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Nonimmigrants, Equal Protection, and the Supremacy Clause

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I. INTRODUCTION

At the intersection of immigration and equal protection lies a judicial vortex. This area of law is a twilight zone of sorts, where established constitutional principles do not follow their regular paths.[1] The Equal Protection Clause of the Fourteenth Amendment applies to all who fall within the jurisdiction of a state, including noncitizens.[2] Generally, the same equal protection restrictions placed on state laws through the Fourteenth Amendment also restrict federal law through the Due Process Clause of the Fifth Amendment.[3] But the Constitution gives Congress exclusive power over immigration, which the Supreme Court has interpreted as a plenary power that is not subject to traditional judicial review.[4] Thus, discriminatory laws that would incur rigorous judicial review if passed by state legislatures are given, at most, a rational basis review if passed by Congress.[5]

Furthermore, laws passed by the states, whether discriminatory or not, are invalid under the Supremacy Clause if they impose upon Congress's exclusive authority to regulate immigration. If Congress expressly grants certain privileges to noncitizens, state laws that revoke those privileges will be preempted. The Supremacy Clause, therefore, is an unwitting companion to the Equal Protection Clause in striking down discriminatory state laws.

Courts handling cases of state discrimination against noncitizens typically review the offending state law under both the Equal Protection Clause and the Supremacy Clause. But the courts either evaluate the two clauses separately, as alternative holdings, or they

1. "[I]mmigration is an area in which the normal rules of constitutional law simply do not apply." Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260.

2. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

3. Johnson v. Robison, 415 U.S. 361, 364–65 n.4 (1974).

4. Mathews v. Diaz, 426 U.S. 67, 81–82 (1976).

5. "[I]t is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Id.* at 86–87.

blur the line between the two clauses by using Supremacy Clause justifications to invalidate state laws under the Equal Protection Clause. More disconcerting, however, is that courts differ on the proper equal protection review standard to apply to one particular class of noncitizen: nonimmigrants.

How equal protection applies to discriminatory state laws depends on the immigration status of the noncitizen who protests the law—some are given more protection than others. There are three broad classes of noncitizens in the United States: permanent residents, nonimmigrants, and illegal immigrants. Permanent residents are most similar to citizens.[6] They are entitled to live in the United States permanently.[7] Nonimmigrants enter the country for a variety of reasons and under a variety of conditions, but are generally only here temporarily.[8] Illegal immigrants, as the title suggests, are noncitizens who enter or stay in the United States without permission.

State laws have discriminated against all three of these classes, but the standard of equal protection review is not always clear. The Supreme Court has held that state laws that discriminate based on "alienage" are subject to strict scrutiny review under the Equal Protection Clause. But the Court has not defined "alienage" and has only applied strict scrutiny when permanent residents challenge discriminatory state laws. With one specific exception, the Court has stated that laws discriminating against illegal immigrants are only subject to a rational basis review.

Nonimmigrants, however, do not enjoy a well-defined standard of review. The Supreme Court has avoided the issue, leaving a legal gap that has led to disagreement among lower courts. Some courts argue that laws discriminating against nonimmigrants should only be given a rational basis review because the Supreme Court has applied strict scrutiny only when permanent residents protest discriminatory laws. Other courts, however, argue that these discriminatory laws should be reviewed using strict scrutiny because "alienage" discrimination includes all aliens and general language used by the Supreme Court does not limit that interpretation.

6. "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re* Griffiths, 413 U.S. 717, 722 (1973).

7. 8 U.S.C. § 1101(a)(20) (2006).

8. *See id.* § 1101(a)(15).

This debate, however, frequently ignores the rationale for giving any class heightened equal protection scrutiny. Supreme Court cases have identified characteristics of discrete classes that justify heightened scrutiny, but lower court cases discussing nonimmigrants as a class have brushed over these characteristics. Classifying nonimmigrants, however, presents a unique problem: they are a heterogeneous class. Congress allows nonimmigrants to enter the country for a variety of reasons and under a variety of restrictions.[9] Discriminatory state laws may touch upon characteristics shared by one subclass of nonimmigrants but not others. This Comment proposes a two-step analysis which resolves these issues.

Because Congress has plenary power over immigration, courts should approach discriminatory state laws by first evaluating their constitutionality under the Supremacy Clause. If Congress, for example, grants rights to nonimmigrants, state laws revoking or infringing on those rights are preempted and invalid. There is no need for an equal protection analysis in these cases. Furthermore, starting an analysis with a Supremacy Clause evaluation eliminates problems associated with the heterogeneous nature of the nonimmigrant class because federal immigration law accounts for the differences between the subclasses.

If a discriminatory state law is not invalid under the Supremacy Clause, a court should then analyze it under the Equal Protection Clause with the level of scrutiny based on the class of immigrants at issue. Classes traditionally receiving heightened equal protection scrutiny share certain characteristics, such as political powerlessness. But some of these classes are only given an intermediate level of heightened scrutiny, likely because they have mitigating circumstances which may lessen the discriminatory impact of state laws. Because nonimmigrants share characteristics with classes that receive heightened scrutiny but also have mitigating characteristics, they should also be given an intermediate level of scrutiny for equal protection challenges to discriminatory state laws.

9. *See id.*

Part II of this Comment reviews the constitutionality of state laws that discriminate against noncitizens under the Equal Protection Clause and the Supremacy Clause and discusses the gap in jurisprudence for equal protection of nonimmigrants. Part III introduces the two-step analysis proposed by this Comment. Part IV applies this proposal to two actual cases and one hypothetical case.

II. THE CONSTITUTIONALITY OF DISCRIMINATORY LAWS

Although this Comment advocates a two-step analysis beginning with the Supremacy Clause and then moving on to the Equal Protection Clause, the jurisprudence has developed in reverse order. Supreme Court cases reviewing state laws that discriminated against noncitizens traditionally focused on the Equal Protection Clause.[10] Eventually, however, the Supremacy Clause crept in as an alternate rationale for overturning discriminatory state laws.[11] As federal immigration law has become more detailed, a stronger use of the Supremacy Clause has emerged,[12] but the need for equal protection analysis has not dissipated. Courts continue to face discriminatory state laws that are not preempted by federal immigration law.

A. Striking Down Discriminatory Laws Under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying equal protection to "any person within its jurisdiction."[13] Three general levels of constitutional review are applied to equal protection cases.[14] The highest level of review, strict scrutiny, applies in two different situations: (1) when the party claiming discrimination fits into a suspect class and the discrimination is based on that classification or (2) when the discrimination denies any individual a fundamental right.[15] To pass

10. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

11. *See* Graham v. Richardson, 403 U.S. 365, 376–80 (1971).

12. *See* Toll v. Moreno, 458 U.S. 1, 10–17 (1982) (finding that the complicated scheme Congress employed for G-4 nonimmigrants preempted a discriminatory state law).

13. U.S. CONST. amend. XIV, § 1.

14. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("[W]e apply different levels of scrutiny to different types of classifications.").

15. *See id.* (noting that "[c]lassifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny" (citations omitted)).

strict scrutiny, a "law must advance a compelling state interest by the least restrictive means available."[16] Intermediate scrutiny applies when the discrimination is against members of specifically identified classes, often referred to as quasi-suspect classes.[17] To pass intermediate scrutiny, a state law "must be substantially related to an important governmental objective."[18] Finally, the lowest level of scrutiny, rational basis, applies to cases that do not fit any of these classifications.[19] A state law is valid under rational basis if it is "rationally related to a legitimate state interest."[20]

1. Equal protection for permanent residents

In *Yick Wo v. Hopkins* the Supreme Court held that "[t]he fourteenth amendment [sic] . . . is not confined to the protection of citizens,"[21] but also provides protection for noncitizens within the jurisdiction of each state. Nearly sixty years later, the Court first applied strict scrutiny review when it declared race to be a suspect classification.[22] The Court subsequently declared alienage to be a suspect classification and used strict scrutiny to invalidate state laws that "create[d] two classes . . . , indistinguishable except with respect to whether they are or are not citizens of this country."[23]

Despite this broad language, the Supreme Court has only used strict scrutiny to review state laws that discriminate against permanent residents. In *Graham v. Richardson*, the Court

16. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

17. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 437–38 (1985). Quasi-suspect classes include non-marital children and women. *Clark*, 486 U.S. at 461.

18. *Clark*, 486 U.S. at 461; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[The law] must serve important governmental objectives and must be substantially related to achievement of those objectives.").

19. *See Clark*, 486 U.S. at 461.

20. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

21. 118 U.S. 356, 369 (1886); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("[A]n alien is surely a 'person' in any ordinary sense of that term. Aliens . . . have long been recognized as 'persons' guaranteed due process [and equal protection] of law by the Fifth and Fourteenth Amendments.").

22. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

23. Graham v. Richardson, 403 U.S. 365, 371 (1971). "But the 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." *Id.* at 371–72 (citations omitted).

invalidated the welfare assistance laws of two states. Arizona required beneficiaries of an assistance program to either be citizens or to have lived in the United States for at least fifteen years.[24] Pennsylvania's program denied assistance to all noncitizens regardless of years of residence.[25] Permanent residents protested both statutes, and the Court found that neither passed strict scrutiny.[26] Given that the permanent residents paid the same taxes, the states' interest in preserving resources for citizens or long-term residents was not compelling.[27]

Based on alienage classifications, the Supreme Court has used strict scrutiny to invalidate laws that required permanent residents to submit an application for citizenship to qualify for college financial aid,[28] that denied permanent residents admission to a state bar,[29] and that prevented permanent residents from obtaining engineering licenses.[30] A common thread throughout these cases is that the law at issue either specifically singled out permanent residents or the law singled out noncitizens generally but was challenged in court only by permanent residents. "Thus far, the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens."[31]

Using strict scrutiny for state laws that discriminate against permanent residents is logical because permanent residents are part of the permanent social fabric of the United States.[32] "Given the extent to which resident aliens are legally entrenched in American

24. *Id*. at 367, 371.

25. *Id*. at 368, 371.

26. *Id*. at 367–68, 374–76.

27. "There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State." *Id*. at 376.

28. Nyquist v. Mauclet, 432 U.S. 1 (1977). While the statute did not single out resident aliens specifically, the wording of the statute exempted refugees paroled in the U.S. and those who did not qualify for citizenship but expressed intent to do so once they qualified. *Id*. at 3–4.

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

30. Examining Bd. of Eng'rs, Architects, & Suveyors v. Flores de Otero, 426 U.S. 572 (1976).

31. LeClerc v. Webb, 419 F.3d 405, 415 (5th Cir. 2005).

32. With certain exceptions, permanent residents are entitled to live and work indefinitely in the United States. The Immigration and Nationality Act (INA) governs the rights of permanent residents to maintain their immigration status and stay in the United States. For example, INA § 237(a)(2) provides grounds for deportation based on the commission of certain crimes. *See* 8 U.S.C. § 1227(a)(2) (2006).

society, their inability to participate in the political process qualifies them as 'a prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate.'"[33]

But there is an exception to this rule. If a state or local government prohibits a permanent resident from holding a position which carries a political function, the law will be reviewed under a rational basis standard.[34] The Supreme Court has "concluded that strict scrutiny is out of place when the restriction primarily serves a political function."[35] Permanent residents are excludable from these positions "because this country entrusts many of its most important policy responsibilities to these officers . . . . [I]t represents the choice, and right, of the people to be governed by their citizen peers."[36]

2. Equal protection for illegal immigrants

In 1982 the Supreme Court addressed the question of what equal protection standard of review to apply to state laws that discriminate against illegal immigrants.[37] The Court indicated that laws discriminating against illegal immigrants will generally receive a rational basis review.[38]

But the case, *Plyler v. Doe*, was about a subset of the illegal immigrant class, and the Court carved out an exception. It held as unconstitutional a Texas statute that denied illegal-immigrant

33. *LeClerc*, 419 F.3d at 417 (alteration in original) (quoting *Griffiths*, 413 U.S. at 721). Note that the Supreme Court did not limit this argument to permanent residents but included all "aliens" in the original sentence. The Fifth Circuit limited the reach of this quote to permanent residents. The quoted language, however, comes from a case in which the plaintiff was a permanent resident. *Griffiths*, 413 U.S. at 718.

34. *See generally* Foley v. Connelie, 435 U.S. 291 (1978); Sugarman v. Dougall, 413 U.S. 634 (1973). "This narrow 'political-function' exception to the strict-scrutiny standard is based on the 'State's historical power to exclude aliens from participation in its democratic political institutions.'" Gregory v. Ashcroft, 501 U.S. 452, 476–77 (1991) (White, J., concurring in part) (quoting *Sugarman*, 413 U.S. at 648).

35. Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

36. *Foley*, 435 U.S. at 296.

37. Plyler v. Doe, 457 U.S. 202 (1982).

38. *See id.* at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'"); *see also id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

students admission to public elementary schools.[39] The Court applied an intermediate-scrutiny-in-disguise review to come to this holding. The opinion looked to see if the state regulation was "rational,"[40] suggesting a rational basis review. But in determining whether the state interest was rational, the Court required it to further a "substantial goal of the State,"[41] suggesting an intermediate scrutiny level of review.[42] Thus the Court required something more than just a mere rational basis. Indeed, concurring and dissenting opinions acknowledged that the majority applied some level of intermediate scrutiny.[43] The Fifth Circuit has labeled the standard used by the *Plyler* Court as a "modified rational basis review."[44]

3. Equal protection for nonimmigrants

The Supreme Court has not explicitly determined what equal protection standard of review to apply to state laws that discriminate against nonimmigrants. Lower courts have interpreted this silence differently. Some have held that alienage discrimination applies only to permanent residents and that state laws discriminating against nonimmigrants receive only a rational basis review under the Equal Protection Clause. These courts point out that the Supreme Court has applied strict scrutiny only to cases where the protesting plaintiff is a permanent resident.[45]

39. *Id*. at 230. The offending statute also contained a provision that withheld education funds "for the education of children who were not 'legally admitted' into the United States" from school districts that enrolled illegal immigrants. *Id*. at 205.

40. *Id*. at 224.

41. *Id*.

42. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

43. *Plyler*, 457 U.S. at 239 (Powell, J., concurring) ("In these unique circumstances, the Court properly may require that the State's interests be *substantial*." (emphasis added)). In dissenting, Chief Justice Burger argued that rational basis is the proper test, not the intermediate scrutiny advocated by the majority. "Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose." *Id*. at 248 (Burger, C.J., dissenting) (citations omitted).

44. LeClerc v. Webb, 419 F.3d 405, 416 (5th Cir. 2005).

45. *Id*. ("The Court has never applied strict scrutiny review to a state law affecting any other alienage classifications, e.g., illegal aliens, the children of illegal aliens, or nonimmigrant aliens.").

The Fifth and Sixth Circuits have expressly adopted the rational basis review for state laws that single-out nonimmigrants.[46] In *LeClerc v. Webb*, for example, the Fifth Circuit used rational basis to review the Louisiana State Bar's rule of only admitting citizens and permanent residents.[47] The plaintiffs were nonimmigrants who held student visas and temporary work visas.[48] All were denied bar admission based on their immigration status.[49] The court explained that permanent residents receive higher scrutiny because they "are similarly situated to citizens in their economic, social, and civic (as opposed to political) conditions."[50] The court examined the differences between permanent residents and nonimmigrants and "conclude[d] 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."[51]

Other courts argue that strict scrutiny is the proper standard of review for state laws that discriminate against nonimmigrants. These courts focus on the broad meaning of "alienage" and the general language used by the Supreme Court when it found alienage discrimination to be a suspect classification.[52] In *Kirk v. New York Department of Education*, the district court struck down a New York

46. *See id.* at 419 ("[T]he Supreme Court has yet expressly to bestow equal protection status on nonimmigrant aliens. . . . [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 entitled to have state legislative classifications concerning them subjected to strict scrutiny.") (footnote omitted); LULAC v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007) ("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. This case presents no compelling reason why the special protection afforded by suspect-class recognition should be extended to lawful temporary resident aliens. Because the instant classification does not result in discriminatory harm to members of a suspect class, it is subject only to rational basis scrutiny.").

47. 419 F.3d at 410.

48. *Id.* at 410–12.

49. *Id.* at 411.

50. *Id.* at 418 (footnote omitted).

51. *Id.* at 419. The court also rejected using intermediate scrutiny to review the law. *Id.* at 419–20.

52. *See, e.g.*, Kirk v. N.Y. Dep't of Educ., 562 F. Supp. 2d 405, 411 (W.D.N.Y. 2008) ("[B]ased on its reading of the aforementioned decisions of the U.S. Supreme Court, which refer to classifications based on 'alienage' generally as being inherently suspect. . . . the Court finds that the challenged statute must be reviewed under the strict scrutiny standard.").

state law which denied veterinarian licenses to nonimmigrants.[53] The district court rejected the Fifth and Sixth Circuit holdings which only used the rational basis standard to review state laws that discriminate against nonimmigrants.[54]

When it declared alienage as a suspect classification, the Supreme Court referred to aliens generally—"Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[55] Also, when summarizing state laws invalidated under a strict scrutiny standard, the Supreme Court stated that the offending laws "struck at the noncitizens' ability to exist in the community"—the Court did not limit this analysis to permanent residents.[56]

Judge Stewart, who dissented on this issue in *LeClerc*, echoed these arguments: "In discussing the alien suspect class, the Supreme Court has referred to resident aliens, aliens and non-citizens interchangeably."[57] He also noted that "alienage" is defined in Black's Law Dictionary as "the state or condition of being an alien" and an alien is defined in the federal immigration law as "any person not a citizen or national of the United States."[58] Thus, according to Judge Stewart and the district court in *Kirk*, the Supreme Court intended for strict scrutiny to apply to laws that discriminate against nonimmigrants and not just permanent residents. Other courts have taken the same approach.[59]

Lack of a solid, logical standard for reviewing state laws that discriminate against nonimmigrants creates two significant problems. The first is that nonimmigrants are treated differently depending on the jurisdiction in which they live. The Constitution is more protective if they live in New York and less protective if they live in

53. *Id.* at 407–08, 412–13.

54. *Id.* at 410–11.

55. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citation omitted).

56. Foley v. Connelie, 435 U.S. 291, 295 (1978).

57. LeClerc v. Webb, 419 F.3d 405, 427 (5th Cir. 2005) (Stewart, J., dissenting).

58. *Id.* at 426 (citing BLACK'S LAW DICTIONARY 79 (8th ed. 1999); 8 U.S.C. § 1101(a)(3) (2000)).

59. *See* Moreno v. Toll, 489 F. Supp. 658, 664 (D. Md. 1980), *aff'd*, 645 F.2d 217 (4th Cir. 1981), *aff'd* 458 U.S. 1 (1982) ("The court concludes that the Supreme Court cases cited have in principle wrapped all resident aliens, both immigrant and nonimmigrant, in the suspect classification blanket."); Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1368, 1372–73 (D.N.M. 1980) (using strict scrutiny to analyze how a state law affected both permanent resident and nonimmigrant plaintiffs).

Louisiana. The second problem is that, in light of *Plyler*, a subset of illegal immigrants is given a higher level of protection than nonimmigrants living in certain jurisdictions. Not only does this offend fundamental equality, it also seems to contravene the immigration scheme set up by Congress—some noncitizens without permission to enter the country are better protected than other noncitizens who *do* have permission to enter the country.

The debate between judges over the application of equal protection to nonimmigrants focuses on what the Supreme Court means by "alienage" discrimination. While both sides have legitimate arguments, neither focuses on the qualities that the Supreme Court traditionally looks for when determining whether a class deserves a heightened level of scrutiny.[60]

B. The Heterogeneity Problem: Difficulty in Finding a Logical Standard

A key characteristic of classes that benefit from heightened equal protection scrutiny is political powerlessness.[61] Nonimmigrants are politically powerless. But the nonimmigrant class is a heterogeneous group, making it difficult to develop a uniform standard of review applicable to all subclasses of nonimmigrants. Federal immigration law gives specific privileges to some nonimmigrants but not to others, and some nonimmigrants enter the country under stricter limitations than others. For example, some nonimmigrants stay in the United States for short periods of time, while others can be here for lengthy periods.[62] Some nonimmigrants can only stay in certain geographical locations within the United States.[63] Some nonimmigrants are subject to strict limitations on work authorization, while others are free to pursue employment opportunities.[64] Thus, the nonimmigrant class is heterogeneous

60. The court in *LeClerc* did make an attempt to evaluate some of these characteristics, but the holding was based on the court's interpretation of the Supreme Court's meaning of "alienage." *See LeClerc*, 419 F.3d at 415–19.

61. *See* discussion *infra* Part III.B.1.

62. Compare "visitors" who stay in the United States for only one year, with some possibility for extension, to "Foreign Government Officials" who could potentially stay indefinitely. 8 C.F.R. §§ 214.2(a)(1), (b)(1) (2010).

63. "Transits" are "limited to transit to and from the United Nations Headquarters District." 8 C.F.R. § 214.2(c)(2) (2010).

64. For example, nonimmigrants who come to the United States to attend college are only allowed limited opportunities to work. *See* 8 C.F.R. § 214.2(f)(9) (2010). But children of

because its members enter the United States for different reasons, under different conditions, and under different obligations.

The Supreme Court has refused to use heightened equal protection scrutiny, (anything more than a rational basis), for heterogeneous classes that are "large, diverse, and amorphous."[65] In *City of Cleburne v. Cleburne Living Center* the Court found that mental handicap is not a quasi-suspect classification and state laws that discriminate based on that classification should not be reviewed using heightened scrutiny.[66] Among the reasons the Court cited for refusing to apply heightened scrutiny was that the class of those who suffer from mental handicaps is amorphous.

> [T]hey range from those whose disability is not immediately evident to those who must be constantly cared for. . . . How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.[67]

If the Court were to declare one "large and amorphous" class as quasi-suspect, it would have a hard time distinguishing other amorphous classes, such as "the aging, the disabled, the mentally ill, and the infirm."[68]

foreign officers of certain international organizations are subject to more liberal rules for work authorization. *See* 8 C.F.R. § 214.2(g)(5) (2010).

65. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

66. 473 U.S. 432, 435 (1985).

67. *Id.* at 442–43 (footnote omitted).

68. *Id.* at 446. The Court cited several other reasons for not applying heightened scrutiny. State and federal legislatures were actively pursuing laws to protect those with mental handicaps, eliminating the need for judicial oversight. *Id.* at 443–44. Furthermore, the existence of positive legislation "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445. The Court also looked at the fact that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world." *Id.* at 442. These limitations justified laws that single out members of the class. "Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others." *Id.* at 444. A heightened standard of review for such laws would hinder legislatures' ability to accommodate these limitations. The Court noted that intermediate scrutiny is used when the characteristic at issue "bears 'no relation to the individual's ability to participate in and contribute to society.'" *Id.* at 441 (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)). However, these reasons do not apply to nonimmigrants. Nonimmigrants lack political power. Positive legislation to protect those suffering from mentally retardation likely exists because they have family members who are politically powerful and can pass legislation on their behalf. Nonimmigrants do not have this same support. Also, state laws that discriminate against

Courts that evaluate the issue of equal protection for nonimmigrants, therefore, face a dilemma: the class consists of individuals in various circumstances, making it difficult to classify nonimmigrants into one well-defined group; but the class also suffers from the inability to protect itself from discriminatory state laws.

The Supreme Court likely recognized this dilemma when it decided *Toll v. Moreno*.[69] The issue of equal protection for nonimmigrants was directly before the Court, but it declined to address the equal protection issue and relied instead on the Supremacy Clause to find a discriminatory law unconstitutional.[70] With this opinion, the Court demonstrated that the Supremacy Clause is often an easier way to analyze state laws that single out nonimmigrants. But to understand how the Supremacy Clause invalidates discriminatory state laws, a foundational knowledge of Congress's plenary power over immigration is necessary.

C. Is the Supremacy Clause the Answer?

Because Congress has plenary power over immigration matters, any state law that contravenes congressional use of this power is unconstitutional under the Supremacy Clause.[71] But this plenary power also means that Congress can discriminate against noncitizens in ways forbidden to the states. The power to regulate everything related to immigration with minimal judicial review is derived from judicial interpretation of the Constitution.[72] Congress has plenary authority to create laws governing "the admission and expulsion of aliens" and "aliens' rights and obligations" once they are in the United States.[73]

nonimmigrants do so not based on their abilities but based on their immigration status. Thus, such laws bear no relation to nonimmigrants' ability to contribute to society.

69. 458 U.S. 1 (1982).

70. *Id*. at 9–10. *See infra* notes 93–98 and accompanying text.

71. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

72. "Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' U.S. CONST. art. I, § 8, cl. 4, its power '[t]o regulate Commerce with foreign Nations,' *id*., cl. 3, and its broad authority over foreign affairs." *Toll*, 458 U.S. at 10. For a discussion of the plenary power see Legomsky, *supra* note 1.

73. Legomsky, *supra* note 1, at 256, 306. Legomsky states that the plenary power only covers "admission and expulsion" powers but admits that Congress's authority over "rights and obligations" of noncitizens is broad and subject to the least exacting judicial review. *Id*. at 256.

1. Discrimination by Congress

The Supreme Court has found that the same protections against discriminatory state laws provided by the Equal Protection Clause also apply against federal laws through the Due Process Clause of the Fifth Amendment.[74] This principle does not apply, however, to federal immigration law because the plenary power authorizes Congress to discriminate. Congress would not have the ability to exercise its authority over immigration if it were required to treat all noncitizens the same way it treats citizens. "Congress regularly makes rules that would be unacceptable if applied to citizens."[75] For example, Congress can pass laws denying certain classes of noncitizens the legal right to work in the United States without offending the equal protection aspects of the Due Process Clause.[76] Any challenged federal law that discriminates against noncitizens in general or against specific subclasses of noncitizens will be reviewed using, at most, a rational basis standard.[77]

74. *See* Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) ("Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."' Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." (citations omitted)).

75. Mathews v. Diaz, 426 U.S. 67, 80 (1976).

76. Students, for example, are allowed to enter the country and gain an education but are only allowed to work under certain circumstances. *See* 8 C.F.R. § 214.2(f)(9) (2010).

77. "In mild contrast with the plenary Congressional power over immigration, the Supreme Court has acknowledged that federal statutes in the aliens' rights area are reviewed for rationality when challenged as discriminatory, though admittedly that review has not been intensive in practice. In addition, with one rapidly expanding exception, state action classifying on the basis of alienage has been subjected to strict scrutiny." Legomsky, *supra* note 1, at 256 (footnotes omitted); *see also* Midi v. Holder, 566 F.3d 132, 134 (4th Cir. 2009), *cert denied*, 130 S. Ct. 805 (2009) ("Although courts usually subject national-origin classifications to strict scrutiny, when such classifications involve unadmitted aliens in the immigration context, we subject them only to rational basis review. This is so because Congress has plenary power over immigration and naturalization, and may 'permissibly set immigration criteria based on an alien's nationality,' *Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006), even though such distinctions would be suspect if applied to American citizens.") (citations omitted); Avila v. Biedess, 78 P.3d 280, 285 (Ariz. Ct. App. 2003) (depublished) (noting that courts follow a rational basis standard for discriminatory federal laws because the "Constitution gives Congress plenary authority to legislate on immigration and alienage issues").

The dynamic between equal protection and the plenary power over immigration is not available to states.[78] This principle explains the seemingly inconsistent results in two Supreme Court cases decided within a five-year period. In *Graham v. Richardson*,[79] the Supreme Court used strict scrutiny to invalidate state laws that either denied welfare benefits to noncitizens or contained a residency requirement to qualify for the benefits. In *Mathews v. Diaz*, however, the Court upheld a federal law requiring noncitizens to be permanent residents for five years before becoming eligible for certain federal Medicare programs.[80] The Supreme Court described the difference between the two cases in terms of both Congress's plenary power over immigration and the Equal Protection Clause:

> [The state rules] violate the Equal Protection Clause of the Fourteenth Amendment and encroach upon the exclusive federal power over the entrance and residence of aliens. Of course, the latter ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations because it concerns the *relationship between aliens and the States* rather than between aliens and the Federal Government.[81]

2. Discrimination by the states

In addition to justifying discrimination by Congress, the plenary power provides a barrier against discriminatory state laws. State laws that deny rights expressly granted by Congress to noncitizens are preempted by federal law and are unconstitutional under the Supremacy Clause.[82] The Supreme Court cases that established strict

78. "[I]t is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews*, 426 U.S. at 86–87.

79. 403 U.S. 365 (1971).

80. 426 U.S. 67 (1976).

81. *Id.* at 84–85 (emphasis added).

82. "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of

scrutiny as the review standard for alienage discrimination under the Equal Protection Clause also relied on the Supremacy Clause as an alternative reason for finding the state laws unconstitutional.[83]

The Court has also described equal protection holdings in terms of the Supremacy Clause by stating that strict scrutiny applies because the state laws are inconsistent with the federal immigration scheme:

> Following *Graham*, a series of decisions has resulted requiring state action to meet close scrutiny to exclude aliens as a class . . . . These exclusions struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence.[84]

Explanations like this, however, blur the line between the Equal Protection Clause and the Supremacy Clause, and lower courts have used Supremacy Clause rationale to decide the equal protection issue.[85]

Ten years after *Graham* established the strict scrutiny standard for alienage discrimination, the Supreme Court demonstrated that it had shifted to a stronger reliance on the Supremacy Clause to analyze state laws.[86] In *Toll v. Moreno*, the Court faced the question of whether alienage discrimination includes discrimination against nonimmigrants. Instead of answering that question, however, the

aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." Takashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

83. *See, e.g.*, Graham v. Richardson 403 U.S. 365, 377–80 (1971) (finding state laws that denied welfare benefits to noncitizens unconstitutional because they contravened the immigration policy established by Congress).

84. Foley v. Connelie, 435 U.S. 291, 295 (1978) (citations omitted).

85. *See, e.g.*, Carlson v. Reed, 249 F.3d 876, 882–83 (9th Cir. 2001) (rejecting appellant's equal protection argument because California's tuition residency scheme fits with federal immigration law).

86. A state law that affects noncitizens will violate the Supremacy Clause if it meets one of three tests. If the state law amounts to a direct regulation of immigration it will be invalid because it infringes onto Congress's exclusive authority. De Canas v. Bica, 424 U.S. 351, 354–55 (1976). Additionally, a state law will be invalid if Congress intended to "occupy the field" and completely oust any state power. *Id.* at 357–63. Finally, a state law will be invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Court relied completely on the Supremacy Clause to strike down a discriminatory state law.

The case arose when the University of Maryland denied in-state tuition to nonimmigrants.[87] The nonimmigrants challenging the policy were children of officers of international organizations who were living in Maryland.[88] They had been admitted to the United States with their parents, who held G-4 visas (for officers of international organizations such as the World Trade Organization).[89] The students filed suit arguing, among other things, that the policy violated the Equal Protection Clause and the Supremacy Clause.[90] The district court followed the pattern set by the Supreme Court in *Graham* and decided the case based primarily on the Equal Protection Clause with an analysis under the Supremacy Clause as an alternative holding.[91] The court determined that the Supreme Court had "wrapped all resident aliens, both immigrant and nonimmigrant, in the suspect classification blanket" and struck down the university policy based on a strict scrutiny review.[92] The court of appeals affirmed the decision with no opinion and passed the entire analysis up to the Supreme Court.[93] Thus the question of what standard of review to apply to state laws discriminating against nonimmigrants was directly before the Supreme Court.

But the Supreme Court expressly declined to reach the equal protection question and instead relied completely on the Supremacy Clause to affirm the holding.[94] The Court found that Congress's complicated immigration scheme for G-4 nonimmigrants precluded states from denying in-state tuition to those who had established a

87. Toll v. Moreno, 458 U.S. 1, 3–5 (1982). The procedural history of the case is quite complicated. This Supreme Court decision was actually the third time the Court had heard this particular case. The University of Maryland first concluded that the nonimmigrant students were not entitled to in-state tuition because they were not domiciled in the state. After a lengthy battle in the courts, the university revised its policy and determined that even if nonimmigrants could establish domicile in the state they were not entitled to in-state tuition. The final Supreme Court opinion dealt with the constitutionality of this revised policy. *Id.* at 3–9.

88. *Id.* at 4.

89. *Id.*

90. *Id.*

91. Moreno v. Toll, 489 F. Supp. 658 (1980).

92. *Id.* at 664.

93. *Toll*, 458 U.S. at 9.

94. *Id.* at 9–10.

domicile within the state.[95] The Court pointed out that while Congress denied many nonimmigrants the ability to establish domicile in the United States, nonimmigrants holding G-4 visas were allowed to establish domicile.[96] Furthermore, "an array of treaties, international agreements, and federal statutes" exempted G-4 nonimmigrants from various federal and state taxes; this was done to induce "organizations to locate significant operations in the United States."[97] The university's tuition policy was invalid because it "frustrate[d] these federal policies," and "[t]he State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting."[98]

With this opinion, the Supreme Court demonstrated that courts should first look to the Supremacy Clause when evaluating state laws that discriminate against noncitizens. It stated that because the university policy violated the Supremacy Clause, the Court had "no occasion to consider whether the policy violate[d] the Due Process or Equal Protection Clauses."[99] Thus state laws targeting noncitizens are first evaluated for constitutionality under the Supremacy Clause and, if they pass muster, are then evaluated under the Equal Protection Clause.

This is a logical process given Congress's exclusive and plenary power over immigration. Furthermore, the Supremacy Clause analysis solves the heterogeneity problem of the nonimmigrant class. Each subclass of nonimmigrants is different because federal immigration law makes them different. The Supremacy Clause analysis would take into account those differences.[100] At least one commentator has advocated using only the Supremacy Clause to evaluate state laws that discriminate against noncitizens: "Arguably,

95. *Id.* at 17.

96. *Id.* at 14.

97. *Id.* at 14, 16.

98. *Id.* at 16.

99. *Id.* at 10.

100. The Supreme Court in *Toll* noted that G-4 nonimmigrants were granted the right to establish domicile in a state while other nonimmigrants are expressly denied this right. *Id.* at 14–15. Thus a state law basing in-state tuition on domicile would be improperly applied under the Supremacy Clause if it denied those benefits to G-4 nonimmigrants, but would not be improper as applied to other subclasses of nonimmigrants.

it would be more consistent with the constitutional structure for the Court to deal with these cases under the supremacy clause [sic]."[101]

But immigration law has not addressed all issues related to noncitizens. The Court acknowledged this in *Toll*: "[W]hen Congress has done nothing more than permit" admission to the United States, "the proper application of the principle is likely to be a matter of some dispute."[102] Also, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted."[103] Indeed, two weeks before deciding *Toll*, the Court decided *Plyler*, in which it relied on the Equal Protection Clause to strike down a state law discriminating against certain illegal immigrants.[104]

Lower court cases subsequent to *Toll* have found the need to analyze equal protection as it applies to nonimmigrants, and courts continue to disagree on the proper standard.[105] This highlights the need for a clearer equal protection standard for state laws that target nonimmigrants.[106]

III. DEVELOPING A LOGICAL STANDARD FOR NONIMMIGRANTS

A two-step approach will solve these issues. The first step is to evaluate the state law under the Supremacy Clause. If the law does not violate the Supremacy Clause, then courts move to the second step and evaluate the law under the Equal Protection Clause using intermediate scrutiny.

A. Supremacy Clause Review

The Supremacy Clause should be the first step in evaluating discriminatory state laws. If federal law preempts a state law, the state law is per se unconstitutional and there is no need to analyze the equal protection issue. Striking down a state law based on the Supremacy Clause is easier than evaluating the equal protection issue

101. Edward L. Barrett, Jr., *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 BYU L. REV. 89, 101.

102. *Toll*, 458 U.S. at 13.

103. De Canas v. Bica, 424 U.S. 351, 355 (1976).

104. *See supra* text accompanying notes 37–43.

105. *See supra* text accompanying notes 45–59.

106. It has been 25 years since the Supreme Court has decided a case dealing with equal protection for noncitizens. The last case dealing with this issue was *Toll v. Moreno*.

because a court does not have to subjectively evaluate the state interest. Either the state regulation violates the Supremacy Clause or it does not. "[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."[107]

Furthermore, the initial Supremacy Clause analysis solves the equal protection classification issues involved with heterogeneous classes. The heterogeneous nature of the nonimmigrant class will not prevent the application of heightened equal protection scrutiny because the differences between subclasses of nonimmigrants are legal in nature. The differences will be accounted for when courts evaluate state laws under the Supremacy Clause—before they reach the equal protection issue. "[T]he distinctions among [the subclasses of nonimmigrants] are relevant for *preemption purposes*."[108] The heterogeneous nature of the nonimmigrant class is different from the amorphous nature of classes based on mental handicap, aging, or physical disabilities because the limiting characteristics of these amorphous classes are physical in nature. Congress made the nonimmigrant class heterogeneous through immigration law.[109] Thus the Supreme Court's reasons for not using heightened scrutiny for amorphous classes are not applicable to nonimmigrants.[110]

A variation on the facts in *Toll* illustrates this point. The plaintiffs in *Toll* were all nonimmigrants from the same subclass: dependent children of G-4 nonimmigrants.[111] If, however, the plaintiffs consisted of a mixed class of nonimmigrants, the analysis would be different.

The original policy denied in-state tuition to all non-domiciliaries and disallowed all nonimmigrants, including those with G-4 visas,

107. *De Canas*, 424 U.S. at 358 n.6.

108. LeClerc v. Webb, 419 F.3d 405, 424 (5th Cir. 2005) (emphasis added).

109. The Supreme Court stated in *Elkins v. Moreno* that "[a]lthough nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States." 435 U.S. 647, 665 (1978). But this statement was an observation of federal immigration law and was not made in the context of equal protection. In the final iteration of this case, *Toll v. Moreno*, the Court expressly ignored the equal protection issue and determined the outcome based solely on the Supremacy Clause. 458 U.S. 1, 10 (1982). Thus, the Court demonstrated that the heterogeneous nature of the nonimmigrant class is resolved by looking to the Supremacy Clause.

110. *See supra* notes 65–68 and accompanying text.

111. *See Toll*, 458 U.S. at 4.

from becoming domiciliaries.[112] The revised policy acknowledged that G-4 visa holders could become domiciled in the state, as Congress had provided, but denied in-state tuition to all nonimmigrants.[113] In both instances, the policy violates the Supremacy Clause as it applies to G-4 nonimmigrants.[114]

But if the plaintiffs consisted of a mixed class of nonimmigrants—some with G-4 visas, some with student F-1 visas,[115] and some with temporary worker H-1B visas[116]—the Supremacy Clause analysis would come out differently. Both F-1 and H-1B visa holders are "precluded . . . from establishing domicile in the United States" by federal immigration law.[117] Thus the original policy, denying domicile to nonimmigrants, is consistent with federal law in regards to F-1 and H-1B nonimmigrants. The revised policy also does not violate the Supremacy Clause with respect to F-1 and H-1B nonimmigrants. The Supreme Court found that denying in-state tuition to domiciled G-4 nonimmigrants contravened federal policy because of the tax rules that apply to G-4 nonimmigrants.[118] Those tax rules do not apply to F-1 or H-1B nonimmigrants; denying in-state tuition to them will not violate Congressional policy. Thus, under this hypothetical, the policy is invalid under the Supremacy Clause as applied to G-4 nonimmigrants but not as applied to F-1 or H-1B nonimmigrants.

F-1 and HB-1 visa holders are different subclasses, but with respect to in-state tuition, they are similarly situated. Once a state law passes Supremacy Clause scrutiny, the heterogeneous nature of the nonimmigrant class disappears and a court can apply heightened equal protection scrutiny to the discriminatory state law.

112. *See supra* note 87.

113. *See supra* note 87.

114. *See supra* text accompanying notes 94–98.

115. An F-1 visa holder is "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study," 8 U.S.C. § 1101(a)(15)(F)(i) (2006).

116. An H-1B visa holder is a nonimmigrant who comes to the United States to work temporarily in "specialty occupation[s]." 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006). But nothing prevents H-1B visa holders from attending college part time while they are working.

117. Toll v. Moreno, 458 U.S. 1, 14 (1982).

118. *See supra* text accompanying notes 97–98.

B. Equal Protection Review: Intermediate Scrutiny for Nonimmigrants

For discriminatory state laws that do not violate the Supremacy Clause, the Supreme Court should declare intermediate scrutiny to be the proper review standard under the Equal Protection Clause. Nonimmigrants share characteristics that the Supreme Court looks for when applying heightened scrutiny. But, like classes for which the Supreme Court uses intermediate scrutiny, they also have mitigating characteristics.

1. Heightened scrutiny for suspect classes

The famous footnote four in *Carolene Products* provides the basis for heightened equal protection scrutiny. The Supreme Court stated that "prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[119] Since *Carolene Products*, the Court has used "discrete and insular" as a key factor in deciding whether a discriminatory state law is subject to strict scrutiny.[120] If a law singles out discrete and insular minorities, it is suspect. The Supreme Court has used strict scrutiny under the Equal Protection Clause to strike down state regulations that have discriminated based on nationality, race, and alienage.[121]

But "discrete and insular" are not the only factors the Court looks to when deciding if a classification is suspect. "This [discrete and insular] rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious."[122] As *Carolene Products* pointed

119. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added).

120. *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) ("But the 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 for whom such heightened judicial solicitude is appropriate." (footnotes and citation omitted)).

121. *Id.*

122. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

out, discrete and insular minorities are suspect classes because they lack political power to combat discriminatory laws. A suspect class is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[123] The Supreme Court has also looked to whether the class has suffered "a history of purposeful unequal treatment."[124] Of course, being discrete and insular, and having a history of discrimination can all be viewed as just indicators of a lack of political power, either past or present.

2. Intermediate scrutiny

The Supreme Court has not been as clear in defining exactly what characteristics qualify a class for intermediate scrutiny. Review of relevant cases, however, suggests that the classes that enjoy intermediate scrutiny, quasi-suspect classes, share some characteristics with suspect classes, but also have characteristics that mitigate the discrimination or justify a certain level of discrimination. The two classifications given intermediate scrutiny are gender and non-marital birth.

The Supreme Court has not explicitly declared gender as a quasi-suspect classification, but in recent decades, it has consistently used intermediate scrutiny to review laws that discriminate based on gender.[125] Women in particular have suffered a long history of discrimination, and "gender classifications . . . are usually based on stereotypes."[126] To justify gender discrimination "[s]tate[s] must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means

123. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

124. *Id*. at 28; *see also* Lyng v. Castillo, 477 U.S. 635, 638 (1986) ("Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.").

125. *See* United States v. Virginia, 518 U.S. 515, 532–34 (1996). In one case a plurality opinion argued that strict scrutiny was the proper standard to apply to gender classifications, *see* Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (plurality opinion), but subsequent opinions have not adopted that standard and only use intermediate scrutiny. *See Virginia* 518 U.S. at 532–34.

126. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 756 (3d ed. 2006).

employed" are "substantially related to the achievement of those objectives."'"[127]

The Court has not explicitly stated why gender classifications are reviewed under intermediate scrutiny and not the tougher strict scrutiny standard. Justice Scalia stated, "We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."[128] The Court has, however, acknowledged that inherent differences between men and women justify gender classifications in some circumstances.[129] For example, the physical differences between men and women may be seen to justify the military draft for men but not for women. Furthermore, some commentators have noted that neither gender qualifies as a discrete and insular minority.[130] Thus if a lack of political power is the driving force behind heightened scrutiny, neither gender can claim strict scrutiny.[131] But because women have suffered through a history of discrimination and political powerlessness, there is a need for something more than a rational basis review.[132]

The Supreme Court also reviews classifications of non-marital children with intermediate scrutiny.[133] Heightened scrutiny is justified because children in this class face a history of

127. *Virginia*, 518 U.S. at 533 (third alteration in original) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

128. *Id.* at 568 (Scalia, J., dissenting).

129. *Id.* at 533–34. "[T]he Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to be instances where sex is a justifiable basis for discrimination." CHEMERINSKY, *supra* note 126, at 672–73.

130. *See* CHEMERINSKY, *supra* note 126, at 756 ("Also, it is claimed that women are a political majority who are not isolated from men and thus cannot be considered a discrete and insular minority.").

131. "Professor Ely remarked: 'I may be wrong in supposing that because women now are in a position to protect themselves they will, that we are thus unlikely to see in the future the sort of official discrimination that has marked our past. But if women don't protect themselves from sex discrimination in the future, it will be because for one reason or another, substantive disagreement or more likely the assignment of a low priority to issue, they don't choose to.'" *Id.* (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 169 (1980)); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1715 (1984) ("Here, as elsewhere, a partial justification for applying heightened scrutiny is a perception that such groups have relatively little political power, increasing the danger that the statute in question was the product of an impermissible motivation.").

132. CHEMERINSKY, *supra* note 126, at 756.

133. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

discrimination.[134] Furthermore, their status as non-marital children is "determined by causes not within the control of the [child], and it bears no relation to the individual's ability to participate in and contribute to society."[135] Despite this, the Court rejected strict scrutiny, arguing that a higher standard was not needed to invalidate discriminatory laws and that the history of discrimination against the class is not as severe as the discrimination against suspect classes.[136]

Although the Supreme Court has not identified a specific test for classifications that receive intermediate scrutiny, principles distilled from the cases provide some answers. Generally, these classes have some characteristics indicating a need for heightened scrutiny. But they also have mitigating characteristics. For gender classifications, women have suffered from a history of unjustified discrimination, but the genders have physical differences which justify some differentiation in specific laws—provided those laws do not place "artificial constraints on an individual's opportunity."[137] Furthermore, neither gender can claim to be a minority. Similarly, non-marital children suffer from a history of discrimination, but the Court felt that was mitigated somewhat because the discrimination was not as severe as it was for other classes.

3. Equal protection for nonimmigrants

Similarly, nonimmigrants share characteristics indicating a need for heightened scrutiny but also have mitigating circumstances. The Supreme Court, therefore, should approach the issue of equal protection for nonimmigrants the same way it approaches equal protection for gender and non-marital children: use intermediate scrutiny to review discriminatory laws.

Nonimmigrants share many of the characteristics that justify heightened scrutiny for permanent residents. Like permanent residents, nonimmigrants encompass a discrete and insular minority that is politically powerless. Nonimmigrants cannot vote, do not run for elections, and are "often handicapped by a lack of familiarity with

134. For example, non-marital children traditionally have had a tougher burden to meet to establish paternity and impose support obligations upon their fathers. *See* Mathews v. Lucas, 427 U.S. 495, 505–06 (1976).

135. *Id.* at 505.

136. *Id.* at 506.

137. United States v. Virginia, 518 U.S. 515, 533 (1996).

our language and customs."[138] Aliens in general, including nonimmigrants, have suffered from a history of discrimination.[139] "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[140] This certainly includes nonimmigrants.

Many cases do not focus on these characteristics, but instead focus on the term "alien." Some courts argue that alienage discrimination means the singling out of all aliens. These courts distinguish state laws that discriminate against all noncitizens from state laws that just discriminate against specified subclasses of noncitizens.[141] The Supreme Court accepted this distinction regarding discriminatory *federal* laws because Congress has plenary power over immigration.[142] If applied to state laws, however, this distinction would permit states to discriminate against nonimmigrants as long as they do not discriminate against all noncitizens.

The Supreme Court rejected this application. In *Nyquist v. Mauclet* the Court struck down a New York state law that effectively banned permanent residents from receiving state financial assistance to college unless they applied for citizenship.[143] The state argued that the discrimination was permissible because it separated some noncitizens from other noncitizens and did not separate all

138. Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976).

139. *See* LeClerc v. Webb, 419 F.3d 405, 428–29 (2005) (Stewart, J., dissenting); CHEMERINSKY, *supra* note 126, at 767 ("Although America is very much a nation of immigrants, discrimination against aliens long has been widespread.").

140. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citation omitted).

141. *See, e.g.*, LULAC v. Bredesen, 500 F.3d 523, 530 (6th Cir. 2007) ("This case is not about 'citizens' versus 'aliens.' . . . The statutory classification in this case is between citizens and lawful permanent resident *aliens* on the one hand, and illegal *aliens* and those *aliens* who are not permanent lawful residents, on the other hand.") (quoting LULAC v. Bredesen, No. 3:04-0613, 2004 WL 3048724, at * 3 (M.D. Tenn. Sept. 28, 2004)).

142. "The real question presented by this case is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination within the class of aliens allowing benefits to some aliens but not to others is permissible." Mathews v. Diaz, 426 U.S. 67, 80 (1976). In *Mathews*, "the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977).

143. 432 U.S. 1, 3–4, 12 (1977). Although the statute did not specifically single out permanent residents, it made eligibility for financial aid contingent upon application for citizenship but exempted all noncitizens who did not qualify for citizenship. *Id.* at 3–4.

noncitizens from citizens.[144] Although the issue was discrimination against some permanent residents but not other permanent residents, the Court rejected the distinction in broad terms: "The important points are that [the state law] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[145] Thus the Supreme Court's general use of the term "alien" does not limit application of heightened scrutiny to state laws that only discriminate against permanent residents specifically or noncitizens generally. And because they share characteristics of "suspectness," nonimmigrants should be given heightened scrutiny for discriminatory state laws.

But nonimmigrants should not be given strict scrutiny, like permanent residents, because the nonimmigrant class has mitigating circumstances that either reduce the discriminatory impact of state laws or justify some measure of discrimination. In other words, nonimmigrants are fundamentally different from permanent residents. Unlike permanent residents, they are not permanently entrenched in society and do not have a long-term interest in state laws.[146] The Fifth Circuit pointed out that

> [t]he [Supreme] Court has uniformly focused on two conditions particular to [permanent resident] status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of [permanent residents] to exert political power in their own interest . . . ; and (2) the similarity of [permanent residents] and citizens.[147]

Nonimmigrants meet the first condition but are not similar to citizens. Unlike permanent residents, they are temporary members of the community. Therefore any discrimination would also be temporary. Because strict scrutiny is such a high standard that invalidates most discriminatory laws,[148] states would be

144. *Id.* at 7–8.

145. *Id.* at 9.

146. An argument may be made that some nonimmigrants are a near-permanent fixture in the United States. Those with G-4 visas, for example, could be here long enough to raise their children and send them to American universities. *Cf.* Toll v. Moreno, 458 U.S. 1 (1982). But as the Supreme Court demonstrated in *Toll*, the Supremacy Clause is the proper vehicle to examine the differences between these and other classes of nonimmigrants. *Id.*

147. LeClerc v. Webb, 419 F.3d 405, 417 (5th Cir. 2005).

148. "Only rarely are statutes sustained in the face of strict scrutiny." Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984).

overburdened in accommodating temporary residents. State laws would be invalid even if there is an important, but not compelling, reason for discrimination. Furthermore, nonimmigrants likely have no long-term interest in the political process, "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."[149] These circumstances would seemingly mitigate discrimination in some cases and justify discrimination in other cases.

Like courts that argue for rational basis, those courts that argue for strict scrutiny also focus more on the general definition of "alien" than on the characteristics of the nonimmigrant class.[150] The debate has primarily centered on what the Supreme Court meant when it declared discrimination based on alienage as suspect.[151] But the Supreme Court has demonstrated that strict scrutiny for alienage discrimination does not mean strict scrutiny for every class of noncitizen. The Court has only applied strict scrutiny when permanent residents have challenged the discriminatory state laws, and it has avoided the issue when nonimmigrants bring the challenge. The Court also held in *Plyler* that illegal immigrants are not entitled to strict scrutiny.[152]

If the question was simply whether alienage discrimination includes discrimination against nonimmigrants, the Supreme Court could have easily provided an answer in *Toll v. Moreno*. The Court did not provide an answer, however, suggesting that the issue is not so simple.

Intermediate scrutiny seems to provide an adequate compromise between the competing arguments that pull equal protection for nonimmigrants to the extreme ends of the review standard. If the Supreme Court were to declare intermediate scrutiny as the proper standard, it could strike a balance that addresses the need to protect nonimmigrants from unnecessary discrimination *and* allows the states flexibility to accomplish important goals.

149. *LeClerc*, 419 F.3d at 419.

150. *See supra* text accompanying notes 52–59.

151. *See supra* text accompanying notes 45–59.

152. "We reject the claim that 'illegal aliens' are a 'suspect class.'" Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

C. The Intersection of the Supremacy Clause and the Equal Protection Clause

Courts face four possible scenarios when confronting discrimination against nonimmigrants. The first is when federal law expressly grants rights to nonimmigrants but states deny these rights. This is the situation the Supreme Court faced in *Toll*. The second scenario is the other side of this situation: federal law expressly denies a right to nonimmigrants but a state law grants that right.[153] In both of these scenarios, the state law is preempted by federal immigration law and there is no need to examine the state law under equal protection. The other two scenarios require an appeal to equal protection. The third scenario is when federal law is silent on the specific issue and the state adopts a discriminatory law. In such cases, state laws are not preempted but are subject to intermediate scrutiny under the Equal Protection Clause. The final scenario is when federal law authorizes states to deny rights to nonimmigrants.[154] This scenario presents an additional constitutional question—if Congress has plenary authority over immigration and can discriminate against noncitizens in ways not allowed to the states, can Congress authorize states to discriminate? In other words, does the Supremacy Clause preempt the Equal Protection Clause?

If Congress were allowed to authorize state discrimination, states could subvert the Equal Protection Clause by lobbying for authorization to discriminate against noncitizens. The phrase "any person" from the Equal Protection Clause would be meaningless because, in practical effect, equal protection would only apply to citizens. Perhaps for these reasons, the Supreme Court has explicitly determined that Congress cannot do this.

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the

153. A hypothetical example would be a state granting domicile status to a nonimmigrant when Congress has expressly denied the ability to obtain domicile in the United States. *See* Elkins v. Moreno, 435 U.S. 647, 665 (1978) ("Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States."). Examples of nonimmigrants under this restriction include students, 8 U.S.C. § 1101(a)(15)(F) (2006); temporary workers, § 1101(a)(15)(H); and business or vacation travelers, § 1101(a)(15)(B).

154. For an example of such a law see *infra* text accompanying notes 156–59.

> power to authorize the individual States to violate the Equal Protection Clause.[155]

The proper analysis for federal laws that grant discretion to states, therefore, is two-fold: (1) the state law does not violate the Supremacy Clause because Congress has authorized discrimination; but (2) the state law must still face equal protection scrutiny because the Supremacy Clause does not legitimize the discrimination.

The following table reflects the four possible scenarios and the structure of court decisions that follow the two-step process advocated here:

Federal Immigration Law	**State Law**	**Case Outcome**
Congress Grants Rights	States Deny Rights	Invalid under the Supremacy Clause
Congress Denies Rights	States Grant Rights	Invalid under the Supremacy Clause
Congress is Silent	States Deny Rights	Equal Protection: Intermediate Scrutiny
Congress gives Authority to the States	States Deny Rights	Equal Protection: Intermediate Scrutiny

IV. APPLICATION OF THE TWO-STEP PROCESS

A. State Laws that Deny "Benefits"

The Fifth Circuit in *LeClerc* did not follow the two-step process described above, but it did evaluate the offending state law under the Supremacy Clause after it had rejected the plaintiff's equal protection claims.[156] The court, however, considered only one of the scenarios described above: federal regulation that expressly gives rights to nonimmigrants and whether or not the state law takes away those rights. Some of the plaintiffs in *LeClerc* were in the United States under F-1 student visas and the others were in the United States

155. Graham v. Richardson, 403 U.S. 365, 382 (1971) (citing Shapiro v. Thompson, 394 U.S. 618, 641 (1969)).

156. LeClerc v. Webb, 419 F.3d 405, 423–26 (2005).

under H-1B temporary worker visas.[157] The court concluded that the state law in question, which denied bar admission to these nonimmigrants, was not a direct contradiction of the regulations establishing these visas and was not otherwise preempted by immigration law.[158] But the court did not consider whether the discrimination imposed by the state law was authorized by Congress. Although the conclusion is the same, a look at that analysis will demonstrate the dynamic between the Supremacy Clause and the Equal Protection Clause.

When Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, it also revised immigration law.[159] Among other provisions, Congress added 8 U.S.C. §§ 1621 and 1622. Section 1621 essentially prohibits states from providing any "State or local public benefit" to illegal immigrants.[160] Section 1622 authorizes states "to determine the eligibility for any State public benefits" of other classes of noncitizens, including nonimmigrants.[161]

Section 1622 does not define "State public benefits." But section 1621, prohibiting state benefits to illegal immigrants, does define "State and local public benefit." Among other things it includes "any grant, contract, loan, *professional license*, or commercial license provided by an agency of a State or local government."[162] If that same definition applies to "State public benefits" in section 1622, then the Act can be interpreted as giving states discretion to deny professional licenses, including bar certification, to nonimmigrants.

Under this interpretation, section 1622 is relevant to the issue in *LeClerc* because it would function as congressional authorization for the state discrimination. But Congress cannot authorize states to violate the Fourteenth Amendment.[163] The Louisiana rule denying bar certification to nonimmigrants does not violate the Supremacy Clause because Congress has authorized the discrimination. But the

157. *Id*. at 410, 412.

158. *Id*. at 423–25.

159. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

160. 8 U.S.C. § 1621(a) (2006).

161. 8 U.S.C. § 1622(a) (2006). The section also provides exceptions for certain aliens, including permanent residents.

162. 8 U.S.C. § 1621(c) (emphasis added).

163. *See supra* text accompanying note 155.

law must still pass intermediate scrutiny under the Equal Protection Clause to be valid.

For the law to pass intermediate scrutiny, Louisiana must establish that it has an important governmental interest in discriminating against nonimmigrants and that the rule is tailored to meet that interest.[164] The state's interest was "continuity and accountability in legal representation."[165] The need to ensure that members of the bar are good stewards of their charge is certainly important, but a blanket rule denying bar admission to nonimmigrants is not tailored to meet this interest.

The *LeClerc* court reasoned that, to meet this interest, the state would have to "locate lawyers under its jurisdiction," and that nonimmigrant lawyers who left the country would be difficult to locate.[166] Also, it would be difficult for the state to discipline nonimmigrant attorneys who fled the country after committing malpractice.[167] Although these concerns are legitimate, the rule banning all nonimmigrants from the bar is both underinclusive and overinclusive.

Even when using less than strict scrutiny, the Supreme Court has struck down discriminatory laws that were underinclusive, overinclusive, or both.[168] In *Jimemz v. Weinberger*, the Court invalidated an application of the Social Security Act that denied benefits to certain non-marital children of disabled parents.[169] The policy denied benefits to non-marital children born after a parent's disabled condition began, even if the children could establish that they were dependent upon that parent for support.[170] The Court found that the government interest, "prevention of spurious claims," was valid.[171] But the policy was overinclusive because it "benefits some children . . . who are not dependent upon their disabled parent," thus allowing spurious claims from other classes of

164. The law "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

165. LeClerc v. Webb, 419 F.3d 405, 421 (2005).

166. *Id.*

167. *Id.*

168. For a discussion of overinclusiveness and underinclusiveness see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348–53 (1949).

169. 417 U.S. 628 (1974).

170. *Id.* at 630, 635.

171. *Id.* at 636.

children.[172] The policy was also underinclusive because it "conclusively excludes some [non-marital children] who are, in fact, dependent upon their disabled parent."[173]

Likewise, Louisiana's policy of denying bar admissions to nonimmigrants is both underinclusive and overinclusive. The *LeClerc* court admitted that Louisiana's policy is underinclusive and suggested that it would not pass heightened scrutiny.[174] It is underinclusive because unscrupulous attorneys who are citizens or permanent residents could also leave the country to avoid discipline. And a nonimmigrant is not necessarily harder to locate than one who is not a nonimmigrant. The rule is also overinclusive because it punishes all nonimmigrants for the possibility that some within the class might commit malpractice. Also, it mandates the ultimate punishment for this possibility. Instead of denying all nonimmigrants admission to the bar, the state could just require that all admitted nonimmigrants purchase extra malpractice insurance to cover the possibility of flight. Thus, even if the Louisiana rule passes a rational basis test, it should not pass intermediate scrutiny. The court should have applied intermediate scrutiny and should have found the rule unconstitutional.

B. State Laws that Create Extra Obligations

In contrast to rules that deny benefits to nonimmigrants, other discriminatory state rules might add additional burdens for nonimmigrants. In one case the University of Toledo required nonimmigrant students to purchase health insurance but made health insurance optional for students who were citizens or permanent residents.[175] Nonimmigrant students who entered the United States on F-1 student visas challenged the rule.[176] Like the *LeClerc* decision, the district court evaluated the rule under the Supremacy Clause after it had done so under the Equal Protection Clause.

172. *Id.* at 637.

173. *Id.*

174. LeClerc v. Webb, 419 F.3d 405, 420–21 (2005). The court used a few paragraphs to argue that the heightened scrutiny used in *Plyler* was not applicable. This indicated that the Louisiana rule would not have passed intermediate scrutiny; otherwise, the court would have just stated that the rule would be valid even under an intermediate scrutiny review.

175. Ahmed v. Univ. of Toledo, 664 F. Supp. 282, 284–85 (1986).

176. *Id.* at 283–84.

The court found that the rule did not violate the Supremacy Clause because it "is a logical and legal extension of the policies of Congress."[177] The court was likely correct in this conclusion. The health insurance policy is not a direct regulation of immigration—nothing in federal immigration law suggests that Congress intended to "occupy the field" with respect to health insurance policies.[178] Also, the policy does not seem to "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[179] To enter the United States on an F-1 visa, a student must show "evidence of financial support."[180] "The federal policy requires that these students be [financially] responsible: the institution which the student will attend must certify that the student is entering this country with sufficient financial resources to meet *all* of his or her anticipated expenses."[181] A school policy which reduces financial risk by mandating health insurance, therefore, likely furthers congressional objectives rather than hindering them.

The policy passes Supremacy Clause scrutiny, but should have incurred intermediate scrutiny under the Equal Protection Clause. The court in *Ahmed* used a rational basis review and found that "[t]he rationale for the policy is the protection of foreign students in the face of medical needs which, absent insurance, could be a potential medical crisis."[182] An additional state interest might be the preservation of state resources by minimizing the number of medical emergencies paid for by state funds. These justifications may qualify as important state interests, but the court did not analyze the issue.

Furthermore, like the state policy in *LeClerc*, this school policy may have a tailoring problem if it were decided today. This case was decided in 1986, but in 2004, Ohio enacted a regulation providing emergency medical care funding for noncitizens who do not qualify for regular Medicaid benefits.[183] This new benefit includes nonimmigrant students. If the case were decided today, therefore,

177. *Id.* at 287.

178. Immigration laws governing nonimmigrant students are silent on the issue of health insurance. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (2006); 8 C.F.R. § 214.2(f) (2010).

179. De Canas v. Bica, 424 U.S. 351, 363 (1976) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

180. 8 C.F.R. § 214.2(f)(1)(B) (2010).

181. *Ahmed*, 664 F. Supp. at 287.

182. *Id.*

183. *See* OHIO ADMIN. CODE 5101:1-41-20 (2010).

the rule would be seemingly underinclusive. Nonimmigrants must obtain more comprehensive medical coverage, but students who are citizens and permanent residents are allowed to merely rely on Medicaid funding for medical emergencies—why is the state not interested in "protecting" these other students? Also, if the justifying interest was to preserve state funds, a more effective law would be to require all students to obtain health insurance.[184]

These points may be arguable, and some courts may find that the policy does pass intermediate scrutiny, but the intermediate scrutiny standard would require courts to take a harder look at state policies that single out nonimmigrants.

C. State Laws that Would Likely Pass Intermediate Scrutiny

In *Toll*, the Supreme Court invalidated a policy that denied in-state tuition to a specific subclass of nonimmigrants using the Supremacy Clause.[185] State laws creating residency requirements that generally deny in-state tuition to nonimmigrants, however, would likely pass constitutional review.[186] "Congress expressly conditioned admission for [many nonimmigrants] on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States."[187] If states base their tuition decisions on the domicile of the student, and the domicile rules do not contradict federal immigration law, then the rule will not violate the Supremacy Clause.[188] The law would also pass intermediate scrutiny under the Equal Protection Clause because a state has an important interest in preserving state resources for use by residents.[189] A law

184. The school health insurance policy has changed somewhat since *Ahmed* was decided. Now all students who are registered for six or more credits are required to purchase health insurance. But nonimmigrant students are still required to purchase health insurance no matter how many credits for which they register. *See UT Student Health Insurance: Overview and Rates*, UNIVERSITY OF TOLEDO, http://www.utoledo.edu/healthservices/student/health_insurance/index.html (last visited Feb. 9, 2011).

185. See *supra* notes 94–98 and accompanying text.

186. *Cf.* Carlson v. Reed, 249 F.3d 876 (Cal. 2001) (finding the state law did not violate the Supremacy Clause and, although not applying intermediate scrutiny, finding that the law also did not violate the Equal Protection Clause even though it denied in-state tuition to those nonimmigrants who could not establish domicile in the state).

187. Elkins v. Moreno, 435 U.S. 647, 665 (1978).

188. *See Carlson*, 249 F.3d at 881.

189. *Plyler* may stand in the way of this argument. In that case, the Supreme Court seemingly applied intermediate scrutiny. *See supra* text accompanying notes 37–44. The state asserted an interest in the "preservation of the state's limited resources for the education of its

conditioning in-state tuition on residency requirements seems properly tailored to meet that interest.[190]

V. CONCLUSION

Equal Protection jurisprudence has failed to establish where nonimmigrants fit in the U.S. legal landscape. The Supreme Court declared that state laws discriminating based on alienage are subject to strict scrutiny, but the Court has only applied this to permanent residents. Furthermore, the Court has refused to apply strict scrutiny for illegal immigrants. Thus, "alienage" does not necessarily mean all noncitizens, and lower courts have struggled to find the proper standard to use when reviewing state laws that discriminate against nonimmigrants. Some courts argue that "alienage" includes nonimmigrants and that strict scrutiny is the proper standard. Other courts point out that the Supreme Court has not expressly applied strict scrutiny for nonimmigrants even though it had an opportunity to do so. Finding an appropriate standard is difficult because nonimmigrants are a heterogeneous class—they enter the United States for many different reasons and under various requirements established by federal immigration law.

For this reason, courts should approach cases of state discrimination by first evaluating the law under the Supremacy Clause. If the state law infringes upon Congress's plenary power over immigration it will be per se invalid. But state laws that are not invalid under the Supremacy Clause must still be constitutional under the Equal Protection Clause. Because the heterogeneous nature of the nonimmigrant class is created by immigration law, the Supremacy Clause analysis should mitigate the differences between each subclass of nonimmigrants. Thus, state laws that do not violate the Supremacy Clause will be discriminatory against a homogenous

lawful residents." Pyler v. Doe, 457 U.S. 202, 227 (1982). The Court rejected this, stating that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.* (citation omitted). The Court, however, did not reject this as an important government interest, but rather found the state rule, which denied primary education to illegal immigrant children, failed the tailoring requirement. *Id.* at 227–30. "[E]ven if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion." *Id.* at 229 .

190. *Cf.* Starns v. Malkerson, 326 F. Supp. 234 (D.C. Minn. 1971), *aff'd* 401 U.S. 985 (1971).

class: foreigners who have entered the country legally and temporarily.

And these nonimmigrants have the characteristics of classes that need heightened equal protection scrutiny—in particular, they are powerless to politically challenge discriminatory laws. But because this is mitigated by the temporary nature of nonimmigrant's residency, states should not be burdened by a strict scrutiny standard. Thus, an intermediate standard of review is the proper equal protection analysis for state laws that discriminate against nonimmigrants.

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