ALIENAGE CLASSIFICATIONS AND THE DENIAL OF HEALTH CARE TO DREAMERS

FATMA MAROUF[*]

ABSTRACT

In the Affordable Care Act ("ACA"), passed in 2010, Congress provided that only "lawfully present" individuals could obtain insurance through the Marketplaces established under the Act. Congress left it to the Department of Health and Human Services ("HHS") to define who is "lawfully present." Initially, HHS included all individuals with deferred action status, which is an authorized period of stay but not a legal status. After President Obama announced a new policy of Deferred Action for Childhood Arrivals ("DACA") in June 2012, however, HHS amended its regulation specifically to exclude DACA recipients from the definition of "lawfully present." The revised regulation denied DREAMers—undocumented immigrants brought to the United States as children—access to affordable health care, while providing it to similarly situated individuals who had been granted deferred action through other means. This Article examines whether the exclusion of DREAMers from the ACA violates equal protection principles, highlighting critical inconsistencies and gaps in the case law on standards of review for alienage classifications. A circuit split exists about whether non-legal permanent residents are ever entitled to strict scrutiny, and the extent of the Executive's power over immigration remains unclear, as does the allocation of power within the executive branch. In addition, courts are divided about the standard of review that applies when states discriminate against noncitizens pursuant to a federal statute. All of these issues complicate the analysis and underscore the need to reevaluate an unraveling tiered approach to judicial review.

---

* B.A., Yale University; J.D., Harvard Law School. Professor of Law and Director of the Immigrant Rights Clinic, Texas A&M University School of Law.

TABLE OF CONTENTS

INTRODUCTION

The application of equal protection principles to noncitizens remains one of the most perplexing areas of constitutional law. While courts have tried to articulate various principles to synthesize the case law in this area, inconsistencies and uncertainties remain pervasive. As one federal appellate court judge recently recognized, "What is remarkable is that seventy-five years after *United States v. Carolene Products Co.* announced the need for 'more exacting judicial scrutiny' for 'discrete and insular minorities,' . . . we should be divided over the proper *standard of review* for classifications based on alienage."[1]

The general rule of thumb is that alienage-based classifications receive strict scrutiny when made by states, since alienage, like race, is a suspect classification, but rational basis review applies when such classifications are made by the federal government, due to its plenary power over immigration. The problem is that this approach is plagued with unresolved questions. In terms of discrimination by states, a circuit split exists about whether strict scrutiny applies only to legal permanent residents ("LPRs") or extends to noncitizens with other types of status, such as individuals with temporary work visas, asylum, withholding of removal, or parole.[2] In addition, courts are divided about what to do with "hybrid" statutes, where Congress gives states discretion to decide whether or not to discriminate against certain categories of noncitizens. Some courts have held that states have no real option to discriminate in this situation, while others have upheld discriminatory actions by states on the basis that they are following a federal direction.

Just as complicated are questions involving discrimination against noncitizens by the federal government. While the Supreme Court has repeatedly held that Congress and the President have plenary power over immigration, the allocation of power between the legislative and executive branches remains unclear. The lawsuit brought by twenty-six states challenging President Obama's executive actions on immigration highlights this issue. Even more confusing—and less theorized—is the scope of the plenary power *within* the executive branch. The Supreme Court has issued only one, opaque decision addressing alienage-based classifications by an executive agency that does not have direct

1. Korab v. Fink, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

2. *See infra* Part II.A.2.

responsibility over immigration.[3] In that case, the Court found the agency's classification unconstitutional but applied a due process analysis to address an equal protection issue.[4] Consequently, there is still an open question about what standard of scrutiny applies to alienage-based classifications by federal agencies whose expertise is not immigration.

An issue that calls attention to these gaps and tensions in equal protection jurisprudence is the exclusion of DREAMers from the Affordable Care Act ("ACA" or "Act"). The term "DREAMers" is used to describe undocumented individuals who came to the United States as children, went to school here, and consider themselves American. They are the group that would have benefited from the Development, Relief, and Education for Alien Minors ("DREAM") Act, legislation that Congress has introduced several times since 2001 but never passed into law.[5] They are also the group that has benefited from the policy of Deferred Action for Childhood Arrivals ("DACA"), introduced by the Department of Homeland Security ("DHS") in 2012, which has requirements resembling the DREAM Act, as it requires entering the United States before the age of sixteen, living here continuously for at least five years, satisfying certain educational requirements, and passing criminal background checks. Unlike the DREAM Act, however, DACA does not create a path to permanent residency or citizenship; it simply allows qualifying individuals to apply for deferred action.

Deferred action is a temporary period of authorized stay granted by DHS that allows someone to apply for employment authorization but does not confer a legal status. As DHS has explained, "Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time."[6] It is "a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or

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

4. *Id.* at 99–117.

5. *See* American Dream Act, H.R. 1751, 111th Cong. (1st Sess. 2009); American Dream Act, H.R. 1275, 110th Cong. (1st Sess. 2007); DREAM Act of 2005, S. 2075, 109th Cong. (1st Sess. 2005); DREAM Act, S. 1545, 108th Cong. (1st Sess. 2003); DREAM Act, S. 1291, 107th Cong. (1st Sess. 2001).

6. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Léon Rodríguez, Dir., U.S. Citizenship & Immigration Servs. et al. 2 (Nov. 20, 2014), *available at* http://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion [hereinafter Memorandum on Expanded DACA and DAPA].

in the interest of the Department's overall enforcement mission."[7] For example, DHS typically grants deferred action status to certain classes of individuals, including, but not limited to: abused spouses and children of US citizens and permanent residents with approved self-petitions; immediate relatives of certain US citizens killed in combat; victims of crimes who have demonstrated prima facie eligibility for U or T visas; and important witnesses in investigations or prosecutions.[8] In addition to such classes, DHS has discretion to grant deferred action in any removal case where the individual is a low enforcement priority.[9] Even noncitizens who have already been ordered deported may be granted deferred action based on sympathetic facts if their removal is not a priority. DACA therefore represents just one of many ways to be granted deferred action.

The key question for purposes of access to affordable health care is whether individuals granted deferred action through DACA should be considered "lawfully present" in the United States. The ACA explicitly limits access to its health insurance Marketplaces and tax credits to individuals who are "lawfully present" but does not define this term.[10] Instead, Congress left it to the Department of Health and Human Services ("HHS") to define who is "lawfully present."[11] Initially, in 2010, HHS

7. *Id.*; *see also* 8 C.F.R. § 274a.12(c)(14) (2016) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

8. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SECURITY, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS 4 (2011) (discussing deferred action status for important witnesses) [hereinafter TOOL KIT FOR PROSECUTORS]; *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/humanitarian/battered-spouse-children-parents (last visited May 13, 2016), *archived at* https://perma.cc/EHE9-YCKB ("If your Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant is approved and you do not have legal immigration status in the United States, we may place you in deferred action, which allows you to remain in the United States."); *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last visited May 13, 2016), *archived at* https://perma.cc/AYX4-7V56 ("Petitioners placed on the waiting list will be granted deferred action or parole and are eligible to apply for work authorization while waiting for additional U visas to become available."); Memorandum on Expanded DACA and DAPA, *supra* note 6, at 2 nn.2–3.

9. *See* 8 C.F.R. § 274a.12(c)(14); Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al. 2 (Nov. 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (discussing the use of deferred action for cases that are low priorities); Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, Memorandum Op. for the Sec'y of Homeland Sec. and the Counsel to the President 18–19 (Nov. 19, 2014), *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (same); Memorandum on Expanded DACA and DAPA, *supra* note 6, at 2 (same); TOOL KIT FOR PROSECUTORS, *supra* note 8, at 4 (same).

10. 42 U.S.C. § 18032(f)(3) (2014).

11. *Id.* § 18081.

included all individuals with deferred action status in its definition of "lawfully present."[12] However, after President Obama announced DACA in June 2012, HHS changed its interpretation to exclude DACA recipients from the definition of "lawfully present," even though it continued to include all other individuals with deferred action status.[13] HHS's decision to treat some individuals with deferred action as "lawfully present" while excluding others with the exact same status raises a serious equal protection issue. Yet the standard of review that applies in this situation remains unclear.

In determining the proper standard of review for the disparate treatment of DACA recipients under the ACA, one must grapple with at least three unresolved questions. First, there is an open question about whether noncitizens with deferred action status are ever entitled to heightened scrutiny. Second, although HHS is part of the federal government, it is an agency that does not have direct responsibility over immigration, so there is a question about whether it is entitled to deference under the plenary power doctrine. Third, since states can choose whether to create their own Marketplaces under the ACA, a question arises whether choosing to do so involves engaging in prohibited discrimination, or whether such discrimination is permitted because the states are merely following a federal directive.

Part I of this Article provides background information about the exclusion of DACA recipients from the ACA, including the legislative history that led to this exclusion and its far-reaching consequences for DREAMers. Part II describes the overt discord and covert gaps in equal protection cases involving noncitizens, examining the issues that plague alienage-based classifications by both state and federal governments, as well as the controversy surrounding Congressional delegation of the power to discriminate to states. Part III then examines the relevance of these questions to HHS's decision to exclude DACA recipients from the ACA, exploring whether heightened scrutiny should apply in this situation and, if not, whether the differential treatment of DREAMers would survive even rational basis review. This Part also explores whether states that apply HHS's discriminatory regulation through their own Marketplaces are engaging in prohibited discrimination subject to strict scrutiny. Part IV offers a path through this quagmire by making explicit what has already occurred in practice: abandonment of a tiered approach to standards of

12. 45 C.F.R. § 152.2(4)(vi) (2010).
13. 45 C.F.R. § 152.2(4)(vi), (8) (2016).

review. This Part suggests adopting a more flexible, sliding-scale approach. Part IV also examines alternative modes of legal analysis as a way to avoid the equal protection conundrum, such as administrative law challenges to the exclusion of DACA recipients from the ACA, but contends that it is still essential to clarify how courts should review alienage-based classifications.

Nearly eight hundred thousand individuals have been granted deferred action through DACA thus far.[14] In November 2014, DHS announced an expansion of the DACA policy, as well as a new policy of Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA").[15] Together, these new policies could provide deferred action to up to 5.2 million people.[16] The policies have not yet been implemented, however, due to a lawsuit filed by twenty-six states that led to a preliminary injunction putting them on hold until the case is resolved.[17] HHS has not yet passed any regulations regarding the treatment of expanded DACA or DAPA recipients under the ACA, but it is expected to exclude them, just like original DACA recipients, if the policies survive.[18] The disparate treatment of different groups of individuals with deferred action is therefore a pressing issue that could affect millions of lives.

---

14. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SECURITY, NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012–2016 (DECEMBER 31) (2016), *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals [hereinafter USCIS DATA SET].

15. *See* Memorandum on Expanded DACA and DAPA, *supra* note 6.

16. Muzaffar Chishti & Faye Hipsman, *All Eyes on U.S. Federal Courts as Deferred Action Programs Halted*, MIGRATION POLICY INST. (Mar. 13, 2015), http://www.migrationpolicy.org/article/all-eyes-us-federal-courts-deferred-action-programs-halted, *archived at* https://perma.cc/C4YG-KVK8.

17. *See* United States v. Texas, No. 15-674, slip op. at 1 (U.S. June 23, 2016) (per curiam) (affirming the Fifth Circuit's decision denying the federal government's appeal of the preliminary injunction by an equally divided Court); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (denying the federal government's appeal of the preliminary injunction), *cert. granted*, 136 S. Ct. 906 (2016); Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (denying the federal government's motion to stay or narrow the preliminary injunction); Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting the preliminary injunction). Since the appeal to the Supreme Court involved only a preliminary injunction, the Court may have an opportunity to revisit the case after a final judgment.

18. NAT'L IMMIGRATION LAW CTR., DACA AND DAPA ACCESS TO FEDERAL HEALTH AND ECONOMIC SUPPORT PROGRAMS 1 (2015).

I. EXCLUSION OF DACA RECIPIENTS FROM THE ACA

A. Legislative History

The Affordable Care Act became law in March 2010 after a highly contentious and divisive political process. The purpose of the Act is to increase the number of insured individuals and reduce the cost of health care. Under prior rules, health insurance companies could deny insurance based on a preexisting condition, charge more based on an applicant's gender or location, and cancel an insurance policy once an individual started using it.[19] The ACA prevents insurance companies from taking these actions. In addition to creating a federal "Marketplace" (also called an "Exchange") for consumers to purchase health insurance, the Act allows states to create their own health insurance Marketplaces. There are currently two types of state-based Marketplaces. In one kind, the state is responsible for performing all of the Marketplace functions, including receiving applications through its own website. In the other kind, which is called a "federally-supported" state-based Marketplace, the state performs all Marketplace functions, except that it relies on the federal government's IT platform, so consumers apply for coverage through healthcare.gov. Currently, twelve states and the District of Columbia have totally state-based Marketplaces, and four states have "federally-supported" state-based Marketplaces. In addition, seven states have "state-partnership" Marketplaces, where the state provides in-person consumer assistance, and HHS performs all other marketplace functions. The remaining twenty-seven states use the federal Marketplace, where HHS performs all functions.[20] Only insurance companies that agree to follow the Act's rules can sell insurance plans in these Marketplaces.

The Act also helps consumers pay for health insurance by providing two types of tax credits that are based on household income. First, the Act provides "premium tax credits" that help reduce the cost of health insurance premiums.[21] Second, the Act provides "cost-sharing reductions"

19. *See* NAT'L IMMIGRATION LAW CTR., FREQUENTLY ASKED QUESTIONS: EXCLUSION OF YOUTH GRANTED "DEFERRED ACTION FOR CHILDHOOD ARRIVALS" FROM AFFORDABLE HEALTH CARE 2–3, 7–8 (2013), *archived at* https://perma.cc/9KP5-6LVX.

20. For a table showing which states use which types of Marketplaces, see *State Health Insurance Marketplace Types, 2016*, HENRY FAMILY FOUND., http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/ (last visited May 13, 2016), *archived at* https://perma.cc/64K9-GWER.

21. I.R.C. § 36B (2014).

that limit the cost of copayments, coinsurance, and deductibles.[22] These tax credits are available to households with incomes at or below 400 percent of the federal poverty level that buy private health insurance through a Marketplace and file federal tax returns.[23]

In order to be eligible for a health plan offered through a Marketplace under the Act or to claim either of the tax credits, an individual must be "a citizen or national of the United States or . . . *lawfully present* in the United States."[24] Congress did not define "lawfully present" in the statute, but instead left it to the Department of Health and Human Services to do so as part of establishing a program that meets the requirements of the Act.[25] One of the Act's key provisions is that it prohibits the denial of health insurance or inflation of rates based on preexisting medical conditions.[26] Since this provision did not become effective until January 1, 2014, § 1101 of the Act directed HHS to establish a temporary high-risk health insurance program to provide immediate access to coverage for eligible noninsured individuals with preexisting conditions. Eligibility under this temporary program was similarly limited to US citizens, nationals, and individuals "lawfully present" in the country.[27]

On July 30, 2010, HHS issued an interim final regulation implementing § 1101 of the Act.[28] This regulation provides that an individual is eligible to enroll in the Pre-Existing Condition Insurance Plan ("PCIP") program if he or she is "a citizen or national of the United States or lawfully present in the United States."[29] HHS defined "lawfully present" in the interim final regulation at 45 C.F.R. § 152.2. This definition included, among many other categories, "[a]liens currently in deferred action status."[30] HHS subsequently passed regulations implementing the Affordable Insurance Exchanges and premium tax credits that cross-referenced this definition of "lawfully present."[31] Furthermore, the same definition of

22. *See* 42 U.S.C. § 18071 (2014).

23. I.R.C. § 36B(c)(1)(A); 26 C.F.R. § 1.36B-2 (2016); 45 C.F.R. § 155.305(f) (2016).

24. I.R.C. § 36B(e)(2) (emphasis added); 42 U.S.C. §§ 18032(f)(3), 18071(e)(2) (emphasis added); *see also* 42 U.S.C. § 18082(d).

25. 42 U.S.C. § 18081.

26. *Id.* § 18001.

27. *See id.* § 18001(d).

28. Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45,014 (July 30, 2010) (to be codified at 45 C.F.R. pt. 152).

29. 45 C.F.R. § 152.14(a)(1) (2010).

30. *Id.* § 152.2(4)(vi).

31. *See* 26 C.F.R. § 1.36B-1(g) (2012) (implementing the premium tax credits); 45 C.F.R. § 155.20 (2012) (implementing the Affordable Insurance Exchanges).

"lawfully present" was used to define eligibility for Medicaid and the Children's Health Insurance Program ("CHIP"), which provide free or low-cost comprehensive health insurance for children under the age of twenty-one, pregnant women, and certain low-income individuals, including seniors and persons with disabilities.[32]

Two years later, on June 15, 2012, President Obama announced a new policy called Deferred Action for Childhood Arrivals, which granted deferred action status to undocumented immigrants who had entered the United States as children, had lived here for at least five years, were below the age of thirty-one on that date, complied with certain educational requirements, and had not been convicted of certain crimes. A Memorandum issued by the Secretary of DHS that set forth these criteria described DACA as a form of prosecutorial discretion for young people who "lacked the intent to violate the law."[33] It explained that immigration laws should not be "blindly enforced without consideration given to the individual circumstances of each case" and were not "designed to remove productive young people to countries where they may not have lived or even speak the language."[34] In addition, the Memorandum recognized that "many of these young people have already contributed to our country in significant ways."[35]

Shortly thereafter, on August 30, 2012, HHS published an interim final regulation that amended the definition of "lawfully present" in 45 C.F.R. § 152.2 to exclude DACA recipients.[36] While the revised regulation still included the general category of individuals in deferred action status, it carved out an exception specifically excluding individuals who had obtained deferred action status through DACA.[37] This change made DACA recipients ineligible for the PCIP, Affordable Insurance Exchanges, premium tax credits, and cost-sharing reductions, since all of these rely on the same definition of "lawfully present."[38] HHS explained

32. *See* Letter from Cindy Mann, Dir., Ctrs. for Medicare & Medicaid Servs., to State Health Official (July 1, 2010), *available at* https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf.

33. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection et al. 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

34. *Id.* at 2.

35. *Id.*

36. 45 C.F.R. § 152.2(4)(vi), (8) (2016).

37. *Id.*

38. *See supra* note 31 and accompanying text.

that excluding DACA recipients from the PCIP would ensure that the interim final rule "does not inadvertently expand the scope of the DACA process."[39] According to HHS, it "would not be consistent with the reasons offered for adopting the DACA process to extend health insurance subsidies under the Affordable Care Act to these individuals."[40] HHS described DHS's reason for adopting DACA as ensuring that enforcement efforts focus on high-priority cases.[41]

HHS's revised definition of "lawfully present" also excluded DACA recipients from obtaining affordable health insurance under the state option available in Medicaid and CHIP.[42] The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA") gives states the option of providing Medicaid or CHIP to children and/or pregnant women who are "lawfully residing" in the United States and otherwise meet the criteria for these benefits.[43] The definition of "lawfully residing" tracks the definition of "lawfully present," with the additional requirement that the individual establish residence in the state where she is applying for benefits.[44] Thus, by excluding DACA recipients from the definition of "lawfully present," the interim final rule also excluded them from the definition of "lawfully residing" for purposes of eligibility for Medicaid and CHIP. Once again, the only explanation offered by HHS in the interim final rule was that "the reasons that DHS offered for adopting the DACA process do not pertain to eligibility for Medicaid or CHIP."[45] HHS stated this same reason in a letter issued to State Health Officials and Medicaid Directors on August 28, 2012.[46]

HHS made the amended interim final rule effective immediately, invoking a waiver of the usual notice and comment procedures for proposed rulemaking. The Administrative Procedure Act ("APA") provides an exception to notice and comment procedures where the agency

39. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614, 52,615 (Aug. 30, 2012) (to be codified at 45 C.F.R. pt. 152).

40. *Id.*

41. *Id.*

42. *Id.*

43. 42 U.S.C. §§ 1396b(v)(4)(A), 1397aa(a) (2014).

44. *See* Letter from Cindy Mann, *supra* note 32, at 2. The regulations specify that residence means living in a state with the intent to remain there for an indefinite period. *See* 42 C.F.R. § 435.403 (2016).

45. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614, 52,615 (Aug. 30, 2012) (to be codified at 45 C.F.R. pt. 152).

46. Letter from Cindy Mann, Dir., Ctr. for Medicaid & CHIP Services, to State Health Official and Medicaid Director 1 (Aug. 28, 2012), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf.

finds good cause that those procedures would be impracticable, unnecessary, or contrary to the public interest.[47] Here, HHS found that waiting for public comments to issue the regulation would be contrary to the public interest because the PCIP program was enrolling eligible individuals, and HHS thought it important to "provide clarity with respect to eligibility for this new and unforeseen group of individuals as soon as possible, before anyone with deferred action under the DACA process applies to enroll in the PCIP program."[48] Based on the same rationale, HHS applied the good cause exception to waiting at least thirty days after publication in the Federal Register for a final rule to become effective[49] and made the final rule effective immediately.[50]

Although the regulation excluding DACA recipients was made effective immediately, HHS provided sixty days for public comments "on the implications of the amendment."[51] In response, HHS received over 250 comments from legal organizations, health care providers, nonprofits that work with immigrants, and others, which overwhelmingly opposed the change.[52] The main reasons given for opposition were that the exclusion of DACA recipients contradicted the purpose of the ACA, would lead to higher health insurance premiums for everyone, would increase health care costs, would send mixed messages to lawfully present immigrants, and would make arbitrary distinctions among individuals with the same legal status.[53] Furthermore, at least one commentator, the

47. 5 U.S.C. § 553(b)(3)(B) (2014).

48. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. at 52,616.

49. *See* 5 U.S.C. § 553(d)(3).

50. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. at 52,616.

51. *See id.*

52. *See* REGULATIONS.GOV, http://www.regulations.gov/#!searchResults;rpp=50;po=0;s=CMS%25E2%2580%25939995%25E2%2580%2593IFC2;dct=PS (last visited May 13, 2016).

53. *See, e.g.*, *id.*; Asian Am. Justice Ctr., Comments on CMS' Interim Final Rule Changes to Definition of "Lawfully Present" in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (Oct. 25, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0132; Alison Buist & Kathleen King, Children's Def. Fund, Comments on CMS' Interim Final Rule Changes to Definition of "Lawfully Present" in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (Oct. 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0118; Matt Ginsburg, AFL-CIO, Comments on Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52614 (Oct. 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0170; Robin Goldfaden, Lawyers' Comm. for Civil Rights of the San Francisco Bay Area, Comments on Changes by Centers for Medicare and Medicaid Services, Department of Health and Human Services, to Interim Final Rule Definition of "Lawfully Present" in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (Oct. 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0209; Jennifer Ng'andu & Laura Vazquez, Nat'l Council of La Raza, Comments on CMS' Interim Final Rule Changes to Definition of "Lawfully Present" in the Pre-

Mexican-American Legal Defense and Education Fund, challenged HHS's reliance on the good cause exceptions to circumvent regular notice and comment procedures and make the regulation effective immediately.[54] In December 2012, Congresswoman Barbara Lee (D-CA), joined by eighty members of Congress, sent a letter to President Obama asking him to reinstate health care for DACA recipients.[55]

These calls for reform have not been successful. In fact, the Obama administration has taken pains to ensure that excluded categories of immigrants do not obtain insurance coverage under the Act. In September 2014, the administration announced that it had cut off the ACA coverage of about 115,000 immigrants who had failed to provide proof that they were lawfully present in the country.[56] Furthermore, in November 2014, when President Obama expanded the category of individuals eligible for DACA and created Deferred Action for undocumented immigrants who are the parents of US citizens or Lawful Permanent Residents, media reports indicated that these individuals would also be excluded from coverage under the ACA.[57] As discussed below, these exclusions leave hundreds of thousands—and potentially millions—of individuals who are lawfully living and working in the United States without any health insurance.

B. Impact of DACA and DAPA Policies

To date, nearly 1.4 million individuals eligible for the original DACA program have applied.[58] Approximately 1.2 million of these applications

---

Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (Oct. 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0203.

54. James A. Ferg-Cadima, Mexican Am. Legal Def. & Educ. Fund (Oct. 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0242.

55. Press Release, Rep. Barbara Lee, Letter to Obama: Reinstate Healthcare to DREAMers (Dec. 18, 2012), *available at* https://lee.house.gov/news/press-releases/letter-to-obama-reinstate-healthcare-to-dreamers.

56. Lena H. Sun, *115,000 Immigrants to Lose Health Coverage by Sept. 30 Because of Lack of Status Data*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/national/health-science/115000-immigrants-to-lose-health-coverage-by-sept-30-because-of-lack-of-status-data/2014/09/15/f76be8e6-3d18-11e4-9587-5dafd96295f0_story.html.

57. *See* Jason Millman & Juliet Eilperin, *Obama's Order Won't Extend Obamacare to Undocumented Immigrants*, WASH. POST (Nov. 19, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/19/obamas-order-wont-extend-obamacare-to-undocumented-immigrants/; Michael D. Shear & Robert Pear, *Obama's Immigration Plan Could Shield Five Million*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/us/politics/obamacare-unlikely-for-undocumented-immigrants.html?_r=0.

58. USCIS DATA SET, *supra* note 14.

have been approved, and about sixty thousand remain pending.[59] Many recipients are now filing their renewal applications, since DACA began in 2012 and granted deferred action status for a period of two years. By the end of Fiscal Year 2015, US Citizenship and Immigration Services ("USCIS") had received nearly 400,000 renewal applications.[60] As a population, those who have applied for DACA are quite young and have strong ties to the United States. One-third of the applicants were between the ages of fifteen and eighteen, and another forty percent were between the ages of nineteen and twenty-three.[61] Furthermore, nearly three-quarters of the applicants have lived in the United States for at least ten years, and one-third arrived at age five or younger.[62]

In November 2014, the Department of Homeland Security announced an expanded DACA program, as well as a new program called Deferred Action for Parental Accountability.[63] If implemented, the expanded DACA program would make about 330,000 additional immigrants eligible for deferred action status by eliminating the requirement that applicants be under the age of thirty-one as of June 15, 2012, and requiring continuous residence in the United States since January 1, 2010, instead of June 15, 2007.[64] About one hundred thousand more people may become eligible for DACA over time by turning fifteen, which is the minimum age to apply, or by satisfying the education requirement (i.e., by enrolling in school or obtaining a high school diploma or GED).[65] In addition, an estimated 3.7 million immigrants would qualify for DAPA.[66] This figure includes 3.53 million parents of US citizens and 180,000 parents of legal permanent residents.[67] Together, the expanded DACA and DAPA programs could

59. *Id.*

60. *Id.*

61. Audrey Singer & Nicole Prchal Svajlenka, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS INST. (Aug. 14, 2013), http://www.brookings.edu/research/reports/2013/08/14-daca-immigration-singer, *archived at* https://perma.cc/UR3J-Z8MQ.

62. *Id.*

63. *See supra* note 15 and accompanying text.

64. *See* Jens Manual Krogstad & Ana Gonzales-Barrera, *If Original DACA Program Is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, PEW RESEARCH CTR. (Dec. 5, 2014), http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief/, *archived at* https://perma.cc/BET5-LT7F; *see also* Press Release, Migration Policy Inst., As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014), *available at* http://migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new [hereinafter Migration Policy Institute Press Release].

65. *See* Chishti & Hipsman, *supra* note 16.

66. Migration Policy Institute Press Release, *supra* note 64.

67. *Id.*

allow 5.2 million undocumented immigrants—half of the estimated undocumented population—to live and work lawfully in the United States.

Although the process of applying for deferred action under the expanded DACA program was expected to begin on February 18, 2015, a preliminary injunction issued by a federal district court judge in Texas and upheld by the Fifth Circuit has put the process on hold. The preliminary injunction is based on a lawsuit filed by twenty-six states challenging the DACA and DAPA programs as unlawful under the US Constitution's Take Care Clause and the Administrative Procedure Act.[68] In June 2016, an equally divided Supreme Court affirmed the Fifth Circuit's decision in a one-sentence per curiam decision.[69] The fate of these recent programs remains uncertain, since the appeal concerned only a preliminary injunction, and a final judgment in the case—which may ultimately be reviewed by a full complement of Justices—has not yet been issued. Regardless of what happens with the expanded DACA and DAPA programs, however, there has been no legal challenge to the original DACA program. Thus, regardless of the outcome of the recent lawsuit, the exclusion of DACA recipients from the ACA remains an important concern. Of course, if an appellate court upholds the expanded DACA and DAPA programs, then over five million people will be authorized to live and work in the United States but excluded from affordable health care under the ACA.

C. Health Care Options for DACA Recipients

In order to assess the impact of exclusion from the ACA, it is important to understand what other health care options are available to DACA recipients. One option is to obtain health insurance through an employer. Nothing prevents DACA recipients from obtaining health insurance in this way, since they can receive an employment authorization document that enables them to obtain a valid social security number. A significant fraction of DACA recipients, however, will not have access to employer-based health insurance, given the statistics for their age group and individuals of Hispanic race.[70] Even DACA recipients who are lucky

68. *See supra* note 17 and accompanying text.

69. United States v. Texas, No. 15-674, slip op. at 1 (U.S. June 23, 2016) (per curiam).

70. Young people in the age group of most DACA recipients (fifteen to twenty-five) are less likely to be engaged in employment that offers health insurance. According to 2010 census data, forty-three percent of individuals aged fifteen to eighteen and sixty percent of those aged nineteen to twenty-five were offered health insurance by an employer, compared to three-quarters of individuals aged twenty-six to sixty-four. HUBERT JANICKI, U.S. CENSUS BUREAU, DEP'T OF COMMERCE,

enough to have employment-based insurance now may become uninsured in the future, as the availability of employer-based health insurance declines.[71]

Another option for those excluded from the ACA is to rely on the so-called "safety net" of health care providers, which includes a patchwork of public hospitals, community health centers, local health departments, rural clinics, special service providers, and private physicians who provide charity care.[72] There are several reasons why these safety net providers are unlikely to be able to meet the health needs of those excluded from the ACA. First, safety-net providers remain under enormous financial strain.[73] Many states faced with budget deficits have cut spending on Medicaid, which is the primary source of funding for safety-net providers.[74] At the same time, the demand for safety-net services has increased significantly over the past decade.[75] In addition, huge geographical variations exist in the strength of safety nets.[76]

EMPLOYMENT-BASED HEALTH INSURANCE: 2010: HOUSEHOLD ECONOMIC STUDIES 2 (2013). Furthermore, census data indicate that only fifty-six percent of Hispanics were offered insurance through an employer in 2010, compared to about three-quarters of Whites and Blacks. *Id.* at 6. Among those offered employer-based insurance, many do not enroll because they cannot afford it. *Id.* at 13. While Hispanics constitute nineteen percent of the population, they represent thirty-four percent of the uninsured. *Key Facts About the Uninsured Population*, KAISER FAMILY FOUND. (Oct. 5, 2015), http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/, *archived at* https://perma.cc/K6TH-HPGU. Among Hispanic noncitizens, half are uninsured. Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Immigrants More Likely to Lack Health Insurance Than U.S.-Born*, PEW RESEARCH CTR. (Sept. 26, 2014), http://www.pewresearch.org/fact-tank/2014/09/26/higher-share-of-hispanic-immigrants-than-u-s-born-lack-health-insurance/, *archived at* https://perma.cc/T29F-38AC.

71. *See, e.g.*, Neil Irwin, *Envisioning the End of Employer-Provided Health Plans*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/01/upshot/employer-sponsored-health-insurance-may-be-on-the-way-out.html?_r=0. One study predicts that by 2020, the overwhelming majority of workers who now receive health insurance through their employers will move to insurance obtained through ACA Marketplaces. *See* S&P CAPITAL IQ, THE AFFORDABLE CARE ACT COULD SHIFT HEALTH CARE BENEFIT RESPONSIBILITY AWAY FROM EMPLOYERS, POTENTIALLY SAVING S&P 500 COMPANIES $700 BILLION 8 (2014).

72. The Institute of Medicine has defined the safety net as health care providers that have a legal mandate or mission of providing health care to patients regardless of their ability to pay and that treat a substantial share of patients who are uninsured, on Medicaid, or otherwise vulnerable. INST. OF MED., AMERICA'S HEALTH CARE SAFETY NET: INTACT BUT ENDANGERED 1 (2000).

73. *See* Irwin Redlener & Roy Grant, *America's Safety Net and Health Care Reform—What Lies Ahead?*, 361 NEW ENG. J. MED. 2201, 2202 (2009).

74. ACAD. HEALTH, THE IMPACT OF THE AFFORDABLE CARE ACT ON THE SAFETY NET 2–3 (2011).

75. *Id.*

76. INST. OF MED., *supra* note 72, at 2. Sixty-five million people live in federally designated Health Professional Shortage Areas, many of which have *no* health center whatsoever; and those that do have health centers may provide only limited services. Redlener & Grant, *supra* note 73, at 2202.

The ACA will make health insurance available to some groups that previously relied on safety-net providers.[77] Yet an estimated 23 million people will remain uninsured, either because they are excluded from the mandate or because they decide to pay a penalty instead of purchasing insurance.[78] Safety-net providers are concerned about their ability to treat this large uninsured population, in part because they are losing funding through the Medicaid Disproportionate Share Hospital ("DSH") program, which began being phased out in 2014.[79] Safety-net providers worry that "[t]hey may lose more in DSH payments than they will gain in other revenue."[80] In addition, patients may turn to safety-net providers for services that are not covered by their insurance plans.[81]

Finally, DACA recipients excluded from the ACA could potentially obtain care in emergency rooms. Under the Emergency Medical Treatment and Labor Act ("EMTALA"), hospitals are required to provide emergency care regardless of immigration status or ability to pay.[82] However, emergency care in this country remains in a dismal state. For the past twenty years, the rate of emergency room visits has increased at twice the rate of growth of the US population.[83] In 2014, the American College of Emergency Physicians ("ACEP") gave a grade of "D+" to the overall environment in which the emergency care system operates.[84] ACEP reports that this near-failing grade "reflects trouble for a nation that has too few emergency departments to meet the needs of a growing, aging population, and of the increasing number of people now insured as a result of the Affordable Care Act."[85]

---

77. For example, the expansion of the Medicaid program to cover individuals with income up to 133 percent of the federal poverty level will create a payment source for patients who were previously uninsured. Other formerly uninsured patients will be able to purchase insurance through the premium and cost-sharing subsidies that are now available to families with incomes between 100 and 400 percent of the federal poverty level. These individuals may no longer need to use safety-net providers, or they may be able to pay safety-net providers through their new insurance. *See* ACAD. HEALTH, *supra* note 74, at 3.

78. *Id.* at 4. In 2015, uninsured individuals were expected to represent twenty-two percent of health center patients. *Id.*

79. *Id.* This program gives money to states to subsidize certain hospitals that incur unreimbursed costs related to treating uninsured and Medicaid patients. *Id.*

80. *Id.*

81. *Id.* at 4–5. In particular, safety-net providers fear that increased demand for specialty services, such as mental health care, will strain their capacity. *Id.* at 5.

82. 42 U.S.C. § 1395dd (2014).

83. AM. COLL. OF EMERGENCY PHYSICIANS, AMERICA'S EMERGENCY CARE ENVIRONMENT: A STATE-BY-STATE REPORT CARD, at v (2014) [hereinafter ACEP STATE-BY-STATE REPORT CARD].

84. *Id.*

85. *Id.*

Although one of the selling points of the ACA was its potential to reduce emergency room visits, the opposite has actually happened. A 2014 survey shows that nearly half of emergency room physicians reported an increase in the number of patients since the ACA went into effect, and the vast majority (86 percent) expected the number to increase over the next three years.[86] One reason for this increase is that the millions of people who became eligible for Medicaid under the ACA cannot find physicians who will accept their insurance and therefore go to the emergency room for treatment instead.[87] Most emergency room physicians do not think their departments are equipped to handle this increase, and only one-third believe the ACA will have a positive long-term impact on access to emergency care.[88]

The obstacles to accessing both employment-based health insurance and safety-net providers, including emergency rooms, suggest that a substantial portion of DACA recipients will be unable to access any kind of affordable health care if kept out of the insurance programs under the ACA. Determining whether their exclusion from the ACA comports with the Equal Protection Clause is therefore a pressing legal issue.

II. SCRUTINIZING STANDARDS OF REVIEW FOR ALIENAGE CLASSIFICATIONS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[89] In 1886, the Supreme Court held that this provision applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[90] Nearly seventy years later, on the same day that it decided *Brown v. Board of Education*, the Court held that the Equal Protection Clause applies to the federal government through the Fifth Amendment Due Process Clause, since "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[91] In the immigration context,

86. MKTG. GEN., INC., 2014 ACEP POLLING SURVEY RESULTS 6, 9 (2014) [hereinafter ACEP POLLING SURVEY RESULTS].

87. ACEP STATE-BY-STATE REPORT CARD, *supra* note 83, at 1–2.

88. ACEP POLLING SURVEY RESULTS, *supra* note 86, at 10.

89. U.S. CONST. amend. XIV, § 1.

90. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (invalidating San Francisco's denial of permits to Chinese laundry operators).

91. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that racial discrimination in District of Columbia public schools violated the Due Process Clause of the Fifth Amendment); *see also* Brown v.

however, the Court has held that the Constitution *does* impose a lesser duty on the federal government.[92] While alienage-based classifications by states are generally subject to strict scrutiny, federal classifications usually receive only rational basis review.[93] The deference given to the federal government stems from the plenary power doctrine, which ties the federal immigration power to foreign affairs and national security, issues largely immune from judicial review.[94]

With respect to both state and federal classifications, however, significant questions that bear on the appropriate standard of review remain unanswered to this day. Regarding state classifications, there is currently a circuit split about whether strict scrutiny is limited to legal permanent residents ("LPRs") or extends to others who are lawfully present. With respect to federal classifications, the division of immigration authority between Congress and the President remains unclear, as evidenced by the pending litigation challenging the legality of the DACA and DAPA policies. Furthermore, the allocation of immigration authority *within* the executive branch has remained largely unexamined by courts and scholars alike, yet is highly relevant to assessing alienage-based classifications made by executive agencies. Another layer of complexity emerges when federal and state programs are entangled; courts have sliced this type of "Gordian knot" in conflicting ways.[95] These lacunae in the legal landscape of alienage-based classifications are all relevant to analyzing whether the exclusion of DACA recipients from the ACA

Bd. of Educ., 347 U.S. 483 (1954) (holding that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment).

92. Mathews v. Diaz, 426 U.S. 67, 85–86 (1976) (applying rational basis review to welfare rules that treated legal permanent residents and citizens differently).

93. *Compare Mathews*, 426 U.S. at 85–86 (applying rational basis review to federal welfare rules that treated legal permanent residents and citizens differently), *with* Graham v. Richardson, 403 U.S. 365, 375–76 (1971) (applying strict scrutiny to state welfare rules that treated legal permanent residents and citizens differently). There is an exception to the general rule that state-made classifications receive strict scrutiny when a state excludes noncitizens from participation in its democratic political institutions. In that situation, only rational basis review applies. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) ("The exclusion of aliens from basic governmental processes is . . . a necessary consequence of the community's process of political self-definition."); Ambach v. Norwick, 441 U.S. 68, 73–74 (1979) ("[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."); Sugarman v. Dougall, 413 U.S. 634, 648 (1973) (recognizing "a State's historical power to exclude aliens from participation in its democratic political institutions").

94. *See infra* notes 149–54 and accompanying text.

95. Bruns v. Mayhew, 750 F.3d 61, 66 (2014) ("[T]his case presents a Gordian knot of federal and state legislation effecting an adverse impact on resident aliens . . . .").

violates equal protection. This Part therefore addresses each of them in turn.

A. Discrimination by States

1. Strict Scrutiny for Legal Permanent Residents

Since the Supreme Court's 1971 decision in *Graham v. Richardson*, alienage-based classifications made by states are normally subject to strict scrutiny, which requires showing that the classification is necessary to achieve a compelling government interest.[96] In *Graham*, the Court examined two state statutes that denied welfare benefits to LPRs.[97] One statute made permanent residents ineligible for these benefits, while the other imposed a fifteen-year residency requirement for them to qualify.[98] For the first time, the Court found that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny," as "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[99] Applying strict scrutiny, the Court struck down both statutes as violations of the Equal Protection Clause, explaining that "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . making noncitizens ineligible."[100] Since *Graham*, the Court has repeatedly found that state laws treating citizens and noncitizens differently violate equal protection under strict scrutiny review.[101]

---

96. *Graham*, 403 U.S. at 375–76; *see also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 413, 420, 422 (1948) (holding unconstitutional a California statute that targeted individuals of Japanese descent by barring issuance of fishing licenses to persons "ineligible to citizenship" and explaining that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits").

97. *Graham*, 403 U.S. at 366–68.

98. *Id.*

99. *Id.* at 372 (footnotes omitted) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

100. *Id.* at 374.

101. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 217–18 (1984) (applying strict scrutiny to invalidate a Texas statute that required notaries public to be US citizens); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 601 (1976) (applying strict scrutiny to state restrictions on civil engineering licenses); *In re* Griffiths, 413 U.S. 717, 717–29 (1973) (applying strict scrutiny to invalidate a Connecticut statute excluding aliens from being licensed as attorneys); Sugarman v. Dougall, 413 U.S. 634, 643 (1973) (holding that the state's exclusion of aliens from civil service jobs denied them equal protection); Dandamudi v. Tisch, 686 F.3d 66, 79 (2d Cir. 2012) (applying strict scrutiny to invalidate a New York statute that prohibited nonimmigrants with temporary work visas from obtaining a pharmacist's license).

State statutes that discriminate among noncitizens likewise are considered classifications based on alienage and subject to strict scrutiny.[102] In *Nyquist v. Mauclet*, the Supreme Court considered a New York statute that imposed alienage-based restrictions on eligibility for state financial assistance for higher education.[103] To qualify, a student had to be a US citizen, an LPR with a pending application for citizenship, an LPR who was not yet qualified to apply for citizenship but who pledged to apply as soon as possible, or someone paroled into the United States as a refugee.[104] The statute was challenged on equal protection grounds by two LPRs who did not wish to become US citizens.[105] In defending the constitutionality of the statute, the state argued that "the statute distinguishe[d] only within the heterogeneous class of aliens and [did] not distinguish between citizens and aliens vel non."[106] According to the state, "[o]nly statutory classifications of the latter type . . . warrant strict scrutiny."[107] The Court rejected this argument, reasoning that the Arizona statute at issue in *Graham* "served to discriminate only within the class of aliens: Aliens who met the durational residency requirement were entitled to welfare benefits."[108] In *Nyquist*, the Court stressed that "[t]he important points are that [the statute] 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."[109] Since both of the appellees in the case were LPRs, the Court did not specifically address the issue of whether a state statute that harmed only non-LPRs would be constitutional.

---

102. Nyquist v. Mauclet, 432 U.S. 1, 11–12 (1977) (applying strict scrutiny to invalidate a New York statute that limited financial aid for higher education to citizens, those who had applied for citizenship, and those who declared an intent to apply when they became eligible); *Graham*, 403 U.S. at 371–74 (applying strict scrutiny to an Arizona statute that required fifteen years of residence in the United States for noncitizens to qualify for benefits but had no residency requirement for US citizens).

103. *Nyquist*, 432 U.S. at 2–4.

104. *Id.* at 3–4.

105. *Id.* at 4–6.

106. *Id.* at 8 (internal quotation marks omitted).

107. *Id.*

108. *Id.* at 8–9.

109. *Id.* at 9.

Nor has the Supreme Court addressed this issue in any subsequent cases. While the Supreme Court had an opportunity to clarify the standard of review for state laws that discriminate against individuals who have only temporary visas (as opposed to permanent residency) in *Toll v. Moreno*, it declined to do so.[110] There, the Court was asked to decide the constitutionality of a Maryland law that denied in-state tuition to individuals with G-4 visas, which are issued to the immediate family members of employees of international organizations.[111] The Court invalidated the law as preempted by Congress's detailed scheme for G-4 visa holders and therefore did not consider the equal protection issue.[112]

Consequently, although the Supreme Court has not distinguished among categories of lawfully present noncitizens in applying strict scrutiny to state laws, a circuit split has emerged on what standard of review applies to non-LPRs.

2. Circuit Split for Non-Legal Permanent Residents

The only distinction drawn by the Supreme Court in standards of scrutiny has been between individuals who are lawfully present and those who are undocumented. While the Court has applied strict scrutiny to the former, it indicated that rational basis review applies to the latter in *Plyler v. Doe*, which involved a Texas statute that prohibited undocumented children from attending public schools.[113] In *Plyler*, the Court found that undocumented children did not constitute a suspect class, reasoning that they fell outside of *Graham*'s reach because "their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[114]

---

110. Toll v. Moreno, 458 U.S. 1 (1982). This case was decided the same month as *Plyler v. Doe*, a seminal decision striking down as unconstitutional a Texas statute that prohibited undocumented children from attending school. Plyler v. Doe, 457 U.S. 202 (1982).

111. *Toll*, 458 U.S. at 3.

112. *Id.* at 17. Some commentators have suggested that the occupational licensing cases discussed above should also have been resolved through the preemption doctrine, since the federal immigration statute and regulations include relevant language about work authorization and licensing. *See* Jennesa Calvo-Friedman, Note, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597, 1621–22 (2014) (arguing that state laws barring nonimmigrants from certain licensed occupations undermine 8 U.S.C. § 1601, which emphasizes the need for noncitizens to be self-sufficient and rely on their own capabilities); Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, 7 MOD. AM. 12, 15 (2011) (discussing the relevance of 8 C.F.R. § 214.2(h)(4)(v)(A), which addresses state licensure as a requirement for obtaining a nonimmigrant visa with H-classification).

113. *Plyler*, 457 U.S. 202.

114. *Id.* at 223.

Although the Court purported to apply rational basis review in *Plyler*, it struck down the Texas statute under a heightened level of scrutiny.[115] The Court explained:

> In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State.[116]

The Court went on to find that the classification excluding undocumented children was unjustified by the State's interests in preserving resources, protecting itself against an influx of undocumented immigrants, providing high-quality education, or educating only those children likely to remain within its borders.[117] Since the classification did not further any substantial state interest, the Court concluded that denying "a discrete group of innocent children the free public education that it offers to other children" violated the Equal Protection Clause.[118]

Some federal appellate courts have gone further by restricting the application of strict scrutiny to state laws that discriminate against LPRs. Conflicting interpretations of Supreme Court precedents have resulted in a circuit split about whether strict scrutiny applies to nonimmigrants, a technical term for individuals who have temporary visas, not permanent residency. Nonimmigrant visas are granted for specific purposes and limited periods of time.[119] The Fifth and Sixth Circuits have held that rational basis review applies to nonimmigrants, whereas the Second Circuit has held that strict scrutiny applies to all lawfully present

---

115. *Id.* at 220 ("It is . . . difficult to conceive of a rational justification for penalizing these children for their presence within the United States."); *id.* at 223–24 (examining the "rationality" of the Texas statute and whether it "furthers some substantial goal of the State"). Justice Powell's concurrence noted that "review in a case such as [this] is properly heightened." *Id.* at 238 & n.2 (Powell, J., concurring).

116. *Id.* at 223–24 (majority opinion).

117. *Id.* at 227–30.

118. *Id.* at 230.

119. Examples of nonimmigrant visas include tourist visas, temporary work visas, student visas, investor visas, and visas for entertainers or athletes.

noncitizens.[120] The Ninth Circuit has also implicitly found that strict scrutiny applies to nonimmigrants.[121]

In *LeClerc v. Webb*, the Fifth Circuit applied rational basis review to a Louisiana Supreme Court rule that required applicants for admission to the Louisiana State Bar to be citizens or LPRs.[122] The court construed Supreme Court decisions such as *Graham* as justifying strict scrutiny based on two conditions specific to LPRs: (1) their similarity to citizens in their economic, social, and civic conditions; and (2) their inability to exert political power, despite this similarity.[123] The court then distinguished nonimmigrants on the basis that they are not "entrenched" in society like LPRs, their lack of political power is "tied to their temporary connection to this country," and "the numerous variations among nonimmigrant aliens' admission status make it inaccurate to describe them *as a class* that is 'discrete' or 'insular.'"[124] The court therefore rejected arguments that nonimmigrants constitute a suspect or quasi-suspect class and applied only rational basis review.[125] Judge Higginbotham, who dissented from the court's denial of a petition for rehearing en banc, cautioned that "judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship . . . . is a bold step not sanctioned by Supreme Court precedent."[126]

In a 2011 decision, *Van Staden v. St. Martin*, the Fifth Circuit relied on *LeClerc* in applying rational basis review to uphold a Louisiana rule restricting nursing licenses to permanent residents and citizens.[127] In that case, the appellant was a citizen of South Africa who had lived in the United States since 2001 and was a licensed practical nurse in Texas.[128] When she moved to Louisiana in 2007, she was denied a nursing license based solely on her immigration status, although that status authorized her to work as a nurse in the United States.[129] Van Staden applied for

120. Dandamudi v. Tisch, 686 F.3d 66, 72–74 (2d Cir. 2012); League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 530–36 (6th Cir. 2007); LeClerc v. Webb, 419 F.3d 405, 420–21 (5th Cir. 2005).

121. *See* Korab v. Fink, 797 F.3d 572 (9th Cir. 2014) (involving nonimmigrants residing in Hawaii under the Compact of Free Association with the United States).

122. *LeClerc*, 419 F.3d at 420.

123. *Id.* at 417.

124. *Id.*

125. *Id.* at 417–20.

126. LeClerc v. Webb, 444 F.3d 428, 429 (5th Cir. 2006) (Higginbotham, J., dissenting).

127. Van Staden v. St. Martin, 664 F.3d 56, 57–62 (5th Cir. 2011).

128. *Id.* at 57.

129. *Id.*

permanent resident status, but the Fifth Circuit found that a pending application was not enough to trigger strict scrutiny.[130] The court held that "*LeClerc* draws a clean line between permanent resident aliens and nonimmigrant aliens," and that LPR applicants like Van Staden "fall into the latter category, even if close to the former."[131]

The Sixth Circuit followed in the Fifth Circuit's footsteps in applying rational basis review to a Tennessee law that required proof of US citizenship or permanent resident status to obtain a driver's license.[132] The Sixth Circuit distinguished *Nyquist*, where the Supreme Court had applied strict scrutiny to a New York law that denied state financial assistance for higher education to nonimmigrants as well as LPRs, primarily on the basis that both of the plaintiffs in that case were LPRs.[133] The court then adopted the Fifth Circuit's reasoning in *LeClerc*, distinguishing nonimmigrants from LPRs on the basis that they "are admitted to the United States only for the duration of their authorized status, are not permitted to serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits."[134] In his dissenting opinion, Judge Gilman advocated "taking the Supreme Court at its word when it reaffirmed in *Graham* that 'classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.'"[135]

The Second Circuit has completely rejected the Fifth and Sixth Circuit's analysis.[136] In *Dandamudi v. Tisch*, the Second Circuit explained that the Supreme Court had never used proximity to citizenship as a test for determining whether a given group of noncitizens should be considered a suspect class entitled to strict scrutiny.[137] Furthermore, the Second Circuit found that "the Supreme Court recognizes aliens generally as a discrete and insular minority without significant political clout."[138] The court also reasoned that even if the appropriate level of scrutiny did depend on the noncitizens' proximity to citizenship, it would still apply strict scrutiny because nonimmigrants pay taxes, are sometimes allowed to

130. *Id.* at 60–61.
131. *Id.* at 59.
132. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 532–33 (6th Cir. 2007).
133. *Id.*
134. *Id.* at 533.
135. *Id.* at 542 (Gilman, J., dissenting) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)).
136. Dandamudi v. Tisch, 686 F.3d 66, 75–79 (2d Cir. 2012).
137. *Id.* at 75–77.
138. *Id.* at 75.

have the intent of remaining permanently in the United States, and were authorized by the federal government to work in the very occupation from which New York was excluding them.[139] The court noted that nonimmigrants often remain in the United States for many years and frequently become LPRs.[140] Finally, the Second Circuit found that applying rational basis review to nonimmigrants would create absurd results, since the Supreme Court had applied *heightened* rational basis review to undocumented children in *Plyler*.[141]

While the Ninth Circuit has not explicitly addressed this issue like the Second Circuit, it has implicitly indicated that strict scrutiny would apply to nonimmigrants subjected to discriminatory state laws. In *Korab v. Fink*, the court considered whether nonimmigrants residing in Hawaii under a Compact of Free Association with the United States ("COFA residents") could be excluded from state-funded health care benefits pursuant to the Welfare Reform Act of 1996.[142] The focus of the court in that case was whether to categorize the discrimination as state or federal, since that would dictate the standard of review.[143] At no point did the court suggest that the nonimmigrant status of the COFA residents triggered rational basis review. If that were the case, the court could have resolved the case without analyzing a complex, hybrid statute.[144]

A lacuna in the law remains not only regarding the standard of review for nonimmigrants, but also for individuals who are authorized to be in the country but do not have a legal status. This group includes, among others, noncitizens with deferred action status or temporary protected status, individuals who have been paroled into the United States or who have pending applications for various forms of relief (such as asylum and cancellation of removal), and noncitizens granted withholding of removal or protection under the Convention Against Torture based on a risk of persecution or torture in their home countries. All of these individuals are lawfully present in the United States, as they have authorization to be here for at least a temporary period of time, do not accrue "unlawful presence," and are eligible to apply for work authorization.[145] For some of these

139. *Id.* at 77.
140. *Id.* at 78.
141. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 230 (1982)).
142. Korab v. Fink, 797 F.3d 572 (9th Cir. 2014).
143. *Id.* at 580–84.
144. *See id.* at 585 (Bybee, J., concurring).
145. *See generally* 8 C.F.R. § 274a.12 (2016) (describing classes of aliens authorized to accept employment); Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigration Servs. et al., to Field Leadership (May 6,

categories, the individual may be authorized to remain in the United States even after a deportation order is issued. For example, when a noncitizen is granted withholding of removal or protection under the Convention Against Torture, a deportation order is issued, but the deportation is withheld indefinitely. Similarly, individuals who are ordered deported but obtain a stay of removal may be granted deferred action status for a temporary period.

So far, only the Ninth Circuit has had the opportunity to consider what standard of review applies to these categories of noncitizens with "less" than nonimmigrant status. In a recent case, the court considered the constitutionality of an Arizona statute that prohibited DACA recipients from using their work permits as evidence of their lawful presence in the United States, while allowing similarly situated individuals with pending applications for cancellation of removal and adjustment of status to do so.[146] In reversing the denial of a preliminary injunction, the court found that the equal protection claim would likely succeed.[147] However, it did not decide if the standard of review is strict scrutiny or rational basis or something in between, because it found that Arizona's law would not even survive the rational basis test.[148] Thus, courts have yet to weigh in on the proper standard of review for equal protection claims involving noncitizens with deferred action status or other types of authorized periods of stay that do not amount to a visa of any kind.

B. Discrimination by the Federal Government

1. Rational Basis Review and the Plenary Power

Although alienage-based classifications are subject to strict scrutiny when made by states, at least if they affect LPRs, such classifications receive great deference when made by the federal government due to the plenary power doctrine.[149] The Court has held that Congress possesses plenary power over immigration based on its constitutional authority to

---

2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

146. Ariz. Dream Act Coalition v. Brewer, 757 F.3d 1053, 1063–67 (9th Cir. 2014).

147. *Id.*

148. *Id.* at 1065–67.

149. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 853–54 (1987); *see also generally* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (arguing that the Court has been unusually deferential in the area of immigration).

establish a "Uniform Rule of Naturalization" and "regulate Commerce with foreign Nations."[150] While the plenary power doctrine was initially articulated in a case upholding the exclusion of Chinese laborers from the United States, the Court has found that it extends far beyond the admission and exclusion of immigrants, giving Congress power over almost all aspects of noncitizens' lives.[151] During the early part of the twentieth century, the Supreme Court discussed the plenary power only in relation to Congress.[152] Subsequent decisions, however, have explicitly extended the plenary power to the President, based on the President's inherent authority over foreign affairs, which derives from the authority "to make Treaties," to "appoint Ambassadors, other public Ministers, and Consuls," and to "receive Ambassadors and other public Ministers."[153] The Court has also found that the power to exclude noncitizens is inherent to national sovereignty.[154]

While the plenary power is quite broad, it does not render government action completely immune from judicial review. The Supreme Court has

---

150. U.S. CONST. art. I, § 8, cls. 3–4; Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (noting that Congress has "broad power over naturalization and immigration"); DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445, *as recognized in* Chamber of Commerce v. Whiting, 563 U.S. 582, 588–90 (2011); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) (citing Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)) ("The authority to control immigration . . . is vested solely in the Federal government.").

151. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 53–73 (1998); Legomsky, *supra* note 149, at 255–60; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

152. *E.g.*, Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U.S. 329, 334 (1932) ("Under the Constitution and laws of the United States, control of the admission of aliens is committed exclusively to Congress . . . ."); Lapina v. Williams, 232 U.S. 78, 88 (1914) ("The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country."); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [immigration].").

153. U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3; *see also, e.g.*, *Mathews*, 426 U.S. at 81 (referring to the "narrow standard of review of decisions made by the Congress or the President in the area of immigration"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress").

154. *Knauff*, 338 U.S. at 542.

acknowledged its limits in cases dating back at least one hundred years.[155] In *Knauff*, the Court recognized that judicial review remains available for constitutional and statutory claims.[156] The Court's language in *Kleindienst v. Mandel*, which involved the Attorney General's discretionary decision to deny a waiver of inadmissibility, further found that the Executive did not have "unfettered discretion."[157] There, the Court reviewed the decision to ensure that there was a "facially legitimate and bona fide" reason for the agency's exercise of discretion.[158]

In *Mathews v. Diaz*, decided a few years later, the Court explicitly applied rational basis review to alienage-based classifications by the federal government.[159] *Diaz* upheld distinctions based on alienage in the federal Medicare statute, which required legal permanent residents, but not citizens, to satisfy a five-year residency requirement to qualify for certain benefits.[160] Due to the "narrow standard of review of decisions made by the Congress or the President in the area of immigration," the Court found that Congress is allowed to enact laws that treat citizens and noncitizens differently, as long as those laws are rationally related to a legitimate government purpose.[161] Accordingly, the Court found it "unquestionably reasonable for Congress to make an alien's [benefit] eligibility depend on both the character and the duration of his residence."[162] Since *Diaz*, federal appellate courts have repeatedly upheld alienage classifications in federal statutes pertaining to benefits under rational basis review.[163] Only

155. *See, e.g.*, Gegiow v. Uhl, 239 U.S. 3, 9 (1915) ("[W]hen the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus."); Ekiu v. United States, 142 U.S. 651, 660 (1892) (reasoning that even though the political branches have plenary power, a noncitizen denied entry into the United States "is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful").

156. *Knauff*, 338 U.S. at 543–46 (rejecting the petitioner's claims that the regulations were unreasonable or that the War Brides Act required a hearing, and acknowledging that the Attorney General had acted pursuant to valid regulations); *see also* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that the plenary power "is subject to important constitutional limitations"); INS v. St. Cyr, 533 U.S. 289, 301, 311 (2001) (internal quotation marks omitted) (finding that judicial review is available "as a means of reviewing the legality of [the order of removal]" even where the statute "preclud[es] judicial review to the maximum extent possible under the Constitution").

157. Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

158. *Id.*

159. 426 U.S. 67 (1976).

160. *Id.* at 79–87.

161. *Id.* at 81–89.

162. *Id.* at 82–83.

163. *E.g.*, Lewis v. Thompson, 252 F.3d 567, 582–84 (2d Cir. 2001) (upholding Welfare Reform Act restrictions on alien eligibility for state-administered prenatal Medicaid benefits); Aleman v. Glickman, 217 F.3d 1191, 1197–1204 (9th Cir. 2000) (same for food stamps); City of Chicago v. Shalala, 189 F.3d 598, 603–09 (7th Cir. 1999) (same for supplemental security income ("SSI") and

in a handful of cases have courts invalidated federal government action pertaining to immigration as irrational.[164]

2. Allocation of Power Between Congress and the President

Although the plenary power applies to both Congress and the President, the precise allocation of power between the legislative and executive branches remains far from clear.[165] Despite the development of a detailed Immigration and Nationality Act ("INA"), Presidents have exercised significant control over immigration.[166] Primarily, the Executive exercises power over immigration through prosecutorial discretion regarding whom to deport, which means that the President's power is "almost entirely at the back end of the system."[167]

President Obama, through the Secretary of DHS, presented the expanded DACA and DAPA policies as an exercise of such prosecutorial discretion on a large scale.[168] Cases such as *Heckler v. Chaney* indicate that an agency's decision about whether to exercise its enforcement authority, or to exercise it in a particular way, is largely immune from judicial review.[169] Yet a lawsuit brought by twenty-six states is currently challenging the President's authority to implement expanded DACA and DAPA.[170] The states counter *Chaney* with *Youngstown*, where Justice Jackson famously set forth a three-part framework for analyzing deference

food stamps); Rodriguez v. United States, 169 F.3d 1342, 1346–53 (11th Cir. 1999) (same for SSI and food stamps).

164. Some examples of cases where the Court actually struck down a federal alienage-based classification under rational basis review include: Yeung v. INS, 76 F.3d 337, 341 (11th Cir. 1995) (striking down under rational basis review a statute that permitted discretionary relief to those seeking to enter the country but not to those already here), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized in* Villalva v. U.S. Attorney Gen., 591 F. App'x 732, 735 (11th Cir. 2014); Wauchope v. U.S. Dep't of State, 985 F.2d 1407, 1412–18 (9th Cir. 1993) (holding a classification irrational that conferred citizenship on the children of some male citizens but not on the children of similarly situated female citizens); Aguayo v. Christopher, 865 F. Supp. 479, 488–91 (N.D. Ill. 1994) (same); *see also* Chin, *supra* note 151, at 53–73 (arguing that racial discrimination in immigration laws would not now be permitted under the rational basis standard).

165. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

166. *See id.* at 485–91.

167. *Id.* at 519.

168. Memorandum on Expanded DACA and DAPA, *supra* note 6.

169. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985); *see also* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he Government's enforcement priorities, and . . . the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

170. *See supra* note 17 and accompanying text.

to executive power.[171] Under that framework, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb."[172]

The district court judge who issued a temporary preliminary injunction in February 2015 halting the expanded DACA and DAPA policies agreed with the states that *Chaney* did not govern.[173] The court found that *Chaney* applies to agency *inaction*, but that DAPA constitutes affirmative agency action.[174] Specifically, the court found that DAPA "awards legal presence . . . as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel."[175] In addition, the district court in *Texas* found that there was no specific statute authorizing expanded DACA and DAPA, noting that the President announced it was Congress's failure to pass a law that had prompted him to "change the law."[176] In fact, the court found that expanded DACA and DAPA "contradict[] Congress' statutory goals."[177] In stating that "the discretion given to the DHS Secretary is not unlimited,"[178] the decision calls into question the precise reach of the President's supposedly plenary power over immigration and where the line between executive and legislative power should be drawn.

The Fifth Circuit agreed with this reasoning, finding that "[d]eferred action . . . is much more than non-enforcement," and that the expanded DACA and DAPA policies exceeded the discretionary authority given to

171. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

172. *Id.* at 637–38; *see also* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002) ("Justice Jackson's concurrence outlined the three now-canonical categories that guide modern analysis of separation of powers . . . .").

173. Texas v. United States, 86 F. Supp. 3d 591, 641 (S.D. Tex. 2015).

174. *Id.* at 654.

175. *Id.*; *see also id.* at 658–59. Similarly, an earlier decision by a federal district court judge in Pennsylvania had held, in a case involving a single individual, that the President's DACA and DAPA programs went "beyond prosecutorial discretion" and amounted to legislation by establishing a relatively rigid framework for considering applications for deferred action. United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 786–88 (W.D. Pa. 2014); *see also* John C. Eastman, *From* Plyler *to* Arizona*: Have the Courts Forgotten About* Corfield v. Coryell*?*, 80 U. CHI. L. REV. 165, 187 (2013) (stating that the President's enforcement discretion cannot involve a "comprehensive and sweeping immigration scheme" that contravenes the Immigration and Nationality Act).

176. *Texas*, 86 F. Supp. 3d at 657 & n.71 (quoting Press Release, The White House Office of the Press Sec'y, Remarks by the President on Immigration—Chicago, IL (Nov. 25, 2014)); *see also id.* at 661 ("[N]o statute gives the DHS the discretion it is trying to exercise here.").

177. *Id.* at 663.

178. *Id.* at 660.

DHS.[179] The court found that the Secretary of DHS's interpretation of the INA's provisions "would allow him to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility."[180] The court further explained that "[e]ven with 'special deference' to the Secretary, the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization."[181] According to the court, broad grants of authority in the INA "cannot reasonably be construed as assigning decisions of vast economic and political significance, such as DAPA, to an agency."[182] The detailed dissenting opinion by Judge King challenged this reasoning, concluding that deferred action is a presumptively unreviewable brand of prosecutorial discretion.[183] This case highlights deeply contested areas in the allocation of immigration power between Congress and the executive branch that will eventually need to be resolved by a full complement of the Supreme Court.[184]

3. Allocation of Power Within the Executive Branch

Not only is the allocation of immigration authority between the two political branches of government unclear, but so is the allocation of that power *within* the executive branch, which remains largely unexplored by courts and scholars alike. There is no doubt that alienage-based classifications made by the executive agency with direct responsibility over immigration, the Department of Homeland Security, would receive only rational basis review. But what if Congress delegates the authority to make alienage-based classifications to another agency that has no

179. Texas v. United States, 809 F.3d 134, 166 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

180. *Id.* at 184.

181. *Id.* (footnote omitted) (quoting Texas v. United States, 106 F.3d 661, 665 (5th Cir. 1997)).

182. *Id.* at 183 (footnote omitted) (internal quotation marks omitted). In reaching this conclusion, the majority relied, in part, on *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted) ("Whether those [tax] credits are available on Federal Exchanges [under the ACA] is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."). *See Texas*, 809 F.3d at 181–82.

183. *Texas*, 809 F.3d at 218 (King, J., dissenting).

184. As mentioned above, an equally divided Supreme Court affirmed the Fifth Circuit's decision in a one-sentence per curiam decision. *See* United States v. Texas, No. 15-674, slip op. at 1 (U.S. June 23, 2016) (per curiam).

immigration expertise, such as the Department of Agriculture, the Social Security Administration, or the Department of Transportation?

The only Supreme Court case that addresses this issue has been rightly described as "opaque."[185] In *Hampton v. Mow Sun Wong*, which was decided the same day as *Mathews v. Diaz*, the Court considered the constitutionality of a regulation issued by the US Civil Service Commission that excluded all persons except US citizens and natives of American Samoa from employment in most positions of federal service.[186] One thing that *Mow Sun Wong* made clear is that the powers Congress and the President have over immigration do not mean that *any federal entity* automatically evades judicial scrutiny in creating classifications based on alienage. The Court expressly rejected the argument that "the federal power over aliens is so plenary that *any agent* of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[187]

The Court explained that "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."[188] In determining whether an agency's regulation was intended to serve an overriding national interest, the Court set forth two alternative tests: (1) whether the agency had direct responsibility over immigration; and (2) whether the agency had an express mandate from Congress or the President.[189]

First, the Court examined whether the agency that promulgated the rule had "direct responsibility for fostering or protecting" the overriding national interest.[190] The Court found that the Civil Service Commission had "no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for

185. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2371 (2001) ("The Court's reasoning in *Hampton* was notably opaque . . . ."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 337 (2000) ("To say the least, *Mow Sun Wong* is an opaque opinion.").

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

187. *Id.* at 101 (emphasis added); *see also* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 211–12 (1994) (noting that in *Mow Sun Wong*, "the Court held that a federal interest in immigration and alienage matters must be articulated by those who are institutionally competent to do so").

188. *Mow Sun Wong*, 426 U.S. at 103.

189. *Id.*

190. *Id.*

naturalization policies."[191] The Court stressed that it was "not willing to presume that the Chairman of the Civil Services Commission . . . was deliberately fostering an interest so far removed from his normal responsibilities."[192] Upon examining the interests that supposedly supported the regulation excluding noncitizens from federal employment, the Court found that all except one (administrative convenience) were "not matters which are properly the business of the Commission."[193] The Court then rejected administrative convenience as a justification for the regulation, applying what appears to be a due process balancing test to conclude that "the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy" outweighed this "hypothetical justification."[194]

The second test used by the Court to determine if the regulation was intended to serve an overriding national interest involved analyzing whether the regulation was "expressly mandated by the Congress or the President."[195] Congress had delegated to the President the power to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service."[196] The President, in turn, had issued an Executive Order directing the Civil Service Commission to "establish standards with respect to citizenship."[197] Pursuant to this authority, the Civil Service Commission had promulgated the regulation barring noncitizens from federal employment.[198]

The Court did not find Congress's general delegation of authority sufficient to justify the regulation and, after searching the Appropriations Acts, found no evidence of "either Congressional approval or disapproval of the specific Commission rule."[199] Turning next to the President's Executive Order, the Court explained that even if this Order allowed the Commission to require citizenship for all federal positions, "the decision to impose the requirement was made by the Commission rather than the President."[200] In other words, the President's Executive Order did not

191. *Id.* at 114.
192. *Id.* at 105.
193. *Id.* at 115.
194. *Id.* at 115–16.
195. *Id.* at 103.
196. 5 U.S.C. § 3301(1) (2014); *Mow Sun Wong*, 426 U.S. at 114–15.
197. *Mow Sun Wong*, 426 U.S. at 111.
198. *Id.*
199. *Id.* at 103–16.
200. *Id.* at 111–12.

expressly mandate the Commission's rule, as evidenced by the Commission's ability to either retain or modify the citizenship requirement without further authorization from the President or Congress.[201]

The Court's findings that the Civil Service Commission had no direct responsibility over immigration-related national interests, and that neither Congress nor the President had expressly mandated the exclusion of noncitizens from federal employment, both played a critical role in the holding that the regulation was invalid.[202] A third factor that contributed to the Court's decision was the fact that the regulation raised a constitutional question. It is because the regulation "deprive[d] a discrete class of persons of an interest in liberty on a wholesale basis" that the Court found that "some judicial scrutiny" was required.[203] Although the Court never specified what level of scrutiny was appropriate, its decision to strike down the regulation indicates a heightened standard of review.[204] To be clear, the Court did not find that the Civil Service Commission had exceeded its delegated authority in promulgating the regulation.[205] Rather, the Court found that the agency's regulation would not be given the deferential review that federal classifications involving alienage normally receive.[206]

The reasoning in *Mow Sun Wong* resonates with the Supreme Court's 2015 decision in *King v. Burwell*, which involved a challenge to an IRS regulation that authorized tax credits for purchases on both state and federal health insurance exchanges established under the ACA.[207] There, the petitioners argued that the ACA only authorized tax credits for health insurance purchased through state exchanges.[208] In an unusual step, the Court decided not to apply *Chevron* deference but to interpret the statutory language itself, reasoning that tax credits are one of the ACA's key reforms, and "had Congress wished to assign that question to an agency, it

201. *Id.* at 112–14.

202. *See supra* notes 190–201 and accompanying text.

203. *Mow Sun Wong*, 426 U.S. at 103.

204. *See* Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 DUKE J. CONST. L. & PUB. POL'Y 93, 99–100 (2007) (interpreting *Mow Sun Wong* to hold that a heightened standard of judicial review is required where the decision to discriminate is not made by Congress or the President).

205. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1774 (2001) (arguing that *Mow Sun Wong* is a leading case on "constitutional 'who' rules"); Hartley, *supra* note 204, at 98–100.

206. *Mow Sun Wong*, 426 U.S. 88.

207. King v. Burwell, 135 S. Ct. 2480 (2015).

208. *Id.* at 2487.

surely would have done so expressly."[209] The Court found it "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."[210] Even without the specter of the constitutional issues that existed in *Mow Sun Wong*, the Court was skeptical that Congress would allow an agency to make an important decision in an area where it lacked relevant expertise.

Similarly, in *Gonzales v. Oregon*, a case about physician-assisted suicide, the Court was wary of the Attorney General's "claimed authority to determine appropriate medical standards."[211] The Court reasoned:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.[212]

Any deference that the Court normally would have given to the Department of Justice's interpretation was "tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."[213]

The decisions in *Mow Sun Wong*, *King*, and *Gonzales* all demonstrate the Court's reluctance to defer to an agency's interpretation of an ambiguous statutory provision if the subject is outside the agency's area of expertise.[214] When constitutional issues are at stake, the need for expertise is especially important. While *Wong* has not had many progeny, it remains good law and indicates that executive agencies are not always equivalent in their authority to create alienage-based classifications.[215]

---

209. *Id.* at 2489.

210. *Id.*

211. 546 U.S. 243, 266 (2006).

212. *Id.* at 266–67 (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991)).

213. *Id.* at 269.

214. *Cf.* Sunstein, *supra* note 185, at 337 ("The narrowest reading of the opinion [in *Mow Sun Wong*] is that the Court will not interpret an ambiguous statutory provision to allow an agency to reach a constitutionally questionable decision on a subject outside its expertise.").

215. Justice Powell relied on *Wong* in two cases involving race-conscious programs. *See* Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring) (emphasis added) (reasoning that "the legitimate interest in creating a race-conscious remedy is not compelling unless an *appropriate governmental authority* has found that [past discrimination] has occurred"); Regents of the Univ. of

C. Discrimination Pursuant to Federal-State Hybrids

Under the framework established by *Graham* and *Mathews*, laws that would violate equal protection if enacted by a state are usually legitimate if enacted by Congress.[216] The analysis becomes more complicated, however, when the federal government authorizes states to discriminate based on alienage.[217] The Naturalization Clause authorizes Congress "[t]o establish an uniform Rule of Naturalization . . . throughout the United States."[218] Accordingly, *Plyler* advised, "if the Federal Government has by *uniform rule* prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."[219] But courts do not always agree on what constitutes a "uniform" rule. In fact, courts are currently divided about what standard of review applies to alienage-based eligibility restrictions in state laws implementing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Reform Act"), as some have concluded that the statute prescribes a uniform rule, while others see no such uniformity.

The Welfare Reform Act provides eligibility requirements regarding noncitizens' access to both federal and state benefits. For state-funded benefits, the Act creates a category of noncitizens to whom states must provide all benefits, another category of noncitizens to whom states cannot provide any benefits, and a third category of noncitizens for whom states are given discretion to determine what, if any, benefits to provide.[220] This third category, which allows states to determine benefit eligibility based on alienage, has been challenged in both federal and state courts. On the federal level, three appellate courts—the First, Ninth, and Tenth Circuits—have addressed this issue and upheld state restrictions under rational basis review.[221] On the state level, the highest courts of New

---

Cal. v. Bakke, 438 U.S. 265, 309–10 (1978) (rejecting the Regents' affirmative action plan and explaining that the Regents lacked the "capability" to make the necessary findings and adopt the policy, as it was not within their "broad mission" and they did not have a mandate to do so from the state legislature).

216. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

217. *See generally* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

218. U.S. CONST. art I, § 8, cl. 4.

219. Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (emphasis added).

220. 8 U.S.C. §§ 1621–1624 (2014).

221. Korab v. Fink, 797 F.3d 572 (9th Cir. 2014); Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004); *see also* Bruns v. Mayhew, 750 F.3d 61 (1st Cir. 2014) (denying the equal protection claim on the basis that the Medicaid-eligible noncitizens were not similarly situated to citizens).

York, Maryland, and Massachusetts have all applied strict scrutiny and struck down such restrictions as a violation of equal protection. Connecticut's Supreme Court applied rational basis review, but only after finding that the state statute did not actually discriminate based on alienage.[222]

1. Decisions Applying Rational Basis Review

In *Soskin v. Reinertson*, the Tenth Circuit considered the argument that allowing states to determine benefit eligibility under the Welfare Reform Act violated the Naturalization Clause of the US Constitution, which requires Congress to "establish an uniform Rule of Naturalization" and has been interpreted broadly to refer to federal control over the status of aliens.[223] In rejecting this argument, the Court examined the historical origins of the Naturalization Clause, which was a response to divergent state naturalization laws that allowed an alien ineligible for citizenship in one state to become a citizen in another state and then return to the original state as a citizen entitled to all of its privileges and immunities.[224] The Tenth Circuit found that the purpose of the uniformity requirement was not undermined by the discretion given to states under the Welfare Reform Act because "the choice by one state to grant or deny . . . benefits to an alien does not require another state to follow suit."[225]

The Ninth Circuit recently agreed with the Tenth Circuit's analysis in *Korab v. Fink*, finding that the Welfare Reform Act as a whole "establishes a uniform federal structure for providing welfare benefits to distinct classes of aliens," and that "a state's limited discretion to implement a plan for a specified category of aliens does not defeat or undermine uniformity."[226] Analogizing to bankruptcy law, the court explained that the principle of uniformity does not require the elimination of differences among states, but rather that the basic operation of the

222. *Compare* Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006), Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262 (Mass. 2011), *and* Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085 (N.Y. 2001), *with* Hong Pham v. Starkowski, 16 A.3d 635 (Conn. 2011) (applying rational basis review).

223. U.S. CONST. art. I., § 8, cl. 4; *Soskin*, 353 F.3d at 1256–57.

224. *Soskin*, 353 F.3d at 1256–57; *see also* Gibbons v. Ogden, 22 U.S. 1, 36 (1824); THE FEDERALIST NO. 42 (James Madison).

225. *Soskin*, 353 F.3d at 1257.

226. *Korab*, 797 F.3d at 581.

federal statute be uniform.[227] Accordingly, the Ninth Circuit upheld Hawaii's decision to deny Medicaid benefits to noncitizens from three Micronesian nations who were lawfully present in the country as nonimmigrants pursuant to Compacts of Free Association that those nations had with the United States.[228] The case, however, produced three separate opinions, and it does not appear that two of the judges actually agreed on the equal protection analysis. Judge Bybee, who wrote a concurring opinion, based his vote on a preemption analysis, acknowledging that "if we looked exclusively to equal protection principles, I think it is likely that Hawai'i's law would fall."[229]

The dissents in *Soskin* and *Korab* argued that strict scrutiny was the correct standard of review, stressing *Graham*'s warning that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[230] Both dissents challenged the majorities' conclusion that Congress had created a uniform law in allowing states to decide whether to restrict eligibility for benefits for certain noncitizens. Judge Clifton, dissenting in *Korab*, noted that "[a] federal 'direction' that points in two opposite ways is not a direction" and characterized Congress's delegation of power to the states as a "lit firecracker, at risk of exploding when a state exercised its discretion to discriminate on the basis of alienage."[231] He found that the majority's analogy to the conceptualization of uniformity in bankruptcy law failed to fit because that analogy ignored "the crucially important counterweight" of the Equal Protection Clause, which is absent from the bankruptcy arena.[232] In Judge Clifton's view, "[t]he option given to the states by Congress to decide whether to treat aliens differently was illusory," in light of the Supreme Court's decision in *Graham*.[233] Both dissents also noted that, under *Graham*, a state's financial condition does not provide a compelling justification to treat noncitizens differently.[234]

While the First Circuit reached the same conclusion as the Tenth and Ninth Circuits in reviewing Maine's legislation terminating noncitizens

227. *Id.* at 581–82. For a critique of this analogy to bankruptcy law, see Wishnie, *supra* note 217, at 535–37.

228. *Korab*, 797 F.3d at 577–84.

229. *Id.* at 597–98 (Bybee, J., concurring).

230. Graham v. Richardson, 403 U.S. 365, 382 (1971); *Korab*, 797 F.3d at 599, 602–05 (Clifton, J., dissenting) (citing *Graham*); *Soskin*, 353 F.3d at 1265–68, 1270–75 (Henry, J., dissenting) (same).

231. *Korab*, 797 F.3d at 602, 605 (Clifton, J., dissenting).

232. *Id.* at 603–04.

233. *Id.* at 599.

234. *Id.* at 600; *Soskin*, 353 F.3d at 1272–73 (Henry, J., dissenting).

from state benefits, it applied a different analysis.[235] The court found that the disparate treatment of noncitizens was not attributable to Maine's statute but to the Welfare Reform Act's alienage-based restrictions on eligibility for public welfare benefits.[236] Accordingly, the court found "no class of similarly situated citizens with whom the appellants can be compared vis-à-vis the state of Maine," which undermined the equal protection claim.[237] In light of its finding that Maine had drawn no distinctions based on alienage, the court found it unnecessary to reach the issue of whether Maine was following a uniform federal policy.[238] Thus, not only are courts divided about the standard of review, but the courts that have rejected equal protection challenges do not agree on the reasoning.

2. Decisions Applying Strict Scrutiny

Like the dissents in the Ninth and Tenth Circuit decisions discussed above, the three state courts that applied strict scrutiny to strike down similar state statutes under the Equal Protection Clause reasoned that Congress had failed to prescribe a "uniform" rule by allowing states to determine for themselves the extent to which they would discriminate against certain categories of noncitizens. In *Matter of Aliessa*, New York's highest court addressed an equal protection challenge to a state law that implemented title IV of the 1996 Welfare Reform Act.[239] Prior to that Act, New York had provided state Medicaid to needy recipients without distinguishing between legal aliens and citizens.[240] The court examined "whether title IV can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility."[241] In holding that Congress could not authorize such discrimination, the court relied heavily on *Graham*, which had explained that "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the]

235. Bruns v. Mayhew, 750 F.3d 61 (1st Cir. 2014).
236. *Id.* at 71.
237. *Id.*
238. *Id.*
239. Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085 (N.Y. 2001).
240. *Id.* at 1089–90.
241. *Id.* at 1096–99.

explicit constitutional requirement of uniformity."[242] The court reasoned that title IV does not impose a uniform immigration rule for states to follow, as it authorizes states to extend state benefits even to aliens not lawfully present, while also authorizing states to withhold state Medicaid even from aliens eligible for federal Medicaid.[243] In other words, "States are free to discriminate in either direction—producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics."[244] According to the court, a uniform rule would require each state to "carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy."[245] The court concluded that title IV was "directly in the teeth of *Graham*" by authorizing states to extend the ineligibility period for federal Medicaid for LPRs beyond five years and terminate federal Medicaid eligibility for refugees and asylees after seven years. Indeed, the court found that title IV went "significantly beyond what the *Graham* Court declared constitutionally questionable" by "impermissibly authoriz[ing] each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid."[246] The court therefore applied strict scrutiny and held that the state law violated equal protection.[247]

The Court of Appeals of Maryland agreed with the reasoning of the New York Court of Appeals. Prior to 2006, Maryland chose to provide non-emergency medical benefits to LPRs excluded from federal benefits by the Welfare Reform Act because they did not satisfy a five-year residency requirement.[248] Maryland's Fiscal Year 2006 budget cut off these benefits.[249] In *Ehrlich v. Perez*, the court considered an equal protection challenge to the termination of benefits for this group of LPRs.[250] The parties agreed that if Congress had prescribed "a truly uniform rule" for the treatment of aliens, and a state abided by that rule in discriminating against or between resident aliens, then an equal protection challenge would receive only rational basis review.[251] After a lengthy analysis of Supreme Court decisions, the court assumed, without deciding,

242. *Id.* (quoting Graham v. Richardson, 403 U.S. 365, 382 (1971)).
243. *Aliessa*, 754 N.E.2d at 1098.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 1098–99.
248. Ehrlich v. Perez, 908 A.2d 1220, 1225 (Md. 2006).
249. *Id.*
250. *See generally id.*
251. *Id.* at 1232.

that this "uniform rule" principle was correct.[252] But the court found that the Welfare Reform Act prescribed no such uniform rule, since Congress had provided the states with "unbridled discretion" to decide whether or not to provide state-funded medical benefits to resident aliens who did not meet the five-year residency requirement.[253] The court reasoned that Congress's "grant of discretion, without more, is not a uniform rule for purposes of imposing only a rational basis test."[254] In other words, "[t]his laissez faire federal approach to granting discretionary authority to the States . . . does not prescribe a single, uniform or comprehensive approach."[255]

Along the same lines, from 2006 to 2009, Massachusetts allowed aliens who are federally ineligible under the Welfare Reform Act to participate in the state's Commonwealth Care Health Insurance Program.[256] While the program is supported by both state and federal funds, only state funds were used to subsidize federally ineligible enrollees.[257] In 2009, the state legislature passed a statute that adopted the same eligibility standards set forth in the Welfare Reform Act.[258] Residents of Massachusetts who lost their health insurance or were found ineligible based on their alienage brought a class action arguing that their right to equal protection had been violated.[259] The Supreme Judicial Court of Massachusetts determined that strict scrutiny was the appropriate standard of review.[260] The court stressed that the Welfare Reform Act allows States to *choose* whether or not to follow federal eligibility rules and "merely declares that Federal policy will not be thwarted if States decide to discriminate against qualified aliens."[261] In this situation, "[w]here the State is left with a range of options including discriminatory and nondiscriminatory policies, its selection amongst those options must be reviewed under the standards applicable to the State and not those applicable to Congress."[262] The court contrasted this scenario, where Congress "enacts a noncompulsory rule" that the state voluntarily adopts, with a situation where Congress

252. *Id.* at 1240–41.
253. *Id.* at 1241.
254. *Id.*
255. *Id.*
256. Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1267 (Mass. 2011).
257. *Id.* at 1266–67.
258. *Id.* at 1267.
259. *Id.* at 1268.
260. *Id.* at 1277.
261. *Id.*
262. *Id.*

establishes "uniform national guidelines and policies dictating how States are to regulate and legislate issues relating to aliens," clarifying that strict scrutiny applies to the former, although rational basis review applies to the latter.[263]

The conclusions of these state courts are directly antithetical to the conclusions of the Ninth and Tenth Circuits, creating a division among courts about the proper standard of review for hybrid statutes that bridge state and federal action.

D. Summary of Standards of Review

The foregoing demonstrates that alienage-based classifications have evaded any clear system of tiered scrutiny. At the state level, where alienage is supposed to be treated as a suspect classification, uncertainty remains as to whether all lawfully present aliens, or just some subset of them, are entitled to strict scrutiny. At the federal level, where the plenary power restricts the extent of judicial review, there are mounting questions about whether the same deference is owed to the President as to Congress in immigration matters. In addition, there is little guidance beyond *Mow Sun Wong* to explain the deference owed to an executive agency without direct responsibility over immigration that chooses to impose alienage-based classifications absent an express mandate from Congress or the President. Finally, courts are divided about whether states engage in prohibited discrimination when they decide to adopt alienage-based classifications articulated by Congress in federal statutes. Each of these gray areas complicates the analysis of whether the exclusion of DACA recipients from the ACA violates equal protection principles.

III. EQUAL PROTECTION ANALYSIS OF THE EXCLUSION OF DACA RECIPIENTS FROM THE ACA

Given Congress's plenary power over matters affecting noncitizens, this Article does not dispute that Congress was authorized to decide that only "a citizen or national of the United States or an alien lawfully present in the United States" may be treated as a "qualified individual" and "covered under a qualified health plan in the individual market that is

263. *Id.* at 1274–75 (contrasting the present case to the uniform rule that was challenged in *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 409 (Mass. 2002), and received rational basis review).

offered through an Exchange."[264] Nor does this Article challenge Congress's authorization to delegate to HHS the job of determining who is "lawfully present in the United States."[265] Instead, this Part explores what standard of review should apply to HHS's regulation defining who is "lawfully present" and whether the regulation survives that standard.

While HHS is part of the executive branch, under *Wong*, it does not automatically receive the same deference given to Congress or the President just because it is a federal agency. The amount of deference will depend on whether HHS is regulating in its area of expertise and whether it has an express mandate from Congress or the President to exclude DACA recipients from the definition of "lawfully present." In addition, there is a question about whether DACA recipients, who have only deferred action status, are ever entitled to strict scrutiny, or if their status automatically limits them to rational basis review. In the event that rational basis review applies, is an interpretation of "lawfully present" that treats people with the exact same status differently rational? Finally, since the ACA does not require states to create their own Marketplaces, are they engaging in prohibited discrimination by choosing to do so, or are they merely following a federal direction? Each of these questions is discussed below.

A. Does Heightened Scrutiny Apply?

1. Does HHS Lack Relevant Expertise?

In *Mow Sun Wong*, the Supreme Court indicated that its willingness to give deferential review to a discriminatory rule made by a federal agency depends on the institutional capacity of that agency.[266] While HHS plays a role in immigration matters, that role is narrowly circumscribed to its

264. 42 U.S.C. § 18032(f)(3) (2014).

265. *Id.* § 18081(a)(1). The nondelegation doctrine reached its peak during the New Deal era and has fallen into desuetude since 1935. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 12 (1982) (arguing that the nondelegation doctrine has become a "nondoctrine"). Arguments for its revitalization include checking arbitrary agency action and requiring elected officials to make tough policy choices; see also, for example, J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 584–86 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)). Arguments against renewal include that it could lead to judicial activism or unpredictable policy results. *See, e.g.*, Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352–53 (1987). Some commentators have proposed revitalizing the doctrine in a limited way. *See, e.g.*, David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1227 (1985) (proposing a model where administrative, but not legislative, power would be delegable).

266. *See* Hartley, *supra* note 204, at 99–100; Motomura, *supra* note 187, at 211–12.

health-related expertise. For example, HHS sets the requirements for the medical examination of noncitizens seeking admission to the United States and provides guidance on issues related to refugee health and resettlement.[267] HHS does not, however, have direct responsibility over immigration; like the Civil Service Commission in *Wong*, HHS is not involved in foreign affairs, treaty negotiations, naturalization policies, or establishing immigration quotas or conditions of entry. In attempting to define who is "lawfully present" in the country, HHS took on a task outside its realm of expertise. This raises a serious question about whether HHS's decision to define all individuals with deferred action status except DACA recipients as "lawfully present" should receive the deference normally given to the federal government when regulating immigration.

The question about the appropriate level of deference becomes particularly salient when one takes into account that HHS's definition of "lawfully present" departs from the interpretations of all other agencies, including the Department of Homeland Security, which is the agency with direct responsibility over immigration. In addressing eligibility to apply for Title II Social Security benefits, DHS has defined "lawfully present" to include all individuals with deferred action status.[268] Although DHS is currently updating this regulation, it has not proposed any changes to its definition of "lawfully present," such as carving out an exception for DACA recipients.[269]

The Department of Agriculture has followed DHS's lead and defined "legally present" to have the same meaning that DHS gave "lawfully present."[270] It also explicitly adopted DHS's definition of "lawfully present" in defining who is "lawfully residing in the U.S." for purposes of the Food Stamp and Food Distribution Program.[271] Likewise, the Department of Transportation adopted DHS's definition of "lawfully

267. *See Medical Examination of Immigrants and Refugees*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/immigrantrefugeehealth/exams/medical-examination.html (last visited May 13, 2016), *archived at* https://perma.cc/E9B6-RMEA; OFFICE OF REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr (last visited May 13, 2016).

268. 8 C.F.R. § 103.12(a)(4)(vi) (2001) (including "[a]liens currently in deferred action status" among the categories of noncitizens eligible for Title II Social Security benefits under Pub L. No. 104-193); *see also* 8 C.F.R. § 1.3(a)(4)(vi) (2016) (same).

269. *See* Immigration Benefits Business Transformation, Increment I, 76 Fed. Reg. 53,764, 53,780 (Aug. 29, 2011).

270. 7 C.F.R. § 2502.2 (2016) ("Legally present in the United States shall have the same meaning as the term 'lawfully present' in the United States as defined at 8 CFR 103.12(a) . . . .").

271. *Id.* § 273.4(a)(7) ("For purposes of determining eligible alien status in accordance with paragraphs (a)(4) and (a)(6)(ii)(I) of this section 'lawfully residing in the U.S.' means that the alien is lawfully present as defined at 8 CFR 103.12(a).").

present" in the regulations implementing the Uniform Act.[272] The Department of Housing and Urban Development incorporated the Department of Transportation's definition of "lawfully present," thereby also adopting DHS's definition.[273]

In launching a new program in December 2014 that allows Central American minors whose parents are "lawfully present" in the United States to apply for refugee status in their home countries, the Department of State defined "lawfully present" to include individuals with deferred action status and explicitly *included* DACA recipients in this category.[274] Finally, at one point, DHS's own website informed DACA recipients: "[Y]ou are considered to be lawfully present in the United States."[275] The district court that issued a preliminary injunction to stop implementation of the expanded DACA and DAPA policies pointed this out and characterized the policies as forms of action rather than inaction because they conferred this benefit of lawful presence.[276] HHS is currently the only agency that has departed from DHS's expert interpretation of "lawfully present," throwing its own interpretation of this term into question.

2. Was There an Express Mandate from Congress?

Under *Mow Sun Wong*, an executive agency that lacks immigration expertise can still make alienage-based classifications if there is an express mandate from Congress or the President.[277] Here, Congress could not possibly have mandated the exclusion of DACA recipients from the ACA, since DACA did not exist in 2010 when the ACA was enacted. The ACA only mandates the exclusion of individuals who are not lawfully present; it is silent about the categories of noncitizens who qualify as lawfully present.[278]

---

272. *See*, *e.g.*, 49 C.F.R. § 24.2(a)(2) (2016).

273. *See* 24 C.F.R. §§ 972.130(b)(5)(ii), 972.230(g)(5)(ii) (2016) (referencing 49 C.F.R. § 24.208).

274. *See* Media Note, U.S. Dep't of State, Launch of In-Country Refugee/Parole Program for Children in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States (Dec. 3, 2014), *available at* http://www.state.gov/r/pa/prs/ps/2014/12/234655.htm; *see also* U.S. DEP'T OF STATE, FORM DS-7699: AFFIDAVIT OF RELATIONSHIP (AOR) FOR MINORS WHO ARE NATIONALS OF EL SALVADOR, GUATEMALA, AND HONDURAS (2014).

275. Texas v. United States, 86 F. Supp. 3d 591, 660–61 (S.D. Tex. 2015) (issuing a temporary injunction to stop the expanded DACA and DAPA policies from taking effect).

276. *Id.*

277. *See supra* notes 189, 195 and accompanying text.

278. *See* 42 U.S.C. § 18032(f)(3) (2014).

Furthermore, the Immigration and Nationality Act provides no basis for the distinction drawn by HHS. The INA and its implementing regulations make it clear that noncitizens are considered "unlawfully present" only if their stay is not authorized by DHS.[279] All individuals with deferred action status are in a period of authorized stay. They therefore do not accrue unlawful presence and are eligible to apply for an employment authorization.[280] Thus, HHS's interpretation of "lawful presence" conflicts with Congress's use of the term in the INA.

In 2013, *after* HHS promulgated the regulation that excluded DACA recipients from the ACA, the Senate expressed approval of the regulation by incorporating its interpretation into the comprehensive immigration reform bill it passed that year. Under the legalization program set forth in that bill, noncitizens granted "registered provisional immigration status" generally would have been considered lawfully present in the United States, but they would have been subject to the rules applicable to individuals *not* lawfully present under the ACA and would not have been eligible for premium tax credits.[281] This *post hoc* approval of a regulation, however, cannot be construed as an express mandate, which must necessarily precede the rule.[282] Furthermore, Congress never passed the comprehensive immigration reform bill, so it should not be taken as evidence of Congress's views.[283]

3. Was There an Express Mandate from the President?

Since there was no express mandate from Congress, the next question is whether there was an express mandate from the President to exclude DACA recipients from benefits under the ACA. When President Obama introduced DACA, he described it as a program that would help create a more inclusive society, stressing that the beneficiaries of this program "study in our schools, . . . play in our neighborhoods, [are] friends with our

279. *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (2014); 8 C.F.R. 214.14(d)(3) (2016); *see also Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated June 15, 2015), *archived at* https://perma.cc/8E5Y-87QG [hereinafter USCIS FAQs].

280. 8 C.F.R. § 274a.12(c)(14).

281. S. 744, 113th Cong. § 245B(d)(4)(A), (C) (2013).

282. *See, e.g.*, United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991) (emphasis added) ("Where an agency fails to follow the PRA in regard to an information collection request that the agency promulgates via regulation, at its own discretion, and without express *prior* mandate from Congress, a citizen may indeed escape penalties for failing to comply with the agency's request.").

283. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) ("Though 'instructive,' failure to act on the proposed bill is not conclusive of Congress' views . . . .").

kids, [and] pledge allegiance to our flag."[284] He described them as "Americans in their heart, in their minds, in every single way but one: on paper."[285] Excluding DACA recipients from the ACA while including others with the same legal status is totally inconsistent with this vision of inclusion. Such exclusion also conflicts with the President's focus on helping a productive group of young people "make extraordinary contributions" to society, since denial of affordable health care clearly hampers productivity.[286]

On the other hand, news reports indicate that the decision to exclude DACA recipients from health care benefits under the ACA came from the White House.[287] The reports characterized the White House's decision as a political one, resulting from the collision of two highly controversial issues: health care and immigration.[288] Since conservative lawmakers had adamantly opposed providing government health care to "illegal immigrants," excluding DACA recipients, who were perceived as "illegal" even after being granted deferred action status, helped avoid another layer of controversy over health care reform.[289]

But can such reports be construed as an "express mandate" from the President? *Mow Sun Wong* described an express mandate as an "explicit directive" and found that the President's Executive Order giving the Civil Service Commission discretion "to establish standards with respect to citizenship" did not constitute such a mandate, as it was "not necessarily a *command* to require citizenship as a general condition of eligibility for federal employment."[290] The Court further reasoned that there was no express mandate from the President because the Commission could retain, modify, or repeal the citizenship requirement "without further authorization from Congress or the President."[291] The same situation exists here with respect to HHS's exclusion of DACA recipients from the ACA. The fact that HHS has already amended its interpretation of

284. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), *available at* https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

285. *Id.*

286. *Id.*; *see also generally* PETER HARBAGE & BEN FURNAS, CTR. FOR AM. PROGRESS, THE COST OF DOING NOTHING ON HEALTH CARE: LOST PRODUCTIVITY COSTS STATES $124 BILLION TO $248 BILLION (2009).

287. Shear & Pear, *supra* note 57 ("The White House decision to deny health benefits also underscores how far the president's expected actions will fall short of providing the kind of full membership in American society that activists have spent decades fighting for.").

288. *Id.*

289. *See id.*

290. Hampton v. Mow Sun Wong, 426 U.S. 88, 111–12, 113 n.46 (emphasis added).

291. *Id.* at 113.

"lawfully present" without explicit authorization from Congress or the President indicates that it was not operating pursuant to an express mandate.

4. Does Having Only Deferred Action Status Matter?

Even if HHS has no direct responsibility over immigration and there is no express mandate from Congress or the President for the exclusion of DREAMers from the ACA, the fact that DACA recipients have only deferred action status gives rise to questions about whether any heightened form of scrutiny is appropriate. As an initial matter, *Plyler* suggests that undocumented immigrants receive only rational basis review, although the Court applies rational basis with bite in that case.[292] Individuals with deferred action status, however, can be distinguished from undocumented immigrants because their presence in the United States is authorized by the DHS, and they are eligible to work here legally. The fact that HHS includes people with deferred action status as "lawfully present," even though it carves out an exception for DACA recipients, shows recognition that this status is different than being undocumented. Furthermore, before the Welfare Reform Act became law in 1996, the definition of "permanently residing in the United States under color of law" ("PRUCOL") included individuals with deferred action status, but not undocumented immigrants.[293] Thus, a clear distinction exists between the two categories.

Accepting that individuals with deferred action status are not undocumented, there is still the question about whether non-LPRs should receive heightened scrutiny. As discussed above, a circuit split exists on this issue, with the Fifth and Sixth Circuits refusing to apply strict scrutiny to state laws that discriminate against nonimmigrants. At least two reasons weigh in favor of rejecting the positions of the Fifth and Sixth Circuits. First, the language used by the Supreme Court does not support this position. *Graham* broadly stated that "*[a]liens as a class* are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[294]

Furthermore, the factors on which the Fifth and Sixth Circuits relied are not as clear-cut as those courts purported them to be. For example, the

292. *See supra* notes 115–18 and accompanying text.

293. *See* 20 C.F.R. § 416.1618(b)(11) (2016).

294. Graham v. Richardson, 403 U.S. 365, 372 (1971) (emphasis added) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

courts noted inability to serve in the military as one reason to treat nonimmigrants differently than LPRs,[295] but a small number of nonimmigrants—and, more recently, DACA recipients—can serve in the military under the Military Accessions Vital to the National Interest ("MAVNI") program, which targets individuals with special language skills critical to national security.[296] The number of LPRs who serve in the military is also relatively small, so service in the military does not appear to be a strong basis for treating LPRs and non-LPRs differently.[297]

Similarly, the Fifth and Sixth Circuits' reliance on differential tax treatment overlooks the overarching similarity in tax structures. Most nonimmigrants are treated as "resident" aliens for tax purposes, just like LPRs, as long as they spend at least thirty-one days in the United States in the current year and at least 183 days in the period that includes the current year and the prior two years.[298] Thus, a nonimmigrant who spends 183 days of the year in the United States is automatically a "resident" for tax purposes and subject to the same tax rules that apply to LPRs and US citizens. DACA recipients should qualify as "residents" for tax purposes because they had to show continuous presence in the United States between June 15, 2007, and June 15, 2012, and could not have left the United States after that period without receiving advance parole. Advance parole is normally granted only for short periods of time (e.g., thirty days) for specific purposes and therefore should not interfere with satisfying the substantial presence test. In addition, insofar as the Sixth Circuit reasoned that nonimmigrants may be denied federal welfare benefits,[299] this does not distinguish them from LPRs, who may also be denied such benefits. In fact, individuals who have been LPRs for less than five years are excluded from most federal benefits.[300]

Another reason to question the Fifth and Sixth Circuit's approach is that several of the factors that led the courts to conclude that nonimmigrants should receive only rational basis review do not point in the same direction when applied to individuals with deferred action status.

---

295. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007); LeClerc v. Webb, 419 F.3d 405, 418–19 (5th Cir. 2005).

296. Julia Preston, *Military Path Opened for Young Immigrants*, N.Y. TIMES (Sept. 25, 2014), http://www.nytimes.com/2014/09/26/us/military-path-opened-for-young-immigrants.html.

297. *See* MOLLY F. MCINTOSH, SEEMA SAYALA & DAVID GREGORY, CNA, NON-CITIZENS IN THE ENLISTED U.S. MILITARY 24 (2011).

298. I.R.C. § 7701(b)(3)(A) (2014).

299. *See supra* notes 132–34 and accompanying text.

300. *See* NAT'L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 1–3 (2011).

To begin with, individuals with deferred action status are often as entrenched in US society as LPRs—especially DACA recipients, who must show at least five years of residency and entry at a young age in order to qualify.[301] Second, the fact that nonimmigrants are subject to strict employment restrictions is inapplicable to individuals with deferred action status, who receive the type of employment authorization that allows them to work at almost any job. Third, the argument that nonimmigrants are not a discrete and insular class because they are admitted with various types of status does not apply when focusing solely on individuals with deferred action status.

Given the weaknesses in the Fifth and Sixth Circuit's reasoning, its inapplicability to individuals with deferred action status, and the Supreme Court's language pointing in the opposite direction, individuals with deferred action status should not be denied heightened scrutiny merely because of their status. More generally, although the notion of scaling scrutiny to proximity to citizenship may seem attractive at first glance, it opens the door to an array of problems. Trying to "rank" various types of immigration status based on proximity to citizenship is harder than it may seem because there is no clear hierarchy. It may be obvious that undocumented immigrants are farther from citizenship than nonimmigrants, who are farther than LPRs. But it is by no means clear how one would compare someone with deferred action status to someone who has only a pending application for asylum or who has Temporary Protected Status.

Another issue is that the nature of a deprivation may be so severe that closer scrutiny is warranted regardless of the legal status of the individual. This was the case in *Plyler*, where the Court purported to apply rational basis review but really applied heightened scrutiny. The sliding-scale approach to scrutiny discussed in Part IV below allows courts to consider these various factors without selecting *a priori* a particular tier for judicial review.

---

301. For discussions of social membership and alienage, see, for example, Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 1986 IMMIGR. & NAT'LITY L. REV. 177; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

B. Does the Exclusion Survive Rational Basis Review?

Even if heightened scrutiny is not applied to the exclusion of DACA recipients from the ACA, the exclusion may still be invalid under ordinary rational basis review. The Ninth Circuit's recent decision in *Arizona Dream Act Coalition* is particularly relevant here. That case involved the denial of a preliminary injunction in an action challenging Arizona's policy of prohibiting DACA recipients from receiving driver's licenses by using their work permits as proof of authorized presence, while permitting individuals with pending applications for adjustment of status and cancellation of removal to do so.[302] In reversing the denial of the preliminary injunction and finding that the equal protection claim was likely to succeed on the merits, the court held that DACA recipients are similarly situated to individuals with pending applications, since both groups have authorization to remain in the country for a temporary period and are allowed to obtain work permits.[303] The court then reasoned that it was not necessary to determine what standard of review applies, because Arizona's "differential treatment of otherwise equivalent federal immigration classifications" was so arbitrary and irrational as to be unlikely to withstand even rational basis review.[304]

HHS's differential treatment of DACA recipients is even more striking because it distinguishes them from other individuals with the exact same status, as well as from individuals with similar types of status. In order to survive rational basis review, HHS's disparate treatment of DACA recipients must be rationally related to a legitimate government interest. Following the Ninth Circuit's analysis in *Arizona Dream Act Coalition*,[305] unless there is some basis in federal law for viewing non-DACA recipients of deferred action status as having some federally authorized presence that DACA recipients lack, the disparate treatment is not rational; no such basis exists.

In fact, HHS's distinction between DACA recipients and other individuals with deferred action status can lead to absurd results. For example, many people obtain deferred action status after being ordered deported and obtaining a temporary stay of removal. DACA recipients, on the other hand, may never have been ordered deported. There is no rational explanation for why someone with a stay of removal has more

302. Ariz. Dream Act Coalition v. Brewer, 757 F.3d 1053, 1059–60 (9th Cir. 2014).
303. *Id.* at 1064.
304. *Id.* at 1066–67.
305. *See supra* notes 302–04 and accompanying text.

authorization to be in the United States than someone who was never ordered deported in the first place. Furthermore, individuals who have pending applications for non-LPR cancellation of removal are considered "lawfully present" by HHS, even though this type of relief is very difficult to obtain, since it requires showing "exceptional and extremely unusual hardship" to a citizen or LPR spouse, parent, or child.[306] It is odd to consider these applicants lawfully present, when many of them will be ordered deported, while excluding DACA recipients, whose deferred action status may be extended for an indefinite period of time.

More generally, HHS's decision to exclude DACA recipients is not rationally related to the objectives of the ACA, which is to increase the number of insured individuals and reduce the cost of health care. Excluding a class of young, generally healthy individuals from the insurance programs established by the ACA drives up the cost of health insurance premiums. In addition, when DACA recipients do seek treatment, it will often be in emergency rooms, where the cost of care is much more expensive. Providing DACA recipients with access to regular health care, including preventive care, would avoid paying the higher cost of treatment associated with delays in getting medical attention. Including DACA recipients in the definition of "lawfully present" individuals would also reduce the administrative costs of health care by making it easier to determine who qualifies.

Under the current classification scheme, health care administrators will have to determine *how* various individuals with deferred action obtained this classification. In cases where individuals have work authorization, this should not be too difficult, as the employment authorization card contains a code that explains the category for work authorization, including a code specific to DACA. Those who do *not* have employment authorization, however, will have to provide evidence to administrators who have no background in immigration law proving how they obtained their deferred action status. According to one article, administrative costs in the US health care system comprise fourteen percent of all health care expenditures, totaling over $360 billion a year.[307] Simplifying eligibility requirements would reduce documentation requirements and help cut down this administrative cost. While DHS's Systematic Alien Verification for Entitlements ("SAVE") program provides an online system to help

306. 8 U.S.C. § 1229b(b)(1)(D) (2014).

307. ELIZABETH WIKLER, PETER BASCH & DAVID CUTLER, CTR. FOR AM. PROGRESS, 3 STRATEGIES FOR REDUCING HEALTH CARE ADMINISTRATIVE COSTS (2012).

verify an individual's immigration status, the accuracy and reliability of that system has come under attack.[308]

In sum, just as the court in *Plyler* found no evidence in the record to support the claim that exclusion of undocumented children was likely to improve the overall quality of education in Texas,[309] HHS would be hard-pressed to show that excluding DACA recipients from affordable health care will improve the overall quality of health care in the country. Furthermore, even if health care would be improved by barring some *number* of noncitizens from coverage, HHS would have to "support its selection of *this* group as the appropriate target for exclusion," as it cannot reduce expenditures for health care by barring "some arbitrarily chosen class."[310] Finally, denial of health care, like the denial of a basic education, is an "enduring disability,"[311] making the analogy to *Plyler* even more appropriate. Children without access to affordable health care are less likely to obtain immunizations that prevent future illnesses and receive timely diagnosis of serious health conditions, and they miss more days of school.[312] Similarly, uninsured adults are less likely to receive preventive service and have higher rates of "unnecessary morbidity and premature death."[313]

C. Are States Engaging in Prohibited Discrimination?

The ACA establishes a complex relationship between the federal government and state governments, as it gives states the option of running their own state Marketplaces, sharing responsibilities with the federal government in running Marketplaces, or refusing to get involved, which means that the state would have a "Federally-facilitated [Marketplace]."[314] For states that choose to run their own Marketplaces, either alone or in partnership with the federal government, a question arises about whether they are engaging in prohibited discrimination. As discussed above, courts are currently divided about whether Congress can give discretion to the

308. *See, e.g.*, Fatma Marouf, *The Hunt for Noncitizen Voters*, 65 STAN. L. REV. ONLINE 66 (2012).

309. *See supra* notes 117–18 and accompanying text.

310. Plyler v. Doe, 457 U.S. 202, 229 (1982) (citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969)).

311. *Id.* at 222.

312. INST. OF MED., AMERICA'S UNINSURED CRISIS: CONSEQUENCES FOR HEALTH AND HEALTH CARE, at 3 (2009).

313. *Id.* at 4.

314. 42 U.S.C. § 18041 (2014); 45 C.F.R. § 155.20 (2016).

states to engage in alienage-based discrimination under the Welfare Reform Act, in light of *Graham*'s warning that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[315] Since administrative agencies are empowered to act by enabling statutes, if Congress does not have the power to authorize discrimination by States, then certainly an executive agency such as HHS would not have the power to do so by adopting a discriminatory definition of who is lawfully present.

As Judge Clifton explained in his dissent in *Korab*, the way Medicaid actually works in most states is that "there is a single plan, administered by the state."[316] While "[t]he federal government reimburses the state for a significant portion of the cost, and the plan must comply with federal requirements, . . . it is a state plan."[317] Similarly, the state-based Marketplaces under the ACA are state plans. According to the highest courts of several states, and dissenting voices in the Ninth and Tenth Circuits, discrimination in such state plans must be subject to strict scrutiny.[318] Since the ACA gives states an option about whether or not to participate in a Marketplace, states have the option of not discriminating against DACA recipients by not participating and leaving discrimination to the federal government. The choice for a state about whether to provide benefits to DACA recipients, like the choice about whether to provide benefits to certain noncitizens under the Welfare Reform Act, arguably is not a true choice if it means the state must engage in prohibited discrimination. In other words, the same controversy that has emerged under the Welfare Reform Act may arise under the ACA.

Currently, several states have chosen to provide DACA recipients with insurance, such as Medicaid, using only state funds. These include California, Massachusetts, New York, Washington, and the District of Columbia.[319] Nothing in the ACA prohibits states from doing this, as the statute does not address eligibility for state benefits.[320] DACA recipients

315. *See supra* Part II.C.

316. Korab v. Fink, 797 F.3d 572, 599 (9th Cir. 2014) (Clifton, J., dissenting).

317. *Id.*

318. Korab v. Fink, 797 F.3d 572, 598–607 (9th Cir. 2014) (Clifton, J., dissenting); Soskin v. Reinertson, 353 F.3d 1242, 1265–76 (10th Cir. 2004) (Henry, J., dissenting); Ehrlich v. Perez, 908 A.2d 1220, 1243–44 (Md. 2006); Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1279–80 (Mass. 2011); Aliessa *ex rel*. Fayad v. Novello, 754 N.E.2d 1085, 1098 (N.Y. 2001).

319. *See* Cindy Y. Rodriguez & Jaqueline Hurtado, *States Work Around Obamacare to Help Undocumented Immigrants*, CNN (Apr. 9, 2014, 1:30 PM), http://www.cnn.com/2014/04/09/us/obamacare-undocumented-immigrants/, *archived at* https://perma.cc/6W8L-KZTF.

320. *See* 8 U.S.C. §§ 1621(a)–(b), 1622(b) (2014).

therefore remain eligible for state-funded programs that include people with deferred action status among the categories of people "Permanently Residing in the United States Under Color of Law." For example, DACA recipients in California who meet the income criteria are eligible for full-scope Medi-Cal, which is totally state funded.[321] If, down the road, these states change their minds about using state funds to provide health care to DACA recipients, the result may be the same kind of litigation that resulted when states stopped using their own funds to provide noncitizens with Medicaid after the passage of the Welfare Reform Act.

IV. POSSIBLE PATHS THROUGH THE QUAGMIRE

A. Alternative Approaches to Judicial Scrutiny

There are at least two possible alternatives to the traditional tiered approach to judicial scrutiny. One is a sliding-scale approach. Another is to simply have a single standard. Justice Marshall argued long ago that courts should abandon the tiered system and simply weigh "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[322] Justice Stevens similarly expressed dissatisfaction with a tiered approach, stating that "[t]here is only one Equal Protection Clause," and it "does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[323] Many commentators have agreed with this perspective, critiquing the tiers and proposing alternative models.[324]

---

321. Letter from Cal. Health & Human Servs. Agency, Dep't of Health Care Servs., to All County Welfare Directors & All County Medi-Cal Program Specialists/Liaisons (Aug. 6, 2014), *available at* http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/MEDIL2014/MEDILI14-45.pdf.

322. Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

323. Craig v. Boren, 429 U.S 190, 211–12 (Stevens, J., concurring).

324. *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 954 (2002) (arguing that "existing accounts of equal protection leave the decision whether to treat a classification as suspect—and most other decisions as well—to almost completely unguided normative judgment"); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484 (2004) ("[T]he problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review . . . ."); Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 104 (2003) (noting that *Lawrence* and *Grutter* "call into question the stability of" traditional equal protection standards of review); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970 (2004) (expressing uncertainty about the utility of traditional equal protection classifications); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of*

Some of the main scholarly critiques of the tiered approach have been that it leads the Court to manipulate principles and precedents in order to reach the desired result in a particular case and creates inconsistency and confusion when the Court deviates from the three established tiers.[325] In addition, there is a sense of stagnation regarding the set of suspect classifications, since courts have long been reluctant to recognize any new classes.[326] The tiered approach also tends to miss what Professor Julie Nice calls a "co-constitutive third strand" that examines the interaction between rights and classes.[327] *Plyler* is an example of a case where the Court found "neither a fundamental right nor a suspect class" but nevertheless invalidated a discriminatory law "because of the right's importance to the targeted class."[328]

As Justice Stevens recognized in *Cleburne*, the Supreme Court's cases actually "reflect a continuum of judgmental responses to differing classifications," rather than the tiered approach it purports to follow.[329] The use of "rational basis with bite" in *Cleburne* and *Plyler* are well-known examples where the Court's analysis did not conform to the traditional tiers.[330] Rather than characterizing the standard of review in these cases as either heightened rational basis or intermediate scrutiny,

---

Equal Protection Doctrine, 42 UCLA L. REV. 1425, 1430–35 (1995); Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573 (1997); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 177–79 (1984); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006).

325. Shaman, *supra* note 324, at 177; *see also* Korab v. Fink, 797 F.3d 572, 593 (9th Cir. 2014) (Bybee, J., concurring) (stating that "the Court's indecision over the equal protection standard of review gives these cases [involving alienage-based classifications] the appearance that the standard has been manipulated to accommodate the Court's intuition over the result in the particular case").

326. Goldberg, *supra* note 324, at 581.

327. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1212.

328. *Id.* Nice articulates two major considerations that led to the results in these cases: "(1) how the right (and particularly its denial) marks, defines, and constructs the meaning of the class; and (2) how the class (and particularly its exclusion from enjoyment of the right) marks, defines, and constructs the meaning of the right." *Id.* at 1225.

329. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

330. The majority and dissenting opinions in *Plyler* illustrate the difference between a uniform and tiered approach. There, Justice Burger's dissenting opinion stuck to a strict, tiered mode of analysis, reasoning that education was not a fundamental right and undocumented children were not a suspect class, so rational basis review applied, and the Texas statute should have been upheld as constitutional. Plyler v. Doe, 457 U.S. 202, 244–48 (1982) (Burger, C.J., dissenting). Justice Brennan's majority opinion, on the other hand, recognized that more was involved than these "abstract question[s]" and took into consideration how the deprivation of a basic education "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status." *Id.* at 223.

courts could acknowledge that it departs from the tiered approach and more closely resembles the sliding-scale approach originally proposed by Justice Marshall.

In more recent years, the continuum in standards of review has become only more visible. For instance, four of the most important gay rights cases decided in the past two decades—*Romer*, *Lawrence*, *Windsor*, and *Obergefell*—invalidated discriminatory laws without ever addressing whether gays and lesbians are a suspect class.[331] Consequently, Professor William Araiza claims that the tiers are, for all practical purposes, already dead.[332] Perhaps, as Professor Suzanne Goldberg has argued, the tiered approach served its purpose "as an unwitting training vehicle for the Court," and the Court has implicitly moved on.[333] Given the inconsistencies that have developed in equal protection jurisprudence involving alienage-based classifications, the time may be ripe for the Court to explicitly embrace the sliding-scale approach that it is already applying in practice. As discussed below, HHS's regulation should be found unconstitutional under a sliding-scale approach, as well as under the single standard with three distinct inquiries proposed by Professor Goldberg.[334]

1. Applying a Sliding-Scale Approach

Under the balancing test proposed by Justice Marshall, HHS's regulation would not pass constitutional muster. Excluding DACA recipients from affordable health insurance under the ACA deprives a

331. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597–2608 (2015) (holding that the Fourteenth Amendment requires states to license marriages between two same-sex individuals and to recognize such marriages lawfully licensed and performed out-of-state); United States v. Windsor, 133 S. Ct. 2675, 2684–96 (2013) (striking down section 3 of the Defense of Marriage Act as violating the equality principles of the Fifth Amendment Due Process Clause); Lawrence v. Texas, 539 U.S. 558, 576–79 (2003) (striking down Texas's sodomy law as violating substantive due process); *Lawrence*, 539 U.S. at 580–85 (O'Connor, J., concurring) (agreeing with the result on an equal protection ground); Romer v. Evans, 517 U.S. 620, 625–36 (1996) (striking down Amendment 2 to the Colorado Constitution as violating the Equal Protection Clause). Justice Scalia, in his dissents, accused the Court of applying an "unheard-of form of rational-basis review" in *Lawrence* and failing to employ "normal 'rational basis' analysis" in *Romer*. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

332. *See* William D. Araiza, *After the Tiers:* Windsor, *Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 369 (2014) ("[T]he Court has not performed a serious suspect class analysis—or purported to—in nearly thirty years. To put that point in more personal terms, no current Justice was sitting the last time the Court purported to engage in such an analysis.").

333. Goldberg, *supra* note 324, at 582.

334. *See infra* Part IV.A.1–2.

discrete class of youth who are not culpable for their legal status of access to health care, which the Supreme Court has recognized as "a basic necessity of life."[335] At the same time, it is not clear how giving coverage to DACA recipients would harm the government. In fact, the opposite may be true. Excluding a group that is younger and healthier than the general population would increase health insurance premiums for everyone. The ACA seeks to bring more people into the health insurance pool in order to spread the risk for insurers and thereby reduce the costs of insurance. Denying coverage to DACA recipients is antithetical to this objective. By driving up premiums, the exclusion of DACA recipients may also lead to more people choosing to remain uninsured and pay the penalty, thereby further reducing the number of people in the insurance pool.

Furthermore, denying DACA recipients coverage under the ACA will require them to rely more heavily on safety-net providers, which not only shifts the cost of care to state and local governments, but also makes it more expensive.[336] Not having a regular source of health care blocks opportunities for preventive care, leading to costly emergency room visits and increasing overall future health care needs.[337]

A third way that the exclusion of DACA recipients increases costs to the government is by making the ACA harder to administer. State agencies, eligibility workers, and patient navigators will all have to be trained about the distinction between deferred action status granted through DACA and through other means, and they will have to examine more documents to determine the basis for the deferred action status. This process not only is time-consuming for the administrators, but it will lead to delays for consumers in accessing health care. Finally, denying coverage to DACA recipients can increase costs for the government by weakening efforts to fight communicable diseases in the general

335. Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 259 (1974) (internal quotation marks omitted); *see also* Roy G. Spece, Jr., *Constitutional Attacks Against the Patient Protection and Affordable Care Act's "Mandating" That Certain Individuals and Employers Purchase Insurance While Restricting Purchase by Undocumented Immigrants and Women Seeking Abortion Coverage*, 38 N. KY. L. REV. 489, 543–44 (2011) (arguing that the right to purchase health insurance satisfies numerous approaches relevant to identifying a fundamental right); Elizabeth R. Chesler, Note, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255, 274–79 (2008) (arguing that infringements of the right to purchase health care deserve heightened scrutiny).

336. Adrianne Ortega, . . . *And Health Care for All: Immigrants in the Shadow of the Promise of Universal Health Care*, 35 AM. J.L. & MED. 185, 195–98 (2009).

337. *See* SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, UNINSURED IN AMERICA: LIFE AND DEATH IN THE LAND OF OPPORTUNITY 12 (2005) ("Emergency room visits typically cost about four times as much as treating the same problem in a regular office visit.").

population.[338] Taking all of these factors into consideration, a sliding-scale approach to judicial scrutiny indicates that the exclusion of DACA recipients from access to health care under the ACA violates equal protection.

The Court has explicitly embraced a sliding-scale formulation of scrutiny in other contexts and could do so in the equal protection context as well. For example, in voting rights cases that implicate both the fundamental right to vote and the government's interest in structuring elections, the Supreme Court has "avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue."[339] In First Amendment cases, the Court has also applied a sliding-scale approach in certain contexts instead of simply categorizing speech as either protected or unprotected.[340] Furthermore, in the evolving jurisprudence on the right to bear arms under the Second Amendment, federal appellate courts "have grappled with varying sliding-scale and tiered-scrutiny approaches, agreeing as a general matter that the level of scrutiny applied to gun control regulations depends on the regulation's burden on the Second Amendment right to keep and bear arms."[341] As one federal appellate judge noted in discussing different forms of strict and intermediate scrutiny, "How strong the government interest must be, how directly the law must advance that interest, how reasonable the alternatives must be—those questions are not always framed with precision in two clearly delineated categories, as opposed to points on a sliding scale of heightened scrutiny approaches."[342] If a sliding scale works for analyzing other constitutional issues, it can also be utilized in the equal protection context.

---

338. *See, e.g.*, SHAWN FREMSTAD & LAURA COX, KAISER COMM'N ON MEDICAID & THE UNINSURED, KAISER FAMILY FOUND., COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE 15 (2004); Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043, 1044 (2002); Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants' Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB. HEALTH 1630, 1632 (2003).

339. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008).

340. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 140 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)) (internal quotation marks omitted) (explaining that the court must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

341. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014) (quoting Nordyke v. King, 681 F.3d 1041, 1045–46 (9th Cir. 2012)) (internal quotation marks omitted).

342. Heller v. Dist. of Columbia, 670 F.3d 1244, 1277 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

2. Answering Goldberg's Three Questions

Professor Suzanne Goldberg proposes a different model than a balancing test to replace the tiered framework. Distilling the Supreme Court's equal protection jurisprudence, she proposes a single standard consisting of three distinct inquiries to determine whether a classification is unconstitutional:

> (1) whether a plausible, nonarbitrary explanation exists for why the burdened group has been selected to bear the challenged burden in the context at issue;
>
> (2) whether the justification offered for the line drawing has a specific relationship to the classification's context; and
>
> (3) whether the classification reflects disapproval, dislike, or stereotyping of the class of persons burdened by the legislation.[343]

If any of these inquiries is not satisfied, then the classification would be invalid.[344] Under this model, too, HHS's regulation would be unconstitutional.

Professor Goldberg explains that the first question, which she calls the "intracontextual inquiry," "demands that a plausible explanation exist for why a group has been singled out for burdensome treatment in a particular context."[345] As noted above, *Plyler* emphasized this issue in stating that "even 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."[346] Applying this prong of the analysis to the exclusion of DREAMers from affordable health insurance under the ACA, there is no obvious reason why HHS singled out DREAMers for exclusion from the ACA. HHS's explanation that DREAMers should be excluded because giving them health care was not part of the DACA program makes little sense since the same could be said for any other group of individuals with deferred action status. For example, HHS could have just as easily singled out individuals with prior orders of removal who have been granted deferred action status on the basis that DHS never intended them to get access to health care when it approved them for deferred action status.

---

343. Goldberg, *supra* note 324, at 533.
344. *Id.*
345. *Id.* at 534.
346. Plyler v. Doe, 457 U.S. 202, 229 (1982); *see also supra* note 310 and accompanying text.

The second question proposed by Goldberg is an "extracontextual inquiry" that asks whether the justification for the classification is so broad that it "could be invoked to justify burdening a trait in all settings, effectively allowing for the creation of superior and inferior classes."[347] Treating DACA recipients as inherently different from other noncitizens with deferred action status fails this test as well. If DACA recipients can be singled out as not "lawfully present" for purposes of coverage under the ACA, then what would prevent the government from singling them out for denial of other benefits available to individuals with deferred action status as well? By signaling that DACA recipients are less deserving of benefits than others with the exact same status, HHS opens the door to discriminating against DREAMers in all different settings.

The third question is the "bias inquiry" and asks whether the government action gives effect to prejudice and stereotyping.[348] In *Cleburne*, *Romer*, and *Moreno*, for example, the Court applied heightened scrutiny after detecting impermissible animus against individuals with intellectual disabilities, gays, and hippies, respectively.[349] The bias inquiry does not, however, require evidence of overtly hostile purposes. Goldberg explains that "serious defects in the process that led to the classification's adoption" are also relevant to this inquiry.[350] With respect to HHS's regulation, there may not be evidence of animus by HHS towards DREAMers. As explained above, the decision to exclude them from the ACA appears to have been a political compromise to appease conservative legislators who adamantly opposed giving health care to "illegal immigrants." Certainly, some of those legislators harbor animus against DREAMers, along with other immigrants who did not enter the country lawfully or fell out of status. Congressman Steve King (R-IA) expressed such animus in July 2013, when he told the media: "For everyone [sic] who's a valedictorian, there's another 100 out there who weigh 130 pounds—and they've got calves the size of cantaloupes because they're hauling 75 pounds of marijuana across the desert."[351]

---

347. Goldberg, *supra* note 324, at 544.

348. *Id.* at 544–45.

349. *Id.* at 545–47 (citing Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

350. *Id.* at 548.

351. Todd Beamon & John Bachman, *Rep. Steve King Slams Norquist over Attacks on Immigration*, NEWSMAX (July 18, 2013, 5:59 PM), http://www.newsmax.com/Newsfront/king%C2%ADnorquist%C2%ADattacks%C2%ADimmigration/2013/07/18/id/515882/, *archived at* https://perma.cc/3K5E-Y8Y7.

Even assuming no overt hostility behind HHS's regulation, the defects in the process through which it was adopted make it vulnerable to attack under the bias inquiry. The fact that HHS skipped over regular notice and comment procedures, as well as the normal thirty-day waiting period before a rule becomes effective, raises serious procedural concerns. Although HHS relied on the good cause exception to justify these actions, the case law indicates that the exception may have been improperly invoked, as discussed further in Subpart IV.B below. In sum, HHS's regulation clearly flunks the first inquiry, likely fails the second one, and may also flunk the third inquiry. Since the failure to satisfy any one of these inquiries means the government action is unconstitutional under Goldberg's proposal, HHS's regulation would not survive this equal protection analysis, just as it would not survive a sliding-scale balancing test.

B. Avoiding Equal Protection Analysis Altogether

Another possible approach would be to just avoid equal protection analysis and resolve the case under other legal doctrine. For example, HHS's regulation could be challenged under the Administrative Procedure Act or under *Chevron*. After briefly discussing these alternative approaches, this Subpart explains why it is nevertheless important to resolve the riddle of alienage-based classifications in equal protection law.

1. Challenging HHS's Regulation Under the APA

HHS's regulation could be challenged as improperly promulgated under the APA. As mentioned above, HHS issued the regulation without notice and comment based on the "good cause" exception. Under this exception, an agency may forego notice and comment when it finds that following these procedures is "impracticable, unnecessary, or contrary to the public interest."[352] HHS found that it would be "contrary to the public interest" to go through notice and comment because the temporary insurance program had already started enrolling eligible individuals and had limited funding.[353] In addition, HHS characterized DACA recipients as a "new and unforeseen group" of applicants.[354]

352. 5 U.S.C. § 553(b)(3)(B) (2014).

353. Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614, 52,616 (Aug. 30, 2012) (to be codified at 45 C.F.R. pt. 152).

354. *Id.*

These reasons are unlikely to satisfy the good cause exception, which must be "narrowly construed and only reluctantly countenanced."[355] The DC Circuit has explained that "[t]he public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[356] Furthermore, all of the same factors that HHS used to justify the exception—active enrollment, the temporary nature of the program, and limited funding—were present in 2010 when HHS initially defined "lawfully present" to include everyone with deferred action status.

It could also be argued that HHS had adequate time to go through notice and comment procedures. If HHS had promptly published a proposed change to the definition of "lawfully present" after the DACA program was announced on June 15, 2012, then the normal notice and comment process could have been completed before any DACA applications were approved.[357] Finally, many circuits have held that an agency must go through notice and comment when promulgating a rule that represents a significant shift in regulatory direction. Under the *Paralyzed Veterans* doctrine, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."[358] The Supreme Court is currently reviewing this doctrine in a pending case, and its decision may prove relevant to determining whether HHS complied with the APA's requirements.[359]

2. Challenging HHS's Regulation Under Chevron

Another approach is to challenge HHS's regulation interpreting "lawfully present" to exclude DACA recipients as an invalid interpretation

355. Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001)) (internal quotation marks omitted).

356. *Id.* at 95; *see also Util. Solid Waste Activities Grp.*, 236 F.3d at 754 (quoting Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)) (stating that the exception "'should be limited to emergency situations'").

357. *See* Julia Preston, *U.S. Says Fast Pace Continues on Reprieves for Young Immigrants*, N.Y. TIMES (Sept. 14, 2012), http://www.nytimes.com/2012/09/15/us/us-cites-fast-pace-on-reprieves-for-young-illegal-immigrants.html?_r=0 (stating that DHS had approved twenty-nine DACA applicants by September 14, 2012).

358. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997), *abrogated by* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

359. *Perez*, 135 S. Ct. 1199.

of the statute under *Chevron*.[360] The first step of *Chevron* requires courts to ask whether Congress has spoken directly on the issue.[361] In other words, has Congress explicitly addressed whether DACA recipients should be considered "lawfully present" in the United States, such that the ACA would apply to them? In answering this question, courts would look at the plain language of the ACA, as well as its object and purpose and its legislative history.[362] Here, neither the text of the ACA nor its legislative history address this issue, since DACA did not exist when Congress passed the ACA. One argument that could be made under the first step of *Chevron* is that excluding DACA recipients undercuts the object and purpose of the ACA, as discussed above. Another argument is that Congress's statutory directive to HHS was to define the categories of "lawfully present" individuals. The plain language of the statute therefore indicates that Congress left it to HHS to determine *which types of status* qualify as lawful presence under the ACA. But nothing in the statute indicates congressional permission to classify aliens based on *how they obtained* their status.

Assuming that Congress did not speak directly to the issue, the next question under *Chevron* is whether HHS's interpretation is reasonable.[363] HHS's interpretation is seriously vulnerable under this second prong. Courts are reluctant to show deference to an agency interpretation that is inconsistent with prior interpretations.[364] Here, HHS recognized that deferred action status constitutes "lawful presence" but then changed its mind and decided that DACA recipients with this status are not "lawfully present." Furthermore, HHS's interpretation of "lawfully present" in the ACA is inconsistent with the Immigration and Nationality Act and its implementing regulations, which make it clear that noncitizens are considered "unlawfully present" only if their stay is not authorized by DHS.[365] All individuals with deferred action status are in a period of authorized stay under the INA.[366]

Although HHS is interpreting the ACA and not the INA, the Supreme Court has held that there is a presumption that Congress uses the same

360. Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
361. *Id.* at 842–43.
362. *E.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000).
363. *Chevron*, 467 U.S. at 843–45.
364. *E.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012).
365. *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (2014); 8 C.F.R. § 214.14(d)(3) (2016); *see also* USCIS FAQs, *supra* note 279.
366. *See* 8 C.F.R. § 274a.12(c)(14).

term consistently in different statutes.[367] Moreover, the Court has held that a single, undifferentiated term in a statute must be given the same meaning in all of its potential applications.[368] The Court observed that giving the same term different meanings "would be to invent a statute rather than interpret one."[369] Even if a statutory term is ambiguous, the Court explained, that does not justify two different simultaneous constructions of the same phrase depending on the category of aliens to which the phrase is applied.[370] The Court noted that a contrary holding would establish a "dangerous principle" that the same text could be given "different meanings in different cases."[371]

Here, "lawfully present" is a single term, yet HHS has given it two different interpretations when applied to two different groups: for DACA recipients, deferred action status does not constitute lawful presence, but for everyone else, it does.[372] This construction is impossible to square with

---

367. *See* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (stressing the "premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes"); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 254 (1994) (displaying similar reasoning); SKF USA Inc. v. United States, 263 F.3d 1369, 1381–82 (Fed. Cir. 2001) (holding that to overcome the presumption that the same term had the same meaning in different statutes, the Department of Commerce was required to provide reasonable explanation); *cf.* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85–86 (2006) (internal quotation marks omitted) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."). *But see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009) (internal quotation marks omitted) (warning that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"); Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."); Global Computer Enters. v. United States, 88 Fed. Cl. 350, 410 (2009) ("[A]bsent congressional intent to the contrary, the same term need not have the same definition in two wholly distinct statutes . . . .").

368. *See* Clark v. Martinez, 543 U.S. 371, 378 (2005).

369. *Id.*

370. *See id.*

371. *Id.* at 386; *see also* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329 (2000) ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.").

372. The term "deferred action" appears at various places in the Immigration and Nationality Act. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i) (2014) (describing certain categories of noncitizens eligible for deferred action and work authorization); *id.* § 1227(d)(2) ("The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.").

the statute under the Supreme Court precedents discussed above. The doctrine of constitutional avoidance lends additional support to the argument that "lawfully present" cannot be construed to include individuals with deferred action status but to exclude DREAMers. Under this doctrine, if a statute is ambiguous but one interpretation "would raise serious constitutional problems," that interpretation is not given any deference.[373] For all of the reasons discussed in Part III above, HHS's interpretation raises a serious equal protection issue. The traditional tools of statutory interpretation therefore indicate that HHS's interpretation is unreasonable and would not survive step two of *Chevron*.

Indeed, HHS's lack of expertise in the area of immigration and the significant economic and political issues at stake in determining which categories of noncitizens qualify for health insurance suggest that *Chevron* deference may not even apply. As noted above, in *King v. Burwell*, the Supreme Court did not apply *Chevron* in a case challenging an IRS regulation interpreting the ACA's tax credit provisions.[374] Instead, it simply decided to interpret the ACA itself, noting the IRS's lack of expertise in crafting health insurance policy and the deep economic and political significance of the question regarding whether tax credits are available on federal Exchanges.[375] It is also unclear whether HHS consulted with DHS about how to define "lawfully present." Lack of expertise combined with failure to engage in such consultation would temper any deference given to HHS's interpretation.[376]

3. Why Equal Protection Still Matters

Even if multiple ways exist to analyze a legal issue involving alienage-based classifications, there are important reasons not to ignore the equal protection problem. First, in some cases, the equal protection issue may be determinative of the outcome. For example, in *Korab*, where the Ninth Circuit upheld Hawaii's law excluding certain nonimmigrants from health benefits, Judge Bybee's concurrence noted that "[t]he choice between a pure preemption analysis and a pure equal protection analysis yields very different results."[377] Furthermore, if courts decide to bypass challenging

373. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

374. *See supra* note 209 and accompanying text.

375. *See supra* notes 209–10 and accompanying text.

376. *See* Gonzales v. Oregon, 546 U.S. 243, 269 (2006).

377. Korab v. Fink, 797 F.3d 572, 596 (9th Cir. 2014) (Bybee, J., concurring).

equal protection issues, the legal standards will never be clarified, reinforcing the current conundrum surrounding alienage classifications. In highlighting the tensions in every area—from federal authority to state authority to hybrid statutes—this Article underscores the urgency for legal reform. It is difficult to understand how the standard of review for a classification that has been recognized as a suspect class for over forty years remains in such a state of disarray. If federal appellate judges describe the law as "unsustainable" and a "morass of conflicting approaches,"[378] then the time has come for simplification and change.

Clarifying the treatment of alienage-based classification is also critical because of the role that equal protection principles have played in groundbreaking social changes during the past century, including the end of egregious forms of discrimination based on race, sex, and sexual orientation. Equal protection analysis plays a unique and distinct role specific to preventing arbitrary discrimination that cannot be replaced by preemption analysis, the APA, *Chevron*, or other doctrines. Moreover, unlike many other legal concepts, equal protection principles have the special ability to evolve over time. We are now at a historical moment where perceptions of prejudice based on alienage are shifting, but the government still maintains that discrimination, even overt racial discrimination, is permissible in the arena of immigration.[379] Clarifying the equal protection jurisprudence in this area is therefore essential to protecting against invidious discrimination.

CONCLUSION

In the thirty-three years since *Plyler* was decided, tremendous changes have taken place in immigration law. Many of the children who were undocumented at that time are now US citizens due to the legalization program that was part of the Immigration Reform and Control Act of 1986. Similarly, if some type of legalization program is passed in the future, today's DACA recipients will become tomorrow's citizens.

378. *Id.* at 584, 598. Judge Bybee favored a preemption analysis, which Hawaii's law would survive, over an equal protection analysis, which he thought Hawaii's law would likely fail, due to the "unsustainable" state of the law regarding alienage-based classifications. *Id.* at 593–98.

379. For example, in a recent case argued before the Supreme Court about whether consular denials of visas are subject to any kind of judicial review, one of the questions asked by Justice Breyer during oral argument was whether a consular official could deny a visa for racially discriminatory reasons, to which the government answered in the affirmative. *See* Transcript of Oral Argument at 12–13, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1402_1a7d.pdf.

Denying them health care means that the government will incur far greater health care costs down the road for conditions that could have been prevented or treated much more easily earlier on. Furthermore, for the DACA recipients themselves, delayed care may cause irreversible harm.

Singling out this subgroup of individuals with deferred action status, who are the least culpable for their current status, for exclusion from affordable health coverage makes no legal or moral sense. Either deferred action status constitutes lawful presence in the United States or it does not, but to say some individuals with this status are lawfully present while others are not is totally arbitrary and opens the door to other kinds of discrimination against politically unpopular groups. Such arbitrary discrimination demands scrutiny under equal protection principles. Yet those principles are currently in a state of chaos.

Confusion and conflict exist regarding alienage-based classifications made by both the federal and state governments, as well as in hybrid situations. The lack of clarity in these areas makes it challenging to analyze the exclusion of DACA recipients by HHS, a federal agency that lacks immigration expertise. Nevertheless, heightened scrutiny is appropriate. Even under rational basis review, however, the regulation excluding DACA recipients from the definition of "lawfully present" should not survive. Acknowledging that the Court no longer actually follows a tiered approach and explicitly embracing a more flexible sliding scale would make the analysis much more straightforward and better reflect the Constitution's equal protection values. While we may be blind to the injustices of our own times, we need not turn a blind eye to the disintegration of the tiered framework that was designed to address such injustice.