligibility requirements.

C. A Case Study: California's Flip/Flop on Driver's Licenses for Undocumented Immigrants

Before the 1990s, many states permitted undocumented immigrants to obtain a driver's license, a policy decision consistent with the safety function of the licensing scheme.¹²² In a time of tumult over illegal immigration and the proposal and adoption of many anti-immigrant measures,¹²³ the California legislature in 1993 passed a law, which went into effect in 1994, making undocumented immigrants ineligible for a California driver's license.¹²⁴ Immigration control concerns carried the day, with restrictionist groups such as the Federation for American Immigration Reform backing the law, while the California Department of Motor Vehicles and immigrants' rights groups registered opposition.¹²⁵

It is important to keep in mind the circumstances in which California restricted driver's license eligibility in 1993. The legislature was not faced with widespread safety problems, or claims of identity fraud, associated with undocumented immigrants having access to licenses. Nonetheless, it enacted the law prohibiting undocumented immigrants from obtaining a license in the midst of anti-immigrant ferment and social turmoil, which culminated in the landslide passage of Proposition 187.¹²⁶ The driver's license law was one of many anti-immigrant measures during this period that the Latina/o community saw as affronts to their dignity.

Over the next few decades, Latina/o politicians in the California legislature pushed for the passage of a bill that would permit undocumented immigrants to obtain a driver's license. In 2002, the legislature passed such a bill. However, Democratic Governor Gray Davis, who expressed concerns with the potential national security consequences of identity fraud if it became law,

most cases do not speak English, criticism of the inability to speak English coincides neatly with race.").

¹²¹ See *supra* text accompanying notes 14-16.

¹²² See *supra* text accompanying notes 45-53.

¹²³ See Philip P. Pan, *Lawmakers Focus on Illegal Immigration*, L.A. TIMES (San Gabriel Valley ed.), Aug. 29, 1993, at J1; Eric Bailey & Dan Morain, *Anti-Immigration Bills Flood Legislature*, L.A. TIMES, May 3, 1993, at A3; see also Johnson, *supra* note 37, at 655 n.128 (noting various anti-immigrant measures pending in California legislature during this time); Jennifer M. Bosco, *Undocumented Immigrants, Economic Justice and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 72-76 (1994); Robert S. Ryan, *Proposition 187: California's Stance Against Illegal Immigration*, 25 CAP. U.L. REV. 613, 620-22 (1996).

¹²⁴ See CAL. VEH. CODE § 12801.5 (West 2000).

¹²⁵ See *supra* text accompanying notes 67-68.

¹²⁶ See *supra* text accompanying notes 35-38.

vetoed the bill.¹²⁷ Governor Davis vigorously defended his veto, claiming among other things that "[t]he bill I got would allow people for whom there was an outstanding warrant . . . for murder, treason or espionage to get a driver's license."¹²⁸

Outraged by the veto, the Latina/o Caucus of the California legislature, which had grown dramatically in size since 1990,¹²⁹ declined to endorse Governor Davis in his bid for reelection in 2002.¹³⁰ This was an extraordinary measure – a group of *Democratic* Latina/o legislators refused to endorse an incumbent *Democratic* governor in large part because of his veto of a driver's license bill. Davis won the election, but by a narrower margin than expected before the driver's license controversy and with lukewarm support from Latina/o voters.

A driver's license bill was introduced again in California's 2003-04 legislative session.¹³¹ Facing a recall election and needing Latina/o support, Governor Davis signed the bill into law, even though it was more liberal than the one he previously had vetoed.¹³² The Governor's signing of the new law obviously reflected political exigencies.¹³³

The controversy was not over, however. Arnold Schwarzenegger campaigned in the recall election with the promise of repealing the driver's license law because, in his view, it posed national security risks.¹³⁴ Moreover, opponents of the new law challenged it in court,¹³⁵ claiming that it was preempted by federal law. Finally, sponsors of an initiative that would repeal the bill began collecting signatures with the hope of placing the issue on the ballot for voters to decide in 2004.¹³⁶ Ultimately, after Governor Schwarzenegger's election, the sponsor of the driver's license bill, Senator Gil Cedillo, successfully

¹²⁷ See Margaret Talev & Kevin Yamamura, *Davis Defends Decision on Driver's License Bill*, SCRIPPS HOWARD NEWS SERV., Oct. 18, 2002.

¹²⁸ *Id.* (quoting Davis); see William Booth, *A Driver's License Debate in California*, WASH. POST, Sept. 10, 2002, at A3.

¹²⁹ See Kevin R. Johnson, *Latina/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 920-21 (2002).

¹³⁰ See Dan Morain, *Latino Caucus Won't Support Davis Reelection Campaign*, L.A. TIMES, Oct. 5, 2002, at B1.

¹³¹ See S.B. 60, Chap. 326, 2003-04 Sess. (Cal. 2003) (amending CAL. VEH. CODE §§ 1653.5, 12800, 12801, 12801.5, 12814.5, 1300 and adding CAL. VEH. CODE §§ 12801.2, 12801.9).

¹³² See Peter Nicolas and Jennifer Mena, *Bill Allowing Illegal Immigrants to get Driver's Licenses is Signed*, L.A. TIMES, Sept. 6, 2003, at B1. The bill that Governor Davis vetoed would have allowed only undocumented immigrants in the process of regularizing their immigration status to obtain a license; the bill signed in the law did not include this restriction. See A.B. 60, 2002 Sess. (Cal. 2002) (passed the Assembly and Senate, Sept. 14, 2002, vetoed by Governor, Sept. 30, 2002).

¹³³ See Margaret Talev, *Recall Campaign Affecting Davis' Political Actions*, VENTURA COUNTY STAR (California), June 16, 2003, at A1; Aurelio Rojas & Ed Fletcher, *Davis Feeling Heat to Sign Immigrant License Bill*, SCRIPPS HOWARD NEWS SERV., June 5, 2003.

¹³⁴ See Frank del Olmo, *Driver's License Test for Schwarzenegger*, L.A. TIMES, Oct. 13, 2003, at B15.

¹³⁵ See Gregg Jones, *Group Calls Driver's License Law Unconstitutional, Files Lawsuit*, L.A. TIMES, Nov. 11, 2003, at B6.

¹³⁶ See Geoffrey Mohan & Allison Hoffman, *Campaign Building Against License Law*, L.A. TIMES, Oct. 18, 2003, at A1.

obtained its repeal because of mounting political opposition, with the hope of passing a compromise bill in the future.¹³⁷ Latina/os engaged in a statewide boycott in response to the repeal.¹³⁸ Senator Cedillo later sponsored, and the California legislature passed, a new driver's license bill, which Governor Schwarzenegger vetoed.¹³⁹

As the controversy suggests, driver's licenses are an issue of great concern to the Latina/o community in California. The Latina/o Caucus, which championed the extension of driver's licenses to undocumented immigrants, mirrored the strong views of the Latina/o community about the legislation. National Latina/o advocacy organizations, such as the National Council for La Raza, pressed the California and other state legislatures on this issue.¹⁴⁰ At one point, the Mexican American Legal Defense and Education Fund opposed the California bill proposed in 2002 on the ground that it failed to sufficiently expand the eligibility of undocumented immigrants for driver's licenses.¹⁴¹ As an article in the *Los Angeles Times* observed, "[t]he inability of illegal immigrants to get driver's licenses has become a major issue in California's Latino community. During the last three years [prior to 2003], demonstrations have been held in support of the bills."¹⁴²

In a related move, California legislators proposed a bill in 2003 that would require state and local agencies to accept Mexican identification cards as a valid form of identification.¹⁴³ This suggests that the pressing issue is access to identification, rather than per se access to a driver's license. *Matriculas consulares*, for example, might substitute for a driver's license as a form of identification if accepted by important social and economic institutions.¹⁴⁴

In sum, the debate over undocumented immigrant access to a driver's license in California has been racially-polarized. Latina/o legislators vigorously advocated for the proposals, with strong support from Latina/o activist organizations. California's experience is not unique. The Midwest and the South have seen considerable Mexican migration in recent years. Mexican migrant communities have arisen in Iowa, Illinois, Missouri, and Nebraska,¹⁴⁵ with the meat and poultry processing industry employing many Mexican migrants. Not coincidentally, these regions also saw increased demands for immigrant access to driver's licenses as a form of identification. As one com-

¹³⁷ See Nancy Vogel, *Assembly Votes Down License Law*, L.A. TIMES, Dec. 2, 2003, at B1.

¹³⁸ See Hector Becerra & Chris O'Connell, *Latino Licenses Protest Hits Schools*, L.A. TIMES, Dec. 13, 2003, at B1; Erin Kragh, *Forging a Common Culture: Integrating California's Illegal Immigrant Population*, 24 B.C. THIRD WORLD L.J. 373, 387-93 (2004) (book review).

¹³⁹ See Jordan Rau & Nancy Vogel, *Governor Vetoes Immigrant License Bill*, L.A. TIMES, Sept. 23, 2004, at B1.

¹⁴⁰ See Lazos, *supra* note 71, at 363.

¹⁴¹ See *Hispanic Group Protests Driver License Restriction for Immigrants*, EFE NEWS SERVICE, Aug. 29, 2002.

¹⁴² Carl Ingram, *Driver License Measure Clears First Hurdle*, L.A. TIMES, Apr. 2, 2003, at 2; see *Driver's Licenses*, CITY NEWS SERV., Aug. 21, 2002.

¹⁴³ See A.B. 522, 2003-04 Sess. (Cal. 2003); see also *supra* text accompanying notes 102-115 (discussing increasing acceptance of Mexican identification cards).

¹⁴⁴ See *supra* text accompanying notes 102-115.

¹⁴⁵ See Lazos, *supra* note 71; Laura Rothstein, *Introduction to the Symposium Issue on Immigration in the Heartland*, 40 BRANDEIS L.J. 849 (2002).

mentator has observed, "access to driver's licenses [was] the most important state civil rights issue for Latinos [in Missouri] in the 2003 legislative session."¹⁴⁶ Specifically, in 2003, Georgia and Virginia, both with quickly growing Latina/o communities, saw controversies similar to California's over driver's licenses.¹⁴⁷ As in California, Missouri saw a racially-polarized debate about driver's license eligibility, even though race was not implicated on the face of the proposal. Ultimately, it is easy to see that the issue is about much more than a license to drive but in fact centers on the place of Latina/os in U.S. society.

II. THE EXPANSION OF CIVIL RIGHTS: IMMIGRATION, ALIENAGE, AND RACE

Immigration has transformed the United States and likely will continue to do so for the foreseeable future. After the elimination of racially discriminatory immigration laws in 1965, the flow of immigrants to the United States has been dominated by people of color from the developing world.¹⁴⁸ In response to labor demand and family, undocumented immigrants have been entering as well, despite the largest border militarization effort in U.S. history that began in the early 1990s.¹⁴⁹ These immigrants share some of the same civil rights concerns as citizens of color in the United States. As the driver's license controversy reveals, however, immigrants have their own specific civil rights concerns as well.

Discrimination has become more sophisticated over time, with the civil rights revolution of the 1960s going far to make the most blatant forms of discrimination both unlawful and condemned socially. However, unconscious racism, stereotypes, and institutional racism still adversely affect the treatment of racial minorities.¹⁵⁰ For immigrants, facially-neutral proxies that substitute for race may assist in facilitating racial discrimination. Discrimination against certain groups of racial minorities, for example, to an extent may be accomplished through reliance on immigration status and language regulation, two forms of discrimination at times permitted by law.¹⁵¹

¹⁴⁶ Lazos, *supra* note 22, at 825.

¹⁴⁷ See Cho, *supra* note 22. In 2004, controversy followed Florida Governor Jeb Bush's endorsement of a bill allowing undocumented immigrants to be eligible for a driver's license. See Michael Vasquez & Gary Fineout, *Governor Endorses Illegal-Alien Driving Bill*, MIAMI HERALD, Apr. 6, 2004, at 1A.

¹⁴⁸ See *supra* text accompanying notes 14-16.

¹⁴⁹ See PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000); TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICAN BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (1996); JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* (2002); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001).

¹⁵⁰ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ian Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

¹⁵¹ See Johnson & Martínez, *supra* note 38, at 1269-71.

To understand fully the political importance of certain issues to minority communities, lawmakers must recognize that many policy decisions have racial implications and disparately affect discrete communities. Seemingly unimportant issues like driver's license eligibility may be important issues to minority communities that warrant serious attention. Immigrants have begun to view these issues as civil rights matters and are taking political steps to vindicate their rights. In the fall of 2003, for example, the Immigrant Workers Freedom Ride, modeled after the 1960s civil rights freedom rides, criss-crossed the country and tried to raise public awareness by equating immigrants' struggle for civil rights with that of African Americans and other racial minorities in the 1960s.¹⁵² Past immigrant activism has included labor organization and related collective action.¹⁵³

Language, public benefits, immigration, and related issues, are battle grounds between Latina/os and Anglos.¹⁵⁴ This helps explain some of the deep-felt views expressed about the driver's licenses issue and the racially-polarized debate that surrounds the various proposals. Similarly, the quest for full membership in U.S. society helps explain the ferment over whether undocumented immigrants will be allowed to pay resident fees to attend public universities.¹⁵⁵ Although relatively few undocumented immigrants would directly benefit from liberalized fee policies, the political debate generated over them has been heated.¹⁵⁶ Access to higher education means access to the American dream for undocumented immigrants, a dream that brought many of them to the United States in the first place. Somewhat ironically, legislation originally proposed in Congress in 2003, which would allow for undocumented immigrants to pay in-state fees at public colleges and universities and to regu-

¹⁵² See <http://www.iwfr.org> (offering details about the Immigrant Workers Freedom Ride and seeking to bring the issues of immigrant workers to national attention).

¹⁵³ See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999); Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Maria Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME L. REV. 157 (2003).

¹⁵⁴ See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987).

¹⁵⁵ See Michael A. Olivas, *IRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J. COLLEGE & UNIVERSITY L. 435 (2004); Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995); Victor Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. INT'L L. & COM. REG. 393 (2002); Jessica Salsbury, *Evading "residence": Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459 (2003). Battles for driver's licenses and access to higher education for undocumented immigrants have tended to arise in tandem in the states. See Bobby Caina Calvan, *Calif. Debates Immigrants' Privileges: Measures Would Aid the Undocumented*, BOSTON GLOBE, May 24, 2003, at A3.

¹⁵⁶ See Mexican American Legal Defense and Education Fund, *Survey of Recent State Law and Legislation During the 2003-04 Legislative Term Aimed at Facilitating Undocumented Student Access to State Universities* (May 18, 2003) (unpublished document on file with author).

larize their immigration status, is known as the DREAM (Development, Relief, and Education for Alien Minors) Act.¹⁵⁷

Debates on issues like driver's license eligibility are not simply differences of opinion on matters of neutral public policy. Rather, the issues amount to a fight for status mobility in the United States. Latina/os, through measures seeking to ensure access to identification documents and to public universities, hope for access to the full amenities of social and economic life in the United States. One can expect these issues to increase with regularity due to a growing Latina/o, and immigrant, population working and living in the United States and seeking full membership.

Driver's licenses are the tip of the proverbial iceberg in terms of civil rights issues for undocumented immigrants in the United States. In the future, new civil rights concerns are likely to arise as well. Regulation of street vendors and day laborers soliciting work in some localities, for example, has racial impacts.¹⁵⁸ These are issues of great importance to Latina/o immigrants struggling for work and a livelihood.

Other areas of law have seen increasing awareness of the racial impacts of apparently facially neutral regulation. Exclusionary zoning is one example; zoning decisions can have racial impacts. At times, municipalities have sought to keep racial minorities, the poor, or both, from their communities.¹⁵⁹ The environmental justice movement, which addresses the siting of toxic hazards near poor minority communities, considers the racial impacts of public policy.¹⁶⁰ Recent years have seen increased scholarly attention paid to the racial impacts of immigration law and its enforcement.¹⁶¹ Language is another area that implicates race and national origin.¹⁶² These areas of law, although neutral on their face, have significant impacts on minority communities.

In modern U.S. society, race-based remedies will not be sufficient to prevent discrimination against communities of color. Of course, race-based policies, such as affirmative action, may be appropriate in certain circumstances. However, today's world of discrimination requires increased sophistication to eradicate the racial impacts of facially neutral laws and regulations. This is one lesson of the battles over access to driver's licenses.

¹⁵⁷ See Franco Ordonez, *Immigrant Students Find College Hard to Afford*, BOSTON GLOBE, June 15, 2003, at A1; see also Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 94 (1998) (contending that increasing criminalization of U.S. immigration laws in 1996 immigration reforms effectively "criminalize[s] dreamers").

¹⁵⁸ See Johnson, *supra* note 5, at 1501-02.

¹⁵⁹ See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1981-89 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1870-78 (1994).

¹⁶⁰ See generally LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000); ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (Clifford Rechtschaffen & Eileen Gauna eds., 2002).

¹⁶¹ See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525; Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202 (1997).

¹⁶² See *supra* text accompanying notes 116-21.

Consider another issue that has increased in prominence since September 11. Besides adversely affecting the civil rights of Arabs and Muslims,¹⁶³ heightened immigration enforcement also has injured Latina/o immigrants.¹⁶⁴ In the wake of September 11, Congress passed a law imposing a U.S. citizenship requirement for employment in airport security jobs, which directly affected Latina/o and Asian American immigrants.¹⁶⁵ Citizenship requirements can have devastating impacts on immigrant communities. More than eighty percent of the security screeners at San Francisco International Airport and about forty percent of those at Los Angeles International Airport lost their jobs as a result even though they were lawful immigrants.¹⁶⁶ Immigration checks at airports across the country have resulted in arrests and deportations, primarily of persons of Latin American and Asian ancestry.¹⁶⁷ Efforts to verify social security numbers of employees as part of the heightened security measures have spawned general fear among undocumented immigrants who secured employment through use of fraudulent documents.¹⁶⁸

In the United States today, discrimination based on citizenship status will disparately impact minority groups with large immigrant populations. In the 1982 case *Cabell v. Chavez-Salido*,¹⁶⁹ for example, the Supreme Court rejected an Equal Protection challenge to a California law interpreted to require that probation officers be citizens. For that reason, Los Angeles County refused to hire Jose Chavez-Salido, a lawful permanent resident for twenty-six years who had been born in Mexico but had received all of his formal education, including a college degree, in the United States.¹⁷⁰ After reviewing the history of the California law, Justice Blackmun dissented: "I can only conclude that California's exclusion of [Chavez-Salido and others like him] from the position of deputy probation officer stems solely from state parochialism and hostility toward foreigners who have come to this country lawfully."¹⁷¹ Given the

¹⁶³ See CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS (Elaine C. Hagopian ed., 2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 853 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

¹⁶⁴ See Johnson, *supra* note 40, at 855-70.

¹⁶⁵ See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 111(a)(2), 115 Stat. 597, 617 (2001). For criticism of this form of profiling, see Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003).

¹⁶⁶ See Steven Greenhouse, *Groups Seek to Lift Ban on Foreign Screeners*, N.Y. TIMES, Dec. 12, 2001, at B10.

¹⁶⁷ See Rosanna Ruiz, *Airport Sweep Nets 143 Arrests*, HOUSTON CHRON., Sept. 10, 2002, at A1; Ted Bridis, *D.C.-Area Airport Raids Net Nearly 100 Arrests*, CHI. TRIB., Apr. 24, 2002 at A12; Patrick J. McDonnell, *200 Airport Workers in West Arrested by INS*, L.A. TIMES, Mar. 27, 2002, at B7; Matthew B. Stannard, *INS Holds 25 at Airports*, S.F. CHRON., Mar. 26, 2002, at A1; *INS Arrests 30 Airport Employees in Portland*, SEATTLE TIMES, Dec. 21, 2001, at B2.

¹⁶⁸ See Michael Riley, *Social Security Net Snares Illegal Workers*, DENVER POST, Sept. 8, 2002, at A24; Dawn House, *Social Security Checks Called Silent Raid' on Illegals*, SALT LAKE TRIB., July 14, 2002, at A1.

¹⁶⁹ 454 U.S. 432 (1982).

¹⁷⁰ *Id.* at 448 n.1 (Blackmun, J., dissenting).

¹⁷¹ *Id.* at 463 (Blackmun, J., dissenting).

immigration demographics of California, it comes as no surprise that many Mexican immigrants stood to be affected by the citizenship requirement.

This history offers lessons for our treatment of immigrants today. The nation must be vigilant and strive to understand the civil rights impacts of governmental policies on immigrant communities. Otherwise, we can expect politically heated debates over public policy and racial divides that go unappreciated and unaddressed.

CONCLUSION

The driver's license issue brewing at the state and national levels is just one of many civil rights grievances that will demand our attention in the future. A seemingly innocuous part of everyday life has, under the circumstances of a high immigration, racially diverse society, become a matter of racially-charged debate. As a nation, we are likely to see similar issues surface in the future. Policymakers and lawmakers must take care to hear the pleas of minority communities about governmental policies and social realities. The traditional civil rights agenda forged to dismantle Jim Crow is no more. Because the modern United States is a more complicated world, care and sensitivity will be necessary to navigate the difficult waters ahead.

The driver's license issue touches something deep for undocumented immigrants who live and work in the United States and seek some recognition of their membership in the national community.¹⁷² The driver's license controversy exemplifies the marginalized status of undocumented immigrants. A new Jim Crow has emerged, with undocumented immigrants filling segregated jobs and living in segregated housing, with the denial of an identification facilitating segregation. Through a variety of legal mechanisms, undocumented immigrants, many of them people of color, are denied full membership in U.S. society. Ensuring full membership for all contributing members of the national community who live and work within its boundaries may well be the pressing social issue of the next millennium.

¹⁷² See Bosniak, *supra* note 91; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996). See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (analyzing efforts of different groups to fully belong in U.S. society).