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SUSPICIOUS SUSPECT CLASSES—ARE NONIMMIGRANTS ENTITLED TO STRICT SCRUTINY REVIEW UNDER THE EQUAL PROTECTION CLAUSE?: AN ANALYSIS OF *DANDAMUDI AND LECLERC*

JOHN HARRAS[†]

INTRODUCTION

Aliens are treated as a suspect class—sometimes. As a general rule, aliens are a suspect class, which makes any statutory classification based on alienage subject to strict scrutiny review under the Equal Protection Clause of the U.S. Constitution. The Supreme Court has identified two exceptions to that general rule. The first is the governmental function exception. This exception permits courts to review statutes that exclude aliens from governmental function occupations, such as employment at police departments, under rational basis review. The second exception concerns undocumented aliens. It allows courts to review statutes that make classifications based on an alien's undocumented status under rational basis review. Due to a split of authority among circuit courts, there is an open question as to whether nonimmigrants, aliens that are permitted to reside in the United States on a temporary, conditional basis, are a suspect class entitled to strict scrutiny review. This Note argues that nonimmigrants are not a suspect class and that, therefore, the Supreme Court should recognize a third exception to the general rule. This third exception would allow courts to review statutes that make classifications based on an alien's temporary status under rational basis review.

Nonimmigrants should not be treated as a suspect class because nonimmigrants are not subject to the type of discrimination that prompted the Supreme Court to announce

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that aliens, in general, are a suspect class. The different experiences of Torao Takahashi, an alien, and Catherine Wallace, a nonimmigrant, exhibit the differences in the kind of discrimination to which aliens used to be subject and the kind of discrimination to which they are currently subjected.

Torao Takahashi was a Japanese immigrant trying to earn an honest living as a fisherman in California.¹ He left the Meiji Emperor and Imperial Japan behind in 1907, likely in the hopes of finding a better life in the land of freedom and democracy.² His new country, however, did not treat him very kindly. After lawfully living in the United States for thirty-five years, he was forced from his home and confined to an internment camp during World War II.³ By the time he returned home, California, acting under the anti-Japanese fervor that permeated the state at that time, enacted a law that denied fishing licenses to all Japanese immigrants. Thus, because of anti-Japanese sentiment, Torao Takahashi was dislocated, incarcerated, and deprived of his livelihood as a fisherman.⁴

Caroline Wallace was a citizen of the United Kingdom and was living temporarily in the United States under “nonimmigrant alien[]” status,⁵ which means she was here temporarily for a specific purpose.⁶ Before coming to the United States in 2001, she was an attorney in England and Wales, having graduated from the College of Law in London with distinction in 1998.⁷ While in the United States, she worked as a paralegal for the Capital Post Conviction Project of Louisiana.⁸ In December 2001, she applied for admission to the Louisiana

¹ *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 412 (1948).

² *See id.*; Eiichiro Azuma, “Pioneers of Overseas Japanese Development”: *Japanese American History and the Making of Expansionist Orthodoxy in Imperial Japan*, 67 *J. ASIAN STUD.* 1187, 1192 (2008).

³ *See Takahashi*, 334 U.S. at 413; *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

⁴ *See Takahashi*, 334 U.S. at 413; *see also id.* at 422 (Murphy, J., concurring) (“The statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century.”).

⁵ *Wallace v. Calogero*, 286 F. Supp. 2d 748, 750–51 (E.D. La. 2003) (footnote omitted), *rev'd*, *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005).

⁶ *See* 8 U.S.C.A. § 1101(a)(15) (West 2014) (describing various employment-related and other classifications under which aliens may be lawfully admitted into the United States on a non-permanent basis).

⁷ *Wallace*, 286 F. Supp. 2d at 751.

⁸ *Id.*

Bar.⁹ In 2002, she was told that she was ineligible to take the Louisiana Bar Examination because of her temporary status.¹⁰ If she became a permanent legal resident, however, she could sit for the exam.¹¹

Are Torao Takahashi and Caroline Wallace's experiences similar? Takahashi was the victim of xenophobia and racism. He was denied a fishing license solely because he was Japanese—a characteristic that in no way affected his ability to participate in society. Can the same be said of Wallace? Her exclusion from the Louisiana Bar did not appear to have been motivated by racism or xenophobia but rather by her temporary immigration status—a characteristic that, unlike her United Kingdom background, may have affected her ability to participate in society on an ongoing basis. Due to her temporary status, she could have been forcibly expelled from the United States if her visa was not renewed, and her application for permanent residency was denied. As a result, her ability to participate in society was more limited than that of a permanent resident.¹²

In *Graham v. Richardson*,¹³ the Supreme Court used Takahashi's experience as a basis for holding alienage classifications to be inherently suspect.¹⁴ By labeling alienage classifications inherently suspect, the Supreme Court ensured that statutes that treated people like Takahashi differently than everyone else would be reviewed under strict scrutiny, which is the highest standard of review under the Equal Protection Clause and is also applied to statutes that make racial classifications.¹⁵ The Court applied this level of scrutiny to alienage classifications because it believed that "treating groups differently based on the members' alienage was akin to

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.*

¹² This Note discusses, in detail, the reasons why temporary immigrants and permanent immigrants are different, focusing on their ability to be professionals, in Part III.

¹³ 403 U.S. 365 (1971).

¹⁴ *Id.* at 372 ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny . . . Accordingly, it was said in *Takahashi* that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" (citations omitted) (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948))); *see also Dandamudi v. Tisch*, 686 F.3d 66, 73 (2d Cir. 2012).

¹⁵ *See Graham*, 403 U.S. at 372; *Dandamudi*, 686 F.3d at 73.

discriminating against a group because of their race or color.”¹⁶ This kind of discrimination is known as “invidious discrimination.”¹⁷

Although the *Graham* Court stated that all alienage classifications should be reviewed under strict scrutiny, the Supreme Court has not always done so. The Supreme Court has applied rational basis review, the lowest standard of review under the Equal Protection Clause, to many types of alienage classifications where it has found a legitimate purpose for the classification. For example, federal regulations affecting aliens;¹⁸ classifications excluding undocumented aliens from education;¹⁹ and laws excluding temporary aliens from voting,²⁰ serving on a jury,²¹ being police officers,²² or from serving as school teachers²³ have all been subject to rational basis review.

From the cases that departed from the *Graham* rule, the courts have developed two exceptions. The first exception is the “governmental functions” exception, which allows courts to review state laws that exclude aliens from performing a “governmental function” under rational basis review.²⁴ The second exception allows courts to review statutes that exclude undocumented aliens under rational basis review.²⁵

Given the Supreme Court’s willingness to depart from *Graham*, the Second and Fifth Circuits have split on whether statutes that exclude nonimmigrant aliens like Caroline Wallace

¹⁶ *Dandamudi*, 686 F.3d at 73.

¹⁷ *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination”); *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (“The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility.”).

¹⁸ See *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976); see also *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (2d Cir. 1990).

¹⁹ *Plyler*, 457 U.S. at 223–24.

²⁰ *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973).

²¹ *Foley*, 435 U.S. at 296.

²² *Id.*

²³ *Ambach v. Norwick*, 441 U.S. 68, 80 (1979).

²⁴ *Id.* at 74–75.

²⁵ *Plyler v. Doe*, 457 U.S. 202, 216–19 (1982); *Dandamudi v. Tisch*, 686 F.3d 66, 73–74 (2d Cir. 2012).

should be reviewed under strict scrutiny.²⁶ The Fifth Circuit, in *LeClerc v. Webb*,²⁷ the case in which Caroline Wallace was a plaintiff, found that nonimmigrants, like Wallace, were not a suspect class and applied rational basis review to uphold the statute that excluded nonimmigrants from taking the bar exam.²⁸ In contrast, the Second Circuit, in *Dandamudi v. Tisch*,²⁹ found that nonimmigrants are a suspect class and applied strict scrutiny to strike down a statute that excluded nonimmigrants from obtaining a pharmacist's license.³⁰

This Note argues that nonimmigrants are not a suspect class and, therefore, statutes that restrict the rights of nonimmigrants should be subject to rational basis review. This Note contends that the Supreme Court did not intend alienage classification to be inherently suspect unless the classification was motivated by invidious discrimination. It argues that nonimmigrants are not subject to invidious discrimination, since they are not victim to discrimination based on an obvious, immutable characteristic that has no affect on the alien's ability to participate in society—something akin to skin color. Therefore, nonimmigrants are not entitled to strict scrutiny review.

Part I of this Note provides the background necessary to understand the different alienage classifications, equal protection jurisprudence, and the confusion in the Supreme Court's alienage equal protection precedent. Part II describes the differences of opinion among the circuit courts on the application of the Equal Protection Clause to nonimmigrants. Part III argues, in greater detail, that nonimmigrants are not a suspect class for the reasons stated above.

²⁶ There is also a split of authority among circuit courts on whether the Supremacy Clause preempts state statutes that exclude nonimmigrants from working in a particular field. Compare *LeClerc v. Webb*, 419 F.3d 405, 423 (5th Cir. 2005) ("Section 3(B) is unquestionably a permissible exercise of Louisiana's broad police powers to regulate employment within its jurisdiction"), with *Dandamudi*, 686 F.3d at 81 (holding that federal immigration law preempts all state immigration law). This Note focuses only on the equal protection analysis of each court. This focus is warranted, as the *Dandamudi* court said "we must decide this case on Equal Protection grounds." *Id.* at 81.

²⁷ 419 F.3d 405.

²⁸ *Id.* at 419–22 ("By process of elimination, rational basis review must be the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens."). The state law at issue excluded nonimmigrants from admission to the Louisiana Bar. *Id.* at 410–11.

²⁹ 686 F.3d 66.

³⁰ *Id.* at 79.

I. BACKGROUND

This Part first provides an overview of U.S. immigration law by explaining the different alienage classifications and the consequences of such classifications. It then provides a general overview of equal protection jurisprudence by defining relevant terms. Finally, this Part examines the Supreme Court's precedent regarding the application of the Equal Protection Clause to aliens.

A. *Aren't Aliens from Mars?—Alienage Classifications Under U.S. Immigration Law*

The Immigration and Nationality Act (the "INA") defines an "alien" as "any person not a citizen or national of the United States."³¹ The INA distinguishes between two types of legal aliens: lawful permanent residents ("LPRs")³² and nonimmigrants.³³ The following Subsections discuss each of these alienage classifications.³⁴

1. Lawful Permanent Residents ("LPRs")

LPR status has been described as "virtual citizenship."³⁵ Such status is only given after an investigation by the U.S. Citizenship and Immigration Services into the immigrant's

³¹ Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C.A. § 1101(a)(3) (West 2014).

³² 8 U.S.C.A. § 1101(a)(20) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."). "[T]he Supreme Court has used the terms 'resident alien,' 'permanent resident alien,' and 'immigrant' almost interchangeably" for this type of alien. *Van Staden v. St. Martin*, 664 F.3d 56, 58 n.4 (5th Cir. 2011), cert. denied, 133 S. Ct. 110 (2012) (mem.) (citing *LeClerc*, 419 F.3d at 410 n.2). Also, the U.S. Citizenship and Immigration Services uses the terms "Lawful Permanent Resident," "Permanent Resident Alien," "Resident Alien Permit Holder," and "Green Card Holder" interchangeably. *Lawful Permanent Resident (LPR)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr> (last visited Aug. 27, 2014). This Note refers to such aliens as lawful permanent residents ("LPRs").

³³ 8 U.S.C.A. § 1101(a)(15)(A)–(V) (specifying the different types of nonimmigrants).

³⁴ Undocumented aliens, also known as illegal aliens, constitute another alien classification. The INA does not acknowledge them as a class of aliens but includes a provision that prohibits their employment. 8 U.S.C. § 1324a (2012). This Part does not discuss undocumented aliens because the distinction between them and other aliens is obvious—their presence is illegal and the others' presence is not.

³⁵ *Van Staden*, 664 F.3d at 59 (internal quotation marks omitted).

fitness for the “breadth of rights and responsibilities” possessed by LPRs.³⁶ These rights include the ability to live in the United States permanently³⁷ and to have “unrestricted authorization for employment in the United States.”³⁸ A legal permanent resident’s resident alien card, also known as a “green card,” is sufficient for employment in any occupation of the resident’s choosing.³⁹ LPRs are, generally speaking, entitled to federal public benefits,⁴⁰ which include Medicare and Social Security.⁴¹ LPRs may also choose to serve in the military.⁴² Regarding the responsibilities of LPRs, they must pay the same taxes as U.S. citizens⁴³ and they must register for the selective service.⁴⁴

2. Nonimmigrants

Nonimmigrants are aliens that are lawfully admitted into the United States for a “specific and temporary” purpose.⁴⁵ Unlike LPRs, they express no intention of abandoning their foreign country residence.⁴⁶ The INA describes over sixty types of

³⁶ *Id.* at 60 (internal quotation marks omitted).

³⁷ 8 U.S.C. § 1101(a)(20) (2012). However, LPRs can be deported if they commit serious crimes, such as crimes of moral turpitude, drug abuse and addiction, and failing to register as a sex offender. *Id.* § 1227(a)(2)(A)(i), (v), (B)(ii).

³⁸ *Etuk v. Slattery*, 936 F.2d 1433, 1445 (2d Cir. 1991); *see also* Richard D. Steel, *Rights of Permanent Residents*, in STEEL ON IMMIGR. LAW § 10:8 (2d ed. 2012) (showing that LPRs have general work authorization subject to a few exceptions).

³⁹ *See* 8 U.S.C. § 1324a(b)(1)(B)(ii) (2012); *Rights and Responsibilities of a Green Card Holder (Permanent Resident), After a Green Card is Granted*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited Mar. 22, 2015).

⁴⁰ Only “qualified alien[s]” are eligible for Federal public benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 401(a); 8 U.S.C. § 1611(a) (2012). A “qualified alien” includes LPRs but does not include nonimmigrants or undocumented aliens. *See* 8 U.S.C. § 1641(b) (2012).

⁴¹ Federal public benefits include “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States.” 8 U.S.C. § 1611(c)(1)(A). They also include “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit.” *Id.* § 1611(c)(1)(B).

⁴² 10 U.S.C. § 504(b)(B) (2012).

⁴³ INTERNAL REVENUE SERV., U.S. DEPT OF THE TREASURY, PUB. 519, U.S. TAX GUIDE FOR ALIENS 3, 10 (2013), *available at* <http://www.irs.gov/pub/irs-pdf/p519.pdf>.

⁴⁴ 50 U.S.C.A. app. § 435(a) (West 2014).

⁴⁵ *LeClerc v. Webb*, 419 F.3d 405, 410 n.2 (5th Cir. 2005).

⁴⁶ *Id.* In every specified visa issued to a nonimmigrant, a condition to the visa is “having a residence in a foreign country which he has no intention of abandoning.”

nonimmigrants,⁴⁷ including aliens visiting the United States temporarily,⁴⁸ working in the United States temporarily,⁴⁹ and studying in the United States temporarily.⁵⁰

Each type of nonimmigrant has a specific corresponding visa authorizing the temporary stay.⁵¹ The visa dictates the terms of the nonimmigrant's stay.⁵² For example, if a nonimmigrant is admitted to the United States on an H-1B visa, the nonimmigrant is admitted for the purpose of performing services in a "specialty occupation."⁵³ Such occupations require either a bachelor's degree or higher, or a full state licensure.⁵⁴ The regulations promulgated under the INA specify the duration of each visa.⁵⁵ H-1B visa holders can legally remain and work in the United States for only three years,⁵⁶ with the possibility of one three-year extension.⁵⁷ Most visas require prospective employers to file a petition on a nonimmigrant's behalf before the nonimmigrant can be employed.⁵⁸ If a nonimmigrant fails to comply with the terms of the visa, or if the visa expires, the nonimmigrant may be deported.⁵⁹ A nonimmigrant, like a LPR, may also be deported for committing a crime.⁶⁰

See 8 U.S.C.A. § 1101(a)(15)(J) (West 2014); *Id.* § 1101(a)(15)(H)(i)(b); see also *LeClerc*, 419 F.3d at 410 n.3, 411 n.4.

⁴⁷ 8 U.S.C.A. § 1101(a)(15)(A)-(V); see also 8 C.F.R. § 214.1(a)(2) (2015). Each type of nonimmigrant is given its own visa. For example, an H1-B visa is for aliens. See *id.* § 214.1(a)(1); 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); *Id.* § 1184(i).

⁴⁸ 8 U.S.C.A. § 1101(a)(15)(B) (serving as the basis of a B-1 visa).

⁴⁹ *Id.* § 1101(a)(15)(H) (serving as the basis of a temporary worker visa, such as the H1-B visa).

⁵⁰ *Id.* § 1101(a)(15)(J) (serving as the basis for a student visa, such as the J-1 visa).

⁵¹ 8 C.F.R. § 214.1(a)(2).

⁵² *Id.* § 214.1(a)(3).

⁵³ 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

⁵⁴ *Id.* § 1184(i).

⁵⁵ See generally 8 C.F.R. § 214.2 (2015) (listing the requirements for each category of nonimmigrants).

⁵⁶ *Id.* § 214.2(h)(9)(iii)(A)(1).

⁵⁷ *Id.* § 214.2(h)(15)(ii)(B).

⁵⁸ Immigration and Nationality Act (INA) § 214(c); 8 U.S.C.A. § 1184(c) (West 2014); *Temporary (Nonimmigrant) Workers, Working in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers> (last visited Mar. 22, 2015).

⁵⁹ 8 U.S.C. § 1227(a)(1)(C) (2012).

⁶⁰ *Id.* § 1227(a)(2).

Generally speaking, nonimmigrants do not qualify for any federal public benefits.⁶¹ They are not required to register for the Selective Service and they are prohibited from serving in the military⁶² because they do not owe “permanent allegiance to the United States.”⁶³ Most nonimmigrants are only taxed on their U.S. income, whereas citizens and LPRs are taxed on their worldwide income.⁶⁴

Thus, while nonimmigrants are subject to many more legal restrictions than LPRs, they do not bear all of the same societal responsibilities as LPRs and citizens.

B. *The Equal Protection Clause—A General Overview*

The Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶⁵ The application of the Equal Protection Clause has expanded significantly since the ratification of the Fourteenth Amendment.⁶⁶ The Supreme Court first interpreted the clause as only providing protection for African Americans from the denial of equal protection under the law.⁶⁷ Today, equal

⁶¹ See *supra* note 40 and accompanying text.

⁶² See 10 U.S.C. § 504(b) (2012).

⁶³ 8 U.S.C.A. § 1101(a)(22) (West 2014) (defining “national of the United States,” which is a type of person that can enlist in the military under 10 U.S.C. § 504(a)).

⁶⁴ U.S. TAX GUIDE FOR ALIENS, *supra* note 43. The IRS uses the green card test and the substantial presence test to determine how an alien is taxed. *Id.* at 3–4. Under the Green Card test, if you are a LPR, as defined in the INA, 8 U.S.C.A. § 1101(a)(20), then you are taxed the same way as a citizen is taxed. *Id.* at 3. Under the substantial presence test, if you are physically present in the United States for thirty-one days during 2013 and 183 days during the three-year time period of 2011–2013, then you are also a resident for tax purposes in 2013, and are taxed as a citizen. *Id.* at 4. If you are a H-1B temporary worker in the United States for three years, as allowed under the regulations, 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), then you would be a nonimmigrant under the INA, but taxed as a citizen. *Id.* at 54.

⁶⁵ U.S. CONST. amend. XIV, § 1.

⁶⁶ *Introduction—Interpreting the Equal Protection Clause, in SUPREME COURT DECISIONS & WOMEN’S RIGHTS* (Clare Cushman ed., 2010), available at http://supremecourthistory.org/lc_womens_rights.html.

⁶⁷ In *Strauder v. West Virginia*, one of the first cases interpreting the Equal Protection clause, the Supreme Court stated that the clause’s purpose is to “secur[e] to a race recently emancipated . . . all the civil rights that the superior race enjoy. [Its] true spirit and meaning . . . cannot be understood without keeping in view the history of the times when [it was] adopted . . .” 100 U.S. 303, 306 (1879) (citation omitted), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

protection applies to all classifications that treat persons who are "similarly situated," differently.⁶⁸

Not all such classifications, however, are analyzed under the same standard of review. The applicable standard of review depends on whether the classification inhibits the exercise of a fundamental right, or whether the classification discriminates against a suspect class, a quasi-suspect class, or a non-suspect class.⁶⁹ A fundamental right is one that is derived, either explicitly or implicitly, from the Constitution itself.⁷⁰ A suspect class is a "discrete and insular minorit[y]"⁷¹ that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁷² A suspect class typically exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group,"⁷³ and this characteristic "bears no relation to [the] ability to perform or contribute to society."⁷⁴ The Supreme Court has said that classifications based on alienage, nationality, and race are "inherently suspect."⁷⁵ Quasi-suspect classes have only been found in two contexts: gender and legitimacy.⁷⁶ A non-suspect class is a class that fits within neither of the other classes.⁷⁷

⁶⁸ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").

⁶⁹ See *Cleburne*, 473 U.S. at 440-41.

⁷⁰ *Plyler*, 457 U.S. at 217 n.15.

⁷¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting "more exacting judicial scrutiny" for legislation that affects "discrete and insular minorities" who may not be able to rely on political processes ordinarily relied upon to protect themselves).

⁷² *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

⁷³ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

⁷⁴ *Cleburne*, 473 U.S. at 441 (emphasis removed) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)) (internal quotation mark omitted).

⁷⁵ *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

⁷⁶ *Cleburne*, 473 U.S. at 440-41.

⁷⁷ See *id.* at 441-42 (stating that the elderly constitute neither a suspect class nor a quasi-suspect class, entitling them to no heightened review of statutes that treat the elderly differently, making them a non-suspect class).

If the classification inhibits the exercise of a fundamental right or discriminates against a suspect class, courts apply strict scrutiny to the classification.⁷⁸ Strict scrutiny requires that the classification be narrowly tailored to serve a compelling state interest.⁷⁹ Many legal scholars view strict scrutiny as “‘strict’ in theory and fatal in fact,”⁸⁰ meaning that the application of strict scrutiny often results in the statute at issue being held unconstitutional.

A classification that discriminates against a quasi-suspect class, such as gender or children born out of wedlock, is reviewed under intermediate scrutiny.⁸¹ Under this level of scrutiny, a classification is only constitutional if it is “substantially related to an important governmental objective.”⁸² The outcome of this standard’s application is less predictable than that for the application of strict scrutiny.⁸³ For example, under this standard the Supreme Court held that excluding women from the Virginia Military Institute is unconstitutional,⁸⁴ while discriminating against women based on their pregnancy status is constitutional.⁸⁵ Thus the application of intermediate scrutiny is not as outcome determinative as the application of strict scrutiny.

Non-suspect classifications are analyzed under rational basis review.⁸⁶ This standard of review is “relatively relaxed” and merely requires that the classification rationally further a legitimate state purpose.⁸⁷ This purpose need not be explicitly articulated by the state.⁸⁸ A legitimate state purpose may be ascertained by a court even when the legislative or

⁷⁸ *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *Graham*, 403 U.S. at 371–72.

⁷⁹ *Plyler*, 457 U.S. at 216–17.

⁸⁰ *E.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

⁸¹ *See Cleburne*, 473 U.S. at 440–41.

⁸² *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

⁸³ *See United States v. Virginia*, 518 U.S. 515, 532–34 (1996).

⁸⁴ *Id.* at 534.

⁸⁵ *Geduldig v. Aiello*, 417 U.S. 484, 494–95 (1974).

⁸⁶ *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976).

⁸⁷ *Id.* at 314.

⁸⁸ *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

administrative history is silent.⁸⁹ Moreover, the classification need not be the best means of accomplishing the state purpose; it just needs some rational relation to the purpose.⁹⁰ Finally, classifications reviewed under rational basis scrutiny are presumed to be valid.⁹¹

C. *Equal Protection and Alienage—The Supreme Court's Precedent*

The Court first applied equal protection to aliens in *Yick Wo v. Hopkins*,⁹² holding that the "[F]ourteenth [A]mendment to the constitution is not confined to the protection of citizens . . . [but is] universal in [its] application[] to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."⁹³ In *Yick Wo*, a San Francisco ordinance said that no laundry facility could be built or operated within the city's limits without the consent of a municipal board.⁹⁴ The board only denied the applications of Chinese aliens and only shut down laundry facilities that were owned by Chinese aliens.⁹⁵ The Court found that no legitimate reason for such discriminatory enforcement existed "except hostility to the race and nationality to which the petitioners belong[ed]."⁹⁶ Consequently, the Court held that the public administration of the San Francisco ordinance violated the Equal Protection Clause.⁹⁷

In *Takahashi v. Fish and Game Commission*,⁹⁸ the Court went further by holding that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."⁹⁹ In *Takahashi*, a LPR of Japanese

⁸⁹ *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.").

⁹⁰ *Murgia*, 427 U.S. at 316.

⁹¹ *Id.* at 314.

⁹² 118 U.S. 356 (1886).

⁹³ *Id.* at 369.

⁹⁴ *Id.* at 366.

⁹⁵ *Id.* at 374.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 334 U.S. 410 (1948).

⁹⁹ *Id.* at 420.

descent was not allowed to renew his commercial fishing license after he returned from his forced internment during World War II.¹⁰⁰ His renewal was barred by a California statute that banned the issuance of fishing licenses to any person ineligible for citizenship.¹⁰¹ The original draft of this statute, however, prohibited the issuance of such licenses to any Japanese alien.¹⁰² The language was changed from prohibiting the license to any “alien Japanese” to any “person ineligible to citizenship” for fear that the law would be ruled unconstitutional if it explicitly targeted a specific race.¹⁰³ The language change, however, did not make a difference, as it was still ruled unconstitutional.¹⁰⁴ The Court suggested that its ruling was based, at least in part, on the notion that a state’s ability to classify based on alienage was particularly tenuous when the alienage classification involved “certain racial and color groups.”¹⁰⁵

The Court first applied strict scrutiny review to alienage classifications in *Graham v. Richardson*.¹⁰⁶ The *Graham* Court was presented with an Arizona statute that denied welfare benefits to all aliens that had not resided in the United States for fifteen years and a Pennsylvania statute that denied welfare benefits to all aliens.¹⁰⁷ The Court reviewed these statutes under strict scrutiny and held that they violated the Equal Protection Clause.¹⁰⁸ In reaching this conclusion, the Court not only relied on the holdings of *Yick Wo* and *Takahashi*, but also on a comparison of alienage to race and nationality.¹⁰⁹ The Court concluded that, like certain racial and nationality groups, “[a]liens as a class are a prime example of a ‘discrete and insular’

¹⁰⁰ *Id.* at 413–14.

¹⁰¹ *Id.* at 413.

¹⁰² *Id.*

¹⁰³ *Id.* (internal quotation marks omitted).

¹⁰⁴ *Id.* at 420–22.

¹⁰⁵ *Id.* at 420.

¹⁰⁶ 403 U.S. 365, 371–72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority.” (internal quotation marks omitted)); *id.* at 376 (“The classifications involved in the instant cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired.”).

¹⁰⁷ *Id.* at 367–68.

¹⁰⁸ *Id.* at 376.

¹⁰⁹ *Id.* at 371–72.

minority."¹¹⁰ Because of this similarity, the Court reasoned that classifications based on alienage should be subject to the same standard of review applied to racial classifications—strict scrutiny.¹¹¹

After *Graham*, the Court continued to review most, but not all, classifications based on alienage under strict scrutiny.¹¹² Strict adherence to the *Graham* rule was first called into doubt in *Sugarman v. Dougall*.¹¹³ Although the *Sugarman* Court struck down a New York statute that excluded all aliens from holding civil service positions by applying strict scrutiny,¹¹⁴ it noted that a state may exclude aliens from certain positions "where citizenship bears some *rational* relationship to the special demands of the particular position."¹¹⁵

The Supreme Court, since *Sugarman*, has applied rational basis review—the lowest standard of review under the Equal Protection Clause—to certain types of alienage classifications, giving rise to the governmental functions exception.¹¹⁶ For example, in *Foley v. Connelie*,¹¹⁷ the Supreme Court held that "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny.'"¹¹⁸ The *Foley* Court reasoned that when dealing with matters firmly within a state's constitutional prerogatives, the "[s]tate need only justify its classification by a showing of *some rational relationship between the interest sought to be protected and the*

¹¹⁰ See *id.* at 372 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

¹¹¹ See *id.* at 371–72.

¹¹² See *In re Griffiths*, 413 U.S. 717, 721–23 (1973) (holding Connecticut's exclusion of all aliens from admission to the Bar unconstitutional after applying strict scrutiny to the statute); *Nyquist v. Mauclet*, 432 U.S. 1, 7–9 (1977) (holding New York's conditioning of financial aid for higher education on being a citizen or applying for citizenship unconstitutional after applying strict scrutiny). *But see infra* notes 113–26 and accompanying text.

¹¹³ 413 U.S. 634, 644 (1973). The *Graham* rule was also not followed in *Mathews v. Diaz*, where the Court upheld a federal statute that conditioned the eligibility for participation in a federal medical insurance program on being a citizen or a LPR who had lived in the United States for at least five years by declining to follow *Graham* and applying a more deferential standard of review, though not explicitly rational basis review. 426 U.S. 67, 69, 82–84 (1976).

¹¹⁴ *Sugarman*, 413 U.S. at 642.

¹¹⁵ *Id.* at 647 (emphasis added) (quoting *Dougall v. Sugarman*, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (Lumbard, J., concurring)) (internal quotation marks omitted).

¹¹⁶ See *id.* at 647.

¹¹⁷ 435 U.S. 291 (1978).

¹¹⁸ *Id.* at 295.

limiting classification.”¹¹⁹ Applying this standard of review, the *Foley* Court upheld a New York statute that excluded all aliens from becoming police officers, explaining that positions held by those participating directly in the formulation, execution, or review of public policy, like police officers, may rationally be reserved for citizens in order to ensure that the people are governed by their citizen peers.¹²⁰ In *Ambach v. Norwick*,¹²¹ the Court affirmed its reasoning in *Foley* and held constitutional a New York statute that precludes aliens from becoming public school teachers, stating that teaching fell within the “governmental function” exception to applying strict scrutiny that was alluded to by the *Foley* Court.¹²² This exception to strict scrutiny review also applies to statutes that exclude aliens from serving on a jury and from voting.¹²³ Thus the government function exception allows courts to review statutes that exclude aliens from government functions under rational basis review.

The Supreme Court has also applied a form of rational basis review outside the governmental function context. In *Plyler v. Doe*,¹²⁴ the Court struck down a Texas statute that excluded the children of undocumented aliens from receiving public education.¹²⁵ The Court said that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”¹²⁶ The Court, however, applied a heightened rational basis test, by requiring the state to show that it had a “substantial”—as opposed to a legitimate—interest in excluding the children of illegal aliens from education, resulting in the statute being held unconstitutional.¹²⁷ The reason for this variation on rational basis review was the “special constitutional sensitivity presented by [the case],”¹²⁸ namely that the statute penalized innocent children for their parents’ faults.¹²⁹

¹¹⁹ *Id.* at 296 (emphasis added).

¹²⁰ *Id.* at 292–93, 296.

¹²¹ 441 U.S. 68 (1979).

¹²² *Id.* at 80 (internal quotation marks omitted).

¹²³ *Foley*, 435 U.S. at 296; *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973).

¹²⁴ 457 U.S. 202 (1982).

¹²⁵ *Id.* at 230.

¹²⁶ *Id.* at 223.

¹²⁷ *Id.* at 230.

¹²⁸ *Id.* at 226.

¹²⁹ *Id.* at 220.

Thus, Supreme Court precedent suggests that there may be exceptions to the application of strict scrutiny if the statute either excludes aliens from a position that should be reserved for citizens or excludes aliens whose status is not a “constitutional irrelevancy.”

Whether statutes that exclude nonimmigrants, but not LPRs, fit within one of these exceptions has yet to be determined by the Supreme Court. In *Toll v. Moreno*,¹³⁰ the Court addressed a policy that excluded nonimmigrants from obtaining in-state tuition at the University of Maryland,¹³¹ but it struck down the policy solely on Supremacy Clause grounds¹³² and did not engage in an equal protection analysis.¹³³

The Supreme Court has, thus, left open the questions of whether nonimmigrants are a suspect class and whether statutes that make classifications based on a nonimmigrant's temporary status should be reviewed under strict scrutiny. The circuit courts have answered these questions differently.

II. EQUAL PROTECTION AND NONIMMIGRANTS—THE CIRCUIT SPLIT

In a 2005 case, *LeClerc v. Webb*,¹³⁴ the Fifth Circuit was the first circuit court to address the issue of whether nonimmigrants are a suspect class entitled to strict scrutiny protection.¹³⁵ It held that nonimmigrants were not a suspect class and, instead,

¹³⁰ 458 U.S. 1 (1982).

¹³¹ *Id.* at 3.

¹³² *Id.* at 17. The Supremacy Clause argument focused on the fact that the federal government had provided specific incentives exclusively for G-4 visa holders to establish a domicile in the United States and that the State of Maryland had to honor that Congressional intention. *Id.* The Court noted that “when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle [Supremacy Clause] is likely to be a matter of some dispute.” *Id.* at 13. Indeed, it has been the subject of dispute between the *LeClerc* and *Dandmudi* courts, with the former saying the Supremacy Clause does not apply to statutes that exclude nonimmigrants from professional licenses, *LeClerc v. Webb*, 419 F.3d 405, 423 (5th Cir. 2005), and the latter suggesting that it would apply, but decided the case on equal protection grounds, *Dandamudi v. Tisch*, 686 F.3d 66, 79 (2d Cir. 2012). This Note does not address the Supremacy Clause issues.

¹³³ *Toll*, 458 U.S. at 9–10.

¹³⁴ 419 F.3d 405.

¹³⁵ See Ariel Subourne, *Alienage as a Suspect Class: Nonimmigrants and the Equal Protection Clause 2* (Jan. 1, 2014) (unpublished article) (on file with the Seton Hall Law eRepository), available at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1146&context=student_scholarship; see also *id.* at 2 n.9.

applied rational basis review.¹³⁶ The Sixth Circuit was the next circuit court to address this issue, doing so in the 2007 case entitled *League of United Latin American Citizens (LULAC) v. Bredesen*.¹³⁷ It largely deferred to the Fifth Circuit's rationale and also applied rational basis review.¹³⁸ In 2011, the Fifth Circuit, in *Van Staden v. St. Martin*,¹³⁹ reaffirmed its commitment to *LeClerc*.¹⁴⁰ The Second Circuit, in *Dandamudi v. Tisch*,¹⁴¹ a 2012 case, disagreed with both circuit courts and applied strict scrutiny protection to nonimmigrants.¹⁴² This Part examines the different approaches to this issue.

A. *The Fifth and Sixth Circuits' Approach*

The Fifth Circuit first examined the application of equal protection to nonimmigrants in *LeClerc v. Webb*.¹⁴³ The statute at issue, Louisiana Supreme Court Rule XVII, § 3(B), required “[e]very applicant for admission to the [Louisiana] Bar . . . [b]e a citizen of the United States or a resident alien thereof.”¹⁴⁴ At the time of suit, all of the plaintiffs had nonimmigrant status: two of the plaintiffs were in the United States on H-1B temporary worker visas while the other two were on J-1 student visas.¹⁴⁵ All of the plaintiffs argued that nonimmigrants should be considered a suspect class and therefore, state laws affecting them should be subject to strict scrutiny review.¹⁴⁶

The Fifth Circuit disagreed and held that Louisiana Supreme Court Rule XVII, § 3(B) was subject to rational basis review.¹⁴⁷ First, the court noted that the Supreme Court had only applied strict scrutiny to classifications involving LPRs.¹⁴⁸ The court examined distinctions between resident aliens and nonimmigrants to justify its conclusion that nonimmigrant aliens, unlike LPRs, are not a “‘discrete’ or ‘insular’” class

¹³⁶ *LeClerc*, 419 F.3d at 415.

¹³⁷ 500 F.3d 523 (6th Cir. 2007).

¹³⁸ *Id.* at 533.

¹³⁹ 664 F.3d 56 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 110 (2012) (mem.).

¹⁴⁰ *Id.* at 58 (“This case is controlled by *LeClerc* . . .”).

¹⁴¹ 686 F.3d 66 (2d Cir. 2012).

¹⁴² *Id.* at 75, 77.

¹⁴³ See *Subourne*, *supra* note 135.

¹⁴⁴ *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005).

¹⁴⁵ *Id.* at 410–11.

¹⁴⁶ *Id.* at 415.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 416.

entitled to have statutes affecting them reviewed under strict scrutiny.¹⁴⁹ These distinctions included the fact that “nonimmigrant aliens may not serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits.”¹⁵⁰ Nonimmigrants also stipulate, as a condition of their admission to the United States, that they have “‘no intention of abandoning’ their countries of origin and do not intend to seek permanent residence in the United States.”¹⁵¹ Thus, the court concluded that “although 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 entitled to have state legislative classifications concerning them subjected to strict scrutiny.”¹⁵²

Regarding intermediate scrutiny, the court held that there was no precedential basis for applying this level of scrutiny to alienage classifications.¹⁵³ It viewed intermediate scrutiny as a level of analysis that the Supreme Court has reserved for gender classifications.¹⁵⁴

The court, thus, applied rational basis review to the Louisiana statute, asking whether the classification had “*some fair* relationship to a legitimate public purpose.”¹⁵⁵ Louisiana’s legitimate public purpose, according to the court, was its “substantial interest in regulating the practice of those it admits to its bar.”¹⁵⁶ The court concluded that this interest is rationally related to the statute’s classification because nonimmigrants are allegedly more transient than their resident counterparts, due to their easily terminable status.¹⁵⁷ Because of this transient propensity, nonimmigrants could be more difficult to locate, making it harder to subject them to the Louisiana Bar’s regulations.¹⁵⁸ Enforcing such regulations would be especially

¹⁴⁹ *Id.* at 417–19 (“Nonimmigrant aliens, in short, do not warrant *Carolene Products* status.”).

¹⁵⁰ *Id.* at 419 (footnotes omitted).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 419–20.

¹⁵⁴ *See id.* at 420.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 421.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

difficult if a malfeasant or nonfeasant nonimmigrant attorney were deported to his country of origin, after his visa expired, where there is no international reciprocity enabling the Louisiana Bar to reach him.¹⁵⁹ Thus, under the highly deferential nature of rational basis review, the court upheld Louisiana's statute.¹⁶⁰

In *Van Staden v. St. Martin*,¹⁶¹ the Fifth Circuit affirmed its commitment to *LeClerc* and upheld a Louisiana statute that required either U.S. citizenship or LPR status to obtain a nursing license by reviewing the statute under *LeClerc*'s rational basis standard.¹⁶² It regarded *LeClerc* as controlling authority that "draws a clean line between permanent resident aliens and nonimmigrant aliens," with the former being a suspect class and the latter a non-suspect class.¹⁶³ The *Van Staden* court went further than *LeClerc* by holding that a "legislature may rationally deem nonimmigrants as categorically more transient. Even if . . . they are LPR applicants and thus signal their willingness to reside here permanently, nonimmigrants have not been vetted by [the United States Citizenship and Immigration Services]."¹⁶⁴ Because of this transient characteristic, a state may not be able to enforce its disciplinary controls over nonimmigrants and may therefore rationally exclude them from certain professions.¹⁶⁵

In *League of United Latin American Citizens (LULAC) v. Bredesen*,¹⁶⁶ the Sixth Circuit, after applying rational basis review, upheld a Tennessee statute that conditions the issuance of a driver license on either U.S. citizenship or LPR status.¹⁶⁷ The Sixth Circuit agreed with the *LeClerc* court's analysis, finding that "[t]here are abundant good reasons, both legal and pragmatic, why lawful permanent residents are the only subclass

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 422 (finding that statute survives rational basis review and, thus, does not violate the Equal Protection Clause). The court also dispensed with every other constitutional attack on the statute, holding that the statute violated neither the Supremacy Clause nor the Due Process Clause. *Id.* at 423–26.

¹⁶¹ 664 F.3d 56 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 110 (2012) (mem.).

¹⁶² *Id.* at 57–59, 61.

¹⁶³ *Id.* at 58–60.

¹⁶⁴ *Id.* at 61.

¹⁶⁵ *Id.*

¹⁶⁶ 500 F.3d 523 (6th Cir. 2007).

¹⁶⁷ *Id.* at 526, 537. The court also dismissed the plaintiff's other constitutional challenge to the statute: that it violated the plaintiff's right to travel. *Id.* at 537.

of aliens who have been treated as a suspect class.”¹⁶⁸ These “good reasons” included the same factual distinctions between permanent residents and nonimmigrants as those articulated by the *LeClerc* court.¹⁶⁹ The *LULAC* court concluded that these factual differences are the most important factors for distinguishing cases like *LeClerc* and *LULAC*, where the statute at issue only classifies against nonimmigrants, from precedent that reviews alienage classifications under strict scrutiny.¹⁷⁰

B. *The Second Circuit's Approach*

The Second Circuit, in *Dandamudi v. Tisch*,¹⁷¹ applied strict scrutiny to a statute that excluded nonimmigrants from becoming pharmacists, finding the statute unconstitutional.¹⁷² The *Dandamudi* court held that “the Supreme Court has repeatedly affirmed the general principle that alienage is a suspect classification and has only ever created two exceptions to that view. We decline to create a third [exception for nonimmigrants]”¹⁷³ The first exception is the governmental functions exception articulated by the Court in *Foley v. Connelie*,¹⁷⁴ which “allows states to exclude aliens from political and governmental functions as long as the exclusion satisfies a rational basis review.”¹⁷⁵ The second exception, articulated by the Court in *Plyler v. Doe*,¹⁷⁶ “allows states broader latitude to deny opportunities and benefits to undocumented aliens.”¹⁷⁷ Nonimmigrants fit within neither exception according to the Second Circuit.¹⁷⁸

¹⁶⁸ *Id.* at 533.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 532 (“Still, it is the district court’s third basis for distinguishing *Nyquist* that is most important. In *Nyquist*, the plaintiffs were lawful *permanent* resident aliens who were subject to discriminatory harm and were treated as members of a suspect class. The reason this is critical is well explained in *LeClerc v. Webb*.”); *see also id.* at 533.

¹⁷¹ 686 F.3d 66 (2d Cir. 2012).

¹⁷² *Id.* at 69–70. New York Education Law § 6805(1)(6) provides that only U.S. citizens or LPRs are eligible to obtain a pharmacist license in New York. *See id.* at 69.

¹⁷³ *Id.* at 72.

¹⁷⁴ 435 U.S. 291, 299–300 (1978).

¹⁷⁵ *Dandamudi*, 686 F.3d at 73.

¹⁷⁶ 457 U.S. 202, 219 (1982).

¹⁷⁷ *Dandamudi*, 686 F.3d at 74.

¹⁷⁸ *See id.*

The Second Circuit stated three reasons for not recognizing a third exception, articulated by the Fifth and Sixth Circuits, that would exclude nonimmigrants from a suspect classification.¹⁷⁹ First, although the *Graham* Court listed factual similarities between aliens and citizens, such as paying taxes and being called into the armed forces, those factual similarities were not intended to be a test for determining when state discrimination against one subclass of aliens is subject to strict scrutiny.¹⁸⁰ Second, because the Supreme Court labeled aliens as a “discrete and insular minority,” due to “their limited role in the political process,” it makes sense to consider nonimmigrants as a “discrete and insular minority” as well, considering the fact that nonimmigrants are likely even “more powerless and vulnerable to state predations” than LPRs.¹⁸¹ Third, even if Supreme Court precedent allowed states to distinguish based on a subclass’s similarity to citizens, strict scrutiny would still apply to nonimmigrants because they are sufficiently similar to citizens.¹⁸²

The Second Circuit also disagreed with the Fifth and Sixth Circuit claim that nonimmigrants’ transience justifies their exclusion from a suspect classification.¹⁸³ The court reasoned that nonimmigrants are transient in name only, as many nonimmigrants ultimately apply for and obtain LPR status.¹⁸⁴ The court also pointed out that LPRs and citizens may be just as likely as nonimmigrants to flee the state or the country to escape disciplinary controls or malpractice actions.¹⁸⁵

Because the Second Circuit found no reason to exclude nonimmigrants from a suspect classification and because no established exception to the general rule that all alienage

¹⁷⁹ *Id.* at 75.

¹⁸⁰ *Id.* at 76 (citing *Graham v. Richardson*, 403 U.S. 365, 376 (1971)).

¹⁸¹ *Id.* at 77.

¹⁸² *Id.* at 77–78 (noting that: (1) nonimmigrants often do pay taxes on the same terms as citizens; (2) although it is true that nonimmigrants must indicate an intent not to remain in the country, under the dual intent doctrine, they may also express an intent to remain in the United States. permanently; (3) a nonimmigrant’s limited work permission is wholly irrelevant where the state seeks to prohibit aliens from working in the very occupation for which they were admitted into the United States.; and (4) nonimmigrants are not necessarily any more transient than citizens or legal permanent residents).

¹⁸³ *See id.* at 78.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 79.

classifications are subject to strict scrutiny applied, it held that discrimination against nonimmigrants is subject to strict scrutiny.¹⁸⁶

III. NONIMMIGRANTS ARE NOT A SUSPECT CLASS

Nonimmigrants are not a suspect class because they are not discriminated against based on any conspicuous, immutable characteristic and therefore they do not face any invidious discrimination.¹⁸⁷ The Supreme Court's declaration that alienage classifications are inherently suspect should not be applied outside of the context in which it was first announced¹⁸⁸; one in which aliens were being excluded based on an immutable characteristic that did not affect their ability to participate in society.¹⁸⁹ Historically, these exclusions were motivated by racist or xenophobic animus.¹⁹⁰ Thus, the original purpose of making aliens a suspect class was to protect them from such animus, which is also referred to as invidious discrimination.¹⁹¹ Where such a purpose is not present, the Supreme Court has not adhered to the declaration that aliens are a suspect class.¹⁹² Thus, where nonimmigrants do not face invidious discrimination, but are excluded for a legitimate purpose, courts should not treat them as a suspect class. Because the nonimmigrants in *LeClerc*, *LULAC*, and *Dandamudi* did not face invidious discrimination,¹⁹³ they should not be entitled to strict scrutiny protection; instead, they should be subjected to rational basis review.

The first Section of this Part shows that aliens are only a suspect class if they face invidious discrimination. The second Section shows how nonimmigrants do not face any such discrimination but, rather, are excluded for legitimate reasons.

¹⁸⁶ See *id.* at 78–79.

¹⁸⁷ See *infra* Part III.B.

¹⁸⁸ See *infra* note 199 and accompanying text.

¹⁸⁹ See *infra* notes 195–98 and accompanying text.

¹⁹⁰ See *infra* notes 195–96 and accompanying text.

¹⁹¹ See *infra* note 197 and accompanying text.

¹⁹² See *supra* Part I.C.

¹⁹³ See *infra* notes 220, 227–28, 230–31 and accompanying text.

A. *Aliens Are Only a Suspect Class When Faced with Invidious Discrimination Based on an Immutable Characteristic*

In *Graham*, the Supreme Court held that classifications based on race, nationality, and alienage are inherently suspect and are thus subject to strict scrutiny.¹⁹⁴ The common factor among these groups is that they all have been the source for some irrational, “deep-seated prejudice,”¹⁹⁵ such as xenophobia or racism, that was based on some conspicuous and immutable characteristic, like skin color, that defined them as a class.¹⁹⁶ This kind of discrimination is known as “invidious” discrimination.¹⁹⁷ The abolishment of this kind of invidious discrimination is the purpose of applying strict scrutiny automatically to classifications based on race, nationality, or alienage.¹⁹⁸ Because nonimmigrants’ distinguishing characteristic, the possession of a temporary visa, is not a conspicuous, obvious, or immutable characteristic, this purpose of applying strict scrutiny is absent. Therefore, the fact that the Supreme Court has applied strict scrutiny to statutes that classify against aliens generally does not mean that strict scrutiny must apply to subgroups of aliens who have not been subject to xenophobic discrimination and whose defining characteristic is the inconspicuous status conferred on them by the federal government.

This view of suspect classes and the application of strict scrutiny is supported by the cases relied on by the *Graham* Court in labeling alienage classifications as inherently suspect.¹⁹⁹ For example, in *Yick Wo v. Hopkins*, one of the cases the *Graham* Court cited,²⁰⁰ the Court held that San Francisco’s discrimination against “Chinese subjects” violated the Equal Protection Clause because “no reason for [the discrimination] exist[ed] except hostility to the race and nationality to which the petitioners

¹⁹⁴ *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

¹⁹⁵ *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

¹⁹⁶ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

¹⁹⁷ *Plyler*, 457 U.S. at 216.

¹⁹⁸ *Id.* at 213 (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”); *see also* *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“[A] State may not accomplish such a purpose by invidious distinctions between classes of its citizens.”).

¹⁹⁹ *See Graham*, 403 U.S. at 371–72 (relying on *Yick Wo* and *Takahashi* for establishing aliens as a suspect class).

²⁰⁰ *Id.* at 371.

belong.”²⁰¹ Thus, in *Yick Wo*, racist and xenophobic considerations fueled the city's discrimination, prompting the Court to find a violation of equal protection.²⁰²

Another case relied upon by the *Graham* Court is *Takahashi v. Fish and Game Commission*.²⁰³ In that case, the legislative history of the statute explicitly showed that the statute's goal was to target Japanese aliens for discrimination.²⁰⁴ Justice Murphy and Justice Rutledge said, in their concurrence, that “[t]he statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century.”²⁰⁵ These Justices also said that “protagonists of intolerance” had engaged in a “long campaign to undermine the reputation of persons of Japanese background and to discourage their residence in California.”²⁰⁶ Thus, it was quite apparent that the California statute was motivated by racism and xenophobia. Consequently, the statute was held to be an unconstitutional violation of the Equal Protection Clause.²⁰⁷

In *Graham*, there were fewer overt racist or xenophobic motivations behind the statute at issue.²⁰⁸ The Court struck down statutes that conditioned the qualification for welfare benefits on either U.S. citizenship or residing in the state for fifteen years because aliens and citizens contributed equally to the tax revenues that supported those welfare benefits.²⁰⁹ The Court reasoned that because aliens and citizens contribute equally to the tax revenues for benefits, any unexplained statutory distinctions between aliens and citizens regarding the receipt of benefits is an invidious distinction. Because neither Pennsylvania nor Arizona provided a reason for excluding aliens from welfare benefits, the Court held that the statutes were

²⁰¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 374 (1886).

²⁰² *Id.* at 374.

²⁰³ *See Graham*, 403 U.S. at 372.

²⁰⁴ *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 413 (1948).

²⁰⁵ *Id.* at 422 (Murphy, J., concurring).

²⁰⁶ *Id.* at 423.

²⁰⁷ *See id.* at 420–22 (majority opinion).

²⁰⁸ *See Graham*, 403 U.S. at 367–68 (reasoning that, on their face, the statutes at issue did not make any classifications based on race and, unlike the cases in *Yick Wo* and *Takahashi*, the implementation of the statutes was not targeted at a particular race of foreigners).

²⁰⁹ *Id.* at 367–68, 376.

unconstitutional violations of the Equal Protection Clause.²¹⁰ Thus the Court inferred a racist or xenophobic motivation for the distinction, given the absence of an otherwise legitimate purpose for excluding the aliens from welfare benefits,²¹¹ which is similar to the method employed by the *Yick Wo* Court in finding such motivations.²¹²

The race, alienage, and nationality of the petitioners in both *Yick Wo* and *Takahashi* were easily discernible from their appearance. The petitioners could not hide the characteristics that set them apart from others and made them subject to baseless and intolerant discrimination. Because they are victims of discrimination that focuses on nothing that affects their ability to participate in society, they are entitled to a suspect classification. A white male from the United Kingdom, studying in the United States on a J-1 visa, is not similarly situated to the petitioners in *Yick Wo* and *Takahashi* because he is not considered an outsider and has not been subject to a history of purposeful discrimination and therefore does not need the same level of protection.

Where there are no racist or xenophobic motivations, the Court has not applied strict scrutiny to classifications based on alienage.²¹³ In *Foley v. Connelie*,²¹⁴ the Court said that “[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of ‘strict scrutiny.’”²¹⁵ The *Foley* Court found that there was no invidious discriminatory motivation for New York’s exclusion of aliens from being appointed to the New York State police force.²¹⁶ The motivation for the exclusion in that case, rather, was to ensure that a democratic society is ruled by its people and that the basic conception of a political community is preserved.²¹⁷ Having found no reason for strict scrutiny protection, the Court applied rational basis review and held the statute constitutional.²¹⁸

²¹⁰ *Id.* at 374–76.

²¹¹ *Id.* at 374–75.

²¹² *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

²¹³ *See supra* Part I.C.

²¹⁴ 435 U.S. 291 (1978).

²¹⁵ *Id.* at 295.

²¹⁶ *Id.* at 296.

²¹⁷ *Id.*

²¹⁸ *See id.* at 300.

B. Nonimmigrants Do Not Face Invidious Discrimination Based on an Immutable Characteristic but Rather Are Excluded from Employment and Professional Services for Legitimate Purposes

Regarding the statutes at issue in *LeClerc*, *LULAC*, and *Dandamudi*, there is no invidious motivation for excluding nonimmigrants. The statutes welcome aliens from all over the world, regardless of race or country of origin, to become licensed professionals; they were not motivated by xenophobia or racism. Moreover, in each of those circuit court cases, there was a legitimate motivation for those statutes.²¹⁹ The following Subsections examine those legitimate motivations.

1. Louisiana's Interest in Regulating the Louisiana Bar

The *LeClerc* court found that the motivation behind the statute at issue was to ensure that attorneys licensed by the Louisiana Bar “provide continuity and accountability in legal representation.”²²⁰ Because a nonimmigrant's ability to remain in the United States can be forcibly terminated by the U.S. government—for example, the visa could expire or the government could decline to renew the visa—a nonimmigrant attorney could be forced to leave the country against the attorney's will, leaving the client with no representation and, most likely, no recourse against the attorney.²²¹

Such a situation could put a great burden on the Louisiana justice system. For example, a nonimmigrant attorney who has been in the United States for one year on an H-1B visa decides to help out with Louisiana's indigent defense shortage and takes on a criminal defendant.²²² The defendant's case turns out to be particularly complex and is going into its second year when, suddenly, the nonimmigrant attorney is deported because his visa expired. The criminal defendant would then have a claim

²¹⁹ See *infra* Part III.B.1–3.

²²⁰ *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005).

²²¹ *Id.*

²²² The Harvard Law Review, in criticizing the *LeClerc* court, suggests that nonimmigrant attorneys could provide legal aid to indigent criminal defendants. See Comment, *Constitutional Law—Equal Protection—Fifth Circuit Holds That Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar.—LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), 119 HARV. L. REV. 669, 675 (2005).

for ineffective assistance of counsel, and the court would have to re-try the entire case. This repetitive trying of cases places a great cost on the judiciary.²²³

Even if the nonimmigrant attorney had extended his H-1B visa, the attorney's stay is limited to six years.²²⁴ It is certainly possible that a criminal defendant's case could last more than six years and that the sudden departure would still likely result in a successful ineffective assistance of counsel claim.

Thus, the *LeClerc* court was correct in treating this motivation as legitimate because it does not seek to exclude nonimmigrants for racist or xenophobic purposes but rather for protecting clients and the taxpayer from undue burdens on their justice system.

This situation in *LeClerc* is distinct from that in *In re Griffiths* in which the Supreme Court struck down a rule that denied admission to the Connecticut Bar to all aliens, permanent residents, and nonimmigrants alike.²²⁵ Permanent residents, unlike nonimmigrants, can stay in this country indefinitely and are not subject to the forced departure to which nonimmigrants are subjected.²²⁶ Therefore, there is no legitimate distinction between a permanent resident attorney and a U.S. citizen attorney, and they do not expose their clients or the justice system to the same types of risks and costs posed by nonimmigrant attorneys. Thus, excluding permanent residents from the bar requires an invidious distinction, since there is no other explanation, while excluding nonimmigrants does not.

²²³ See *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) (holding that the State must bear the cost of ineffective assistance of counsel claims); see also Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1134 (1999) (citing an ABA opinion that describes the remands for ineffective assistance of counsel as "costly").

²²⁴ Assuming the nonimmigrant has not had an application for permanent residency or labor certification pending for more than one year. Even if that was the case, he or she would only be eligible for a one year extension. See American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 104(c), 114 Stat. 1251 (2000) (codified as amended at 8 U.S.C.A. § 1152 (West 2013)); *id.* § 106(a); see also Richard Steel, *Temporary Workers—H-1B, H-1C and TN Status*, in STEEL ON IMMIGRATION LAW § 3:14 (2013 ed.). Even if that was the case, he would only be eligible for a one year extension.

²²⁵ See *In re Griffiths*, 413 U.S. 717, 718 (1973).

²²⁶ Richard Steel, *Generally*, in STEEL ON IMMIGRATION LAW § 10:1 (2013 ed.).

2. Tennessee's Administrative Interest

Tennessee's exclusion of nonimmigrants and illegal aliens from the issuance of a driver license was not motivated by invidious discriminatory intent.²²⁷ It is difficult to infer that there was invidious intent in excluding a group of people, where such exclusion resulted in no harm to the excluded class. Under the statute addressed in *LULAC*, nonimmigrants could drive as freely as any U.S. citizen or lawful permanent resident that possessed a driver's license.²²⁸ Nonimmigrants were merely given a different document solely to reflect their different immigration status in that their driving certificate expired on the same date as their visas.²²⁹ This is no different than the fact that permanent residents and nonimmigrants possess different immigration documentation from the U.S. Citizenship and Immigration Services. The different documentation serves merely administrative purposes and creates no harm for any party involved. Therefore, the statute is not a product of invidious discrimination.

3. New York's Interest in Regulating Health Care Services

New York's exclusion of nonimmigrants from becoming licensed pharmacists, the issue in *Dandamudi*,²³⁰ was motivated not by invidious animus but by a desire to protect patients.²³¹ Similar to the risk posed by nonimmigrant lawyers to clients, patients of nonimmigrant pharmacists could be harmed by the sudden, forced departure of their pharmacists caused by a failure to renew their visas or a denial of their renewal requests. For example, many patients take a variety of medications. Some of

²²⁷ *Dandamudi v. Tisch*, 686 F.3d 66, 75 (2d Cir. 2012).

²²⁸ *League of United Latin American Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 532 (6th Cir. 2007).

²²⁹ Brief of Appellees at 31, *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523 (6th Cir. 2007) (No. 06-5306), 2006 WL 4389690 ("[T]he State decided to issue to them the certificates for driving that expire on the same date as their visas.").

²³⁰ 686 F.3d at 69.

²³¹ Reply Brief for Appellants, *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012) (No. 10-4397-cv.), 2011 WL 2612826, at *14 ("But § 6805(1)(6) represents no judgment as to the likelihood that any individual applicant will violate the State's disciplinary rules and flee the country; rather, it reflects a general policy to protect the health and safety of its residents by encouraging compliance with disciplinary rules and increasing the likelihood that adequate remedies will be available if pharmacists do violate those rules.").

these medications cannot be taken together. A patient's regular pharmacist keeps track of all these medications to make sure that they are administered safely to the patient.²³² If a patient's regular pharmacist is suddenly forced to leave because of the expiration of the pharmacist's visa, then the patient is exposed to the risk of taking medications improperly. This risk is especially high if the patient is prescribed a new medication that cannot be taken with the patient's current medication because the patient's new pharmacist may not know about the patient's current medication.²³³ Such risks result in 1.5 million medication-related adverse events every year in the United States, costing more than \$177 billion in terms of medication-related morbidity and mortality.²³⁴ Thus the exclusion of nonimmigrants is based on protecting patients, not on a racist or xenophobic desire to rid the profession of aliens.

The foregoing Subsections show that excluding nonimmigrants from professional licenses is not invidious discrimination. Professionals have people that depend on them and expect continuity of service. A nonimmigrant's terminable status undermines this expectation. Thus, in order to serve the expectation of clients and patients, a state may rationally and legitimately exclude nonimmigrants from professional services.

The *Dandamudi* court contends, however, that, in practice, there is little distinction between permanent resident professionals and nonimmigrant professionals because the latter ultimately apply for and obtain permanent residency.²³⁵ This

²³² See AM. PHARMACISTS ASS'N & THE NAT'L ASS'N OF CHAIN DRUG STORES FOUND., MEDICATION THERAPY MANAGEMENT IN PHARMACY PRACTICE: CORE ELEMENTS OF AN MTM SERVICE MODEL 3-4 (March 2008), available at <https://www.accp.com/docs/positions/misc/CoreElements.pdf> [hereinafter AM. PHARMACISTS ASS'N] (describing pharmacist ability to prevent adverse health events related to improper medication administration by overseeing a patient's medication intake).

²³³ For example, many senior citizens have a plethora of doctors. If a senior citizen is currently on medication prescribed by her neurologist and another medication prescribed by her primary care physician, the nonimmigrant pharmacist would check to make sure she takes the medication appropriately. If the nonimmigrant pharmacist is deported, and the senior citizen fills a new medication prescribed by her cardiologist with a new pharmacist, that new pharmacist may not know about the medication from the neurologist and the primary physician. If the cardiologists' medication cannot be taken with the other medication, the patient is at severe risk of harm.

²³⁴ AM. PHARMACISTS ASS'N, *supra* note 232, at 3.

²³⁵ *Dandamudi*, 686 F.3d at 78.

contention presumes that obtaining permanent residency is a sure thing, a mere formality. It is not.²³⁶ The INA contains detailed conditions of eligibility for such adjustment of status.²³⁷ Nonimmigrants must have their employer file a petition on their behalf and demonstrate that they meet the criteria set forth in the regulations.²³⁸ They must be cleared by the U.S. Citizenship and Immigration Services after a thorough vetting process.²³⁹ Even if a nonimmigrant meets these criteria, only a limited number of aliens may adjust to permanent resident status each year.²⁴⁰ Thus, it is not certain that nonimmigrants will obtain permanent status, leaving clients and patients at risk.

Moreover, while the policy of attracting the best and brightest professionals from all over the world by giving them visas is noteworthy, a state may rationally prefer the policy of protecting their citizens from the consequences of a nonimmigrant professional's terminable status.

CONCLUSION

When the Supreme Court declared that alienage classifications are inherently suspect, it did so by comparing such classifications to racial classifications. The comparison is warranted because many legislatures used alienage classifications to disguise their racist and intolerant motivations and escape equal protection. The comparison is also warranted because alienage classification could be based on xenophobia, which is, like racism, an example of irrational and deep-seated prejudice. Xenophobia is irrational because it is not based not on any characteristic that affects the foreigner's ability to participate in society but merely on the fact that the foreigner is different. Thus, by making aliens a suspect class, the Supreme Court sought to eradicate this invidious discrimination.

Aliens can, however, possess characteristics that do affect their ability to participate in society, justifying differential treatment. Because nonimmigrants have terminable status in

²³⁶ See Reply Brief for Appellants, *supra* note 231, at *23 ("While some immigrants do succeed in obtaining LPR status, it is much more than a formality.").

²³⁷ *Id.* (citing 8 U.S.C. § 1255 (2012)).

²³⁸ *Id.* at 23–24 (citing 8 C.F.R. § 204.5 (2009)).

²³⁹ See *Van Staden v. St. Martin*, 664 F.3d 56, 59–60 (5th Cir. 2011).

²⁴⁰ Reply Brief for Appellants, *supra* note 231, at *24 (citing 8 U.S.C. §§ 1151–53 (2012)).

this country, meaning that they may be compelled to leave this country upon the expiration of their visas, they possess characteristics that affect their ability to participate in society. This effect is particularly true for nonimmigrants that serve in professional capacities because the clients of those professionals reasonably expect that their needs will be continuously served. A legislature may, therefore, exclude nonimmigrants from being professionals. This exclusion would not be based merely on the fact that the nonimmigrant looks different, or some other xenophobic reason, but on the legitimate concern about the effect of a nonimmigrant's terminable status.

Thus, the *Dandamudi* court's conclusion that nonimmigrants are a suspect class because aliens are a suspect class is wrong. It disregards the purpose of making aliens a suspect class and the serious consequences of a nonimmigrant's terminable status.

