

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

*Ariel Subourne<sup>†</sup>*

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## I. INTRODUCTION

The United States of America has traditionally been a country of opportunity for many legal immigrants. But the process of establishing a life in their new home country has never been easy on immigrants, who have historically faced legal discrimination, often in the form of laws aimed at preventing them from working.<sup>1</sup> In *Takashi v. Fish & 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.”<sup>2</sup> Yet today there is a group of legal immigrants in the United States that are facing precisely this dilemma. Nonimmigrants, a class of legal aliens who reside in the United States under temporary visas,<sup>3</sup> have recently brought a series of challenges to laws that have discriminated against them on basis of their legal status.<sup>4</sup> Decades after the Supreme Court ruled in *Takashi*, the Second Circuit Court of Appeals invoked this issue when it concluded that the State of New York could not prevent immigrants with temporary work visas from

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†\*J.D. Candidate, Seton Hall University School of Law, 2014; B.A., University of Vermont, 2011. I would like to thank Professor Jenny-Brooke Condon for her guidance and insight during the writing process, as well as my mentors, Christopher Russo and Mallory Sweeney. I would also like to thank my family and friends for their unwavering support and love, without which I would not be the person I am today. Finally, thank you to the *Seton Hall Circuit Review* and its members for making this Comment possible.

<sup>1</sup>*Takashi v. Fish & Game Comm’n*, 334 U.S. 410, 416 (1948).

<sup>2</sup>*Id.* at 416 (striking down a law preventing people of Japanese descent, who were at the time ineligible for citizenship because of their race, from receiving fishing licenses).

<sup>3</sup> RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 2:23 (2013 ed.).

<sup>4</sup> See discussion *infra* Part III.B.

becoming licensed pharmacists in the state.<sup>5</sup> This ruling was the first in a series of steps necessary for the court system to prevent state discrimination against nonimmigrants.<sup>6</sup> Further protections for nonimmigrants are needed, however.<sup>7</sup> Courts should evaluate discriminatory state laws under the Equal Protection Clause using strict scrutiny review, both because nonimmigrants are a suspect class and because the Supreme Court has previously ruled that classifications based on alienage are reviewed using strict scrutiny.<sup>8</sup>

In 1971, the Supreme Court in *Graham v. Richardson* considered whether the Equal Protection Clause of the Fourteenth Amendment prohibited states from discriminating between residents on the basis of alien status.<sup>9</sup> 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.<sup>10</sup> The Court held that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>11</sup> After *Graham*, it appeared that the debate over whether the Equal Protection clause prohibited alienage-based discrimination might have been resolved.<sup>12</sup> In recent years, the Supreme Court has considered the difference between the rights afforded to undocumented immigrants versus legal immigrants,<sup>13</sup> but has yet to address what safeguards the Equal Protection Clause affords to nonimmigrants.<sup>14</sup>

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 one group of legal immigrants, legal permanent residents, but not to nonimmigrants.<sup>15</sup> Three Circuit Courts 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

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<sup>5</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012).

<sup>6</sup> See discussion *infra* Part IV.A.

<sup>7</sup> See discussion *infra* Part IV.A.

<sup>8</sup> See discussion *infra* Part IV.A.

<sup>9</sup> *Graham v. Richardson*, 403 U.S. 365, 366 (1971).

<sup>10</sup> *Id.* at 371–72; see also *infra* Part II.A.

<sup>11</sup> *Graham*, 403 U.S. at 372.

<sup>12</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 73–74 (2d Cir. 2012).

<sup>13</sup> See discussion *infra* Part III.A.2.

<sup>14</sup> See *Toll v. Moreno*, 458 U.S. 1 (1982); see also *infra* notes 105–15 and accompanying text.

<sup>15</sup> See discussion *infra* Part III.B.

that discriminate against nonimmigrants.<sup>16</sup> These Courts have found that *Graham's* holding only applies to legal permanent residents and not to nonimmigrants.<sup>17</sup> The Second Circuit disagreed in *Dandamudi*, finding that *Graham's* holding applied to nonimmigrants as well.<sup>18</sup> The Second Circuit thus split from the Fifth and Sixth Circuits as to the appropriate level of review for such claims under the Equal Protection Clause.<sup>19</sup> As a result of these rulings, the legitimacy of laws that discriminate against nonimmigrants varies depending on what part of the country the nonimmigrant resides in.

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.<sup>20</sup> 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.<sup>21</sup> For these reasons, strict scrutiny is the appropriate level of review.<sup>22</sup> 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 discusses a variety of approaches to preventing legal discrimination against nonimmigrants and the consequences of each suggested approach. Finally, Part V concludes that courts should review laws that discriminate against nonimmigrants under the strict scrutiny standard of review.

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<sup>16</sup> See discussion *infra* Part III B.1-2.

<sup>17</sup> See discussion *infra* Part III B.1-2.

<sup>18</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012).

<sup>19</sup> *Id.* at 75-76.

<sup>20</sup> See discussion *infra* Part IV.A.

<sup>21</sup> See discussion *infra* Part IV.A.2.

<sup>22</sup> See discussion *infra* Part IV.A.1.

## II. BACKGROUND

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.”<sup>23</sup> Historically, the Supreme Court applied the Equal Protection Clause to state laws that discriminated against different groups in an uneven manner.<sup>24</sup> The Court later developed a more specific method of deciding Equal Protection cases, beginning with *United States v. Carolene Products*.<sup>25</sup> In footnote four, the 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.”<sup>26</sup> The Supreme Court later adopted the idea that it is appropriate to apply different levels of scrutiny to laws depending on what groups the laws distinguish between.<sup>27</sup> The Court eventually developed three levels of scrutiny: strict scrutiny, intermediate or heightened scrutiny, and rational basis.<sup>28</sup>

Strict scrutiny is the most exacting level of Equal Protection review. To pass review under strict scrutiny, 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.<sup>29</sup> The courts will apply strict scrutiny review to classifications based on race or national origin.<sup>30</sup> The Supreme Court has also applied strict scrutiny review to classifications based on alienage,<sup>31</sup> though whether such classifications always trigger strict scrutiny review is, of course, the subject of continued debate.<sup>32</sup> 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.<sup>33</sup> For this standard of review, courts

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<sup>23</sup> U.S. CONST. amend. XIV, § 1.

<sup>24</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE, § 18.3(a)(i) (5th ed. 2012).

<sup>25</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>26</sup> *Id.*

<sup>27</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(v).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at § 12.3(a)(iii).

<sup>30</sup> *Id.*

<sup>31</sup> See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971); *infra* Part III.A.1.

<sup>32</sup> See *infra* Part III.B.

<sup>33</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(ii).

evaluate only whether the classification has a rational relationship to some legitimate end that the government is pursuing.<sup>34</sup> The Supreme Court has also applied an intermediate level of scrutiny in some cases, such as those discriminating on the basis of gender.<sup>35</sup> 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.<sup>36</sup> In certain circumstances, the Supreme Court has also applied intermediate scrutiny to undocumented immigrants.<sup>37</sup>

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.<sup>38</sup> The Court will look at a variety of factors, such as if the class is a “discrete and insular minority”<sup>39</sup> or has been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness,” to determine whether a class is suspect.<sup>40</sup> If a court finds that the group in question is a suspect class, it will apply strict scrutiny review.<sup>41</sup> If the group has some of the characteristics of a suspect class, a court may choose to apply a heightened form of scrutiny.<sup>42</sup> But if the class is not suspect, it is unlikely that a court will apply anything other than rational basis scrutiny.<sup>43</sup> Courts generally give a strong presumption of constitutionality to laws reviewed under rational basis.<sup>44</sup> Therefore, heightened levels of scrutiny are far more advantageous to plaintiffs challenging these classifications.<sup>45</sup>

#### *B. The Classification of Aliens Under United States Law*

United States immigration law divides aliens into three major categories: legal permanent residents, undocumented immigrants, and nonimmigrants.<sup>46</sup> The first category contains legal permanent residents

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<sup>34</sup> *Id.*

<sup>35</sup> *Craig v. Boren*, 429 U.S. 190, 198 (1976).

<sup>36</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(iv).

<sup>37</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *see infra* Part III.A.2.

<sup>38</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(iii).

<sup>39</sup> *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>40</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>41</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(iii).

<sup>42</sup> *Id.* at § 18.3(a)(iv).

<sup>43</sup> *Id.* at § 18.3(a)(ii).

<sup>44</sup> *Id.* at § 18.3(a)(v).

<sup>45</sup> *Id.*

<sup>46</sup> STEEL, *supra* note 3, at § 2:23.

(herein “LPRs”).<sup>47</sup> Also referred to simply as immigrants, LPRs have the intention to stay in the United States permanently.<sup>48</sup> LPRs obtain legal permits, often referred to as green cards, which allow them to remain in the United States permanently.<sup>49</sup> 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.”<sup>50</sup> The second category of aliens is undocumented immigrants or “illegal aliens.” Undocumented immigrants generally have fewer legal rights due to their illegal status.<sup>51</sup>

The final category of immigrants is nonimmigrants, who are temporary, legal aliens.<sup>52</sup> Nonimmigrants come to the United States “to engage in an activity encompassed within one of the nonimmigrant classifications set forth in the [Immigration and Nationality Act (“INA”)(8 U.S.C.A. § 1184)].”<sup>53</sup> They are required to establish “eligibility within one of the principal nonimmigrant classifications or one of the subclassifications” in order to qualify for a visa.<sup>54</sup> The category covers a variety of individuals, such as “temporary workers, students, foreign diplomats, tourists, and business travelers.”<sup>55</sup> 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.<sup>56</sup>

This Comment focuses on nonimmigrants; specifically, those nonimmigrants 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.<sup>57</sup> The INA also provides for a variety of temporary work visas, including H-1B and H-1C visas.<sup>58</sup> Additionally, “TN”

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at § 2:24.

<sup>51</sup> *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982).

<sup>52</sup> STEEL, *supra* note 3, at § 2:23.

<sup>53</sup> *Id.* at § 3.1.

<sup>54</sup> *Id.* at § 2.28.

<sup>55</sup> Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, 7 MOD. AM. 12, 13 (2011).

<sup>56</sup> STEEL, *supra* note 3, at § 3:12.

<sup>57</sup> 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 3, at § 3:12.

<sup>58</sup> Immigration and Nationality Act § 101(a)(15), 8 U.S.C.A. § 1101 (2012).

immigrants are a class of nonimmigrants created under the North American Free Trade Agreement (NAFTA).<sup>59</sup> 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.<sup>60</sup> Thus, the work period is technically restricted to six years.<sup>61</sup> 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.”<sup>62</sup> 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 visa<sup>63</sup>

Of particular note to this comment are nonimmigrants with longer-term visas, such as work and student visas. The limited federal case law on nonimmigrants and the Equal Protection Clause involves challenges brought by nonimmigrants with work and student visas, who are usually the target of the discriminatory laws.<sup>64</sup> While the analysis of this Comment focuses on nonimmigrants with work visas, its conclusions are applicable more broadly to nonimmigrants as a whole, who are generally in a legally vulnerable position because their status under the Constitution is unclear.<sup>65</sup> As such, the conclusion that their vulnerable position merits suspect class status can be applied to all nonimmigrants.<sup>66</sup>

### III. IMMIGRATION AND THE EQUAL PROTECTION CLAUSE IN THE COURTS

#### A. *Supreme Court Precedent on Alienage*

##### 1. Early Rulings on Alienage: *Graham v. Richardson* and its Progeny

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 laws that

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<sup>59</sup> 8 C.F.R. § 214.6.

<sup>60</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012).

<sup>61</sup> *Id.* at 71.

<sup>62</sup> *Id.*

<sup>63</sup> Storch, *supra* note 55, at 13.

<sup>64</sup> *See infra* Part III.B.

<sup>65</sup> *See* discussion *infra* Part IV.A.

<sup>66</sup> *See* discussion *infra* Part IV.A.



restricted welfare benefits to citizens and long-term residents.<sup>67</sup> The Court referred to the plaintiffs, who all had some form of LPR status, as “lawfully admitted residents.”<sup>68</sup> 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.<sup>69</sup> The plaintiffs argued that preventing aliens from accessing welfare benefits on an equal basis as their citizen counterparts was unconstitutional under both the Equal Protection Clause and the Supremacy Clause of the United States Constitution.<sup>70</sup>

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.”<sup>71</sup> Invoking *Carolene Products 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.”<sup>72</sup> The Court therefore concluded that its decisions had “established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>73</sup> While acknowledging that it had occasionally upheld statutes that distinguished between citizens and immigrants, the Court found that those distinctions had been necessary to protect specific “special interests of the State or its citizens.”<sup>74</sup> 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.<sup>75</sup>

The Supreme Court focused on LPRs in its analysis and used the terms “resident aliens” and “lawful aliens” interchangeably throughout the opinion.<sup>76</sup> The Supreme Court also relied on the similarities between LPRs and citizens to support its conclusions.<sup>77</sup> It held that “[a]liens like citizens pay taxes and may be called into the armed forces,” and that

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<sup>67</sup> *Graham v. Richardson*, 403 U.S. 365, 367–68 (1971).

<sup>68</sup> *Id.* at 367–70.

<sup>69</sup> *Id.* at 370–71.

<sup>70</sup> *Id.* at 368–69.

<sup>71</sup> *Id.* at 371.

<sup>72</sup> *Id.* at 371–72.

<sup>73</sup> *Graham*, 403 U.S. at 371–72.

<sup>74</sup> *Id.* at 372.

<sup>75</sup> *Id.* at 374.

<sup>76</sup> *Id.* at 367–70.

<sup>77</sup> *Id.* at 376.

“[u]nlike the short-term residents . . . aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.”<sup>78</sup> The Court distinguished “short-term residents” from permanent aliens, who share more in common with citizens.<sup>79</sup> The Supreme Court further noted 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.”<sup>80</sup> By specifically framing the issue around the characteristics of LPRs, the Court may have been limiting its holding to that specific group of aliens.<sup>81</sup> As such, the holding would exclude nonimmigrants, and laws discriminating against them would only be subject to rational basis review.<sup>82</sup> Nevertheless, some scholars and at least one court have concluded that 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.<sup>83</sup> Others have argued that the holding in *Graham* applied only to LPRs and not to nonimmigrants.<sup>84</sup> These differing interpretations of *Graham* are the basis of the current circuit split over the level of Equal Protection review granted to nonimmigrants.<sup>85</sup>

Following *Graham*, the Court addressed a variety of other Equal Protection challenges to state laws that discriminated on the basis of alienage. In *In re Griffiths*, the Court struck down a Connecticut law limiting admission to the bar to citizens.<sup>86</sup> The plaintiff in *Griffiths*, as in *Graham*, was an alien that had LPR status.<sup>87</sup> 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

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<sup>78</sup> *Id.*

<sup>79</sup> *Graham*, 403 U.S. at 376.

<sup>80</sup> *Id.*

<sup>81</sup> See generally *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 (LULAC)*, 500 F.3d 523 (6th Cir. 2007).

<sup>82</sup> See *supra* note 81.

<sup>83</sup> See generally *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012); *Kirk v. N.Y. State Dep. Of Educ.*, 562 F.Supp.2d 405 (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).

<sup>84</sup> See generally *LeClerc*, 419 F.3d 405; *Van Staden*, 664 F.3d 56; *LULAC*, 500 F.3d 523; Wall, *supra* note 83.

<sup>85</sup> See discussion *infra* Part III.B.

<sup>86</sup> *In re Griffiths*, 413 U.S. 717, 718 (1973).

<sup>87</sup> *Id.*

nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>88</sup> As in *Graham*, the Court also emphasized the similarities between LPRs and citizens to support its holding.<sup>89</sup> 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.”<sup>90</sup> The Supreme Court cited these same factors to support the decision in *Graham*.<sup>91</sup> In a later case, the Court again cited to these same factors in ruling that state financial aid statutes could not discriminate against certain classes of resident aliens.<sup>92</sup> It specifically noted in *Nyquist* that resident aliens had to pay “their full share of taxes” and, as such, the law disproportionately burdened them over similarly-situated citizens.<sup>93</sup> These subsequent decisions reinforced the view that the Supreme Court, in focusing on the characteristics of LPRs, intended to limit its holding to LPRs alone. But the Court did not use these cases as an opportunity to explicitly establish that the holding in *Graham* was limited. Therefore, *Graham*’s progeny merely added to the controversy over the extent of *Graham*’s protection without resolving the issue.

## 2. Undocumented Immigrants and *Plyler v. Doe*

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 admissions policy that restricted the registration of children of undocumented immigrants.<sup>94</sup> In *Plyler*, the Court initially dismissed the idea that undocumented aliens are a suspect class.<sup>95</sup> Specifically, the Court held that an individual’s undocumented status does not permit the same level of constitutional protections afforded to legal aliens.<sup>96</sup> Therefore, it seemed that the *Plyler* Court had decided to apply rational basis review in the case.<sup>97</sup>

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<sup>88</sup> *Id.* at 721.

<sup>89</sup> *Id.* at 722.

<sup>90</sup> *Id.*

<sup>91</sup> See *supra* notes 76–80 and accompanying text.

<sup>92</sup> *Nyquist v. Mauclet*, 432 U.S. 1, 4, 12 (1977).

<sup>93</sup> *Id.* at 12.

<sup>94</sup> *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

<sup>95</sup> *Id.* at 223.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

But the *Plyler* Court went on to emphasize that the class at issue in the case was the children of undocumented immigrants, not just undocumented immigrants in general.<sup>98</sup> The Court stated that the law at issue “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”<sup>99</sup> The Court therefore required the state to point to a “substantial goal” furthered by the law.<sup>100</sup> 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.<sup>101</sup> Ultimately, the Court struck down the restrictions on undocumented immigrant children under this heightened standard.<sup>102</sup>

The *Plyler* decision 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.<sup>103</sup> *Plyler’s* holding, however, seemed to actually apply a form of heightened review to undocumented immigrants as a class.<sup>104</sup> As a result, 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.<sup>105</sup> The Court’s focus on the vulnerability of children implies that intermediate scrutiny would not usually apply to undocumented aliens. Therefore, the actual holding of *Plyler* may be narrower than it first appears.

### 3. Nonimmigrants and *Toll v. Moreno*

The Supreme Court has only decided one case that contained an Equal Protection challenge to a law that discriminated against nonimmigrants: *Toll v. Moreno*.<sup>106</sup> *Toll* involved the University of

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Plyler*, 457 U.S. at 224.

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”).

<sup>103</sup> *See id.* at 224.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See Toll v. Moreno*, 458 U.S. 1, 3 (1982); *see also LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005).

Maryland's decision to grant preferential tuition to students with a domicile in Maryland.<sup>107</sup> Only citizens or LPRs with domicile, however, could receive these benefits.<sup>108</sup> The university policy excluded nonimmigrants from these benefits, even if the particular type of visa the nonimmigrant held allowed them to establish domicile in the state.<sup>109</sup> Nonimmigrant students challenged the law, arguing that it violated the Equal Protection Clause by discriminating against nonimmigrants as a class in favor of citizens and LPRs.<sup>110</sup> The plaintiffs argued in the alternative that federal immigration law, which designated that nonimmigrants with G-4 visas could establish domiciles, preempted the Maryland statute.<sup>111</sup>

Without addressing the Equal Protection argument, the Supreme Court struck down the law on preemption grounds.<sup>112</sup> The Court held that it “[had] no occasion to consider whether the policy violates the . . . Equal Protection Clause.”<sup>113</sup> The holding itself was very narrow, dealing only with a very small subset of nonimmigrants that were explicitly granted domicile status.<sup>114</sup> The Court did not even consider the Equal Protection arguments.<sup>115</sup> The Court seemed to avoid any discussion of the issue beyond recounting the District Court's ruling below.<sup>116</sup> As such, the question as to whether the *Graham* analysis should apply to nonimmigrants remained open following *Toll*.

### *B. Circuit Courts Challenges to Laws Discriminating Against Nonimmigrants*

The federal circuits have only occasionally addressed challenges to laws discriminating against nonimmigrants.<sup>117</sup> These cases have arisen

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<sup>107</sup> *Toll*, 458 U.S. at 3–4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *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.” *Id.* Maryland was not permitted to remove this domicile status, as the Supremacy Clause of the Constitution made federal law preempt state law. *Id.* The Court “note[d] the substantial limitations upon the authority of the States in making classifications based upon alienage” in deciding *Toll*. *Id.*

<sup>113</sup> *Id.* at 10.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Toll*, 458 U.S. at 10.

<sup>116</sup> *Id.*

<sup>117</sup> For a discussion on these cases in their totality see discussion *infra*.

within the last ten years and are concentrated within three circuits: the Fifth, the Sixth, and the Second.<sup>118</sup> The Fifth and Sixth Circuits have held that courts should consider laws that discriminate against nonimmigrants under rational basis review.<sup>119</sup> Very recently, the Second Circuit has disagreed with its fellow circuit courts, holding that strict scrutiny review is appropriate for reviewing laws that restrict the employment of nonimmigrants.<sup>120</sup> Accordingly, there is currently a split amongst the circuits as to the appropriate level of scrutiny to be applied in Equal Protection challenges to laws that exclude nonimmigrants.

1. The Fifth Circuit: *LeClerc v. Webb* and *Van Staden v. St. Martin*

In *LeClerc v. Webb*, the Fifth Circuit became the first circuit court to examine what level of scrutiny nonimmigrants should receive under the Equal Protection Clause.<sup>121</sup> *LeClerc* addressed an Equal Protection challenge to a Louisiana law restricting state bar exam admissions to citizens and LPRs.<sup>122</sup> The class of plaintiffs, from two consolidated cases, held several different types of nonimmigrant visas, including J-1 student visas and H-1B work visas.<sup>123</sup> Several of the plaintiffs had entered the United States under one of these types of visas but had then transitioned to others.<sup>124</sup> The plaintiffs maintained that the law violated their Equal Protection rights by distinguishing their legal treatment from that of citizens and LPRs.<sup>125</sup> 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, at a minimum, under intermediate scrutiny because “nonimmigrant aliens are a quasi-suspect class.”<sup>126</sup> The Fifth Circuit dismissed these arguments and held that rational basis was the appropriate level of review.<sup>127</sup>

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<sup>118</sup> See discussion *infra*..

<sup>119</sup> See discussion *infra*.

<sup>120</sup> See generally *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

<sup>121</sup> *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005).

<sup>122</sup> *Id.* at 410.

<sup>123</sup> *Id.* at 410–11.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 414–15.

<sup>126</sup> *Id.* at 415.

<sup>127</sup> *LeClerc*, 419 F.3d at 415.

As a threshold matter, the Fifth Circuit concluded that the holding in *In re Griffiths*<sup>128</sup> was not applicable because it addressed discrimination against an LPR alien, and not whether strict scrutiny review applied to nonimmigrants.<sup>129</sup> The court held that the differences between nonimmigrants and LPRs were “paramount.”<sup>130</sup> The Supreme Court’s decision in *Griffiths*, the Fifth Circuit reasoned, 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.”<sup>131</sup> As such, the court concluded that *Griffiths* forbade the “total exclusion” of aliens in general, but did not forbid the exclusion of some classes of aliens.<sup>132</sup>

The Fifth Circuit then considered two additional arguments: (1) that nonimmigrants constituted a suspect class for the purposes of Equal Protection analysis, and (2) that laws restricting nonimmigrants in general should receive strict scrutiny as a default.<sup>133</sup> The court held that while alienage classifications are “subject to close judicial scrutiny as a general matter,” not all such classifications are inherently invalid or suspect.<sup>134</sup> After *Graham*, the court noted, non-LPR aliens had only received rational basis review or, in the rare case of *Plyler*, heightened review.<sup>135</sup> Further, the court held that the plaintiffs in *Plyler* only received heightened review because they were children and as such *Plyler* represented an outlier.<sup>136</sup>

The court reasoned that the distinct traits of LPR status meant that such aliens were entitled to heightened judicial scrutiny, while nonimmigrants, lacking these traits, were not.<sup>137</sup> 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

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<sup>128</sup> As previously discussed, *Griffiths* held that the state of Connecticut could not prevent LPRs from sitting for the bar solely because of their alien status. See *In re Griffiths*, 413 U.S. 717, 718. (1973).

<sup>129</sup> *LeClerc*, 419 F.3d at 415.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 415–16.

<sup>135</sup> *LeClerc*, 419 F.3d at 416.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 417.

resident aliens and citizens.”<sup>138</sup> 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 provides.<sup>139</sup> The Fifth Circuit placed a great deal of emphasis on nonimmigrants’ “temporary connection” to the United States.<sup>140</sup> 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 nonimmigrant aliens are a suspect class.”<sup>141</sup> 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.”<sup>142</sup> The court reviewed the state bar exam restrictions under rational basis review and ultimately upheld them.<sup>143</sup>

The majority in *LeClerc* upheld the regulations on all grounds.<sup>144</sup> But in his dissent, Judge Stewart departed from the majority’s decision to apply rational basis review.<sup>145</sup> 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.”<sup>146</sup> The Supreme Court did not restrict its ruling in *Graham* to LPRs, Judge Stewart maintained, even though the Court used language referring to resident aliens.<sup>147</sup> Judge Stewart stated that “the Supreme Court has referred to resident aliens, aliens and non-citizens interchangeably,” and therefore “residence and immigration status should be understood as two separate distinctions; one does not necessarily have to do with the other.”<sup>148</sup> According to the dissent, the *Graham* Court held that alienage in general was a suspect class.<sup>149</sup>

Judge Stewart also disagreed with the way the majority distinguished nonimmigrants as a distinct class from LPRs.<sup>150</sup> He argued

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 418–19.

<sup>140</sup> *Id.*

<sup>141</sup> *LeClerc*, 419 F.3d at 418–19.

<sup>142</sup> *Id.* at 419.

<sup>143</sup> *Id.* at 422.

<sup>144</sup> *Id.* at 426.

<sup>145</sup> *LeClerc*, 419 F.3d at 426 (Stewart, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 427.

<sup>149</sup> *Id.* at 428.

<sup>150</sup> *Id.*



that the distinction between the two classes was not great enough to warrant different treatment under the Equal Protection Clause.<sup>151</sup> Instead, there were enough similarities between LPRs and nonimmigrants in important areas—such as the inability to vote and a history of discrimination—to warrant nonimmigrants’ inclusion as a suspect class.<sup>152</sup> 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.<sup>153</sup> 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).”<sup>154</sup> The acceptance of dual intent showed that even the government acknowledged that nonimmigrants were not, as a group, transient.<sup>155</sup> 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.”<sup>156</sup>

Six years after *LeClerc*, the question of the scope of Equal Protection rights for nonimmigrants was again before the Fifth Circuit in *Van Staden v. St. Martin*.<sup>157</sup> *Van Staden* addressed the constitutionality of licensing restriction for nurses in Louisiana.<sup>158</sup> *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.<sup>159</sup> At the outset, the Fifth Circuit concluded that the case was “controlled by *LeClerc*.”<sup>160</sup> The Fifth Circuit held that “[n]onimmigrant aliens satisfy neither of the conditions triggering strict scrutiny,” because nonimmigrants were neither discrete nor insular, had varied admission statuses, and lacked political capacity

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<sup>151</sup> *LeClerc*, 419 F.3d at 428 (Stewart, J., dissenting).

<sup>152</sup> *Id.* at 429.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Van Staden v. St. Martin*, 664 F.3d 56, 57 (5th Cir. 2011).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 58 (reasoning that “*LeClerc* need not be extended to cover the facts of this case; it need only be restated”).

due only to their temporary status.<sup>161</sup> 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 LPRs.<sup>162</sup> The Fifth Circuit thus applied rational basis review to the law and ultimately upheld the restrictions.<sup>163</sup>

As the first cases to deal with laws discriminating against nonimmigrants, the Fifth Circuit's rulings were particularly troubling. Both *LeClerc* and *Van Staden* established that nonimmigrants would not fall under the protections of *Graham* or the Court's other alienage decisions.<sup>164</sup> States within the Fifth Circuit were thus free to limit the ability of nonimmigrants to work in certain fields. In the interim between the rulings in *LeClerc* and *Van Staden*, the Sixth Circuit joined the Fifth in ruling that laws discriminating against nonimmigrants would be evaluated under rational basis review.<sup>165</sup>

## 2. The Sixth Circuit: *LULAC v. Bredesen*

In the Sixth Circuit, the issue regarding the scope of Equal Protection rights for nonimmigrants arose in *League of United Latin American Citizens (LULAC) v. Bredesen*.<sup>166</sup> In *LULAC*, the Sixth Circuit agreed with the Fifth Circuit by holding that state restrictions on nonimmigrants were not subject to strict scrutiny review.<sup>167</sup> Unlike the Fifth Circuit cases, which addressed laws restricting employment, *LULAC* considered a law preventing nonimmigrants from receiving driver's licenses.<sup>168</sup> *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.<sup>169</sup> The plaintiffs alleged that the law discriminated

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<sup>161</sup> *Van Staden*, 664 F.3d at 59.

<sup>162</sup> *Id.* at 59–60.

<sup>163</sup> *Id.* at 62.

<sup>164</sup> See *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005); *Van Staden*, 664 F.3d at 58.

<sup>165</sup> *League of United Latin American Citizens v. Bredesen (LULAC)*, 500 F.3d 523, 527 (6th Cir. 2007).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 533–34.

<sup>168</sup> *Id.* at 526.

<sup>169</sup> *Id.*

against them based on their nonimmigrant status and that such discrimination violated the Equal Protection Clause.<sup>170</sup>

Relying heavily on the Fifth Circuit's analysis in *LeClerc*, the Sixth Circuit agreed that nonimmigrants are dissimilar as a class from LPRs.<sup>171</sup> The *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."<sup>172</sup> 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.<sup>173</sup> It also dismissed the argument that subsequent Supreme Court cases, such as *Nyquist*, indicated that the *Graham* Court intended to extend strict scrutiny review to all classifications based on alienage.<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> The judge fundamentally disagreed with the majority opinions in both *LULAC* and *LeClerc*, arguing that the Supreme Court intended *Graham's* holding to apply to nonimmigrants.<sup>177</sup> While acknowledging that the 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.<sup>178</sup> Rather, he noted that the *Graham* majority had not restricted its analysis to LPRs exclusively, but had instead applied its reasoning to alienage classifications generally.<sup>179</sup>

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."<sup>180</sup> In

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<sup>170</sup> *Id.*

<sup>171</sup> *LULAC*, 500 F.3d at 526.

<sup>172</sup> *Id.* at 533.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 532–33.

<sup>175</sup> *Id.* at 533.

<sup>176</sup> *LULAC*, 500 F.3d at 537 (Gilman, J., dissenting).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 538.

<sup>179</sup> *Id.* at 539.

<sup>180</sup> *Id.* at 540.

invoking Judge Stewart's dissent in *LeClerc*, Judge Gilman stated that the majority had failed to address both that dissent and the other criticisms that the majority opinion had been subject to.<sup>181</sup> Judge Gilman concluded that extending strict scrutiny review to nonimmigrants would not be expanding the Supreme Court's ruling in *Graham*, but would merely apply the decision as the Court intended it.<sup>182</sup>

The Sixth Circuit added its voice to the Fifth in rejecting the application of heightened scrutiny to laws discriminating against nonimmigrants.<sup>183</sup> The *LULAC* opinion did not add substantially to the legal reasoning behind such a suggestion, as it mostly reiterated points already made by the *LeClerc* majority.<sup>184</sup> The ruling was important in that it expanded the number of circuits denying heightened scrutiny. The only two circuits that had considered this question agreed in their conclusions.<sup>185</sup> Only later when the Second Circuit ruled would a disagreement emerge among the federal circuits as to the proper level of scrutiny that should be applied.<sup>186</sup>

### 3. The Second Circuit: *Dandamudi v. Tisch* and the Circuit Split

Prior to the summer of 2012, the federal circuit courts were in limited agreement that courts should review laws that discriminated against nonimmigrants under rational basis review.<sup>187</sup> But in *Dandamudi v. Tisch*, the Second Circuit departed from the Fifth and Sixth Circuits in ruling that such laws should instead be subject to strict scrutiny review.<sup>188</sup> It did so on two grounds: (1) that the Supreme Court's ruling in *Graham* meant that all classifications based on alienage were subject to strict scrutiny and (2) that nonimmigrants had all the characteristics of a suspect class and strict scrutiny must therefore be applied.<sup>189</sup>

Prior to *Dandamudi*, the Second Circuit seemed receptive to the idea that strict scrutiny should apply to nonimmigrant Equal Protection

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<sup>181</sup> *Id.* at 542.

<sup>182</sup> *LULAC*, 500 F.3d at 540 (Gilman, J., dissenting).

<sup>183</sup> *LULAC*, 500 F.3d at 533.

<sup>184</sup> *Id.* at 526.

<sup>185</sup> *See generally* *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *LULAC*, 500 F.3d 523.

<sup>186</sup> *See generally* *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

<sup>187</sup> *See* discussion *supra* Part III.B.1–2.

<sup>188</sup> *Dandamudi*, 686 F.3d at 70.

<sup>189</sup> *Id.* at 78–79.

claims.<sup>190</sup> 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.<sup>191</sup> The district court considered both the Fifth and Sixth Circuit majority opinions and dissents.<sup>192</sup> It rejected the theory that the Supreme Court had limited its holding in *Graham* to LPRs.<sup>193</sup> Rather, the court concluded that “the challenged statute must be reviewed under the strict scrutiny standard” and that the law “fail[ed] to pass such scrutiny.”<sup>194</sup> The Second Circuit never had the opportunity to review the decision in *Kirk*, however, as the plaintiff received LPR status shortly after prevailing in the district court.<sup>195</sup>

One year later, the Second Circuit had another chance to address the scope of nonimmigrants’ Equal Protection rights in the case of *Dandamudi v. Tisch*.<sup>196</sup> *Dandamudi* addressed the constitutionality of a New York law that prevented nonimmigrants from obtaining pharmacist licenses.<sup>197</sup> The law required pharmacists to either be citizens of the United States or legal permanent residents.<sup>198</sup> Although the law originally provided an exception allowing nonimmigrants to work as pharmacists, that provision had expired in 2006 and the legislature did not renew it.<sup>199</sup> As a result, a number of nonimmigrants previously licensed as pharmacists in New York brought suit, arguing that the new restrictions violated their Equal Protection rights under the Constitution.<sup>200</sup>

There were two types of nonimmigrant work visas at issue in *Dandamudi*: H1-B visas, which fall under the Immigration and Nationality Act, and TN visas under NAFTA.<sup>201</sup> These visas permitted the workers to stay in the United States for six years under the initial visa

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<sup>190</sup> See generally *Kirk v. N.Y. State Dep. Of Educ.*, 562 F.Supp.2d 405 (W.D.N.Y. 2008); *Kirk v. N.Y. State Dept. of Educ.*, 644 F.3d 134 (2d Cir. 2011).

<sup>191</sup> 562 F.Supp.2d at 407.

<sup>192</sup> *Id.* at 410–11.

<sup>193</sup> *Id.* at 411.

<sup>194</sup> *Id.*

<sup>195</sup> *Kirk v. N.Y. State Dept. of Educ.*, 644 F.3d 134, 135 (2d Cir. 2011).

<sup>196</sup> See generally *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

<sup>197</sup> *Id.* at 69.

<sup>198</sup> New York Education Law § 6805(1)(6); *Dandamudi*, 686 F.3d at 69.

<sup>199</sup> *Dandamudi*, 686 F.3d at 71–72, n.5.

<sup>200</sup> *Id.* at 69–70.

<sup>201</sup> *Id.* at 70.

and the extension.<sup>202</sup> 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.”<sup>203</sup> Additionally, twenty-two of the plaintiffs had applied for LPR status at the time that the court decided *Dandamudi*.<sup>204</sup>

The Second Circuit began by stating that “[t]here is no question that the Fourteenth Amendment applies to *all* aliens.”<sup>205</sup> The court then proceeded to discuss *Graham*, concluding that while the Supreme Court had not explicitly applied strict scrutiny to nonimmigrant aliens, “the Court has never held that lawfully admitted aliens are outside of *Graham’s* protection.”<sup>206</sup> In support of its position, the court pointed *Nyquist* and *In re Griffiths*, where the Supreme Court had reaffirmed its ruling in *Graham* without limiting it to LPRs.<sup>207</sup> Indeed, the Second Circuit observed that “the Court has never distinguished between classes of *legal* resident aliens.”<sup>208</sup> While the Supreme Court had carved out other exceptions to *Graham*, the court noted, it had never done so for nonimmigrants.<sup>209</sup> The Second Circuit therefore rejected the argument that *Graham’s* analysis did not apply to nonimmigrants.<sup>210</sup>

The Second Circuit also addressed the Fifth and Sixth Circuits’ position in *LeClerc*, *Van Staden*, and *LULAC*.<sup>211</sup> The court rejected their rationale for three reasons. First, 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.”<sup>212</sup> The Supreme Court was merely supporting its point in listing those factors, the Second Circuit noted, and was not creating an exhaustive test.<sup>213</sup> 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

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<sup>202</sup> *Id.* at 71.

<sup>203</sup> *Id.* (emphasis in the original)

<sup>204</sup> *Id.*

<sup>205</sup> *Dandamudi*, 686 F.3d at 72(emphasis in the original) (internal citations omitted).

<sup>206</sup> *Id.* at 74.

<sup>207</sup> *Id.* at 73.

<sup>208</sup> *Id.* at 74 (emphasis in the original).

<sup>209</sup> *Id.* at 73.

<sup>210</sup> *Id.* at 74–75.

<sup>211</sup> *Dandamudi*, 686 F.3d at 75.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 75.

context in which they were employed.”<sup>214</sup> 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.”<sup>215</sup> The Second Circuit held 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.”<sup>216</sup>

Second, 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.”<sup>217</sup> The court recognized that the Supreme Court in *Graham* had not distinguished between different subclasses of aliens, but rather between legal and illegal aliens.<sup>218</sup> *Graham*’s language specifically spoke to alienage as a general class and not to LPRs only.<sup>219</sup> Therefore, the Second Circuit explicitly rejected the Fifth and Sixth Circuits’ narrow reading of *Graham*.<sup>220</sup>

Finally, the court found that even if it were 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.”<sup>221</sup> 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 courts had acknowledged.<sup>222</sup> 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.<sup>223</sup> Acknowledging that many nonimmigrants do, in fact, stay in the United

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<sup>214</sup> *Id.* 75–76.

<sup>215</sup> *Id.* at 76.

<sup>216</sup> *Id.*

<sup>217</sup> *Dandamudi*, 686 F.3d at 75.

<sup>218</sup> *Id.* at 76–77.

<sup>219</sup> *Id.* at 77.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 75.

<sup>222</sup> *Id.* at 77.

<sup>223</sup> *Dandamudi*, 686 F.3d at 75.

States longer, the court pointed to the dual intent doctrine, which provided that nonimmigrants could express both “an intent to remain temporarily” under their work visas and “an intent to remain permanently” by applying for LPR status.<sup>224</sup> The Second Circuit therefore concluded that “[t]he aliens at issue here are ‘transient’ in name only.”<sup>225</sup> 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.”<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup>

The opinion in *Dandamudi* makes it very clear that the Second Circuit found the Fifth and Sixth Circuits to have misapplied Supreme Court precedent to the issue at hand.<sup>229</sup> As a result, what had previously been a settled, if limited, issue of law became a circuit split. As it stands, the question of what level of scrutiny laws discriminating against nonimmigrants should be evaluated under has two very distinctly different answers. For the reasons argued below, the Second Circuit is clearly correct in its holding that such laws must be subject to strict scrutiny under existing Equal Protection jurisprudence.

#### 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.<sup>230</sup> Even prior to

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<sup>224</sup> *Id.* at 77.

<sup>225</sup> *Id.* at 78.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Dandamudi*, 686 F.3d at 74–76.

<sup>230</sup> *See generally Dandamudi*, 686 F.3d 66.



*Dandamudi*, dissenting judges and scholars had argued that rational basis was not the appropriate level scrutiny for nonimmigrants.<sup>231</sup> The Second Circuit's ruling incorporated many of the arguments made previously by both commentators and the dissenters in *LULAC* and *LeClerc*. As the subsequent discussion will show, strict scrutiny is the appropriate level of review for laws restricting the rights of nonimmigrants. *Graham* and its subsequent expansions strongly suggest that the Supreme Court requires the application of strict scrutiny to classifications based on alienage. 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, not only to LPRs. It is true that the Supreme Court's opinion in *Graham* focused on LPRs and their characteristics and that the opinion did not mention nonimmigrants explicitly.<sup>232</sup> The 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."<sup>233</sup> The Court may have made this distinction with the intent to separate nonimmigrants as a whole from LPRs, or to distinguish nonimmigrants with shorter term visas. While the Supreme Court did not decide this point conclusively, its opinion did not explicitly exclude nonimmigrants.<sup>234</sup> The Court did, however, state in *Graham* that laws discriminating against "alienage" as a class should be subject to strict scrutiny review.<sup>235</sup> This language implies that the holding was broad, not restrictive. The Supreme Court likely focused on LPRs in *Graham* purely because the plaintiffs in the case were all LPRs.

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<sup>231</sup> See 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).

<sup>232</sup> *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

<sup>233</sup> *Id.* at 376.

<sup>234</sup> See generally *Graham*, 403 U.S. 365 (1971).

<sup>235</sup> *Id.* at 371–372.

As Judge Gilman argued in his dissent in *LULAC*, the Supreme Court's silence on nonimmigrants in *Graham* "proves little."<sup>236</sup> While the Supreme Court may not have specifically discussed nonimmigrants in *Graham*, it did not explicitly leave them out either. Indeed, in using such broad language regarding alienage, the Court may have meant to include nonimmigrants.<sup>237</sup> 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.<sup>238</sup> Importantly, the Court has only explicitly excluded undocumented immigrants from its holding in *Graham*, but it did so largely due to their illegal status in the country.<sup>239</sup> The Fifth and Sixth Circuits found that the list of similarities between citizens and LPRs in *Graham* shows that *Graham* applies only to LPRs.<sup>240</sup> But the Second Circuit disagreed, holding that "nonimmigrant aliens are sufficiently similar to citizens that discrimination against them . . . must be strictly scrutinized."<sup>241</sup> Thus, the Second Circuit showed that the *Graham* analysis logically encompasses nonimmigrants as well as LPRs.<sup>242</sup> Contrarily, the Fifth and Sixth Circuits' position that the Supreme Court used language in *Graham* meant to exclude nonimmigrants has no textual support.<sup>243</sup> The silence of the Court on the issue and its previous rulings are 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 *LeClerc* and *LULAC* that addressed this issue have suggested,

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<sup>236</sup> League of United Latin American Citizens v. Bredesen (*LULAC*), 500 F.3d 523, 538 (6th Cir. 2007).

<sup>237</sup> 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 v. Webb*, 419 F.3d 405 (5th Cir. 2005) (Stewart, J. dissenting).

<sup>238</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

<sup>239</sup> See *supra* notes 98–102 and accompanying text.

<sup>240</sup> See *supra* notes 137–40, 171 and accompanying text.

<sup>241</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 68 (2d Cir. 2012).

<sup>242</sup> *Id.*

<sup>243</sup> *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005).

nonimmigrants should be considered a suspect class for the purposes of Equal Protection review.<sup>244</sup> As such, the courts should review laws discriminating against nonimmigrants under strict scrutiny review.

One common characteristic of a suspect class is the class' inability to utilize the political process.<sup>245</sup> The *LeClerc* majority suggested that, because nonimmigrants as a class are so varied, one cannot state that as a group they are unable to access the political process.<sup>246</sup> 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.<sup>247</sup> Because of their legal status in the country, nonimmigrants are just as separated from the political process as LPRs, if not more so.<sup>248</sup>

Another argument that nonimmigrants are not a suspect class involves the lack of "permanency" within the class of nonimmigrants.<sup>249</sup> The Fifth Circuit tied nonimmigrants' "temporary connection to this country" with their lack of legal capacity to conclude that nonimmigrants do not warrant suspect class status.<sup>250</sup> The Fifth Circuit held that nonimmigrants are transient and have no permanent ties to the United States because they are required to maintain foreign citizenship and not remain in the United States.<sup>251</sup> This is an overly literal interpretation of immigration law and the permanency of nonimmigrant residence. The Second Circuit disagreed with this interpretation, and found that most nonimmigrants end up staying legally in the United States for longer periods of time and that many ultimately receive LPR status.<sup>252</sup> The Second Circuit noted that one of the plaintiffs in the district court case preceding *Dandamudi* was dismissed during the appeals process because

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<sup>244</sup> See generally *Dandamudi*, 686 F.3d 66; *LeClerc*, 419 F.3d 405 (Stewart, J., dissenting); *League of United Latin American Citizens v. Bredesen (LULAC)*, 500 F.3d 523 (6th Cir. 2007) (Gilman, J., dissenting).

<sup>245</sup> *U.S. v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

<sup>246</sup> *LeClerc*, 419 F.3d at 417.

<sup>247</sup> *LeClerc*, 419 F.3d at 428–29 (Stewart, J. dissenting). See generally *Fifth Circuit Holds That Louisiana Can Prevent Nonimmigrant Aliens From Sitting For The Bar*, 119 HARV. L. REV. 669 (2005).

<sup>248</sup> *Dandamudi*, 686 F.3d at 77.

<sup>249</sup> See *supra* notes 153–55, 223–26 and accompanying text.

<sup>250</sup> *LeClerc*, 419 F.3d at 417.

<sup>251</sup> *Id.*

<sup>252</sup> *Dandamudi*, 686 F.3d at 77.

he had received a green card.<sup>253</sup> The previous Second Circuit district court case, *Kirk*, was also dismissed for this reason.<sup>254</sup>

Nonimmigrants are a suspect class under the Equal Protection Clause. They are politically impotent, facing many of the same problems and prejudices as LPRs.<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup> One could argue that if undocumented immigrants benefit from heightened scrutiny under *Plyler*, nonimmigrants deserve at least the same standard of review.<sup>258</sup> Although the Supreme Court stated it was only using rational basis review in *Plyler*, under a closer reading it seems that the Court applied a heightened level of scrutiny.<sup>259</sup> 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.<sup>260</sup> The Court's focus on the vulnerability of children in particular may indicate that the holding is very narrow.<sup>261</sup> If *Plyler*'s holding is limited only to cases involving undocumented immigrant children, or even only undocumented immigrant children's education, its holding does not include undocumented immigrants as a whole.<sup>262</sup> In that case, it seems likely that the court would merely apply rational basis review to laws discriminating against undocumented immigrants, as they purported to do in *Plyler*.<sup>263</sup> If this is the true holding of *Plyler*, then the argument

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<sup>253</sup> *Id.* at 71, n. 4.

<sup>254</sup> *Kirk v. N.Y. State Dept. of Educ.*, 644 F.3d 134, 136 (2d Cir. 2011).

<sup>255</sup> *See supra* notes 245–48. *See generally Dandamudi*, 686 F.3d 66.

<sup>256</sup> *See supra* notes 252–54 and accompanying text.

<sup>257</sup> *See generally* Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU. L. REV. 2298–305 (2010).

<sup>258</sup> *See supra* notes 95–104 and accompanying text. *See generally Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>259</sup> *See supra* note 258.

<sup>260</sup> *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005).

<sup>261</sup> *See supra* note 258.

<sup>262</sup> *See supra* note 258.

<sup>263</sup> *Plyler*, 457 U.S. at 223.

that heightened scrutiny should be applied to cases involving nonimmigrants because it is the standard used for undocumented immigrants no longer exists.

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 that it deemed not “discrete and insular” enough to receive strict scrutiny, but that deserved a lever of scrutiny that is slightly higher than rational basis review.<sup>264</sup> Therefore, it is plausible that the Supreme Court would chose to apply heightened scrutiny to nonimmigrants. The case for strict scrutiny review is still strong,<sup>265</sup> however, and it is the preferable standard of review because of the greater level of protection it affords to suspect classes.<sup>266</sup>

### *C. Preemption and the Supremacy Clause*

Preemption arguments have been utilized in several of the nonimmigrant challenges. Several commentators have supported the use of the supremacy clause as a method of striking down such laws.<sup>267</sup> 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.”<sup>268</sup> The Supreme Court therefore held that immigration is an area traditionally occupied by the federal government.<sup>269</sup>

Most recently, the Supreme Court has reaffirmed the federal government’s supremacy in the immigration field in *Arizona v. United States*.<sup>270</sup> There the Court stated that “[t]he federal power to determine

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<sup>264</sup> These classes include “gender and non-marital birth”. See Hess, *supra* note 257, at 2299–301.

<sup>265</sup> See *supra* Part IV.A. See generally *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

<sup>266</sup> ROTUNDA & NOWAK, *supra* note 24, at § 18.3(a)(v).

<sup>267</sup> See Hess, *supra* note 257, at 2287–88.

<sup>268</sup> *Graham v. Richardson*, 403 U.S. 365, 378 (1971).

<sup>269</sup> *Id.*

<sup>270</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012).

immigration policy is well settled.”<sup>271</sup> The Court therefore struck down several sections of an Arizona law dealing with immigration, holding that “[t]he Federal Government has occupied the field of alien registration” and as such “field preemption” prevented the states from interfering.<sup>272</sup> The Court struck down other sections of the law when they were obstacles in the fulfillment of the purpose of Congress.<sup>273</sup> *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.<sup>274</sup>

The *LeClerc* and *LULAC* majorities accepted the federal government’s power in the immigration field while arguing that federal law would not actually preempt the challenged state laws.<sup>275</sup> 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.<sup>276</sup> But as *Arizona* shows, the Supreme Court may be less inclined to allow states to control in areas of immigration than certain circuit courts have been.<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup>

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

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<sup>271</sup> *Id.* at 2498.

<sup>272</sup> *Id.* at 2502.

<sup>273</sup> *Id.* at 2505.

<sup>274</sup> *See generally Arizona*, 132 S. Ct. 2492.

<sup>275</sup> *See supra* Part III.B.1–2.

<sup>276</sup> *LeClerc v. Webb*, 419 F.3d 405, 423–24 (5th Cir. 2005)(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”).

<sup>277</sup> *See generally Arizona*, 132 S. Ct. 2492.

<sup>278</sup> *Dandamudi v. Tisch*, 686 F.3d 66, 79–80 (2d Cir. 2012).

<sup>279</sup> *Id.* at 80.

provisions in the INA might preempt.<sup>280</sup> Another, however, involved drivers' licenses,<sup>281</sup> which might fall outside the federal government's immigration 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.<sup>282</sup> 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. Legal Permanent Residents and nonimmigrants should receive the same treatment under the Equal Protection Clause. Nonimmigrants have come to the United States legally for a specified purpose, most commonly to continue their studies or work in a specific field.<sup>283</sup> Many stay for a significant period of time before becoming legal permanent residents and eventually citizens.<sup>284</sup> Yet, in several circuits nonimmigrants do not receive the same protection under the law as LPRs.<sup>285</sup> But they should. Nonimmigrants are as deserving of the protection that strict scrutiny review affords because they are a suspect class that fits into the category of a discrete and insular minority.<sup>286</sup> They face many of the same problems as LPRs and are just as politically powerless, if not more so.<sup>287</sup> 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.<sup>288</sup> The Court's holding in *Graham* applies to alienage as a whole, not merely to LPRs.<sup>289</sup> Therefore, there is clearly precedent to establish any law discriminating against nonimmigrants should be subject to strict scrutiny review under

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<sup>280</sup> *Id.*

<sup>281</sup> *League of United Latin American Citizens v. Bredesen (LULAC)*, 500 F.3d 523, 526 (6th Cir. 2007).

<sup>282</sup> *Dandamudi*, 686 F.3d at 81.

<sup>283</sup> *STEEL*, *supra* note 3, at § 3:1.

<sup>284</sup> *Dandamudi*, 686 F.3d at 77.

<sup>285</sup> *See generally* *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *League of United Latin American Citizens v. Bredesen (LULAC)*, 500 F.3d 523 (6th Cir. 2007).

<sup>286</sup> *See supra* Part IV.A.2. *See generally* *Dandamudi*, 686 F.3d 66, 77.

<sup>287</sup> *Id.*

<sup>288</sup> *See supra* notes 232–43 and accompanying text; *see also* *Dandamudi*, 686 F.3d at 77.

<sup>289</sup> *See generally* *Graham v. Richardson*, 403 U.S. 365 (1971).

the Equal Protection Clause. To do otherwise would fail to protect vulnerable group and offer them far less protection than is afforded to other similarly situated groups.