Out of Many, One: Heightening the Standard of Review for Nonimmigrant Aliens

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Part I: Introduction

A. The Challenge of Diversity

In the year 1782—roughly one year after the thirteen American colonies ratified the Articles of Confederation—Congress adopted the Great Seal of the United States, bearing the motto, "E pluribus unum," Latin for, "Out of many, one."\(^1\) This motto was first selected on July 4, 1776, by a committee of the Continental Congress, in order to represent the six nations from which the American colonists had principally emigrated.\(^2\) It is rather unlikely that these committeemen, or indeed any of the Founding Fathers of our nation, truly recognized the expansive role that foreign immigration would play in the future of our then-young republic. Nevertheless, planted early on in the heritage that is uniquely ours was an acknowledgement that these United States would indeed be a New World, where the distinctions of the Old World would cease in favor of a vibrant, diverse, and mobile social order. Although there have been numerous detours and delays in that ascendant vision, American society and culture is indeed heterogeneous today; perhaps more heterogeneous than anywhere else on earth. Yet, despite the myriad differences that abound between individuals, communities, and regions within our United States, we retain a culture and a psyche that is distinctly ours; distinctly American.

Notwithstanding our society’s diverse and varied culture, our history with immigration has not been one devoid of controversy. At times in our history, anti-immigrant fervor has swept parts of the American population, and pitted “native” or nativist Americans against those of

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\(^2\) Id.
foreign birth, ancestry or simply those of a perceived foreign ideology. There have been numerous efforts throughout our history to afford preference in the law for citizens over aliens – whether those preferences were constitutionally permissible or not. The motivations for these various legislative initiatives likely ranged the gamut from animus towards foreign-born individuals, to rationales of economic competitiveness, to innocently misguided notions about the law. Nevertheless, the Supreme Court has made it abundantly clear that the several States cannot treat citizens in a manner differently than non-citizens, except in a few strictly defined circumstances.

This Comment explores one of the remaining controversies with respect to legal discrimination against aliens: to what extent the government can treat nonimmigrant aliens differently under the law than it treats immigrant aliens. Part II discusses, in brief, the history of international immigration to the United States – particularly the salutary effects of this immigration on this country – and discusses in detail the three federal appellate level cases that are in disagreement on this question of law. The legal disagreement has been highlighted and explored through the lens of a split between the United States Court of Appeals for the Second Circuit and the Fifth and Sixth Circuits. The split arose when the Second Circuit seemingly broke ranks and held that strict scrutiny, the highest standard of review, was to be applied to laws and regulations affecting non-immigrant aliens. The Second Circuit disagreed with the reasoning and holding of its sister circuit courts, who had examined the legal issue and applied the most deferential standard of review to the laws challenged, what is called rational basis review. The

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4 See, e.g. Sugarman v. Dougall, 413 U.S. 634 (1973); Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).

5 Id.
legal analytical framework and approach utilized by each of the three courts is essentially the same, yet, the courts’ understanding and interpretation of the facts as analyzed through that framework are decidedly different. Part III analyzes the equal protection review which the Supreme Court has fostered over the years, discussing the seminal cases and those which are most applicable to the dispute at issue here. Part III also advocates for a strict scrutiny tier of review, or alternatively for a heightened rational basis review, for laws that discriminate against nonimmigrant aliens as a class. The settled law with respect to legal discrimination against immigrants applies strict scrutiny as a matter of fact if a law affects a lawful permanent resident. But, as this split indicates, lower courts have interpreted the silence of the Supreme Court on this ancillary matter as ambiguous, and disagreed over whether or not any heightened scrutiny is justified for discrimination against non-immigrant aliens.

Part II: Background

A. Assimilation and its Beneficial Byproducts

The culture, customs, and institutions of the United States have played no small role in allowing for the large number of international immigrants to blend as smoothly as they do into our social fabric. Equally important, of course, is the work ethic and single-headed determination of many of the immigrants who come to America, and make it their home. As stated in a song learned by many children of the twentieth century, from School House Rock:

Lovely Lady Liberty; with her book of recipes; and the finest one she’s got; is the great American melting pot; the great American melting pot. What good ingredients, Liberty and immigrants!\(^6\)

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\(^6\) This is not to say that the American immigrants’ experience is or has been one free from prejudice or hardship – merely that immigrants have been and continue to be a vibrant part of our society.

Generalizations about immigration are part of our collective consciousness, but the social science, particularly the economic data, tells an even more compelling story in favor of immigration.

B. Economic Impact of Immigration

International immigration to the United States has had a positive impact on the national economy over time. Early studies of immigration to America:

"found that US immigrants earned less than natives when entering the country but converged to the native wage level in 15 years (e.g. Chiswick 1978; Carliner 1980). After 30 years, immigrants were found to earn more than natives of similar age and education. These results led many to conclude that immigration had a positive net impact on the US economy."

If nothing else, these numbers demonstrate that many immigrants come to America with a strong work ethic and competitive ingenuity. Despite the challenges they face, evidenced by their typical income being less than a native-born American’s income, immigrants have flocked to America, and, according to the study cited above, they generally eventually outperformed native workers. This single statistic seems to give empirical support to the idea of the American Dream itself. In addition, there is “robust evidence that [immigrant workers] increased total factor productivity, on the one hand, while they decreased capital intensity and the skill-bias of production technologies.” Without wading too deep into the economic waters presented by the above terminology, the above quote indicates a very important economic effect which stems, at least in part, from immigration. The American economy has become more productive, while at the same time becoming more efficient and cheaper to participate in. In broad terms, when the data indicates that “capital intensity” has been decreased by the proliferation of immigrants in the workforce, it means that, as a whole, it requires less money or capital investment to produce

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goods. This at least supports the notion that more overall jobs in production are able to be created in the country, for native-born and immigrant alike. In addition, the reduction of “skill bias” in production technologies means that, as a whole, production has become less requiring of skilled workers than before, which again is a benefit to low-skilled workers, whether they are native-born or immigrants. Taking into account all of “these [economic] effects, an increase in employment in a[n American] state of 1% due to immigrants produced an increase in income per worker of 0.5% in that state [between 1960-2000, and 2000-2006].”

Not only has immigration increased the average income of Americans, increased workplace productivity, lowered the expense of doing business and allowed for lower-skilled workers to enter the economy, but immigrants have contributed substantially to American innovation as well. “[I]mmigrants patent at double the native rate.” Our current level of industrialization would not have been possible without an influx of foreign immigration to the United States. Indeed, “immigration not only contributed to the growth and spread of factories but it also contributed to the growth of cities.” The continuing low-cost and relative ease of immigrating to the United States “reduces the share of offshored jobs,” and may “even increase total native employment of less skilled workers.” The data is unambiguous on the points that matter most: immigration contributes to the economic prosperity of the entire United States.

C. Social Impact of Immigration

Economic inferences made regarding immigration are numerical or statistical indicators of something more tangible, and thus it is important to recognize that there has been a

10 Id.
13 Id.
tremendous social impact of immigration as well. It is difficult to divorce economics, as a metric, from the rest of our existence, but there is yet another anecdote regarding the importance of immigrants: the influx of low-skilled workers through immigration has allowed for professionals—including, on an increasing basis, women—to work longer hours outside the home, and, presumably, attain higher achievement in their careers. Immigrants to the United States are also, in general, less likely to be criminals or in the criminal justice system than native-born Americans, as they are far more likely to be law-abiding members of society. In fact, some studies have shown that immigrant communities “were less cynical about the law...and...more likely to cooperate with the police.” This is presumably attributable to the fact that these immigrants possessed enough of a sense of determination to work hard and leave their home countries in pursuit of the benefits of an American life, and they still possess that determination.

The correlative inference about immigration on the larger scale is also largely positive.

“For example, in rural counties that experienced an influx of immigrants in the 1980s and ‘90s, crime rates dropped by more than they did in rural counties that did not see high immigrant growth.”

Increased levels of immigration have been associated with lower homicide rates in numerous demographic subclasses. In large cities, immigration has been associated with reductions in overall crime, as well as economic revitalization and redevelopment.

The melting pot that is the United States of America is now home to immigrants from every corner of the globe. They come here to live freely and work productively, and they

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17 Id.
18 Id.
19 Id.
contribute new ideas, new energy, and new labor to the American economy. Although there is ample room for debate about the extent to which their arrival can or should be regulated, there is little serious debate about the merits of immigration as a whole. There is even less room for debate about the merits of attracting skilled, talented, and/or educated workers to the United States—such as pharmacists or lawyers. In light of these facts, why would any state wish to discriminate against such a group for the sole basis that their residency is not (yet) legally permanent?

D. New York’s Unlawful Discrimination – Creation of the Circuit Split

In the case of Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012), the United States Court of Appeals for the Second Circuit was confronted with the question of how deferentially to review a state statute that treated subclasses of immigrants differently from one another. The dispute raised the same basic questions of fairness, justice, and equality which have been raised throughout the history of our nation’s Equal Protection jurisprudence. Confronted with a New York statute that did not allow non-resident aliens, or aliens whose immigration status was temporary, to be licensed as pharmacists, the Second Circuit applied strict scrutiny, the least deferential tier of review, and ruled the statute unconstitutional as a violation of the Fourteenth Amendment’s Equal Protection Clause.21

This ruling put the Second Circuit squarely at odds with two other federal appellate courts, the Fifth and Sixth Circuits, which afforded substantially greater deference to state efforts to discriminate on the basis of some sub-classification of alienage.22 Although there may be occasion for the law to recognize distinctions between citizens and non-citizens, as well as different types of immigrants, these reasons should be compelling, and the law narrowly-tailored

to serve those interests, in order that the law not be applied unequally or unfairly to the detriment of some of our most “insular and discrete minorities.” 23 As a well-known Supreme Court nominee, Robert Bork, once wrote, “The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the law.” 24

Having argued that immigration, as a whole, is largely a net benefit for the United States, we must turn to the disagreement between our federal appellate courts. A circuit split was created by the United States Court of Appeals for the Second Circuit when it held that any government action which discriminated against a person on the basis of some sub-classification of their alienage status should be reviewed with the lens of strict scrutiny. Until that time, rational basis had been exclusively applied by courts who had considered the issue. Each Circuit’s ruling will be examined in turn.

E. The Second Circuit’s Approach

Judge Wesley, writing for the court, wasted no time cutting to what he saw to be the heart of the matter. “This case involves a state regulatory scheme that seeks to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work.” 25 The plaintiffs were a group of “nonimmigrant aliens,” which refers to those aliens, legally residing and working in the United States, who for whatever reason, are not considered permanent residents. 26 Each of these plaintiffs was authorized to live and work in the United States by the federal government. 27 The plaintiff immigrants possessed one of two substantially similar immigration statuses: either an H1-B visa, designated for

26 Id. at 70.
27 Id.
temporary workers in a specialty field, or TN status, which allows Canadian and Mexican immigrants to enter the United States to work temporarily at a professional level. The central issue at hand was whether the State of New York could allow a statutory provision to expire that effectively would bar the plaintiffs from practicing as pharmacists, despite the fact that they were admitted to the United States by the federal government to do just that. The statute required, in pertinent part, that an applicant for a pharmacist’s license must “be a United States citizen or an alien lawfully admitted for permanent residence in the United States.” The State had theretofore waived that provision of the law for legal aliens whose status was not permanent.

In the district court, the State of New York sought “to distinguish the rule that alienage classifications draw strict scrutiny...[so] that the rule should only apply to laws that discriminate against [legally permanent residents].” “According to the State, legal permanent residents, or immigrant aliens ‘share essential benefits and burdens of citizenship’—they pay taxes like citizens, they can volunteer for or be conscripted into the military, and they have authorization to live and work in the country indefinitely—while other aliens lawfully within the country do not have as much in common with citizens.” Discussing the Fifth and Sixth Circuits’ approach to discrimination against nonimmigrant aliens, the district court noted that the Western District of New York struck down a substantially similar New York law, barring nonimmigrant aliens from practicing veterinary medicine. The state court in Kirk found that the challenged [veterinary]

30 N.Y. Educ. Law § 6805 (McKinney)
31 Dandamudi, 686 F.3d 66, 71.
33 Id.
34 Id. at 591.
"statute must be reviewed under the strict scrutiny standard, and that it fail[ed] to pass such
scrutiny." Ultimately, the court in Adsumelli (the district court case) found that the disputed
statutory provision did not adequately consider the similarities of nonimmigrant aliens to
immigrant aliens, or perhaps incorrectly determined that there were substantial differences
between the two.36

The Second Circuit’s analysis of Equal Protection jurisprudence was not dissimilar to the
district court’s analysis, which it affirmed.37 The fundamental premise of its decision was simply
that, “the Supreme Court has long held that states cannot discriminate on the basis of alienage.”38
Of principal importance was the case of Graham v. Richardson, 403 U.S. 365 (1971), where the
court struck down statutes that granted benefits to citizens but not to non-citizen residents of the
state, and also where a separate statute required aliens to live in a state for a certain number of
years before being eligible for the same welfare benefit as everyone else.39 “Graham is
considered the lodestar of the Court’s alienage discrimination doctrine.”40 The Second Circuit
noted that in Graham, relying on Takahashi v. Fish and Game Comm’n, 334 U.S. 410 (1948):

“The Court held that treating groups differently based on the members’ alienage
was akin to discriminating against a group because of their race or color. ‘The
protection of [the Fourteenth Amendment] has been held to extend to aliens as
well as to citizens,’ the Court reasoned, ‘[and] all persons lawfully in this country
shall abide ... on an equality of legal privileges with all citizens.’ Id. at 419–20
(emphasis added).39

Turning from Graham, the Second Circuit noted the two exceptions to Graham’s
fundamental principle against discrimination based on alienage. The first exception, known by

66 (2d Cir. 2012).
37 Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012).
38 Id. at 72
40 Dandamudi, 686 F.3d at 72.
41 Id. at 73
some courts as the Sugarman exception (but not referred to as such by the Second Circuit) provides for a rational basis review for state action which excludes aliens from some political and governmental functions.\textsuperscript{42} "For a democracy to function, a state must have the power to 'preserve the basic conception of a political community.'\textsuperscript{43} A state ‘can limit certain ‘important nonelective...positions [to] officers who participate in...the formulation, execution, or review of broad public policy.'\textsuperscript{44} The Second Circuit properly declined to apply this exception to pharmacists, presumably because they have no major role in forming or executing public policy.

The second potential exception from Graham's rule of strict scrutiny for discrimination based on alienage applies in the case of undocumented aliens. Judge Wesley recognized that in Plyler v. Doe, 457 U.S. 202 (1982), the Supreme Court noted that the presence of undocumented immigrants in this country in violation of the law is not a "constitutional irrelevancy,” and thus rational basis was applied; however, the review was a heightened rational basis review, and the law, prohibiting children of undocumented immigrants from attending public schools, was struck down.\textsuperscript{45} Finding neither of the above-mentioned exceptions in the statute at bar, and noting that the state’s argument for a third exception ignored the underlying rationale for granting the previous two exceptions, the Second Circuit applied strict scrutiny review, and overturned the New York statute on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{46}

\textbf{F. LeClerc v. Webb Distinguishes Between Immigrant Aliens and Non-Immigrant Aliens}

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 73-74 (citing Foley v. Connellie, 435 U.S. 291, 295–96).
\textsuperscript{44} Id.
\textsuperscript{45} Id (citing Plyler v. Doe, 457 U.S. 202 (1982)).
\textsuperscript{46} Dandamudi, 686 F.3d 66, 75 (2d Cir. 2012).
In *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), a federal appeals court for the first time considered what standard of review to employ when a state action discriminates specifically against nonimmigrant, or non-permanent resident aliens. The *LeClerc* court applied rational basis review to uphold the Louisiana Court Rule at issue. That specific court rule required "that '[e]very applicant for admission to the Bar of this state shall ... [b]e a citizen of the United States or a resident alien thereof.'" The plaintiffs in *LeClerc* were foreign born and mostly foreign trained lawyers who wanted leave to sit for the Louisiana Bar. One of the plaintiffs had attended Tulane University School of Law, but was not a permanent resident and was nevertheless prevented from sitting for the Bar. The Fifth Circuit Court noted accurately that the Supreme Court of the United States has yet to apply strict scrutiny to any specific nonimmigrant alien classification (although the *LeClerc* court failed to note that the Supreme Court has not applied any other standard of review, either).

The court first dealt with plaintiffs' assertion that nonimmigrant aliens are a suspect class, and as such, laws which affect them should be subject to strict judicial scrutiny. The plaintiffs relied on Supreme Court precedent dealing with a Connecticut statute affecting admission to the bar—*In re Griffiths*, 413 U.S. 717 (1973). In *Griffiths*, the Court invalidated a Connecticut statute that required that applicants to the Bar be United States citizens. The court in *LeClerc* held that the difference between *Griffiths*, where all aliens, immigrant and nonimmigrant alike, were prohibited from being attorneys, and the Louisiana dispute, where only non-permanent

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47 *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005).
48 Id.
50 *LeClerc* at 410-11.
51 Id.
52 Id.; *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982).
residents were prohibited, "is paramount."\(^5\) The total exclusion of aliens which was present in *Griffiths* was, according to the Fifth Circuit, what made the law "constitutionally infirm."\(^6\)

Further, *LeClerc* accepted the logic of *Griffiths*, which attempted to equate many resident aliens with citizens, saying they shared the same "essential benefits and burdens...in a way that aliens with lesser legal status do not."\(^7\) "The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens."\(^8\) The Fifth Circuit determined that "resident aliens are legally entrenched in American society," and that "their inability to participate in the political process qualifies them" as a suspect class, or a discrete and insular minority. Further, "[c]haracterizing resident aliens as a *Carolene Products* minority reconciles the breadth of rights and responsibilities they enjoy with their lack of political capacity."\(^9\) However, *LeClerc* decided that nonimmigrant aliens, whose future in the country is far from definite or certain, and who have no claim to permanent residence, "need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone."

The *LeClerc* court decided that [nonimmigrant aliens'] "lack of legal capacity...is tied to their temporary connection to this country." The court then took the questionable step of declaring that "the numerous variations among nonimmigrant aliens' admission status makes it inaccurate to describe them *as a class* that is "discrete" or "insular."" Nonetheless, the law at issue in all of these cases effectively does just that. Nonimmigrant aliens are a class by virtue of the law which treats them as one. Although their status may be varied and different by virtue of differing legal

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\(^{55}\) *LeClerc* at 415.

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 417.

\(^{59}\) *Id.* at 417.
labels or definitions, their treatment under the law at issue is uniform: New York would not allow them, as a class, to become pharmacists; Tennessee would not grant them, as a class, drivers' licenses, and Louisiana prohibited them, as a class, from becoming members of the Bar.

The *LeClerc* court's treatment of the situation in this manner continues: "...resident aliens are similarly situated to citizens in their economic, social, and civic (as opposed to political) conditions."60 Without another word, the *LeClerc* court assumed that nonimmigrant aliens are *not and will not be* similarly situated to citizens in their economic, social, and civic conditions, regardless of the details of their immigration status. The factors that *LeClerc* lists as the major distinguishing ones between immigrant and nonimmigrant aliens are that immigrants "may not be deported, are entitled to reside permanently in the United States, may serve, voluntarily or by conscription, in the military, are entitled to state aid benefits, and pay taxes on the same bases as citizens."61 However, by the logic of the court in *LeClerc*, nonimmigrant aliens' status is "far more constricted than that of resident aliens." Nonimmigrant aliens are in the United States for a set term, conditioned upon having "no intention of abandoning" their country of origin. Further, their presence is entirely at the discretion of the Attorney General of the United States. Nonimmigrant aliens cannot serve in the military, have heavy employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits.62

Although it is important to note that *LeClerc*'s basic premise—that federal law treats nonimmigrant aliens differently in some ways than immigrant aliens—is not wrong, the court failed to recognize and reconcile the fact that many nonimmigrant aliens are not truly transient, and although their status is potentially precarious, many end up staying in the United States, legally, for the rest of their lives. As such, conceptually, they are "virtual citizens" in the same

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60 *LeClerc*, 419 F.3d 405, 418.
61 *Id*.
62 *Id.* at 419.
ways that immigrant aliens are, although the federal government does retain more power to remove them until that point. Nonimmigrant aliens are admitted to the United States by the federal government under 22 different broad categories, to do varying kinds of work and to undergo various studies and trainings. Although the LeClerc court generalized and held that nonimmigrant aliens receive differential tax treatment as compared to citizens and immigrant aliens, this differential treatment appears, on its face, to be rather similar to the differential treatment that the Internal Revenue Code imposes on American citizens who earn varying levels and types of income. Yet, no court would tolerate using this regulatory precision as a justification for further legal discrimination. Furthermore, all of the badges of citizenship that LeClerc identifies as not belonging to the nonimmigrant alien are the same badges of citizenship that are regulated almost exclusively by the federal government. This undermines any premise that there is customary support for legal discrimination against nonimmigrant aliens.

The LeClerc court also strongly weighted the idea that the Supreme Court, when presented with the opportunity to apply strict scrutiny to laws affecting nonimmigrant aliens, declined to do so. The case law cited stems from Toll v. Moreno, 458 U.S. 1 (1982). The Supreme Court held, in pertinent part, that “[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have been held invalid.”

“Based on the aggregate factual and legal distinctions between resident aliens and nonimmigrant aliens, we conclude that…precedent does not support …strict scrutiny.”

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63 TEMPORARY (NONIMMIGRANT) WORKERS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2012), available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=13ad2f8b69583210VgnVCM100000082ca60aRCRD&vgnextchannel=13ad2f8b69583210VgnVCM100000082ca60aRCRD.

64 Toll v. Moreno, 458 U.S. 1, 11 (1982) (citing Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948)).
After deciding that strict scrutiny was not warranted by the case law, the court turned to what level of review might then be utilized—rational basis review, or an intermediate level of review, based on the presumption that alienage classifications were a “quasi-suspect class”. Again the court decided that no precedent allowed or required them to apply a heightened standard of review. The court moved to rational basis review “by process of elimination.”

Within this level of review, the court had two options. Regular, or traditional, rational basis review, or a heightened rational basis review, as used by the court in Plyler, but also in other cases, such as Romer v. Evans. Heightened rational basis review was given to undocumented immigrants in Plyler because the undocumented immigrants being harmed were children, “having no culpability for or control over their condition.” That consideration moved the Plyler court to inquire whether the statute being considered furthers a substantial goal of the state, instead of just a legitimate governmental purpose. Because the plaintiffs in LeClerc entered the United States voluntarily, and with an understanding of their “limited” status, the court declined to apply any heightened rational basis review.

Out of deference for the legislative policy embodied in the Louisiana Rules of Court, the Fifth Circuit held that there were legitimate interests at play in prohibiting nonimmigrant aliens from practicing as attorneys in Louisiana, and that the means chosen by the government bore some rational relationship to those goals.

G. Tennessee’s Legal Discrimination

In League of United Latin American Citizens v. Bredesen, 500 F.3d 523 (6th Cir. 2007), the U.S. Court of Appeals for the Sixth Circuit became the second circuit to apply rational basis

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65 LeClerc, 419 F.3d 405, 420.
66 Id.
67 Id. at 422.
review to laws discriminating against nonimmigrant aliens.\textsuperscript{68} The court's chosen standard of review was its most deferential equal protection standard, and upheld the Tennessee statute in dispute.\textsuperscript{69} The controversial statute, in pertinent part, required applicants to be either American citizens or immigrant aliens in order to apply for a "driver license, instruction permit, intermediate driver license or photo identification license."\textsuperscript{70} Nonimmigrant aliens were able to obtain driver certificates under the statutes, but such certificates were not valid as a form of state-issued photo identification.\textsuperscript{71} The affirmed district court's decision "also concluded that the classification, treating illegal aliens and lawful temporary resident aliens differently than lawful permanent resident aliens, does not discriminate against a suspect class."\textsuperscript{72} For our purposes, their findings regarding the burdening of a suspect class are most pertinent.

The district court wrote in its opinion that "the statute at issue does not classify persons based on alienage," but reasoned that the statute instead distinguished between two groups: citizens or lawful permanent residents, and illegal aliens or nonimmigrant aliens, and as such no protected or suspect class was burdened because the distinction rested on something other than strictly alienage.\textsuperscript{73} The District Court turned its analysis to the subclass of aliens that was burdened by this legislation: illegal aliens and nonimmigrant, or non-permanent resident aliens. Applying \textit{Plyler}, the court acknowledged that illegal aliens could not be considered a suspect class, and further decided that the class burdened here has no resemblance to the children

\textsuperscript{68} League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 526 (6th Cir. 2007).
\textsuperscript{69} Id.
\textsuperscript{70} Tenn. Code Ann. § 55-50-321 (West).
\textsuperscript{71} League of United Latin Am. Citizens, 500 F.3d at 526.
\textsuperscript{72} Id. at 527.
burdened in *Plyler*, and therefore the heightened rational basis review applied in *Plyler* was inapposite to the case at hand.  

The second question considered by the district court was whether or not the fundamental right to travel was burdened by this statute. The court posited "that aliens who have been legally admitted to this country on a temporary basis [do not] have a fundamental right to travel at will, much less a constitutional right to a license to drive a vehicle." Although the court refined its reasoning to hold that restricting one mode of travel did not burden the fundamental right of travel, its refusal to recognize the fundamental rights of particularized groups of people living within the United States, while holding that other groups of people possess those rights is, at best, morally troublesome.

In reviewing the district court’s decision, the Sixth Circuit opinion did not even consider applying strict scrutiny to the controversial statute. Instead, the court focused its discussion on whether rational basis review was most appropriate, or some heightened standard of review, which would have required the court to "carefully examine" the government interest claimed to justify the discrimination and determine "whether that interest is legitimate and substantial" and "whether the means adopted to achieve the goal are necessary and precisely drawn." This standard of heightened scrutiny was one articulated by Justice Blackmun and the Supreme Court in its opinion in *Nyquist v. Mauclet*, 432 U.S. 1, (1976). Important to note from that case’s holding is its reaffirming of the principle that classifications "based on alienage are inherently suspect, and subject to "close judicial scrutiny." This articulation of heightened scrutiny

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74 Id. at *3-4.
75 Id.
76 Id. (citing *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1976) (quoting *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976)).
78 Id.
deviates from the commonly and precisely drawn definition of strict scrutiny, which requires that the government have a compelling interest, and that the law is narrowly-tailored to serve that compelling interest. Nevertheless, that definition was drawn in Nyquist as applied to a state statute which distinguished "only within the 'heterogeneous' class of aliens." Justice Blackmun's footnote on that point is particularly apposite to our consideration of the Sixth Circuit's opinion. In it, he cites the District Court's "abruptly" stated opinion, which read:

"This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage."

The Sixth Circuit opinion discussed in some detail the district court's distinguishing of the facts considered in Nyquist v. Mauclet, 432 U.S. 1 (1976) from the facts at hand. The Court considered three factors as sufficient to distinguish Nyquist from the controversy at hand: "(1) the harm flowing from the classification; (2) the fact that the Nyquist classification affected not just temporary, but also permanent resident aliens; and (3) the gravity of the state interest justifying the classification." The harm, or potential harm, presented to the court in this case was the burdening of the ability to travel, which was minimal, and the lack of valid identification given to the subclass of aliens. The classification imposed by Tennessee was different from that classification in Nyquist, in that it particularly targeted nonimmigrant aliens. Third, the state interests asserted by Tennessee were highway safety and public safety. It was asserted by appellants and accepted by the Court that the State of Tennessee's method of protecting its legal identification system was serving a compelling or important governmental interest.

79 Id. (citing Brief for Appellants at 20, Nyquist v. Mauclet, 432 U.S. 1 (1976) No. 76-208).
80 Id. at n. 10 (citing Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) aff'd 432 U.S. 1 (1977)).
81 500 F.3d 523, 532.
82 Id.
83 Id.
As the Fifth Circuit previously held in *LeClerc v. Webb*, 419 F.3d 405 (5th Cir.2005), in *Bredesen* the court held there was strong reason for the state government of Tennessee to distinguish between lawful permanent residents, and temporary resident aliens. In supporting the conclusion of the Fifth Circuit, the court wrote:

The appropriateness of this conclusion is underscored by the fact that the classification drawn by Tennessee law, unlike that presented in *Nyquist*, is in no way inconsistent with federal law, but rather mirrors it. As the district court observed, [the statute] does not deny any benefit of state law to lawful temporary resident aliens. It merely serves to deny state-issued proof of identification to any alien whose presence the federal government has refrained from permanently authorizing, so as to avoid the appearance that the State of Tennessee is vouching for his or her identity.84

III. Argument

A. Equal Protection Analysis

*Strict Scrutiny – Its Origins and Application*

It is a well-recognized principle of constitutional jurisprudence that any governmental classification based on race alone will result in a court employing heightened scrutiny.85 This is likely a reflection of the historical fact that the Fourteenth Amendment itself was designed to protect African Americans from legal discrimination after the end of the Civil War. However, since the adoption of the Fourteenth Amendment, the Supreme Court has expanded the use of strict scrutiny to classifications beyond just those which classify based on race.86 After all, “[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a

84 *Id.* at 533.
direction that all persons similarly situated should be treated alike." The Amendment, specifically Section 5, authorizes Congress to enforce this mandate of legal equality, but in the occasional absence of controlling congressional legislation or direction, the federal courts have created their own standards for determining the constitutionality of state legislation. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Courts do not weigh whether the statute is practical—only whether it is rationally related to the interest at stake—something of a low threshold for a state to meet. "The general rule gives way, however, when a statute classifies by race, alienage, or national origin." These statutes, or government classifications, are subjected to strict scrutiny, which means they must be "suitably tailored" to furthering a compelling government interest. The reason for this shift is that it is presumed that there is rarely a true need for the government to distinguish by race, alienage, or national origin, and as such the presumption is that the underlying purpose is truly a discriminatory or prejudicial one.

In *Graham v. Richardson*, 403 U.S. 365, (1971), the Supreme Court addressed whether the states could discriminate between aliens and citizens in the awarding of federal welfare benefits. The states argued in *Graham* that their distinguishing between citizens and aliens did not involve "invidious discrimination" because it did not distinguish on the basis of race or

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88 Id.
90 Id. at 440.
91 Id.
92 Id.
national origin.\textsuperscript{95} The \textit{Graham} court noted that the Fourteenth Amendment did not create any distinction between citizens and aliens in the protections it afforded—rather, the protections it afforded were granted to “persons.”\textsuperscript{96} However, \textit{Graham} insisted that statutes which discriminate against aliens are “inherently suspect.”\textsuperscript{97} The Court confirmed that “[a]liens as a class are a prime example of a ‘discrete and insular minority’ for whom such heightened judicial review is appropriate.”\textsuperscript{98} Accordingly, the Court held in \textit{Takahashi} that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”\textsuperscript{99} The \textit{Graham} decision held that a state’s attempt to “justify their restrictions on the eligibility of aliens for public assistance solely on the basis of a State's ‘special public interest’ in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits…” is inadequate as a reason for discriminating against aliens.\textsuperscript{100} Although the Fifth Circuit court in \textit{LeClerc} accurately pointed out that the Supreme Court has not yet applied strict scrutiny, or any form of heightened scrutiny, to state action regarding subclasses of alienage, their analysis falls short in several regards when contrasted to the Supreme Court’s jurisprudence as set forth in \textit{Graham}. \textit{Graham} overturned two separate state statutes, one from Pennsylvania and one from Arizona.\textsuperscript{101} Pennsylvania’s statute prohibited non-citizens from receiving public assistance funds, and was overturned under a strict scrutiny review.\textsuperscript{102} The Arizona statute required that individuals had to reside within the state for at least fifteen years before being eligible for public assistance benefits.\textsuperscript{103} The \textit{Graham} court did not explicitly discuss a distinction between

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 370.
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.} (citing Carolene Products n. 4)
\item \textsuperscript{99} \textit{Id.} (internal citations omitted)
\item \textsuperscript{100} \textit{Graham v. Richardson}, 403 U.S. 365, 372 (1971)
\item \textsuperscript{101} \textit{Id.} at 365.
\item \textsuperscript{102} \textit{Graham v. Richardson}, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L. Ed. 2d 534 (1971)
\item \textsuperscript{103} \textit{Id.} at 365.
\end{itemize}
nonimmigrant aliens and immigrant aliens. However, the Court did say that the state’s interest in preserving its welfare dollars did not permit it to discriminate in favor of citizens or “longtime resident aliens.”\(^{104}\) Although the *LeClerc* court continues to couch *Graham*, and the entirety of the Supreme Court’s alienage jurisprudence, as applying specifically to immigrant aliens, or permanent resident aliens, the Supreme Court in *Graham* rejected such a narrow construction of the Equal Protection Clause and asks the state for a more compelling justification for legal discrimination than merely the period of an alien’s residency. Further repudiating the logic of *LeClerc* is a case cited by that court as evidence of the Supreme Court’s reluctance to impose strict scrutiny nonimmigrant alienage discrimination—*Toll v. Moreno*, 458 U.S. 1 (1982). The *Dandamudi* court correctly articulates the principle thusly:

> "Read together, *Takahashi* and *Graham* stand for the broad principle that ‘state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.’"\(^{105}\)

There can be no doubt that *lawful* nonimmigrant aliens are still the subject of constitutional protections, and cannot be discriminated against in a manner that immigrant aliens cannot. It defies logic to suggest that aliens as a whole are a suspect class, because they are a discrete and insular minority, and then to deny that more isolated, discrete and insular groups of workers and residents of the United States who do not have permanent residence guaranteed are less discrete, insular, or politically powerless members of a minority.

*LeClerc* attempted to distinguish between nonimmigrant aliens and immigrant aliens, calling the latter group “virtual citizens.” Although it is true that nonimmigrant aliens cannot be drafted and cannot otherwise join the military, this distinction “simply lack[s] legislative

\(^{104}\) Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L. Ed. 2d 534 (1971)

\(^{105}\) Dandamudi v. Tisch (citing Toll v. Moreno, 458 U.S. 1, 12-13, 102 S. Ct. 2977, 2983-84, 73 L. Ed. 2d 563 (1982))
relevance.”106 Certainly the federal government, which bears the constitutional responsibility of regulating immigration, has much broader latitude to distinguish among subclasses of aliens. “But this latitude does not give states carte blanche to do the same.”107

The Bredesen court’s distinguishing of Nyquist from its own set of facts fails in numerous respects.

“In Nyquist, a subclass of aliens, including permanent resident aliens, was denied a significant privilege under New York law, state financial assistance for higher education. The Nyquist court noted the unfairness implicit in disallowing permanent resident aliens, who were required to pay their full share of the taxes that supported the financial aid programs, from equal participation in those programs.”108 Like LeClerc, the Bredesen court wrongly assumes as a principle supporting its judgment that nonimmigrant aliens: do not wish to remain in the United States; will not remain in the United States; do not pay taxes in the United States; or are not themselves engaged in American society and American political communities. To deny them the same rights to engage in the economic practice of their profession is an injustice not warranted by the Constitution, even when such discrimination is given deference by the political process.

The Alternative: “Heightened” Rational Basis Review

Although illegal aliens are not to be afforded the same protections under the law as legal aliens, in certain situations even laws affecting illegal aliens have been afforded a “heightened” rational basis review.109 The Supreme Court in Plyler v. Doe, 451 U.S. 202 (1982) rejected the idea that illegal aliens were not afforded any constitutional protection whatsoever, contending that illegal aliens are still persons within the meaning of the Fourteenth Amendment.110 The Equal Protection Clause requires that “all persons similarly circumstanced shall be treated
alike.”\textsuperscript{111} \textit{It should be noted, however, that, “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”}\textsuperscript{112} Our constitutional framework provides the government with enough power to address the real needs of governing reality, but not to discriminate or treat groups unfairly based on group membership alone. As such, while the \textit{Plyler} Court recognized that there were legitimate state interests in discouraging illegal immigration and protecting the fiscal integrity of the State of Texas, they also recognized that the illegal immigrant children had not intentionally broken any law and as such a heightened rational basis standard was required, where substantial or important state interests must be asserted to justify a law and there must be some nexus between the end and the means chosen.\textsuperscript{113}

Similarly, in \textit{Romer v. Evans}, 517 U.S. 620 (1996), the Supreme Court dealt with an entirely different situation and its Equal Protection implications. The challenge presented to the Supreme Court was deciding whether, when the State of Colorado passed a state constitutional amendment which, in short, prohibited anti-discrimination measures to protect homosexuals, the Equal Protection Clause was violated.\textsuperscript{114} Justice Kennedy opened for the Court, saying “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’”\textsuperscript{115} However, the Supreme Court, in the same decision, refused to recognize homosexuals as a suspect class, determining that they were not a discrete and insular minority.\textsuperscript{116} That determination was not the most important part of the inquiry for our present purposes. Indeed, in the \textit{Romer} decision, the Court held that the Colorado constitutional

\begin{footnotesize}
\textsuperscript{111} F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).
\textsuperscript{112} Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).
\textsuperscript{114} Romer v. Evans, 517 U.S. 620 (1996).
\textsuperscript{115} Romer v. Evans, 517 U.S. 620, 623 (1996) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion)).
\textsuperscript{116} \textit{Id}. 
\end{footnotesize}
amendment had to have been motivated by an animus towards homosexuals, and as such was not deserving of the same deferential attitude that other legislation receives.\textsuperscript{117} Although the Court did not articulate the particular expression of “heightened” rational basis review, the stringency with which they reviewed Colorado’s constitutional amendment represented a stronger, more activist take on rational basis review.

There is no “smoking gun” present in any of the three laws dealt with by the federal appellate courts that suggests that bare animus is the sole controlling factor for disparate treatment of nonimmigrant aliens. However, there seems to be insufficient justification beyond that for treating nonimmigrant aliens as inferior in status to immigrant aliens. The New York State legislature concluded that as a first point of logic, nonimmigrant aliens were not as likely to remain in the state as were immigrant aliens and citizens, and therefore had a lower propensity for observing regulations, particularly regarding controlled substances, due to a lesser fear of disciplinary proceedings.\textsuperscript{118} Of course, the state admitted in the district court proceedings that no pharmacist in New York State actually had to reside within the state to obtain a license. Thus, the question remains, why are nonimmigrant aliens less deserving of that statutory trust?\textsuperscript{119}

Second, the State legislature postulated that nonimmigrant aliens were more likely to hold their assets outside of New York. But in litigation, the State again conceded that the law does not require that any pharmacist, citizen or otherwise, keep any assets within the state.\textsuperscript{120} Similarly, the law in Tennessee which was upheld in \textit{Bredesen} was premised on the idea that the State of Tennessee did not wish to vouch for the identities of nonimmigrant aliens in the same way it was willing to for immigrant aliens and permanent residents. This public safety concern is laudable,

\textsuperscript{117} Id. at 632.
\textsuperscript{118} Brief for Venkat Rao Dandamudi, et al as Plaintiffs/Appellees, Dandamudi v. Tisch 686 F. 3d 66 (2d Cir. 2012).
\textsuperscript{119} Id.
\textsuperscript{120} Id.
but yet the record at the appellate level is devoid of evidence or discussion to support the alleged fact that there is a greater likelihood that nonimmigrant aliens will engage in identity fraud. Although animus is not stated on the faces of these pieces of legislation, and while it would be unfair to automatically presume such animus, it is difficult to find substantial justification for this divergence in the law.

Although it is concededly difficult to definitively isolate animus toward nonimmigrant aliens in any of the three policies discussed in the above-mentioned circuit court cases, a more stringent rational basis review might yield the same results as a strict scrutiny review. Determining, in *Romer*, that there was no rational basis for holding homosexuals out as incapable of receiving statutory protection, the Supreme Court set the stage for a similar ruling here. Even if the Supreme Court will not consider nonimmigrant aliens as a suspect class, there is no rational basis for prohibiting them from practicing, for example, as pharmacists when they are capable of so doing, and in fact admitted by the federal government to perform such a task. Similarly, it seems absurd to deny nonimmigrant aliens the right to practice law if they are, again, capable of so doing, and no rational basis seems able to be found, except their potential for transience (which is the same potential that citizens have).

"The core of the state's argument (and the analytical pivot of *LeClerc* and *LULAC*) is 'transience.'"\(^{121}\) Just as *LeClerc* accurately states that the Supreme Court has never instituted strict scrutiny for a law affecting a subclass of aliens, neither has the Supreme Court ever explicitly instituted rational basis review. In the seminal case on the matter, *Graham v. Reynolds*, the Supreme Court did apply strict scrutiny to an Arizona statute which conditioned receipt of federal benefits on periods of residency within the state.\(^{122}\) Duration in the United States was not

\(^{121}\) Dandamudi v. Tisch, 686 F.3d 66, 78 (2d Cir. 2012).

\(^{122}\) Graham v. Richardson, 403 U.S. 465 (1971).
permitted to be a governing principle there, and should not be a governing principle when
deciding what rights nonimmigrant aliens have to work in their professions or live as members of
society within the United States.

Looking at the three circuit cases discussed herein, we can see two separate types of
discrimination. The Bredesen court in the Sixth Circuit was probably correct in indicating that
the harm suffered by nonimmigrant aliens was of a minimal nature; however, there is no
sacrosanct principle of our legal heritage that permits the government to discriminate against a
suspect class, if only provided that the harm suffered is of a nature that might be deemed
minimal. Of course, inherent in our judicially crafted standards for review is the idea that, when
affecting a fundamental right or a suspect class, the means chosen must be narrowly tailored.
Nevertheless, in Bredesen, there was nothing narrow or precise about the regulation challenged,
and indeed it presented a real challenge to many law-abiding residents of Tennessee for the basis
of their membership in a suspect class alone. The Sixth Circuit erred in not recognizing this
discrimination as constitutionally impermissible.

The LeClerc decision’s reliance on the “virtual citizens” language of In re Griffiths is
similarly misplaced.123 Although the Supreme Court in Griffiths was undoubtedly correct in
employing that language to disavow the discrimination inherent in the Connecticut regulation, it
“does not become a litmus test for determining whether a particular group of aliens is a suspect
class.”124 Moreover, the conclusions drawn by the court in LeClerc about nonimmigrant aliens
(as a class, by the way) are far from fair, or universally true. Illegal aliens and nonimmigrant
aliens alike pay federal income taxes.125 Many nonimmigrant aliens are only nonimmigrant

123 LeClerc, 419 F.3d 405, 417-420.
124 Dandamudi v. Tisch, 686 F.3d 66, 76 (2d Cir. 2012)
125 INTERNAL REVENUE SERVICE, Taxation of Nonresident Aliens, available at
aliens because that is the best status they have yet been able to obtain with the federal government. Many go on to become permanent residents, and as such are as equally tied to the communities as citizens, by the logic of LeClerc itself.126

“This fact is borne out by the realities of the case before us as well as the previous appeal in Kirk. Here, one of the plaintiffs was granted permanent resident status during the pendency of this appeal. And, in Kirk, we held the appeal moot because the plaintiff was granted permanent resident status during the pendency of the appeal. As much as the state wants to lump nonimmigrants in the same category as tourists such a classification makes no sense.”127

B. Public Policy Supports Uniformly Employing a Heightened Standard of Review

It is in the public policy interests of the United States federal government to speak with one voice regarding the interests and protections afforded to all immigrants, including the treatment of nonimmigrant aliens as a class. The manner in which immigrants, nonimmigrants, and unlawful immigrants are treated by the government “embraces immediate human concerns.”128 Immigration and immigration policy can impact “trade, investment, tourism, and diplomatic relations for the entire Nation...”129 Indeed, “[o]ne of the most important and delicate of all international relationships...has to do with the protection of...a country's own nationals when those nationals are in another country.”130 For these reasons and more, the federal government has broad powers to regulate immigration and alienage in this country.131

Notwithstanding the clear and necessary supremacy of the federal government with respect to immigration, it is undoubtedly appropriate for states to regulate in independent and unique ways in response to matters of localized importance. For instance, the requirements and

\[\text{\footnotesize 126} \text{ Dandamudi, 686 F.3d 66, 78.} \]
\[\text{\footnotesize 127} \text{ Id.} \]
\[\text{\footnotesize 128} \text{ Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).} \]
\[\text{\footnotesize 129} \text{ Id.} \]
\[\text{\footnotesize 130} \text{ Hines v. Davidowitz, 312 U.S. 52, 64 (1941).} \]
\[\text{\footnotesize 131} \text{ Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).} \]
restrictions which physicians must meet to be licensed in Alabama may reasonably need to differ from the requirements and restrictions in place in Alaska. The knowledge and expertise which adequate attorneys must possess to work in Louisiana is undoubtedly different from the knowledge which adequate attorneys must possess to work in Montana. It cannot be credibly said, however, that the concerns which might be raised regarding nonimmigrant aliens are particularly local concerns, or that benefitting immigrants and citizens at their expense meets local needs. In a recent landmark case regarding the supremacy of the federal government’s immigration regulations, Justice Kennedy wrote:

"The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse...the State may not pursue policies that undermine federal law."

The work of a legislature, at any level, is to govern and prescribe laws for the needs of their constituents. Much can and will be written about the impact of immigration on this country, and undoubtedly different states will adopt different measures to respond to the needs they encounter. The need for a unitary policy regarding the treatment of nonimmigrant aliens can best be balanced with this competing need for localized governance and regulation by the adoption of strict scrutiny as the federal standard of review for state laws regulating these aliens. In this manner, the Constitution can safeguard the basic rights of all persons under its protection while embracing federalism and giving due regard to all compelling local matters.

IV. Conclusion

132 Id. at 2510.
Nonimmigrant aliens are a discrete and insular class which deserves the protections afforded by the strict scrutiny standard of review employed by the courts when government action is challenged pursuant to the Fourteenth Amendment's Equal Protection Clause. Nonimmigrant aliens are both legally present in the United States, and are largely politically powerless. Of the legislation considered in the three Circuit Court cases discussed at length here, most of it seems to be premised either on an animus toward this suspect class, a disregard for the human challenges which they face, or a desire to keep them from competing economically with citizens and immigrant aliens. The distinctions and their justifications should be subjected to strict scrutiny, or perhaps a heightened rational basis review, under which all of these classifications presented above and most future classifications will likely, and justifiably, fail the test of constitutionality.

Even if the Constitution is not sufficiently broad to provide a legal remedy to this class of nonimmigrant aliens, it should be the public policy of these United States to support their equality in the law. There is little empirical support for prohibiting immigrants who are admitted to this country legally from working in various professions. Indeed, the empirical evidence, as attested to at the beginning of this Comment, points to many economic benefits from the presence of immigrants, whether those immigrants are temporary or permanent. Nonimmigrant aliens working as pharmacists, veterinarians, doctors, lawyers, or in any other number of professions are not less effective at their work as a mere fact of their alienage, and the law should allow the free market which has built the prosperity of this country to dictate what professionals are deemed competent or employable. Absent any failure of these individuals to meet the same skill-based requirements, as might be embodied in state licensing tests, or a failure to conform to
state regulations for the practice of their profession, the exclusion of nonimmigrant aliens from the workforce ultimately boils down to wrongheaded discrimination using the force of law.