

ALIENATING LEGAL ALIENS:
EXCLUSIONS FROM PROFESSIONAL LICENSING, STANDARD OF
REVIEW, AND STATE INTEREST

*Olga Tseliak**

INTRODUCTION

Imagine that you are a foreign citizen studying law in the United States under the F-1 student visa.¹ While attending law school in the United States, you continuously live in one state, pay taxes, take out loans to pay tuition, and buy high-priced textbooks to invest in your future. You dedicate three years of your life to the pursuit of a legal career and survive the rigors of a legal education. Imagine further that your hard work and commitment finally pays off and you get an offer from a law firm to join them as an Associate after graduation. Excited to enter the professional legal world, you change your F-1 student visa² to an H-1B temporary work visa³ through the sponsorship of your future employer and apply to sit for the bar exam in Louisiana. But can you fathom the disappointment when you are told that, although you are otherwise qualified, you cannot sit for the bar exam solely because you are not a citizen or a Lawful Permanent Resident? This disappointment is a result of Louisiana Supreme Court Rule

* George Mason University School of Law, J.D. Candidate, May 2015; George Mason University, B.A. *summa cum laude*, 2011. I would like to thank my notes editor, Stephanie Greco, for her invaluable feedback and attentive editing advice and my fiancé, Robert John Colón, for his love and support.

¹ The facts of this hypothetical are based on a recent court case. *See* Wallace v. Calogero, 286 F. Supp. 2d 748, 751-52 (E.D. La. 2003) *overruled by* LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) (involving plaintiff Emily Maw who graduated from Tulane University School of Law under F-1 student visa with a *juris doctor* degree and planned to practice law in Louisiana).

² Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(15)(F)(i) (2012) (defining F-1 visas as designed for foreign nationals “to pursue a full course of study . . . at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution”).

³ *Id.* § 1101(a)(15)(H) (noting that H-1 visas are issued to aliens “engaged in a specialty occupation”).

XVII § 3(b) that limits admission into its bar association to citizens or resident aliens of the United States.⁴

Frustrated with your situation, you challenge Louisiana Supreme Court Rule XVII § 3(b) as discriminatory under the Equal Protection Clause of the Fourteenth Amendment by filing a complaint in the United States District Court for the Eastern District of Louisiana.⁵ The district court agrees with your argument that the exclusion of nonimmigrants from admission to the bar violates the Equal Protection Clause and you succeed on your claims.⁶ But on appeal, the Fifth Circuit Court reverses the judgment, upholding the state statute denying licensure to nonimmigrant aliens as serving the state's legitimate interest in protecting health, safety, and welfare of state residents.⁷

This hypothetical serves as an illustration of just one of the many real-world scenarios where a nonimmigrant alien is barred from admission into a profession solely based on his immigration status.⁸ Until recently, as demonstrated in the above hypothetical, federal circuit courts, particularly the Fifth and the Sixth Circuits, applied the rational basis scrutiny standard and upheld these restrictive statutes as related to the protection of general welfare of the states' citizens from potentially transient professionals.⁹ This exemplifies some states' perception that nonimmigrants' temporary presence in the country is potentially frustrating to the states' interests in monitoring, regulating,

⁴ La. Sup. Ct. Rule XVII, 8 LA. REV. STAT. ANN. § 3(B) (1998) (providing in its original version that “[e]very applicant for admission to the Bar of this state shall . . . [b]e a citizen of the United States or a resident thereof”); *see also*, *In re Bourke*, 819 So. 2d 1020, 1022 (2002) (interpreting La. Sup. Ct. Rule XVII as applying only to those aliens “who have attained permanent resident status in the United States”).

⁵ U.S. CONST. amend. XIV, § 1 (stating that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

⁶ *See Wallace*, 286 F. Supp. 2d at 758-63 *overruled by LeClerc*, 419 F.3d 405 (citing *Graham v. Richardson*, 403 U.S. 365, 371 (1971)) (holding that nonimmigrant resident aliens “as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate”).

⁷ *See LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005) (noting that “if a nonimmigrant practitioner leaves the country . . . to the detriment of Louisiana clients, such an attorney would be utterly beyond the reach of the Louisiana Bar”).

⁸ *See also* LA. REV. STAT. § 37-970(2) (2010) (barring nonimmigrants from receiving nursing licenses); N.Y. EDUC. LAW § 6805(1)(6) (2006) *invalidated by Dandamudi v. Tisch*, 686 F.3d 66 (2012) (barring nonimmigrants from receiving pharmaceutical licenses); TENN. CODE ANN. § 55-50-321(c)(1)(C) (2008) (barring nonimmigrants from receiving drivers' licenses).

⁹ *See Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011); *LeClerc*, 419 F.3d 405.

and enforcing their compliance with professional rules and codes of ethics.¹⁰

In the summer of 2012, the Second Circuit expressly refused to follow the Fifth Circuit in applying the rational basis standard to state laws excluding legal nonimmigrants from obtaining professional licenses. Instead, the Second Circuit applied strict scrutiny judicial review.¹¹ Operating under strict scrutiny judicial review, the Second Circuit subsequently found that New York regulations that required health care professionals be United States citizens or lawful permanent residents violated the Fourteenth Amendment of the Constitution.¹²

The Second Circuit's use of strict scrutiny and Fifth Circuit's application of rational basis demonstrate two of the three standards of review courts generally apply in determining whether a law regarding individual rights is constitutional.¹³ Under the rational basis review, which is the minimal level of review, a law will be upheld if it is rationally related to a legitimate government purpose.¹⁴ A government has a legitimate purpose when it "advances a traditional 'police' purpose: protecting safety, public health, or public morals."¹⁵ Under intermediate scrutiny review, a law will be upheld if it is substantially related to an important government purpose.¹⁶ Intermediate scrutiny is typically invoked in evaluation of the laws involving gender discrimination,¹⁷ discrimination against non-marital children,¹⁸ and regulation of speech in public forums.¹⁹ Finally, under strict scrutiny, a law will be upheld

¹⁰ See *Van Staden*, 664 F.3d at 56; *LeClerc*, 419 F.3d at 405.

¹¹ See *Dandamudi*, 686 F.3d at 66.

¹² See *id.* at 72.

¹³ 3 C.J.S. *Equal Protection – Standard of Review of Federal and State Laws* § 29 (2012) [hereinafter *Equal Protection*].

¹⁴ See ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 552 (4th ed. 2011) (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988), *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), *Allied Stores v. Bowers*, 358 U.S. 522 (1959), *Williamson v. Lee Optical*, 348 U.S. 483 (1955)).

¹⁵ See *id.* at 697-98 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961), *Williamson*, 348 U.S. 483, *Railway Express Agency v. New York*, 336 U.S. 106 (1949)) (upholding state laws promoting public health and public morals).

¹⁶ See *id.* at 687 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983)) (presenting examples of where the intermediate scrutiny was found appropriate).

¹⁷ See *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸ See *Lehr v. Robertson*, 463 U.S. 248 (1983).

¹⁹ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

only if it is necessary to achieve a compelling government purpose.²⁰ This test is used when a law discriminates against a class of people that the United States Supreme Court has designated as a “suspect class.”²¹ Aliens are one class treated by the Supreme Court as “suspect” when the classification is the subject of state regulation.²²

This Comment argues that the courts should uniformly adopt strict scrutiny as the proper judicial standard for review of state laws disproportionately targeting nonimmigrants by denying professional licenses. This Comment also demonstrates that the exclusionary licensing regulations should ultimately be repealed as inadequate to protect state citizens from nonimmigrants’ misperceived “transience” and suggests alternative methods of ensuring nonimmigrants’ professional accountability in lieu of complete exclusion from licensing.

Part I of this Comment briefly reviews the statutory definitions of nonimmigrants. Part II of this Comment discusses relevant background of Supreme Court precedent relating to the application of the Fourteenth Amendment’s Equal Protection Clause to aliens in general. Part III evaluates competing interpretations of the Supreme Court precedents by Circuit Courts. Part IV of this Comment explains why strict scrutiny review is the proper standard for state licensing laws by establishing that nonimmigrants are sufficiently similar to citizens and by demonstrating that nonimmigrants are a suspect class meriting the highest degree of protection from discrimination practices. Lastly, Part V discusses the negative implications of the licensing exclusions for the state interests and proposes alternative mechanisms that will facilitate states’ interests in protecting their constituents from potentially transient professionals while ameliorating the negative effects of over-inclusive restrictions.

I. WHO ARE THE NONIMMIGRANTS

Nonimmigrants and immigrants are two categories of aliens devised by Congress to distinguish temporary migration from settle-

²⁰ See generally *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert v. Verner*, 374 U.S. 398 (1963).

²¹ *Equal Protection*, *supra* note 13.

²² Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(3) (2012) (defining alien as “any person not a citizen or national of the United States”); *Equal Protection*, *supra* note 13.

ment migration.²³ Immigrant aliens, also known as “resident aliens,” or “lawful permanent residents” (“LPRs”), come to the United States for permanent residence and enjoy all the rights and benefits of American citizenship except for the ability to vote.²⁴ Nonimmigrants, on the other hand, are admitted to the United States for a specific purpose and for a designated period of time under one of the twenty-four major visa categories.²⁵ These visa categories are commonly referred to by the letter and numeral that correlates with the subsection in the Immigration and Nationality Act (“INA”).²⁶ For example, visa categories include B-2 tourists, F-1 foreign students, H-1 temporary professional workers, and L intracompany transfers.²⁷

F-1 visas are tailored for international students pursuing a full-time academic education.²⁸ Intracompany transfers or L-type visas are issued to foreign individuals who have managerial knowledge or executive skills to continue employment with the company the territory of the United States for up to seven years.²⁹ A majority of nonimmigrants are H-1B professional specialty workers³⁰ and H-1C nurses³¹ who can legally remain and work in the United States for a period of three years with a one-time extension for another three years.³²

Visa categories are not static. If a nonimmigrant wishes to change from one nonimmigrant category to another, she can do that by filing a change of status application with the United States Citizenship and Immigration Services (“USCIS”) within the Department of

²³ DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, TEMP. ADMISSIONS OF NONIMMIGRANTS TO THE UNITED STATES: 2006 1-2 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf [hereinafter TEMP. ADMISSIONS OF NONIMMIGRANTS].

²⁴ DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, RIGHTS AND RESPONSIBILITIES OF GREEN CARD HOLDER (2010), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f3f43a4107083210VgnVCM100000082ca60aRCD&vgnnextchannel=f3f43a4107083210VgnVCM100000082ca60aRCD>.

²⁵ See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS, 32 (2011).

²⁶ See 8 U.S.C. § 1101 (2012).

²⁷ See *id.* § 1101(a)(15).

²⁸ *Id.* § 1101(a)(15)(F)(i).

²⁹ See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS, 32 (2011) (discussing 8 U.S.C. § 1101(a)(15)(L)(2012)).

³⁰ Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

³¹ *Id.* § 1101(a)(15)(H)(i)(c).

³² See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS, 32 (2011) (discussing 8 U.S.C. § 1101(a)(15)(H)(i) (2012)).

Homeland Security (“DHS”).³³ Most commonly, nonimmigrants switch from tourist status to F-1 foreign student status and from F-1 foreign student status to H-1 specialty worker.³⁴ Additionally, a non-immigrant may pursue permanent residency in the United States by filing an application with the DHS.³⁵

United States immigration policy, incorporated in the INA presumes that all foreign nationals entering the territory of the United States intend to stay here permanently.³⁶ Because of this presumption, the law requires that most foreign nationals seeking a visa must demonstrate strong ties to their native countries.³⁷ Nevertheless, several types of subclasses of nonimmigrants, specifically, H-1 professional workers, L-intracompany transferees, and V-accompanying family members, are exempt from proving that they are not coming to live permanently.³⁸ This exemption demonstrates the general recognition that although nonimmigrants come to the United States on a temporary basis, they may later pursue permanent residence.³⁹ This practice is formally known as the “dual intent doctrine.”⁴⁰

Immigrants and nonimmigrants historically have been an integral part of the American society.⁴¹ Nevertheless, they have frequently been subjects of adverse treatment by the states’ legislatures and were commonly denied equal protection of the laws.⁴² The next Section of this Comment discusses the Supreme Court’s constitutional analysis of the states’ discriminatory laws affecting aliens.

³³ See Immigration and Nationality Act § 248, 8 U.S.C. § 1258 (2012).

³⁴ See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS, 28 (2011).

³⁵ See *id.* at 27.

³⁶ See Immigration and Nationality Act § 214, 8 U.S.C. § 1184(b).

³⁷ See *id.*; 22 C.F.R. § 41.11 (2013).

³⁸ 22 C.F.R. § 41.11 (stating that an applicant for a nonimmigrant visa, other than an alien applying for a visa under 8 U.S.C. § 1101(a)(15)(H)(i) or (L), shall be presumed to be an immigrant until the consular officer is satisfied that the alien is entitled to a nonimmigrant status).

³⁹ *Id.*

⁴⁰ See *Matter of Hosseinpour*, 15 I. & N. Dec. 191, 192-93 (BIA) (1975); *INS Agrees to Dual Intent for E Visa Holders*, 70 NO. 42 INTERPRETER RELEASES 1444, 1444 (Nov. 1, 1993).

⁴¹ See CHEMERINSKY, *supra* note 14, at 787 (asserting that “American is very much a nation of immigrants”).

⁴² See *id.*

II. SUPREME COURT HISTORY: APPLICATION OF EQUAL PROTECTION CLAUSE TO ALIENS

This Part reviews the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment in the context of alienage classifications and examines the Court's rationale for applying the strict scrutiny standard to state laws disadvantaging aliens. First, Section A reviews Supreme Court's early interpretation of the Equal Protection Clause. Second, Section B discusses the emergence of strict scrutiny judicial protection for aliens, and examines its subsequent application to state laws precluding aliens from engaging in certain occupations. Finally, Section C reviews judicially created exceptions to the general application of strict scrutiny judicial standard for aliens.

A. *The Supreme Court's Early Interpretations*

In the 1886 landmark case of *Yick Wo v. Hopkins*, the Supreme Court famously declared the Fourteenth Amendment's Equal Protection clause applies with equal force to "all persons within the territorial jurisdiction without regard to any differences of race, of color, or of nationality."⁴³

Having recognized that aliens are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court did not initially designate aliens as a suspect class eligible for additional judicial scrutiny when laws affecting them are enacted.⁴⁴ To the contrary, in its early decisions the Supreme Court gave great deference to the state laws discriminating against aliens under the so called "special public interest doctrine."⁴⁵ Under this doctrine, the Court held that states had "special public interest" in excluding aliens from land ownership⁴⁶ and in preventing aliens from operating pool halls,⁴⁷ thus contributing to widespread discrimination

⁴³ *Yick Wo v. Hopkins*, 118 U.S. 365, 369 (1886).

⁴⁴ *See id.* at 368.

⁴⁵ CHEMERINSKY, *supra* note 14, at 788 (explaining under the concept of "special public interest," states could discriminate against aliens so long as it was related to some public interest).

⁴⁶ *See id.* at 789 (citing *Terrace v. Thompson*, 263 U.S. 197 (1923)).

⁴⁷ *See id.* (citing *Clarke v. Deckebach*, 274 U.S. 392 (1923)).

against aliens by the states.⁴⁸ This approach to alienage classifications persisted until *Takahashi v. Fish & Game Comm'n*, decided in 1948.⁴⁹

Takahashi v. Fish & Game Comm'n became a turning point towards the recognition of aliens as a suspect class.⁵⁰ In *Takahashi*, the Court denounced the “special public interest” doctrine and invalidated a California law that excluded resident aliens from receiving licenses for commercial fishing in coastal waters as unconstitutional.⁵¹

B. *Later Trends in the Supreme Court's Interpretations of the Equal Protection Clause*

Official recognition of aliens as a suspect class emerged in *Graham v. Richardson* where the Court announced that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”⁵² The Court noted that aliens as a class are a prime example of a “discrete and insular minority” because of their political powerlessness and pervasiveness of historical discrimination.⁵³

The Court applied the same reasoning just a few years later in *In re Griffiths*.⁵⁴ In *In re Griffiths* the Supreme Court ruled that a state's statute precluding LPRs from taking a state bar exam violated the Equal Protection Clause finding that states' exclusions of the practice of law were “inherently suspect” and thus failing strict scrutiny review.⁵⁵ The Court stressed that “[f]rom its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply.”⁵⁶

In re Griffiths is especially relevant to the issue of reaching the proper standard for nonimmigrants because the Court's opinion did

⁴⁸ See *id.* (citing *Clarke*, 274 U.S. at 392).

⁴⁹ CHEMERISNKY, *supra* note 14, at 789 (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (rejecting the “special public interest” theory in a California law that prohibited aliens from receiving commercial fishing licenses)).

⁵⁰ See *Takahashi*, 334 U.S. at 419-22.

⁵¹ *Id.*

⁵² *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁵³ See *id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

⁵⁴ *In re Griffiths*, 413 U.S. 717 (1973).

⁵⁵ See *id.* at 721-23.

⁵⁶ *Id.* at 719.

not distinguish between temporary and permanent aliens.⁵⁷ Although the plaintiff in *In re Griffiths* was a permanent resident alien who had no intention of becoming a United States citizen and wanted to retain her Dutch citizenship, the Court did not address this factor in its reasoning.⁵⁸ Therefore, in light of *In re Griffiths*, a nonimmigrant could argue that all aliens are subject to strict scrutiny protection.⁵⁹ It should be noted, however, that a more narrow interpretation of this case is also plausible.⁶⁰ Specifically, since the facts of the case involved a permanent alien, Court's holding strictly applies only to permanent aliens to the exclusion of nonimmigrants.⁶¹

In re Griffiths is not the only example where the Supreme Court didn't distinguish between immigrants and nonimmigrants in striking down state's discriminating statute. In *Examining Board v. Flores de Otero*, the Court invalidated Puerto Rico's statute that excluded LPRs from receiving engineering licenses, again, without differentiating between nonimmigrants and immigrants.⁶² The Court re-affirmed that "state classifications based on *alienage* are subject to 'strict judicial scrutiny'" and held that exclusion of aliens from becoming engineers bears "no rational relationship to skill, competence, or financial responsibility."⁶³ The Court also mentioned that there are other ways to limit dangers of potentially transient professionals; however, the Court did not provide specific examples.⁶⁴

C. *Exceptions to the General Rule of Strict Scrutiny*

Although strict scrutiny generally applies when the state government discriminates against aliens, the Supreme Court has delineated two narrow exceptions.⁶⁵ The first exception allows states to exclude

⁵⁷ See *id.* at 722.

⁵⁸ See *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), 119 HARV. L. REV. 669, 674 (2005) [hereinafter *Constitutional Law*].

⁵⁹ Kristin L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 150 (2005).

⁶⁰ See *id.* at 150.

⁶¹ See *id.*

⁶² See *Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 601-02 (1976).

⁶³ *Id.* at 602, 606 (quoting *Graham v. Richardson*, 403 U.S. 365, 376 (1971)) (emphasis added).

⁶⁴ *Id.* at 606.

⁶⁵ CHEMERINSKY, *supra* note 14, at 791-92.

aliens from political and governmental functions as long as the exclusion satisfies a rational basis review.⁶⁶ The Supreme Court first announced this exception in *Sugarman v. Dougall* holding that states may bar aliens from state civil service positions.⁶⁷ Likewise, the Court later ruled that states are justified in precluding aliens from becoming state troopers,⁶⁸ public school teachers,⁶⁹ and deputy probation officers.⁷⁰ Exclusion of aliens from these specific professions is justified because aliens cannot represent the government or to execute public policy in the same way citizens do.⁷¹

The second exception applies to state laws discriminating against illegal immigrants.⁷² In *Plyler v. Doe* the Supreme Court recognized that “undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a constitutional irrelevancy.”⁷³ Although the Supreme Court created an exception to the general rule of strict scrutiny for aliens, it nevertheless applied heightened rational basis review to the Texas statute denying education to the children of illegal immigrants.⁷⁴ In doing so, the Court stressed the blamelessness of the children who were brought to the United States by their parents and the unfairness of preventing children from receiving an education.⁷⁵

Thus, review of the Supreme Court jurisprudence on the application of the Equal Protection Clause of the Fourteenth Amendment concludes that strict scrutiny generally applies to state laws discriminating on the basis of alienage, subject only to “democratic” and illegal aliens’ exceptions, both of which receive a lower level of judicial protection.⁷⁶ This line of cases also demonstrates that thus far, the Supreme Court has reviewed with strict scrutiny only state laws affect-

⁶⁶ See *Foley v. Connelie*, 435 U.S. 291, 295-96 (1976) (citing *Sugarman v. Dougall*, 413 U.S. 634, 646-47 (1973)).

⁶⁷ *Sugarman*, 413 U.S. at 646-47.

⁶⁸ See *Foley*, 435 U.S. at 295-97.

⁶⁹ See *Ambach v. Norwich*, 441 U.S. 68, 80 (1979) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).

⁷⁰ See *Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982).

⁷¹ Beckman, *supra* note 59, at 147.

⁷² See *Plyler v. Doe*, 457 U.S. 202 (1982); *DeCanas v. Bica*, 424 U.S. 351 (1976).

⁷³ *Plyler*, 457 U.S. at 223 (internal quotation marks omitted).

⁷⁴ See *id.* at 219-20.

⁷⁵ See *id.*

⁷⁶ See *Equal Protection*, *supra* note 13.

ing immigrant aliens, but not state laws impacting nonimmigrant aliens.⁷⁷

III. CIRCUIT COURTS' DIVERGENT VIEWS ON NONIMMIGRANTS

Because the Supreme Court has never explicitly applied strict scrutiny review to a statute discriminating against nonimmigrant aliens, the federal circuits are currently split on the interpretation.⁷⁸ Section A of this Part analyzes the Fifth Circuit Court's rationale for applying rational basis review to the state laws disproportionately affecting nonimmigrants. Section B of this Part examines the Second Circuit Court's reasoning in support of the finding that nonimmigrants are entitled to the strict scrutiny protection. .

A. *Fifth Circuit*

The Fifth Circuit was the first court to confront the issue of proper constitutional standard of review for the state law disproportionately affecting nonimmigrants. Subsections One and Subsection Two will provide a detailed overview of two cases—*LeClerc v. Webb* and *Van Staden v. Martin*—in which the court analyzed state statutes precluding nonimmigrants from obtaining professional licenses and established that such types of laws are subject to rational basis review.

1. *LeClerc v. Webb*

In *LeClerc v. Webb*, the Fifth Circuit upheld the Louisiana Supreme Court Rule which rendered nonimmigrants ineligible to sit for the Louisiana bar exam.⁷⁹ The court acknowledged that “aliens are a suspect class in general,” however, drew an unprecedented distinction between immigrants and nonimmigrants as two separate subclasses.⁸⁰ In light of this new delineation of subclasses, the Court concluded that the Supreme Court's precedents support the proposition

⁷⁷ See *Plyler*, 457 U.S. at 230; *Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 603 (1976); *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

⁷⁸ See *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012); *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011); *LeClerc v. Webb* 419 F.3d 405 (5th Cir. 2005).

⁷⁹ See *LeClerc*, 419 F.3d at 425-26.

⁸⁰ See *id.* at 419.

that adverse treatment of nonimmigrants by the states merit only rational basis judicial review.⁸¹

In reaching this conclusion, the Fifth Circuit reasoned that in the past, the Supreme Court awarded strict scrutiny protection to immigrants as a suspect class solely for two main reasons: (1) their inability to protect their interests through a democratic process, and (2) their “similarity to citizens in their economic, social, and civic, as opposed to political, conditions.”⁸² With this interpretation in mind, the Fifth Circuit reasoned that nonimmigrants do not merit the same protection because they fail to meet these two criteria.⁸³ The court observed that immigrant aliens are similar to the citizens in that they share privileges and burdens of citizenship: ability to reside permanently in the United States without the risk of deportation, eligibility for state and federal benefits, qualification for military service, and obligation to pay taxes.⁸⁴ While sharing the burdens of the citizenship, aliens cannot vote to protect their interests through democratic process, thus, constituting a “discrete and insular minority”⁸⁵ meriting additional protections under the Fourteenth Amendment.⁸⁶

In the court’s opinion, nonimmigrant aliens are not entitled to additional constitutional protection because they are dissimilar to the citizens and because they are present in the country on a temporary basis.⁸⁷ Comparing nonimmigrants to citizens and immigrants, the Fifth Circuit identified a few perceived differences immigrants’ possess such as deportability, inability to serve in the United States military, employment limitations, favorable tax treatments and ineligibility for federal and state benefits.⁸⁸ Additionally, the court excessively focused on nonimmigrants’ proclamation of preserving their native citizenship upon entry in the United States and their inability to enforce claims to establish permanent residence.⁸⁹ Having created these distinctions, the Fifth Circuit concluded that in light of

⁸¹ *See id.* at 415-21.

⁸² *See id.* at 417-18 (footnote omitted).

⁸³ *See id.* at 417-19.

⁸⁴ *See id.* at 418.

⁸⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁸⁶ *LeClerc v. Webb* 419 F.3d 405, 417 (5th Cir. 2005).

⁸⁷ *See id.* at 418.

⁸⁸ *Id.* at 419.

⁸⁹ *See id.* at 417.

nonimmigrants' dissimilarity to immigrants, they are not a suspect class entitled to the strict scrutiny protection.⁹⁰

Because the court established that strict scrutiny is not warranted in this case, the court reviewed Louisiana bar admissibility under the rational basis standard and agreed with the state that it had a legitimate interest in precluding nonimmigrants from practicing law in the state.⁹¹ The Fifth Circuit accepted as valid the argument that due to "easily terminable status" of nonimmigrant lawyers, they could leave Louisiana jurisdiction by returning to their native countries at any time, leaving the state "impotent to remedy unethical or incompetent conduct" of those attorneys.⁹²

Notably, Judge Stewart dissented from the majority opinion on two express theories.⁹³ First, he posited that regulations precluding nonimmigrants from entering legal practice are subject to strict scrutiny.⁹⁴ In support of this conclusion, Judge Stewart argued that the majority misinterpreted the Supreme Court precedent because the Supreme Court intentionally did not distinguish between immigrant and nonimmigrant aliens.⁹⁵ Judge Stewart argued that under 8 U.S.C. § 1101(a)(33),⁹⁶ there is "no definition of resident alien, only a definition of residence" and therefore, an alien who resides in the United States may be either an immigrant (residing permanently) or a nonimmigrant (residing temporarily).⁹⁷ Thus, by referring to noncitizens as "aliens" rather than dividing them into "immigrants" and "nonimmigrants," similarly divided in the federal statute, Judge Stewart argued that the Supreme Court intended to include both subclasses in the definition of a suspect class.⁹⁸

Further, Judge Stewart argued that the majority refused strict scrutiny protection to nonimmigrants under the wrong rationale.⁹⁹ He maintained that the basis for aliens' designation as a suspect class is

⁹⁰ *Id.* at 419.

⁹¹ *See id.* at 417, 421.

⁹² *LeClerc v. Webb* 419 F.3d 405, 421 (5th Cir. 2005).

⁹³ *Constitutional Law*, *supra* note 58, at 672.

⁹⁴ *See LeClerc*, 419 F.3d at 428 (Stewart, J., dissenting in part).

⁹⁵ *See id.*

⁹⁶ Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(33) (2012) (defining "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent").

⁹⁷ *See LeClerc*, 419 F.3d at 427-28 (Stewart, J., dissenting in part).

⁹⁸ *Id.*

⁹⁹ *See id.*

not premised on their “ability to serve in the Armed Forces or pay taxes,” but rather on aliens’ inability to vote and “long history of invidious discrimination.”¹⁰⁰ But even under the majority’s framework, he argued, nonimmigrants still qualify as a suspect class because they “do pay taxes, support the economy and contribute in other ways to our society.”¹⁰¹

Second, having assumed *arguendo* that rational basis is the appropriate analysis to be used in this case, Judge Stewart concluded that the Louisiana Rule could not survive rational basis scrutiny because it was improperly calibrated to solve the problem of transience and did not promote any “special interest.”¹⁰² He noted that while the Rule purports to protect clients’ interests from potentially transient nonimmigrant lawyers, the same concern equally applies to both citizens and immigrants because they could just as easily leave the country to escape prosecution for ethical violations.¹⁰³ Hence, “the Rule is not the least restrictive way” to protect the state’s interests from lawyers who may suddenly leave.”¹⁰⁴

2. *Van Staden v. St. Martin*

The Fifth Circuit revisited the constitutionality of state laws barring nonimmigrants from obtaining professional licenses in *Van Staden v. St. Martin*.¹⁰⁵ In this case, the court reviewed a Louisiana statute § 37:970(2) that requires an applicant for a nursing license to be a permanent resident or a citizen of the United States.¹⁰⁶ The plaintiff, a citizen of the Republic of South Africa, had lived in the United States for ten years under the H-1C registered nurse visa and was a licensed practical nurse in Texas.¹⁰⁷ At that time, she had also applied to USCIS to become a permanent resident alien.¹⁰⁸

The court relied on the rationale of *LeClerc v. Webb* and applied the rational basis standard, finding the Louisiana statute constitu-

¹⁰⁰ *Id.* at 428-29 (citations omitted).

¹⁰¹ *See id.* at 428 (citations omitted).

¹⁰² *Constitutional Law*, *supra* note 58, at 669, 673 (citing *LeClerc*, 419 F.3d at 431).

¹⁰³ *See LeClerc v. Webb* 419 F.3d 405, 430 (5th Cir. 2005) (Stewart, J., dissenting in part).

¹⁰⁴ *Id.* at 431.

¹⁰⁵ *Van Staden v. St. Martin*, 664 F.3d 56, 57 (5th Cir. 2011).

¹⁰⁶ *See id.* at 59-61.

¹⁰⁷ *Id.* at 57.

¹⁰⁸ *Id.*

tional.¹⁰⁹ The Fifth Circuit Court reaffirmed that in *LeClerc v. Webb* it was correct to draw a line between immigrants and nonimmigrants, because the latter does not satisfy the conditions triggering strict scrutiny.¹¹⁰ First, the court noted that nonimmigrants differ from permanent aliens in that their lack of political capacity is tied to their temporary connection to this country.¹¹¹ And second, the court emphasized that nonimmigrants are not “virtual citizens” because of a number of factual and legal distinctions, specifically, different tax treatment, ineligibility for military service and federal benefits.¹¹²

Relying on these rationales, the Fifth Circuit reaffirmed the holding in *LeClerc v. Webb* by noting that because nonimmigrants are not a suspect class, state laws that treat them unfavorably need to only pass the rational basis review.¹¹³ Viewed through this deferential lens, the court upheld the Louisiana statute¹¹⁴ as serving a legitimate state interest in regulating the practice of those it admits to its professions.¹¹⁵

In sum, the Fifth Circuit in *Van Staden* concluded that the Supreme Court jurisprudence allows states to distinguish between immigrants and nonimmigrants for the purposes of Equal Protection analysis.¹¹⁶ The court ruled that based on the dissimilarities between nonimmigrants and United States citizens, nonimmigrants do not merit the highest degree of judicial protection.¹¹⁷

B. *Second Circuit*

A year after the Fifth Circuit rendered the *Van Staden* decision, the Second Circuit addressed a similar issue in *Dandamudi v. Tisch*.¹¹⁸

Unlike the Fifth Circuit, however, the Second Circuit struck down a New York statute that precluded nonimmigrants from practicing pharmacy, medicine, and other professions for violating the Fourteenth

¹⁰⁹ See *id.* at 61.

¹¹⁰ *Id.* at 59.

¹¹¹ *Van Staden v. St. Martin*, 664 F.3d 56, 59 (5th Cir. 2011) (citing *LeClerc v. Webb*, 419 F.3d 405, 417-18 (5th Cir. 2005)).

¹¹² See *id.* (citing *LeClerc*, 419 F.3d at 428).

¹¹³ See *id.* at 60.

¹¹⁴ LA. REV. STAT. § 37:970(2) (2005) (providing that a qualifying applicant must be “a citizen of the United States or have taken out of his first citizenship papers.”).

¹¹⁵ See *Van Staden*, 664 F.3d at 61 (citing *LeClerc*, 419 F.3d at 421).

¹¹⁶ See *id.* at 58 (citing *LeClerc*, 419 F.3d at 421).

¹¹⁷ See *id.* (citing *LeClerc*, 419 F.3d at 421).

¹¹⁸ *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

Amendment's Equal Protection Clause.¹¹⁹ The Second Circuit explicitly disagreed with the Fifth Circuit on application of the judicial review for the state statues adversely affecting nonimmigrants, noting that the Fifth Circuit rationale in *LeClerc v. Webb* and in *Van Staden v. St. Martin* "misconstrues both law and fact."¹²⁰ Expressing its disagreement with the Fifth Circuit Court's ruling, the Second Circuit emphasized that strict scrutiny is warranted in these types of cases for three reasons.¹²¹

First, the Second Circuit criticized the Fifth Circuit's narrow interpretation of the Supreme Court's jurisprudence on the issue of aliens as a "suspect class." The Second Circuit first stressed that the Supreme Court did not designate a list of similarities between immigrants and citizens as the test for determining when state discrimination against any subclass of lawful immigrants is subject to strict scrutiny.¹²² The court opined that by distinguishing between immigrants and nonimmigrants as two subclasses of aliens, the Fifth Circuit took the Supreme Court's precedent, *Graham v. Richardson*, out of context.¹²³ In *Graham v. Richardson*, the Supreme Court drew a comparison between resident aliens and citizens with one specific purpose—to refute the states' arguments that there was a compelling interest in restrictive legislation to preserve the benefits for citizens at the exclusion of permanent residents.¹²⁴ The Supreme Court pointed out that because permanent residents and citizens have much in common, treating them differently does not pass muster under the Fourteenth Amendment.¹²⁵ Therefore, the Supreme Court's use of similarities between immigrant aliens and citizens in *Graham v. Richardson* was not intended to be a "litmus test for determining whether a particular group of aliens is a suspect class."¹²⁶

Second, even if Supreme Court precedent allows for a distinction between immigrants and nonimmigrants based on their similarity to citizens, application of strict scrutiny is still justified because nonimmigrants

¹¹⁹ See *id.* at 72.

¹²⁰ See *id.* at 75.

¹²¹ See *id.*

¹²² See *id.*

¹²³ *Id.*

¹²⁴ *Dandamudi v. Tisch*, 686 F.3d 66, 75 (2d Cir. 2012) (citing *Graham v. Richardson*, 403 U.S. 365, 376 (1971)).

¹²⁵ *Id.* at 76 (citing *Graham*, 403 U.S. at 374).

¹²⁶ *Id.*

grants are substantially similar to citizens in certain relevant aspects.¹²⁷ For instance, the Second Circuit rebutted the Fifth Circuit's contention that nonimmigrants incur favorable tax treatment by noting that nonimmigrants "do pay taxes, often on the same terms as citizens and LPRs, and certainly on the income earned in the United States."¹²⁸ The Second Circuit also criticized the Fifth Circuit's focus on nonimmigrants' "transience" as overly formalistic, contradicting reality and disregarding the dual intent doctrine.¹²⁹ The dual intent doctrine essentially recognizes that although nonimmigrants express intent not to seek permanent residence in the United States, they are legally permitted to do so upon entry.¹³⁰

Third, the Second Circuit reasoned that nonimmigrant aliens are one subclass of aliens that the Supreme Court generally recognizes as a "discrete and insular minority."¹³¹ Classifications of aliens are inherently suspect because of their limited role in the political process coupled with the history of discrimination against them and not because they are factually indistinguishable from citizens.¹³²

Finally, the Second Circuit refused to create a third exception to strict scrutiny analysis for statutes discriminating against lawfully admitted aliens reasoning that it "would create odd, some might say absurd, results" because children of illegal immigrants would receive greater protection than nonimmigrants, legally admitted to the country.¹³³ As previously discussed in Part I, the Supreme Court delineated only two exceptions to the general rule of strict scrutiny: the democratic exception and the illegal aliens exception, both of which receive the minimum level of scrutiny.¹³⁴ The Court also created an exception illegal immigrants exception, giving a "heightened" rational

¹²⁷ *Id.* at 76-77.

¹²⁸ *Id.* at 77 (citing Internal Revenue Code, 26 U.S.C. § 7701(b) (2012)).

¹²⁹ *See id.* at 77-78.

¹³⁰ *Dandamudi v. Tisch*, 686 F.3d 66, 77 (2d Cir. 2012) (citing *LeClerc v. Webb*, 444 F.3d 428, 429 (5th Cir. 2006) (Stewart, J., dissenting in part)).

¹³¹ *See id.* (quoting *LeClerc*, 419 F.3d at 428-29 (Stewart, J., dissenting in part)).

¹³² *See id.* (citing *LeClerc*, 419 F.3d at 428-29 (Stewart, J., dissenting in part)).

¹³³ *See id.* at 78.

¹³⁴ *Plyler v. Doe*, 457 U.S. 202, 223-24, 226 (1982); *see Foley v. Connelie*, 435 U.S. 291, 296 (1978) (explaining that because "a democratic society is ruled by its people," states may deny aliens the right to vote)); *see also Perkins v. Smith*, 370 F. Supp. 134, 136-37 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976) (noting that aliens are denied the right to serve on juries); *Sugarman v. Dougall*, 413 U.S. 634, 647-49 (1973) (noting that aliens are similarly denied the right to hold political office).

basis protection to children of illegal immigrants.¹³⁵ Thus, as the Second Circuit aptly pointed out, “[i]f statutes discriminating against *lawfully* admitted nonimmigrant aliens were reviewed under a rational basis framework that would mean that a class of *unlawful* aliens would receive greater protection against state discriminatory states than those *lawfully* present.”¹³⁶

Thus, the Second Circuit held that the subclass of aliens known as nonimmigrants are part of the suspect class, as they constitute a discrete and insular minority, and any discrimination by the state against this group is subject to strict scrutiny review.¹³⁷

VI. WHY STATE LAWS DISCRIMINATING AGAINST NONIMMIGRANTS WARRANT STRICT SCRUTINY JUDICIAL REVIEW

Legal precedent, immigration policy, and pragmatic considerations support the Second Circuit’s embrace of strict scrutiny protection for nonimmigrants. Section A of this Part demonstrates that nonimmigrants possess characteristics of a traditional suspect class and exposes the deficiencies in the Fifth Circuit’s argument in denying nonimmigrants strict scrutiny protection. Section B of this Part argues that assuming the proper standard for justification of strict scrutiny is the aliens’ proximity to citizenship, this standard is met because nonimmigrants are sufficiently similar to citizens.

A. *Nonimmigrants as a “Suspect Class” Qualify for Strict Scrutiny Standard of Review*

The INA defines an alien as “any person not a citizen or national of the United States” and subdivides the class of aliens into subclasses of immigrants and nonimmigrants.¹³⁸ Despite this statutory sub-classification, the Supreme Court has not used the same terminology and has referred to all noncitizens as “aliens.”¹³⁹ Conceivably, this choice

¹³⁵ *Dandamudi*, 686 F.3d at 78 (citing *Plyler*, 457 U.S. at 223-24, 230).

¹³⁶ *Id.* at 78.

¹³⁷ *See id.* at 77, 79.

¹³⁸ Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(3) (2012).

¹³⁹ *See Plyler*, 457 U.S. at 219-20; *Examining Bd. of Eng’rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 606 (1976); *In re Griffiths*, 413 U.S. 717, 724-25 (1973); *Graham v. Richardson*, 403 U.S. 365, 374-76 (1971).

of words indicates that the Supreme Court never intended to exclude nonimmigrants from the “suspect class.”¹⁴⁰

1. Nonimmigrants as “Discrete and Insular Minority”

In denying nonimmigrants equal protection of laws, the Fifth Circuit lessened the importance of the rationale designating aliens a suspect class.¹⁴¹ The Supreme Court has long established that “classifications based on alienage, like those based on nationality or race, are inherently suspect”¹⁴² because aliens are “subject to disadvantages not shared by the remainder of the community.”¹⁴³ The most prominent disadvantages of aliens are their political powerlessness and unfamiliarity with American traditions and customs, which has historically made them an easy target of discrimination.¹⁴⁴ Hence, to avoid state predatory actions against legal noncitizens, the Supreme Court endowed them with strict scrutiny judicial protection.¹⁴⁵

Comparably, nonimmigrant aliens are also discrete and insular minorities because they suffer from the same limitations as immigrants.¹⁴⁶ Like any person within a state’s jurisdiction, nonimmigrants must comply with the state’s laws.¹⁴⁷ However, nonimmigrant aliens have no ability to change or influence the laws by which they must abide because they lack political voice.¹⁴⁸ Some commentators even argue that nonimmigrants are in a worse position than immigrants in terms of protection against state discrimination because they are “more powerless and vulnerable to state predations—more ‘discrete and insular.’”¹⁴⁹ Nonimmigrants are particularly vulnerable because of their inability to serve in the United States military, their ineligibility for federal welfare benefits despite paying taxes, and the risk of deportation at the discretion of the Attorney General.¹⁵⁰ Regardless of these vulnerabilities, the Fifth Circuit gave little weight to what has

¹⁴⁰ See Beckman, *supra* note 59, at 150.

¹⁴¹ See *LeClerc v. Webb* 419 F.3d 405, 415, 422 (5th Cir. 2005).

¹⁴² *Graham*, 403 U.S. at 372.

¹⁴³ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

¹⁴⁴ *Id.*; 16B C.J.S. *Constitutional Law* § 1103 (2012).

¹⁴⁵ See C.J.S., *supra* note 144, § 1103 (citing *LeClerc*, 419 F.3d at 415, 422).

¹⁴⁶ See *Dandamudi v. Tisch*, 686 F.3d 66, 75 (2d Cir. 2012).

¹⁴⁷ See Adam Bryan Wall, *Justice for All?: The Equal Protection Clause And Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 774 (2010).

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* at 772.

¹⁵⁰ See *id.*

been traditionally viewed as justifications for strict scrutiny protection, arguing that nonimmigrants' lack of legal capacity is "tied to their temporary connection to this country."¹⁵¹

2. "Transient in Name Only"

Legal precedent and practical considerations embodied in United States immigration policy demonstrate that the Fifth Circuit's emphasis of nonimmigrants' "transience" is misguided. As discussed in Part I, the Supreme Court has never differentiated between immigrants and nonimmigrants, instead referring to any class of noncitizens as "aliens."¹⁵² Moreover, the controlling cases applying the Equal Protection Clause to aliens "appear to downplay the relevance of aliens' transience."¹⁵³ For instance, in *In re Griffiths*, the ability of the resident alien to remain permanently in the United States was not a factor in equal protection analysis.¹⁵⁴ In fact, the aspiring attorney in *In re Griffiths* had no intention of becoming a United States citizen or abandoning her Dutch citizenship, which, by the Fifth Circuit's standard, would have also rendered her transient.¹⁵⁵ In affording resident aliens the highest degree of judicial protection, "evidently the Griffiths 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."¹⁵⁶

Aside from the Supreme Court's depreciation of transience in Equal Protection analysis, the United States immigration policy shows that it does not necessarily characterize nonimmigrants as transient.¹⁵⁷ Under the United States immigration policy, H-1 visa applicants, the class of applicants most affected by the states' licensing exclusions, are lawfully permitted to express intent to remain temporarily to obtain and maintain their work visas, as well as an implicit intent to remain

¹⁵¹ *LeClerc v. Webb* 419 F.3d 405, 417 (5th Cir. 2005).

¹⁵² *See Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605-06 (1976); *In re Griffiths*, 413 U.S. 717, 718 (1973); *Graham v. Richardson*, 403 U.S. 365, 266-68 (1971).

¹⁵³ *Constitutional Law*, *supra* note 58, at 669, 673.

¹⁵⁴ *See Griffiths*, 413 U.S. at 719.

¹⁵⁵ *Constitutional Law*, *supra* note 58, at 674 (citing *Griffiths*, 413 U.S. at 718 n.1).

¹⁵⁶ *See id.*

¹⁵⁷ *See Dandamudi v. Tisch*, 686 F.3d 66, 71 (2d Cir. 2012) (interpreting Immigration and Nationality Act § 214, 8 U.S.C. § 1184(a)(2)(B) (2009)).

permanently when they apply for LPR status.¹⁵⁸ This practice is officially known as the “dual intent doctrine,” and its existence demonstrates that the United States immigration policy is guided by practical considerations rather than by formalistic characteristics.¹⁵⁹ Recognizing the dual intent doctrine, the Second Circuit expressly stated that “any claimed distinction based on permanency of residence is . . . disingenuous.”¹⁶⁰ Statistics collected by the DHS amply demonstrates the dual intent doctrine at work. According to the DHS Yearbook, USCIS adjusted 667,776 foreign nationals to LPR status in 2009 and 566,576 in 2010.¹⁶¹ Presumably, many of these foreign nationals had been originally admitted as nonimmigrants.¹⁶²

Another example of nonimmigrants’ tendencies to stay in the United States permanently is the “F-1 to H-1B to LPR” path.¹⁶³ Under this method of status adjustment, a foreign national arrives to the United States as a student under the F-1 visa and then changes his status to H-1B visa through the sponsorship of the employer.¹⁶⁴ While staying in the country under the H-1 visa, nonimmigrants can petition the DHS to become LPRs through one of the employment-based immigration categories.¹⁶⁵ Some commentators consider this “a natural and positive chain of events” reasoning that “it would be foolish to educate these talented young people only to make them leave to work for foreign competitors.”¹⁶⁶

Data collected by the DHS on United States immigration policy demonstrates that nonimmigrants and LPRs are similarly situated in terms of their position and presence in the United States.¹⁶⁷ As the Second Circuit shrewdly explained it in *Dandamudi v. Tisch*, nonimmigrants are “transient in name only.”¹⁶⁸ The Second Circuit explic-

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at 77.

¹⁶⁰ See *id.*

¹⁶¹ U.S. DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS 18 (2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf [hereinafter YEARBOOK 2010]; U.S. DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS 18 (2009), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf [hereinafter YEARBOOK 2009].

¹⁶² See WASEM, *supra* note 34, at 29 n.66.

¹⁶³ See *id.* at 28-29.

¹⁶⁴ See *id.* at 29 (citations omitted).

¹⁶⁵ See *id.* (citations omitted).

¹⁶⁶ See *id.*

¹⁶⁷ See YEARBOOK 2010, *supra* note 161 at 18; YEARBOOK 2009, *supra* note 161 at 18.

¹⁶⁸ See *Dandamudi v. Tisch*, 686 F.3d 66, 78 (2012) (internal quotation marks omitted).

itly recognized that reality proves the Fifth Circuit's reasoning deficient, noting that "[a] great number of these professionals remain in the United States for much longer than six years and many ultimately apply for, and obtain, permanent residence."¹⁶⁹ The Second Circuit concluded that these practicalities demonstrate that there is little distinction between LPRs and nonimmigrants.¹⁷⁰

Thus, although nonimmigrants initially express the intent to stay in the country temporarily, they later are permitted to pursue permanent residency, consistent with United States' laws and immigration policy.¹⁷¹ The process of the status adjustment can be very slow, exposing nonimmigrants to the disparate state treatment for a prolonged period of time.¹⁷² While in nonimmigrant status, nonimmigrants share many burdens similar to those of American citizens, as addressed in the next Section.¹⁷³

B. *Nonimmigrants are Sufficiently Similar to Citizens*

Assuming that proximity to citizenship is the proper test for determining when strict scrutiny applies to a class of aliens, this Section explains why under this test, nonimmigrants still warrant strict scrutiny judicial protection. Subsection One addresses nonimmigrants' contribution to society while subsection Two analyzes taxing of nonimmigrants in comparison to citizens.

1. Participation in Society

Nonimmigrants are similar to American citizens and LPRs in terms of participation in society and economic contribution.¹⁷⁴ According to data collected by the United States Department of Commerce, F-1 visa students "contribute nearly \$20 billion to the [United States] economy through their expenditure on tuition and living expenses" and "[a]lmost 70 [percent] of all international students' funding comes from sources outside of the United States."¹⁷⁵ Temporary H-type visa workers provide even greater societal and economic

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.*

¹⁷² *See id.* at 71, 78.

¹⁷³ *See* WASEM, *supra* note 34, at 2-3 (citations omitted).

¹⁷⁴ *See id.* (citations omitted).

¹⁷⁵ *Id.* at 2 (footnote omitted).

contribution.¹⁷⁶ For instance, the ability of United States firms to hire foreign-born nationals with specialized skills and knowledge helps them “to remain competitive in a worldwide market and to keep their firms in the United States.”¹⁷⁷ If deprived of the opportunity to employ nonimmigrants, firms will potentially be forced to resort to outsourcing of jobs to foreign countries, which in turn will harm United States’ labor markets.¹⁷⁸ Some scholars even posit that the temporary workers “boost economic output and create new middle class job opportunities for native-born Americans.”¹⁷⁹

2. Taxation of Nonimmigrants

In addition to significant social contribution, and contrary to opinion of *LeClerc v. Webb*, nonimmigrants pay taxes, often on the same terms as citizens and resident aliens.¹⁸⁰ According to 26 U.S.C. § 7701(b), nonimmigrants are considered United States residents for tax purposes so long as they are physically “present in the United States for at least 31 days during the calendar year, and the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years . . . equals or exceeds 183 days.”¹⁸¹ Because H-1 specialty workers, H-1 nurses and F-1 students are normally present in the United States for a period of three to six years, they meet this test and, accordingly, bear the same tax obligations as citizens.¹⁸²

The United States Internal Revenue Service closely monitors the amounts paid to nonresident aliens, including employee compensation, interest, and royalties.¹⁸³ Nonimmigrants are not allowed to claim “exempt,” in the same manner as citizens and have a fixed tax withholding from their pay.¹⁸⁴ In other words, nonimmigrants’ status

¹⁷⁶ See *id.* at 2-3 (citations omitted).

¹⁷⁷ *Id.* at 3.

¹⁷⁸ See *id.* (citations omitted).

¹⁷⁹ See Wasem, *supra* note 34, at 3 (citations omitted).

¹⁸⁰ See *Dandamudi v. Tisch*, 686 F.3d 66, 77 (2d Cir. 2012) (citations omitted).

¹⁸¹ Internal Revenue Code, 26 U.S.C. § 7701(b)(3) (2010).

¹⁸² See 2 GREGORY P. ADAMS, ET AL., IMMIGRATION & NATIONALITY LAW HANDBOOK 312 (2003-04 ed.).

¹⁸³ See *id.* at 313.

¹⁸⁴ See *id.* (footnote omitted).

does not provide them with a more favorable tax treatment, as it may seem.¹⁸⁵

V. ADVERSE EFFECTS OF THE BROAD LICENSING PRECLUSIONS TO THE STATE INTERESTS AND AVAILABILITY OF ALTERNATIVE METHODS COMPEL REMOVAL OF THE DISCRIMINATORY RESTRICTIONS

States' exclusion of aliens from licensing professions is predicated on the states' interests in protecting the general welfare of its citizens.¹⁸⁶ This Part argues that citizens' interests are better served when nonimmigrants are admitted to licensing professions. Section A of this Part exposes the deficiencies of the overly broad restrictive licensing regulations and their incidental injurious consequences to citizens' welfare.

A. *Preclusion of the Well-Qualified Professionals Negatively Impacts States' Interests and Denies States' Citizens Quality Care*

Exclusion of nonimmigrants from professional licensure purports to ensure ethical conduct, accountability, and answerability of the members of certain professions to the citizens of the state because of their misperceived "transience."¹⁸⁷ Regulations of such broad nature, however, are not properly calibrated to address this particular concern.¹⁸⁸ Attempting to address the problem of potential transience, these state regulations "deny opportunities to highly educated and qualified foreign workers, who not only benefit the U.S. workforce, but also the nation as a whole" and contribute to the shortage of certain professionals in those states.¹⁸⁹

¹⁸⁵ See *id.*

¹⁸⁶ See *Van Staden v. St. Martin*, 664 F.3d 56, 59-60 (5th Cir. 2011) (citations omitted); *LeClerc v. Webb*, 419 F.3d 405, 418-19 (5th Cir. 2005) (citations omitted).

¹⁸⁷ See *Dandamudi v. Tisch*, 686 F.3d 66, 78 (2d Cir. 2012) (citations omitted); *Van Staden*, 664 F.3d at 61; *LeClerc*, 419 F.3d at 417-19 (citations omitted).

¹⁸⁸ See Beckman, *supra* note 59, at 150.

¹⁸⁹ Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, 7 MOD. AM. 12, 16 (2011).

For instance, recently many states have experienced a shortage of medical professionals.¹⁹⁰ According to the Immigration Impact reports, as of January 2013, there were 5,864 primary-care “Health Professional Shortage Areas” and this shortage is expected to worsen in the coming decades.¹⁹¹ To remedy that problem, a number of foreign nurses were invited to work in the United States under the H-1B visa.¹⁹² By excluding foreign nationals from practicing medicine, certain states are contributing to the shortage of medical personnel within their borders, thus denying their citizens quality care.¹⁹³ As one commentator put it, “in protecting its citizens against transient [nurses], the Fifth Circuit may have left some of them with no [nurses] at all.”¹⁹⁴

In addition to the medical field, licensing restriction laws generally deny states the benefits of keeping locally educated skilled professionals.¹⁹⁵ As previously mentioned in Part II, it is common for foreign nationals to pursue education in the United States under F-1 visa and then to seek employment by adjusting an immigration status to H-1 visa.¹⁹⁶ Because most of the specialized professions—including lawyers, engineers, and medical practitioners—require licensing, an inability to obtain needed licensure forces these individuals to move to states that have more permissive licensing regulations. Thus, by foreclosing licensing opportunities to nonimmigrants, the states deprive themselves and consequently their citizens, the benefits of keeping locally educated skilled professionals.

B. *Alternative Mechanisms to Ensure Accountability of Potentially Transient Professionals*

As previously discussed, exclusion of nonimmigrants from licensing professions is purported to be a prophylactic remedy to insulate

¹⁹⁰ LINDA H. AIKEN & ROBYN CHEUNG, NURSE WORKFORCE CHALLENGES IN THE UNITED STATES: IMPLICATIONS FOR POLICY, HEALTH COMM. 4 (2008), http://www.who.int/hrh/migration/Case_study_US_nurses_2008.pdf.

¹⁹¹ Paul McDaniel, SKILLED IMMIGRANTS FILLING U.S. HEALTH CARE NEEDS, AM. IMMIGRATION COUNCIL (2013), <http://immigrationimpact.com/2013/02/25/skilled-immigrants-filling-u-s-health-care-needs/>.

¹⁹² See *id.*

¹⁹³ See *Constitutional Law*, *supra* note 58, at 669-70 (citations omitted).

¹⁹⁴ *Id.* at 676.

¹⁹⁵ WASEM, *supra* note 34, at 5-6 (citations omitted).

¹⁹⁶ *Id.* at 28 (citations omitted).

states' residents from dangers associated with potentially transient professionals.¹⁹⁷ By targeting only nonimmigrants, these regulations fail to consider that citizenship, no matter how it is granted, does not guarantee that a professional will continue to reside in the United States.¹⁹⁸ Additionally, concerns of nonimmigrants' temporary status bear no particular or rational relationship to skill, competence, or financial responsibility.¹⁹⁹ This Section argues that nonimmigrants' peculiar position in the country partially serves as a restraint from unethical or unprofessional behavior. Lastly, this Section concludes by proposing alternative methods for ensuring nonimmigrants' accountability to the states' citizens.

1. Self-Deterrence of Nonimmigrants

States' exclusionary rules are in conflict with Congress's policy underlying the attraction of the foreign professionals to the United States workforce.²⁰⁰ In reviewing whether foreign professionals should be able to work in this country, Congress has already considered their potential transience, but determined that "the benefits these foreign nationals could provide . . . greatly outweigh the negative effects of transience."²⁰¹ To receive an H-1 visa, foreign nationals must meet the same requirements for licensure as any United States citizens; however, "there is no indication that Congress intended for foreign nationals to meet additional requirements."²⁰²

In addition to ignoring federal findings in support of recruitment of foreign specialists to the United States workforce, state laws overlook self-deterrence on the part of nonimmigrants as a method for promoting quality and ethical conduct. Because foreign nationals typically pursue permanent residency while in the United States—either through adjustment of the immigration status or through green card application with the USCIS—they have strong personal incentives to avoid professional misfeasance.²⁰³ In other words, the time and effort nonimmigrants put into the green card process serves as deterrence

¹⁹⁷ See *infra* Section III. .

¹⁹⁸ See *Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 606 (1976) (citations omitted).

¹⁹⁹ See *id.* (citations omitted).

²⁰⁰ See Storch, *supra* note 189, at 16.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ WASEM, *supra* note 34, at 29-30 (citations omitted).

from unethical behavior and reduces the flight risk. Thus, with the dual intent visas such as H-1B and H-1C, state citizens are already protected from the risks posed by potentially transient professionals.

2. Alternative Methods to Ensure Nonimmigrants' Accountability

Although profession regulation and prevention of nonimmigrants from easily leaving the country may be legitimate state purposes, restrictive licensure laws do not constitutionally achieve those goals.²⁰⁴ As the district court noted in *Wallace v. Calogero*, “[t]he Rule [Louisiana Supreme Court Rule XVII § 3(b)] does not restrict membership to the bar to citizens and immigrant aliens who plan to reside permanently in Louisiana. . . . Citizens and immigrant aliens may be admitted to the bar even if they have no intention of residing in Louisiana.”²⁰⁵ If the state was concerned with transience, “the Rule would be calculated to address the problem directly. However, “the Rule only excludes a fraction of persons who may have temporary residence in the state.”²⁰⁶ The same logic would apply to the exclusion of the medical professionals.

Preclusive state statutes are not often narrowly tailored and, as the Supreme Court pointed out in *Examining Bd. v. Flores de Otero*, there are other, more efficient methods available to the states to address the problem directly.²⁰⁷ For instance, malpractice insurance can be one of the methods to limit the dangers of potentially transient professionals as suggested by the Second Circuit in *Dandamudi*.²⁰⁸ Malpractice insurance will provide a remedy to the state’s citizens in the event they become victims of the incompetent or unethical conduct of the professional who fled the jurisdiction.²⁰⁹

Another possible method of ensuring continuity and accountability of foreign professionals is a reduction of the license duration for nonimmigrants. Shorter licensing periods will permit the state to evaluate the conduct of the professionals on a case-by-case basis and thus

²⁰⁴ See Wall, *supra* note 147, at 777 (citations omitted).

²⁰⁵ *Wallace v. Calogero*, 286 F. Supp. 2d 748, 763 (E.D. La. 2003) *overruled by* LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005).

²⁰⁶ *Id.*

²⁰⁷ *Dandamudi v. Tisch*, 686 F.3d 66, 79 (2d Cir. 2012) (citing *Examining Bd. of Eng’rs, Architects and Surveyors v. Flores De Otero*, 426 U.S. 572, 606 (1976)).

²⁰⁸ *Id.* (citing *Flores De Otero*, 426 U.S. at 606).

²⁰⁹ See *id.* (citing *Flores De Otero*, 426 U.S. at 606).

monitor their compliance with the code of ethics. In any event, states will gain a greater advantage if they remove the complete ban on the admission of the foreign nationals or replace it with another protective mechanism. After all, as the Supreme Court noted in *Examining Bd. v. Flores de Otero*, the state's interest in regulation of the potentially transient professionals is "at odds with the Federal Government's primary power and responsibility for the regulation of immigration."²¹⁰ "Once an alien is lawfully admitted, a State may not justify the restriction of the alien's liberty on the ground that it wishes to control the impact or effect of federal immigration laws."²¹¹

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment was created to ensure equal treatment of all state residents by the state laws and the Supreme Court interpreted the clause to extend to the protection of aliens.²¹² Without expressly distinguishing between immigrants and nonimmigrants, the Supreme Court considered aliens' political impotence and history of unequal treatment in society, and denominated them as a suspect class.²¹³ As such, all state laws disadvantaging aliens are generally scrutinized under the highest standard of judicial review.²¹⁴

Because the Court never expressly stated what level of judicial review applies to state laws discriminating against nonimmigrants, the federal circuits are split on the interpretation. The Fifth and the Sixth Circuits argue that only a rational basis applies to the state laws excluding nonimmigrants from obtaining professional licenses because of the nonimmigrants' temporary presence on the country and dissimilarity from the United States citizens.²¹⁵ But the Second Circuit provides a more accurate interpretation of the Supreme Court precedent

²¹⁰ *Flores De Otero*, 426 U.S. at 606.

²¹¹ *Id.* at 605-06.

²¹² CHEMERINSKY, *supra* note 14, at 787 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

²¹³ See generally *Plyler v. Doe*, 457 U.S. 202 (1982); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores De Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

²¹⁴ CHEMERINSKY, *supra* note 14, at 786-93.

²¹⁵ See *LeClerc v. Webb*, 419 F.3d 405, 415-22 (5th Cir. 2005) (citations omitted); *Van Staden v. St. Martin*, 664 F.3d 56, 59-61 (2011) (citations omitted).

supporting the conclusion that nonimmigrants warrant strict scrutiny level of protection.²¹⁶

State licensing laws precluding foreign nationals from entering certain professions should be analyzed using strict scrutiny judicial standard for three reasons. First, nonimmigrants possess characteristics of the traditional suspect classes, namely, targeted discrimination and inability to vote.²¹⁷ Second, nonimmigrants are sufficiently similar to citizens to pass the proximity to citizenship test articulated by the Fifth Circuit.²¹⁸ And third, nonimmigrants' "transience" is misperceived as evidenced by the formal recognition of the "dual intent" policy and immigration data statistics.²¹⁹

Lastly, the states' interests are better promoted if the exclusionary licensing provisions are completely repealed because accountability of the nonimmigrant professionals can be achieved more efficiently and accurately through methods other than a complete ban from licensure.²²⁰

²¹⁶ See *Dandamudi v. Tisch*, 686 F.3d 66, 73-77 (2d Cir. 2012).

²¹⁷ See *id.* at 75.

²¹⁸ See *id.* at 76-77 (citations omitted).

²¹⁹ See *id.* at 77-78.

²²⁰ See *Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 606 (1976).

