Washington Law Review

Volume 71
Number 4 *Symposium on Tuberculosis*

10-1-1996

States as International Law-Breakers: Discrimination Against Immigrants and Welfare Reform

Elizabeth Landry

STATES AS INTERNATIONAL LAW-BREAKERS: DISCRIMINATION AGAINST IMMIGRANTS AND WELFARE REFORM

Elizabeth Landry

Abstract: As part of the current "devolution revolution," policy makers at the state and federal levels are designing proposals that would permit states to discriminate on the basis of immigration status in determining eligibility for public education, medical care, social services, and cash assistance. This Comment asserts that such proposals violate international human rights norms, by which both federal and state governments are bound. Moreover, it maintains that legislators must consider international law when crafting proposals that would allow discrimination on the basis of alienage. If they fail to do so, courts are obliged to intervene and ensure that treaty provisions are not violated.

State discrimination against persons on the basis of their immigration status in public benefits eligibility determinations, once clearly disallowed,[1] soon may be standard practice in the United States. In the past several years, residents and legislators of several states have endorsed proposals to deny education, health, and basic social services to undocumented immigrants.[2] Although the most visible of these efforts, California's Proposition 187, has been enjoined by a federal district court on preemption grounds,[3] the momentum has not slackened. Recently enacted federal "welfare reform" legislation[4] requires states to deny virtually all benefits[5] to illegal immigrants and sanctions state discrimination on the basis of alienage in the provision of public benefits to legal immigrants.[6] Similarly, a proposed amendment to federal immigration-reform legislation would have delegated to states the

1. Graham v. Richardson, 403 U.S. 365, 376 (1971) (finding invalid state alienage discrimination in eligibility determination for welfare benefits).

2. California's Proposition 187, the forerunner of the rest, was enacted in its entirety at the November 8, 1994 general election. Illegal Aliens—Public Services, Verification, and Reporting, 1994 Cal. Legis. Serv. Prop. 187 (West) [hereinafter California Proposition 187]; *see also* S. 2274, 14th Leg., Reg. Sess. (Fla. 1996); H.R. 2933, 68th Leg., Reg. Sess. (Or. 1995); S. 1, 74th Leg., Reg. Sess. (Tex. 1995).

3. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 777 (C.D. Cal. 1995).

4. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

5. Exceptions to this denial of benefits include emergency medical assistance, short-term disaster aid, immunizations, and in-kind community services. § 401(b), 110 Stat. at 2261. In addition, a state may choose to provide any other state or local benefits to otherwise unqualified immigrants by enacting a law to that effect. § 411(d), 110 Stat. at 2261.

6. § 412, 110 Stat. at 2269.

authority to deny public education to undocumented children.[7] Even Washington, historically a refugee- and immigrant-friendly state,[8] is not immune from this anti-immigrant trend. State residents generated an unsuccessful Proposition 187-like initiative in 1994,[9] and the 1996 legislative session opened with a bill to deny nearly all public benefits to non-citizens.[10]

This Comment examines three proposed avenues of state discrimination on the basis of alienage in the determination of eligibility for basic public benefits: states acting on their own initiative,[11] states acting under a federal directive,[12] and states acting under congressional authorization.[13] These types of discrimination raise serious concerns for the United States regarding its obligations under international human rights law. In particular, such state action conflicts with the provisions of the International Covenant on Civil and Political Rights ("the Covenant"),[14] which the United States ratified in 1992.[15] The Covenant's

---

7. 142 Cong. Rec. H2487–88 (daily ed. Mar. 20, 1996) (statement of Rep. Gallegly) (proposing amendment to Immigration and Nationality Act). To facilitate passage, this amendment was dropped from the final legislation. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

8. *See, e.g.*, Jim Simon, *State Help for Women, Citizens or Not: Legislators Protect Prenatal Care for Illegal Immigrants*, Seattle Times, Apr. 4, 1995, at A1.

9. Washington's Initiative 653 read, in final form, "Shall public schools, hospitals and agencies report 'apparent illegal aliens' and deny them health care, education and assistance?" Wash. Initiative 653 (on file with *Washington Law Review*) [hereinafter Washington Initiative 653]. Failing to attract the requisite number of signatures, it never reached the ballot. Ann Davis, *The Return of the Nativists*, Nat'l L.J., June 19, 1995, at A1. Initiative sponsor Karen Small of Mount Vernon vowed to try again: "For the next one, we'll be ready." *Id.*

10. *See* S. 6749, 54th Leg., Reg. Sess., 1995 Wash. Laws 11. The bill, entitled "An Act Relating to Making Welfare Work," was introduced on January 31, 1996 by Senators Hochstatter, Schow, and Oke and added the following new section regarding non-citizens:

> (1) It is the intent of the legislature that new immigrants to Washington state provide for themselves and their families. It is the intent of the legislature to limit access to certain public assistance benefits by noncitizens. (2) Noncitizens are not eligible for financial grants; medical assistance; food stamps; or nutrition services including school lunches, breakfasts, child care nutrition programs, and women, infant and children's nutrition programs.

S. 6749, § 9.

11. For example, Proposition 187 aimed at "illegal" immigrants, Proposition 187, *supra* note 2, and Washington's Senate bill aimed at all "noncitizens," S. 6749.

12. For example, federal welfare reform legislation precludes state assistance for illegal immigrants, unless a state enacts a law specifically providing benefits for such persons. § 411, 110 Stat. at 2268.

13. For example, welfare reform allows states to discriminate against legal immigrants in benefit eligibility determinations. § 412, 110 Stat. at 2269.

14. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

guarantees regarding nondiscrimination and family life clearly are implicated.

Proposals that would permit states to discriminate on the basis of alienage are in direct conflict with fundamental international human rights norms. Decisions and comments of the Human Rights Committee[16] and jurisprudence of the European Court of Human Rights will be used to sketch the parameters of these rights.[17] Using the international human rights norm of nondiscrimination to interpret the equal protection guarantee of the Fourteenth Amendment, reveals a heightened standard of equal protection scrutiny. Similarly, international norms provide strong safeguards of family unity and privacy. In light of these standards, this Comment argues that there are necessary limits to what Congress may authorize the states to do. At the very least, Congress should not be permitted to authorize the states to violate international human rights norms regarding nondiscrimination or family life without explicitly stating such an intent.

Part I draws the contours of the international nondiscrimination norm and discusses the current state of U.S. law regarding alienage discrimination, considering both its federal preemption and equal

---

15. *Senate Report on the International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4783–84 (daily ed. Apr. 2, 1992).

16. The Human Rights Committee consists of 18 members recognized as experts in the field of human rights and is authorized under the Covenant to receive reports submitted by state parties and to hear complaints from individuals under the Optional Protocol. ICCPR, *supra* note 14, arts. 28, 40–42; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) [hereinafter OP]. The Optional Protocol is a companion instrument to the Covenant, which has not been signed or ratified by the United States. *See generally* Dominic McGoldrick, *The Human Rights Committee* ¶¶ 4.1–4.5 (1991).

17. Specifically, the court has interpreted analogous provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. *See, e.g.*, Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) (1987) (interpreting Convention's nondiscrimination guarantee). The European Convention is the human rights treaty of the European Community currently ratified by 28 members of the Community and designed to "take the first steps for the collective enforcement of certain of the Rights stated in the [United Nation's] Universal Declaration [of Human Rights]." European Convention, *supra*, pmbl. The use of an international court's jurisprudence to interpret international law finds support in the *Restatement (Third) of Foreign Relations* §103(2)(a) (1987), which states that judgments and opinions of international judicial and arbitral tribunals are given substantial weight in determining whether a rule has become international law. *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.16 (2d Cir. 1980) (recognizing judicial decisions as one source of international law and citing opinion from European Court of Human Rights); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980) (citing European Convention as among "principle sources of fundamental human rights" and "indicative of the customs and usages of civilized nations"), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

protection components. This part also examines the international human rights guarantees regarding family unity and privacy as they relate to aliens. Part II demonstrates the preemptive force of the Covenant's nondiscrimination guarantee and uses the international norm to interpret the Equal Protection Clause of the Fourteenth Amendment. The emergent standard of equal protection scrutiny is then applied to the various proposed avenues of state discrimination in order to show their constitutional invalidity. Finally, this part examines the ways in which legislation that permits state discrimination on the basis of alienage in determining eligibility for public benefits violates international norms pertaining to family life.

I. NONDISCRIMINATION AND FAMILY LIFE PROTECTIONS UNDER INTERNATIONAL LAW

A. The Nondiscrimination Norm Is a Core Element of International Human Rights Law

1. The Nondiscrimination Norm as Expressed in the International Covenant on Civil and Political Rights

Nondiscrimination is a central tenet of all major international human rights treaties.[18] The Covenant has two separate articles guaranteeing nondiscrimination—articles 2(1) and 26. Article 2(1) "recognizes" that state parties:

> [U]ndertake[] to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[19]

Article 26 provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. . . . [T]he law shall prohibit any discrimination and guarantee to all persons equal

18. *See, e.g.*, U.N. Charter art. 55; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/44/49 (1989) [hereinafter Child Convention]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]; ICCPR, *supra* note 14, arts. 2(1), 26; European Convention, *supra* note 17, art. 14; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

19. ICCPR, *supra* note 14, art. 2(1).

> and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[20]

The Human Rights Committee defines discrimination as:

> [A]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [21]

According to the Human Rights Committee, whereas article 2(1) only guarantees nondiscrimination with regard to the rights set forth in the Covenant, article 26 provides an autonomous guarantee against nondiscrimination, not limited to Covenant rights.[22]

Not every differentiation constitutes discrimination.[23] Certain distinctions are permissible for aliens and juveniles, for example, and are enumerated explicitly in the Covenant.[24] In addition, "affirmative action" or "preferential treatment" is permissible in order to correct conditions that "prevent or impair . . . [the] enjoyment of human rights" by certain groups of persons.[25] Such distinctions are legitimate "as long as such action is needed to correct discrimination in fact."[26] In other words, "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the

---

20. ICCPR, *supra* note 14, art. 26.

21. *International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* 26, ¶ 7 (1992) [hereinafter HRI/GEN]. Drawing from its experience in reviewing state reports submitted under article 40 of the Covenant, the Human Rights Committee intends its comments to assist state parties in implementing their Covenant obligations. *Id.* at 1. For a discussion of the General Comments, see Dominic McGoldrick, *The Human Rights Committee* ¶¶ 3.33–.38 (1991).

22. HRI/GEN, *supra* note 21, at 27, ¶ 12 ("[Article 26] prohibits discrimination in law or in fact in any field regulated and protected by public authorities . . . . Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of nondiscrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.").

23. *Id.* at 26, ¶ 8 ("The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.").

24. *See* ICCPR, *supra* note 14, art. 25 (stating that every "citizen" has right to participate in political life), art. 6(5) (forbidding death penalty for juveniles and pregnant women), art. 10(3) (requiring segregation of juvenile offenders from adults).

25. HRI/GEN, *supra* note 21, at 27, ¶ 10.

26. *Id.* at 27, ¶ 10.

aim is to achieve a purpose which is legitimate under the Covenant."[27] The Committee's considerations of individual claims of discrimination reflect this approach, finding discrimination only where a distinction cannot be "justified" under the Covenant.[28]

Because the Covenant's articles apply to all persons, aliens are entitled to the rights guaranteed by the Covenant (unless explicitly excepted) without discrimination on the basis of their status under immigration laws. In addition, discrimination against persons on the basis of their immigration status falls under the category of discrimination based on "other status" and is prohibited by the Covenant.[29] The Human Rights Committee has made it clear that aliens are covered by the Covenant's guarantees, stating that "[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[30] Other United Nations (UN) instruments allow for the discriminatory treatment of aliens,[31] but the Covenant does not.

---

27. *Id.* at 27, ¶ 13.

28. *See, e.g., Report of the Human Rights Committee, Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. R. 9/35*, U.N. GAOR, 36th Sess., Supp. No. 40, at 134, ¶ 9.2(b)(2)(i)(8), U.N. Doc. A/36/40 (1981) [hereinafter Mauritian Women Case] (finding that distinction based on sex alone not sufficient to establish discrimination and that determining factor was lack of "sufficient justification").

29. *See* ICCPR, *supra* note 14, arts. 2(1), 26.

30. HRI/GEN, *supra* note 21, at 18, ¶ 1.

31. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter ICERD] (stating in article 1(2) that Convention will not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens"); *see also* Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, art. 2(1), G.A. Res. 144, U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (1985) ("Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. *However, such laws and regulations shall not be incompatible with the international legal obligations of the state, including those in the field of human rights.*") (emphasis added). It is significant also that a recent ICERD report on the United States' compliance with the terms of that Convention noted that Proposition 187 contained "discriminatory and anti-constitutional" provisions in its denial of education, health care, and welfare services to "the children of illegal migrant workers." Maurice Glele-Ahanhanzo, *Report to the Hum. Rts. Comm'n: Implementation of the Programme of Action for the Second Decade to Combat Racism and Race Discrimination* at 24, ¶ 81, U.N. Doc. E/CN.4/1995/78/Add.1, U.N. Sales No. E.95.10167 (1995).

2. *Jurisprudence of the European Court of Human Rights Highlights the Contours of the International Nondiscrimination Norm*

Although certainly not binding on the United States, decisions of the European Court of Human Rights are an invaluable source of international human rights jurisprudence. The European Court is especially significant because it has been interpreting fundamental human rights norms under the European Convention for nearly forty years. Like the Optional Protocol of the Covenant,[32] the European Convention provides a mechanism of individual petition for persons who believe that their Convention rights have been violated—first to the European Commission of Human Rights and then to the European Court of Human Rights.[33] Unlike the decisions of the Human Rights Committee, however, decisions of the European Court are binding on state parties to the Convention.[34]

The court's long and rich human rights jurisprudence is especially valuable for its interpretations of fundamental human rights guarantees common to the European Convention, the International Covenant, and other instruments. The European Court's jurisprudence in this area has influenced a number of cases undertaken by the Inter-American Court of Human Rights and the Human Rights Committee. [35] As international law becomes more prominent in a variety of areas, including trade, environmental protection, and human rights, the decisions of international tribunals charged with interpreting certain common provisions will become more important. At the very least, such jurisprudence is useful as an interpretive tool and may be persuasive support for a particular interpretation of a human rights guarantee.

The nondiscrimination article of the European Convention closely parallels the guarantee of the Covenant. Specifically, article 14 of the European Convention provides that:

> The enjoyment of the rights and freedoms as set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

---

32. *See supra* note 16 and accompanying text.

33. European Convention, *supra* note 17, art. 25.

34. *Id.* art. 53.

35. *See, e.g.*, Advisory Op. No. 4, Inter-Am. C.H.R. 43, OEA/ser. L./V/III.10, doc. 13 (1984) (concerning proposed amendments to naturalization provisions of the Constitution of Costa Rica); Advisory Op. No. 8, 1987 Y.B. Inter-Am. on H.R. (Inter-Am. Ct. of H.R.) 750. *See generally* J.G. Merrills, *The Development of International Law by the European Court of Human Rights* 16–21 (1993) (discussing European Court's influence on international law).

opinion, national or social origin, association with a national minority, property, birth or other status.[36]

As is clear from the language of the article as well as from the jurisprudence of the European Court of Human Rights interpreting it,[37] this nondiscrimination article is quite similar to the guarantee set forth in the Covenant's article 2(1).[38] The article also possesses some of the autonomy of the Covenant's article 26, because the European Court has suggested that it will attach *whenever* there is discrimination that does not have a reasonable justification even if there is otherwise no violation of a Convention right.[39] Because of these similarities and the considerable body of jurisprudence of the European Court of Human Rights concerning the article, the court's rulings are particularly helpful for interpreting the nondiscrimination guarantee of the Covenant. Indeed, the Human Rights Committee endorsed this approach in its General Comment on nondiscrimination, in which it drew directly from the language of the European Court's decisions.[40]

The European Court has held that a distinction is discriminatory if it has no "objective and reasonable" justification—that is, if it does not pursue a "legitimate aim" or demonstrate a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."[41] In the article's application, the element of proportionality is often a deciding factor. In many cases, the court finds that an aim is justified but that the means employed are not proportionate.[42] In

---

36. European Convention, *supra* note 17, art. 14.

37. *See, e.g.*, Hoffmann v. Austria, 255 Eur. Ct. H.R. (ser. A) (1993); Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) (1987); Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) (1985); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979); Belgian Linguistics Case (No. 2), 6 Eur. Ct. H.R. (ser. A) (1968).

38. *See supra* note 19 and accompanying text.

39. For article 14 to apply, the claim of discrimination must fall within the "ambit" of one of the Convention's other articles. Complementing the Convention's other normative protections, the nondiscrimination guarantee must be read in conjunction with them. Its application does not, however, require that a violation of another article has actually occurred and in this sense, article 14 is autonomous. *Inze*, 126 Eur. Ct. H.R. at 17, ¶ 36. Hence, "[t]he notion of discrimination within the article includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention." *Abdulaziz*, 94 Eur. Ct. H.R. at 39, ¶ 82.

40. *See supra* note 27 and accompanying text.

41. *See, e.g.*, *Marckx*, 31 Eur. Ct. H.R. at 16, ¶ 33.

42. *Abdulaziz*, 94 Eur. Ct. H.R. at 38, ¶ 78 (stating that aim of protecting domestic labor market is justified, but means not proportionate, because resulted in discrimination against women wishing to bring alien spouse into country; stating that because equality of sexes is "major goal" of European Community, "very weighty reasons" are needed to justify such distinction based on sex). In another

determining proportionality, the court allows for a certain "margin of appreciation" to be accorded to State action. Like a standard of deference, its scope will vary "according to the circumstances, the subject-matter and its background."[43] The court has granted considerable leeway to States in matters concerning "national security," for example, but has been much less deferential to a State's economic and public order concerns.[44]

3. *Brief Summary of U.S. Law Regarding Alienage Discrimination*

a. *Federal Discrimination on the Basis of Alienage*

The constitutional validity of discrimination on the basis of alienage depends on who is acting and in what arena. Essentially, when the federal government discriminates, courts look for a "rational basis" for the action.[45] As part of the federal government's broad powers over immigration and naturalization, the U.S. Supreme Court has recognized a corresponding federal right to distinguish among aliens that is not shared by the states.[46] In short, the reasons for granting deference to federal action regarding aliens, including for example, matters of national sovereignty and "self-definition,"[47] simply are not present when individual states are acting. In addition, permitting each state to devise its own scheme regarding the status of aliens would result in inconsistency and interfere with the federal government's obligation to comply with international standards for the treatment of aliens.[48]

---

case, the aim was legitimate (protection of health and welfare of children), but the means were not proportionate (distinction based solely on religion). Hoffmann v. Austria, 255 Eur. Ct. H.R. (ser. A) at 60, ¶ 36 (1993).

43. *Abdulaziz*, 94 Eur. Ct. H.R. at 37, ¶ 78.

44. *See* P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 583–607 (1990) (discussing danger that margin of appreciation could eviscerate content of article 14).

45. *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976) (applying rational-basis review to federal action discriminating on basis of alienage in determining eligibility for federal public benefits; stating that federal government may "take into account the character of the relationship between the alien and this country"). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976) (denying such deference to Civil Service Commission's exclusion of resident aliens from federal civil service).

46. *Mathews*, 426 U.S. at 84–87.

47. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int'l L. 201, 203 (1994).

48. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 69 (1941) ("Numerous treaties, in return for reciprocal promises from other governments, have pledged the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for discriminatory burdens.").

b. State Discrimination and Equal Protection

State discrimination on the basis of alienage is accorded the deferential "rational basis" standard of review only when the so-called "political function" exception applies.[49] If this exception does not apply, state discrimination against legal aliens that implicates a state's economic, rather than "sovereignty," concerns is subject to "strict scrutiny."[50] In *Graham v. Richardson*, the U.S. Supreme Court found invalid state public assistance statutes that limited eligibility on the basis of alienage.[51] The Court noted that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[52] State law classifications on the basis of alienage in eligibility determinations for the receipt of public benefits are thus "presumptively invidious" and subject to strict scrutiny. To withstand strict scrutiny, the classification must be related to a "compelling government interest."[53] An interest in preserving the state's fisc almost never is sufficient.[54]

State discrimination against undocumented aliens warrants a less stringent review, but still may require a state to demonstrate more than a rational basis for such action. Considering state legislation that would deny public elementary education to undocumented children in *Plyler v. Doe*,[55] the U.S. Supreme Court employed a kind of intermediate review. Although the Court did not find undocumented persons in general to be a suspect class or education quite a fundamental right, it employed this heightened standard of review because of the quasi-fundamental nature of the right at stake—education[56]—and the innocence of the class—

49. The "political function exception" permits states to discriminate against aliens in hiring for jobs that are somehow related to state governance. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 73–74 (1979) ("[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government.").

50. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that states cannot discriminate on basis of alienage in provision of general assistance benefits); *see also* Barannikova v. Town of Greenwich, 643 A.2d 251, 263 (Conn. 1994) (holding that state cannot apply federal sponsor-deeming rules to alien's application for state benefits).

51. 403 U.S. at 376.

52. *Id.* at 372.

53. *Id.* at 376.

54. A state therefore has no "special public interest" in tax revenues to which aliens have contributed on an equal basis with other state residents. *Id.*

55. 457 U.S. 202, 230 (1982) (striking down Texas statute that prohibited undocumented children from attending state public schools).

56. *Id.* at 221.

children.[57] Given these emphases, it is unlikely that this standard would be applied to discrimination against undocumented adults in the provision of other public benefits.

c. State Discrimination and Federal Preemption

In addition to Fourteenth Amendment scrutiny, state alienage discrimination may be preempted by the exclusive federal control of matters concerning immigration and alienage.[58] In *Graham*, Justice Blackmun acknowledged the importance of the potential for preemption when he noted that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government."[59] The preemption argument also has come to the fore in the Proposition 187 litigation, in which Judge Pfaelzer found most of the proposition's provisions to be impermissible state attempts to regulate immigration and, hence, preempted.[60]

In light of this broad federal preemptive power in matters of immigration and alienage, a relevant question is whether congressional authorization of state alienage discrimination may effectively shield such state action from Fourteenth Amendment scrutiny. The case law offers conflicting replies to this question, particularly regarding state discrimination aimed at legal residents. The *Graham* Court suggested that congressional authorization will not insulate state action from Fourteenth Amendment review because:

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and

57. *Id.* at 226.

58. Many scholars have suggested that questions of immigration (such as matters of entry and exclusion) ought to be considered separately from those of alienage (such as matters of "equal personhood" of those within a country's jurisdiction), removing alienage from the realm of the federal plenary power over immigration. *See, e.g.*, Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047 (1994); *see also* Yasemin Nuhoglu Soysal, *Limits of Citizenship* 154–55 (1994) (proposing post-national model of societal membership that would recast membership rights in terms of human rights and "equal personhood," in place of nationality and citizenship). Although these arguments are persuasive, this Comment presumes that the two categories remain blurred and that, when it comes to aliens, federal action will receive greater deference than state action.

59. Graham v. Richardson, 403 U.S. 365, 378 (1971).

60. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768–87 (C.D. Cal. 1995) (engaging exclusively in preemption analysis and making no mention of equal protection as factor).

> conditions of their naturalization, *Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.*[61]

In *Plyler v. Doe*, on the other hand, the Court noted that states do have "some authority" to take action toward undocumented immigrants that "mirrors federal objectives and furthers a legitimate state goal."[62] The Court also stated in dictum that "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."[63] When Connecticut advanced this reasoning to justify its application of federal guidelines regarding sponsor-deeming,[64] resulting in denial of state-funded assistance to a legal permanent resident, however, the Connecticut Supreme Court found the *Plyler* dictum inapplicable.[65] Because *Plyler* did not involve a statute in which the federal government had authorized the "disparate treatment of resident aliens," its dictum on the matter could not be considered controlling in such a case.[66]

4. *Using the International Nondiscrimination Norm To Interpret the Equal Protection Guarantee of the Fourteenth Amendment*

Using an international human rights norm to interpret the content of an important constitutional guarantee is admittedly a controversial enterprise.[67] To simplify, the primary debate occurs between "interpretivists" and "non-interpretivists." The "interpretivist" adjudication involves making a determination of constitutionality based on the values the original Framers intended to enshrine in the Constitution, ascertained by reference to the text of the Constitution and

---

61. 403 U.S. at 382 (emphasis added) (citation omitted); *see also* Barannikova v. Town of Greenwich, 643 A.2d 251, 261–62 (Conn. 1994) ("The fact that a state may act within a given realm provided it does not conflict with federal legislation, does not also imply that when so acting it may make invidious distinctions without regard to the constitutional equal protection guarantee.").

62. Plyler v. Doe, 457 U.S. 202, 225 (1982).

63. *Id.* at 219 n.19.

64. "Sponsor-deeming" is a process by which a sponsor's income is "deemed" to be available to the alien for the purposes of determining eligibility for benefits.

65. *Barannikova*, 643 A.2d at 262–63.

66. *Id.*

67. The controversy surrounding such an approach is an enormous topic, *see, e.g.*, Michael J. Perry, *The Constitution, the Courts and Human Rights* (1982), and is beyond the scope of this Comment.

other historical documents.[68] The "non-interpretivist" camp, on the other hand, determines constitutionality by reference to value judgments outside the text of the Constitution and other than those envisioned by the Framers.[69] Using the international human rights norm of nondiscrimination to interpret the Fourteenth Amendment is an example of the non-interpretivist approach.

Although debates regarding theories of constitutional adjudication remain contentious, the non-interpretivist approach is applied commonly and is represented amply in constitutional case law. In the early civil rights cases, for example, advocates consistently argued for incorporating norms from the newly ratified UN Charter in the courts' understandings of constitutional guarantees.[70] In particular, civil rights advocates urged that the broader scope of the international nondiscrimination norm be used to interpret the bounds of the equal protection guarantee of the Fourteenth Amendment, seeking to expand its application to encompass racial segregation. Thus, a scholar has argued that, although seldom explicitly mentioned by the courts, the content of the international human rights norms contained in the UN Charter played a seldom acknowledged role in shaping early civil rights jurisprudence in the United States.[71] In a time of evolving international human rights guarantees and protection mechanisms, this approach is essential to ensure that the United States keeps pace with its international obligations and maintains its reputation as one of the most effective guarantors of individual liberties and fundamental human rights.

B. International Protection of Family Life and Family Unity

In addition to violating international nondiscrimination norms, proposals that would permit states to discriminate on the basis of alienage in crafting public benefits eligibility criteria conflict with international human rights guarantees pertaining to family life. Unlike the nondiscrimination norm, which can be used to interpret the equal protection guarantee of the Fourteenth Amendment, there is no clear constitutional parallel to the international right to family privacy and unity. Nonetheless, in ratifying the Covenant, the United States has

---

68. *Id.* at 10–11.

69. *Id.* at 11.

70. Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 Iowa L. Rev. 901 (1984).

71. *Id.* at 948.

agreed to adhere to international standards regarding the protection of family life. Like the nondiscrimination norm, these family life guarantees are clarified by jurisprudence of the European Court of Human Rights.

1. Protection of Family Life Under the International Covenant

Like many other international human rights instruments,[72] the Covenant guarantees certain protections for the family. One such protection appears in article 23(1) where the Covenant states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[73] In article 17(1), the Covenant protects every person against "arbitrary or unlawful interference with his privacy, family, home or correspondence . . . [and] unlawful attacks on his honour and reputation." The protection of family life is of particular relevance to aliens, both in matters of entry and expulsion, as well as in the conditions of residence.[74] Elaborating on the meaning of this guarantee, the Human Rights Committee stated that the term "unlawful" means that "[i]nterference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[75] As for the article's protection against "arbitrary" interference with privacy and family life, the Committee notes that this protection can "extend to interference provided for under the law . . . [and] is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[76]

The Human Rights Committee, considering the application of these protections to aliens, noted that although the Covenant does not recognize a right of an alien to enter or to reside in a particular state, "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations

---

72. *See, e.g.*, International Convention On the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 44(1), G.A. Res. 45/158, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/158 (1990); Child Convention, *supra* note 18, art. 9(1); American Convention on Human Rights, art. 17(1), Nov. 22, 1969, 36 O.A.S.T.S. 1; ICESCR, *supra* note 18, art. 10; European Convention, *supra* note 17, art. 8; UDHR, *supra* note 18, art. 16(3).

73. ICCPR, *supra* note 14, art. 23(1)

74. *See generally* Louis B. Sohn & Thomas Buergenthal, *The Movement of Persons Across Borders* 65–71 (1992) (discussing treatment of aliens under international human rights instruments protecting family life and family unity).

75. HRI/GEN, *supra* note 21, at 20, ¶ 3.

76. *Id.* at 20, ¶ 4.

of nondiscrimination, prohibition of inhuman treatment and *respect for family life* arise."[77] In accord with this statement, the Committee also noted in its comment on article 23 that:

> [T]he right to found a family implies, in principle, the possibility to procreate and live together . . . [and this] implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.[78]

In one of its decisions, the Committee articulated the application of article 17 to immigration matters. Considering a state's immigration laws that prevented women from bringing their alien husbands into the country, the Committee observed that:

> [T]he exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17. . . . [Whether the immigration laws are] compatible with the Covenant depends on whether such interference is either 'arbitrary or unlawful' as stated in Article 17(1), or conflicts in any other way with the State party's obligations under the Covenant.[79]

In this instance, the Committee found that "[i]n the present cases, not only the future possibility of deportation but the existing precarious residence situation of foreign husbands in Mauritius represents . . . an interference . . . with the family life of the Mauritian wives and their husbands."[80] Like the European Court,[81] the Committee also allowed the State a considerable "margin of appreciation," observing that "the legal protections . . . a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions."[82] The Committee ultimately found it unnecessary to determine whether there had been interference with family life, because it found that the law had a discriminatory effect on

---

77. *Id.* at 18, ¶ 5 (emphasis added) (concerning General Comment 15 regarding "[t]he position of aliens under the Covenant").

78. *Id.* at 28–29, ¶ 5.

79. *See* Mauritian Women Case, *supra* note 28, ¶ 9.2(b)(2)(i)(2).

80. *Id.* ¶ 9.2(b)(2)(i)(3).

81. *See supra* notes 43–44 and accompanying text.

82. Mauritian Women Case, *supra* note 28, ¶ 9.2(b)2(ii)(1).

the basis of gender in violation of article 26 and was invalid for that reason.[83]

2. *Respect for Family Life Under the European Convention*

The European Convention's protection of family life is similar to that provided under the Covenant. The European Convention guarantees "respect for family life" in article 8, which provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of heath or morals, or for the protection of the rights and freedoms of others.[84]

Significantly, the European Court of Human Rights sees this protection as having both a positive and negative component. In other words, article 8 "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."[85] States are therefore required to "act in a manner calculated to allow these ties to develop normally."[86]

The European Court has a particularly robust tradition of interpreting the content of this "respect for family life" with regard to aliens' entry and expulsion from European states.[87] Like the Human Rights Committee,[88] the court emphasizes that no alien has a *right* to enter or reside in a particular country or a right not to be expelled but acknowledges that the expulsion or refusal of entry of persons from or to a country in which their immediate family is resident may violate article

---

83. For example, Mauritian *males* who wished to bring their spouses were not similarly affected.

84. European Convention, *supra* note 17, art. 8.

85. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 15, ¶ 31 (1979).

86. *Id.* at 21, ¶ 45.

87. *See, e.g.*, Lamguindaz v. The United Kingdom, 258-C Eur. Ct. H.R. (ser. A) (1993); Moustaquim v. Belgium, 193 Eur. Ct. H.R. (ser. A) (1991); Djeroud v. France, 191 Eur. Ct. H.R. (ser. A) (1991); Berrehab v. the Netherlands, 138 Eur. Ct. H.R. (ser. A) (1988); Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) (1985). *Lamguindaz* and *Djeroud* reached friendly settlement with the state party so references are to the decisions of the European Commission on Human Rights.

88. *See supra* note 77 and accompanying text.

8.[89] Whether the case involves the attempted expulsion of a long-time resident "criminal" alien[90] or alien divorced from a national with whom he had a child[91] or the denial of entry to alien spouses,[92] the court's reasoning is consistent.

As a threshold matter, the European Court determines whether there is a genuine family connection. As broadly interpreted by the court, family life includes at least the "ties between near relatives," such as grandparents and grandchildren.[93] Extending the Convention's conception of "family life" beyond the bounds of the nuclear family, the court considers a number of factors to determine whether sufficiently close ties exist, including economic interdependence, and whether the household is shared.[94] Once a real and close family tie is found, the court examines whether a given interference with family life was "'in accordance with the law'; had an aim or aims that is or are legitimate under article 8(2) and was 'necessary in a democratic society' for the aforesaid aim or aims."[95] In many cases, the state action will easily clear the first two hurdles—for example, being lawful under the state's immigration laws and having a legitimate aim of protecting the public order (especially for criminal aliens) or labor market—but will founder on the "necessary in a democratic society" requirement. The court interprets this "necessity" as being both responsive to a "pressing social need" and proportionate to the legitimate aim pursued.[96]

As in the discrimination context, it is often the issue of proportionality upon which a given State action fails.[97] The court considers a number of factors implicated in a proposed expulsion or denial of entry, including

89. *See, e.g.*, *Lamguindaz*, 258-C Eur. Ct. H.R. at 100, ¶ 36.

90. *See, e.g.*, *Lamguindaz*, 258-C Eur. Ct. H.R. at 102, ¶ 45; *Moustaquim*, 193 Eur. Ct. H.R. at 8, ¶¶ 9, 10; *Djeroud*, 191 Eur. Ct. H.R. at 28, ¶ 8.

91. *See, e.g.*, *Berrehab*, 138 Eur. Ct. H.R. at 8, ¶ 9.

92. *See, e.g.*, *Abdulaziz*, 94 Eur. Ct. H.R. at 10, ¶ 10.

93. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 21 (1979). In fact, the scope of "family life" has been interpreted quite broadly by the Court and may include a parent's relationship with an illegitimate child, a child's relationship with a non-custodial parent, polygamous and extra-marital relationships, and other "close family ties." *See* van Dijk & van Hoof, *supra* note 44, at 378–79.

94. van Dijk & van Hoof, *supra* note 44, at 378–80. In the case of a non-custodial parent's relationship with his child, for instance, the court considered the parent's right of access to the child and contribution to her education as sufficient to constitute "family life." *See Berrehab*, 138 Eur. Ct. H.R. at 13, ¶ 20.

95. Lamguindaz v. United Kingdom, 258-C Eur. Ct. H.R. (ser. A) at 101, ¶ 39 (1993); *Berrehab*, 138 Eur. Ct. H.R. at 15–16, ¶ 28.

96. *Lamguindaz*, 258-C Eur. Ct. H.R. at 101–02, ¶¶ 42–43.

97. *See, e.g.*, *id.* at 102, ¶ 48; *Berrehab*, 138 Eur. Ct. H.R. at 16, ¶ 29.

how long the individual has lived in the country, the nature of her family and economic ties there, and the ease with which the rest of the family could be expected to follow her to another country.[98] The court then weighs the interests of the individual against those of the community and frequently finds that the proposed action is disallowed because its effects on the individual are out of proportion with the legitimate aims pursued.

a. Illegal Immigrants Also Are Granted Family Life Protections

The protections of article 8 extend also to undocumented immigrants who have demonstrable family ties in a country. This aspect of the article's protection is expressed in some recent rulings of the domestic courts of several European Convention countries. Although the nature of these decisions may seem quite out of step with the immigration policy trends in the United States,[99] such decisions are nonetheless instructive because U.S. obligations under the International Covenant mirror the obligations of state parties under the European Convention.[100]

Citing article 8, European courts consistently hold that an illegal immigrant's interest in family unity outweighs a State's interest in enforcing its immigration laws and protecting the "public order." For example, a Finnish court recently revoked an expulsion order issued against a family of illegal immigrants, noting the family's demonstrated ties with Finland and that their sick child was benefiting from a healthy diet available there.[101] The same court found a violation of article 8 in the attempted expulsion of a Russian homosexual who was in the country illegally.[102] Noting his domestic partnership with a Finn, the court deemed the proposed expulsion an interference with the couple's "private life" and, hence, prohibited by article 8. In a similar vein, the

98. van Dijk & van Hoof, *supra* note 44, at 386–89.

99. *See, e.g.*, U.S. Comm'n on Immigration Reform, *Legal Immigration: Setting Priorities, A Report to Congress* 10–20 (1995) (proposing new limits and restrictions on family visas for *legal* immigrants).

100. For example, article 2(1) of the International Covenant requires state parties to endeavor to ensure to all persons in their jurisdiction the rights of the Covenant and article 2(2) requires that they "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." ICCPR, *supra* note 14. arts. 2(1), 2(2). In the same way, article 1 of the European Convention requires States to ensure that their domestic law is compatible with the Convention and article 13 requires States to provide a remedy to any person whose Convention rights have been violated. European Convention, *supra* note 17, arts. 1, 15.

101. X v. Finland, 1993 Y.B. Eur. Conv. on H.R. (Sup. Admin. Ct.) 497.

102. X v. Finland, 1993 Y.B. Eur. Conv. on H.R. (Sup. Admin. Ct.) 499. The other part of the decision rested on the fact that, as a homosexual, he might face inhuman or degrading treatment if he were returned to Russia.

Constitutional Court of Austria found that immigration authorities had failed to engage in the balancing necessary under article 8.[103] In this case, a Nigerian, married to an Austrian, was denied a visa based on his threat to public order and safety.[104] Finding that the authorities had failed to weigh the interests of the individual in maintaining his family life against the general interests of the community in public safety, the court invalidated the visa-denial under article 8.[105]

II. APPLYING THE INTERNATIONAL NORM IN THE DOMESTIC CONTEXT

A. The International Nondiscrimination Norm Contained in the International Covenant Is the Supreme Law of the Land

Although there is considerable debate about whether the Covenant is self-executing, as a treaty signed and ratified by the United States the Covenant is the supreme law of the land,[106] displacing conflicting state law and earlier federal law.[107] Treaties maintain their "supreme" status regardless of whether they are self-executing or not.[108] Courts have long held that Congress may pass legislation in violation of a treaty.[109] Mitigating Congress' license to break international law is the standard canon of statutory construction requiring that legislation not be interpreted as inconsistent with treaties unless no other interpretation is possible.[110] When violating international law, therefore, Congress must be explicit.[111] The fact that Congress has breached international norms in the past without being clear about its intentions does not eliminate this

103. X v. Austria, 1993 Y.B. Eur. Conv. on H.R. (Const. Ct.) 487–88.

104. *Id.*

105. *Id.*

106. *See* U.S. Const. art. VI.

107. *See, e.g.*, Head Money Cases, 112 U.S. 580, 599 (1884) (noting that between treaty and conflicting federal statute, that which is later in time controls).

108. Self-executing treaties are those immediately enforceable by the courts, whereas non-self-executing treaties require congressional action before enforcement.

109. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 723–24 (1893) (holding that Congress has authority to pass laws that deny individuals rights guaranteed under treaty).

110. Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 Wash. L. Rev. 589, 592 (1995) (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

111. *Id.* at 593.

requirement. It remains the duty of the courts to prevent the political branches from heedlessly disregarding international law.[112]

The Covenant supports a private right of action, despite some authority to the contrary.[113] In ratifying the Covenant, the Senate attached a "declaration," purporting to make the treaty's first twenty-seven articles non-self-executing.[114] In light of this declaration, some courts have summarily concluded that the Covenant does not support a "private right of action."[115] This view has been challenged, however, as has the very efficacy of the Senate's declaration.[116] Unlike a reservation, which is incorporated in the treaty itself, a declaration arguably never becomes a part of the treaty and, hence, is not binding as law.[117] Also, under established precedent, the courts are to decide whether or not a treaty is self-executing.[118] Even if the declaration were to be considered a definitive expression of non-self-execution, the Covenant's protections

112. *Id.* at 627 (noting that political branches have often breached international norms in immigration arena and observing "[t]hat the political branches of the federal government may consciously choose, without domestic legal consequence, to abrogate the nation's international obligations is perhaps an inescapable reality after the *Chinese Exclusion Case*. That contemporary policymakers should be permitted by the courts to do so unconsciously or cavalierly is not unavoidable.") (citation omitted).

113. *See, e.g.*, Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (stating that because articles one through 27 of Covenant are non-self-executing, they do not give rise to privately enforceable rights; rejecting plaintiffs' attempt to use Covenant to override constitutional provisions), *cert. denied*, 115 S. Ct. 1426 (1995).

114. *See* 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992).

115. *See, e.g.*, *Igartua de la Rosa*, 32 F.3d at 10 n.1.

116. *See* Manuel Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 723 (1995) (arguing that "private right of action" issue is distinct from self-execution question and courts must determine whether or not treaty is self-executing, thereby fulfilling "central role that the Constitution assigns to them in the enforcement of treaties"); *see also* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DePaul L. Rev. 1287, 1309 (1993) (urging courts to apply "traditional jurisprudence on self-execution to find that the Covenant is the 'law of the land' in the United States").

117. Quigley, *supra* note 116, at 1301–03 (noting that if declaration is valid and binding on courts, it would place United States in violation of Covenant itself; stating, for example, that article 2(3) requires that every person whose rights under Covenant are violated shall have some remedy and "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State . . . [and that States should] develop the possibilities of judicial remedy."); *see also* Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 Chi.-Kent L. Rev. 571, 590 (1991) (arguing that Senate pronouncements that are inconsistent with international law are also invalid under U.S. law).

118. *See* Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829); *see also Restatement (Third) of Foreign Relations* § 154(1) (1987) ("Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation.").

still could be invoked defensively in U.S. courts.[119] Such protections under the Covenant also could be used to construe and interpret constitutional provisions, making the Constitution itself the source of law, rather than the treaty.[120]

Most importantly, non-self-executing treaties are still the law of the land, preempting conflicting state law, because they express a "national-policy" binding on the states.[121] The U.S. Supreme Court long has held that the international obligations undertaken by the President and the Senate in signing and ratifying treaties supersede conflicting state laws.[122] The provisions of the International Covenant, therefore, preempt conflicting state laws.[123] Accordingly, the federal government is obliged to ensure that the states do not violate treaties or customary international law.[124] Just as Congress must be explicit when it chooses to violate international law, so too must it be equally clear in authorizing the states to act contrary to international law.[125] Lacking this clarity, congressional

---

119. Vazquez, *supra* note 116, at 720.

120. This approach is suggested in a number of law review articles. *See, e.g.*, Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3, 19 (1983); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 Hastings L. J. 805, 838–41 (1990); *see also Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add. 50 at 3, para. 11 (1995) [hereinafter Article 40 reports] (evidencing Human Rights Committee's acknowledgment of this well-accepted role: "[N]otwithstanding the non-self-executing declaration of the United States, courts of the United States are not prevented from seeking guidance from the Covenant in interpreting United States law").

121. Fitzpatrick & Bennett, *supra* note 110, at 591 (citing Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 866–67 (1987)); *see also* ICCPR, *supra* note 14, art. 50 (stating that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions").

122. Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 Proc. Am. Soc'y Int'l L. (forthcoming 1996) (on file with *Washington Law Review*). Fitzpatrick states:

> As the Supreme Court noted in preempting California's attempt in the 1870s to exclude Chinese women suspected of prostitution, it is the national government and not the state that is held accountable for the breach of treaty obligations stemming from the state's oppressive actions. Where the President and the Senate have solemnly committed the nation to substantive provisions of human rights treaties, national policy should preempt conflicting state rules.

Id. (citations omitted).

123. Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 Sup. Ct. Rev. 295, 334 (1995) (asserting that international law is federal law and preempts contrary state law).

124. *Id.* at 335.

125. *Id.* at 336 (finding parallel in Commerce Clause context, in which Congress authorizes states to adopt legislation that would otherwise violate Commerce Clause, and in regulation of insurance,

authorization of state alienage discrimination contained in the welfare reform legislation[126] does not effectively sanction state violation of international law. Because the legislation neither mentions U.S. treaty obligations nor expresses an intent to abrogate them, its provisions that are contrary to the International Covenant must be invalid.

1. States Have a Positive Obligation To Implement the Covenant's Guarantees

In addition to the preemption consideration, the states have an affirmative duty to safeguard the individual rights guaranteed in the Covenant. The Human Rights Committee recognizes states as key players in guaranteeing for individuals in the United States the rights set forth in the Covenant. Emphasizing the International Covenant's application to the states, the Committee recognized the federal government's "readiness . . . to take such further measures as may be necessary to ensure that the States of the Union implement the rights guaranteed by the Covenant"[127] and noted its "satisfaction [with] the assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States."[128] The Committee also addressed the matter of discrimination by states when it recommended that "[s]tate legislation which is not yet in full compliance with the nondiscrimination articles of the Covenant should be brought systematically into line with them as soon as possible."[129]

In fact, the U.S. "understanding" regarding federalism can be read as an expression of the affirmative obligation of the states to implement the provisions of the Covenant.[130] This is consistent with the language of the Supremacy Clause itself, which directs "Judges in every State" to ensure the operation of treaties, "any Thing in the Constitution or Laws of any

---

"[s]ince Congress can violate international law so long as it does so clearly, the states also may violate international law *so long as Congress has clearly authorized such violations*") (emphasis added).

126. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2268.

127. Article 40 Reports, *supra* note 120, at 2, ¶ 9.

128. *Id.* at 3, ¶ 12. The "understanding" stated that the Covenant will be implemented by the federal government "to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments." 138 Cong. Rec. at S4784 (daily ed. Apr. 2, 1992).

129. Article 40 Reports, *supra* note 120, at 5, ¶ 30.

130. Fitzpatrick, *supra* note 122.

State to the Contrary notwithstanding."[131] The understanding thus can be read as an invitation to state authorities: (1) to provide appropriate state remedies for self-executing treaty norms; (2) to assess potential preemption of state norms by federal policy embodied in non-self-executing treaties; (3) to absorb international human rights norms into the common-law-making enterprise; and (4) to turn to international law benchmarks in interpreting both state constitutions and statutes.[132]

At the very least, state legislators must strive not to violate U.S. treaty obligations as they shape state law and policy.

2. *The International Nondiscrimination Norm Requires a Rigorous Form of Intermediate Review*

Coupling the article 14 tests from the European Court's jurisprudence with the Human Rights Committee's interpretations of nondiscrimination and the significant protections afforded to aliens under the International Covenant reveals a rigorous standard of scrutiny applicable to alienage discrimination. The requisite international tests of proportionality and progressive interpretation of the norm result in a standard far beyond "rational-basis" review. In the international context, the justifications that a State must produce in order to show that its aims are legitimate and carried out in a proportional manner recall the "compelling government interest" standard of "strict scrutiny." At the very least, then, the international standard suggests a stringent form of intermediate review.

In contrast to equal protection jurisprudence under the Constitution, with its various levels of scrutiny, the European Court has not articulated specific standards that should be applied to different types of discrimination. It is possible, however, to discern certain trends in the court's jurisprudence that suggest the level of scrutiny imposed. In all instances of discrimination, the court applies the two-pronged test of "legitimate aim" and "reasonable relationship of proportionality" between the aim and the means employed. The court has stated that the reasonable relationship of proportionality between means and ends must be established clearly and that the question of proportionality is to be considered separately from that of the legitimate aim.[133] The court's cases further reveal that proportionality is to be measured as the "fair balance" to be struck between the protection of the "general interest of the

131. *Id.*

132. *Id.*

133. Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) at 34, ¶ 10 (1968).

community" and the respect due to the individual's fundamental human rights.[134]

In addition to this balancing test for proportionality, the scope of the "margin of appreciation" will also effect the scrutiny accorded a given act of discrimination. Although it may be used to grant States discretion to discriminate, the margin is generally not applied to that end. In fact, in determining the margin of appreciation that applies to a given state action, the court considers as one of the relevant factors the "existence or non-existence of common ground" with the laws of other States who are parties to the European Convention.[135] In addition, article 14 is to be interpreted in a progressive way, in keeping with the rights reflected in other international instruments. [136] Although such instruments may not have been ratified by an allegedly discriminating state party, the individual rights guaranteed in widely-accepted human rights instruments ought to prevail.[137] In this way, an individual State's margin of appreciation may be quite circumscribed.

3. *Applying the International Norm's Heightened Standard of Review to State Discrimination*

Although the Senate added an "understanding" regarding nondiscrimination when ratifying the Covenant, stating that distinctions are to be permitted when they are "*at minimum*, rationally related to a legitimate governmental objective,"[138] discriminatory actions by both federal and state actors in the United States ought to be subject to review under the international norm's higher standard of scrutiny. Adopting this view, the Human Rights Committee noted "with satisfaction" that this "understanding" indicates that the United States will not permit "distinctions that would not be legitimate under the Covenant."[139] In spite of the Senate's "understanding," therefore, the United States and its constituent units are bound by the application of the nondiscrimination guarantee to the same extent as other state parties.

---

134. Berrehab v. the Netherlands, 138 Eur. Ct. H.R. (ser. A) at 15–16, ¶¶ 27–29 (1988).

135. Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) at 15, ¶ 40 (1984).

136. *See* Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 37–39, ¶¶ 78–80 (1988) (stating that because equality of sexes is "major goal" of European Community, it is particularly difficult to justify distinctions on basis of sex).

137. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19–20, ¶ 41 (1979).

138. 138 Cong. Rec. at S4783 (daily ed. Apr. 2, 1992) (emphasis added).

139. Article 40 Reports, *supra* note 120, at 3, ¶ 10.

a. States Acting on Their Own Initiative: Legal Immigrants

State action that discriminates against legal immigrants in making welfare eligibility determinations,[140] undertaken without congressional authorization, currently is subject to strict scrutiny under *Graham v. Richardson.*[141] Application of the international norm's demanding standard reaffirms that holding. The Washington Senate Bill that proposed making all "non-citizens" ineligible for nearly all forms of public assistance, for example, aimed to ensure that "new immigrants to Washington state provide for themselves and their families."[142] Although it is possible that this goal passes the preliminary "legitimate aim" test necessary for the international norm's satisfaction,[143] the next component of the test asks whether the distinction is based on "objective and reasonable" criteria.[144] With this requirement, state alienage discrimination runs into difficulty. Because immigrants as a class have been shown to generate as much as twenty-five billion dollars more than they use in public benefits,[145] immigration status as a criterion for welfare ineligibility is manifestly unreasonable. In fact, without some fiscal data to support the state's interest in alien "self-reliance," the very legitimacy of the original aim is questionable. For these reasons, such measures should fail before reaching the tests for "justification" or "proportionality."[146]

b. States Acting with Congressional Authorization: Legal Immigrants

State discrimination on the basis of alienage that is undertaken with congressional authorization,[147] for which there is no binding precedent in the domestic case law, is ripe for application of the international standard. Under federal welfare reform's block-grant model, states have the "option" to discriminate on the basis of alienage in determining

140. *See, e.g.*, Wash. S. 6749, *supra* note 10.

141. 403 U.S. 365, 376 (1971); *see supra* notes 50–57 and accompanying text.

142. Wash. S. 6749, *supra* note 10.

143. A good argument certainly can be made that the aim does not constitute a purpose "legitimate under the Covenant." *See* HRI/GEN, *supra* note 21, at 27, ¶ 13.

144. *Id.*

145. Michael Fix & Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight* 6 (1994).

146. *See supra* notes 25–27, 41–44 and accompanying text.

147. For example, federal welfare reform declares that "a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien," subject to a few limited exceptions. § 412, 110 Stat. at 2268.

eligibility for public benefits if sought to be justified by the "compelling government interest" in enacting "new rules for eligibility and sponsorship agreements in order to assure that aliens become self-reliant."[148] Application of the more rigorous international standard first requires a finding that this aim is legitimate. Clearing that hurdle, proponents of such discrimination must demonstrate that it is based on objective and reasonable criteria. As in the case of state-initiated discrimination, proposals in the federal context similarly lack such reasonable criteria. Without some evidence that the singling out of immigration status as a basis for discriminating against legal residents has some rational fiscal basis, such federally-sanctioned state action also should fail.

An examination of state alienage discrimination in the provision of basic health services illustrates the usefulness of the international norm's standard of review. If states exercise their "option" to discriminate on the basis of alienage in the administration of Medicaid and other health benefits, legal immigrants most likely will find themselves without access to basic health services. The impact would be tremendous, for instance, if Washington were to discriminate against legal immigrants in administering its new Basic Health Plan[149] that provides low fee basic health insurance to all Washington residents.

Although the right to health care is not enumerated in the Covenant, the Covenant's companion instrument, the International Covenant on Economic, Social, and Cultural Rights, explicitly guarantees this right,[150] as do a number of other international human rights instruments.[151] Under the Covenant on Economic, Social and Cultural Rights, the right is, however, subject to an important limitation. Article 2(3) states that "[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[152] In spite of this weakened nondiscrimination guarantee, the

148. § 400, 110 Stat. at 2260.

149. Basic Health Plan—Health Care Access Act, Wash. Rev. Code ch. 70.47 (1996).

150. *See* ICESCR, *supra* note 18, art. 12 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

151. *See, e.g.*, Child Convention, *supra* note 18, art. 23; ICESCR, *supra* note 18, art. 12; UDHR, *supra* note 18, art. 25.

152. This provision has been decried as "unconscionably vague" and "likely to cause invidious and unreasonable distinctions to be made against aliens on the ground of their foreign nationality." *See* Warwick McKean, *Equality and Discrimination Under International Law* 201 (1983); *see also* Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* 48 (1984)

Committee on Economic, Social and Cultural Rights consistently has found violations by non-developing States who justify discrimination on the basis of economic concerns.[153]

Because the nondiscrimination norm of article 26 of the International Covenant is neither limited to the rights set forth in that instrument nor to the economic means of the state parties, its standard of review may be applied to state alienage discrimination that impacts access to basic health care. Denying such access to tax-paying legal residents, based merely on their immigration status, betrays the unreasonableness of the policy makers' criterion. In addition, the "compelling government interest"[154] in the "self-reliance" of aliens must be weighed against the essential interest of legal resident children and adults in having access to some form of basic health services. In light of this interest and the faulty criterion on which the discrimination is based, such state action is a clear violation of the nondiscrimination guarantee of the International Covenant. Unless Congress is explicit in sanctioning such a treaty violation, it must fail.[155]

c. States Acting on Their Own Initiative: Illegal Immigrants

Because the domestic equal protection jurisprudence regarding undocumented immigrants is so weak, particularly when it comes to adults,[156] the international norm could have a dramatic effect on state-initiated discrimination against undocumented immigrants in the provision of basic social services, health care, and education.[157] As a threshold matter, the international test acknowledges that such state action is discrimination on the basis of "status." That is, "[m]easures

---

(drawing conclusion that ICESCR does not contain "general norm of non-discrimination" against aliens.)

153. For example, members of the Committee found an Austrian policy of denying aliens maternity benefits available to nationals to be impermissible discrimination under article 2. The exception under article 2(3) did not apply, because Austria was by no means a "developing country." *See* U.N. ESCOR, 2d. Sess., 4th mtg. at 8, ¶ 45, U.N. Doc. E/C.12/1988/SR.4 (1988); U.N. ESCOR, 2d Sess., 3rd mtg. at 4–5, ¶ 13, U.N. Doc. E/C.12/1988/SR.3 (1988). Similarly, Germany was called to task for failing to provide social, health care, and education benefits to migrant workers and their families on an equal footing with nationals. *See* U.N. ESCOR, 1st Sess., 12th mtg. at 5, ¶ 16, U.N. Doc. E/C.12/1987/SR.12 (1987). *See generally* Matthew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 172–74 (1995).

154. § 400, 110 Stat. at 2260.

155. *See supra* notes 123–125 and accompanying text.

156. *See, e.g., supra* note 55 and accompanying text.

157. *E.g.*, California Proposition 187, *supra* note 2; Washington Initiative 653, *supra* note 9.

which specifically exclude aliens from access to basic human services represent not border regulation but punishment for status; they impose a penalty on a class of people by virtue their status under the immigration laws."[158] The test then asks whether the state's aims—for example, to save money and to deter illegal immigrants from coming to the state—are legitimate. Assuming that these aims could be considered legitimate, the validity of the measures again turns on whether the criteria employed are objective and reasonable and the means proportional. For the criterion of undocumented status to be objective and reasonable, some proof that the availability of public benefits is a magnet for illegal immigration is required.[159] Already, there are few public services for which undocumented immigrants are eligible;[160] public education for undocumented children probably constitutes the greatest expense for the states.[161] In spite of this demonstrable cost, barring a class of individuals from an important right like education requires extremely strong justification.[162] The potential effects on the thousands of children forced out of schools weigh heavily against a state's economic concerns. In addition, the societal costs of such a measure never have been calculated.[163] On the other hand, state costs for the provision of other social and medical services to undocumented immigrants are much

158. Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 Va. J. Int'l L. 179, 188 (1994).

159. *See, e.g.*, Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. Rev. 1453, 1465 (1995) (noting that there is no empirical evidence to support claim that "significant numbers of persons immigrate to the United States for public benefits or welfare").

160. The few federal programs currently available to undocumented persons include WIC (Special Supplemental Food Program for Women, Infants and Children), community and migrant health centers, school lunch, and social service programs authorized under Title XX of the Social Security Act. Under Plyler v. Doe, 457 U.S. 202 (1982), states must provide public education to undocumented children and under federal law state Medicaid programs must provide emergency services (including childbirth) to all persons. 457 U.S. at 230.

161. According to an Urban Institute study, the cost to the seven states with the majority of undocumented residents (Arizona, California, Florida, Illinois, New Jersey, New York, and Texas) was $3.1 billion in fiscal year 1993. R. Clark et al., *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* 11 (1994).

162. The right to education (especially primary, free, and compulsory) is guaranteed in a number of instruments. *See, e.g.*, Child Convention, *supra* note 18, art. 28 (1)(a); ICESCR, *supra* note 18, art. 13; UDHR, *supra* note 18, art. 26. For a good discussion of the right to education in international law, see Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 2 Harv. BlackLetter L.J. 37 (1994). *See also* Stephen Knight, Note, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 Hastings Int'l & Comp. L. Rev. 183 (1995).

163. For example, consider the public safety effects of creating a class of idle and illiterate children.

lower.[164] Contrasting this relatively low cost with the potential effect of removing even the most basic human and health services available to undocumented immigrants,[165] the balance tips toward the invalidity of state discrimination.

d. States Acting Under a Federal Mandate: Illegal Immigrants

Under welfare reform legislation, states are prohibited from providing any services to undocumented aliens (except for emergency medical services and public education) unless they enact a state law that "affirmatively provides for such eligibility."[166] The articulated aim of this prohibition is to "remove the incentives for illegal immigration provided by the availability of public benefits."[167] With federal authorization, this immigration-control aim may be considered more legitimate than in the case of state-initiated programs. Again, however, some link between illegal immigration and the provision of the few available state benefits must be shown. A strong argument can be made that denying access to the most minimal human services to a class of persons residing in the United States does not strike a "fair balance" between the interests of the individual and those of society. The state interest pales when it is measured against the individual's interest in survival with some measure of dignity. In addition, societal interests in public health and safety weigh in on the side of providing some basic assistance. Here again, unless explicit, congressional authorization will not rescue measures that are contrary to the Covenant.

B. State Discrimination on the Basis of Alienage Affects Family Life

1. State-initiated Proposals Impact Family Unity

A host of family unity concerns emerge in the wake of state proposals for denying public benefits to undocumented immigrants. For the sake of clarity, this Comment focuses on one specific proposal: the public school reporting requirements found in Proposition 187.[168] This proposal

164. For the seven states, estimated costs are $200–300 million for fiscal year 1993. *See* R. Clark et. al., *supra* note 161, at 13.

165. For example, consider the potential deleterious effect on the public health interests of society at large.

166. § 411(d), 110 Stat. at 2269.

167. § 400, 110 Stat. at 2260.

168. California Proposition 187, *supra* note 2, § 7(c).

requires school officials to verify the immigration status of all students and their parents and report suspected "illegal immigrants" to the Immigration and Naturalization Service within forty-five days.[169] The special danger of this measure is that many families are "mixed," consisting of some members who are U.S. citizens, others who are legal permanent residents, and still others who are undocumented, possibly awaiting a visa.[170] Often the children in these families are U.S. citizens by birth, while one or both of their parents may be undocumented. These reporting requirements would therefore place U.S. citizen children at risk of having a parent reported and possibly deported.

Applying the international tests drawn from interpretations of the Covenant and the European Convention,[171] this potential impact on families is insupportable. Although strictly "lawful," it may fail as either "arbitrary" or unnecessary. Under the European Court's jurisprudence, "necessity" must be supported by evidence of a "pressing social need" and under both the Covenant and the Convention, a legitimate aim must be accomplished by proportionate means. Although California may assert that the reporting requirements aim to address a pressing need to remove undocumented children from its schools, this claim does not respond to the potential impact of the reporting requirements on U.S. citizen children and their right to family unity. A general interest in deterring illegal immigration is insufficient to counter the profound interest of these children in remaining with their closest family members, regardless of their immigration status.

2. *State Reporting Provisions Authorized by Congress Impact Family Privacy and Unity*

Federal welfare reform legislation also contains state reporting provisions.[172] Under these provisions, certain state agencies are required to report to the Immigration and Naturalization Service "any individual

---

169. *Id.* § 7(e).

170. U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 122–26 (1994) (discussing common occurrence of "mixed" families).

171. *See supra* notes 133–137 and accompanying text.

172. States receiving Social Security grants will be obligated to report to the Immigration and Naturalization Service at least four times annually information about any aliens known to be in the United States illegally. § 404(b), 110 Stat. at 2267. Reporting requirements were also among the recent proposed amendments to the Immigration and Nationality Act; for example, the Bryant amendment would have required hospitals and other health facilities to report to the INS undocumented persons over the age of 18. *See* 142 Cong Rec. H2482 (daily ed. Mar. 20, 1996).

who the State knows is unlawfully in the United States."[173] Especially in mixed families, such reporting provisions would have a real impact on the internationally protected rights to both family privacy and family unity. Congress may assert that requiring states not only to verify eligibility, but to report undocumented family members is a necessary response to the "pressing social need" of halting illegal immigration. Even were this accepted as a legitimate aim based on reasonable criteria, the question of proportionality of the means must be addressed.

Causing mixed families to fear applying for necessary benefits lest one of their members be reported and deported is difficult to justify. If the factors of close family ties, economic interdependence, and long-time residence are present, and if it is demonstrably difficult for the whole family to follow the undocumented member to her home country, decisions from the European Court indicate that a state would have a heavy burden to show that deportation (the intended result of reporting) is warranted. Another danger of the reporting proposals is that they transform state social service providers into immigration officers.[174] Without adequate training in the intricacies of immigration law and the vagaries of the many different kinds of legal "status," the reports of these service providers may result in truly "arbitrary" interference with the privacy of families caused by the mistaken identification and reporting of *suspected* illegal immigrants. Although the ultimate aim may be legitimate, in light of family life concerns, a more proportionate means must be found.

3. *State Application of Federal Sponsor-deeming Rules Deters Family Reunification*

Under federal welfare reform proposals, states may apply "sponsor-deeming" in determining alien eligibility for public benefits to the same extent as the federal government.[175] Allowing states to apply the new federal sponsor-deeming requirements in their reckoning of alien eligibility for benefits has clear implications for family unity. Not only

---

173. § 404(b), 110 Stat. at 2267.

174. A similarly complex task was presented by an immigration reform proposal that would have prevented U.S. citizen children from obtaining AFDC benefits if they had undocumented parents. Implementing such a provision would require that states devise complicated guardianship schemes that would permit the citizen children to receive the benefits to which they are entitled. *See* 142 Cong. Rec. at H2487, D237 (daily ed. Mar. 20, 1996).

175. 110 Stat. 2105, at 2270–71 (including provisions that make Affidavits of Support legally binding and enforceable for as long as ten years after alien receives public benefit).

would permitting states to apply federal deeming standards conflict with judicial precedent,[176] but strong international presumptions regarding family unity would have to be overcome. If states embrace the "option" of applying federal sponsor-deeming requirements in their eligibility determinations, immigrants will find it more difficult to help their close relatives to join them in the United States. The situation of a newly arrived refugee well illustrates this problem. Eligible to adjust to permanent residence after one year, she is then qualified to sponsor close family members. Already struggling to adapt to her new environment, however, she may be deterred by the onerous requirements of sponsorship, resulting in prolonged separation from the very family members who might ease her adaptation to life in the United States.

Here again, the legislation's aim is to ensure alien self-sufficiency. While the means applied may be lawful, they are not necessary. The state must show that such measures in fact respond to a "pressing social need" and, if so, that the means are proportionate to the aim. Weighing the interest of legal residents in being reunited with their close family members against the state's fiscal interests, the family unity interests should prevail. For a refugee hoping to be reunited with her spouse, for example, there is no reasonable possibility of reunion in the home country from which she was forced to flee. Her only option is for her spouse to join her in this country. If rigorous sponsor deeming-rules attach even at the state level, that reunification may be prevented.

III. CONCLUSION

At a time when limiting immigration is a hot political issue, state and federal policy makers are crafting laws that grant states more autonomy in devising eligibility criteria for public benefits. In the trend toward federally funded "block-grant" programs, increased state independence is inevitable. This shift in authority to determine eligibility requirements for public assistance programs does not, however, give states license to flaunt international human rights norms and U.S. treaty obligations. Without a voice in the political process, immigrants are particularly vulnerable to policy proposals that are contrary to their fundamental interests. Safeguards are required to ensure that immigrants are not relegated to lives on the margins of this society. International human rights law provides these necessary protections and must be heeded by both law makers and the courts.

176. *See* Barannikova v. Town of Greenwich, 643 A.2d 251, 263 (Conn. 1994)