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Alienage as a Suspect Class: Nonimmigrants and the Equal Protection Clause

Ariel Subourne

I. INTRODUCTION

The United States of America has traditionally been a country of opportunity for many legal immigrants. But the process of establishing themselves in their new home has never been easy on immigrants, who have historically faced legal discrimination, including laws aimed at preventing them from working. In *Takashi v. Fish and Game Commission*, the Supreme Court noted that “[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.”¹ Yet today, a group of legal immigrants are facing precisely this dilemma in parts of the United States. Nonimmigrants, a class of legal aliens who reside in the United States under temporary visas,² have recently brought a series of challenges to laws that discriminated against them on basis of their legal status.³ Decades after the Supreme Court ruled in *Takashi*, the Second Circuit Court of Appeals invoked this case when it concluded that the State of New York could not prevent immigrants with temporary work visas from becoming licensed pharmacists in the state.⁴ This ruling was the first in a series of steps needed by the court system to prevent state discrimination against nonimmigrants. The courts should evaluate discriminatory state laws under the Equal Protection Clause using strict scrutiny review, both because nonimmigrants are a

¹ 334 U.S. 410, 416 (1948) (the Supreme Court struck down a law preventing people of Japanese descent, who were at the time ineligible for citizenship because of their race, from receiving fishing licenses).

² RICHARD D. STEEL: STEEL ON IMMIGRATION LAW, §2.23 (2d ed. 2012).

³ See *infra* Part III.B.

⁴ *Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012).

suspect class and because the Supreme Court has previously ruled that classifications based on alienage are reviewed using strict scrutiny.

In 1971, the United States Supreme Court in *Graham v. Richardson* confronted the question of whether the Equal Protection Clause of the Fourteenth Amendment prohibited states from discriminating between residents on the basis of alien status.⁵ In doing so, the Supreme Court had to determine whether it would review the laws under rational basis review, a standard that is very deferential to the government, or strict scrutiny, the highest level of equal protection review.⁶ The Court held that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”⁷ After *Graham*, it appeared that the debate over whether the Equal Protection clause prohibited alienage-based discrimination might have been resolved. In recent years, the Supreme Court has considered the difference between the rights afforded to undocumented immigrants versus legal immigrants several times. But the Court has yet to address what safeguards the Equal Protection Clause affords to nonimmigrants.

A question has arisen as to whether *Graham’s* analysis truly applies to alienage as a class, or if the Supreme Court merely afforded strict scrutiny review to a specific subset of legal immigrants, legal permanent residents, and not to nonimmigrants.⁸ Three of the Circuit Courts of Appeal have addressed this issue within the last ten years. Both the Fifth and the Sixth Circuits have concluded that rational basis review applies to laws that discriminate against nonimmigrants.⁹ These two Circuit Courts have found that *Graham’s* holding only applies to

⁵ 403 U.S. 365, 366 (1971).

⁶ See *infra* Part II.A.

⁷ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁸ See *infra* Part III.A.1.

⁹ See *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011); *League of United Latin American Citizens (LULAC) v. Bredesen*, 500 F.3d 523 (6th Cir. 2007).

legal permanent residents and not to nonimmigrants.¹⁰ The Second Circuit in *Dandamudi* disagreed, finding that *Graham*'s holding applied to nonimmigrants as well.¹¹ The Second Circuit thus split from the Fifth and Sixth Circuits as to the appropriate level of review of such claims under the Equal Protection Clause.¹² As a result, the legitimacy of laws that discriminate against nonimmigrants varies depending on the part of the country the nonimmigrant resides in. This legal discrepancy could cause serious problems for nonimmigrants in the United States.

This Comment addresses this present circuit split and argues that courts should review laws that discriminate against nonimmigrants using strict scrutiny analysis under the Equal Protection Clause of the United States Constitution. Nonimmigrants are a suspect class, which has historically warranted the application of a strict scrutiny standard of review. In addition, the Supreme Court's holding in *Graham* was meant to establish strict scrutiny as the appropriate standard of review for alienage as a whole. For these reasons, strict scrutiny is the appropriate level of review. Part II of this Comment contains a brief overview of immigration law and how it categorizes different classes of immigrants, as well as a brief discussion of the standards of review under the Equal Protection Clause. Part III contains an analysis of the Supreme Court case law on immigration and equal protection challenges, and a discussion of the current federal appellate and district court cases covering challenges to laws that restrict the rights and privileges of nonimmigrants. Part IV then discusses a variety of approaches to preventing legal discrimination against nonimmigrants and the consequences of each suggested approach. Part V concludes that courts should review laws that discriminate against nonimmigrants under the strict scrutiny standard of review.

II. BACKGROUND

¹⁰ *Id.*

¹¹ *Dandamudi*, 686 F.3d at 81.

¹² *Id.* at 78–79.

A. *The Equal Protection Clause and Levels of Review*

The Fourteenth Amendment of the United States Constitution states that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹³ Historically, the Supreme Court applied the Equal Protection Clause to state laws that discriminated against different groups in an uneven manner.¹⁴ The Court later developed a more specific method of deciding Equal Protection cases beginning with *United States v. Carolene Products*.¹⁵ In footnote four, the Supreme Court noted that it might apply “more exacting judicial scrutiny” to laws depending on, among other things, whether the law discriminated between “particular religious. . . or national. . . or racial minorities. . .” or “discrete and insular minorities. . .”¹⁶ The Supreme Court later adopted the idea that it was appropriate to apply different levels of scrutiny to laws depending on what groups they were distinguishing between.¹⁷ The Supreme Court eventually developed three levels of scrutiny: strict scrutiny, intermediate or heightened scrutiny, and rational basis.¹⁸

Strict scrutiny is the most exacting level of Equal Protection review. To pass, the proponent of the law must show that they are pursuing a compelling government interest and that the law is narrowly tailored and necessary to achieve this interest.¹⁹ The courts will apply strict scrutiny review to classifications based on race or national origin.²⁰ The Supreme Court has also applied strict scrutiny review to classifications based on alienage,²¹ though whether classifications based on alienage always trigger strict scrutiny review is, of course, the subject of

¹³ U.S. CONST. amend. XIV, § 1.

¹⁴ See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE, § 18.3(a)(i) (5th ed. 2012).

¹⁵ See 304 U.S. 144 (1938).

¹⁶ *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁷ ROTUNDA & NOWAK, *supra* note 14, at § 18.3(a)(v).

¹⁸ *Id.*

¹⁹ *Id.* at § 12.3(a)(iii).

²⁰ *Id.*

²¹ See *Graham*, 403 U.S. 365 (1971); *infra* Part III.A.1.

some debate.²² Rational basis is the lowest level of scrutiny and is the default applied by the courts in absence of a reason for a heightened level of scrutiny.²³ The courts evaluate only whether the classification has a rational relationship to some legitimate end that the government is pursuing.²⁴ While the specific formulation varies, intermediate scrutiny generally requires a court to evaluate whether there is an important government objective that is substantially related to the government action at issue.²⁵ The Supreme Court has also applied an intermediate level in some cases, such as those discriminating on the basis of gender.²⁶ In some particular circumstances, the Supreme Court has also applied intermediate scrutiny to undocumented immigrants.²⁷

The appropriate level of classification is determined by evaluating whether the group in question is a “suspect class” for the purpose of the Equal Protection Clause.²⁸ Whether a class is suspect can depend on a variety of factors, such as if the class is a “discrete and insular minority. . .”²⁹ or has been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness. . . .”³⁰ If a court finds that the group in question is a suspect class, it will apply strict scrutiny review.³¹ If the group has some of the characteristics of a suspect class, a court may choose to apply a heightened form of scrutiny.³² But if the class is not suspect, it is unlikely that a court will apply anything other than rational basis scrutiny.³³

Courts generally give a strong presumption of constitutionality to laws reviewed under rational

²² See *infra* Part IV.A.1.

²³ ROTUNDA & NOWAK, *supra* note 14, at § 18.3(a)(ii).

²⁴ *Id.*

²⁵ *Id.* at § 18.3(a)(iv).

²⁶ *Craig v. Boren*, 429 U.S. 190, 198 (1976).

²⁷ *Plyler v. Doe*, 457 U.S. 202, 230 (1982); see *infra* Part III.A.2.

²⁸ ROTUNDA & NOWAK, *supra* note 14, at § 18.3(a)(iii).

²⁹ *Carolene Products*, 304 U.S. at 152 n.4.

³⁰ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

³¹ ROTUNDA & NOWAK, *supra* note 14, at § 18.3(a)(iii).

³² *Id.* at § 18.3(a)(iv).

³³ *Id.* at § 18.3(a)(ii).

basis.³⁴ Therefore, heightened levels of scrutiny are far more advantageous to plaintiffs challenging these classifications.

B. The Classification of Aliens Under United States Law

Immigration law in the United States divides aliens into three major categories: legal permanent residents, nonimmigrants, and undocumented immigrants.³⁵ The first category contains legal permanent residents (herein “LPRs”).³⁶ Also referred to simply as immigrants, LPRs have the intention to stay in the United States permanently.³⁷ LPRs obtain legal permits, often referred to as green cards, that allow them to remain in the United States permanently.³⁸ LPRs can achieve permanent resident status through a variety of means, though the most common include “through family relationships, through a job, or as a refugee or asylee.”³⁹ The second category of aliens is undocumented immigrants or “illegal aliens”. Undocumented immigrants generally have less legal rights due to their illegal status.⁴⁰

The final category of immigrants is nonimmigrants, who are temporary, legal aliens.⁴¹ Nonimmigrants come to the United States temporarily “to engage in an activity encompassed within one of the nonimmigrant classifications set forth in the [Immigration and Nationality Act].”⁴² Nonimmigrants are required to establish “eligibility within one of the principal nonimmigrant classifications or one of the subclassifications” in order to qualify for a visa.⁴³ The category covers a variety of individuals, such as “temporary workers, students, foreign

³⁴ *Id.* at § 18.3(a)(v).

³⁵ STEEL, *supra* note 2, at §2.23.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at § 2.24.

⁴⁰ *Plyler*, 457 U.S. at 222.

⁴¹ STEEL, at §2.23.

⁴² *Id.* at §3.1.

⁴³ *Id.* at §2.28.

diplomats, tourists, and business travelers.”⁴⁴ The INA only permits nonimmigrants to remain in the United States for a finite period, though that period varies depending on the type of nonimmigrant visa.⁴⁵

This Comment focuses on nonimmigrants, and specifically those that are in the United States for a longer period of time, such as those with work or student visas. There are several types of student visas; nonimmigrants can attend a college program with an F-1 visa, while Mexican and Canadian students can receive an F-3 visa for a similar purpose.⁴⁶ The Immigration and Nationality Act (INA) also provides for a variety of temporary work visas, such as H-1B and H-1C visas.⁴⁷ Additionally, “TN” immigrants are a class of nonimmigrants created under the North American Free Trade Agreement (NAFTA).⁴⁸ Workers with H-1B, H-1C, and TN visas typically stay in the United States for an initial period of three years, and can later receive a three-year extension of the initial period.⁴⁹ Thus, the work period is technically restricted to six years.⁵⁰ But many nonimmigrants remain in the country for longer, as “federal law permits many aliens with TN or H1-B status to maintain their temporary worker authorization for a period greater than six years.”⁵¹ Generally, nonimmigrants enter the United States on a temporary basis and must attest that they do not intend to remain in the United States past the time allowed by their visa⁵²

⁴⁴ Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, 7 MOD. AM. 12, 13 (2011).

⁴⁵ STEEL, *supra* note 2, at § 3.12.

⁴⁶ Immigration and Nationality Act § 101(a)(15)(f), 8 U.S.C.A. § 1101(a)(15)(F) (2012); 22 C.F.R. § 41.12 (2012); *see also* STEEL, *supra* note 2, at § 3.12.

⁴⁷ Immigration and Nationality Act § 101(a)(15), 8 U.S.C.A. § 1101 (2010).

⁴⁸ 8 C.F.R. § 214.6.

⁴⁹ *Dandamudi*, 686 F.3d at 70.

⁵⁰ *Id.* at 71.

⁵¹ *Id.*

⁵² *Storch*, *supra* note 44, at 13.

This Comment focuses on nonimmigrants with work visas because they are some of the longer-staying nonimmigrant classes. As a result, discriminatory laws disproportionately affect them as a group. Additionally, the limited case law on nonimmigrants and the Equal Protection Clause usually involves challenges brought by nonimmigrants with work and student visas, because these laws discriminated against those particular nonimmigrants.⁵³ While the analysis of this Comment focuses on nonimmigrants with work visas, the conclusions are applicable to the whole category. Nonimmigrants in general are in a legally vulnerable position because their status under the Constitution is unclear.⁵⁴ Therefore, the conclusions drawn in this Comment are applicable to the whole class.

III. IMMIGRATION AND THE EQUAL PROTECTION CLAUSE

A. *Alienage Before the Supreme Court*

1. Early Rulings on Alienage

The Supreme Court initially determined the level of Equal Protection review afforded to aliens in *Graham v. Richardson*. In *Graham*, the Court examined Arizona and Pennsylvania state laws that restricted welfare benefits to citizens or long-term residents.⁵⁵ The Court referred to the plaintiffs, who all had some form of LPR status, as “lawfully admitted residents.”⁵⁶ Arizona and Pennsylvania argued that the Constitution permitted states to “favor United States citizens over aliens” and that doing so did not violate the Equal Protection Clause.⁵⁷ The plaintiffs argued that preventing aliens from accessing welfare benefits on an equal basis as their

⁵³ See *infra* Part III.B.

⁵⁴ See *infra* Part III.A.

⁵⁵ *Graham*, 403 U.S. at 367.

⁵⁶ *Id.* at 367–70.

⁵⁷ *Id.* at 371.

citizen counterparts was unconstitutional under both the Equal Protection Clause and the Supremacy Clause of the United States Constitution.⁵⁸

The Court stated that the restrictive welfare laws “create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country.”⁵⁹ Invoking *United States v. Carolene Product Co.*’s famous footnote four, the Court found that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority. . . for whom. . . heightened judicial solicitude is appropriate.”⁶⁰ As such, the Court concluded that their decisions had “established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”⁶¹ The Court stated that while it had occasionally upheld statutes that distinguished between citizens and immigrants, those distinctions had been necessary to protect specific “special interests of the State or its citizens.”⁶² Under the circumstances presented in the case, the Court held that the “State’s desire to preserve limited welfare benefits for its own citizens” was not a special interest sufficient to justify the state’s discrimination against the plaintiffs.⁶³

The Supreme Court focused on LPRs in its analysis. The Court referred variously to “resident” aliens and “lawful” aliens throughout the opinion.⁶⁴ The Supreme Court also relied on the similarities between LPRs and citizens to support its conclusions.⁶⁵ It held that “[a]liens like citizens pay taxes and may be called into the armed forces” and that “[u]nlike the short-term residents. . . aliens may live within a state for many years, work in the state and contribute to the

⁵⁸ *Id.* at 368–69.

⁵⁹ *Id.* at 368–369.

⁶⁰ *Id.*

⁶¹ *Graham*, 403 U.S. at 371–372.

⁶² *Id.* at 372.

⁶³ *Id.* at 374.

⁶⁴ *Id.* at 367–70.

⁶⁵ *Id.* at 376.

economic growth of the state.”⁶⁶ The Court distinguished “short-term” residents from permanent aliens, who share more in common with citizens.⁶⁷ The Supreme Court also stated that states cannot argue that citizens have a special interest in tax revenue spent on citizens themselves when “aliens have contributed on an equal basis with the residents of the State.”⁶⁸ By specifically framing the issue around the characteristics of LPRs, the Court may have been limiting its holding to that specific group of aliens.⁶⁹ As such, the holding would exclude nonimmigrants and laws discriminating against them would only be subject to rational basis review.⁷⁰ Many courts and scholars have concluded the Supreme Court intended its holding in *Graham* to apply to alienage in general, thus applying a strict scrutiny standard of review to classifications affecting all classes of legal immigrants.⁷¹ Others have argued that the Supreme Court’s holding in *Graham* applied only to LPRs and not to nonimmigrants.⁷² These differing interpretations of *Graham* are the basis of the current circuit split over the level of Equal Protection review granted to nonimmigrants.

Following *Graham*, the Court addressed a variety of other Equal Protection challenges to state laws that discriminated on the basis of alienage. For example, in *In re Griffiths*, the Court considered a challenge to a state law limited admission to the Connecticut bar to citizens.⁷³

⁶⁶ *Id.*

⁶⁷ *Graham*, 403 U.S. at 376.

⁶⁸ *Id.*

⁶⁹ See *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011); *League of United Latin American Citizens (LULAC) v. Bredesen*, 500 F.3d 523, (6th Cir. 2007).

⁷⁰ See *supra* notes 23–24.

⁷¹ See *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012); *Kirk v. New York State Dep. Of Educ.*, 562 F.Supp.2d (W.D.N.Y. 2008); Adam Bryan Wall, *Justice For All? The Equal Protection Clause and Its Not-So-Equal Application To Illegal Aliens*, 84 TUL. L. REV. 759 (2010).

⁷² See *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011); *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, (6th Cir. 2007); Adam Bryan Wall, *Justice For All? The Equal Protection Clause and Its Not-So-Equal Application To Illegal Aliens*, 84 TUL. L. REV. 759 (2010).

⁷³ *In re Griffiths*, 413 U.S. 717, 718 (1973).

Griffiths, like *Graham*, involved an alien that had LPR status.⁷⁴ In concluding that the Connecticut law violated the Equal Protection Clause, the *Griffiths* Court affirmed that “[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”⁷⁵ As in *Graham*, the Court also emphasized the similarities between LPRs and citizens to support its holding.⁷⁶ The *Griffiths* Court stated that “[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. . .” and therefore the state “bear[s] a heavy burden when it deprives them of employment opportunities.”⁷⁷ The Supreme Court cited these same factors to support the decision in *Graham*.⁷⁸ These subsequent decisions had reinforced the view that the Supreme Court, in focusing on the characteristics of LPRs, intended to limit its holding to LPRs alone.

2. Undocumented Immigrants

Undocumented immigrants have also challenged laws under the Equal Protection clause, with varying degrees of success. The Supreme Court ruled on such a claim in *Plyler v. Doe*, a case examining the legality of a school admission policy that restricted the registration of children of undocumented immigrants.⁷⁹ In *Plyler*, the Court initially dismissed the idea that undocumented aliens were a suspect class.⁸⁰ Specifically, the Court held that an individual’s undocumented status did not permit the same level of constitutional protections afforded to legal

⁷⁴ *Id.*

⁷⁵ *Id.* at 721.

⁷⁶ *Id.* at 722.

⁷⁷ *Id.*

⁷⁸ See *supra* notes 65–68.

⁷⁹ 457 U.S. at 204.

⁸⁰ *Id.* at 223.

aliens.⁸¹ Therefore, it seemed that the *Plyler* Court had decided to apply rational basis review in the case.⁸²

But the *Plyler* majority went on to emphasize that the class at issue in the case was the children of undocumented immigrants, not just undocumented immigrants in general.⁸³ The Court stated that the law at issue “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”⁸⁴ The Court therefore required the state to point to a “substantial goal” furthered by the law.⁸⁵ While the Supreme Court explicitly stated that it would use rational basis review, the “substantial goal” language implied that the Court was actually applying some form of heightened scrutiny.⁸⁶ Ultimately, the Court struck down the restrictions on undocumented immigrant children under this heightened standard.⁸⁷

Plyler complicated the analysis of how the Equal Protection Clause is used to review laws that discriminate on the basis of alienage by potentially introducing a third level of scrutiny. The Supreme Court stated in *Plyler* that it was applying rational basis review to the case.⁸⁸ But *Plyler*’s holding seemed to actually apply a form of heightened review to undocumented immigrants as a class.⁸⁹ As a result, the courts now have three levels of scrutiny that could potentially apply to aliens. The *Plyler* Court emphasized the fact that the undocumented immigrants at issue were children who were in a particularly vulnerable position through no fault of their own.⁹⁰ This focus on the vulnerability of children implies that intermediate scrutiny

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Plyler*, 457 U.S. at 224.

⁸⁶ *Id.*

⁸⁷ *Id.* at 230.

⁸⁸ *Id.* at 222.

⁸⁹ *Id.* at 223

⁹⁰ *Id.*

would not usually apply to aliens. Therefore, the actual holding of *Plyler* may be narrower than it first appears.

3. Nonimmigrants

The Supreme Court has almost never dealt considered the constitutionality of laws that discriminated against nonimmigrants. *Toll v. Moreno* is the sole case decided by the Supreme Court that contained an Equal Protection challenge to a law that discriminated against nonimmigrants.⁹¹ *Toll* involved the University of Maryland's decision granted preferential tuition to students with a domicile in Maryland.⁹² Only citizens or LPRs with domicile, however, could receive these benefits.⁹³ The University policy exempted nonimmigrants from these benefits, even if the particular type of visa the nonimmigrant held allowed them to establish domicile in the state.⁹⁴ Nonimmigrant students challenged the law, arguing that it violated the Equal Protection Clause because it discriminated against nonimmigrants as a class in favor of citizens and LPRs.⁹⁵ The plaintiffs argued in the alternative that federal immigration law preempted state law, which designated that nonimmigrants with G-4 visas could establish domiciles.⁹⁶

Rather than deciding the case on the Equal Protection argument, the Supreme Court struck down the law on preemption grounds.⁹⁷ After ruling on preemption grounds, the Court held that it “[had] no occasion to consider whether the policy violates the . . . Equal Protection

⁹¹ *Toll v. Moreno*, 458 U.S. 1, 3 (1982).

⁹² *Id.* at 3–4.

⁹³ *Id.*

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 4.

⁹⁶ *Id.* at 3.

⁹⁷ *Toll*, 458 U.S. at 10–17 (The Court held that Congress has expressly permitted the classes of nonimmigrants in question here to “establish domicile.” Maryland was not permitted to remove this domicile status, as the Supremacy Clause of the Constitution made federal law preempt state law. The Court “note[d] the substantial limitations upon the authority of the States in making classifications based upon alienage” in deciding *Toll*.)

Clause.”⁹⁸ The holding itself was very narrow, dealing only with a very small subset of nonimmigrants that were explicitly granted domicile status.⁹⁹ The Court did not even consider the Equal Protection arguments presented in *Toll*.¹⁰⁰ The Court seemed to avoid any discussion of the issue, beyond recounting the District Court’s ruling.¹⁰¹ As such, it remained an open question as to whether the *Graham* analysis should apply to nonimmigrants.

B. Circuit Courts, Nonimmigrants, and the Equal Protection Clause

The federal circuits have only occasionally addressed challenges to laws discriminating against nonimmigrants. Most of these cases arose within the last twenty years and are concentrated within three circuits: the Fifth, the Sixth, and the Second. The Fifth and Sixth Circuit Courts have held that courts should consider laws that discriminate against nonimmigrants under rational basis review. The Second Circuit has very recently disagreed with its fellow Circuit Courts, holding that strict scrutiny review is appropriate for reviewing laws that restrict the employment of nonimmigrants. Accordingly, there is a current split amongst the circuits as to the appropriate level of scrutiny for Equal Protection challenges to laws that exclude nonimmigrants.

1. The Fifth Circuit’s Interpretation

The Fifth Circuit was in the position of being the first Circuit Court to determine what level of scrutiny nonimmigrants should receive under the Equal Protection Clause in *LeClerc v. Webb*. *LeClerc* addressed an equal protection challenge to a law restricting state bar exam admissions.¹⁰² Louisiana law only permitted only citizens or LPRs to apply to the bar.¹⁰³ The

⁹⁸ *Toll*, 458 U.S. at 10.

⁹⁹ *Id.* at 17

¹⁰⁰ *Id.* at 10.

¹⁰¹ *Id.*

¹⁰² 419 F.3d at 410.

¹⁰³ *Id.*

class of plaintiffs, from two consolidated cases, held several different types of nonimmigrant visas, including J-1 student visas and H-1B work visas.¹⁰⁴ Several of the plaintiffs had entered the United States under one of these types of visas but had then transitioned to others.¹⁰⁵ The plaintiffs maintained that the law violated their Equal Protection rights by distinguishing their legal treatment from that of LPRs and citizens.¹⁰⁶ The plaintiffs argued that the law should either be evaluated under strict scrutiny analysis because “under *In re Griffiths*, nonimmigrant aliens are a suspect class and state laws affecting them are subject to strict scrutiny”, or that it should be evaluated under intermediate scrutiny because “nonimmigrant aliens are a quasi-suspect class.”¹⁰⁷ The Fifth Circuit dismissed these arguments and eventually ruled that rational basis was the appropriate level of review.¹⁰⁸

As a threshold matter, the Fifth Circuit concluded that *In re Griffiths*¹⁰⁹ was not applicable because it addressed discrimination against an LPR alien, and not whether strict scrutiny review applied to nonimmigrants.¹¹⁰ The Fifth Circuit held that the differences between nonimmigrants and LPRs were “paramount[.]”¹¹¹ The court reasoned that the Supreme Court’s decision in *Griffiths* turned on the fact that “resident aliens share essential benefits and burdens of citizenship . . . in a way that aliens with lesser legal status do not.”¹¹² The Fifth Circuit found that *Griffiths* forbade the “total exclusion” of aliens in general, but did not forbid the exclusion of some classes of aliens.¹¹³

¹⁰⁴ *Id.* at 410–11; *see supra* Part II.A.

¹⁰⁵ *LeClerc*, 419 F.3d at 410–411.

¹⁰⁶ *Id.* at 414–15.

¹⁰⁷ *Id.* at 415

¹⁰⁸ *Id.*

¹⁰⁹ Which, as previously discussed, held that the state of Connecticut could not prevent LPRs from sitting for the bar solely because of their alien status. *See supra* notes 73–78.

¹¹⁰ *LeClerc*, 419 F.3d at 415.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

The Fifth Circuit then considered two additional arguments: that nonimmigrants constituted a suspect class for the purposes of Equal Protection analysis, or that laws restricting nonimmigrants in general should receive strict scrutiny as a default.¹¹⁴ The Fifth Circuit held that though alienage classifications are “subject to close judicial scrutiny as a general matter[,]” and all such classifications are not inherently invalid or suspect.¹¹⁵ The court pointed out that after *Graham*, non-LPR aliens had received only rational basis review or, in the rare case of *Plyler*, heightened review.¹¹⁶ The Fifth Circuit also held that the plaintiffs in *Plyler* only received heightened review because they were children and as such the case represented an outlier.¹¹⁷

The court reasoned that the distinct traits of LPR status meant that such aliens were entitled to more searching judicial scrutiny, while nonimmigrants, lacking these traits, were not.¹¹⁸ Specifically, the Fifth Circuit noted that the Supreme Court has emphasized two conditions of LPRs that justified the application of strict scrutiny to laws that affected them: “(1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens.”¹¹⁹ In contrast, nonimmigrants, “who ordinarily stipulate. . . that they have no intention of abandoning their native citizenship” did not merit “the extraordinary protection” that strict scrutiny review provided.¹²⁰ The Fifth Circuit placed a great deal of emphasis on nonimmigrants’ “temporary connection” to the United States.¹²¹ The court concluded that “[a]lthough aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 415–416.

¹¹⁶ *LeClerc*, 419 F.3d at 416.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 417.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 418–19.

¹²¹ *Id.*

nonimmigrant aliens are a suspect class. . . .”¹²² The Fifth Circuit therefore held that the Supreme Court did not intend for nonimmigrants to receive a higher level of scrutiny and “decline[d] to extend the Supreme Court's decisions concerning resident aliens to different alien categories when the Court itself has shied away from such expansion.”¹²³ The Court reviewed the state bar exam restrictions under rational basis review and ultimately upheld them.¹²⁴

The majority of the Fifth Circuit upheld the regulations on all grounds.¹²⁵ But in the *LeClerc* dissent, Judge Stewart disagreed with the majority’s decision to apply rational basis review.¹²⁶ Judge Stewart differed with the majority’s interpretation of *Graham*, noting that “the Supreme Court's statement that ‘alienage is a suspect class’ by definition includes nonimmigrant aliens as part of that class.”¹²⁷ Judge Stewart maintained that the Supreme Court did not restrict its ruling in *Graham* to LPRs, even though the Court used language referring to resident aliens.¹²⁸ Judge Stewart stated that “the Supreme Court has referred to resident aliens, aliens and non–citizens interchangeably” and “residence and immigration status should be understood as two separate distinctions; one does not necessarily have to do with the other.”¹²⁹ According to the judge, the *Graham* Court held that alienage in general was a suspect class.¹³⁰

Judge Stewart also disagreed with the way the majority distinguished nonimmigrants as a distinct class from LPRs. He argued that the distinction between the two classes was not great enough to warrant different treatment under the Equal Protection Clause.¹³¹ Instead, he argued there were enough similarities between LPRs and nonimmigrants in important areas (such as the

¹²² *LeClerc*, 419 F.3d at 418–19.

¹²³ *Id.* at 419.

¹²⁴ *Id.* at 422.

¹²⁵ *Id.* at 426.

¹²⁶ *LeClerc*, 419 F.3d at 426 (Stewart, J., dissenting).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 427.

¹³⁰ *Id.* at 428.

¹³¹ *Id.*

inability to vote and a history of discrimination) to warrant nonimmigrants' inclusion as a suspect class.¹³² Judge Stewart also dismissed the alleged “transience” of nonimmigrant aliens, noting that “not all nonimmigrant aliens are required to keep a permanent residence abroad [,]” nor were they forbidden from intending to stay in the United States.¹³³ The judge pointed to the State Department’s acceptance of the doctrine of dual intent, which permitted nonimmigrant aliens to “express a short term intent to remain in the United States temporarily (so as to not contravene the requirements of the visa under which they entered)” as well as “a long term intent to remain in the United States permanently (so that they may apply for adjustment of status).”¹³⁴ The acceptance of dual intent showed that even the government acknowledged that nonimmigrants were not, as a group, transient.¹³⁵ Judge Stewart concluded that “[t]he presumption should be that nonimmigrant aliens are part of the alien suspect class and the defendants should have the burden of proving the opposite.”¹³⁶

Six years after *LeClerc*, the scope of Equal Protection rights for nonimmigrants was again before the Fifth Circuit in *Van Staden v. St. Martin*.¹³⁷ *Van Staden* addressed the constitutionality of licensing restriction for nurses in Louisiana.¹³⁸ Van Staden, a nurse authorized to work in the United States who was in the process of applying for LPR status, challenged a law allowing only LPRs and citizens to apply for nursing licenses.¹³⁹ At the outset, the Fifth Circuit concluded that the case was “controlled by *LeClerc*.”¹⁴⁰ The Fifth Circuit held that “[n]onimmigrant aliens satisfy neither of the conditions triggering strict scrutiny. . .” because

¹³² *LeClerc*, 419 F.3d at 429 (Stewart, J., dissenting).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 664 F.3d at 57.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 58 (reasoning that “*LeClerc* need not be extended to cover the facts of this case; it need only be restated.”).

nonimmigrants were neither discrete nor insular, had varied admission statuses, and lacked political capacity only due to their temporary status.¹⁴¹ Additionally, the Fifth Circuit further concluded that applicants for LPR status should count as nonimmigrants for the purposes of Equal Protection challenges, and should not receive the same treatment as full-fledged a LPR.¹⁴² The Fifth Circuit thus applied rational basis review to the law, and ultimately upheld the restrictions.¹⁴³

2. The Sixth Circuit Follows the Fifth

In the Sixth Circuit, the scope of Equal Protection rights for nonimmigrants arose in *League of United Latin American Citizens (LULAC) v. Bredesen*.¹⁴⁴ In *LULAC*, the Sixth Circuit agreed with the Fifth Circuit in holding that that state restrictions on nonimmigrants were not subject to strict scrutiny review.¹⁴⁵ Unlike the Fifth Circuit cases, which addressed laws restricting employment, *LULAC* considered a law preventing nonimmigrants from receiving driver's licenses.¹⁴⁶ *LULAC*, a non-profit organization concerned with Hispanic rights, sued on behalf of its members, in addition to several individuals who could not obtain driver's licenses due to their nonimmigrant status.¹⁴⁷ The plaintiffs alleged that the law discriminated against them based on their nonimmigrant status, and that that discrimination violated the Equal Protection Clause.¹⁴⁸

Relying heavily on the Fifth Circuit's analysis and quoting *LeClerc* frequently in its analysis, the Sixth Circuit agreed that nonimmigrants were a dissimilar class from LPRs.¹⁴⁹ The

¹⁴¹ *Van Staden*, 664 F.3d at 58.

¹⁴² *Id.* at 59–60.

¹⁴³ *Id.* at 62.

¹⁴⁴ *LULAC*, 500 F.3d at 526.

¹⁴⁵ *Id.* at 525.

¹⁴⁶ *Id.* at 526

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

LULAC majority found that “there are abundant good reasons, both legal and pragmatic, why lawful permanent residents are the only subclass of aliens who have been treated as a suspect class.”¹⁵⁰ The court reasoned that the case at hand did not provide any “compelling reason” to extend “the special protection afforded by suspect–class recognition” to nonimmigrants.¹⁵¹ The Sixth Circuit concluded that as “the instant classification does not result in discriminatory harm to members of a suspect class[,]” rational basis was the appropriate standard to apply.¹⁵²

In a counterpoint to the *LULAC* opinion, Judge Gilman argued in his dissent that strict scrutiny review was the proper standard of Equal Protection review for laws that discriminated against nonimmigrants.¹⁵³ The judge fundamentally disagreed with the majority opinions in both *LULAC* and *LeClerc* as to the Supreme Court’s intention that *Graham*’s holding applied to nonimmigrants.¹⁵⁴ While acknowledging that the Supreme Court had “never specifically held that temporary resident legal aliens, as a subset of all aliens, are a suspect class for equal–protection purposes. . .” Judge Gilman deemed such silence irrelevant.¹⁵⁵ He noted that the *Graham* majority had not restricted its analysis to LPRs exclusively, but had instead applied its reasoning to alienage classifications generally.¹⁵⁶

Judge Gilman further criticized the majority’s reliance on *LeClerc*, noting that it had adopted the *LeClerc* opinion “without even mentioning the numerous criticisms to which that analysis has been subject.”¹⁵⁷ In invoking Judge Stewart’s dissent in *LeClerc*, Judge Gilman stated that the majority had failed address both that dissent and the other criticisms that the

¹⁵⁰*LULAC*, 500 F.3d at 526.

¹⁵¹ *Id.* at 533.

¹⁵² *Id.*

¹⁵³ *LULAC*, 500 F.3d at 537 (Gilman, J., dissenting).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 538.

¹⁵⁶ *Id.* at 539.

¹⁵⁷ *Id.*

majority opinion had been subject to.¹⁵⁸ In the end, Judge Gilman concluded that extending strict scrutiny review to nonimmigrants would not be expanding the Supreme Court's ruling in *Graham*, as the Court had intended it.¹⁵⁹

3. The Second Circuit's Disagreement

Prior to the summer of 2012, the Federal Circuit Courts of Appeal were in limited agreement that courts should review laws that discriminated against nonimmigrants under rational basis review. But the Second Circuit departed the Fifth and Sixth Circuits in ruling in the case *Dandamudi v. Tisch* that such laws should instead be subject to strict scrutiny review.

Even prior to *Dandamudi*, the Second Circuit seemed receptive to the idea that strict scrutiny should apply to nonimmigrant Equal Protection claims. In 2008, the United States District Court for the Western District of New York in *Kirk v. New York State Department of Education* considered whether a law restricting veterinarian licenses to citizens and LPRs violated the equal protection rights of an alien with a TN temporary work visa.¹⁶⁰ The District Court considered the Fifth and Sixth Circuit majority opinions as well as the dissents.¹⁶¹ It proceeded to reject the theory that the Supreme Court had limited its holding in *Graham* to LPRs.¹⁶² It concluded that “the challenged statute must be reviewed under the strict scrutiny standard...” and that the law “fail[ed] to pass such scrutiny.”¹⁶³ The Second Circuit never had the opportunity to review the decision in *Kirk*, however, as the plaintiff received LPR status shortly after the prevailing before the district court.¹⁶⁴ One year later, the Second Circuit had

¹⁵⁸ *Id.* at 542.

¹⁵⁹ *LULAC*, 500 F.3d at 540 (Gilman, J., dissenting).

¹⁶⁰ *Kirk*, 562 F.Supp. at 407.

¹⁶¹ *Id.* at 410–11.

¹⁶² *Id.* at 411

¹⁶³ *Id.*

¹⁶⁴ *Kirk v. New York State Dept. of Educ.*, 644 F.3d 134,135 (2d Cir. 2011)

another chance to address the scope of nonimmigrants' equal protections right in the case of *Dandamudi v. Tisch*.

Dandamudi addressed the constitutionality of a New York law that prevented nonimmigrants from obtaining pharmacists licenses.¹⁶⁵ The New York law required pharmacists to either be citizens of the United States or be legal permanent residents.¹⁶⁶ The New York law had provided an exception allowing nonimmigrants to work as pharmacists, but it expired in 2006 and the legislature did not renew it.¹⁶⁷ As a result, a number of nonimmigrants licensed as pharmacists in New York brought suit, arguing that the licensing restrictions violated their Equal Protection rights under the Constitution.¹⁶⁸

There were two types of nonimmigrant work visas at issue in *Dandamudi*: H1–B visas, which fell under the Immigration and Nationality Act, and TN visas, which fell under the NAFTA.¹⁶⁹ These visas permitted the workers to stay in the United States for six years under the initial visa and the extension.¹⁷⁰ Federal law permitted them to stay longer and as a result “[a]ll plaintiffs in this case... ha[d] been *legally authorized* to reside and work in the United States for more than six years.”¹⁷¹ Additionally, twenty–two of the plaintiffs had applied for LPR status at the time the court decided *Dandamudi*.¹⁷²

The Second Circuit began by stating that “[t]here is no question that the Fourteenth Amendment applies to all aliens.”¹⁷³ It then proceeded to discuss *Graham*, concluding that while the Supreme Court never explicitly applied strict scrutiny to nonimmigrant aliens, “the Court has

¹⁶⁵ *Dandamudi*, 686 F.3d at 69.

¹⁶⁶ New York Education Law § 6805(1)(6); *Dandamudi*, 686 F.3d at 69.

¹⁶⁷ *Dandamudi*, 686 F.3d at 69–71, n.4.

¹⁶⁸ *Id.* at 69–70.

¹⁶⁹ *Id.* at 70.

¹⁷⁰ *Id.* at 71.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Dandamudi*, 686 F.3d at 72.

never held that lawfully admitted aliens are outside of *Graham's* protection.”¹⁷⁴ Indeed, the court observed that “the [Supreme] Court has never distinguished between classes of legal resident aliens.”¹⁷⁵ The Second Circuit therefore rejected the argument that *Graham's* analysis did not apply to nonimmigrants.¹⁷⁶

The Second Circuit also addressed the Fifth Circuits position in *LeClerc and Van Staden* and Sixth Circuits’ position in *LULAC*.¹⁷⁷ The court proceeded to reject these positions for three reasons. Initially, the court rejected the notion that the Supreme Court's discussion of “the similarities between citizens and aliens” in *Graham* had articulated “a test for determining when state discrimination against any one subclass of lawful immigrants is subject to strict scrutiny.”¹⁷⁸ According to the Second Circuit, the Supreme Court was merely supporting its point in listing those factors, and was not creating an exhaustive test.¹⁷⁹ The court further reasoned that the Fifth and Sixth Circuits’ argument that *Graham's* language limited its holding to LPRs “reveals the danger of separating the words of an opinion from the context in which they were employed.”¹⁸⁰ In the Second Circuit’s view, the Supreme Court was merely stating that “LPRs and citizens have much in common [and that] treating them differently does not pass muster under the Fourteenth Amendment.”¹⁸¹ The Second Circuit went on to hold that “[t]he converse of this rationale, however, does not become a litmus test for determining whether a particular group of aliens is a suspect class”.¹⁸²

¹⁷⁴ *Id.* at 74.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 74–75.

¹⁷⁷ *Id.* at 75.

¹⁷⁸ *Id.*

¹⁷⁹ *Dandamudi*, 686 F.3d at 65.

¹⁸⁰ *Id.* 75–76.

¹⁸¹ *Id.*

¹⁸² *Id.* at 76.

Next, the Second Circuit reasoned that “nonimmigrant aliens are but one subclass of aliens, and the Supreme Court recognizes aliens generally as a discrete and insular minority without significant political clout.”¹⁸³ The court recognized that the Supreme Court in *Graham* had not distinguished between different subclasses of aliens, but only between legal and illegal aliens.¹⁸⁴ *Graham*’s language specifically spoke to alienage as a general class and not to LPRs only.¹⁸⁵ Therefore, the Second Circuit explicitly rejected the Fifth and Sixth’s Circuits’ narrow reading of *Graham*.¹⁸⁶

Finally, the court found that even were it to decide the appropriate level of scrutiny based on nonimmigrants’ similarity to citizens, it would still apply strict scrutiny “because nonimmigrant aliens are sufficiently similar to citizens that discrimination against them in the context presented here must be strictly scrutinized.”¹⁸⁷ The Second Circuit pointed to a myriad of characteristics common to both nonimmigrants and citizens, including that nonimmigrants pay taxes “often on the same terms as citizens and LPRs. . .” and that many nonimmigrants also had a far more permanent connection to the United States than other court had acknowledged.¹⁸⁸ Specifically, the court rejected the Fifth and Sixth Circuits’ dismissal of nonimmigrants as a discrete and insular minority partially due to the fact that nonimmigrants could only stay in the United States for six years and had to promise that they did not intend to remain permanently in the United States.¹⁸⁹ Acknowledging that many nonimmigrants do, in fact, stay in the United States longer, the court pointed to the dual intent doctrine, which provided that nonimmigrants could express both “an intent to remain temporarily” under the their work visas and “an intent to

¹⁸³ *Id.* at 75

¹⁸⁴ *Id.* at 76–77.

¹⁸⁵ *Dandamudi*, 686 F.3d at 77.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 75.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

remain permanently” by applying for LPR status.¹⁹⁰ The Second Circuit therefore concluded that “[t]he aliens at issue here are ‘transient’ in name only.”¹⁹¹ The court reasoned that “[a] great number of these professionals remain in the United States for much longer than six years and many ultimately apply for, and obtain, permanent residence. These practicalities are not irrelevant.”¹⁹² Acknowledging that the Supreme Court applied heightened scrutiny to undocumented immigrants in *Plyler*, the Second Circuit also saw “no reason to create an exception to the Supreme Court's precedent that would result in such illogical results. . . .” by applying a lower level of scrutiny to nonimmigrants than was applied to undocumented immigrants.”¹⁹³ Accordingly, finding “little or no distinction between LPRs and the lawfully admitted nonimmigrant plaintiffs [in *Dandamudi*,]” the court held that strict scrutiny was the appropriate level of scrutiny to apply in the present case.¹⁹⁴

IV. ANALYSIS

A. *The Case for Strict Scrutiny*

The Second Circuit is the first Circuit Court to hold that the Equal Protection Clause requires courts to review laws that discriminate against nonimmigrants under a strict scrutiny level of review. Even prior to *Dandamudi*, dissenting judges and scholars had argued that rational basis was not the appropriate level scrutiny for nonimmigrants.¹⁹⁵ The Second Circuit’s ruling incorporated many of the arguments made previously by commentators, as well as by the

¹⁹⁰ *Id.*

¹⁹¹ *Dandamudi*, 686 F.3d at 78.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Judge Gilman’s dissent in *LULAC* contains a sample of the commentary against the Fifth and Sixth Circuits’ positions, some of which are reproduced here: Kathleen Ann Harrison, *LeClerc v. Webb: Rational Scrutiny Analysis of Equal Protection Claims By Nonimmigrant Aliens*, 25 MISS. C. L. REV. 273 (2006); *Fifth Circuit Holds That Louisiana Can Prevent Nonimmigrant Aliens From Sitting For The Bar*, 119 HARV. L. REV. 669 (2005); see also Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU. L. REV. 2277 (2010); Adam Bryan Wall, *Justice For All? The Equal Protection Clause and Its Not-So-Equal Application To Legal Aliens*, 84 TUL. L. REV. 759 (2010).

dissenters in *LULAC* and *LeClerc*. As the subsequent discussion will show, strict scrutiny is the appropriate level of scrutiny for laws restricting the rights of nonimmigrants. Binding precedent from the Supreme Court clearly requires the application of strict scrutiny. In addition, strict scrutiny review of laws that discriminate against nonimmigrants is necessary to protect a vulnerable class of legal aliens.

1. The Proper Application of *Graham*

Graham extended strict scrutiny review to all classes of aliens, and not only to LPRs. It is true that the Supreme Court’s opinion in *Graham* did explicitly discuss LPRs and their characteristics, and that the opinion did not mention nonimmigrants.¹⁹⁶ The Supreme Court stated that “short term” aliens did not share the same characteristics as citizens and LPRs, but it did not define what it meant by “short term.”¹⁹⁷ The Court may have made this distinction with the intent to separate nonimmigrants as a whole from LPRs, or it could be distinguishing nonimmigrants with shorter term visas.¹⁹⁸ The Supreme Court did not decide this point, but its opinion did not explicitly exclude nonimmigrants. The Supreme Court did, however, state in *Graham* that laws discriminating against “alienage” as a class should be subject to strict scrutiny review.¹⁹⁹ This language implies that the holding was broad, not restrictive. The Supreme Court may have focused on LPRs in *Graham* purely because the plaintiffs in the case were all LPRs.

As Judge Gilman argued in his dissent in *LULAC*, the Supreme Court’s silence on nonimmigrants in *Graham* “proves little.”²⁰⁰ While the Supreme Court may not have specifically discussed nonimmigrants in *Graham*, it did not explicitly leave them out either. Indeed, in using broad language about alienage, the Supreme Court may have been explicitly

¹⁹⁶ *Graham*, 403 U.S. at 371.

¹⁹⁷ *Id.* at 376.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 371–372.

²⁰⁰ *LULAC*, 500 F.3d at 538.

including nonimmigrants.²⁰¹ Had the Court wanted to limit its holding to LPRs, it could have explicitly stated this, rather than using general language about alienage. The Supreme Court's silence in *Toll*, its only case presenting an Equal Protection question on nonimmigrants, neither confirms nor denies that strict scrutiny is the appropriate level of review.²⁰² The Supreme Court has only explicitly excluded undocumented immigrants from its holding in *Graham*, and did so largely due to their illegal status in the country.²⁰³ The Fifth and Sixth Circuits held that the list of similarities between citizens and LPRs in *Graham* shows that *Graham* applies only to LPRs. But the Second Circuit disagreed, holding that "nonimmigrant aliens are sufficiently similar to citizens that discrimination against them... must be strictly scrutinized."²⁰⁴ Thus, the Second Circuit showed that the *Graham* analysis can easily encompass nonimmigrants as well as LPRs. The Fifth and Sixth Circuits' position, that the Supreme Court used language in *Graham* meant to exclude nonimmigrants, has no textual support.²⁰⁵ There is strong support for the proposition that the Supreme Court intended its holding in *Graham* to apply to alienage as a whole, including nonimmigrants.

2. Nonimmigrants as a Suspect Class

Even if *Graham*'s holding is limited to LPRs, nonimmigrants still deserve strict scrutiny review. As the Second Circuit and dissenting judges in other circuits that have addressed this issue have suggested, nonimmigrants may be suspect class for the purposes of Equal Protection Clause review.²⁰⁶ As such, the courts would review laws discriminating against nonimmigrants under strict scrutiny review.

²⁰¹ Adam Bryan Wall, *Justice For All? The Equal Protection Clause and Its Not-So-Equal Application To Illegal Aliens*, 84 TUL. L. REV. 759, 777–78 (2010); see also *LeClerc*, 419 F.3d 405 (Stewart, J. dissenting).

²⁰² *Toll*, 458 U.S. at 10.

²⁰³ *Plyler*, 457 U.S. at 223.

²⁰⁴ *Dandamudi*, 686 F.3d at 68.

²⁰⁵ *LeClerc*, 419 F.3d at 415.

²⁰⁶ See *supra* Part II.A.

One common marker of a suspect class is the class's inability to utilize the political process.²⁰⁷ As the *LeClerc* majority suggested, because nonimmigrants as a class are so varied, one cannot state that as a group they are politically unable.²⁰⁸ But the variety of nonimmigrant visas available is irrelevant to whether nonimmigrants as a whole are unable to access the political process as easily as citizens.²⁰⁹ Because of their legal status in the country, nonimmigrants are just as separated from the political process than LPRs, if not more so.²¹⁰

Another argument against nonimmigrants as a suspect class is the lack of “permanency” within the class of nonimmigrants. The Fifth Circuit tied nonimmigrants’ “temporary connection to this country” with their lack of legal capacity, and concluded that nonimmigrants did not deserve suspect class status.²¹¹ The Fifth Circuit held that because nonimmigrants were required to promise not to stay in the United States and to maintain foreign citizenship, nonimmigrants were transient and had no permanent ties to the United States.²¹² This is a very literal interpretation of immigration law as to the permanency of nonimmigrant residence. The Second Circuit disagreed with this interpretation, and found that most nonimmigrants ended up staying legally in the United States for longer periods of time and ultimately received LPR status.²¹³ The Second Circuit noted that one of the plaintiffs in the district court case preceding *Dandamudi* was dismissed during the appeals process because he received a green card.²¹⁴ The previous Second Circuit district court case, *Kirk*, was also dismissed for this reason.²¹⁵

²⁰⁷ See *supra* Part II.A.

²⁰⁸ *LeClerc*, 419 F.3d at 417.

²⁰⁹ *Fifth Circuit Holds That Louisiana Can Prevent NonImmigrant Aliens From Sitting For The Bar*, 119 HARV. L. REV. 669 (2005); *LeClerc*, 419 F.3d at 428-29 (Stewart, J. Dissenting).

²¹⁰ *Dandamudi*, 686 F.3d at 77

²¹¹ *LeClerc*, 419 F.3d at 417.

²¹² *Id.*

²¹³ *Dandamudi*, 686 F.3d at 77.

²¹⁴ *Id.* at n. 4.

²¹⁵ *Kirk*, 644 F.3d at 136.

Nonimmigrants are a suspect class under the Equal Protection Clause. They are politically impotent, facing maybe of the same problems and prejudices as the LPRs. Furthermore, the lack of permanency of nonimmigrants is an illusion, dispelled by the reality that many end up staying in the United States legally for a long period of time, ultimately receiving LPR status. Therefore, courts should review laws discriminating against nonimmigrants under strict scrutiny review.

B. Intermediate Scrutiny as a Viable Alternative

Short of reviewing classifications based upon nonimmigrant status under strict scrutiny, intermediate scrutiny might appropriately apply to nonimmigrants.²¹⁶ One could argue that if undocumented immigrants receive at least heightened scrutiny under *Plyler*, nonimmigrants deserve at least the same standard of review.²¹⁷ Although the Supreme Court stated it was only using rational basis review in *Plyler*, it is widely acknowledged that the Court applied a heightened level of scrutiny.²¹⁸ But this argument is premised on the assumption that the Supreme Court was granting heightened scrutiny to undocumented immigrants as a whole, and not merely applying it because the challenge involved children.²¹⁹ The Court's focus on the vulnerability of the children in particular may indicate that the holding is very narrow. If the holding is narrow, the argument that the Court intended to apply heightened scrutiny to undocumented immigrants is weaker.

Alternatively, if the Supreme Court ever rejects the application of strict scrutiny to nonimmigrants, intermediate scrutiny review would still be a preferable alternative to rational basis review. Indeed, the Supreme Court has applied heightened scrutiny to several other classes

²¹⁶ See generally Justin Hess, *NonImmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU. L. REV. 2277, 2298-305 (2010).

²¹⁷ See *supra* Part III.A.2.

²¹⁸ *Id.*

²¹⁹ *LeClerc*, 419 F.3d at 416.

that it deemed not “discrete and insular” enough to receive strict scrutiny, but that deserved slightly higher scrutiny than rational basis review.²²⁰ Therefore, it is possible the Supreme Court would choose to apply heightened scrutiny to nonimmigrants. The case for strict scrutiny review is still strong, however, and it is the preferable standard of review.

C. *Preemption and the Supremacy Clause*

Preemption arguments have shown up in several of the nonimmigrant challenges. Several commentators have supported the use of the supremacy clause as a method of striking down such laws.²²¹ The argument is that the federal government occupies the immigration field in general, or at the very least, specific statutes on immigration regulating the work of nonimmigrants preempt state restrictions in the same area. *Graham* spoke to this issue when it held that “[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”²²² The Supreme Court therefore held that immigration is an area traditionally occupied by the federal government.²²³

Most recently, the Supreme Court has reaffirmed the federal government’s supremacy in the immigration field in *Arizona v. U.S.*²²⁴ The Court stated that “[t]he federal power to determine immigration policy is well settled.”²²⁵ The Court struck down several sections of an Arizona state law dealing with immigration. The Supreme Court held that “The Federal Government has occupied the field of alien registration” and as such “federal preemption” prevented the states from interfering.²²⁶ The Court struck down other sections when the laws

²²⁰ These classes include “gender and non-marital birth”. See *Hess*, *supra* note 216, at 2299-2301.

²²¹ See *Hess*, *supra* note 216, at 2287-88.

²²² *Graham*, 403 U.S. at 378.

²²³ *Id.*

²²⁴ *Arizona v. U.S.*, 132 S.Ct. 2492 (2012)

²²⁵ *Id.* at 2498

²²⁶ *Id.* at 2502

were obstacles in the fulfillment of the purpose of Congress.²²⁷ *Arizona* stands as an affirmation of the overwhelming powers of Congress to control immigration law, and the limited ability of states to add additional restrictions on immigrants.

The Circuit Courts that concluded rational basis review applied to states' classifications based upon nonimmigrant status accepted the federal government's power in the immigration field while arguing that federal law would not actually preempt the state laws. In *LeClerc*, the Fifth Circuit dismissed the preemption argument, invoking both state police powers and arguing that there could be harmonious regulation by both the state and federal government.²²⁸ But as *Arizona* shows, the Supreme Court may be less inclined to allow states control in areas of immigration than certain circuit courts have been. The Second Circuit in *Dandamudi* reasoned that the federal government had control over the field of immigration, and preemption by federal immigration law might disallow even complementary state regulation.²²⁹ The court concluded that because the visas involved are permission from the federal government to work in a specific field, the INA would preempt state laws restricting nonimmigrants from working in that field.²³⁰

The Supremacy Clause may not be the best way to eliminate states' classifications on the basis of nonimmigrant status, however, as preemption challenges do not necessarily resolve whether all state classifications on the basis of nonimmigrant status are constitutional. For example, some of the laws challenged in the Circuit Court cases addressed state laws that restricted job licenses, which the work visa provisions in the INA might preempt; but another involved drivers' licenses, which might fall outside the federal government's immigrations

²²⁷ *Id.* at 2505

²²⁸ *LeClerc*, 419 F.3d at 423-24 (stating the restrictions were "a permissible exercise of Louisiana's broad police powers to regulate employment within its jurisdiction for the protection of its residents" and that "the field of alien employment tolerates harmonious state regulation...")

²²⁹ *Dandamudi*, 686 F.3d at 70-80.

²³⁰ *Id.* at 80.

powers and more within the state's powers. Additionally, the court in *Dandamudi* did not strike down the New York license restriction on preemption grounds because some of the plaintiffs had TN visas, which precluded that argument.²³¹ Therefore, while preemption arguments are important in resolving state authority to regulate nonimmigrants, they are not dispositive.

V. CONCLUSION

Courts should review laws that discriminate against nonimmigrants using strict scrutiny review. LPRs and nonimmigrants should receive the same treatment under the Equal Protection Clause. Nonimmigrants have come to the United States legally for a specified purpose, such as to continue their studies or work in a specific field. Many stay for a long period of time before becoming lawful permanent residents, and eventually citizens. Yet, in several circuits nonimmigrants do not receive the same protection under the law as LPRs. But they should; nonimmigrants are as deserving of the protection that strict scrutiny review affords. Nonimmigrants are a suspect class because they fit into the category of a “discrete and insular minority”. They face many of the same problems as LPRs and are just as politically powerless, if not more so. Furthermore, the Supreme Court has never explicitly granted them a lesser status than LPRs and has implied that they deserve the same levels of protection. The Court's holding in *Graham* applies to alienage as a whole, not merely to LPRs. Therefore, any law discriminating against nonimmigrants should be subject to strict scrutiny review under the Equal Protection Clause.

²³¹ *Dandamudi*, 686 F.3d at 81.