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Go Home Stranger: An Analysis of Unequal Workers' Compensation Death Benefits to Nonresident Alien Beneficiaries

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GO HOME, STRANGER: AN ANALYSIS OF UNEQUAL WORKERS' COMPENSATION DEATH BENEFITS TO NONRESIDENT ALIEN BENEFICIARIES

ADAM S. HERSH

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GO HOME, STRANGER: AN ANALYSIS OF UNEQUAL WORKERS' COMPENSATION DEATH BENEFITS TO NONRESIDENT ALIEN BENEFICIARIES

ADAM S. HERSH

While working on a Georgia construction project, José Morales fell from a twenty-two story scaffold to his death.[1] Morales' wife and sons filed for death benefits under the state's workers' compensation law.[2] While most dependents would be eligible for $100,000,[3] Morales' wife and children were limited to $1,000 because they were citizens and residents of Mexico when Morales died.[4] Georgia workers' compensation law, as well as the law in sixteen other states, explicitly allows for drastic caps on death benefits to nonresident alien beneficiaries.[5] When a worker dies in Alabama, for instance, his or her nonresident alien beneficiary is barred from recovery.[6]

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1. Barge-Wagener Constr. Co. v. Morales, 429 S.E.2d 671, 672 (Ga.), *cert. denied*, 114 S. Ct. 579 (1993); *see also* Bill Rankin, *Court Endorses $1000 Limit on Death Benefit Restriction on Foreigners*, ATLANTA CONST., May 29, 1993, at B1.

2. *Morales*, 429 S.E.2d at 672.

3. GA. CODE ANN. § 34-9-265(d) (Harrison 1993).

4. *Id.*

5. Section 34-9-265(b)(5) of the *Georgia Code* provides:

> If death results instantly from an accident arising out of and in the course of employment . . . the compensation under this chapter shall be as follows:
>
> . . . .
>
> (5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

See Appendix to this Comment, which lists each state's death benefit provisions for nonresident alien beneficiaries.

A nonresident alien is a person who is not a citizen of the United States, is not a lawful immigrant of the United States, and does not reside in the United States. A workers' compensation dependent or beneficiary is a person who, in accordance with a state's workers' compensation law, "look[s] to and relie[s] on the contributions of the worker for support and maintenance in whole or in part, in accordance with such person's social position and accustomed mode of life. . . ." 82 AM. JUR. 2D *Workers' Compensation* § 185 (1962).

6. Section 25-5-82 of the *Alabama Code* provides:

> Compensation for the death of an employee shall be paid only to dependents who, at the time of the death of the injured employee, were actually residents of the United States. No right of action to recover damages for the death of an employee shall exist in favor or for the benefit of any person who was not a resident of the United States at the time of the death of such employee.

ALA. CODE § 25-5-82 (1993).

Florida, Delaware, and several other states provide for a 50% reduction.[7]

This Comment analyzes the constitutionality of these death benefit systems and suggests methods to improve them. Part I details the traditional justifications courts have used to uphold workers' compensation statutes that deny full benefits to nonresident alien beneficiaries. Part II addresses the Equal Protection Clause and Supremacy Clause issues raised by these statutes, and suggests that states take an activist stance to invalidate them. Part III analyzes access to courts and argues that many jurisdictions have wrongly granted employers immunity from liability while denying plaintiffs the right to compensation. Part IV discusses model statutes which may be used to distribute death benefits rationally and equitably.

I. Traditional Justifications for Denying Nonresident Alien Beneficiaries Full Recovery

Five justifications have emerged as bases for denying full compensation to nonresident alien beneficiaries: lack of standing,[8] welfare considerations,[9] cost of living differentials,[10] administrative convenience,[11] and parity with federal statutes.[12] Historically, courts have barred nonresident alien beneficiary claims for full death benefits[13] because the beneficiaries lacked standing to challenge the constitutionality of the benefit denial.[14] Proponents of this principle assert that

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7. Section 440.16(c)(7) of *Florida Statutes* provides:

> [T]he judge of compensation claims may, at the option of the judge of compensation claims, or upon the application of the insurance carrier, commute all future installments of compensation to be paid to [nonresident alien dependents other than Canadians] by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation . . . and provided further that compensation to dependents referred to in this subsection shall in no case exceed $50,000.

FLA. STAT. § 440.16(c)(7) (1993).

The maximum amount of benefits available to all other dependents is $100,000. FLA. STAT. § 440.16(b) (1993). *See also* DEL. CODE ANN. tit. 19, § 2333(a) (1993), and the Appendix to this Comment.

8. *See infra* notes 15-31 and accompanying text.

9. *See infra* notes 32-33 and accompanying text.

10. *See infra* notes 34-36 and accompanying text.

11. *See infra* note 37 and accompanying text.

12. *See infra* notes 38-44 and accompanying text.

13. *See infra* notes 18-26 and accompanying text.

14. Barge-Wagener Constr. Co. v. Morales, 429 S.E.2d 671, 673 (Ga.) (denying nonresident alien beneficiaries' challenge to Georgia's $1000 maximum on death benefit payments because "[a]liens outside the borders of the United States are subject to their own nations' laws and cannot invoke the protections reserved for citizens and residents of the United States"), *cert. denied*, 114 S. Ct. 579 (1993); *see also* Pedrazza v. Sid Flemming Contractor, Inc., 607 P.2d 597, 600 (N.M. 1980).

death benefits under workers' compensation are the exclusive property of the beneficiary,[15] separate from the rights and remedies vested in the worker.[16] As the United States Supreme Court has noted, a state's decision to provide death benefits:

> fundamentally chang[es] the rights of relatives and dependents of a person killed in the course of employment, and must be considered as vesting in the relatives of the deceased employee a new and independent property right, which they do not take by way of succession through the employee, but which first exists in themselves as a separate right.[17]

Because the dependent's right to death benefits does not derive from the employee's right to compensation, a deceased employee's standing cannot be transferred to family members wishing to challenge the truncated recovery.[18] Moreover, U.S. constitutional guarantees extend only to U.S. citizens and aliens residing within the United States.[19] Once nonresident alien beneficiaries are deemed beyond constitutional protection, courts do not discuss the merits of an equal protection challenge to the residency distinction.[20] Even if constitutional protection were to exist, however, the merits of an equal protection argument may be defeated under a "rational relationship" analysis[21] by concluding that the residency distinction against aliens serves legitimate governmental interests.[22]

An illustration of how courts preclude relief is *Pedrazza v. Sid Fleming Contractor, Inc.*,[23] where the New Mexico Supreme Court

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15. Alvarez Martinez v. Industrial Comm'n, 720 P.2d 416, 417 (Utah 1986). Utah's workers' compensation statute reducing benefits to nonresident alien beneficiaries was recently repealed. UTAH CODE ANN. § 35-1-72 (1953), *repealed by* 1993 Utah Laws Ch. 18, § 1.

16. *Pedrazza*, 607 P.2d at 601.

17. Liberato v. Royer, 270 U.S. 535, 536 (1926).

18. *Morales*, 429 S.E.2d at 673.

19. Johnson v. Eisentrager, 339 U.S. 763 (1950); *see also* De Tenorio v. McGowan, 510 F.2d 92, 101 (5th Cir. 1975), *cert. denied*, 423 U.S. 877 (1975).

20. *See infra* notes 23-26 and accompanying text; *see also* Alvarez Martinez v. Industrial Comm'n, 720 P.2d 416, 418 (Utah 1986) (rejecting, without discussing the merits, nonresident alien beneficiary's equal protection challenge).

21. Under rational relationship review, a statutory scheme will survive a constitutional challenge provided it is "rationally related" to a legitimate governmental interest. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (applying rational relationship standard to city's hiring practice); *see also* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

22. *See, e.g.*, Jalifi v. Industrial Comm'n, 644 P.2d 1319, 1322 (Ariz. Ct. App.), *appeal dismissed*, 459 U.S. 899 (1982). For a discussion of the governmental interests courts have identified as sufficient to pass the rational basis test, see *infra* notes 23-37 and accompanying text.

23. 607 P.2d 597 (N.M. 1980).

ruled against a mother and her Mexican children who sought compensation after the father died in a job-related industrial accident in the United States.[24] The court stated that because the father's rights and remedies under workers' compensation were "separate and distinct" from those of the children's, the children as nonresident aliens were "beyond the protective reach of the Equal Protection Clause and outside of our ability to help their cause on constitutional grounds."[25] Had they resided in the United States when their father died, however, the alienage distinction would have been applicable, and the children would have received compensation.[26]

The Fifth Circuit Court of Appeals has similarly commented on the residency/nonresidency dichotomy, noting that "[r]esident aliens, lawfully in the United States, are undoubtedly entitled to the equal protection of the law. It is equally obvious that the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States."[27]

In 1982, the Court considered the issue of territorial application of the Fourteenth Amendment's Equal Protection Clause in *Plyler v. Doe*.[28] In *Plyler*, Mexican children who illegally entered the United States sought injunctive and declaratory relief against their exclusion from Texas public schools.[29] The State contended that undocumented aliens were not "persons within the jurisdiction" of Texas and, as a consequence, had no right to equal protection.[30]

In rejecting the State's argument, the Court reaffirmed that both the Equal Protection Clause and the Due Process Clause of the U.S. Constitution apply to illegal and legal aliens who are *residents* of the United States:

> In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the

24. *Id.* at 601.

25. *Id.* at 600.

26. *Id.* at 601. The challenged statute stated: "[N]o claim or judgment for compensation . . . shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury." N.M. STAT. ANN. § 52-1-52 (Michie 1978). The New Mexico Legislature has since amended its workers' compensation statutes to allow recovery by nonresident alien beneficiaries equal to that of other beneficiaries. *See* N.M. STAT. ANN. § 52-1-52 (Michie 1993).

27. De Tenorio v. McGowan, 510 F.2d 92, 101 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975) (citation omitted).

28. 457 U.S. 202 (1982).

29. *Id.* at 206.

30. *Id.* at 210.

> Fourteenth Amendment was designed to afford its protection to all *within the boundaries of a State.* Our cases applying the Equal Protection Clause reflect the same territorial theme . . . .[31]

In addition to the territorial rationale, a second argument for denying recovery to nonresident alien beneficiaries is that workers' compensation helps prevent an employee's dependents from becoming public charges and joining the welfare rolls due to the financial loss accompanying a worker's death.[32] Consequently, statutes which prohibit death benefits distinguish between *resident* alien beneficiaries, who, without full benefits, are in a position to become public charges in the United States, and *nonresident* alien beneficiaries, who are not in danger of becoming public charges in the United States.[33]

The third reason courts uphold the validity of these statutes is that the cost of living in many foreign countries is substantially less than in the United States.[34] If parity were to be established, nonresident alien dependents might receive compensation greatly exceeding the death benefit they would receive in their country. Proponents of this argument claim that overpayment would run counter to the social policies behind workers' compensation[35] and would be inconsistent with the belief that death benefits are a statutory right of the beneficiary as opposed to an immutable property right of the decedent worker's estate.[36]

The fourth justification is that the reduction in death benefits to nonresident alien beneficiaries is a practical decision based on administrative convenience in light of the considerable task of proving the validity of claims. As one commentator pointed out, "Most of the special rules [denying death benefits to nonresident alien beneficiaries] are the result not of any desire to discriminate but of the awkward problem of proof and continuing administration that is unavoidably present in these cases."[37]

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31. *Id.* at 212 (citations omitted) (emphasis added).

32. Jalifi v. Industrial Comm'n, 644 P.2d 1319, 1322 (Ariz. Ct. App.), *appeal dismissed,* 459 U.S. 899 (1982).

33. *Id.*

34. *Id.*

35. Alvarez Martinez v. Industrial Comm'n, 720 P.2d 416, 418 (Utah 1986) ("Since the constitutionality of worker's compensation death benefits must be viewed in light of the laws and history of this country, the extension of full death benefits to foreign nationals is not constitutionally required.").

36. *See* Barge-Wagener Constr. Co. v. Morales, 429 S.E.2d 671, 672-73 (Ga.), *cert. denied,* 114 S. Ct. 579 (1993) (analogizing a decedent's estate's statutorily created right to sue for wrongful death, which is not a property right of the decedent's estate, to the statutorily created right of dependents to collect workers' compensation death benefits). For a critique of this analogy, see *infra* notes 49-63 and accompanying text.

37. 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 63.51 at 11-184 (1989).

A possible fifth justification which has not been raised by courts is that federal workers' compensation laws, like many of their state counterparts, also discriminate on the basis of alienage. Several state statutes are modeled after the Federal Longshoremen's and Harbor Workers' Compensation Act,[38] which provides for a 50% reduction of death benefits based on the dependent's status as a nonresident alien beneficiary.[39]

The Defense Base Act also provides for 50% reductions in nonresident alien dependents' death benefits.[40] In *Calloway v. Hanson*,[41] the Defense Base Act was used to truncate a Salvadoran woman's death benefits after the death of her husband.[42] The widow argued that Congress, through the Act, intended that the dependents of United States citizens receive full death benefits regardless of their nationality or residency.[43] Holding for the Government, the court noted that the limitations in the Defense Base Act were nearly identical to those in the Longshoremen's and Harbor Workers' Compensation Act.[44]

II. Challenging the Constitutionality of Unequal Death Benefits Through the Equal Protection Clause and Supremacy Clause

When discussing the constitutionality of state death benefit statutes which discriminate against nonresident alien beneficiaries, it is important to distinguish state constitutional challenges from federal constitutional challenges. As a jurisdictional matter, claims under both theories wind their way through state court systems, where state

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38. 33 U.S.C. § 909 (1988).

39. The Longshoremen's and Harbor Workers' Act provides:

> Aliens: Compensation under this [Act] to aliens, not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary [of Labor] may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary [of Labor].

33 U.S.C. § 909(g) (1988).

40. 42 U.S.C. § 1652(b) (1988).

41. 295 F. Supp. 1182 (D. Haw. 1969).

42. *Id.* at 1183.

43. *Id.*

44. *Id.* at 1184 ("It is probably significant to note that the language used in [the Defense Base Act] was not new language, but will be found almost verbatim in The Longshoremen's and Harbor Worker's [sic] Compensation Act, 33 U.S.C.A. § 909(g), first enacted March 4, 1927.").

grounds for relief (equal protection, access to courts) and federal grounds for relief (equal protection, supremacy of federal laws) are advanced. This section uses federal equal protection analysis, as a constitutional floor, to conclude that statutes denying full death benefits to nonresident alien dependents violate fundamental principles of equity and fairness. In addition, this section demonstrates how, in limited circumstances, the Supremacy Clause may be invoked to render these statutes inoperative.[45]

A. *Equal Protection Clause*

1. *Establishing Standing*

Before discussing statutory challenges to discrimination based on alienage, standing for the beneficiaries must be established.[46] Courts usually deny standing in such cases, asserting that death benefits are property rights of the beneficiary created by statute, rather than property rights of the worker.[47] Consequently, nonresident alien beneficiaries cannot challenge the constitutionality of legislative decisions curtailing their benefits because they are prohibited from asserting state or federal constitutional guarantees.[48]

In recent years, however, a handful of state supreme courts have questioned the antiquated property notions which have kept alien dependents from their day in court.[49] In *De Ayala v. Florida Farm Bureau Casualty Insurance*, the Florida Supreme Court concluded that death benefits belong to the worker as part of the benefits earned *before* the job-related death occurred.[50] *De Ayala* involved death bene-

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45. *See infra* notes 90-109 and accompanying text.

46. *See supra* notes 15-31 and accompanying text.

47. *See supra* notes 18-22 and accompanying text.

48. *See supra* notes 23-26 and accompanying text.

49. *See* Jurado v. Popejoy, 853 P.2d 669 (Kan. 1993); De Ayala v. Florida Farm Bureau Casualty Ins., 543 So. 2d 204 (Fla. 1989).

50. 543 So. 2d at 206 ("[W]e do not perceive this case as hinging on the constitutional rights of the surviving dependents, but on the constitutional rights of the worker, now deceased.").

De Ayala relied in part on a California Supreme Court decision that allowed nonresident dependents to collect death benefits under California's workers' compensation system:

> The provision for such death benefits, like that for the payment of compensation to injured employ[ees] themselves, is a regulation of the conditions surrounding the employment of labor and is to be justified upon similar grounds.
>
> . . . .
>
> If it may reasonably be thought that the best interests of the state, of the employers of labor, and of those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident—and some such theory lies at the bottom of all workmen's compensation statutes—the residence and citizenship of the injured workman, or (if he shall have met with death) of his dependents, are factors entirely foreign to the discussion.

Western Metal Supply Co. v. Pillsbury, 156 P. 491, 495 (Cal. 1916) (citation omitted).

fits stemming from a job-related accident which killed Maximiano De Ayala, whose beneficiaries were citizens and residents of Mexico.[51] While the Florida death benefit cap for residents was $100,000, the beneficiaries challenged the statute limiting them, as nonresident alien dependents, to $1,000.[52] The Florida Supreme Court invalidated the $1,000 limit, reasoning that the alienage discrimination began the moment the worker decedent started work as opposed to when the worker decedent died.[53] As a result, the statute violated the *worker's* equal protection rights because the worker could not exercise his right to death benefits as enforced by his beneficiaries.[54]

Unlike courts rejecting the proposition that death benefits belong to the worker,[55] *De Ayala* took into account how workers' compensation systems are funded, recognizing that workers' salaries—not just employers' premiums—pay for compensation insurance entitling employees to benefits in the event of injury or death.[56] With so much "sweat

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51. *De Ayala*, 543 So. 2d at 205.

52. The challenged statute stated:

> Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of the injury, and except that the deputy commissioner may, at the deputy commissioner's option, or upon the application of the insurance carrier, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the deputy commissioner, and provided further that *compensation to dependents referred to in this subsection shall in no case exceed $1,000.*

FLA. STAT. § 440.16(7) (1983) (emphasis added).

During the claims process in *De Ayala*, the defendant compensation carrier acknowledged the severe limitations imposed by the statute: "While I commend you for your efforts on behalf of the deceased claimant's estate, I cannot (in good conscience) offer you anymore [sic] than is statutorily allowed. Pursuant to Florida Statute 440.16(7), we cannot pay the estate or personal representative of the deceased claimant more than the $1,000 allowed." Letter from R. Neil Durrance, Jr., Workers' Compensation Regional Claims Manager, Florida Farm Bureau Insurance Companies, to Roger N. Messer, counsel for plaintiff beneficiaries (Aug. 28, 1984) (on file with author).

53. *See supra* note 50.

54. *See supra* note 50; *see also* Jurado v. Popejoy Constr. Co., 853 P.2d 669 (Kan. 1993). *Jurado* involved a nonresident alien beneficiary's challenge to Kansas' $750 cap on death benefits to alien dependents, despite payment of up to $200,000 to every other type of claimant:

> Although the death benefit vests after death and is distributed to dependents rather than the worker, the benefit nevertheless arises out of the employment relationship and is part of the benefits package that the worker earned before he died. Thus, as a practical matter, the disparate treatment occurred before [the worker] died.

Jurado, 853 P.2d at 673-74.

55. *See supra* notes 23-26 and accompanying text.

56. The *De Ayala* majority stated:

equity" built into workers' compensation, "[c]ommon sense dictates that [the decedent] should be entitled to the same 'benefits,' regardless of the residence or status of his dependents."[57] Rather than subscribe to the bundle-of-rights fiction other courts used, *De Ayala* found death benefits inuring from the employer-employee relationship, meaning that nonresident alien beneficiaries have a right of action derivative of the employee's contract of employment.[58]

Accord for this position was advanced as early as 1923, when the Court recognized that death benefits serve an employee's interest in providing for his or her family.[59] In *Madera Sugar Pine Co. v. Industrial Accident Commission*,[60] the Court upheld a provision in California's workers' compensation law requiring payment of death benefits to nonresident aliens, despite a challenge by the employer on Fourteenth Amendment due process grounds contending that the state lacked the authority to grant statutory death benefits to nonresident alien beneficiaries.[61] In reaching its conclusion, the Court emphasized that the purpose of workers' compensation is to serve the employee's best interests by seeing that his or her family is protected against loss of the worker's income.[62] The Court in *Madera* also noted that workers' compensation benefits are analogous to insurance in that the benefits should go "to those to whom the employee would naturally have made such insurance payable: to himself, although an alien, if he be disabled; and to those dependent upon his earnings for support, if he be killed."[63]

> One of the primary benefits that an employee works for is the satisfaction and well-being of providing for his or her family. The law did not afford [the deceased worker] different treatment while he was alive and working. He shared the same "burdens" as his fellow employees. He paid taxes and contributed to the growth of his company and the general economy. His labor . . . helped pay for the employer's insurance premiums required under the worker's compensation law.

543 So. 2d at 207.

57. *Id.* at 206.

58. *Id.*

59. Madera Sugar Pine Co. v. Industrial Accident Comm'n, 262 U.S. 499, 503 (1923).

60. *Id.*

61. *Id.* at 504. *Madera* affirmed on Fourteenth Amendment due process grounds (as opposed to Fourteenth Amendment equal protection grounds) the authority of a state legislature to grant to nonresident alien beneficiaries a statutory death benefit. *Id.*

62. *Id.* at 502-03. Justice Sanford explained that:

> [T]he compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee caused by an industrial accident, which in case of his death is paid to those whom he had supported by his earnings and who have suffered direct loss through the destruction of his earning power.

Id.

63. *Id.* at 503.

2. *Variations on Standing as Applied to Nonresident Alien Dependents*

Because each state's standing interpretations differ, federal standing doctrine, which has often been criticized for its seemingly arbitrary denials of relief,[64] becomes helpful as a worst-case scenario to demonstrate how a nonresident alien beneficiary may persuade a court to reach the cases' merits. Standing should be evident once the nonresident alien beneficiary asserts the decedent's constitutional rights.[65]

The guideposts for standing are: (1) that the plaintiffs have an injury in fact; (2) that the injury in fact be fairly traceable to the challenged policy; and (3) that the injury in fact has redressibility by the remedy sought.[66] In the context of nonresident alien beneficiaries challenging death benefit statutes, the injury in fact is the deprivation of tens of thousands of dollars in death benefits. The deprivation is "fairly traceable" to the death benefit statutes, as they directly authorize loss of benefits based on alienage and residency. And finally, courts can easily redress the discrimination by striking the statutes as violations of equal protection and other guarantees.[67]

In addition to advocating standing under the derivative rights analysis outlined in *De Ayala*,[68] another possible argument to confer standing is a "nexus theory."[69] This approach contends that the alienage statutes, by providing at least a limited recovery, establish a connection between the nonresident beneficiaries and the deceased worker sufficient to bring the claimants within the purview of equal protection.[70] Compared to asserting the derivative constitutional rights of the worker, however, the nexus argument is a poor substitute.[71] While

64. Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22-23 (1982) (noting that federal standing law has been criticized as little more than a "litany" used before "the Court . . . chooses up sides and decides the case"); *see also* 4 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983) (finding standing law "permeated with sophistry"); Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing standing law as "a word game played by secret rules").

65. *See supra* notes 49-63 and accompanying text.

66. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37-38 (1976); Warth v. Seldin, 422 U.S. 490, 498-500 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973).

67. *See* De Ayala v. Florida Farm Bureau Casualty Ins., 543 So. 2d 204 (Fla. 1989); Jurado v. Popejoy, 853 P.2d 669 (Kan. 1993).

68. *See supra* notes 49-58 and accompanying text.

69. Jalifi v. Industrial Comm'n, 644 P.2d 1319, 1321 n.2 (Ariz. Ct. App.), *appeal dismissed*, 459 U.S. 899 (1982).

70. *Id.*

71. *See id.* at 1319 (approving nexus theory to grant plaintiffs standing, yet rejecting the statutory challenge on rational relationship grounds).

the nexus theory acknowledges nonresident aliens may assert their rights as dependents to collect death benefits, its central weakness is that these rights do not include those of the deceased worker.[72] Without the ability to assert the worker's immutable constitutional guarantees, the nexus theory implicitly accepts legislative discretion to grant, limit, or abolish the rights of nonresident beneficiaries.[73] In light of its tenuous nature and inability to attach firmly to the worker decedent's rights, the nexus argument should yield to the theory that nonresident alien dependents may derivatively enforce the deceased worker's constitutional rights.

3. *Classifications Based on Alienage are Suspect Classifications Requiring Strict Scrutiny*

Once an equal protection[74] challenge to statutes denying death benefits is analyzed on its merits, courts must decide whether to apply rational basis,[75] intermediate,[76] or strict scrutiny review.[77] Equal Protection Clause jurisprudence reveals that strict scrutiny is warranted in cases where the legislative classification infringes on a fundamental right or is based on "suspect classifications" such as race or alienage.[78] Because the statutes denying equal death benefits distin-

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72. Alvarez Martinez v. Industrial Comm'n, 720 P.2d 416, 419 (Utah 1986) (holding the state's partial payment of benefits to a nonresident alien beneficiary does not establish a nexus sufficient to bring the plaintiff within constitutional bounds).

73. *Id.* ("[I]f the state were to grant no death benefits to nonresident aliens whatsoever, there would be no nexus and no denial of equal protection."); Pedrazza v. Sid Fleming Contractor, Inc., 607 P.2d 597, 601 (N.M. 1980) ("A dependent's claim is not derivative of the worker, but is given [to] him by statute independent of the worker.").

74. U.S. CONST. amend. XIV.

75. Under rational basis review, a statute will be upheld if its classifications are "rationally related" to a legitimate governmental purpose. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (applying rational relationship standard to Transit Authority hiring practice); Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979) ("[L]egislative classifications are valid unless they bear no rational relationship to the State's objectives.").

76. Under intermediate scrutiny review, often associated with gender-based classifications, courts will uphold legislation which bears a "substantial relationship" to "important governmental objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

77. Under strict scrutiny review, a classification will be upheld only if it "advance[s] a compelling state interest by the least restrictive means available." Bernal v. Fainter, 467 U.S. 216, 219 (1984).

78. Graham v. Richardson, 403 U.S. 365, 372 (1971). *Graham* concerns a constitutional challenge to state statutes disqualifying aliens from welfare assistance. *Id.* at 367. The Court held that "classifications based on alienage, like those based on nationality or race, are inherently suspect." *Id.* at 372. Applying strict scrutiny to the challenged statutes, the Court found that the "State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . making noncitizens ineligible for public assistance." *Id.* at 374. Nonresident aliens asserting the constitutional rights of the decedent worker should fall easily within *Graham*'s constitutional protection on grounds that they are seeking benefits which have already inured to them through the decedent's right to workers' compensation.

guish on the basis of alienage, strict scrutiny is the appropriate standard of review.[79]

For a statute to survive strict scrutiny, it must be necessary to serve a compelling governmental interest.[80] When this standard is applied to statutes denying full benefits, the governmental interest falls short of "compelling." For instance, one of the justifications for upholding the statutes has been that denying death benefits to nonresident alien beneficiaries will prevent dependents from becoming public charges in the United States.[81] When one considers, however, that nonresident *U.S.* citizens (i.e., Americans living abroad) are entitled to the same statutory maximums available to beneficiaries who live in the United States, the hollowness of the justification becomes evident. In addition, many of the statutes denying recovery to nonresident alien beneficiaries make an exception for Canadian beneficiaries, allowing them to receive benefits equal to resident U.S. beneficiaries.[82] There is no compelling interest in preventing Canadians from becoming public charges in Canada that would not similarly suffice for other nonresident aliens, such as Mexicans living in Mexico.[83] If the governmental interest in reducing the number of public charges in the United States were compelling, full death benefits would be restricted to only one type of beneficiary—those living in the United States—rather than extended to Canadian and U.S. beneficiaries living abroad.

Proponents of the public charge argument may claim that full payment to Americans living abroad is justified because those citizens may permanently return to the United States—an option nonresident aliens cannot exercise—and potentially become public charges. This rationale is questionable, however, because none of the workers' compensation statutes reduces the nonresident U.S. beneficiary's death benefit by an amount commensurate to the time spent abroad.[84]

Another interest not sufficient to survive strict scrutiny analysis is that of preventing nonresident alien beneficiaries from monetary windfalls. While it is true that the cost of living is less in some coun-

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79. *Id.* at 372; *see also Bernal*, 467 U.S. at 219.

80. *See supra* note 77.

81. *See supra* notes 32-33 and accompanying text.

82. Jalifi v. Industrial Comm'n, 644 P.2d 1319, 1322 (Ariz. Ct. App.), *appeal dismissed*, 459 U.S. 899 (1982).

83. Regarding Georgia's workers' compensation system, which grants up to $100,000 in death benefits to Canadian citizens but limits death benefits to only $1,000 for all other nonresident aliens, one commentator stated: "It's a racist statute, simple as that. Canadians look more like us, and Mexicans don't." Telephone Interview with Norman J. Slawsky, lawyer and amicus curiae for the deceased worker's family in Barge-Wagener Constr. Co. v. Morales, 429 S.E.2d 671 (Ga.), *cert. denied*, 114 S. Ct. 579 (1993).

84. *See* Appendix to this Comment.

tries than it is in the United States, in other countries the cost of living is the same or greater than that in the United States. Japan, for example, is infamous for its high food and housing costs.[85] In Mexico, consumer prices rose 131.8% during 1986-1987, compared to only a 3.7% increase in U.S. consumer prices during the same period.[86] Further underscoring the statutes' less-than-compelling classifications is the fact that the statutes do not require Americans living abroad—especially those who reside in countries with a low cost of living—to suffer a similar reduction in benefits.[87]

In addition to the governmental interests mentioned above, administrative convenience similarly does not constitute a compelling justification for discriminating on the basis of alienage. Today's technology easily tackles administrative barriers to processing claims, as evidenced by the success insurance companies have when they regularly locate foreign beneficiaries through a consular office to present them a check for diminished death benefits.[88] As one state supreme court recently concluded:

> [The] difficulty of establishing a dependent's entitlement to benefits is not a difficulty of the State. . . . [T]he contention that administration of benefits would be an 'insurmountable task' may have been viable in 1911 [when the state's death benefit statute was enacted]. However, given the global economy within which we work, the task has become less difficult over the past 80 years.[89]

B. Supremacy Clause

The U.S. Constitution provides that a duly ratified treaty made by the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[90] This

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85. Harry Levinson, *Japan: Working Like Crazy*, CHRISTIAN SCI. MONITOR, Dec. 6, 1990, at 19; Tom Ashbrook, *Tokyo Tour: Land of the $50 Melon*, BOSTON GLOBE, May 26, 1986, at C3.

86. *International Financial Statistics*, International Monetary Fund, Washington, D.C. In 1992, consumer prices in Mexico were rising at three times the rate of U.S. consumer prices. 1994 THE WORLD ALMANAC AND BOOK OF FACTS 103, 789 (Robert Famighetti ed., 1993).

87. *See* Appendix to this Comment.

88. *See infra* notes 145-48 and accompanying text.

89. Jurado v. Popejoy Constr. Co., 853 P.2d 669, 677 (Kan. 1993).

90. U.S. CONST. art. VI.

provision, an integral part of the Supremacy Clause,[91] may be used to invalidate a state's attempt to deny death benefits to nonresident alien dependents. The applicability of the Supremacy Clause is limited, however, to those cases where the nonresident alien dependent is from a country which has signed a reciprocity treaty with the United States granting citizens from each country a right of action under the other country's legal system.[92]

When applying the language of a treaty to a particular case, courts use a liberal construction to carry out the intent of the contracting parties and secure equality between them.[93] The interpretation of a treaty may not, however, infringe upon the U.S. Constitution or "invade the province of the States of the Union in matters inherently local, or . . . restrict the various states in the exercise of their sovereign powers."[94] With these interpretive boundaries in mind, a treaty which seemingly grants reciprocal rights between citizens of the United States and the claimant's country may nevertheless be parsed into pieces to foreclose recovery.[95]

An example of how narrowly treaties may be construed is *Liberato v. Royer*,[96] where the Court denied death benefits to the Italian dependents of a worker killed in Pennsylvania.[97] The Pennsylvania statute denied all death benefits to nonresident alien beneficiaries, and the plaintiffs sued on grounds that the state statute violated the Treaty of 1913 signed by the United States and Italy.[98] Despite the treaty afford-

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91. The full text of the *Supremacy Clause* reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

92. *See* Alvarez Martinez v. Industrial Comm'n, 720 P.2d 416, 417 (Utah 1986) (finding no violation of the Supremacy Clause because Mexico and the United States have not entered into a treaty extending to Mexican nationals the same rights and privileges under United States workers' compensation laws as to United States citizens). *See generally* 16 AM. JUR. 2D *Constitutional Law* § 75 (1964).

93. Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940); Hauenstein v. Lynham, 100 U.S. 487 (1879); *see* United States v. Pink, 315 U.S. 203, 230-31 (1942).

94. Antosz v. State Compensation Comm'r, 43 S.E.2d 397, 400 (W. Va. 1947).

95. *See* 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 63.52, at 11-185 (1989) ("The exact scope and terms of the treaty must be carefully examined to determine whether compensation discrimination is violative of its guarantees.").

96. 270 U.S. 535 (1926).

97. *Id.* at 538.

98. *Id.* at 537. The treaty reads:

> The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and

ing citizens of both countries "the most constant security and protection," the Court read out any claim to death benefits from the language "establish[ing] a civil responsibility for injuries or for death caused by negligence or fault."[99]

Twenty-one years after *Liberato*, however, the West Virginia Supreme Court decided *Antosz v. State Compensation Commissioner*,[100] which involved a Polish national who sued for death benefits on Supremacy Clause grounds after her husband was killed in a coal mining accident.[101] In granting compensation, the court emphasized that the treaty between the United States and Poland established civil liabilities for injuries or for death, and that these civil liabilities gave to dependents "a right of action or a pecuniary benefit . . . regardless of their alienage or residence outside of the territory where the injury occurred . . . ."[102] The court distinguished *Micaz v. Compensation Commissioner* and another case construing the Italy-United States treaty[103] by noting that unlike the Polish treaty, which expressly provided for pecuniary benefits, the Italian treaty "simply established 'a civil responsibility for injuries or for death caused by *negligence or fault* and gives to relatives or heirs of the injured [or deceased] party a right of action . . . .'"[104]

Recently, the New York Court of Appeals construed the 1953 Treaty of Friendship, Commerce and Navigation between Japan and the United States in favor of a Japanese mother seeking death benefits after her son was stabbed to death at his employer's headquarters.[105] The New York Workers' Compensation Law attempted to deny death benefit eligibility to the parents due to the law's prohibition on compensation to those who were supported by their children for less than

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> property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.

Treaty on Commerce and Navigation, Feb. 25, 1913, U.S.-Italy, art. I, 38 Stat. 1669, 1670 [hereinafter Commerce].

99. Liberato v. Royer, 270 U.S. 535, 538 (1926).

100. 43 S.E.2d 397 (1947).

101. *Id.* at 398-99.

102. *Id.* at 400, 398.

103. Antosz v. State Compensation Comm'r, 43 S.E.2d at 400 (construing Micaz v. State Compensation Comm'r, 13 S.E.2d 161 (W. Va. 1941)).

104. *Id.* (quoting Commerce, *supra* note 98).

105. Mizugami v. Sharin W. Overseas Inc., 615 N.E.2d 964, 965 (N.Y. 1993).

one year.[106] The court, however, considered the "ordinary meaning and clear import" of the treaty and concluded states "are required to accord 'national treatment' equally to foreign nationals and United States citizens in these circumstances."[107] Like the United States-Poland treaty, the United States-Japan treaty contained language stating that the citizens of each country would be provided "pecuniary compensation."[108] This phrase was not in the United States-Italy treaty at issue in *Liberato*, and its endorsement by state courts indicates that states will welcome it as a vehicle for extending death benefits to nonresident alien beneficiaries.[109]

III. Access to Courts

Historically, workers' compensation statutes have survived judicial scrutiny because they provide a sufficient quid pro quo to employers and employees.[110] That is, in exchange for guaranteed and speedy compensation, an injured employee or the estate of a deceased employee gives up the common law right to sue the employer for negligence or wrongful death.[111] By agreeing to compensate workers injured in job-related accidents regardless of fault, employers give up the "unholy trinity" defenses of assumption of risk, contributory negligence, and the fellow servant doctrine.[112] Workers' compensation is fundamentally different from tort liability because tort liability is based on a system of fault, while workers' compensation is based on whether the employee's injury arose out of and in the course of employment.[113] Unlike tort liability, workers' compensation "is a mechanism for providing cash wage benefits and medical care to victims of

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106. *Id.* at 966.

107. *Id.* at 967. The Treaty of Friendship, Commerce, and Navigation provides:

> Nationals of either Party [the United States and Japan] shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation, or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

Id. at 966.

108. *See supra* notes 102-04 and accompanying text.

109. *Compare* Antosz v. State Compensation Comm'r, 43 S.E.2d at 397 (providing a "pecuniary benefit" under the treaty) *and Mizugami*, 615 N.E.2d at 965 (providing "pecuniary compensation" under the treaty) *with* Liberato v. Royer, 270 U.S. 535 (1926) (failing to provide any "pecuniary" recovery under the treaty).

110. *See* Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206 (1952) [hereinafter Larson, *Nature*].

111. Richard A. Epstein, *The Historical Origins and Economic Structure of Worker's Compensation Law*, 16 Ga. L. Rev. 775 (1982).

112. *See* W. Keeton et al., Prosser & Keeton on the Law of Torts § 80 at 569 (5th ed. 1984).

113. Larson, *supra* note 37, § 1.02.

work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product."[114]

Despite the general validity of workers' compensation, however, statutes which mandate unequal death benefits for nonresident beneficiaries take away dependents' quid pro quo by stripping them of recovery and leaving them without remedy in law or equity.[115] To counter such restrictions, a nonresident alien may turn to "open courts" provisions in state constitutions to argue that the statutes violate the individual's right to access the judicial system. Most state constitutions have "open courts" language, which provides that justice will be administered to all without delay and the courts will always be open to aggrieved parties.[116]

Lack of standing, however, can easily defeat an argument based on access to courts.[117] In this respect, state courts wield tremendous power over the construction of workers' compensation statutes which, hailing from a different era, continue to discriminate against nonresident workers. An example of how an access-to-courts argument can be raised in the parties' briefs, put forth at oral argument, yet appear nowhere in the final opinion is *Barge-Wagener Construction Co. v. Morales*.[118] In *Morales*, the Georgia Supreme Court upheld the validity of Georgia's $1,000 cap on death benefits payable to nonresident alien beneficiaries.[119] After concluding the right to death benefits vests in dependents only after the worker dies, the court stated that the statute "surely discriminates against [the nonresident alien beneficiaries], but it is not unlawful. They must settle for what the legislature of this state is willing to provide."[120]

If *Morales* were to have concluded like *De Ayala* that the right to death benefits inures directly with the decedent worker,[121] Georgia's "open courts" doctrine might have compelled at least a discussion of the beneficiaries' case on this point.[122] Georgia's "open courts" provision states that "no person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's *own cause*

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114. Larson, *Nature*, *supra* note 110, at 207.
115. *See supra* notes 110-14 and accompanying text.
116. *See* 16A AM. JUR. 2D *Constitutional Law* § 613, at 557-58 (1962).
117. *See supra* notes 13-31 and accompanying text.
118. 429 S.E.2d 671 (Ga.), *cert. denied*, 114 S. Ct. 579 (1993).
119. *Id.* at 674.
120. *Id.* at 673.
121. *See supra* notes 49-58 and accompanying text.
122. After the court concluded that the *Equal Protection Clause* did not extend to the plaintiff beneficiaries, the merits of the claimants' access to courts argument were not addressed. *Morales*, 429 S.E.2d at 673.

in any of the courts of this state."[123] The key consideration, which the Georgia Supreme Court rejected but which the Florida Supreme Court embraced, is that the right to death benefit compensation is the worker's *own cause* advanced by beneficiaries.[124]

Many of the seventeen states which curtail death benefits for nonresident alien beneficiaries have "open courts" provisions.[125] As more challenges to the statutes' validity are raised, these provisions will serve as important tools for obtaining judicial relief. The inadequacy of the $1,000 death benefit upheld in *Morales* is reflected by the fact that the Georgia Legislature set the $1,000 limit more than seventy years ago and has continuously failed to raise it.[126] The original Georgia workers' compensation act provided up to $4,000 for resident dependents and $1,000 for nonresident dependents.[127] Although the Georgia Legislature amended the statute a dozen times to increase benefits for *resident* dependents, the compensation for nonresident alien dependents has yet to be raised.[128]

A. Societal Benefits of Using Access-to-Court Arguments for Nonresident Alien Beneficiaries

The access-to-courts argument is particularly compelling when the consequences of *not* permitting dependents to assert their claims are considered. Workers' compensation systems serve two key societal interests in addition to the advantages employers and employees enjoy under the labor arrangement.[129] First, workers' compensation encourages employer interest in safety and rehabilitation through an appropriate experience-rating system that affects insurance rates.[130] Second, it promotes frank study of the causes of accidents to help keep preventable ones from occurring.[131] Workers' compensation programs provide employers with preventative services, including safety engineering, while the structure of insurance premiums serves as a pri-

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123. GA. CONST., art. I, § 1, ¶ XII (emphasis added).

124. *See* De Ayala v. Florida Farm Bureau Casualty, Ins., 543 So. 2d 204 (Fla. 1989); *see also* Jurado v. Popejoy Constr. Co., 853 P.2d 669 (Kan. 1993).

125. *See, e.g.*, ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; DEL. CONST. art. I, § 9; ILL. CONST. art. II, § 12; ME. CONST. art. I, § 19; N.C. CONST. art. I, § 35; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.C. CONST. art. I, § 15.

126. *See* 1929 Ga. Laws 38; GA. CODE ANN. § 34-9-265(d) (1993).

127. 1929 Ga. Laws 38.

128. *See* GA. CODE ANN. § 34-9-265(b)(5) (1993).

129. U.S. CHAMBER OF COMMERCE, 1993 ANALYSIS OF WORKERS' COMPENSATION LAWS vii (1993).

130. *Id.*

131. *Id.*

mary monetary incentive for employers to improve their safety records.[132]

The financial incentive for employers who employ a large number of aliens to comply with safety and health regulations is destroyed, however, by states that allow employers and their insurance companies to deny death benefits to nonresident alien beneficiaries. Indeed, a perverse situation arises under these statutes whereby an injured employee may receive tens of thousands of dollars in injury compensation, but the beneficiaries of that same employee will suffer a severe reduction in benefits if the employee is killed on the job. In this respect, states with discriminatory death benefit statutes are essentially underwriting employers and their insurance companies by valuing employee deaths as an incidental cost of doing business. An Alabama employer, for example, may not have any incentive to improve working conditions because the death of an employee with an alien beneficiary will not impact the employer's insurance policy covering workplace injury or death beyond the nominal amount paid for burial expenses.[133] This type of compensation system emphasizes far too dramatically the common law maxim that "it is cheaper to kill a man than to maim him."[134]

B. *The Impact of the Discriminatory Statutes on Farmworkers in the United States*

Illustrating the acute impact of these discriminatory statutes are the estimated 2.5 million farmworkers hired to perform seasonal and migrant labor in the United States.[135] Of the workers performing seasonal agricultural services (SAS), 62% are foreign-born and more than half are from Mexico.[136] A 1991 staff report from the U.S.

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132. ALA. CODE § 25-5-82 (1993).

133. *Id.*

134. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 945 (5th ed. 1984). Despite the fact that death benefits comprise more than 14% of total income benefits, "the economic loss associated with death cases is often less than that of a permanent total disability." *See* U.S. CHAMBER OF COMMERCE, 1993 ANALYSIS OF WORKERS' COMPENSATION LAWS 19 (1993).

135. ASSOCIATION OF FARMWORKER OPPORTUNITY PROGRAMS TESTIMONY ON THE NEEDS OF ELDERLY FARMWORKERS 6 (1990), *reprinted in After 30 Years, America's Continuing Harvest of Shame: Hearing before the House of Representatives Select Committee on Aging*, 101st Cong., 2d Sess. 69 (1990) [hereinafter *Harvest of Shame*].

"Seasonal farmworkers" are those who work in their home areas without staying away overnight. "Migrant farmworkers" travel across state lines and stay away from home overnight to perform agricultural work. 29 U.S.C. § 1802(8)(A) (1988).

136. OFFICE OF PROGRAM ECONOMICS, U.S. DEPT. OF LABOR, NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1990 15 (1990) [hereinafter NAWS SURVEY]. Two percent of SAS workers are from other countries in Latin America, 2% are from Asia, and 1% are from the non-Spanish speaking Caribbean. *Id.*

House of Representatives Select Committee on Aging described the situation facing farmworkers:

> The average farmworker is employed about 25 weeks per year with few earning more than $6,000 a year. Their work is physically demanding, lacking job security, and providing little opportunity for promotion. [B]ecause many cannot vote due to their undocumented status, they are disenfranchised and disempowered. Exacerbating the lack of governmental representation for their concerns, farmworkers are without an audible voice in either the Nation's agricultural fields or the Nation's capital.[137]

Most SAS workers have dependents, yet 40% of them do not live with their families.[138] While agricultural laborers often do not receive workers' compensation benefits,[139] many are nevertheless eligible for workers' compensation because they also perform nonagricultural labor which qualifies under state workers' compensation programs.[140] When job-related fatalities occur, the families of these farmworkers suffer severe hardship from the loss of income and denial of equal death benefit payments.

IV. SOLUTIONS

Workers' compensation laws in seventeen states have provisions for reducing the amount of death benefits to nonresident alien dependents.[141] Other states commute the benefits to a lump sum or restrict the types of dependents eligible as beneficiaries.[142] As part of these schemes, states have also devised various methods guaranteeing benefit payment, although diminished, and ensuring against fraud.[143] By

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137. STAFF REPORT OF H.R. SELECT COMM. ON AGING, 102D CONG., 1ST SESS., THE STATUS OF FEDERAL LAWS AFFECTING OUR NATION'S FARMWORKERS 2 (Comm. Print Nov. 1991).

138. NAWS SURVEY, *supra* note 136, at ii.

139. Fourteen states exclude agricultural workers from workers' compensation coverage: Alabama, Arkansas, Idaho, Indiana, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee. *Harvest of Shame*, *supra* note 135, at 191. States that provide workers' compensation coverage for agricultural workers the same as all other employees are: Arizona, California, Colorado, Connecticut, Hawaii, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, Ohio, and Oregon. *Id.* at 91-92. Washington, D.C. and the Virgin Islands similarly provide the same coverage for agricultural workers as for other employees. *Id.* at 92.

140. Thirty-six percent of SAS workers perform non-SAS labor during a one-year period. NAWS SURVEY, *supra* note 136, at 77.

141. *See* Appendix to this Comment.

142. *Id.*

143. *See, e.g.*, MONT. CODE ANN. § 39-71-724(1) (1993); OR. REV. STAT. § 656.232 (1993); TEX. BUS. & COM. CODE ANN. § 3.12 (West 1993); WIS. STAT. § 102.19 (1993).

looking at the ways states have worked against abuses in the compensation system, several models emerge as states consider implementing systems which do not discriminate based on alienage. In light of the Court's recent decision to deny certiorari to a case challenging a state's cap on death benefits to nonresident alien dependents,[144] the mechanisms states use to prevent abuses in the compensation system will become increasingly important to states which change their discriminatory statutes.

One of the ways states try to guarantee delivery of death benefits to nonresident alien beneficiaries is by requiring the beneficiaries' consular office to represent the nonresident alien dependent before receiving benefit payments.[145] The insurer may be required to pay death benefits to the consular office on the beneficiaries' behalf.[146]

Similarly, states have ensured against fraudulent death benefit claims by requiring the dependent to furnish proof of dependency status, such as a marriage or birth certificate, under seal of a court officer from the dependent's resident country.[147] Often, this requires the consular office of the dependent's country to execute a bond to guarantee an accounting of the funds received. Before the bond is discharged, a verified statement of receipt and disbursement of the funds must be made and filed in the circuit court ordering the payment.[148] By incorporating these types of procedural safeguards, states with discriminatory compensation systems can distribute payments more fairly and without fear of fraud or abuse.

V. CONCLUSION

As seen from the various types of workers' compensation delivery systems, states can be creative when finding methods to protect against fraud yet guarantee delivery of death benefits to the beneficiaries of employees killed during work-related activity. If states are to honor the workers' compensation conditions imposed on employers and employees, they must provide equal compensation to dependents and beneficiaries without regard to where they are from or where they live.

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144. Barge-Wagener Constr. Co. v. Morales, 429 S.E.2d 671 (Ga.), *cert. denied*, 114 S. Ct. 579 (1993).

145. OR. REV. STAT. § 656.232 (1993); WIS. STAT. § 102.19 (1993).

146. *See, e.g.*, MONT. CODE ANN. § 39-71-724(1) (1993).

147. *Id.*

148. IOWA CODE § 85.31(5) (1993).

APPENDIX

State	Statute	Limitation on death benefits to nonresident alien beneficiaries
Alabama	ALA. CODE § 25-5-82 (1993)	100%
Alaska		none
Arizona	ARIZ. REV. STAT. ANN. § 23-1046 (1993)	60%
Arkansas	ARK. CODE ANN. § 11-9-111(a) (1993)	50%
California		none
Colorado		none
Connecticut		none
Delaware	DEL. CODE ANN. tit. 19, § 2333 (1993)	50%
Florida	FLA. STAT. § 440.16(7) (1993)	50%
Georgia	GA. CODE ANN. § 34-9-265(b) (1993)	$1,000
Hawaii		none
Idaho		none
Illinois	ILL. REV. STAT. ch. 820 para. 305/7 (1993)	50%
Indiana		none
Iowa	IOWA CODE § 85.31(5) (1993)	50%
Kansas		none
Kentucky	KY. REV. STAT. ANN. § 342.130 (Michie 1993)	50%
Louisiana		none

Maine	ME. REV. STAT. ANN. § 101(8)(c)(4) (West 1993)	50%
Maryland		none
Massachusetts		none
Michigan		none
Minnesota		none
Mississippi		none
Missouri		none
Montana		none
Nebraska		none
Nevada	NEV. REV. STAT. § 616.615(9) (1993)	50%
New Hampshire		none
New Jersey		none
New Mexico		none
New York		none
North Carolina	N.C. GEN. STAT. § 97-38 (1993)	50%
North Dakota		none
Ohio		none
Oklahoma		none
Oregon	OR. REV. STAT. § 656.232 (1993)	No specific amount. May be reduced to take into account different costs of living.
Pennsylvania	PA. STAT. ANN. tit. 77, § 563 (1993)	50%
Rhode Island		none
South Carolina	S.C. CODE ANN. § 42-9-290 (Law. Co-op. 1993)	50%
South Dakota		none
Tennessee		none
Texas		none

Utah		none
Vermont		none
Virginia		none
Washington	WASH. REV. CODE § 51.32.140 (1993)	50%
W. Virginia		none
Wisconsin	WIS. STAT. § 102.51(2)(b) (1993)	100% once employee has been a U.S. resident for eight years
Wyoming		none