

A BALANCED APPROACH TO A GROWING PROBLEM: HOW CONGRESS CAN KEEP ROADS SAFE AND THE ELDERLY POPULATION HAPPY

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When elderly drivers cause lethal automotive accidents, some survivors and state legislators press for more stringent license renewal requirements based on age. Yet, in part due to political backlash from senior citizens fearing age discrimination, states have implemented few effective age-based renewal requirements. Given the growing number of elderly drivers and the degree to which aging can impair seniors' ability to drive, this Note evaluates current state renewal procedures for elderly drivers, including in-person and accelerated renewals, as well as vision testing. This Note furthermore identifies third-party sources of information concerning the effects of age on individual drivers, with significant information coming from doctors, family and friends, police, and DMV personnel. This Note concludes by determining that certain age-based renewal procedures would likely survive rational basis review under the Constitution, and the author proposes Congress enact a law educating drivers, improving roads and highways, requiring medical reporting, educating referral sources in addition to doctors, accelerating age-based license renewal, and providing alternative transportation options.

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I. Introduction

Tara Sad, a member of the New Hampshire House of Representatives, received a phone call from one of her constituents.¹ Bette Champney, now a widow, told her State Representative the heart-breaking story of her husband's tragic death.² On August 25th, 2012, Bette's husband, Gary, was riding his motorcycle in a memorial run for a fallen soldier.³ Gary and about 200 other riders were traveling southbound when 87-year-old Robert Lockerby, traveling northbound, swerved into the southbound lane. Lockerby collided with the pack of motorcycles, killing Gary and one other rider. Bette's call inspired Sad to sponsor New Hampshire House Bill 263.⁴ The proposed bill required mandatory driving tests for license renewals after a driver reached the age of 75.⁵ Additionally, proposed House Bill 263 sought to encourage medical care providers to report drivers who posed a risk to public safety, as well as themselves.⁶ However, after being met with opposition, the bill was killed and reintroduced without the required mandatory driving tests.

The debate on driver's license renewal procedures always seems to flare when an elderly driver is involved in a high-profile accident. The issue of elderly drivers is not new and Tora Sad's story is not the first such accident; nor is New Hampshire House Bill 263 the first bill to receive opposition. The screening and evaluation of elderly drivers in the interest of public safety has also received attention due to accidents such as the one that occurred in Los Angeles in the summer of 2012.⁷ Just after school was let out, a 100-year-old driver reversed onto a sidewalk hitting eleven people and leaving four children in critical condition.⁸ A similar accident occurred in Santa Monica, California in 2003.⁹ In that instance, an eighty-six-year-old man drove

1. Garry Rayno, *Bill Seeks Immunity for Medical Providers who Report those Unfit to Drive at any Age*, UNION LEADER, Feb. 20, 2014, available at <http://www.unionleader.com/article/20140221/NEWS06/140229836>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Police: 100-year-old-driver Hits 11 near LA School*, CBS (Sept. 17, 2012, 3:53 PM), <http://www.cbsnews.com/News/police-100-year-old-driver-hits-11-near-la-school/> [hereinafter *Police*].

8. *Id.*

9. *Car Plows Through Market, Killing 9*, CNN (July 17, 2003, 11:46 AM), <http://www.cnn.com/2003/US/West/07/16/farmers.market.crash/>.

through a farmers market killing ten people, injuring sixty-three others, and leaving fourteen people in critical condition immediately following the accident.¹⁰

The accidents in Los Angeles, Westmoreland, and Santa Monica are all tragic examples of the harm elderly drivers can cause to the public, as well as themselves. Nevertheless, elderly drivers continue to face inconsistent rules across the country.¹¹ The problem will likely worsen as the number of elderly drivers continues to grow. Still, the United States remains without a comprehensive solution to dealing with elderly drivers. For now, the burden of determining whether an elderly driver is at-risk on the road falls to the individual driver, friends, or a family member.

Therefore, this Note proposes that Congress, under the Spending Power, require the states to adopt and enforce new driver's license renewal procedures. This Note will further examine the reasons for supporting a change in driver's license renewal procedures. Likewise, this Note will examine the obstacles such a proposal must overcome before being implemented.

Part II of this Note will focus on the growing number of elderly drivers, the elderly driver generally, and the effects of aging on one's ability to drive. Part III discusses and analyzes the current driver's license renewal procedures across the states, as well as other promising approaches. Additionally, Part III will determine which approaches prove most effective in protecting the driver and the public. Part III continues by considering whether the United States Constitution will prove to be an insurmountable barrier to implementation. Part III concludes by considering what non-constitutional opposition such a proposal must overcome.

Finally, Part IV proposes a comprehensive solution to dealing with elderly drivers. The primary solution involves accelerated license renewal periods, medical certification, required medical reporting, and immunity for medical providers. The second solution outlines necessary steps to keep safe the public and elderly drivers capable of renewing a driver's license.

10. *Id.* See also *Police*, *supra* note 7 (providing updated numbers for the death count and amount of injuries caused by the Santa Monica accident).

11. AM. MED. ASS'N, PHYSICIAN'S GUIDE TO ASSESSING AND COUNSELING OLDER DRIVERS, 69-70, available at http://www.nhtsa.gov/people/injury/old_drive/olddriversbook/pages/contents.html [hereinafter PHYSICIAN'S GUIDE]; *Ag-ing drivers face inconsistent rules across U.S.*, CBS (Sept. 17, 2012, 4:51 PM), <http://www.cbsnews.com/News/aging-drivers-face-inconsistent-rules-across-/>.

II. Background

A. Increasing Age of America

In 2010, there were already 40.3 million Americans age sixty-five or older.¹² That number is expected to increase by another fifteen million by 2020.¹³ Some of this growth can be credited to modern advances in health care and medicine.¹⁴ However, much of the growing elderly population is a direct result of the high birthrate from 1946 to 1964.¹⁵ Between 1946 and 1964, approximately seventy-four to seventy-six million children were born.¹⁶ These millions of children, this country's largest generation, came to be known as the "Baby Boom" generation.¹⁷

As the elderly population continues to grow, so too does the number of elderly drivers. In fact, the elderly population is currently the fastest growing segment of drivers in the United States.¹⁸ In 2011, there were already thirty-four million drivers who were age sixty-five or older.¹⁹ By 2025, it is projected that twenty percent of all drivers will be age 65 or older.²⁰ This trend should continue as the boomers age.

12. Robert Krueger, *New ULI Report 'Housing in America: The Baby Boomers Turn 65' Explores Opportunities, Challenges in Housing The Nation's Older Citizens*, URBAN LAND INST. (Oct. 17, 2012), available at <http://www.uli.org/press-release/new-uli-report-housing-in-america-the-baby-boomers-turn-65-explores-opportunities-challenges-in-housing-the-nations-older-citizens/>.

13. *Id.*

14. Amanda Sonnega, *The Future of Human Life Expectancy: Have We Reached the Ceiling or is the Sky the Limit?*, RES. HIGHLIGHTS IN THE DEMOGRAPHY AND ECONOMICS OF AGING (Population Reference Bureau, Washington, D.C.), March 2006, at 2-3, available at http://www.prb.org/pdf06/na_futureoflifeexpectancy.pdf.

15. Krueger, *supra* note 12.

16. *Id.*; STEPHEN F. BARNES, INST. FOR APPLIED CRITICAL THINKING, PART I. BABY BOOMERS—JUST ANOTHER GENERATION? 1 (2007), available at <http://interwork.sdsu.edu/clip/bve/documents/babyBoomers.pdf>.

17. *Id.*

18. Krueger, *supra* note 12; Ilyce Glink, *Today's seniors not keen on retirement housing*, CBS (Oct. 23, 2012, 7:00 AM), http://www.cbsnews.com/8301-505145_162-57535083/todays-seniors-not-keen-on-retirement-housing/.

19. TRIP, *Keeping Baby Boomers Mobile: Preserving the Mobility and Safety of Older Americans*, 1, available at <http://www.aarp.org/content/dam/aarp/livable-communities/act/transportation/Keeping-Baby-Boomers-Mobile-Preserving-the-Mobility-and-Safety-of-Older-Americans-AARP.pdf> [hereinafter *Keeping Baby Boomers Mobile*].

20. *Id.*

One reason for the increase will be the surge in elderly women drivers as the boomers age.²¹ Unlike their parents, the baby boomers, both men and women, drove early and often. Also, unlike their parents, they entered the work force at high rates.²² When this generation first began getting married and having kids, only thirty-eight percent of two-adult households were dual-income households.²³ However, as a result of the baby boomers' unprecedented amount of women in the work force, the dual-income home soon became the norm.²⁴ Similar to the dual-income home, the boomers made the two-car family the norm. As a result, major changes in vehicle travel and ownership resulted.²⁵ From 1977 to 2009, as the number of two-car families and two-income households continued to grow, the number of household vehicles almost doubled.²⁶

The baby boomer generation has since become increasingly dependent on driving because almost sixty percent of the elderly population lives in the suburbs and almost eighty percent live in either rural or suburban areas.²⁷ Additionally, many elderly adults are continuing to work past retirement.²⁸ For those living in the suburbs, driving may be the only way to get to work. Even if it is not the only transportation available, driving remains the preferred option of the elderly.²⁹ Only 1.3 % of trips by the elderly population are by way of public transportation.³⁰

Another factor resulting in more elderly drivers is that the elderly population is choosing to stay in the suburbs. The elderly population has a tendency to stay living in "empty nests," continuing to live

21. *Id.* at 2.

22. NANCY MCGUCKIN & JANA LYNOTT, AARP PUBLIC POLICY INSTITUTE, IMPACT OF BABY BOOMERS ON U.S. TRAVEL, 1969 TO 2009 3 (2012), available at http://www.aarp.org/content/dam/aarp/research/public_policy_institute/liv_com/2012/impact-baby-boomers-travel-1969-2009-AARP-ppi-liv-com.pdf; JOSEPH F. COUGHLIN, AGE LAB, ARE YOU READY FOR THE NEW OLDER WORKPLACE? AGING BABY BOOMERS AND THE EVOLVING ROLE OF EMPLOYERS 1 (2008), available at <http://web.mit.edu/coughlin/Public/Publications/AgeLab%2012%202008-1%20Coughlin%20Wide%20Version.pdf>.

23. MCGUCKIN & LYNOTT, *supra* note 22, at 4.

24. *Id.* at 3-4.

25. *Id.* at 4.

26. *Id.*

27. KEEPING BABY BOOMERS MOBILE, *supra* note 19.

28. *Id.* at 3 (finding "new generations of older Americans will be more mobile, healthy and active for a longer portion of their lives than those just a few decades ago").

29. *Id.*

30. *Id.*

in their homes even after their children have left.³¹ Additionally, a report by the Urban Land Institute found that most elderly Americans are interested in remaining in their homes as they age, even when they may require assistance.³² However, not everyone is staying put by choice. Some members of the elderly population are staying put because of the current housing market.³³

B. The Myth about Accident Rates

In 2013, fatal crashes were the leading cause of injury-related deaths among elderly drivers age sixty-five to seventy-four.³⁴ For elderly drivers age seventy-five to eighty-four, fatal crashes are the second leading cause of injury-related deaths.³⁵ Yet, some statistical data would still suggest that elderly drivers are actually quite safe. For example, the American Association of Retired Persons (AARP) presents statistical evidence, which alleges to show that elderly drivers have "lower rates of crashes involving injury per licensed driver than younger drivers."³⁶ However, data portraying elderly drivers as one of the safer groups of drivers is actually misleading. The AARP, like other groups advocating for elderly rights, only looks at the number of crashes per licensed driver.³⁷ However, these statistics fail to take into account the fact that elderly drivers tend to drive fewer miles than their younger counterparts.³⁸ When this factor is taken into account, an elderly driver's crash rate is twice as great.³⁹

A significant variable associated with crash risks is the age of the driver.⁴⁰ Crash risks rise steadily from age forty until age sixty-five.⁴¹ These risks then continue to rise at a much faster rate after the age of

31. *Id.* at 2.

32. Krueger, *supra* note 12.

33. *Id.*

34. Physician's Guide, *supra* note 11.

35. *Id.*

36. See Johnathan Cohn, Note, *Increased Driving Regulations for the Elderly: A Case Study in New York Calling for the Expansion of Current Regulations*, 2 ALB. GOV'T L. REV. 309 (2009).

37. *Id.* at 307.

38. *Id.*

39. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., ENHANCING THE EFFECTIVENESS OF SAFETY WARNING SYSTEMS FOR OLDER DRIVERS: PROJECTS REPORT 3 (2010), available at <http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/.../811417.pdf%E2%80%8E> [hereinafter SAFETY WARNING SYSTEMS].

40. Robert G. Ulmer & Helen B. Weinstein, *Fatal Crash Risk for Older Drivers at Intersections*, 30 ACCIDENT ANALYSIS & PREVENTION 151 (1998).

41. *Id.*

sixty-five.⁴² A noticeable increase in fatal crash rates occurs between the ages of seventy and seventy-four, but is highest in drivers over eighty-five.⁴³ One reason for the higher fatal crash rate is that elderly drivers have an increased risk of injury because of a general susceptibility to injury.⁴⁴ Because older drivers are weaker and more fragile than their younger counterparts, they are more likely to be killed in an accident than a younger driver.⁴⁵

C. How Aging Poses a Threat to Elderly Drivers

AARP and other groups advocating for the elderly argue that the age of an elderly driver is not the best way to identify crash risk.⁴⁶ Everyone ages differently, so there is no arbitrary cutoff as to when someone should stop driving. Nevertheless, driving is a complicated task. It requires people to see and hear clearly; pay attention to other cars, traffic signs, traffic signals, and pedestrians; and to react quickly to events.⁴⁷ It is common for aging to cause declines in vision, hearing, reaction times, cognitive functions, and sensory abilities.⁴⁸ Diminishing vision, hearing, reaction times, cognitive functions, and sensory abilities put elderly drivers at increased risk of accidents.⁴⁹ Therefore, as natural aging occurs, people may experience declines in some driving-related abilities.

An individual's driving abilities are reliant on his or her vision, cognitive function, and physical functions.⁵⁰ Diminishing vision may affect the ability to see other drivers, traffic lights, pedestrians, and the road.⁵¹ Declines in cognitive function will affect decision-making and

42. Kaarin J. Anstey et al., *Cognitive, Sensory and Physical Factors Enabling Driving Safety in Older Adults*, 25 *CLINICAL PSYCHOL. REV.* 45, 45 (2005).

43. *Older Drivers*, INS. INST. FOR HIGHWAY SAFETY, available at <http://www.iihs.org/iihs/topics/t/older-drivers/fatalityfacts/older-people/2011> (last visited Sept. 15, 2013) [hereinafter *Older People*].

44. *Id.*

45. Ulmer & Weinstein, *supra* note 40.

46. Mike Connors, *DMV Study Suggests Tougher Rules for Elderly Drivers*, VIRGINIAN-PILOT, Dec. 20, 2013, <http://hamptonroads.com/2013/12/dmv-study-suggests-tougher-rules-elderly-drivers>.

47. UNIV. OF MICH. TRANSP. RESEARCH INST., PROMISING APPROACHES FOR ENHANCING ELDERLY MOBILITY 2 (2003), available at http://www.michigan.gov/documents/PAEEMLowRes_82326_7.pdf [hereinafter PROMISING APPROACHES].

48. Anstey et al., *supra* note 42, at 46.

49. *Id.*

50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-413, OLDER DRIVER SAFETY 5 (2007) [hereinafter OLDER DRIVER SAFETY].

51. *Id.*

navigation.⁵² Declining physical functions would reduce the ability to control the vehicle or perform necessary movements.⁵³

Vision is said to account for ninety-five percent of an individual's ability to drive and process the information needed to operate safely on the road.⁵⁴ Additionally, the loss of peripheral vision can severely hinder an elderly driver's ability to see what is going on around him or her.⁵⁵ The type of crashes elderly drivers are often involved in occur in complex traffic situations; therefore, declines in cognitive impairment can put an elderly driver at risk.

Health conditions can also play a role in identifying at-risk elderly drivers.⁵⁶ If an individual has suffered a stroke, then the likelihood of being involved in an accident increases due to a decrease in motor skills.⁵⁷ These motor skills include: perception, the ability to think and act while driving, and logical reasoning.⁵⁸ Additionally, diseases such as Alzheimer's and dementia can diminish a driver's cognitive abilities.⁵⁹ An individual with dementia will have difficulty remembering and executing daily activities, which can affect the ability to operate a car.⁶⁰ Also, studies show that drivers diagnosed with Alzheimer's are more likely to be the cause of car accidents than drivers who do not have the disease.⁶¹ Additionally, those suffering from Arthritis can be affected by a loss of range in motion, which could result in delays in a driver's ability to react to events going on around them.⁶²

Medications taken because of various health conditions can also impair an individual's driving abilities.⁶³ Research indicates that eighty percent of elderly individuals take a minimum of one prescrip-

52. *Id.*

53. *Id.*

54. David P. Lampman, Comment, *Fun, Fun, Fun, 'Til Sonny (or the Government) Takes the T-Bird Away: Elder Americans and the Privilege to be Independent*, 12 ALB. L.J. SCI. & TECH. 863, 866-70 (2002).

55. *Id.*

56. SAFETY WARNING SYSTEMS, *supra* note 39.

57. Lampman, *supra* note 54.

58. *Id.*

59. *Id.*

60. Kanoelani M. Kane, Comment, *Driving into the Sunset: A Proposal for Mandatory Reporting to the DMV by Physicians Treating Unsafe Elderly Drivers*, 25 U. HAW. L. REV. 59, 66 (2002).

61. John C. Bodnar, Note, *Are Older Americans Dangerously Driving into the Sunset?*, 72 WASH. U. L. Q. 1709, 1715 (1994).

62. Lampman, *supra* note 54, at 869.

63. Bodnar, *supra* note 61, at 1717.

tion drug.⁶⁴ These medications generally cause side effects, which can weaken driving performance.⁶⁵ If an individual's driving abilities are hindered, this puts the driver at risk for a crash.⁶⁶

As elderly drivers have come under increased scrutiny, it has become apparent that it is not age, per se, that leads to problems with driving. However, natural aging and resulting declines in driving-related abilities can create risks for the elderly driver, other drivers, and pedestrians.

D. Suggested Models

Due to the inconsistencies in license renewal requirements across the states, various Model Programs and Uniform Procedures have been suggested.⁶⁷ There are already approximately thirty-four million elderly drivers in the United States.⁶⁸ Depending on where these drivers live, the license renewal requirements that must be met will vary. The models seek to help DMV employees, doctors, family members, and other potential sources of referrals to identify at-risk drivers.⁶⁹

The "Model Driver Screening and Evaluation Program: Guidelines for Motor Vehicle Administrators" (Model Guidelines) were published by the National Highway Traffic Safety Administration (NHTSA) and the American Association of Motor Vehicle Administrators. The Model Guidelines seek to shift responsibility away from the driver, their family, and their physician and instead suggest more active management by motor vehicle agencies.⁷⁰ The goal throughout the Model Guidelines is to create a way of "fairly, effectively, and affordably" screening high-risk drivers.⁷¹ Essentially, the Model Guidelines seek to identify those drivers that are a danger to themselves and

64. Leigh H. Bernstein, *The Elderly Driver: The Need for Tailored License Renewal Procedures*, THE ELDER LAW REPORT, Oct. 2003, at 1.

65. *Id.*

66. Bodnar, *supra* note 61, at 1717.

67. See generally David Rosenfield, Note, *From California To Illinois To Florida, Oh My!: The Need For A More Uniform Driver's License Renewal Policy*, 12 ELDER L.J. 449 (2004); Jennifer L. Klein, Note, *Elderly Drivers: The Need For Tailored License Renewal Procedures*, 3 ELDER L.J. 309 (1995).

68. *Aging drivers*, *supra* note 11.

69. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., MODEL DRIVER SCREENING AND EVALUATION PROGRAM: GUIDELINES FOR MOTOR VEHICLES ADMINISTRATORS iv (2003), available at <http://www.nhtsa.gov/people/injury/olddrive/modeldriver/guidelines.htm> [hereinafter MODEL GUIDELINES]; PHYSICIAN'S GUIDE, *supra* note 11.

70. MODEL GUIDELINES, *supra* note 69.

71. *Id.*

others without putting too much of a burden on motor vehicle agencies. In order to do so, the Model Guidelines identify relevant functional abilities as well as how DMV employees should seek to observe these abilities.

In addition to the Model Guidelines, the American Medical Association (AMA) and National Highway Traffic Safety Administration (NHTSA) published the Physician's Guide to Assessing and Counseling Old Drivers (Physician's Guide). The Physician's Guide "provides simple screening tools, information on their relation to safe driving, a discussion of common medical conditions that are related to functional limitations and a reference to state licensing practices."⁷² The Physician's Guide provides guidance for doctors, families, and the patient. This guidance includes counseling advice, self-assessments for the patient, a list of medical conditions and medications that may affect a patient's driving skills, as well as information on state licensing requirements and state medical reporting laws.⁷³

Both the Model Guidelines and Physician's Guide can be useful in developing a comprehensive solution to dealing with the increasing number of elderly drivers. The Model Guidelines will make DMV employees more effective at screening at-risk drivers. Similarly, the Physician's Guide will provide doctors with the information necessary to more effectively identify, counsel, and report at-risk patients.

III. Analysis

A. Current State Renewal Procedures

There is insufficient evidence on the validity and reliability of any driving assessment or screening tool. Thus, states may have trouble discerning which tools to implement. Because assessment practices are not comprehensive, a recent report suggested increased uniformity of medical reporting procedures and regulations throughout the states.⁷⁴

72. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., OLDER DRIVER TRAFFIC SAFETY PLAN, available at http://www.nhtsa.gov/people/injury/olddrive/older_driver_traffic_safetyplan.pdf.

73. PHYSICIAN'S GUIDE, *supra* note 11.

74. THE ASS'N FOR DRIVER REHABILITATIONS SPECIALIST (ADED), CLOSING THE GAP: A COMPREHENSIVE, MULTIDISCIPLINARY APPROACH TO THE OLDER DRIVER 5 (2005), available at http://stuff.mit.edu/afs/athena/dept/agelab/news_events/pdfs/Benner.pdf.

States differ in renewal cycle periods and whether they require in-person renewal or allow renewal by mail. Additionally, states also differ in medical reporting and whether or not they grant civil immunity to those persons providing third-party referrals. This section will examine the various renewal procedures required for driver's license renewal across the states.

1. IN-PERSON RENEWAL

One of the more common screening procedures utilized by states requires in-person driver's license renewals. In-person renewals can be effective because they allow DMV employees to observe both the physical and cognitive abilities of drivers seeking to renew a driver's license. During the renewal process DMV employees are able to observe a driver's: lower body strength and range of motion; upper body strength and range of motion; ability to hear, ability to see; and cognitive abilities.⁷⁵ Many states that require in-person renewals have developed manuals and training programs in order to help employees better identify at-risk drivers.⁷⁶ However, not all states provide employees with the proper training.

Therefore, the Model Guidelines can provide useful descriptions on how an employee can better identify impairments in these functional abilities. For example, an employee can determine whether an individual has the necessary lower body strength, range of motion, and coordination to drive by observing the individual as they walk to the counter.⁷⁷ Employees should pay careful attention to whether a person can walk to the counter without the help of others or a supportive device.⁷⁸ Similarly, an employee can observe an individual's ability to hear by determining whether the person can hear normal spoken voice throughout the renewal process without the use of a hearing aid.⁷⁹

The Model Guidelines strongly suggest that DMVs require employees to complete a checklist of observations made while interacting with the individual seeking to renew his or her license.⁸⁰ In-person renewals may not be the primary means used by states to screen driv-

75. MODEL GUIDELINES, *supra* note 69, at 9.

76. *Id.* at 8.

77. *Id.* at 9.

78. *Id.*

79. *Id.*

80. *Id.* at 8.

ers, however, but effective use of these checklists can make in-person renewals an effective screening tool.

2. ACCELERATED RENEWALS

A driver's age will often affect license renewal requirements in many states. License renewal cycles range from every two years in Vermont, to no renewals required until sixty-five in Arizona.⁸¹ A majority of states require license renewals every four to five years.⁸² In those states that chose to adopt some type of age-based renewal procedures, accelerated renewal cycles are most common.⁸³

Fourteen states require accelerated renewal cycles for elderly drivers.⁸⁴ However, in these fourteen states, there is little consistency in regards to when these accelerated renewal cycles begin.⁸⁵ The ages, which begin the accelerated renewal cycles, range from as low as sixty-five to as high as eighty-one.⁸⁶ The shortest accelerated license renewal cycle is one year, which begins in Illinois at age eighty-seven and in New Mexico at seventy-five.⁸⁷ The longest accelerated renewal cycle, found in Arizona, South Carolina, and Colorado, is five years.⁸⁸

National data shows an increased risk of crash involvement in drivers seventy and above.⁸⁹ This increasing crash risk coupled with the high correlation between aging and function impairment suggest age-related requirements are reasonable.⁹⁰ However, opponents of age related requirements argue they are "ageist."⁹¹

Accelerated renewal cycles can be beneficial; however, they can also be expensive. The average renewal period is 5.8 years.⁹² In Virginia (as of 2013), it is currently eight years.⁹³ In a recent study, the

81. PHYSICIAN'S GUIDE, *supra* note 11 at 73, 132.

82. *Id.* at 71-142.

83. See generally, CONN. GEN. ASSEMB. 2006-R-0457 (July 2006), available at <http://www.cga.ct.gov/2006/rpt/2006-R-0457.htm>

84. PHYSICIAN'S GUIDE, *supra* note 11, at 71-140.

85. *Id.*

86. *Id.*

87. *Id.* at 88, 112.

88. *Id.* at 73, 77, 125.

89. VA. DEP'T OF MOTOR VEHICLES, MATURE DRIVERS STUDY (2013). [hereinafter MATURE DRIVERS STUDY].

90. Amendments to Highway Safety Program Guidelines, 78 Fed. Reg. 230 (Nov. 29, 2013), available at <https://www.federalregister.gov/articles/2013/11/29/2013-28635/amendments-to-highway-safety-program-guidelines#h-31> [hereinafter Amendment to Highway Safety Programs].

91. *Id.*

92. MATURE DRIVERS STUDY, *supra* note 89, at 14.

93. *Id.*

Virginia DMV calculated the economic impact these types of renewal requirements would have on the DMV if it were to change its required in-person renewal to age seventy-five and require renewal every five years.⁹⁴ The study found that the DMV would lose approximately \$818,225 per year due to customers paying a lower fee for a five-year license (\$20) rather than an eight-year license (\$32).⁹⁵ If the renewal cycles were decreased and in-person renewal was required it would also result in the DMV having to serve more customers. The study estimates that it would cost an additional \$203,866 per year to serve the customers and an additional \$61,116 to make and distribute licenses.⁹⁶

Accelerated renewal cycles can be useful in identifying at-risk drivers. Accelerated renewals, especially those requiring in-person renewals, will better allow the DMV to screen at-risk drivers whose driving abilities have become impaired as the result of natural aging. However, they can also be expensive and an administrative headache.

3. VISION TESTING

Vision testing is another common screening tool used in the driver's license renewal process. Many states require vision testing during the license renewal process, and therefore those who cannot pass the test are not issued a new license. It is well accepted that vision is vital to driving; however, there is no unanimity regarding the lowest level of vision required to drive safely.⁹⁷ Research suggests that visual acuity, the smallest detail a driver can see, is often not associated with an increased risk of crash involvement.⁹⁸ Nevertheless, because it is difficult to study the correlation between visual acuity and an increased risk in crash involvement, it is still important to test for vision during the license renewal process. This is because those drivers with weakened visual acuity are often not driving, and less likely to be involved in such studies.

Most states have vision screening requirements that apply to all license renewal applicants.⁹⁹ However, some states require vision tests beginning at certain ages.¹⁰⁰ Once again, there is very little consistency

94. *Id.* at 15.

95. *Id.*

96. *Id.*

97. NAT'L HIGHWAY SAFETY ASS'N, DRIVER FITNESS MEDICAL GUIDELINES, 32 (2009).

98. *Id.*

99. PHYSICIAN'S GUIDE, *supra* note 11, at 71-142.

100. *Id.* at 78, 88, 96, 109, 120, 122, 130.

across the states regarding the age at which the vision-testing requirement applies.¹⁰¹ The lowest age at which the vision-testing requirement applies is in Maine, where vision testing starts at age forty.¹⁰² Illinois requires vision-testing beginning at age seventy-five, the highest of the seven states requiring an age-based vision test.¹⁰³ However, this is not the only reason they are often no longer driving. Another reason is that many people with weakened vision may give up driving or self-limit the amount of driving they do.

Based on existing research, it has not been established that vision testing is useful in identifying drivers at risk of crash involvement. However, it is clear that vision testing can identify drivers who will have trouble with highway signs, street names, and lane markings.¹⁰⁴ This is because “engineers and highway departments select a font size for signs so that the sign can be effectively read at appropriate braking distance by people who have at least 20/30 or 20/40” visual acuity.¹⁰⁵ Therefore, individuals with visual acuity below these levels will have difficulty reading street names, highway signs, and even identifying lane markings.

B. Third-Party Referrals

Family members, physicians, police, or employees of the motor vehicle agencies can refer at-risk drivers to screening and evaluation programs.¹⁰⁶ Referrals from employees of the motor vehicle agencies are categorized as “internal” referrals.¹⁰⁷ These referrals typically come about through direct observations by an employee of the motor vehicle agency when an older driver comes in to renew their license.¹⁰⁸ Referrals from “physicians, law enforcement and the courts, family and friends, and others” are categorized as “external referrals.”¹⁰⁹ Depending on the state, the influence of internal and external references will vary.¹¹⁰ In some states, external referrals are the primary way

101. *Id.*

102. *Id.* at 96.

103. *Id.* at 88.

104. DRIVER FITNESS MEDICAL GUIDELINES, *supra* note 97, at 34.

105. *Id.*

106. PHYSICIAN’S GUIDE, *supra* note 11, at 88.

107. MODEL GUIDELINES, *supra* note 69, at 7.

108. *Id.*

109. *Id.*

110. *Id.*

drivers are entered into screening and evaluation programs.¹¹¹ External referrals can come from physicians, vision care specialists, hospitals, social service providers, and family members.¹¹² Third-party referrals can be really effective. For example, a Virginia study recently revealed that only eight percent of referred drivers in their study were eventually found fit to drive without restrictions or continuing medical review.¹¹³

1. DOCTORS

Physicians can play an active role in keeping at-risk drivers off the road by evaluating patients' ability to drive, provide safe driving practices, referring at-risk drivers to motor vehicle agencies, and recommending restrictions on the patients' driving.¹¹⁴ However, in order for doctors to take on this active role, two things must happen. First, doctors must be provided immunity from civil liability and criminal liability. Second, states must provide doctors with guidance regarding when and how to report an at-risk patient.

a. Immunity

Some states provide immunity to physicians, and other states do not.¹¹⁵ Those states that require reporting typically provide immunity.¹¹⁶ However, some states only permit physicians to voluntarily report potentially at-risk drivers, while not granting immunity.¹¹⁷ This uncertainty leaves physicians concerned with potential liability if they report and violate the doctor-patient confidentiality.

For instance, in 2010, Massachusetts provided immunity to physicians who reported unsafe drivers to the DMV.¹¹⁸ Before 2010, Dr. Robert Lebow never reported a patient because he was reluctant to do so without immunity.¹¹⁹ Dr. Lebow can now opt to contact the

111. *Id.* at 12.

112. *Id.*

113. NAT'L HIGHWAY TRANSP. SAFETY ADMIN., MEDICAL REVIEW PROCESS AND LICENSE DISPOSITION OF DRIVERS REFERRED BY LAW ENFORCEMENT AND OTHER SOURCES IN VIRGINIA 32 (2011) [hereinafter MEDICAL REVIEW PROCESS].

114. PHYSICIAN'S GUIDE, *supra* note 11, at 4.

115. *Id.* at 71-142.

116. *Id.*; MODEL GUIDELINES, *supra* note 69, at 13.

117. MODEL GUIDELINES, *supra* note 69, at 13; PHYSICIAN'S GUIDE, *supra* note 11, at 71-142.

118. Jean M. Lang, *New Law Will Affect Older Drivers*, AARP (Nov. 1, 2010), http://www.aarp.org/politics-society/rights/info-10-2010/new_law_will_affect_older_drivers_in_massachusetts_.html.

119. *Id.*

state DMV, after efforts by him and family members failed to keep an unsafe driver off the road. AARP of Massachusetts also endorsed the medical reporting provision, finding that it has the ability to keep all unsafe drivers off the road regardless of age.¹²⁰

Similarly, a Missouri study showed a decrease in car accidents after a voluntary reporting law was passed in the state.¹²¹ The voluntary reporting law allows physicians to keep unsafe drivers off the road without the fear of being sued for violating their doctor-patient confidentiality.¹²² The law is not age specific, however the average age of the reported driver was 80.¹²³ The Missouri study found that 96.5% of drivers who were reported quit driving.¹²⁴ Thus, the law was very successful in encouraging at-risk drivers to stop.

In her dissenting opinion of *Gonzalez v. Raich*,¹²⁵ Justice O'Connor suggested that federalism promotes innovation, and if its citizens choose to, a state should be allowed to act as a laboratory and "try novel and social experiments without risk to the rest of the country."¹²⁶ Missouri, Virginia, and Massachusetts, amongst others, have launched such social experiments. These experiments suggest that providing immunity will result in more doctors reporting patients.

b. Guidance

It is important that doctors understand the link between "medical conditions, functional impairments, and driving difficulties" which put drivers at risk.¹²⁷ Additionally, a doctor must know how to counsel a patient, manage their own legal and ethical responsibilities, and abide by state reporting laws. Some states leave it to the physician to become familiar with the specific conditions that put drivers at risk and state renewal requirements.¹²⁸

The Physician's Guide is a significant source for all of this information. The Physician's Guide provides medical information on

120. *Id.*

121. Thomas M. Meuser et. al., Nat'l Insts. of Health, *Motor-Vehicle Crash History and Licensing Outcomes for Older Drivers Reported as Medically Impaired in Missouri*, 41 ACCIDENT ANALYSIS & PREVENTION 246 (2009).

122. Lang, *supra* note 118.

123. Meuser et. al., *supra* note 121.

124. *Id.* at 1.

125. *Gonzalez v. Raich*, 545 U.S. 1 (2005) (O'Connor, J., dissenting).

126. *Id.*

127. MODEL GUIDELINES, *supra* note 69, at 14.

128. *Id.*

how to test a patient's vision, cognitive skills, and motor skills.¹²⁹ Additionally, it provides physicians with advice on how to counsel at-risk patients, as well as how to deal with resisting the recommendation to stop driving.¹³⁰ The most important and most useful chapter of the Physician's Guide provides physicians with medical conditions and medications, which may affect a patient's driving abilities.¹³¹ Lastly, the Physician's Guide provides physicians information on ethical and legal issues involving patient reporting, state licensing requirements, license renewal criteria, and reporting laws.¹³²

Doctors can be an effective source of referrals. However, in order to encourage doctors to report at-risk patients, states must provide doctors with immunity from civil and criminal liability. Additionally, states must provide guidance as to what medical conditions, functional impairments, and medications can put patients at risk.

2. FAMILY & FRIENDS

Another source of referrals is family and friends. Family and friends are in a unique position to observe the behavior of potential at-risk drivers over longer periods of time. Because they spend more time with the elderly drivers, they are able to observe behavior all day, and may notice things that a doctor does not in their short visits.¹³³ Families are an important source of referrals because some physicians are hesitant to get involved in the personal lives of their patients. However, sometimes when the driver is a parent or grandparent the family member might be hesitant to report as well.¹³⁴ Additionally, older drivers may be more willing to stop driving if important people in their lives advise them it is time to do so.¹³⁵ However, in order for family members, friends, and caregivers to be referral sources, they must be educated on how to identify and counsel these elderly drivers.¹³⁶

Friends and family can be an important referral source; however, states must investigate more in these instances. People with ulterior

129. *Id.* at 20.

130. *See generally* PHYSICIAN'S GUIDE, *supra* note 11, at 49-58.

131. *Id.* at 145.

132. *Id.*

133. MODEL GUIDELINES, *supra* note 69, at 17.

134. *Id.*

135. PROMISING APPROACHES, *supra* note 47, at 7.

136. HIGHWAY SAFETY PROGRAMS, *supra* note 90.

motives may refer family members in order to harass them. Therefore, states should be careful to allow anonymous referrals.

3. POLICE

Police, who may encounter a driver during a traffic stop or at the scene of a crash, can also be a significant referral source. In Virginia, almost thirty-five percent of referrals come from police.¹³⁷ Police officers who suspect a driver of having a medical condition or some other type of impairment must complete a Medical Review Request Form.¹³⁸ Once the Medical Review department receives this Medical Review Form, the driver will receive notice that they must have their physician complete a medical report.¹³⁹ The driver will also be required to get a vision report filled out as well.¹⁴⁰ A study of the effect of the Medical Review Form found that eighty-eight percent of the police referrals examined resulted in license actions, showing that police are an effective source of referrals for at-risk drivers.

4. DMV PERSONNEL

Applicants for renewal are generally referred through “direct interactions with counter personnel, resulting in identification of candidates for functional screening based upon predetermined, standard and objective criteria.”¹⁴¹ Others may be referred because of their driving history or solely because of their age.¹⁴² A majority of internal referrals are the result of observations by employees of the motor vehicle agencies.¹⁴³ States that require in person license renewal are provided the opportunity to objectively assess a driver’s cognitive and physical capability. Through simple observations and brief conversations with the elderly driver seeking to renew, the employees of the agencies are able to determine which drivers may need further assessment.¹⁴⁴ Internal referrals brought by direct observations of motor vehicle agencies have been approved by the courts in cases brought under the Americans with Disabilities Act (ADA).¹⁴⁵

137. MEDICAL REVIEW PROCESS, *supra* note 113, at 19.

138. *Id.* at 4.

139. *Id.*

140. *Id.*

141. MODEL GUIDELINES, *supra* note 69, at 8.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

Another source of internal referrals is the Medical Fitness questions on a driver's license application. These application forms will contain questions on the driver's medical conditions, medical symptoms, and medications they are currently taking.¹⁴⁶ These questionnaires are often used to identify specific conditions such as diabetes, epilepsy, cardiovascular issues, or those causing vision loss or functional motor impairment.¹⁴⁷ Another source of referrals is the driver's reported driving history. Past accidents and traffic violations can serve as a great indicator of at risk drivers who should be further assessed before they are able to renew their license.¹⁴⁸ The final internal referral source is the driver's age. However, across jurisdictions the age which triggers screening varies.

C. Alternatives to More Stringent Renewal Requirements

1. SAFER ROADS/BRIGHTER SIGNS

Opponents of more stringent license renewal procedures often suggest there should be a focus on helping older drivers who are able to continue driving safely do so, rather than restricting all elderly drivers. For years, the United States Government has studied how to enhance and protect the mobility of elderly drivers.¹⁴⁹ For example, the Federal Highway Administration (FHWA) suggests making roads easier to navigate by using bigger letters on signs.¹⁵⁰ This is because "engineers and highway departments select a font size for signs so that the sign can be effectively read at appropriate braking distance by people who have at least 20/30 or 20/40" visual acuity.¹⁵¹ Therefore, people with visual acuity below these levels will have difficulty reading street names, highway signs, and even identifying lane markings. Other recommendations by the FWHA include improving intersection layouts and placing advance street name signs.¹⁵²

In order to accommodate the diminishing functional capacity of elderly drivers, the FWHA provides designers with guidelines to use while developing roadway enhancements.¹⁵³ The FWHA will also

146. *Id.* at 9.

147. *Id.*

148. *Id.* at 10.

149. PROMISING APPROACHES, *supra* note 47, at 1.

150. OLDER DRIVER SAFETY, *supra* note 50.

151. DRIVER FITNESS MEDICAL GUIDELINES, *supra* note 97, at 34.

152. OLDER DRIVER SAFETY, *supra* note 50, at 2.

153. *Id.* at 10.

provide federal funding to states in order to address elderly driver safety.¹⁵⁴ FWAH practices aim to improve conditions at trouble sites for elderly drivers.¹⁵⁵ Iowa, for example, has accepted the task of enhancing the driving environment of elderly drivers.¹⁵⁶ Through the use of more durable pavement markings and adding paved shoulders with a rumble strip in order to increase visibility and make drivers aware that they are off the road,¹⁵⁷ Iowa took the initiative to enhance the driving environments for older drivers.

2. SELF-REGULATION

According to various studies, elderly drivers drive less often, less at night, less during bad weather, and less during peak traffic hours.¹⁵⁸ These same studies also suggest that older drivers avoid situations they regard as high-risk; these situations include difficult intersections and busy roads.¹⁵⁹ This research suggests that elderly drivers aware of their diminishing driving-related abilities tend to self-restrict their driving.¹⁶⁰ Therefore, opponents of the proposal may suggest self-regulation alone lessens the risk elderly drivers pose to themselves, other drivers, and pedestrians.¹⁶¹

However, for the following reasons, self-regulation is not enough. First, depending on the type of impairment, some drivers may or may not be able to identify their impairments. Some impairments, such as losses in vision and hearing, are relatively easy to identify and correct.¹⁶² Still, other impairments are more difficult to identify. For example, individuals with losses in cognitive function may be unaware of their diminishing abilities.¹⁶³ Additionally, some elderly drivers, especially those living alone, may have no other options. Therefore, in order to grocery shop, make doctor appointments, and pick up medications, these individuals have no choice but to drive.¹⁶⁴

154. *Id.* at 3.

155. *Id.* at 13.

156. *Id.* at 41.

157. *Id.* at 1.

158. MODEL GUIDELINES, *supra* note 69, at 6.

159. *Id.* at 9.

160. *Id.* at 6.

161. *Id.* at 26.

162. *Id.*

163. *Id.*

164. MODEL GUIDELINES, *supra* note 69, at 26.

3. EDUCATING ELDERLY DRIVERS

Some states have developed and implemented strategies in an effort to improve elderly driver safety.¹⁶⁵ For example, Florida has created the GrandDriver Program, which provides a web-based driver safety course and also provides visitors with alternative transportation options.¹⁶⁶ Similarly, California, through its “Older Californian Traffic Safety Task Force,” also promotes elderly driving safety through education and awareness.¹⁶⁷ Additionally, it has been suggested that many states should enact laws that require car insurers to provide discounts as an incentive for elderly drivers to participate in these courses.¹⁶⁸

The NHTSA, through brochures and booklets, provides medical providers, police, family, and elderly drivers guidance as to what can be done to improve an elderly driver’s capabilities or how to compensate for lost capabilities.¹⁶⁹ These guides provide the elderly driver with simple, quick, and cheap procedures that can be done at home.¹⁷⁰ These re-education programs and training classes should also increase an elderly driver’s self-awareness and knowledge about driving-related declines in ability. For example, a recent AARP study on its Driver Safety Program shows that the program has helped many drivers.¹⁷¹ Approximately 91% of the Program’s graduates say that because of the course they have changed at least one driving attribute. Not only has the course helped them avoid traffic accidents, graduates also say that the course made them consider their own driving habits.¹⁷²

165. OLDER DRIVER SAFETY, *supra* note 50, at 2-4.

166. *Id.* at 4.

167. *Id.* at 39.

168. Vasiliki L. Tripodis, Note, *Licensing Policies for Older Drivers: Balance Public Safety and Individual Mobility*, 38 B.C. L. REV. 1051, 1086 (1997).

169. *Id.* at 1063.

170. MODEL GUIDELINES, *supra* note 69, at 23.

171. Gail Kutner, *Summary of 2005 AARP Driver Safety Program Graduate Study*, May 2006, http://www.aarp.org/home-garden/transportation/info-2005/dsp_2005.html.

172. *Id.*

D. Potential Barriers

1. CONSTITUTIONAL BARRIERS

a. *Fundamental Right to Drive*

Without the ability to drive some individuals fear isolation and difficulties in getting around. The elderly population views driving as an important tool to remaining independent and connected with society.¹⁷³ Without the ability to drive the elderly population will face restricted mobility and isolation.¹⁷⁴ The elderly driver, their families, and their caregivers will all be impacted.¹⁷⁵ However, driving is a privilege, not a fundamental right.¹⁷⁶

In *Miller v. Reed*,¹⁷⁷ the court found that the state's denial of a driver's license for refusal of an applicant to provide his Social Security number did not violate that applicant's right to interstate travel.¹⁷⁸ The court also held that there exists no fundamental "right to drive."¹⁷⁹

This language by the court suggests that states have the right to determine their license renewal requirements. Therefore, an elderly driver's claim that he or she is denied a fundamental right by facing more stringent renewal requirements is unsupported.

b. *Fourteenth Amendment*

An elderly person facing more stringent license renewal requirements may challenge the new requirements on Fourteenth Amendment grounds, invoking either the Equal Protection Clause or the Due Process Clause.

1. EQUAL PROTECTION

In 2007, New Hampshire repealed a law requiring a road test for drivers after age seventy-five.¹⁸⁰ The law was repealed after an eighty-

173. *Attracting Senior Drivers to Public Transportation: Issues and Concerns* (2010), AARP (Oct. 11, 2012), <http://www.aarp.org/livable-communities/learn/transportation-mobility/info-12-2012/Attracting-Senior-Drivers-to-Public-Transportation-Issues-and-Concerns-2010.html>.

174. PHYSICIAN'S GUIDE, *supra* note 11, at 70.

175. *Id.*

176. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999).

177. *Id.*

178. *Id.*

179. *Id.*

180. *State by State Look at Driving Rules for Older Drivers*, CLAIMS JOURNAL, Sept. 19, 2012, <http://www.claimsjournal.com/news/national/2012/09/19/213818.htm>.

four-year-old lawmaker, Representative Bob Williams, argued that the law should be repealed because it discriminated on the basis of age.¹⁸¹ An elderly driver now subject to more stringent renewal requirements may attempt to invoke the Equal Protection Clause with a similar argument. However, this claim is unlikely to succeed.

In *Massachusetts Board of Retirement v. Murgia*,¹⁸² the Supreme Court held that age-based classifications are subject to the rational basis standard.¹⁸³ Under the rational basis standard, the government action must be rationally related to furthering a legitimate state interest in order to pass an equal protection challenge.¹⁸⁴ Therefore, so long as it is a proper exercise of a state's police power, age-based classifications will survive an equal protection challenge. Here, the purpose of the more stringent renewal requirements is to promote the safety of elderly drivers as well as the public. It is well within a state's police powers to reduce the number of unsafe drivers and therefore the equal protection challenge will likely fail.

2. DUE PROCESS

An elderly driver challenging under the Due Process Clause has a much stronger argument, however, it will likely be defeated as well. Under the Fifth and Fourteenth Amendments of the United States Constitution, no person shall be deprived of life, liberty, or property, without due process of law.¹⁸⁵ The Fifth Amendment also states that private property should not be taken for public use without just compensation.¹⁸⁶ In *Bell v. Burson*,¹⁸⁷ the Supreme Court held that a person has a property interest in his or her driver's license under the Due Process Clause of the Fourteenth Amendment.¹⁸⁸ The Court also held that due process requires that when a state seeks to terminate a property interest, such as a driver's license, it must afford an individual notice and opportunity for a hearing.¹⁸⁹

181. *Retain the road for senior drivers*, CONCORD MONITOR, Jan. 6, 2011, <http://www.concordmonitor.com/news/4583189-95/bobwilliams-elderlydrivers-age-75>.

182. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 307 (1976).

183. *Id.*

184. *Id.*

185. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

186. U.S. CONST. amend. V.

187. *Bell v. Burson*, 402 U.S. 535, 535 (1971).

188. *Id.* at 539.

189. *Id.* at 535.

An elderly driver whose license is not renewed may attempt to argue that the proposal is unconstitutional. The driver will argue that prior to the restriction, suspension, or revocation of their license, an administrative hearing is required under the Due Process Clause. *Bell v. Burson*¹⁹⁰ makes it clear that the Due Process Clause applies to the revocation or suspension of a driver's license.¹⁹¹ Therefore, "some form of hearing is required before an individual can be deprived of a property interest."¹⁹² Under this proposal, an administrative hearing will not be provided until after the license is restricted, suspended, or revoked.

Therefore, the issue is not whether a hearing will be provided. The issue is whether an administrative hearing will be available drivers before or after their license is restricted, suspended, or revoked. In *Dixon v. Love*,¹⁹³ the Court reversed a district court's ruling that a license could not constitutionally be suspended or revoked until after an administrative hearing. Using the factors considered in *Mathews v. Eldridge*,¹⁹⁴ the Court found that the public interest in driver's license administration allowed for an initial decision to restrict, suspend, or revoke a license prior to an administrative hearing.¹⁹⁵

However, this does not necessarily mean that the procedures provided under this proposal are constitutionally sufficient. Procedural safeguards may satisfy due process in one case, yet be found inadequate in another case. Therefore, in order to determine whether the procedures provided under this proposal are constitutionally adequate the factors in *Mathews v. Eldridge*¹⁹⁶ must be considered.

The first factor to be considered is the private interest threatened by the proposal.¹⁹⁷ Here, the private interest threatened is the same private interest threatened in *Dixon v. Love*¹⁹⁸, a state granted license to

190. *Id.*

191. *Dixon v. Love*, 431 U.S. 105, 112 (1977).

192. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

193. *Dixon*, 431 U.S. at 105.

194. *Mathews*, 424 U.S. at 335 ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.")

195. *Dixon*, 431 U.S. at 105.

196. *Mathews*, 424 U.S. at 335.

197. *Id.*

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

drive. The second factor to be considered is the risk of error through the procedures used and the value of “additional or substitute safeguards.”¹⁹⁹ Under the proposal, an initial decision will be based on a number of tests and factors. These factors include medical reports, vision tests, DMV Personnel Reports, and other third-party referrals, as well as other official records. Like in *Dixon*,²⁰⁰ the decisions made based upon these facts will generally be automatic. Therefore, outside of a potential clerical error, the risk of an erroneous deprivation is not high. The third and final factor is the “Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”²⁰¹ Under this proposal, it would be an administrative nightmare were a hearing required before a license was restricted, suspended, or revoked. It would allow for every driver to automatically delay his or her restrictions, revocation, or suspension. Even more important is the Government’s interest in removing unsafe drivers from the roads and highways.

After applying the factors laid out in *Mathews v. Eldridge*,²⁰² it is unlikely a court will find the proposal unconstitutional. First, the private interest in a driver’s license is not so great as to require a hearing prior to restriction, suspension, or revocation. Second, there is little risk of erroneous deprivation. Finally, the Government has a substantial interest in administrative efficiency as well as removing unsafe drivers from roads and highways.

3. FEDERALISM CONCERNS/TENTH AMENDMENT

In order to determine if this proposal will pass constitutional muster we must assess whether the federal government can interfere with states’ rights to regulate driver’s licenses. The Supreme Court has held that under the Tenth Amendment, Congress may not commandeer the legislative process of the states by directly compelling them to enact a regulatory program.²⁰³ However, so long as it is not too coercive, Congress may use the Spending Power to avoid the Court’s anti-commandeering holdings.²⁰⁴

199. *Mathews v. Eldridge*, 424 U.S. 319 at 335 (1976).

200. *Dixon*, 431 U.S. at 105.

201. *Mathews*, 424 U.S. at 335.

202. *Id.*

203. *New York v. United States*, 505 U.S. 144, 161 (1992).

204. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

a. *Commandeering*

The Tenth Amendment of the United States Constitution reserves “powers not delegated to the federal government by the Constitution, nor prohibited by it to the States, to the states respectively, or the people.”²⁰⁵ Essentially, except for the powers the states granted to the federal government, the Tenth Amendment reserves to the states, those powers they had prior to the Constitution.

The question that must be answered is how may Congress direct or otherwise motivate states to regulate a particular field in a particular way. The Supreme Court in *New York v. United States*²⁰⁶, shot down a Federal Act directing states on how to control radioactive waste. The Court held that Congress may not commandeer the legislative process of the states by directly compelling them to enact a regulatory program.

The policy rationale behind this is that this diminishes the accountability of both state and federal officials. When both the state and federal government publically act, they are each held accountable. However, when the federal government directs the states to regulate, it may be state officials who face the public disapproval while federal officials, who devised the program, are insulated from electoral ramifications.

In *Printz v. United States*²⁰⁷, the Supreme Court invalidated a Congressional Act, which required state and local law enforcement to conduct background checks on gun purchasers.²⁰⁸ The Court held that Congress could not commandeer the States’ executive power in the absence of a particularized constitutional authorization, unless the state consents.²⁰⁹ Essentially, so long as the act does not require the states in their sovereign capacity to regulate their own citizens according to federal law, but rather regulates the states as owners of a database the law will likely be constitutional.²¹⁰

However, Congress can get around the Court’s anti-commandeering case law by asserting its spending power. Under the Constitution, Congress has the “power to lay and collect taxes, duties,

205. U.S. CONST. amend. X.

206. *New York*, 505 U.S. at 144.

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

208. *Id.*

209. *Id.*

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

imposts and excises, to pay the debts and provide for the common [defense] and general welfare of the United States.”²¹¹

Still, Congress’ power to tax is not unlimited. Congress may attach conditions on the receipt of federal funds, however, in order to do so the Congressional act must pass the “Dole Test” laid out in *South Dakota v. Dole*.²¹² In *South Dakota v. Dole*,²¹³ the Supreme Court upheld a federal law which conditioned highway funds on a state’s agreement to raise the legal drinking age to twenty-one. After *Dole*, Congress may attach conditions on the receipt of federal funds subject to several restrictions. First, the spending must promote the “general welfare.”²¹⁴ Second, the condition must be unambiguous, that is Congress must allow the states to exercise their own choice “cognizant of the consequences of their participation.”²¹⁵ Third, the condition must be related to “the federal interest in particular national projects or programs.”²¹⁶ Next, the condition imposed on the states must not be unconstitutional.²¹⁷ Lastly, the condition must not be too coercive.²¹⁸

Under this proposal, Congress will allocate federal highway funds on the condition that the states adopt a uniform system of driver’s license renewal requirements. Here, the conditioned spending certainly serves the general welfare. Elderly drivers continue to face inconsistent rules across the states, and this problem requires national attention. The condition is very unambiguous; in order to receive federal highway funds the states must accept a uniform system of driver’s license renewal requirements. Additionally, the condition is directly related to the expenditure of federal highway funds. One of the main purposes of federal highway funds is safe interstate travel, and inconsistent license renewal requirements frustrate Congress’ goal. Lastly, it is unlikely the Court would find Congress’ attempt to withhold federal highway funds as too coercive.²¹⁹

Under the Tenth Amendment, Congress will not be able to force the states to adopt a uniform system of driver’s license renewal re-

211. U.S. CONST. art. I, § 8, cl. 1.

212. *South Dakota v. Dole*, 483 U.S. 203, 204 (1987).

213. *Id.*

214. *Id.* at 207.

215. *Id.*

216. *Id.*

217. *Id.* at 208.

218. *Id.* at 211.

219. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2567 (2012) (until Sebelius the Court had never shot down an attempt by Congress to condition federal funds upon the states).

quirements. However, Congress can simply use the spending power to achieve the same goal. The Court will likely find that the proposal passes the “Dole Test”²²⁰ and allow Congress to condition federal highway funds on the states’ adoption of a uniform system of driver’s license renewal requirements.

4. PRIVILEGES AND IMMUNITIES

Another potential barrier to the proposal is the Court’s recognition of the fundamental right to travel.²²¹ An elderly driver whose license is restricted, suspended, or revoked may attempt to drive in violation of the Privileges and Immunities clause of the Fourteenth Amendment.²²² However, it is unlikely this challenge will be successful.

In *Saenz v. Roe*,²²³ the court described three components to the right to travel. First, every citizen has the right to enter one state and leave another.²²⁴ Next, every citizen has the right to be treated as a welcome visitor and not a hostile stranger.²²⁵ Lastly, every citizen who seeks to be a permanent resident of a State has the right to be treated as every other resident of the state.²²⁶

Under the suggested proposal, the issue is whether an elderly driver whose license was restricted, suspended, or revoked has been denied the right to enter and leave another state. The argument would likely be that by depriving the driver of their primary means of traveling, driving a car, the State has violated a driver’s fundamental right to travel. It is unlikely the argument will be that the purpose of the more stringent renewal requirements is to prevent interstate travel or that interstate and intrastate drivers are treated differently. Instead, an individual will likely argue that because the individual can no longer drive, unless their license is renewed, they will be deprived of their primary mode of transportation. However, courts have found that burdens on a single mode of transportation (driving) do not infringe upon an individual’s right to interstate travel.²²⁷

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

221. *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

222. U.S. CONST. amend. XIV, §1, cl. 2.

223. *Saenz*, 526 U.S. at 489.

224. *Id.* at 500.

225. *Id.*

226. *Id.*

227. *Miller v. Reed*, 176 F.3d 1202, 1205 (1999).

Therefore, so long as the individual has other means of transportation, the restriction, suspension, or revocation of their license does not infringe upon the fundamental right to travel.²²⁸ The suggested proposal does not prevent an individual from taking a bus, train, or taxi. Therefore, because other modes of transportation are available, an elderly driver's fundamental right to travel is not denied because a state has adopted more stringent license renewal requirements.

B. Non-Constitutional Barriers

The proposal may pass constitutional muster, however it still has some obstacles to overcome. The elderly population and their advocates are a growing political force. Therefore, the typical response in opposition to more stringent renewal requirements is to call advocates "ageist." Additionally, some doctors may fear required medical reporting may put them at risk of liability for violating the doctor-patient confidentiality.

1. POLITICAL FORCE

The elderly population and their advocates create a strong political voice. The elderly population is the fastest growing population in the United States.²²⁹ This strength in numbers alone presents a formidable obstacle to any sort of license renewal requirement reform.²³⁰ With a high voter turnout rate, the elderly population is a political force and their concerns must be taken into account.²³¹

In addition to the elderly population themselves, there are many powerful organizations that lobby on behalf of the elderly.²³² AARP is the largest and most influential group representing elderly drivers.²³³ With over forty million members, AARP is the United States' second largest organization, has deep pockets, and its members make up twenty percent of all registered voters.²³⁴ AARP has routinely opposed potential renewal requirement reforms by attacking them as

228. *Id.* at 1206.

229. *See* Krueger, *supra* note 12.

230. *See* Rosenfeld, *supra* note 67, at 474.

231. *Id.* at 473.

232. Bodnar, *supra* note 61, at 1739.

233. *Id.*

234. *Id.*

“ageist” and discriminatory.²³⁵ Therefore, it is understandable why Congress may be hesitant to pass the current proposal.

Because of the strong influence of AARP and the political power of the elderly population, Congress must seek to achieve the reform necessary with the concerns of the elderly population in mind.

2. HIPAA/ DOCTOR-PATIENT CONFIDENTIALITY

The Health Insurance Portability and Accountability Act is a potential barrier to the proposals required medical reporting. Some doctors may fear reporting patients in fear of violating the doctor-patient privilege. However, if a state requires medical reporting, medical professionals are covered under Section 164.512(a) of HIPAA.²³⁶ Section 164.512(a) allows disclosure if required by law. Even if not provided with immunity a medical provider may be able to disclose the name of driver to the state motor vehicle department under Section 164.512(j) of HIPAA.²³⁷ Section 164.512(j) permits disclosure to avert a serious threat to the public health or safety.²³⁸ However, the actor must in good faith believe disclosure is necessary to protect a person or the public and the disclosure must be made to someone reasonably able to prevent or lessen the threat.²³⁹ Therefore, whether mandatory reporting is required or not, a doctor acting in good faith who believes that a patient is a serious threat to the public health or safety will not be found to have violated HIPAA.

IV. Recommendation

The United States has yet to find a comprehensive solution; therefore, there are many inconsistencies across the states in determining license renewal procedures and requirements. In order to help remedy the growing number of elderly drivers, there must be a more uniform model of license renewal procedures. However, it is important that this solution effectively addresses the current problems, and at the same time takes into account the concerns of the elderly driver. This section will recommend various approaches to combating the problem. These approaches include: educating drivers, improving

235. *Id.*

236. TEXAS DEP'T OF STATE HEALTH SERVS., EXCEPTIONS THAT ALLOW DISCLOSURE OF PROTECTED HEALTH INFORMATION UNDER HIPAA (2006).

237. *Id.*

238. *Id.*

239. *Id.*

roads and highways, required medical reporting, educating other referral sources, accelerated age-based license renewal, and alternative forms of transportation. None of these approaches standing alone will solve the problem; however, together they can provide a comprehensive solution to the growing problem of elderly drivers.

A. Educating Drivers

Providing educational information to older drivers about the link between functional decline and driving safety is essential. This information can be provided by doctors, through brochures, by family members, and through driver education programs.²⁴⁰ Driver education programs, help increase elderly drivers' self-awareness and knowledge regarding their driving-related declines in ability. However, it is sometimes difficult to get drivers to participate in these classes. In order to combat this issue, this proposal suggests a federal law requiring automobile insurers to provide discounts as an incentive for elderly drivers to take the courses.²⁴¹

Another great way to educate elderly drivers is through brochures and self-assessments. Often, these guides provide the elderly driver with quick, simple, and convenient ways to assess their own impairments and how to compensate for these impairments. The Physician's Guide contains great resources that can be provided to the elderly driver.²⁴² The guide provides patients with successful aging tips on things such as regular doctor visits, eating, health, and exercising.

Congress should propose that all states require car insurers to provide discounts to elderly drivers participating in driver safety programs.²⁴³ Additionally, using the Physician's Guide as a model, Congress should require states to provide driver safety programs, create educational brochures, and create self-assessment tests.

240. See generally PHYSICIAN'S GUIDE, *supra* note 11; MODEL GUIDELINES, *supra* note 69.

241. See, e.g., Jen Burklow, *It Pays to Be Gray: Senior Driver Discounts*, KICKING TIRES (Aug. 27, 2014), <http://blogs.cars.com/kickingtires/2014/08/it-pays-to-be-gray-senior-driver-discounts.html>.

242. See generally PHYSICIAN'S GUIDE, *supra* note 11.

243. Burklow, *supra* note 241.

B. Medical Reporting

A more active role by the medical community will be a huge help in identifying at-risk drivers. However, doctors are hesitant to report patients without immunity from civil and criminal liability.²⁴⁴ The voluntary reporting laws of Massachusetts and Missouri have delivered promising results.²⁴⁵ Nonetheless, civil and criminal immunity are not enough.

Immunity for doctors who can voluntarily report drivers does not protect the patient or other drivers. Instead, voluntary reporting only protects the doctor. Voluntary reporting provides complete immunity from civil and criminal lawsuits for all doctors, whether that doctor reports an unsafe driver or not. This allows a doctor who knows a driver is unsafe and knows that that driver is a risk to others, to stand by and do nothing with complete immunity. Immunity is helpful but it must be accompanied by mandatory reporting; otherwise, voluntary reporting only protects the doctor who chose to do nothing. Therefore, Congress should require states to make medical reporting mandatory.

C. Educating Referral Sources

Physicians, friends, family, police officers, and other third parties can be great sources of referral.²⁴⁶ This proposal suggests that Congress encourage states to accept referrals from all of these parties. Therefore, it is important that all of these individuals receive proper guidance on how to be effective screeners of at-risk drivers.

Doctors can be an effective source of referrals; however, it is important for states to provide them with guidance.²⁴⁷ In order to identify these at-risk drivers, the Physician's Guide is a great resource for physicians. In fact, the Physician's Guide should be provided to all physicians in a state's jurisdiction. The guidelines provide doctors with counseling advice, self-assessments from the patient, a list of medical conditions and medications that may affect a patient's driving skills, as well as information on state licensing requirements and state

244. Lang, *supra* note 118.

245. See generally Lang, *supra* note 118; Meuser, *supra* note 121.

246. See generally PHYSICIAN'S GUIDE, *supra* note 11; MODEL GUIDELINES, *supra* note 69.

247. PHYSICIAN'S GUIDE, *supra* note 11, at 14, 17, 20; MODEL GUIDELINES, *supra* note 69, at 49-58, 145.

medical reporting procedures.²⁴⁸ These guidelines will provide doctors with the information necessary to more effectively identify, counsel, and report at-risk patients.

Friends and family are another source of referrals.²⁴⁹ Family and friends often spend more time with the elderly driver and the driver may be more willing to listen to them.²⁵⁰ Therefore, it is important states educate family members as well. However, in order to prevent harassment states should not accept anonymous reporting. In order to do so states should require those family and friends who suspect a driver of having a medical condition or some other impairment to complete a Medical Request Form. This form will not result in immediate restriction, suspension, or revocation. However, it will require the driver to visit a physician and complete a medical report. This same form should be required of police officers referring drivers. Police officers have proven to be a source of referrals.²⁵¹ Therefore, the same information, which provides guidance to physicians, family, and the driver should be provided to police officers as well.

D. Renewal Procedures

Increased uniformity of renewal requirements may help address the problems that elderly drivers pose. Consequently, Congress should require the states to require in-person renewals, which are triggered at a certain age. Because of a noticeable increase in fatal crash rates, which occurs between ages seventy and eighty-five, these renewals should begin at age seventy-five.²⁵² At this age, renewal cycles will become accelerated, requiring drivers to renew every two years. It is true that everyone ages differently; however, these in-person renewals will allow Department of Motor Vehicles (DMV) employees to screen elderly drivers who have become impaired drivers as the result of natural aging.

In order to do so, these employees must be trained to observe functional impairments. Therefore, using the Model Guidelines, Congress should provide information on how to observe these impairments as well as design checklists for employees to use. Using the

248. See generally PHYSICIAN'S GUIDE, *supra* note 11.

249. MODEL GUIDELINES, *supra* note 69, at 17.

250. *Id.*

251. MEDICAL REVIEW PROCESS, *supra* note 113, at 19.

252. *Older People*, *supra* note 43.

Model Guidelines, states will better prepare DMV employees to identify those drivers that are a danger to themselves and others.²⁵³ DMV employees should be trained to observe and individuals lower body strength and range of motion, upper body strength and range of motion, hearing, vision, cognitive skills, as well as the ability to maintain a normal state of mind.

E. Transportation

It is clear that the increasing elderly driving population is a growing problem. However, it is important to balance the public interest in safe roads and highways against the individual driver's concerns. If it is the case that an individual's driver's license is restricted, suspended, or revoked it is important that alternative transportation be provided. Elderly drivers, especially the baby boomers, have grown increasingly dependent upon their cars.²⁵⁴ Additionally, most of the elderly population lives in either rural or suburban areas.²⁵⁵ For these individuals, driving may be the only option.

Therefore, it is important that with reform must also come guidance. Those drivers who lose their privilege to drive must be educated on alternative transportation options. These options should help individuals continue driving and maintain the quality of life they were afforded by independent mobility. Transportation options can involve community services, public transportation, and even private providers. The elderly population is not fond of public transportation;²⁵⁶ however, if informed they may be more interested in door-to-door private services.

V. Conclusion

The problem of elderly drivers is not going away and if not addressed may become much worse. However, these problems must be balanced against the needs of the elderly driver, which are extensive. One screening tool, one person, and one state alone cannot solve the problem. The growing problem of elderly drivers must be addressed through a coordinated effort across the nation. Elderly drivers are not a new problem; yet, little has been done. Elderly drivers today face

253. MODEL GUIDELINES, *supra* note 69, at 9.

254. *See supra* Part II.A.

255. KEEPING BABY BOOMERS MOBILE, *supra* note 19, at 2.

256. *Id.* at 4.

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inconsistent requirements across the states. Therefore, Congress must compel the states to adopt a uniform model of license renewal procedures. However, as we stand today the United States has not developed a comprehensive solution to this issue. In choosing a well-balanced approach which incorporates mandatory medical reporting, accelerated in-person renewals, and educational efforts Congress can help guide the way towards safe roads and at the same time address the concerns of the elderly population.