

EQUAL PROTECTION, PREEMPTION, AND THE NEED FOR UNIFORM REGULATION OF NONIMMIGRANT ALIENS' ABILITY TO OBTAIN PROFESSIONAL LICENSES

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INTRODUCTION

Is it constitutional for states to prevent skilled workers with temporary work visas from obtaining professional licenses? The Circuit Courts of Appeal have reached different answers.

In the 2012 case *Dandamudi v. Tisch*, the Second Circuit ruled that a New York law which prevents “nonimmigrants,” a broad term describing aliens legally in the United States on a temporary basis, from receiving a license to practice pharmacy was unconstitutional as applied to certain skilled immigrants present in the United States on temporary visas.¹ The Second Circuit’s opinion explicitly rejected a 2005 Fifth Circuit decision, *LeClerc v. Webb*, which affirmed the constitutionality of a Louisiana Supreme Court rule that prohibited all nonimmigrants, including skilled guest workers, from sitting for Louisiana’s bar exam.²

1. *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012). The decision overruled § 6805 (1)(6) of New York’s Education Law. *Compare id. with* N.Y. Educ. Law § 6805 (2009). The plaintiffs in the case had obtained licenses under a waiver to the requirement, but the waiver program ended in 2009. *Dandamudi*, 686 F.3d at 69. Other New York statutes attempted to do the same thing in other fields. For example, veterinary licenses were restricted to citizens and permanent residents. N.Y. Educ. Law § 6704 (6) (2007). That law was also held to violate the Equal Protection Clause and Supremacy Clause. *Kirk v. New York State Dept. of Educ.*, 562 F. Supp. 2d 405, 405 (W.D.N.Y. 2008). It is important to note that *Dandamudi* was an ‘as applied’ challenge to the New York statute, as opposed to a facial challenge, as is clear from the lower court decision on appeal before the Second Circuit. *Adusumelli v. Steiner*, 740 F. Supp. 2d 582, 601 (S.D.N.Y. 2010).

2. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). The rule in question stated at the time of the suit: “[e]very applicant for admission to the Bar of this state shall . . . [b]e a citizen of the United States or a resident alien thereof.” *Id.* at 410. The rule “effectively prohibit[ed] . . . nonimmigrant aliens who are not entitled to live and work in the United States permanently from sitting for the Louisiana Bar.” *Id.* The rule was revised in 2009 to allow those authorized to work in the United States to sit for the exam. Sup. Ct. Rules, Rule 17 § (3)(b), 8 L.S.A. – R.S. The question of whether the rule was permissible to begin with remains open. Outside of the employment law context, the Sixth Circuit declined to strike down a Tennessee law that prevented nonimmigrant aliens from obtaining drivers licenses. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). The court relied on many of the arguments adopted by the majority in the *LeClerc* decision in reaching its decision. *Id.* at 532-33. These cases continue to influence other courts addressing questions regarding state laws that affect aliens. *See, e.g., Ariz. Dream Act Coal. v. Brewer*, No. CV12–02546 PHX DGC., 2013 WL 2128315, at *12 (D. Ariz. May 16, 2013) (discussing *LeClerc v. Webb* and *League of United Latin American Citizens v. Bredesen* and

The ultimate resolution of the split will help define the constitutional rights of skilled guest workers, who play an important role in the U.S. economy and whose ranks are likely to grow if and when Congress adopts immigration reform legislation. It will also open or close an avenue for opponents of the skilled guest worker program to influence policy at the state level. This comment argues that the Second Circuit was correct in rejecting the New York law as applied. State laws that discriminate against nonimmigrants violate the Equal Protection Clause and are preempted by the Immigration and Nationality Act when they are used to discriminate against skilled workers who are present in the United States on temporary work visas.

This Comment begins by exploring the skilled guest worker program in the United States. In part II, it considers whether state licensure bans targeting these workers violate the Equal Protection Supremacy Clauses. The comment concludes by proposing a legislative solution to the problem.

I. THE SKILLED GUEST WORKER PROGRAM

A. *Exploring the Immigration Status of Skilled Guest Workers*

“Nonimmigrant” is a broad term that encompasses people holding dozens of different types of visas.³ Nonimmigrants are individuals admitted to the United States for a limited time to achieve a specific purpose, such as studying, working temporarily, conducting business, or simply touring the country.⁴ Skilled guest workers are but one subset of individuals under the nonimmigrant umbrella. Many skilled guest workers hold H1-B visas, which cover people coming to the United States to perform services in a “specialty occupation.”⁵ H1-B visas expire after three years, but can be extended to six. A specialty occupation is defined by federal statute as one that requires the “theoretical and practical application of a body of highly specialized knowledge”, and “attainment of a

their relevance).

3. The H1-B visa is one of dozens of different visa types that fall under the nonimmigrant category. Nonimmigrants holding other types of visas, such as H2-A and H2-B workers, also play an important role in the U.S. economy. However, many of the plaintiffs in *LeClerc* and *Dandamudi* held H1-B visas, making it the focus of this Comment. For a list of the various types of visas falling under the nonimmigrant heading, see 22 C.F.R. § 41.12, available at <http://www.uscis.gov/ilink/docView/22CFR/HTML/22CFR/0-0-0-1/0-0-0-500/0-0-0-669.html>.

4. STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 344 (4th ed. 2005).

5. *Id.* There are other visa types that skilled guest workers might use to come to the US. The North American Free Trade Agreement led to the creation of some other types of visas, for example. See *supra* note 3, for a catalog of nonimmigrant visas.

bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."⁶ Potential H1-B visa recipients can qualify in four ways: possession of (1) a U.S. bachelors or higher degree required by the specialty occupation, (2) an equivalent foreign degree, (3) an unrestricted state license to fully practice a specialty occupation, or (4) specialized training or experience equivalent to a U.S. degree along with work experience.⁷

Potential H1-B recipients must also affirm that they intend to depart the U.S. at the end of their visa's duration, as long as it is not extended. The potential recipient's "intent to leave," however, is not subject to verification by enforcement officials because of the concept of "dual intent." Dual intent allows H1-B visa holders to pursue permanent green cards while in the US on their temporary visa. This means, for example, that entrants on H1-B visas are not required to maintain residences abroad while in the United States.⁸

U.S. employers also play an important role in the H1-B process as petitions require employer sponsorship,⁹ and the sponsoring employer must pay a fee to the government.¹⁰ Furthermore, the employer must verify that the petitioner they are sponsoring will receive the prevailing wage and working conditions afforded to similar employees in the employer's industry.¹¹ An applicant cannot receive a visa if there is a labor dispute with existing employees at the sponsoring employer's company, such as a strike or lockout.¹² Furthermore, the employer may face financial penalties and a suspension of sponsorship ability should they be involved in a fraudulent petition.¹³

The number of H1-B visas is capped at 65,000 per fiscal year, with an additional 20,000 visas granted to graduates of U.S. technical schools.¹⁴ This ceiling stands as a bar to many potential immigrants. In 2009, U.S. Citizenship and Immigration Services (CIS) received 163,000 petitions for H1-B visas—well above the cap.¹⁵ Indeed, the overload of petitions has reached the point that CIS proposed a rule that would create a waitlist to

6. 8 U.S.C. § 1184 (i)(3)(A), (B) (2012).

7. 8 C.F.R. § 214.2 (h)(4)(iii)(C). *See also* RICHARD STEEL, STEEL ON IMMIGRATION LAW, § 3:14 (2d ed. 2012) (explaining qualification requirements).

8. Austin T. Fragomen et al., *Requirements for H-1B classification—Nonimmigrant intent exemption*, 1 IMMIGR. LAW & BUS., § 6:6, (2d ed. 2012).

9. *Id.* at § 6:12.

10. 8 U.S.C. § 1184 (c)(9)(A) (2012).

11. Fragomen, *supra* note 8, at § 6:9.

12. *Id.*

13. 8 U.S.C. § 1184 (c)(14)(A) (2012).

14. *H-1B Fiscal Year (FY) 2014 Cap Season*, U.S. C.I.S., <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2014-cap-season> (last visited Dec. 31, 2013).

15. Fragomen, *supra* note 8, at § 6:8.

avoid problems when the cap is reached on the first day petitions can be filed.¹⁶

B. The Policy Behind the Guest Worker Program

As a policy matter, H1-B and other temporary work visa programs are supported because employers claim that they cannot find suitable domestic-resident candidates for open positions.¹⁷ Foreign workers play an important role in industries such as the high tech sector, where graduates with science, technology, math and engineering backgrounds (STEM backgrounds) are in high demand. Anecdotally, foreign-born entrepreneurs founded each of Yahoo, Google, and eBay.¹⁸ The numbers tell a similar story. One study found that, in 1998, Chinese and Indian engineers held senior executive positions at “one-quarter of Silicon Valley’s new technology businesses,” generating “\$16.8 billion in sales and creating 58,282 jobs” that year alone.¹⁹

Another quantitative way of analyzing foreign STEM workers’ impact on the U.S. economy is by looking at their contribution to intellectual property development. One study estimated that 24.2% of all international patent applications filed in 2006 with the U.S. Patent and Trademark Office came from immigrants in the U.S. who are not citizens.²⁰ Given this backdrop, perhaps it is less surprising that the Obama administration believes that skilled immigrants boosted U.S. GDP by 1.4%-2.4% in the

16. Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations, 76 Fed. Reg. 11686 (proposed Mar. 3, 2011) (to be codified at 8 C.F.R. pts. 214 and 299).

17. Neil G. Ruiz et al., *The Search for Skills: Demand for H1-B Workers in U.S. Metropolitan Areas*, METROPOLITAN POLICY PROGRAM AT BROOKINGS (July 18, 2012), at 2, <http://www.brookings.edu/~media/research/files/reports/2012/7/18-h1b-visas-labor-immigration/18-h1b-visas-labor-immigration.pdf>.

18. Jon Swartz, *Tech Talents from India, Other Countries Leaving Silicon Valley*, USA TODAY, May 11, 2011, available at http://usatoday30.usatoday.com/tech/news/2011-05-10-tech-talents-leave-silicon-valley_n.htm; see also AnnaLee Saxenian, *Silicon Valley’s New Entrepreneurs*, (Pub. Policy Inst. of Cal.), June 1999, at 89, available at http://www.ppic.org/content/pubs/report/R_699ASR.pdf (providing a table listing influential immigrants and their positions at Silicon Valley tech companies).

19. *Id.* at viii. These numbers include aliens present in the United States on variety of different visas, so they should not be taken as signifying the economic contribution of H1-B workers alone. However, it is safe to assume that H1-B workers contribute to part of this growth.

20. Wadhwa, et al., *America’s New Immigrant Entrepreneurs*, DUKE MASTER OF ENGINEERING MANAGEMENT PROGRAM and UC BERKELEY SCHOOL OF INFORMATION 27 (Jan. 4, 2007), http://people.ischool.berkeley.edu/~anno/Papers/Americas_new_immigrant_entrepreneurs_I.pdf.

1990s.²¹ This type of data also helps explain the push to expand the current H1-B program to encourage more skilled immigrants to bring their skills to the U.S.

Employers in the high tech industry have been vocal in support of expanding access to temporary work visas. Bill Gates, for instance, has voiced his support.²² Lobbying groups such as The Internet Association are also pushing for a higher cap on H1-B visas.²³ Raising the cap on temporary work visas seems to have bipartisan support in Congress and will likely be a part of any immigration reform package that becomes law.²⁴

C. *Disagreement with the Program*

The H1-B program is not without its detractors, who argue that the main goal of employers is to take jobs away from Americans in favor of underpaid foreign workers.²⁵ There is some data to support this position. One study found that computer professionals present in the U.S. on new H1-B visas were making 25% less than their counterparts with U.S. citizenship.²⁶ Another concluded that H1-B admissions are associated with a five to six percent drop in wages for computer programmers and systems analysts.²⁷

Explaining this phenomenon, one academic faults the government's definition of "prevailing wage," which imposes a floor on wages for guest

21. THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 24 (May 2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

22. Anne Broach, *Bill Gates to Congress: Let Us Hire More Foreigners*, CNET NEWS (Mar. 12, 2008), http://news.cnet.com/8301-10784_3-9892046-7.html.

23. Michael Beckerman, *Changing face of America increases urgency for STEM immigration reform*, THE INTERNET ASSOCIATION (Nov. 27, 2012), <http://internetassociation.org/changing-face-of-america-increases-urgency-for-stem-immigration-reform/> (The internet association is a lobbying group representing high tech companies. This type of op-ed is an example of their push for changes to the current system).

24. Matt O'Brien, *Summary of the Immigration Innovation Act of 2013*, CONTRA COSTA TIMES (Jan. 29, 2013), http://www.mercurynews.com/top-stories/ci_22473314/high-tech-immigrant-reform-bill-would-bring-more.

25. See e.g., Jennifer Epstein, *President Obama Google+ Chat Gets Personal*, POLITICO (Jan. 30, 2012), <http://www.politico.com/news/stories/0112/72185.html> (in particular, see video exchange embedded in body of text).

26. RON HIRA, ECON. POLICY INST., THE H-1B AND L-1 VISA PROGRAMS OUT OF CONTROL, EPI BRIEFING PAPER #280 11 (Econ. Policy Inst.), Oct. 14, 2010.

27. Jennifer Dorning and Charlie Fanning, *Gaming the System 2012: Guest Worker Visa Programs and Professional and Technical Workers in the U.S.*, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, 34 (2012), available at <http://dpeaflcio.org/wp-content/uploads/Gaming-the-System-2012-Revised.pdf>.

worker employees, claiming it is “riddled with loopholes.”²⁸ There is no “labor market test” to determine the prevailing wage; instead the government relies on surveys selected or conducted by employers.²⁹ This means that a skilled nonimmigrant with significant experience that would merit a high salary in the U.S. labor market could be offered a lower salary based on the average pay for the position he is being offered. Given that employer support is required for a nonimmigrant to receive a visa, the labor market may not be working efficiently, either for domestic or foreign workers. Furthermore, some contend that the visa program helps employers select away from older American workers, who bring more costs to businesses.³⁰ Other scholars who support the program contest these arguments.³¹

D. Attempts to Undermine the Program at the State Level

Regardless of the overall merits of the policy, the discontent many individuals feel toward the program could provide a motive for state governments to pass or maintain legislation that attempts to undermine the program and protect the state’s domestic workforce. One avenue for opponents of the program to adopt would be to restrict the issuance of professional licenses to only citizens and legal permanent residents.

States require that individuals obtain professional licenses before entering a variety of professions to assure others of their competence.³² A surprising number of fields are subject to such regulations, extending beyond what one would traditionally assume would be regulated.³³ For example, Louisiana requires that even florists pass an exam and pay a fee

28. Vivek Wadhwa, *America’s Other Immigration Crisis*, THE AMERICAN (July 2008) <http://www.american.com/archive/2008/july-august-magazine-contents/america2019s-other-immigration-crisis>.

29. Dorning and Fanning, *supra* note 27, at 35. Consider also that employers are not required to make the wages they pay to H1-B employees public. The documentation an employer provides to the agency to support its compliance with the prevailing wage requirement is considered confidential. *Santiglia v. Sun Microsystems*, US Dept. of Labor Administrative Review Board, Case No. 2003-LCA-2 (2005).

30. Patrick Thibodeau, *Norman Matloff Tells What’s Wrong with the H-1B Visa Program*, COMPUTERWORLD (Sept. 8, 2008), http://www.computerworld.com/s/article/323943/Norman_Matloff?taxonomyId=13&pageNumber=1.

31. LEGOMSKY, *supra* note 4, at 364-65.

32. See Dick M. Carpenter et al., *License to Work: A National of Burdens from Occupational Licensing*, INSTITUTE FOR JUSTICE (May 2012), available at https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf (comparing the professional licensure requirements of the fifty states and highlighting requirements in unexpected industries).

33. *Id.*

in order to obtain a license.³⁴ Software engineers may soon face state licensure requirements as well.³⁵ Limiting these types of licenses to citizens or permanent residents could affect how labor markets function in states that are concerned about an influx of foreign workers.

If a patchwork of state licensure bans are permissible, companies would have to think about locating personnel in states that do not interfere with their efforts to hire nonimmigrants. Companies usually prefer uniform regulation as it lowers costs and complexity.³⁶ The constitutionality of such state level legislation as applied to skilled guest workers thus looms large for businesses and workers alike as Congress contemplates allowing even more guest workers to enter the United States.

E. A Refresher on Constitutional ‘levels of scrutiny’

When a court considers whether or not a challenged law violates the Equal Protection Clause, it must first decide how much deference it should give to the legislative branch that adopted the law. This is often discussed as the “level of scrutiny” the court is applying. Courts often adopt a highly deferential approach called rational basis review that asks only whether there is a legitimate government interest underlying the law before upholding it or striking it down.³⁷ Other times courts will adopt strict scrutiny, a highly skeptical approach that asks whether the law is narrowly tailored to serve a compelling state interest.³⁸ Intermediate standards that fall somewhere in between these two approaches are available as well.³⁹ Once the court decides how closely to scrutinize a law, it then proceeds to do so and decides whether or not to uphold it.

34. *Id.* at 30.

35. Kathy Kowalenko, *Licensing Software Engineers Is in the Works*, THE INSTITUTE (Feb. 3, 2012), available at <http://theinstitute.ieee.org/career-and-education/career-guidance/licensing-software-engineers-is-in-the-works>.

36. See, e.g., Tim Fernholz, *The patchwork of regulations entangling Square, and every American internet startup that takes money*, QUARTZ (Mar. 14, 2013), <http://qz.com/62265/why-square-and-seven-other-finance-start-ups-got-run-out-of-illinois/> (discussing the challenges some start up payment companies are facing when dealing with varying types of state level banking regulations in the United States, as opposed to the uniform system Europe has in place).

37. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (providing an example of rational basis review in action).

38. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (discussing how legal restrictions that curtail the rights of a single racial group are subject to “the most rigid scrutiny”). *Korematsu* is an outlier, in that the law at issue was upheld despite the application of strict scrutiny.

39. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (applying intermediate scrutiny to a law that discriminates based on gender).

II. LEGAL ISSUES

A. *Do State Licensure Bans Violate the Equal Protection Clause?*

State licensure bans that discriminate against all nonimmigrants violate the Equal Protection Clause when they are applied to skilled guest workers who have permission to reside in the United States. The Fourteenth Amendment to the Constitution states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁰ As the Supreme Court has noted, the clause uses the word “person” instead of “citizen,” which means it protects aliens as well.⁴¹

This section points out that because aliens lack a vote, and thus a voice in the political process, courts must step in to protect their interests when states adopt laws that discriminate against them. Skilled workers admitted to the United States with permission to reside contribute substantially to our economy. They have followed our immigration laws. Some have lived here for years and plan on staying legally in the United States even after the expiration of their current visas. The Fifth Circuit decision not to protect these individuals against a discriminatory state law was incorrect, and while the Second Circuit’s contrary decision may have slightly overstated its case, it arrived at the correct conclusion.

1. Background Supreme Court Decisions

A long line of Supreme Court cases hold that strict scrutiny is applied to state laws that broadly discriminate against all aliens, including aliens who are legal permanent residents.⁴² This approach can be traced back at least as far as *Takahashi v. Fish & Game Commission*, which held that it was unconstitutional for California to refuse to grant commercial fishing licenses to aliens who were ineligible for citizenship.⁴³ The Court’s approach to equal protection cases involving aliens was cemented in the seminal case *Graham v. Richardson*, which held that “[a]liens . . . are a prime example of a ‘discrete and insular minority’.”⁴⁴ Applying strict

40. U.S. CONST. art. XIV, cl. 1.

41. *Truax v. Raich*, 239 U.S. 33, 35-36 (1915).

42. LEGOMSKY, *supra* note 4, at 1352.

43. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948).

44. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (finding that a class of individuals constitutes a discrete and insular minority that lack political power is a trigger for courts to scrutinize state laws that affect them as a class more closely, in accord with the precedent set in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)). Without political influence, minority groups are subject to the arbitrary prejudices of the rest of the population, and must rely on the judicial system for protection. A key question is whether the skilled guest workers in these cases should qualify as a discrete and insular minority, or

scrutiny review, *Graham* held that it was impermissible for states to condition welfare benefits on U.S. citizenship, or to require that aliens live in the United States for a certain number of years in order to qualify for benefits.⁴⁵

The Court continued to apply heightened scrutiny in subsequent cases where states prohibited all noncitizens from obtaining professional licenses. In *Application of Griffiths*, the Court struck down a Connecticut bar rule that prohibited all noncitizens from sitting for the state's bar exam.⁴⁶ It also followed this approach in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, striking down a Puerto Rico law that prohibited noncitizens from obtaining engineering licenses.⁴⁷

Complicating matters, the status of *Graham*, *Griffiths*, and *Flores* was cast into doubt by a series of cases that followed. These subsequent cases found their roots in *Sugarman v. Dougall*, a contemporary of *Graham*, where the Court noted that states have a legitimate interest in "limiting participation in [its] government to those who are within the basic conception of a political community."⁴⁸ The thrust of this line of cases was that state laws that discriminated against aliens were to be analyzed under a preemption approach rather than an equal protection approach. Analyzing the disputes on preemption grounds arguably placed these disputes on more favorable terrain for the states.

After *Sugarman*, the Court subsequently held that it is constitutional for states to prevent aliens from participating in certain professions that "implicate[] the 'political function'" of the state.⁴⁹ *Foley* also contained language that tried to cabin *Graham*, and *Griffiths* as preemption cases rather than equal protection cases.⁵⁰ It did not overrule *Graham*, however,

should be treated differently.

45. *Graham*, 403 U.S. at 372.

46. *Application of Griffiths*, 413 U.S. 717 (1973).

47. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero* 426 U.S. 572, 605 (1976).

48. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). *Sugarman* struck down a New York law that prohibited aliens from serving in the state's civil service system. *Id.*

49. *Foley v. Connelie*, 435 U.S. 291, 298 (1978); LEGOMSKY, *supra* note 4, at 1353. In *Foley*, the Court held that it was permissible for states to prohibit noncitizens from serving in New York's state police force. *Foley*, 435 U.S. at 291.

50. *Id.* at 295. Specifically the Court said: "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." *Id.* This attempt to cabin *Graham* as a preemption case is somewhat strengthened by *Mathews v. Diaz*, which upheld a federal law that conferred benefits differently based on alienage. *Mathews v. Diaz*, 426 U.S. 67 (1976). However, this Comment addresses state, not federal law, so *Diaz* is not particularly relevant. As the Court noted in *Diaz*, "equal protection analysis . . . involves significantly different considerations" when "it concerns the relationship between aliens and the States rather than between aliens

leaving its status an open question. The Court later expanded its political function exception to *Graham* to include professions that involve a state's "sovereign functions."⁵¹ States were now able to prohibit noncitizens from working as public school teachers and probation officers.⁵² The Supreme Court's diverging opinions in all of these cases reflect significant divisions on the Court.⁵³ However, the justices supporting *Graham's* equal protection approach appeared to prevail when, in an 8-1 decision in *Bernal v. Fainter*, the Court struck down a Texas law that prevented aliens from becoming notaries public.⁵⁴ Justice Marshall's decision construed the political function exception to *Graham* narrowly. *Id.* *Sugarman* was the exception to *Graham's* adoption of strict scrutiny, not the other way around. *Id.* This Comment proceeds from the premise that *Foley's* attempt to cabin *Graham*, *Griffiths* etc. as preemption cases failed.

Assuming that state laws that discriminate against all aliens will be strictly scrutinized under the Equal Protection Clause, another question remains: what level of scrutiny is applied to state laws that discriminate against subsets of the alien class—as opposed to the class as a whole? The closest the Court has come to addressing this question was in *Nyquist v. Mauclet*.⁵⁵ In that decision, the Court held that it was unconstitutional for New York to require legal permanent residents to state that they intended to apply for United States citizenship in order to qualify for state tuition assistance.⁵⁶ By imposing this requirement, the state was denying benefits to a segment of legal permanent residents who were content with their current status and did not want to apply for citizenship.⁵⁷ The Court held that the law still discriminated against the alien class even though it only affected certain members of the class.⁵⁸ Notably, the Court stated that it was impermissible for states to adopt discriminatory statutes whose

and the Federal Government.” *Id.* at 84-85.

51. LEGOMSKY, *supra* note 4, at 1353.

52. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979).

53. See Michael Cornelius Kelly, *A Wavering Course: United States Supreme Court Treatment of State Laws Regarding Aliens in the Twentieth Century*, 25 GEO. IMMIGR. L.J. 701, 729-38 (2011) (discussing the dividing lines on the court that help explain these dual, conflicting strings of opinions).

54. *Id.* at 737, (citing *Bernal v. Fainter*, 467 U.S. 216 (1984)). This Comment proceeds from the premise that *Foley's* attempt to cabin *Graham*, *Griffiths* etc. as preemption cases failed. In *Bernal*, Justice Marshall construed the political function exception to *Graham* narrowly. *Id.* *Sugarman* was the exception to *Graham's* adoption of strict scrutiny, not the other way around. *Id.*

55. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

56. *Id.*

57. *Id.*

58. *Id.* at 8-9.

purpose was to detect an alien's "degree of national affinity."⁵⁹ However, the case again involved a statute that discriminated against legal *permanent* residents, so extending it to protect nonimmigrants is not a certain proposition.

Graham itself can be read in different ways, making it challenging to definitively apply it to the question of how courts ought to approach state laws that discriminate against subsets of the alien class, like nonimmigrants. The decision used the broad term "aliens" to describe the protected class, which seems to include nonimmigrants. However, the Court was only addressing a controversy involving legal permanent residents, and its ultimate holding pertained only to "resident aliens."⁶⁰ Furthermore, the decision included an observation that aliens are similar to citizens in that "[a]liens like citizens pay taxes and may be called into the armed forces [and] may live within a state for many years . . . and contribute to the economic growth of the state."⁶¹ This suggests that an alien's connection to the community is a relevant consideration for courts considering equal protection challenges, and calls into question efforts to extend *Graham* to cover all aliens regardless of their relationship to the community.

The Supreme Court has also held that state laws targeting undocumented immigrants receive less scrutiny under the equal protection clause than those that broadly discriminate against aliens regardless of their legal status. In *Plyer v. Doe*, the Supreme Court applied heightened rational basis review to a Texas law that excluded undocumented immigrant children from public schools.⁶² Where the Court would draw the line and stop strictly scrutinizing discriminatory state laws as applied to skilled guest workers with temporary visas remains an open question and has created a division amongst the Circuit Courts of Appeal.

2. The Circuit Split

As noted above, the Fifth and Second Circuits have disagreed about how to apply these cases to the question of whether courts ought to strictly

59. *Id.* at 10.

60. *Graham* specifically held: "Accordingly, we hold that a state statute that denies welfare benefits to *resident aliens* and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause." *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (emphasis added). As is noted below, what the term "resident alien" is referring to is ambiguous. It could be denoting permanent residents, or it could be denoting a distinction found in the US tax code. It could also simply mean anyone who lives in the United States. *Infra* note 103.

61. *Id.*

62. *Plyer v. Doe*, 457 U.S. 202 (1982). The Court struck down the exclusion. *Id.*

scrutinize state laws that discriminate against nonimmigrants.⁶³ The Fifth Circuit adopted minimal rational basis review, arguing that nonimmigrants are transients, and declined to strike down a state rule that prohibited nonimmigrants from sitting for the Louisiana bar exam. The Second Circuit applied strict scrutiny and struck down a New York statute that prohibited nonimmigrants from obtaining a license to practice pharmacy. The courts disagreed about whether or not nonimmigrants were transients, and thus had insufficient connections to the community to warrant judicial protection. They also disagreed about whether this was relevant under the case law outlined above.

a. The Fifth Circuit Applies Rational Basis Review

In *LeClerc v. Webb*, the Fifth Circuit analyzed a Louisiana Supreme Court rule that prohibited nonimmigrants from sitting for the state's bar exam.⁶⁴ In a 2-1 decision, the court held that strict scrutiny applies only to state laws that discriminate against legal permanent residents (LPRs), and not to laws that discriminate against nonimmigrants.⁶⁵ Furthermore, the court declined to apply an intermediate level of scrutiny or a heightened rational basis review.⁶⁶ Applying minimal rational basis review, the court upheld the state's rule.⁶⁷ Judge Stewart dissented from the majority's equal protection analysis, and the Circuit's decision to deny a rehearing *en banc* drew further dissent.⁶⁸

The majority opinion drew a line excluding nonimmigrants from heightened court protection because the majority felt the transience of nonimmigrants distinguished them from the legal permanent residents the Supreme Court had before them in *Graham* and *Griffiths*.⁶⁹ The opinion noted that in *Plyer*, the Court had applied only heightened rational basis review, which demonstrated that strict scrutiny is not appropriate for every challenge to a discriminatory state law targeting subsets of the alien class.⁷⁰

63. The Sixth Circuit has adopted the Fifth Circuit's approach, upholding a Tennessee law that required a person to be a citizen or a legal permanent resident in order to obtain a driver's license. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). In an effort to maintain a focus on employment law issues, this Comment focuses on the other two Circuit opinions.

64. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). The case arose when six foreign lawyers were denied permission to sit for the state's bar exam. *Recent Cases*, 119 HARV. L. REV. 669, 676 n. 63 (2005). Two suits were filed. *LeClerc*, 419 F.3d at 405.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 426 (Stewart, J., dissenting); *LeClerc*, 444 F.3d at 428 (Higginbotham, J., dissenting).

69. *Id.*

70. *Id.*

The majority also noted that the Supreme Court has never invalidated a state law discriminating against nonimmigrants under the Equal Protection Clause, or applied strict scrutiny to such a law.⁷¹ It further observed that the Supreme Court had the opportunity to do so in one case but invalidated the law on preemption grounds without addressing the equal protection issue.⁷² Looking at the body of Supreme Court opinions on equal protection alienage claims, the opinion states that two concerns underlie the Supreme Court's decision to apply strict scrutiny in cases such as *Graham* and *Griffiths*: "(1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens."⁷³ The opinion noted that in *Griffiths*, the Supreme Court had compared resident aliens' contributions to society, including service in the armed forces, participation in the economy, and their tax obligations to those of full citizens.⁷⁴

The opinion also cited a law review article by David Martin, a Professor of Law at the University of Virginia, which argues that courts should apply different levels of scrutiny based on an alien's connection to the community in which they live.⁷⁵ An idea of reciprocity is at play here, namely that an immigrant who respectfully contributes to the community should receive more protection from courts than one who contributes little.⁷⁶ Martin's proposed hierarchy would place legal permanent residents at the top and undocumented immigrants at the bottom, with nonimmigrants somewhere in the middle.⁷⁷ The article suggests these umbrella groups are appropriate proxies for ascertaining an individual's connection to the community because legal statutes outline the ways in which members can contribute to the community, what members are entitled to, and how long they can stay.⁷⁸ These statutory umbrella groups also indicate whether or not an individual has abided by our country's

71. *Id.* at 416.

72. *Id.*, citing *Toll v. Moreno*, 458 U.S. 1 (1982).

73. *Id.* at 417.

74. *Id.* at 418, citing *Application of Griffiths*, 413 U.S., 717722 (1973).

75. *Id.* at 425 n.55.

76. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47 (2001). As Martin put it:

Aliens . . . may be members of a relevant community they share with citizens, and are thus entitled to the respect of certain rights and subject to certain reciprocal duties. But there are different levels of membership . . . and additional reciprocal duties and rights, or at least more stringent protections of rights, will come into being for persons as they move to higher circles of membership.

Id. at 89.

77. *Id.* at 95-96.

78. *Id.*

immigration laws.⁷⁹

Adopting this approach, the Fifth Circuit considered ways in which nonimmigrants differ from citizens in how they relate to the community. Holding that nonimmigrants deserve less protection than legal permanent residents and citizens, the court pointed out that nonimmigrants are not allowed to serve in the military, and are subject to different tax treatment than citizens.⁸⁰ Rejecting strict scrutiny, the Fifth Circuit also refused to apply an intermediate level of scrutiny or heightened rational basis review.⁸¹ The court distinguished the *Plyer* case, where the Supreme Court adopted heightened rational basis review when analyzing a law that discriminated against the children of undocumented immigrants as *sui generis*.⁸² The court noted that the decision involved the Supreme Court's deep sympathy for children who were not culpable for their plight and were facing the prospect of an inadequate education.⁸³ The court held that professionals residing here on a work visa knew they were going to face restrictions when they came to the United States, and are thus entitled to less court protection than the children in *Plyer*.⁸⁴ Ultimately, applying standard rational basis review, the court upheld Louisiana's bar rule.⁸⁵ It held that Louisiana had a legitimate state interest in regulating the legal profession, and that having the ability to locate attorneys under its jurisdiction helped ensure "continuity and accountability."⁸⁶ The court noted the state's concern that a "malfeasant or nonfeasant" nonimmigrant attorney could flee the United States to avoid accountability.⁸⁷ The court further held that it could not rule that the law was irrationally overinclusive since it was not the court's place to substitute its opinion on a law's wisdom for the perception of its drafters under standard rational basis review.⁸⁸

b. The Second Circuit Applies Strict Scrutiny

The Second Circuit rejected the Fifth Circuit's approach and applied strict scrutiny.⁸⁹ The court essentially provided four grounds for its

79. *Id.* The article divides undocumented immigrants into three more categories. *Id.*

80. *LeClerc v. Webb*, 419 F.3d 405, 418 (5th Cir. 2005).

81. *Id.* at 419-20.

82. *Id.* at 420.

83. *Id.*

84. *Id.*

85. *Id.* at 421.

86. *Id.*

87. *Id.* at 422.

88. *Id.*

89. *Dandamudi v. Tisch*, 686 F.3d 66, 76 (2d Cir. 2012).

decision.⁹⁰ First, the court rejected the idea that an alien's degree of connection to the community was a relevant consideration for courts.⁹¹ Second, the court pointed out that all aliens, including nonimmigrants, lack political clout, which is the basis for court protection.⁹² Third, the court stated that the nonimmigrant litigants before it were so similar to citizens that, even assuming for the sake of argument such a comparison was a relevant consideration, strict scrutiny would still be appropriate.⁹³ Finally, the court seemed to believe that the legal status of the litigants before it meant they needed greater protection from courts than those afforded undocumented children in *Plyer*.⁹⁴

Looking at the first--and critical-- issue of societal contributions, the court construed the body of Supreme Court precedent differently than the Fifth Circuit. According to the Second Circuit, *Graham's* discussion of the similarities between legal permanent residents and citizens was simply included to provide a response to the state's arguments that its statute served a compelling state interest.⁹⁵ The Second Circuit did not view it as establishing a litmus test that courts could use to decide what level of scrutiny to adopt.⁹⁶ The court narrowly construed *Foley* and the subsequent cases that created room for states to discriminate against aliens in an effort to create a "political community," that could have buttressed the argument that an exception to strict scrutiny should be carved out for nonimmigrants as well.⁹⁷ According to the Second Circuit, the *Foley* exception to strict scrutiny only pertained to discriminatory state employment laws that involved "important nonelective executive, legislative, and judicial positions" involving public policy.⁹⁸ Thus, the Second Circuit considered it inapplicable to the case before it.⁹⁹

The Second Circuit viewed the scrutiny determination as revolving around political clout.¹⁰⁰ Since nonimmigrants are arguably even less

90. *Id.* at 75.

91. *Id.* *LeClerc* actually quoted *Griffiths* in support of its conclusion that it should assess the contributions a nonimmigrant makes to the community before determining what level of scrutiny to apply to laws that discriminate against them. *See LeClerc*, 419 F.3d at 418. This does not really change the argument, but it could be confusing to readers comparing both opinions.

92. *Dandamudi*, 686 F.3d at 75.

93. *Id.*

94. *Id.* at 78.

95. *Id.*

96. *Id.*

97. *Id.* at 73-74.

98. *Id.* This is not an entirely fair reading of the case law, as the exception outlined in *Foley* did expand somewhat in subsequent cases to include the execution of sovereign functions. *See supra* notes 51 and 52 and accompanying text (discussing this expansion).

99. *Dandamudi*, 686 F.3d at 73-74.

100. *Id.* at 77.

politically influential than legal permanent residents who have roots here, the Second Circuit held that they should be afforded heightened court protection.¹⁰¹

Even if the differences between nonimmigrants and citizens' societal contributions were an important factor, the Second Circuit would have reached the same conclusion.¹⁰² The court noted that nonimmigrants pay taxes on income earned in the United States, and that the doctrine of dual intent means that many nonimmigrant aliens who are supposedly here on a temporary basis will actually stay here for many years afterwards.¹⁰³

The court did not leave it at that, however. It made a determination that *Plyer* compelled it to apply at least heightened basis review to claims brought by lawfully admitted nonimmigrants.¹⁰⁴ Recall that in *Plyer*, the Supreme Court had applied heightened rational basis review to claims brought by the children of undocumented immigrants regarding their education.¹⁰⁵ The Second Circuit stated that applying heightened rational basis review to some undocumented aliens while applying only standard rational basis review to lawfully admitted nonimmigrants would create an "odd, some might say absurd result[]." ¹⁰⁶ It called such an outcome "illogical," and stated that it would "clearly contradict the federal government's determination as to which individuals have a legal right to be here."¹⁰⁷

The Second Circuit decided to apply strict scrutiny to the New York statute.¹⁰⁸ It held that New York's licensure ban did not serve a compelling state interest and was not narrowly tailored, and thus violated the Equal Protection Clause.¹⁰⁹ The court observed that there was no evidence that transient pharmacists were endangering the public health, and that even if this were a problem, malpractice insurance would be a more appropriate solution.¹¹⁰

101. *Id.* at 77.

102. *Id.*

103. *Id.* Whether or not an individual is considered a "resident alien" is an important tax consideration, but nonimmigrants can be considered "resident aliens" for the purposes of taxation. *LeClerc v. Webb*, 419 F.3d 405, 427 n.1 (5th Cir. 2005) (Stewart, J., dissenting). Nonimmigrant aliens are treated the same as legal permanent residents for taxation purposes if they are in the United States "at least 31 calendar days during the course of the year" and 183 days over the course of the previous three years. *Id.* (citing 26 U.S.C. § 7701(b)(3)(2010)). This adds further ambiguity to *Graham's* holding, since the court stated that strict scrutiny applied in order to protect "resident aliens."

104. *Dandamudi*, 686 F.3d at 78.

105. *Plyer v. Doe*, 457 U.S. 202 (1982).

106. *Dandamudi*, 686 F.3d at 78.

107. *Id.*

108. *Id.*

109. *Id.* at 79.

110. *Id.*

c. Analysis

Strict scrutiny should often be applied to state laws that discriminate against the umbrella of aliens who are classified as nonimmigrants when they come up in as applied challenges. The Fifth Circuit's argument that an alien's connection to the community should be a consideration for determining which level of scrutiny to apply has some intuitive appeal. However, it has little basis in precedent, and its use of the nonimmigrant umbrella as a proxy for transience shows how it will often fail in practice. While many nonimmigrants may only be present in the United States briefly, those who choose to stay contribute significantly to our communities and deserve judicial protection.

It is true that the Supreme Court has never squarely addressed what level of scrutiny to apply when considering state laws targeting nonimmigrants instead of legal permanent residents. However, in *Graham* and *Nyquist*, laws that discriminated against a subset of the alien class were held to be unconstitutional because they discriminated against the class as a whole.¹¹¹ Furthermore, the Fifth Circuit's reliance on *Foley* seems questionable, given the Court's decision reaffirming a broad reading of *Graham* in *Bernal*.

Regardless, *Foley* does not provide the support the Fifth Circuit needs to establish that nonimmigrants should be handled differently than permanent residents. *Foley* suggested that strict scrutiny was applied in *Graham* because states were adopting laws that conflicted with the federal government's grant of an offer to reside in the United States.¹¹² Yet the state laws discriminating against nonimmigrants do the same thing. The umbrella of nonimmigrants includes skilled workers who have been offered the chance to work and live in the United States for years. *Foley* would only provide support for a state law that discriminated against a class of immigrants who received no offer of residence from the federal government. The Supreme Court case law does not clearly and unambiguously support the "contributions to society" inquiry the Fifth Circuit decided to undertake, and until it does, it would be precarious to assume that it is appropriate. Setting aside the issue of precedent, it is not clear that courts should be deciding whether one group of aliens living in the United States is somehow more American than another group, a troubling conclusion for many readers looking at a court's decision in this area.

Even assuming for the sake of argument that the level of review

111. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

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

should depend on an alien's contributions to society, strict scrutiny is appropriate because skilled workers within the nonimmigrant umbrella are contributing substantially to this country's economic development and innovative spirit. The introduction to this comment highlighted the impact, represented as an estimated percentage, that skilled immigrants have on gross domestic product, and discussed skilled immigrants' significant contributions to the development of new technologies. The Second Circuit did a good job of highlighting some of the formal legal designations that apply to this group of aliens. Under federal tax law, an alien's contributions to the public depends not on whether or not they are a nonimmigrant, but on how many days they have spent in the United States over the previous three years.¹¹³ Thus many nonimmigrants are contributing to the United States treasury, even though they do not have the chance to vote.

In addition, the doctrine of dual intent creates the possibility that many skilled immigrants will legally stay in the United States after the expiration of their visa.¹¹⁴ There are some statistics, however, that lend credence to the Fifth Circuit's concerns about transience. AnnaLee Saxenian's article *Silicon Valley's New Entrepreneurs*, noted in the introduction, provides valuable insight into the nonimmigrant experience.¹¹⁵ She argues that her data show that it is incorrect to assume that nonimmigrants will stay permanently in the United States.¹¹⁶

She found that an average of 47% of the 1990-1991 foreign doctoral recipients in science and engineering were still working in the United States in 1995.¹¹⁷ This varied significantly based on the student's country of origin. For instance, 88% of Chinese and 79% of Indian doctoral recipients stayed in the United States until 1995, while only 13% and 11% of Japanese and South Korean doctoral recipients, respectively, remained that long.¹¹⁸

Nevertheless, Saxenian noted that skilled immigrants who do stay "play a critical role as middlemen linking businesses in the United States to those in geographically distant regions."¹¹⁹ The fact that some skilled immigrants stay while others leave simply highlights how precarious it is to

113. See *supra* text accompanying note 103 (discussing tax treatment of nonimmigrants).

114. Recall from the introduction that the doctrine of dual intent means that H1-B visa holders can pursue permanent resident status despite having accepted a limited duration visa to initially enter the United States.

115. AnnaLee Saxenian, *Silicon Valley's New Entrepreneurs*, (Pub. Policy Inst. of Cal.), June 1999, at 3 n.3, available at http://www.ppic.org/content/pubs/report/R_699ASR.pdf.

116. *Id.* at 2-3.

117. *Id.*

118. *Id.*

119. *Id.*

use the nonimmigrant tag as a proxy for transience or community contribution. While the idea may have theoretical appeal, the data show how inadequate the labels, “permanent resident” and “nonimmigrant,” are for achieving that task. This also underscores an important point—these licensure bans may be an unconstitutional violation of equal protection *as applied* to certain subgroups of the nonimmigrant class who can demonstrate their contributions to American society, even as they remain valid as applied to say, a tourist, who also falls under the large “nonimmigrant” umbrella. This comment is focused on skilled guest workers however, not the status of other more transient nonimmigrants.

That being said, the rationale the Second Circuit adopted with regards to the *Plyer* decision is troubling. The equitable arguments presented to the court in *Plyer*, those of children who have since been termed “Dreamers,”¹²⁰ are substantially stronger than those that could be offered by a frustrated computer engineer, or recent law school graduate who cannot sit for the bar exam. The *Plyer* decision in some respects should actually counsel against adopting strict scrutiny in this case, as Dreamers have lived in the United States for years, contribute substantially to society, and yet cannot vote because of a decision their parents made for them. In a vacuum, they would appear to fit more easily into the “discreet and insular” minority description provided by *Carolene Products* than skilled guest workers. However, the fact that the Supreme Court was willing to substantially penalize Dreamer petitioners in *Plyer* for their immigration status does not mean that courts ought to penalize nonimmigrants even more severely just to be consistent on equitable grounds. The Supreme Court is evidently greatly concerned with undocumented vs. documented status. Perhaps the best solution would simply be for courts to focus on precedent that is most on point – cases in which the Court addressed claims brought by documented immigrants.

Courts should not follow the Fifth Circuit’s invitation to create different levels of review that hinge on whether or not an alien falls under the nonimmigrant umbrella. Supreme Court precedent does not support the approach, and it fails to achieve its goals because the term “nonimmigrant” includes individuals with substantially different ties to the community. Courts should instead protect skilled nonimmigrant guest workers from laws that discriminate against them based on their status by applying strict scrutiny to the regulations underlying their as applied claims.

120. Who and Where the DREAMers Are, AMERICAN IMMIGRATION COUNCIL, <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are> (last visited Feb. 17, 2014).

B. Are State Licensure Bans Preempted by Federal Law?

Setting aside the equal protection issue, state licensure bans are also preempted by the Immigration and Nationality Act and its accompanying regulations. The Supremacy Clause of the Constitution requires that state laws give way when Congress intends for its legislation to supersede state laws in the same field.¹²¹ Congress can make its intent clear through an express provision in a statute. In the absence of such a provision, courts may infer Congressional intent where the federal government has passed a comprehensive piece of legislation in the regulatory field at issue, or where a state law presents a conflict with federal law that members of Congress could not have anticipated.¹²²

After reviewing the background cases that make up the Supreme Court's relevant preemption jurisprudence, this comment explores the arguments of the Fifth and Second Circuit. It then argues that the Second Circuit's position was correct. While there is no express preemption provision in the Immigration and Nationality Act, one can infer Congressional intent to occupy the field from the statute. Moreover, state licensure bans create an obstacle to Congressional goals.

1. Background Cases

The concept of preemption seems straightforward at first glance.¹²³ Federalism recognizes that both the states and the federal government "have elements of sovereignty the other is bound to respect."¹²⁴ However, a dilemma emerges when state and federal law are at odds with one another. The Supremacy Clause of the Constitution provides a solution to this problem, stating that the "Constitution, and Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹²⁵ Thus state laws that conflict or displace federal laws are invalid.¹²⁶ When a court analyzes whether or not a federal

121. U.S. CONST. art. VI, § 2.

122. See Preemption, LEGAL INFORMATION INSTITUTE (Aug. 19, 2012, 5:22 PM), <http://www.law.cornell.edu/wex/preemption> (explaining, defining, and giving examples of preemption in federal law).

123. See Stephen Wermiel, *SCOTUS for law students: Preemption and the Arizona Immigration Law*, SCOTUSBLOG (Dec. 9, 2011, 1:37 PM), <http://www.scotusblog.com/2011/12/scotus-for-law-students-preemption-and-the-arizona-immigration-law/> (explaining preemption in context of the Arizona immigration law and showing how preemption might seem simple but can become complex in application).

124. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

125. U.S. CONST. art. VI, § 2.

126. The concept of preemption dates back to the early years of the republic. See e.g.,

law preempts a state law, it is investigating Congressional intent in crafting the federal law.

Preemption breaks into two categories: express, and implied. Where a federal statute includes an express preemption clause, state statutes that fall within the clause are preempted, because Congressional intent is clear.¹²⁷ In situations where no express preemption clause is included in the federal statute or where it is inapplicable, courts may still find that the federal law implies that the state law is preempted.¹²⁸ This occurs when Congress has passed such a comprehensive statute that one may infer that Congress intended to occupy the field on its own without state level supplementation, or where the state law conflicts with the federal law.¹²⁹

If the alleged conflict occurs in a field that states have traditionally occupied, courts start with the presumption that the state law is not preempted and look to see if the “clear and manifest purpose of Congress” is to the contrary.¹³⁰ Two Supreme Court decisions, *De Canas v. Bica*, and *Toll v. Moreno*, contain similarities with the issues presented by state nonimmigrant licensure bans.

In *De Canas*, the Court upheld a California statute that prohibited an employer from “knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”¹³¹ The Court’s decision addressed whether or not Congress had occupied the field of immigration law, such that state laws governing the employment of illegal aliens were impermissible. The Court held that the California statute fell within the state’s traditional police power to regulate the “employment relationship”

McCulloch v. Maryland, 17 U.S. 316 (1819); *Gibbons v. Ogden* 22 U.S. 1 (1824) (applying the Supremacy Clause to disputes of federal versus state law). Concern about crafting a cohesive foreign policy was one of the original justifications for the supremacy clause. Foreign countries need to be able to deal with one entity—the federal government—in order to be sure of the “status, safety, and security” of their citizens. See *Arizona v. United States* 132 S. Ct. 2492, 2498 (citing THE FEDERALIST No. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003)). John Jay was concerned that if the states were left to their own devices, border states would act impulsively based on local concerns and create problems with foreign nations. THE FEDERALIST No. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003). He discussed how some states had mistreated Native Americans within their borders. *Id.* There seems to be a great deal of parallel with Jay’s concerns and immigration issues, which presumably is why the Supreme Court referenced his essay in their recent decision. There seem to be parallels to the issue here as well.

127. See *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990) (explaining preemption in context with Congress’ enactment of laws to limit the nuclear industry’s liability).

128. See *id.* at 79 (explaining how courts can infer preemption from Congressional Acts).

129. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (providing multiple cases that show how Congress can issue laws intended to preempt state laws).

130. *Id.*

131. *De Canas v. Bica*, 424 U.S. 351, 352 (1976).

and “protect workers within the [s]tate,” and searched for evidence of Congressional intent to displace state law.¹³²

The Court noted a particular provision of federal law prohibiting farm labor contractors from hiring undocumented workers.¹³³ The provision included language stating that it was merely intended to “supplement” state laws and regulations, and that the state rules were still in effect.¹³⁴ The Court construed this provision as persuasive evidence that Congress had not “unmistakably . . . ordained” a total occupation of the field, and rejected the challenge to the California law.¹³⁵

The Court did not consider whether the California law was preempted because it stood as an obstacle to federal law.¹³⁶ Instead, the Court noted the importance of discerning the proper construction of the California law before reaching a conclusion.¹³⁷ It suggested that the outcome might change if the law applied to immigrants that were lawfully permitted to work here, but were not entitled to lawful residence.¹³⁸

De Canas is an old case. In 2012, the Supreme Court addressed it in *Arizona v. United States*,¹³⁹ noting that *De Canas*’ holding was limited to its own time period because federal immigration law has changed since the 1970s.¹⁴⁰ Still, the Court’s overall approach in *De Canas* remains useful, and dicta at the end of the decision is instructive for its discussion on obstacle preemption and the importance of statutory construction.

Toll v. Moreno is another important background case. In *Toll*, the Court held that the University of Maryland could not discriminate against nonimmigrants by preventing them from receiving in-state tuition.¹⁴¹ The Court noted that, “state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by

132. *Id.* at 356-57.

133. *See id.* at 361-62 (citing a provision of the Farm Labor Contractor Regulation Act).

134. *See id.* (exploring the relationship between the Farm Labor Contractor Regulation Act and state law).

135. *Id.*

136. *Id.* at 363-64.

137. *Id.*

138. *Id.*

139. *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012).

140. *Id.* *See also*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974 (2011) (discussing *De Canas* in light of changes to federal law).

141. *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982), (citing *Takahashi v. Fish & Game Comm’n* 334 U.S. 410 (1941) and *Graham v. Richardson*, 403 U.S. 365, 378 (1971)). By citing *Graham* as supporting its Supremacy Clause analysis, *Toll* arguably adds support to those that argue that *Graham* has been limited such that its equal protection holdings are no longer good law. However, since *Bernal* came down two years after *Toll*, this argument is not very convincing. *See supra* note 54 (discussing attempts to cabin *Bernal*).

Congress.”¹⁴² The Court hedged however, adding: “to be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute.”¹⁴³

The Court ruled that Maryland’s tuition policy was preempted for two reasons. First, the Court noted that Congress had allowed G-4 visa holders (a type of nonimmigrant) to establish domicile in the U.S., and that a state policy denying them the right to establish in-state status amounted to an impermissible burden not contemplated by Congress.¹⁴⁴ Second, the Court reasoned that since Congress had expressly provided G-4 visa holders with significant tax exemptions, Maryland’s policy of financially discriminating against them was an obstacle to federal policy.¹⁴⁵ The Court pointed out that the tax exemptions were designed to induce foreign organizations to locate in the United States, and that barring employees from receiving preferential tuition rates inhibited this effort.¹⁴⁶ The Court stated: “we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.”¹⁴⁷

2. The Circuit Split

The Fifth and Second Circuits disagreed over whether the Immigration and Nationality Act preempts state licensure bans. The Fifth Circuit viewed the licensure ban before it as operating harmoniously with a federal law that only peripherally touched on professional licensure.¹⁴⁸ The Second Circuit held that such bans impermissibly conflict with Congressional objectives.¹⁴⁹ The Second Circuit is correct. Congress occupied the field of immigrant employment through its regulations of nonimmigrant employment and expressed a policy preference to bring individuals here to work professionally. State laws preventing these individuals from working conflict with that goal and are preempted by the federal legislation.

142. *Toll*, 458 U.S. at 12-13.

143. *Id.* at 13. G4 visa holders are considered nonimmigrants under federal statute, just as H1-B visa holders are. 8 U.S.C. § 1101 (a)(15)(G)(iv) (2012). The category includes officers and employees of certain international organizations, such as the World Bank, and their immediate families. *Id.*

144. *Toll*, 458 U.S. at 14-17.

145. *Id.*

146. *Id.*

147. *Id.* at 17.

148. *LeClerc v. Webb*, 419 F.3d 405, 423-26 (2005).

149. *Dandamudi v. Tisch*, 686 F.3d 66, 80 (2d Cir. 2012).

a. The Fifth Circuit holds state licensure bans are not preempted

In *LeClerc v. Webb*, the Fifth Circuit unanimously held that a Louisiana rule that prohibited nonimmigrant aliens from sitting for the bar exam was not preempted by federal law.¹⁵⁰ The court held that the Immigration and Nationality Act (INA) left it up to the states to decide who qualifies for professional licensure in a state, and that there is nothing prohibiting a state from deciding that nonimmigrant aliens simply do not qualify.¹⁵¹ 8 U.S.C. § 1184 (i)(2)(A) provides that one of the methods for qualifying as a practitioner of a “specialty occupation” is to obtain “full state licensure to practice in the occupation, if such licensure is required to practice in the occupation.”¹⁵²

The decision’s discussion of preemption began by citing *De Canas* for the proposition that alien employment is a field that “tolerates harmonious state regulation.”¹⁵³ The court then attempted to distinguish *Toll* by noting the differences between the G-4 visas held by the plaintiffs there, and the H1-B and F-1 visas held by the plaintiffs before the court.¹⁵⁴ The court noted that G-4 visa holders are not transients, but that some nonimmigrants are.¹⁵⁵

The court then tried to show how the Louisiana rule was harmonious with the INA.¹⁵⁶ It pointed out that student visa holders are restricted in their ability to obtain gainful employment, and that aliens could obtain H1-B visas in other ways aside from obtaining professional licensure.¹⁵⁷ It observed that aliens can meet the specialty occupation criteria by attaining a bachelors or higher degree that meets the “minimum for entry into the occupation in the United States,”¹⁵⁸ and that visas may also be granted in certain circumstances where states allow persons to work under the

150. *LeClerc*, 419 F.3d at 423-26. While Judge Stewart dissented in the case, he concurred with the majority decision on the preemption issue. *Id.* at 426 (chronicling Judge Stewart’s dissent).

151. *Id.*

152. 8 U.S.C. § 1184 (i)(2)(A) (2012).

153. *LeClerc*, 419 F.3d at 424.

154. *Id.* at 424 (explaining how F-1 visas are temporary visas held by students studying in the United States).

155. The court also oddly suggested that Maryland’s tuition policy in *Toll* “proscrib[ed] by state law what Congress expressly permit[ted] by federal statute.” *Id.* (tense changed). The court did not point out the section of federal law in *Toll* that expressly discussed state tuition policies, so it is not clear what support there is for this interpretation of the decision. The Maryland statute did not prevent matriculation; it just meant that the students had to pay more to go there.

156. *Id.*

157. *Id.* As discussed in the introduction, obtaining a professional license is one way of fulfilling a prerequisite for obtaining an H1-B visa. There are other ways of meeting the eligibility requirements.

158. 8 U.S.C. § 1184 (i)(1)(B) (2012).

supervision of licensed practitioners in lieu of having a license themselves.¹⁵⁹ In light of these alternative routes to a visa, the court held that the state licensure ban was “in accord, rather than conflict with federal regulation of alien employment.”¹⁶⁰

The court also held that the Louisiana rule was not an obstacle to Congressional objectives.¹⁶¹ It pointed out that in *De Canas* the Court had upheld a California law addressing the employment of undocumented immigrants in spite of “overlap” between federal immigration regulations and the state employment regulation system.¹⁶² The court held that the case before it similarly presented a situation where a federal law had only “peripheral[ly]” touched on an area of state regulation.¹⁶³ The court concluded by arguing that the Louisiana law was designed to deal with local problems, and that this was permissible so long as it was consistent with federal law.¹⁶⁴

b. The Second Circuit holds state licensure bans preempted

In *Dandamudi v. Tisch* the Second Circuit reached a different conclusion when considering a New York law that barred nonimmigrant aliens from receiving pharmacy licenses.¹⁶⁵ The court stated that the state law was preempted because it stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁶ The court stated that “Congress exercised its immigration power to permit” nonimmigrant aliens “to participate in certain [specialty] occupations so long as they are *professionally qualified* to engage in the particular

159. *LeClerc*, 419 F.3d at 425 n.55.

160. *Id.* at 425.

161. *Id.* at 425.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Dandamudi v. Tisch*, 686 F.3d 66, 80 (2d Cir. 2012). The Second Circuit’s discussion of preemption is dicta because the court held that not all the plaintiffs had standing to bring a preemption challenge to the state law. *Id.* Several of the plaintiffs held TN visas, which are granted to people interested in coming to the United States pursuant to the North American Free Trade Agreement (NAFTA). *Id.* According to the court, “the NAFTA Implementation Act allows only the United States to bring actions against state laws inconsistent with NAFTA. See 19 U.S.C. § 3312(b)(2).” *Dandamudi*, 686 F.3d 66, 81 (2d Cir. 2012). Still, the strong language of the court shows how it would have decided the case had the TN visa holders not participated. In light of this, courts should address the equal protection issue first to give a definitive answer to whether the law is unconstitutional as applied to all skilled guest workers, as opposed to just some of them. *But see*, Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU L. REV. 2277 (2010) (arguing that preemption should be a court’s first area of concern in light of the approach adopted in *Toll v. Moreno*).

166. *Dandamudi*, 686 F.3d at 80.

specialty occupation they seek to practice.”¹⁶⁷

The court argued that granting states the right to prohibit nonimmigrant aliens from receiving licenses without considering their skill set would mean allowing a state’s traditional police power in the field of employment law to “morph” into something far different.¹⁶⁸ Rather than simply keeping tabs on the “educational and experiential qualifications” of workers, the state would be rendering federal immigration laws “advisory.”¹⁶⁹ The court argued that federal immigration law states that a certain *class* of nonimmigrant aliens should be admitted to the country to obtain specialty occupations, subject to a state’s determination that an *individual* has the qualifications to be considered part of that class.¹⁷⁰ It felt that the New York law flipped the law on its head by giving the states the right to determine which classes of employees could come to work there, and thus stood as an obstacle to the federal law.¹⁷¹

The court further rejected the argument that the hedging language in *Toll* amounted to a rule and added that in any event Congress had done more than merely allow nonimmigrants to enter temporarily: it also gave them the right to work in certain occupations.¹⁷² It then cited to twelve pages of the Court’s recent *Arizona* decision with much explanation and concluded that the state statute presented serious preemption problems because of the obstacles posed to the accomplishment of the purposes of the INA.¹⁷³

c. Analysis

There is no express preemption provision in the statute, so the analysis focuses on implied preemption. While Congressional intent is not crystal clear, the extensive nature of its regulations of nonimmigrant employment suggests that it intended to occupy the field except in express situations. In any event, state laws that prevent skilled immigrants from obtaining professional licensure stand as an obstacle to Congressional objectives and are invalid.

i. Field Preemption

LeClerc’s heavy reliance on the *De Canas* case to support the notion

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 80-81.

171. *Id.*

172. *Id.*

173. *Id.*

that Congress has not preempted the field of state regulations of employment law with respect to aliens is problematic. *Arizona* narrowed the applicability of *De Canas*, explaining: “When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject.”¹⁷⁴ The Court noted that federal laws had changed substantially, and that at the time of the *De Canas* decision, the federal government had expressed no more than a “peripheral concern with [the] employment of illegal entrants.”¹⁷⁵ However, the Court observed that federal immigration law had changed, and highlighted the ways Congress had begun regulating the employment of undocumented immigrants.

LeClerc asserts that licensure law is a peripheral concern of the federal law because it “does not itself mandate domestic professional licensing” for nonimmigrant aliens.¹⁷⁶ However, following the Court’s approach in *Arizona* reveals that this is overly simplistic. Congress has expressed more than a peripheral concern with the employment of nonimmigrant aliens. In fact, it has adopted an extensive set of regulations about the conditions that must be present before an employer can successfully petition for a visa for a potential entrant and grant them employment.¹⁷⁷ Congress has also mandated that workers present on a temporary work visa be paid a prevalent wage, and that they cannot enter to work at a company in the midst of a labor disruption.¹⁷⁸ The presence of these regulations undercut the *LeClerc* decision’s arguments on field preemption just as new federal rules supplanted *De Canas*’ holding on Congress’ occupation of the field of undocumented immigrant employment regulation. Many academics agree that federal law preempts state licensure bans.¹⁷⁹

174. *Arizona v. United States* 132 S. Ct. 2492, 2503 (2012).

175. *Id.* at 2503-04.

176. *LeClerc v. Webb*, 419 F.3d 405, 425 (5th Cir. 2005).

177. *See, e.g.*, Fragomen, *supra* note 8, at 6:9 (discussing government regulation of minimum salaries employers must pay H1-B guest workers).

178. A review of the legislative history of the Immigration Act of 1990 was not particularly illuminating as to congressional intent regarding the licensure issue. *See, e.g.*, IGOR I. KAVASS, BERNARD D. REAMS, JR., *THE IMMIGRATION ACT OF 1990, A LEGISLATIVE HISTORY OF PUB. L. NO. 101-649* 269 (1997).

179. *See, e.g.*, Erin Delaney, *Note: In the Shadow of Article I: Applying A Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821 (2007) (discussing the issues of state laws that regulated immigrants and using the Dormant Commerce Clause’s as a potential solution); Hess, *supra* note 165 (detailing the interplay of the Supremacy Clause and the Equal Protection Clause in relation to the constitutionality of immigration laws that discriminate against nonimmigrants); Justine Storch, *Legal Impediments facing nonimmigrant’s entering licensed professions*, 7 MOD. AM. 12 (2011) (discussing the licensing issues facing nonimmigrants and the impact of federal immigration laws on this process).

ii. Obstacle Preemption

The preemption argument that the state law stands as an obstacle to the full purposes and objectives of Congress is strong. In *Arizona*, the Court relied on the text, structure and history of the federal statute in determining Congressional intent.¹⁸⁰ A logical reading of 8 U.S.C. § 1184 suggests that the Second Circuit's construction of the licensure provision as allowing a state to impose professional qualification requirements, but not barring completely a class of aliens from achieving licensure is correct. As the district judge noted in *Adusumelli v. Steiner*, the lower court opinion preceding *Dandamudi*, any other reading would render a portion of the United States Code merely advisory – if the fifty states so chose, they could nullify part of the H1-B program.¹⁸¹

This is supported by dicta in *De Canas*, where the court was cautious about properly construing California's law so as to ascertain whether or not it discriminated against workers who were lawfully present in the country, but not entitled to permanent residence.¹⁸² Apparently the Court felt that even under the old, less comprehensive federal law this would have made for a compelling obstacle argument.

While formalistically it is true that potential entrants could still get a visa in spite of state licensure restrictions by fulfilling one of the other possible requirements, such as having significant experience in the field, or by having requisite degrees for entry into the field, it is unclear how a potential entrant would be able to meet the other requirements in order to actually get a visa. It seems unlikely that an employer would sponsor an employee to come to the United States, given the significant expenditures and potential liabilities involved in the application process if it knew that the entrant would not be able to obtain a license to practice in the field the company brought them over to work in.

The Fifth Circuit's answer seems to be that these workers could simply work the duration of their visa as apprentices, which is allowable under federal regulations, and would not run afoul of licensure requirements.¹⁸³ Yet it remains unclear how forcing foreigners into unnecessary apprenticeships is not an obstacle to a federal program that is designed to enhance the productivity of the United States workforce by encouraging foreign talent to join us.

Furthermore, the similarities with the *Toll* decision are instructive.

180. *Arizona*, 132 S. Ct. at 2505.

181. *Dandamudi v. Tisch*, 686 F.3d 66, 80 (2d Cir. 2012).

182. *De Canas v. Bica*, 424 U.S. 351, 363-64 (1976).

183. See *LeClerc v. Webb*, 419 F.3d 405, 425 n.56 (5th Cir. 2005) (discussing how federal regulations permit H1-B visa holders to work as a subordinate to someone that holds a professional license in certain circumstances).

While it is true that the visas held by the plaintiffs in that case differ from H1-B and other temporary work visas it is not clear why these differences should affect the analysis. In *Toll*, the Court ruled that it was impermissible for Maryland to interfere with a federal tax program designed to encourage a group of aliens to come to the United States.¹⁸⁴ The Court stated that: “In light of Congress’ explicit decision not to bar G-4 aliens from acquiring domicile, the State’s decision to deny ‘in-state’ status to G-4 aliens, *solely* on account of the G-4 alien’s federal immigration status surely amounts to an ancillary burden”¹⁸⁵ Similarly here, Congress has not barred H1-B aliens from obtaining professional licenses, but states are adopting laws that deny them this possibility based solely on their immigration status.

It is not clear why the Fifth Circuit was so focused on the issue of transience. The analogy is simply that states are interfering with federal immigration policy by putting up barriers to nonimmigrants that Congress did not adopt. Even if transience was an important distinguishing factor, the argument is undermined by *Toll*’s alternative holding that the Maryland policy presented an impermissible obstacle by interfering with the financial incentives Congress was offering to G-4 visa holders through its tax exemption policy.¹⁸⁶ That holding had nothing to do with the transience of the plaintiffs, and focused merely on the meddlesome nature of the state program. Given the economic benefits of allowing skilled workers into the United States, state licensure bans that inhibit their entrance meddle with Congressional goals, just as Maryland’s discriminatory tuition policy did.

The Second Circuit was correct in pointing out that the hedging language the Court adopted is not a rule, and that in any case, Congress has done more than simply allow nonimmigrants to enter the country. State laws that prevent nonimmigrant aliens from obtaining professional licenses as a class represent an unconstitutional interference with federal immigration regulations.

CONCLUSION

While there may be a valid debate about the proper role of skilled guest workers in the United States economy, the place for that debate is in Washington, not state legislatures. The equal protection clause protects skilled guest workers against the passions and prejudices of a political system in which they are not allowed to participate, in spite of their substantial contributions to our economic growth.

184. *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982).

185. *Id.* at 14.

186. *Id.* at 16.

Leaving immigration regulations to the federal government means that we will continue to present ourselves to the world as one country, with one door. When a national consensus is achieved, states should not attempt to undermine that effort by adopting laws that conflict with Congressional goals. Allowing state licensure bans that affect skilled guest workers opens the door to a patchwork system of immigration policies that will interfere with American businesses.

In light of the split amongst the Circuit Courts on both the equal protection and preemption issues, it might be wise for members of Congress to consider adopting an express preemption clause prohibiting states from adopting licensure bans that apply to skilled guest workers based on their immigration status alone, as opposed to a more individualized assessment that includes their skills, training and ties to the state. Such a move would cement the hard work members of Congress are putting in to achieve a consensus on immigration reform legislation. While legal analysis shows that state level attempts to undermine that consensus are unlikely to succeed, such a provision would make it a more open and shut case.