

CONSTITUTIONAL LAW — EQUAL PROTECTION — FIFTH
CIRCUIT HOLDS THAT LOUISIANA CAN PREVENT NON-
IMMIGRANT ALIENS FROM SITTING FOR THE BAR. — *LeClerc v.*
Webb, 419 F.3d 405 (5th Cir. 2005).

For more than thirty years, Louisiana's indigent defense system has been the target of intense criticism.¹ Too many cases, too few attorneys, too much political interference, and too little funding threaten the fair administration of justice and the effective representation of poor defendants in the state.² One report estimates that indigent defense attorneys in Louisiana each take as many as 792 felony cases per year, more than five times the national workload standard.³ Hurricane Katrina has only exacerbated the situation.⁴

Recently, in *LeClerc v. Webb*,⁵ the Fifth Circuit held that the State of Louisiana could prevent six nonimmigrant alien lawyers — some of whom were working with indigent clients⁶ — from sitting for the bar.⁷ The court reasoned that transient nonimmigrant lawyers could upset the accountability and continuity of the profession, which could in turn degrade the quality of legal services in Louisiana.⁸ Considering Louisiana's indigent defense attorney shortage, this result is puzzling;

¹ See, e.g., NAT'L LEGAL AID & DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* 2 (2004), available at http://www.nlada.org/Defender/Defender_Evaluation/la_eval.pdf (noting that thirty years of research on Louisiana's funding structure for indigent defense clearly indicates that the structure "threatens the integrity of the state's system of justice"); Laura Maggi, *Courts Look at Indigent Defense*, TIMES-PICAYUNE (New Orleans), Apr. 14, 2005, at A2 (noting that "many in the state say" Louisiana's indigent defense system "is broken").

² See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 1, at 19–56.

³ *Id.* at 35 n.119.

⁴ See Peter Applebome & Jonathan D. Glater, *Storm Leaves Legal System a Shambles*, N.Y. TIMES, Sept. 9, 2005, at A1 (noting the longtime "low-grade crisis" in Louisiana's indigent defense system, as well as "the perverse logic of the law [that promises that] Hurricane Katrina — months from now, when people return home — will spawn an unimaginable flood of legal issues").

⁵ 419 F.3d 405 (5th Cir. 2005).

⁶ See Kevin McGill, *Court Says La. Doesn't Have To Let Foreign Visitors Practice Law*, ASSOCIATED PRESS, Aug. 1, 2005, WL 8/1/05 APALERTLA 22:55:23 (noting that some of the attorneys "came to Louisiana to help the poor").

⁷ *LeClerc*, 419 F.3d at 422. Section 3(B) of Rule 17 of the Rules of the Supreme Court of Louisiana states that every applicant to the bar must be "a citizen of the United States or a resident alien thereof." LA. SUP. CT. R. 17(3)(b). From 1984 to 2002, Louisiana interpreted its resident alien requirement as including all aliens legally admitted to the United States. See *In re Appert*, 444 So. 2d 1208, 1208 (La. 1984) (per curiam). In 2002, the Louisiana Committee on Bar Admissions and the Louisiana Supreme Court narrowed this definition to include permanent resident aliens only. *In re Bourke*, 819 So. 2d 1020, 1021–22 (La. 2002) (per curiam). This change means that only immigrant aliens, as distinct from nonimmigrant aliens who are in the United States only "for specific and temporary purposes," may sit for the bar. See *LeClerc*, 419 F.3d at 410 & n.2.

⁸ See *LeClerc*, 419 F.3d at 422.

moreover, no other state has a similar rule.⁹ Closer examination reveals a short-sighted and bureaucratic decision that misconstrues precedent and misapplies equal protection analysis. The paradox of *LeClerc* is that in seeking to protect clients from bad lawyers, the decision could leave some of the most vulnerable clients in the state with even less effective representation.

Maureen Affleck, Beatrice Boulord, Guillame Jarry, Karen LeClerc, Emily Maw, and Caroline Wallace are foreign lawyers working in Louisiana under various visa classifications.¹⁰ In 2000 and 2001, Affleck and Wallace applied for equivalency determinations in the hopes of sitting for the Louisiana bar,¹¹ but officials told them that nonimmigrant aliens could not take the examination.¹² Maw, who had attended an American law school and did not have to prove equivalency, was denied access to the examination for the same reason.¹³ Subsequently, the six lawyers sought declaratory and injunctive relief in two separate suits on a variety of constitutional claims against the Louisiana Supreme Court and the Committee on Bar Admissions.

The district court opinions in *LeClerc v. Webb*¹⁴ and *Wallace v. Calogero*¹⁵ were separated by about three months and were nearly identical in every respect, except in their resolution of the plaintiffs' equal protection claims. In both cases, the defendants argued that the state's requirement is appropriate because transient lawyers who could relocate to foreign countries could potentially frustrate client continuity and undermine professional accountability.¹⁶ The courts agreed that such regulation is permissible only so long as the state's bar "admission policies and procedures [do not] run afoul of the Equal Protection Clause."¹⁷ At this point, the two opinions parted ways. The *LeClerc* court determined that the Supreme Court's holding in *In re Griffiths*,¹⁸ which found that Connecticut's complete exclusion of aliens from the

⁹ Petition for a Writ of Certiorari at 16, *Marty v. Supreme Court*, 537 U.S. 1019 (2002) (mem.) (No. 02-461), 2002 WL 32134560.

¹⁰ At the time of the opinion, LeClerc and Jarry had student visas and the other four had temporary worker visas. *LeClerc*, 419 F.3d at 410, 412.

¹¹ Graduates of foreign law schools applying for bar admission must demonstrate through an "equivalency determination" that their programs are on par with comparable programs in the United States. *See id.* at 411.

¹² *Id.* at 410.

¹³ *Id.* at 412. The court noted that Maw had actually later taken and passed the Louisiana bar but that "her admission to the Bar is stayed pending the outcome of this case." *Id.* at 413 n.16.

¹⁴ 270 F. Supp. 2d 779 (E.D. La. 2003). Affleck, Boulord, Jarry, and LeClerc were the plaintiffs in this suit.

¹⁵ 286 F. Supp. 2d 748 (E.D. La. 2003). Maw and Wallace were the plaintiffs in this suit.

¹⁶ *See id.* at 763; *LeClerc*, 270 F. Supp. 2d at 800-01.

¹⁷ *LeClerc*, 270 F. Supp. 2d at 798; *see also Wallace*, 286 F. Supp. 2d at 759 n.25.

¹⁸ 413 U.S. 717 (1973).

bar violated the Equal Protection Clause,¹⁹ was limited by its facts to include immigrant resident aliens only.²⁰ Because this and other cases had not explicitly addressed whether nonimmigrant aliens qualify as a suspect class, the district court decided not to “expand strict scrutiny status” to that population.²¹ As a result, the *LeClerc* court applied rational basis review.²² The *Wallace* court took the opposite approach, reasoning that “[n]othing . . . in the [*Griffiths*] Court’s opinion suggests that ‘resident alien’ is limited to an immigrant alien,” and therefore nonimmigrant aliens must fall into the general alien suspect class.²³ Accordingly, state action affecting them must survive strict scrutiny. These standards proved dispositive: under *LeClerc*’s deferential review, the Louisiana bar rule excluding nonimmigrant aliens survived; under *Wallace*’s strict scrutiny, it was declared “unenforceable.”²⁴

The Fifth Circuit affirmed *LeClerc* and reversed *Wallace*, holding that the State could prevent nonimmigrant aliens from taking the bar. Writing for a divided panel, Judge Jones²⁵ stated that nonimmigrant aliens were neither a suspect nor a quasi-suspect class and that rational basis was therefore the appropriate standard of review.²⁶ The court recognized that “aliens are a suspect class in general”²⁷ but insisted that the significant “factual and legal distinctions” between immigrant and nonimmigrant aliens²⁸ compelled the conclusion that nonimmigrant aliens “need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone.”²⁹ Immigrant aliens, the court reasoned, are “legally entrenched” in the United States and shoulder burdens similar to citizens, without the ability to participate in the political process.³⁰ Accordingly, they embody the paradigmatic “discrete and insular minority” requiring additional protections under the Fourteenth Amendment.³¹ Nonimmigrant aliens, however, declare upon entering the United States that they intend to retain their foreign citizenship and that they will leave by a specified date.³² They cannot serve in the military and sometimes have reduced tax

¹⁹ *Id.* at 718.

²⁰ *LeClerc*, 270 F. Supp. 2d at 800.

²¹ *Id.*

²² *Id.*

²³ *Wallace v. Calogero*, 286 F. Supp. 2d 748, 762 (E.D. La. 2003).

²⁴ Compare *LeClerc*, 270 F. Supp. 2d at 801, with *Wallace*, 286 F. Supp. 2d at 764.

²⁵ Judge Jones was joined by Judge Smith.

²⁶ *LeClerc*, 419 F.3d at 419–20.

²⁷ *Id.* at 419.

²⁸ *Id.*

²⁹ *Id.* at 417.

³⁰ *Id.*

³¹ *Id.* (quoting *In re Griffiths*, 413 U.S. 717, 721 (1973) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))).

³² *Id.* at 418–19.

burdens.³³ In the court's view, such a "temporary connection to this country" did not warrant heightened equal protection status.³⁴ Moreover, because the Supreme Court has never overtly conferred suspect or quasi-suspect status on nonimmigrant aliens, the Fifth Circuit maintained that its holding comported with precedent.³⁵

The court then reviewed Louisiana's bar admissibility requirement under the more deferential rational basis standard, seeking only "some fair relationship to a legitimate public purpose."³⁶ Again, the court emphasized the relatively brief interaction that nonimmigrant aliens have with the United States. Such "federally prescribed transience," the court reasoned, creates a "special quandary" for Louisiana bar officials.³⁷ Nonimmigrant lawyers could escape Louisiana's jurisdiction by returning to their countries of citizenship at any time, leaving the State "impotent to remedy [the] unethical or incompetent conduct" of those attorneys.³⁸ The court held that the State's underlying purpose and admissibility requirement were not unreasonably over- or under-inclusive and therefore survived rational basis review.³⁹

Judge Stewart dissented from the majority's equal protection analysis on two distinct theories. First, he argued that regulations targeting nonimmigrant aliens were subject to strict scrutiny. He believed that relevant Supreme Court jurisprudence did not make an explicit distinction between immigrant and nonimmigrant aliens, but instead referred simply to "a general 'alien' suspect class."⁴⁰ Judge Stewart also rejected the majority's suggestion that nonimmigrant aliens are more like illegal aliens⁴¹ than immigrant residents:

Nonimmigrant aliens do pay taxes, support the economy and contribute in other ways to our society. . . . I am not persuaded that an alien's ability to

³³ See *id.* at 419 & n.45.

³⁴ *Id.* at 417-18.

³⁵ See *id.* at 415-16. The court also considered whether heightened rational basis review would be appropriate. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that the children of illegal aliens, although not a suspect or quasi-suspect class, were nonetheless entitled to heightened rational basis review of a Texas law forbidding them from attending public school. *Id.* at 238 (Powell, J., concurring). The circuit court distinguished *Plyler* as a "unique instance" in which the Court was particularly "moved" by the plight of children who had no say in their illegal status. *LeClerc*, 419 F.3d at 420. The *LeClerc* plaintiffs, however, "entered this country voluntarily and with an understanding of their limited, temporary status" and were therefore not "similarly situated to the children of illegal aliens." *Id.* at 420-21.

³⁶ *LeClerc*, 419 F.3d at 420 (quoting *Plyler*, 457 U.S. at 216).

³⁷ *Id.* at 421.

³⁸ *Id.*

³⁹ See *id.* at 421-23.

⁴⁰ *Id.* at 428 (Stewart, J., dissenting).

⁴¹ *Id.* at 425 (majority opinion) ("Section 3(B) is a state Bar rule designed to address local problems arising from the transitory status of nonimmigrant aliens who, by the terms and conditions of their federal status, possess fewer ties to the United States than any other group (besides illegal aliens).").

serve in the Armed Forces or pay taxes is the primary rationale for affording suspect class designation to aliens Instead, the basis for aliens' class designation seems to be premised on aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious discrimination against them.⁴²

Nonimmigrant aliens deserve heightened protection, Judge Stewart concluded, because they are disempowered in the American political system just like immigrant aliens.

Second, Judge Stewart argued that even using rational basis review, the bar requirement “does not pass constitutional muster.”⁴³ Among other things, the requirement is underinclusive of flight risks. Both citizen and immigrant alien lawyers could conceivably abandon their Louisiana clients and professional responsibilities; if the State were genuinely worried about unethical transient lawyers, it would “address the problem directly” instead of simply “exclud[ing] a fraction of persons” seeking admission.⁴⁴ Thus, Judge Stewart criticized the Louisiana rule as improperly calibrated to solve the problem of transience.⁴⁵

In its equal protection analysis, the *LeClerc* court admitted that the Supreme Court has traditionally applied strict scrutiny to policies discriminating against aliens and has never suggested that nonimmigrant aliens ought to be treated differently.⁴⁶ In refusing nonimmigrant aliens any level of heightened scrutiny, the court had to explain why these precedents did not cover nonimmigrant aliens. The rationale settled upon — that nonimmigrants are transients who bear fewer social burdens than permanent residents — requires creative, counterintuitive interpretation of equal protection jurisprudence. Not only has the Supreme Court never differentiated equal protection review based on status as an immigrant or a nonimmigrant alien, but the governing cases also appear to downplay the relevance of aliens' transience. Moreover, the *LeClerc* court's reasons for distinguishing nonimmigrant from immigrant aliens are tenuous and arbitrary. Finally, the court's analytical framework led to absurd results, particularly because equal protection precedent allows for more fact-specific, interest-balancing resolutions.

The controlling precedent cited by the *LeClerc* court did not highlight alien transience as a concern. In *Griffiths*, the Court found that prohibiting aliens from taking the bar violated the plaintiff's equal protection rights because she was deprived of “employment

⁴² *Id.* at 428–29 (Stewart, J., dissenting).

⁴³ *Id.* at 431.

⁴⁴ *Id.* (quoting *Wallace v. Calogero*, 286 F. Supp. 2d 748, 763 (E.D. La. 2003)).

⁴⁵ *Id.*

⁴⁶ *See id.* at 419 (majority opinion). The court also noted “some ambiguity in Supreme Court precedent.” *Id.* at 415.

opportunities” within her “chosen occupation[.]”⁴⁷ Her ability to remain permanently in the United States was not a factor; in fact, the *Griffiths* Court noted that the plaintiff had openly stated that she had no intention of becoming a United States citizen and did not want to revoke her Dutch citizenship.⁴⁸ Evidently, the *Griffiths* Court believed that resident aliens could simultaneously express the desire to retain foreign citizenship and have a highly protected right to serve as an American attorney. This precedent cuts strongly against the *LeClerc* court’s reasoning.

Transience aside, *LeClerc*’s other distinctions between immigrant and nonimmigrant aliens also should not matter for standard of review purposes. That nonimmigrant aliens work under a different tax structure, cannot serve in the military, and face mandatory departure from the United States, for example, does not justify offering them less constitutional protection; if anything, these restrictions render them more powerless and vulnerable to state predations — more “discrete and insular.”⁴⁹ The *LeClerc* court tried to skirt these famous words of *United States v. Carolene Products Co.*⁵⁰ by arguing that the multiple types of nonimmigrant aliens cannot possibly compose a single discrete and insular class.⁵¹ Yet such administrative taxonomy seems largely irrelevant, at least for constitutional purposes. The alien class is suspect because of its political impotence, which is universal; subdivisions within this class do not alter the group’s discrete and insular nature.

The *LeClerc* court’s failure to advance a compelling reason for not treating nonimmigrant aliens as part of the suspect class invites reconsideration of two Supreme Court cases dismissed by the court as inapposite, *Plyler v. Doe*⁵² and *City of Cleburne v. Cleburne Living Center, Inc.*⁵³ These two cases occupy somewhat unusual positions in the equal protection canon because they permitted heightened rational basis review in situations involving nonsuspect classes and nonfundamental rights.⁵⁴ In *Plyler*, the Court held that the State could not

⁴⁷ *In re Griffiths*, 413 U.S. 717, 719, 722 (1973).

⁴⁸ *See id.* at 718 n.1.

⁴⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). *But cf.* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1437–39 (1995) (advancing reasons why nonimmigrant aliens might “not receive the benefit of strict scrutiny”).

⁵⁰ 304 U.S. 144.

⁵¹ *See LeClerc*, 419 F.3d at 417.

⁵² 457 U.S. 202 (1982).

⁵³ 473 U.S. 432 (1985).

⁵⁴ *See, e.g.*, Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 741 (2004) (describing *Cleburne* as one of the “four major ‘rational basis plus’ cases that took the unusual step of invalidating laws under the normally deferential, government-friendly rational basis standard”); Sarah Harton Clark, Note, *Substantive Due Process in a State of Flux: Should Courts Develop New Fundamental*

deprive children of illegal aliens of access to free public education.⁵⁵ This decision was highly fact-specific, reflecting a sensitivity to the predicament of these children within their particular cultural and social context. Similarly, in *Cleburne*, the Court looked beyond the wording of a municipal zoning ordinance to its real-world application, holding that the ordinance unconstitutionally discriminated against the mentally retarded.⁵⁶ In both cases, the Court's equal protection analysis turned on the specifics of the situations; reaching socially acceptable results required the Court to adopt a stricter version of rational basis review.⁵⁷

These holdings are relevant given the current state of legal services in Louisiana. *Plyler* and *Cleburne* involve responsive, results-oriented approaches to equal protection analysis when dealing with a group that is not formally part of a suspect class but is still politically disfavored and vulnerable. Had the *LeClerc* court followed this situational approach, the court would have had to reconcile the purported rational basis of Louisiana's bar rule (alien lawyers as flight risks) with the practical realities (attorney shortages) of the Louisiana bar. Using this analytical framework would have exposed the disconnect between the speculative danger posed by nonimmigrant lawyers and the actual deficiencies in Louisiana's system.⁵⁸ This ad hoc, somewhat inverted inquiry is not and should not be the norm for equal protection analysis; for groups that defy easy classification, however, it could lead to better,

Rights for Alien Children?, 72 B.U. L. REV. 579, 592 (1992) (characterizing *Plyler* as an outlier with "uncertain" precedential value).

⁵⁵ *Plyler*, 457 U.S. at 205, 230.

⁵⁶ See *Cleburne*, 473 U.S. at 450 ("[T]he city . . . urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. . . . The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded. . . .").

⁵⁷ See, e.g., Caren G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQ. 275, 306-07 (1997) (arguing that a history of discrimination could justify using heightened rational basis review).

⁵⁸ More searching analysis of the State's transience concern would have been instructive. The facts do not support the court's assessment of nonimmigrant aliens as uniformly transient. For instance, Maw has been in the United States for seven years and is licensed to practice in Mississippi. She serves as the director of the Innocence Project of New Orleans. Innocence Project New Orleans, People, <http://www.ip-no.org/staff.htm> (last visited Nov. 13, 2005). H-1B visaholders like Maw have an initial grant of three years of legal residence that can be extended up to six; extensions are available under certain circumstances, such as permitting completion of services. See U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., H-1B Frequently Asked Questions, <http://uscis.gov/graphics/howdoi/h1b.htm> (last visited Nov. 13, 2005). Moreover, through the "doctrine of dual intent," H-1B visaholders are legally allowed to have a long-term plan to stay in the United States even though they are theoretically only admitted for a limited length of time. See *LeClerc*, 419 F.3d at 429 (Stewart, J., dissenting). Maw's continuing Louisiana practice, the H-1B requirements, and the doctrine of dual intent all undermine the majority's characterization of nonimmigrant aliens as necessarily temporary residents.

wiser decisionmaking. Reading *Plyler* and *Cleburne* as promoting judicial accountability under unique or extraordinary circumstances is consonant with the normative underpinnings of the Equal Protection Clause — eradicating arbitrary and irrational reasoning that results in discrimination.⁵⁹

Proponents of Louisiana's refusal to allow nonimmigrant aliens to sit for the bar might argue that the state's ban is narrow. The number of nonimmigrant aliens seeking admission to the bar is relatively small,⁶⁰ and certainly not all foreign lawyers are practicing indigent defense. However, upholding this restrictive interpretation could have far-reaching destructive consequences at federal and local levels.⁶¹ Within the federal system, simply claiming that the transience of nonimmigrants is sufficient reason to exclude them from the alien suspect class is neither descriptive of their status nor sensitive to their justifiable claim for higher review.⁶²

At the state level, Louisiana's restriction will not protect its citizens seeking legal services from the negative effects of transience: the restriction is overinclusive of responsible, stable lawyers, underinclusive of flight risks, and oblivious to practical realities. In this particular case, the restriction directly affects lawyers working with vulnerable populations that historically have been underrepresented and have the greatest need for legal services. Ironically, in protecting its citizens against transient lawyers, the Louisiana Supreme Court and the Fifth Circuit may have left some of them with no lawyers at all.⁶³

⁵⁹ See, e.g., *Plyler*, 457 U.S. at 213 (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”).

⁶⁰ Cf. Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 198 (1984) (noting that in the five years before *Griffiths*, one study indicated that only ten alien lawyers had been admitted to an American bar (citing Volker Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 DUKE L.J. 871, 894)).

⁶¹ The consequences could even be harmful on the international level. See Kristin L. Beckman, Comment, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 164 (2005) (arguing that Louisiana's restriction impedes its progress toward “globalization and an international legal field”).

⁶² Additionally, permitting state governments to single out nonimmigrant aliens in this manner could promote anti-alien employment discrimination based on seemingly neutral qualities like “transience.”

⁶³ See Susan Finch, *Judge Deals Setback to Foreign Lawyers*, TIMES-PICAYUNE (New Orleans), July 3, 2003, at B1 (quoting attorney Clive Stafford-Smith as calling the district court ruling in *LeClerc* “a tragedy for indigent people in Louisiana” and further saying that “[i]t's hard to understand why, given the lack of resources we have for poor people, why we would look a gift horse in the mouth when other people are willing to help us” (internal quotation marks omitted)). The plaintiffs in *LeClerc* have suggested that the change in Louisiana's rule was based on the success of foreign lawyers in death penalty cases. See *LeClerc v. Webb*, 270 F. Supp. 2d 779, 797 n.20 (E.D. La. 2003); see also Petition for a Writ of Certiorari, *supra* note 9, at 3–5, 15 (noting that Louisiana changed its rule only after the “devastatingly effective” work of foreign lawyers at the Louisiana Crisis Center).