SB

53

The Constitutional Validity of Preferential Hiring Requirements Under Proposed Alaska State Oil and Gas Leases

Introduction

Residential hiring legislation like Senate Bill No. 53 (Seventh Legislature, First Session, 1971), would be susceptible to constitutional attack on the ground that it violated (1) the privileges and immunities clause of Article IV, (2) the equal protection clause of the 14th Amendment; and (3) interfered with interstate commerce within the meaning of Article I, Section 8. Because a successful constitutional argument on either ground would invalidate the legislation, an analysis of each is offered, first in the context of the preferential hiring requirements of SB No. 53 (1971), then in the context of other preferential hiring proposals.

Section 38.05.177 of SB No. 53 would require the inclusion into every oil and gas lease to which Alaska is a party a provision requiring the hiring of bona fide residents of Alaska at prescribed percentages of the lessee-employer's work force. The preferential hiring requirements would also apply to the lessee's assignees, sublessees, contractors, and any persons doing lease-related work for or in conjunction with the lessee.

Both the equal protection clause of the 14th Amendment and the privileges and immunities clause of Article IV, Section 2 prohibit certain

forms of discrimination by a State. Compared with the 14th Amendment's equal protection clause, the distinctive quality of the privileges and immunities clause is its inapplicability to cases involving discrimination by a State against its own citizens. It does not follow, however, that the 14th Amendment's equal protection clause has no applicability to controversies involving discrimination against citizens of other States. Hence, that provision of the Constitution bears on the problem for discussion. Of the two anti-discrimination constitutional provisions, however, the privileges and immunities clause is more specific, narrower in scope, and more particularly related to the subject of preferential hiring as contemplated by your Legislature.

The Privileges and Immunities Clause

History

The privileges and immunities clause of the Constitution is contained in Article IV, Section 2, which provides in relevant part:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

While different theories have supported the purpose of the clause, only one persists today: Since the Slaughter-House Cases in 1873, the clause has been interpreted as forbidding a State to discriminate against citizens of other States and in favor of its own citizens. Slaughter-House Cases, 16 Wall. 36 (1873).[1]

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1. Three other theories concerning the purpose of the clause have lost

In 1947, the primary purpose of the privileges and immunities clause was described by Chief Justice Vinson, speaking for the Court in Toomer v. Witsell, 334 U.S. 385, 395 (1948), as follows:

> The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. 168, 180 (1868).

Prohibited Discrimination

If all discrimination by a State in favor of its citizens and against citizens of other States were prohibited by the privileges and immunities clause, preferential hiring as proposed by your Legislature would be unconstitutional. Without question, the import of the proposed legislation is discriminatory. But a long line of Supreme Court cases hold that the clause is not an absolute. The question is this, as in all privileges

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their validity with the passage of time. They are: (1) the clause guarantees to citizens of different States equal treatment by Congress, a theory recognized in part by the Dred Scott case, 19 How. 393 (1857), but now obsolete; (2) citizens of each State enjoy all the privileges and immunities enjoyed in any State by its citizens, a view rejected in McKane v. Durston, 153 U.S. 684, 687 (1894); (3) a State must guarantee to a visiting citizen from another State all the privileges and immunities enjoyed by that citizen in his home State, a view rejected in Detroit v. Osborne, 135 U.S. 492, 498-9 (1889).

and immunities clause cases, is whether there is a substantial reason for the discrimination against citizens of other States "beyond the mere fact that they are citizens of other States." Toomer v. Witsell, 334 U.S. 385, 396 (1948).

In Toomer, the test described by Chief Justice Vinson for the Court is as follows:

> /T/he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. 334 U.S. at 396.

Applying that test, the Supreme Court has held unconstitutional under the privileges and immunities clause, a State's discriminatory imposition of a fishing license fee of $25.00 for residents and $2,500 for nonresidents; Toomer v. Witsell, supra; a $50 commercial fishing license fee for nonresidents and a $5.00 commercial license fee for residents, Mullaney v. Anderson, 342 U.S 415; the denial to nonresidents of a tax exemption allowed residents of the State, Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); the taxation of nonresidents for the privilege of selling within the State goods produced in other States, Ward v. Maryland, 12 Wall. 418, 424 (1871). These are some examples of unconstitutional types of extreme discrimination by a State against noncitizens, with no rational basis apart from the fact of noncitizenship in the State imposing the discrimination.

State Natural Resources

When the State has a proprietary interest in tangible natural resources within the State, legislation limiting the depletion of those resources to citizens of the State is sometimes sustained on the theory that the natural resource constitutes a property right held for the use of the State's citizens. First stated in the landmark case of Corfield v. Coryell, 6 Fed., Cas. 546 (1823), the theory has been followed and applied to wild game, Greer v. Connecticut, 161 U.S. 519 (1896), and the running water of a State, Hudson Water Co. v. McCarter, 209 U.S. 349 (1908). While Corfield v. Coryell, supra, was a Circuit Court decision, its rationale was followed in McCready v. Virginia, 94 U.S. 391 (1877), a landmark case often referred to in privileges and immunities clause literature as the "McCready exception to the privilege and immunities clause." In the McCready case, the Supreme Court upheld a Virginia statute which prohibited nonresidents from planting or fishing for oysters in the inland waters of the State, on the theory that the resource was owned by the State.

Toomer v. Witsell, supra, and Mullaney v. Anderson, supra, which arose in Alaska, appear not to follow the McCready doctrine, but are in fact clearly distinguishable for the reason that the State in both cases attempted to impose a discriminatory licensing fee on fishing in the marginal sea, thus introducing into those cases an element of State control over the channels of commerce among the States and accompanying overtones of an unconstitutional interference with interstate commerce. Inasmuch as the proposed pipeline will be constructed entirely within the State of

Alaska, it is not possible to equate the pipeline with free-swimming fish in the marginal waters of a State. From a proprietary standpoint, the State-owned land on which the pipeline will be constructed is clearly an intrastate resource; and there are no overtones here of an unconstitutional interference with interstate commerce insofar as control of the State's proprietary interest is concerned.[2] (This observation should be carefully distinguished from the subject of a possible interference with the interstate travel of potential out-of-state employees seeking work at pipeline construction sites. This is discussed, infra.)

Separate and independently-prepared memoranda by your Honorable State Attorney General[3], and by Avrum M. Gross, Esq. of the Juneau law firm of Faulkner, Banfield, Boochever, and Doogan, for the Alaska Oil & Gas Association[4], comment upon the proprietary-interest theory. Both conclude that the theory is not sufficiently broad to sustain the valid-

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2. The proposed North Slope pipeline will traverse about 130 miles of State land, 640 miles of federal land, and about 30 miles of privately owned land. Letter from Senator Croft to Professor Alleyne, dated November 2, 1971.

   Under Senate Bill No. 294 (Seventh Legislature, Second Session, 1972), the Alaska Leasing Board created by that bill would lease or acquire for pipeline purposes easements on land belonging to the United States, and in turn lease the land so acquired to carriers for pipeline right-of-way. Sec. 38.40.200, SB No. 294 (1972).

3. Opinion letter to Senator Josephson dated April 19, 1971. The Attorney General has apparently taken the opposite position in defending the State Department of Labor in Knutson v. State of Alaska, in the Alaska Superior Court on cross motions for summary judgment. No. 71-2941. Memorandum brief dated October 26, 1971.

4. Opinion letter to Alaska Oil & Gas Association dated April 1, 1971.

ity of the proposed legislation. I am not in agreement with the conclusions reached by both on their respective analyses of the proprietary-interest concept. Your Attorney General's memorandum does not discuss what is perhaps the most compelling reason for concluding that preferential hiring, as proposed by Senate Bill No. 53 of 1971, is not unconstitutional: namely, the separate and distinct theory of a State's power to discriminate between citizens and noncitizens in the terms of a lease of public land.

The Proprietary Interest Rationale

First, on the proprietary interest theory as established by the McCready case, the Attorney General's memorandum appears to recognize the Supreme Court's distinction between state-owned resources within a State and a resource like free-swimming fish located in a State's marginal waters. Yet, the Attorney General concludes, without saying why, that notwithstanding these distinctions, "as presently drafted, Senate Bill 53 would probably be found to be unconstitutional on several grounds." While he mentions "several grounds" of unconstitutionality, his memorandum discusses only the privileges and immunities clause.

The Gross memorandum states that if McCready v. Virginia, 94 U.S. 391 (1877), were still the law, "the statute before the Alaska legislature would clearly be valid." It concludes, however, that McCready is no longer the law, "insofar as it approves State 'ownership' as a valid justification for discrimination." Mr. Gross quotes the following passage from the Toomer decision in support of his conclusion that McCready is no longer the law:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

The quoted language does not reject McCready, but regards the "ownership theory" as but another name for a State's power to preserve, regulate, and exploit a natural resource. By citing the ownership theory as a short-hand name for the state power described, the Court, in Toomer, necessarily recognizes the existence of a State's power over, and its ability to discriminate in appropriate cases against, noncitizens in the protection of that resource. The quote from Toomer, in short, is a re-affirmation of the principle that the privileges and immunities clause's restrictions are not absolute.

The discrimination in Toomer was held invalid because of the high degree of discrimination inherent in the imposition of a noncitizens shrimp boat license fee one hundred times greater than the fee for citizens, and the location of the shrimp in the marginal sea as distinguished from the inland waters of the State.

In the paragraph following the portion of the Toomer decision quoted by the Gross memorandum, the Court notes that the McCready exception "should not be expanded to cover this case". Clearly, the refusal to expand a constitutional concept does not mean that the concept has been repudiated. The Gross memorandum almost concedes as much by noting that it is possible to construe Toomer as "still authorizing State restriction

over fully 'owned' property as opposed to areas simply controlled by the State."

I agree with the latter statement, insofar as it relates to property "owned" by the State. Questions concerning mere "control" are not relevant here, inasmuch as the proposed legislation, the Right of Way Leasing Act, SB No. 294 (1972), and the preferential hiring requirements of SB No. 53 (1971), apply only to State-owned land. Ownership necessarily connotes the power to impose some degree of control; and it is the State's right to control through the leasing power that makes Alaska's proprietary interest so strong. But before developing further the relationship between Alaska's interest as owner of the lands in question and Alaska's power to establish through the terms of a lease some form of preferential hiring for Alaska residents, a further comment is in order on the Gross memorandum position that there is no longer a viable distinction between inland and marginal waters in privileges and immunities clause cases.

The Gross memorandum cites one federal district court case in support of the view that there is no longer a viable distinction between inland and marginal waters in cases arising under the privileges and immunities clause. It states (p.4) that in Brown v. Anderson, 202 F. Supp. 96 (Alas., 1962), "/E/he Court specifically rejected an argument that the restriction was valid in the inland waters of the State..."[5] I am un-

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5. The law firm of which Mr. Gross is a member was counsel for the plaintiffs attacking the licensing provision in Brown v. Anderson.

able to follow this reasoning, inasmuch as Brown v. Anderson dealt with the issue of salmon fishing in marginal waters and dealt not at all with salmon fishing in inland waters with no access to the sea. The court stated, probably by way of judicial notice since the fact is so obvious, that "/s7almon are migrating, free-swimming fish which are caught in the marginal seas of Alaska", 202 F. Supp. at 98; and that the "Alaska marginal waters are divided into ten general areas /with7 specific geographical boundaries." /Emphasis added.7 202 F. Supp. at 98. Challenged and held unconstitutional in that case was Chapter 62 of the Alaska Session Laws of 1961, which, among other things, authorized the Alaska Board of Fish and Game "to withdraw from nonresidents the right to take salmon from the marginal seas in certain areas, under certain conditions." /Emphasis added.7 202 F. Supp. at 101. Thus, both the facts and the applicable law in Brown v. Anderson relate solely to fishing in marginal waters. Accordingly, it is not possible to say that the case is inconsistent with McCready.

It is true that the court in Brown v. Anderson read the Toomer decision as abrogating the McCready "ownership" concept. But inasmuch as both Toomer and Brown were marginal-sea cases, the Brown court's comments citing Toomer as overruling McCready can only be regarded as dictum.

For reasons noted above in the comments on the Gross memorandum's analysis of Toomer, I think the dictum is incorrect. Again, Toomer distinguishes but does not overrule McCready. Toomer merely recasts the McCready test in a different semantic mold. It emphasizes the severity of the discrimination in that case and the absence of any compelling reasons,

apart from noncitizenship, to justify the discrimination against nonresident fishermen fishing in marginal waters off the coast of South Carolina. Where, on the other hand, a discriminatory license fee is not flagrantly discriminatory and where, at the same time, the fishing waters in question are not marginal but inland, a discriminatory license fee is valid. See, for this proposition, and for comparison with Brown v. Anderson, the federal district court opinion in American Commuters Association v. Levitt, 279 F. Supp. 40 (S.D.N.Y., 1967), citing and distinguishing Toomer, Mullaney v. Anderson (Alaska fish case), and Brown v. Anderson:

> Plaintiffs do not raise a substantial constitutional question because a nonresident is charged a fee of $5.50 for a noncommercial fishing license...while a resident is charged a fee of $3.25. No showing has been made that the difference in fee is not justified by added enforcement burdens and conservation programs supported by taxes paid by residents...Decisions such as Toomer v. Witsell...Anderson v. Mullaney, 191 F.2d 123... (9th Cir. 1951), aff'd, 342 U.S. 415 (1952)...Brown v. Anderson ...are distinguishable since they dealt with commercial fishing rights involving interstate commerce. [Emphasis added.] American Commuters Association v. Levitt, 279 F. Supp. at 48.

Leasing Power Implications: The Heim-Crane Doctrine

An attempt by Alaska to restrict all hiring by all employers in the State to residents of Alaska, or to require that those employers prefer Alaska citizens in hiring, would undoubtedly be unconstitutional. Truax v. Raich, 239 U.S. 33 (1915), for example, invalidated an Arizona law which effectively excluded aliens from work by requiring employers of five or more persons to hire eighty per cent qualified electors or native-born citizens of the United States. The Supreme Court held that the alien attacking the statute, having been lawfully admitted into the United States

under federal immigration laws, had a federal privilege to enter and abide in "any State in the Union" and to enjoy the equal protection of the laws under the 14th Amendment; that the privilege to enter in and abide in any State carried with it the "right to work for a living in the common occupations of the community." One month later, Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915), companion cases, were decided. At issue was the constitutional validity of Section 14 of the New York Labor Law, a preferential hiring law for public works employment. It provided as follows:

> Preference in employment of persons upon public works.--In the construction of public works by the State or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. [Emphasis added.] Laws 1909, ch. 36, Consol. Laws, ch. 31.

The Supreme Court sustained the statute as applied to the hiring of employees for the construction of New York City's subway system. The Court rejected contentions that Section 14 of the New York Labor Law violated the equal protection clause, the privileges and immunities clause, and the due process clause, basing its decision on the State's power to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. 239 U.S. 175, at 192, 193. The legislation was sustained with respect to hiring by a public agency and as applied to private contractors working under public-agency contracts.

Criminal penalties under the same statute were sustained by the Supreme Court in the companion case of Crane v. New York, 239 U.S. 195 (1915), affirming an opinion by Cardoza for the New York Court of Appeals, People v. Crane, 214 N.Y. 154 (1915), where the following statements appear:

> To defeat this law it must therefore be held that the constitution gives to the state a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources...214 N.Y. at 162.
>
> There may be forms of employment where efficiency would be promoted by the employment of citizens, and if the statute were restricted to such employments, its validity would not be doubtful...214 N.Y. at 163.
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> When payment for public works is to be made from public funds, it may prefer in employment its own citizens, since to them the legislature may believe that the first duty is owing...214 N.Y. at 164.

Obviously, if the Heim and Crane doctrines are still valid, they constitute powerful support for preferential hiring statutes. While not "modern" cases, the Heim and Crane decisions have never been overruled.

The kind of competitive leasing arrangements under which the pipeline will be constructed will not require a cash outlay of public funds, as in the usual public works context. State land will be leased. The difference is merely the nature of the asset distributed by the State: cash in return for construction services in one case; land in exchange for the royalty benefits accruing to the State-lessor in the other case.

Truax v. Raich, supra, striking down Arizona's sweeping ban on

alien hiring, is distinguishable. This is graphically illustrated by the fact that Heim and Crane were decided one month after Truax. The lack of similarity between the statutory provision involved in the two cases was apparently so plain to the Court that the Heim and Crane opinions did not deem it necessary to attempt to distinguish or, for that matter, even cite Truax. Clearly, the Truax decision does not stand in the way of your proposed legislation.

In plaintiff's reply memorandum in support of a motion for partial summary judgment, in Knutson v. Alaska, No. 71-2941, Alask. Super. Ct., it is stated that Heim (and by implication Crane), is "no longer very good law." Two 1970 federal district court cases are cited in support of this statement: Gonzales v. Shea, 318 F. Supp. 572, 578, n. 15 (E.D. Wis, 1970), and Leger v. Sailer, 321 F. Supp. 250, 254, n. 10 (E.D. Pa. 1970).

Of course, federal district judges are without power to overrule Supreme Court decisions. Apart from that, Gonzales cites Heim with approval in holding that a Colorado Old Age Pension amendment requiring United States citizenship as a condition for eligibility is not an unconstitutional classification. 318 F. Supp. at 578, n. 15. The Leger decision questions the validity of Crane's holding concerning alien exclusion, but not the extent to which Crane sustains the preferential hiring aspect of the New York Labor Law. 321 F. Supp. at 254.

The school segregation case, Brown v. Board of Education, 347 U.S. 483 (1954), its progeny, as well as Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), holding unconstitutional a California statute denying

fishing licenses for aliens, and the 1964 Civil Rights Act's prohibitions concerning discrimination because of national origin in federally-assisted programs, 42 U.S.C. § 2000d (1969), may indeed cast doubt upon a State's ability to discriminate against aliens, even on public works projects But public works employment discrimination based on residency within the State is another matter. To that extent, Alaska Statutes, Chapter 10, Section 36.10.050, banning public works employment to non-resident aliens "unless the alien worker has in good faith declared his intention of becoming a citizen..." may be of doubtful validity today. Section 36.10.010, giving preference to Alaska residents on public works projects is, for the reasons developed in this memorandum, not of doubtful constitutional validity.

It is recommended that no distinction be made between aliens and persons not aliens in any preferential hiring legislation adopted by your Legislature.

That the Heim-Crane rationale is still valid as applied to preferential hiring based on place of residency in public works projects is evidenced by a number of factors. State and local legislation restricting public hiring to local residents has been sustained by virtually all courts considering the question. See e.g., Quigley v. Blanchester, 16 Ohio App.2d 104 (1968) (police and firemen), Detroit Police Officers Association v. City of Detroit, 190 N.W.2d 97 (1971) (policemen), Jackson v. Firemen's and Policemen's Civil Service Commission, 466 S.W.2d 414 (1971) (firemen); Marabuto v. Town of Emeryville, 183 C.A.2d 406, 6 Cal. Rptr. 690 (1960) (policemen and firemen); Kennedy v. City of Newark, 29

N.J. 178, 148 A.2d 473 (1959) (all employees); Williams v. Civil Service Commission of the City of Detroit, 383 Mich. 507, 176 N.W.2d 593 (1970) (all employees); Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1969) (all employees).

State, County and Municipal Employees Local 339, AFL-CIO v. City of Highland Park, 363 Mich. 39, 108 N.W.2d 898 (1961), invalidated a public employee residency requirement, but only because the city did not have enough suitable housing available for the 163 employees required to relocate to the city; and compare, Williams v. Civil Service Commission of the City of Detroit, supra, sustaining legislation without that encumbrance. The only case flatly contra is Donnally v. City of Manchester, 274 A.2d 789 (1971), basing the rejecting of a public employee residency requirement on an interference with the right to travel.

The history of the Heim-Crane rationale may be traced to a 1932 Supreme Court decision sustaining a statute forbidding intrastate carriers from using the state highways without permits from a commission prescribing minimum cargo rates and requiring cargo insurance. Stephenson v. Binford, 287 U.S. 251 (1932). The legislation was attacked as an unlawful regulation of private business. Rejecting that contention the Court held:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. 287 U.S. at 264.

The Court drew a parallel between the legislation under review and the legislation sustained in Heim v. McCall:

> The provision...under review is governed by the same principle as that which recognizes the authority of a state to prescribe the conditions upon which it will permit public work to be done on its behalf. 287 U.S. at 275, 276.

While the case is forty years old and not "modern," the absence of extensive citations of its holding is perhaps best explained by the entrenched authority of states to regulate intrastate carriers.

The Contracting Power Analogy

In Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940), the Supreme Court sustained the Public Contracts Act of 1936, requiring that all manufacturing or supply contracts with the United States contain a minimum wage stipulation. Against the argument that the statute constituted an illegal interference with the right of private employers to conduct business with the Government, the Court said:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. 310 U.S. at 127.

In support of this statement the Court cited Heim v. McCall, 310 U.S. at 127, n. 15. The Perkins opinion concluded that a minimum wage determination made by the Secretary of Labor pursuant to the Public Contracts Act was not even reviewable in light of the Government's contracting power.

The Perkins' rationale has never been successfully challenged. The parallel between that decision and the validity of SB No. 53 (1971) is placed in clear perspective when the validity of racial quota requirements under federal executive orders is considered.

Federal Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), requires that Government manufacturing and supply contracts, and contracts with federally-assisted employers, contain a clause obligating the contractor, supplier, or federally-assisted employer, to take affirmative action to assure nondiscriminatory employment policies. The Philadelhia Plan, and others like it, implementing the Executive Order, go further and require that the contractor, supplier, or federally-assisted employer take affirmative steps and make a good faith effort to reach a minority hiring goal established by the Area Coordinator for the Office of Federal Contract Compliance. Equal protection and due process attacks directed at the Philadelphia Plan's validity were rejected in Contractors Association of Eastern Pennsylvania v. Shultz, 442 F.2d 159 (3d Cir. 1971), cert. denied, _____ U.S. _____ (1971).

> The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action.[6]
> 442 F.2d at 177.

6. As applied to the construction industry in state government contracts by virtue of federal assistance, the validity of the Executive Order has been sustained. Weiner v. Cuyahoga Community College, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970), and Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

The perceived evil sought to be eradicated by Alaska through the preferential hiring requirement is its consistently high unemployment rate, perennially one of the highest in the nation. Its power to do so by establishing conditions in a lease which potential lessees are free to accept or reject is at least equal to the federal government's power to reduce the incidence of racial discrimination through its power to establish contract conditions which a potential government contractor is free to accept or reject.

Equal Protection, the Commerce Clause and the "Right to Travel"

Since Shapiro v. Thompson, 394 U.S. 618 (1969), invalidating a state and a District of Columbia one-year waiting period requirement for welfare assistance, a number of cases have invalidated waiting period requirements for other forms of public assistance. See Cole v. Housing Authority of the City of Newport, 435 F.2d 807 (1st Cir. 1970) (one-year waiting period for housing); Vaughan v. Bower, 313 F. Supp. 37 (Ariz., 1970), aff'd 400 U.S. 884 (1971); (one-year wait for mental hospital eligibility); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 649 (2d Cir. 1971) (five-year wait for housing); Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970); Crapps v. Duval County Hospital Authority, 314 F. Supp. 181 (M.D. Fla. 1970) (one-year wait for free medical care).

All of the above cases dealt with durational residency requirements. The distinctions between a durational requirement and a non-durational residency requirement like that found in S.B. No. 53 (1971), is vital. It is the waiting period requirement that the courts have found unconstitutional.

To emphasize and fully discern the distinction, one need only contemplate a court holding that no state residency requirements need be met in order to qualify for welfare under a state's welfare laws or state unemployment compensation benefits. The result would clearly be fiscal chaos, as United States citizens living in any state could then receive welfare or unemployment compensation payments from any requested state.

SB No. 53 (1971) differs drastically from the types of durational residency requirement laws dealt with in the cases noted above. It does not require a residency period of any duration, but does require residency in the sense of a physical presence in the state with the intent to remain permanently. Specifically, a resident is defined by Sec. 38.05.179 as follows:

> DEFINITIONS. In secs. 176-179 of this chapter
>
> (1) "bona fide resident of Alaska" or "resident" means
>
> (A) a person who has been physically present in the state of Alaska, except for brief intervals, for a period of one year; or
>
> (B) a person who has not been present in the state for a period of one year, except for brief intervals, but shows by all attending circumstances that his intent is to make Alaska his permanent residence and the Department of Labor has certified that the attending circumstances show this intent.

While the issue, to my knowledge, has not yet been dealt with in a square holding by a court, dictum in numerous cases, including Shapiro v. Thompson, supra, suggest that a bona fide

residency requirement is entirely distinguishable from durational residency requirements. For example, in King v. New Rochelle Municipal Housing Authority, supra, the Court concluded:

> In reaching our conclusion (that a five-year durational residency requirement for public housing is invalid) we emphasize that we are here deciding only the validity of a durational residency requirement for admission to public housing. As in Shapiro (v. Thompson), there is no contention here that a state or a local government may not require that applicants for public services be bona fide residents. 442 F.2d at 649.

The "right to travel" argument necessarily encompasses interstate commerce clause considerations, as Edwards v. California, 314 U.S. 160 (1941), decided in striking down a California statute effectively prohibiting indigents from entering the State. Accordingly, the "new" equal protection theories as described in Shapiro v. Thompson, supra, are discussed here under a heading which includes the interstate commerce implications of preferential hiring legislation as typified by SB No. 53 (1971).

The issue of durational residency requirements, as opposed to mere residency requirements, was squarely dealt with by the prestigious First Circuit Court of Appeals in Cole v. Housing Authority of Newport, 435 F. 2d 807 (1970)--albeit by way of dictum. That court stated:

> The answer, we think, lies in the Court's concept of the right to travel. The Court apparently uses "travel" in the sense of migration with intent to settle and abide. See Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U.L. Rev. 989, 1012 (1969). Thus, laws that comparatively disadvantage persons traveling to take advantage of state benefits and then leaving are permissible under Shapiro. For example, the Court suggested that

> residency is a reasonable requirement for eligibility to receive welfare benefits but that the one-year waiting period was unconstitutional. Shapiro, supra at 636, 89 S.Ct. 1322, 22 L.Ed.2d 600. Any residency requirement might be thought to penalize the right to travel if "travel" is used in the sense of movement. A resident of Maine vacationing for a month in New Hampshire might be penalized for traveling if he could not obtain the benefits of a library card in New Hampshire during his vacation. Nevertheless, a residence requirement so "penalizing" that kind of travel is probably permissible under Shapiro.

Footnote eleven at the end of the above quoted paragraph provides:

> We do not think, for example, that Newport is required to convert its public housing into motel facilities for transients. A requirement that persons applying for public housing have a bona fide intent to reside in Newport would be permissible.

CONCLUSION

In my judgment neither the equal protection clause nor the interstate commerce clause should bar the contemplated legislation. As concluded earlier, I think that the privileges and immunities clause of Article IV Section 2 would not bar the contemplated legislation.

Other suggestions going to the form of the legislation, and make-weight arguments concerning a tie-in with equal employment opportunity legislation and general training programs, I should prefer to discuss after talking personally with Senator Croft and other interested legislators. It may be that these matters need only be mentioned as a legislative finding of fact in the preamble to the legislation.

A tax incentive to accomplish the preferential hiring objective,

while constitutionally valid, if not unreasonably discriminatory or confiscatory, would be valid but not as effective, overall, as the lease condition route.

Professor Reginald H. Alleyne, Jr.
UCLA School of Law
Los Angeles, California

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