HB

266

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MEMORANDUM

To: All Members, House Labor and Commerce Committee

From: Roger Poppe, Committee Staff

Date: March 20, 1985

Subject: Overview, HB 266

ON March 20, 1985, the House Labor and Commerce Committee met in Room 102 of the Capitol Building from 1:15-2:45 on HB 266, An Act relating to employment preference for state residents.

The material on this bill came in too late for me to analyze it properly. However, local hire issues have been introduced through various bills and resolutions in every session of the legislature for some years now. Last session HB 424 by McBride, and SB 174 by Josephson, both dealt with this issue. This session, there is a bill that is almost word for word identical to HB 266 in the Senate, which is SB 191. Some of the material in your back-up file has been obtained from the sponsor of SB 191, since it is also applicable to HB 266.

The whole issue of the state's right to hire in-state residents for major construction projects has been going on for a long time. The State has tried, with mixed results, to put into effect some sort of local hire preference for state residents who are being passed by for work in favor of outside laborers. Sometimes this is because the outsiders are willing to work for lower wages than Alaskans, often in non-union situations; other times it is because the major companies doing the construction have long-standing working relations with outside labor, and so they bring up their "friends" from outside to hold down not only the upper level supervisory and management positions, but also the higher paying actual construction jobs on the site.

In an effort to combat this, the state has tried to require varying length-periods of residency in different programs, which have been cut down by various U.S. Supreme Court decisions so that the maximum length of residency is 1 year for most programs, and as little as 30 days for other things like being able to vote. Hence, residency has not been entirely successful as a means of ensuring that local people get hired. A similiar problem has been fought around not only local hire, but the land lottery program, the permanent fund dividend check, and other state programs as well. This legislation, and other similiar bills that will be heard in Committee next week, are all part of a larger pattern of attempts to deal with the issue of local preference in the job market.

From the U.S. Supreme Court's point of view, many local hire laws are contrary to the Privileges and Immunities Clause of the U.S. Constitution which states, in effect, that "the citizens of each state are on the same footing with the citizens of other states, so far as the advantages resulting from citizenship in the states are concerned," or, the right to pursue a livelihood in a state other than ones own. A recent Wyoming Supreme Court decision in your file has thrown a new wrinkle on this area, which the sponsor will be discussing.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
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MEMORANDUM February 14, 1985

SUBJECT: Alaska Hire (Work Order No. 14-0485)

TO: Senator Victor Fischer

FROM: Teresa B. Cramer Terry Cramer
Legislative Counsel

You have asked for a bill providing for the strongest Alaska resident hire permissible under the constitution, and to apply that law to public and, if possible, private employees. Given the present state of the law, it is not possible to draft a bill that would withstand constitutional scrutiny without specific information about the particular harm that out-of-state employees create for Alaska residents and a close connection between the demonstrated harm and the remedy created in the bill.

Alaska currently has a strong local preference law for state funded construction projects. AS 36.10.010 provides in part

> (a) In the performance of contracts let by a municipality for construction . . . 95 percent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In all cases of public works projects, preference shall be given to residents.
>
> (b) When a construction project is partly or wholly funded by state money and the state . . . is a signatory to the construction contract, the contract shall require that the worker hours on a craft-by-craft basis shall be performed at least 95 percent by bona fide state residents. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified.

The statute as it now reads could be subject to constitutional challenge under the Privileges and Immunities clause and a strong showing would be required to support it.

Two recent cases of the United States Supreme Court have examined local hire laws. In White v. Massachusetts Council of Construction Employees, 460 U.S. 204, 75 L.Ed. 2d 1 (1983), the Court held that the City of Boston's resident work force preference (requiring employment of at least 50 percent bona fide residents of Boston on construction projects funded in whole or in part by the city) did not violate the Commerce Clause of the U.S. Constitution. The court reasoned that Boston was a market participant rather than a market regulator, entitled to favor its own citizens over others while acting in a proprietary manner. The court noted that the record did not support a finding that the preference would have a "significant impact" on firms employing out-of-state residents.

Under White, Alaska can favor its own citizens while acting as a market participant without violating the Commerce Clause. Measures that required others to favor Alaskans over out-of-state residents would be subject to Commerce Clause and Privileges and Immunities prohibitions. White and Hicklin v. Orbeck, 437 U.S. 518 (1978).

However, in a later case, United Building and Construction Trades Council v. Camden, 104 S.Ct. 1020, 79 L.Ed. 2d 249 (1984), the Court examined a similar ordinance and found that the ordinance appeared to violate the Privileges and Immunities clause of the U.S. Constitution. The distinction between market participant and market regulator that the court relied on in White did not dispose of the Privileges and Immunities issue. The clause imposes a direct restraint on state action in the interests of interstate harmony. The Court noted that a state may discriminate

> against citizens of other states where there is a "substantial reason" for the difference in treatment. "The 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." As part of any justification offered for the discriminatory law, nonresidents must be somehow shown to "constitute a peculiar source of the evil at which the statute is aimed."

United Bldg & Construction, 52 LW at 4191, citations omitted. The record in the case was insufficient to determine whether there was justification for the discrimination, since the case was heard initially by the New Jersey supreme court without a trial. The Court remanded the case to the state court to permit Camden to attempt to justify the discrimination against citizens of other states.

The Seventh Circuit Court of Appeals considered both White and United Bldg & Construction when it overturned an Illinois preference law as violating the Privileges and Immunities clause. W.C.M. Window v. Bernardi, 730 F.2d 486 (1984). The court noted that Illinois had offered no evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents and suggested the kind of evidence needed to meet a challenge under the Privileges and Immunities clause.

> We are not told the unemployment rate in Illinois' construction industry, what such unemployment costs the state, whether it would be significantly increased by throwing open public construction projects to nonresidents (which might just cause a reshuffling of jobs between public and private projects), and whether the costs -- if any -- to Illinois of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, are likely to exceed any cost savings in public construction from hiring nonresident workers.

If I may be of further assistance, please advise.

TBC:ejb
J11/095

tion of the questionnaire system), we should opt for the interpretation that effectuates the plain Congressional intent. And there are clear expressions of Congressional commitment to random selection. We should thus decide what constitutes a substantial failure to comply with the Act in light of the overall Congressional purpose of randomness. The majority ignores that purpose, sweeping it under the rug by characterizing any attention to questionnaire return as "conscription." Congress may not have intended a generally applicable system of "conscription." But given the repeated references in the legislative history to the goal of "random selection" there is no doubt that Congress intended some reaction by the clerk to a response rate as extremely low as that alleged in this case.

The majority's references to Gometz' sixth amendment rights are mystifying and lead away from the central problem of Congressional intent. This court has acknowledged that the Act may require a more perfect cross section than the constitution. *See United States v. Dellinger,* 472 F.2d 340, 365 (7th Cir.1972), *cert. denied,* 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1974). Whatever the relationship between the sixth amendment and the Act, Gometz has not made a sixth amendment claim and the majority's discussion of the amendment serves merely to confuse.[3] Certainly the majority does not believe that Congress lacks power to prescribe jury selection standards more rigorous than the minimum intended by the framers.

In summary, I do not think that any level of nonresponse constitutes a *per se* violation of the Act, but a 70% nonresponse coupled with a showing of substantial unrepresentativeness of the jury panel would so far depart from the principles of the Jury Selection and Service Act that a violation would be shown. The only thing that is before us now is whether a hearing should be provided in which the defendant would have the burden of showing the second prong of the requirements for a violation—substantial unrepresentativeness of the resulting panel in a cognizable category. This seems to me to be a minimalist view of our obligations to enforce the Jury Selection and Service Act.

For these reasons, I respectfully dissent with respect to the claim based on nonresponse to questionnaires.

3. In his reply brief, Gometz specifically disavowed any sixth amendment basis to his challenge to the jury pool and criticized the government for citing constitutional cases in response to his statutory arguments.

W.C.M. WINDOW CO., INC., et al., Plaintiffs-Appellees,

v.

E. Allen BERNARDI, Director of the Department of Labor, State of Illinois, Defendant-Appellant.

No. 83-1781.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 10, 1984.

Decided March 16, 1984.

As Amended on Denial of Rehearing and Rehearing En Banc May 11, 1984.

Director of Illinois Department of Labor appealed from a decision of the United States District Court for the Central District of Illinois, Michael M. Mihm, J., enjoining him from enforcing Illinois' preference law. The Court of Appeals, Posner, Circuit Judge, held that: (1) District Court was not required to abstain in favor of state court; (2) Illinois preference law violated commerce clause; (3) law was prima facie unlawful under privileges and immunities clause; and (4) state failed to satisfy burden of justifying law's discrimination

against nonresidents under privileges and immunities clause.

Affirmed.

1. Courts ⇐508(7)

Under *Younger,* federal district court may not enjoin state criminal prosecution in civil rights suit, provided that plaintiff in suit can raise his federal claims in state court by way of defense to prosecution. 42 U.S.C.A. § 1983.

2. Courts ⇐508(2)

Younger doctrine includes cases in which state civil proceeding sought to be enjoined in civil rights suit involves important state interests. 42 U.S.C.A. § 1983.

3. Injunction ⇐1, 85(1)

Injunction is extraordinary remedy, rarely available as matter of right and never more extraordinary than when, if granted, it would prevent government officials from proceeding under statute founded on important state interests against violator of statute.

4. Courts ⇐508(1)

Federal court injunction which, if granted, would prevent government officials from proceeding under statute founded on important state interests against violator of statute would offend comity and federalism.

5. Injunction ⇐16

Injunction will not be issued when plaintiff has adequate remedy at law.

6. Injunction ⇐16

Plaintiff has "adequate remedy at law," precluding issuance of injunction, when plaintiff can assert ground on which he seeks injunction as defense to very proceeding to which injunction would put a stop.

See publication Words and Phrases for other judicial constructions and definitions.

7. Courts ⇐508(1)

Younger doctrine is inapplicable when state tribunal is deemed to have prejudged federal claim because tribunal has pecuniary interest in outcome.

8. Administrative Law and Procedure ⇐229

Habeas Corpus ⇐3

Exhaustion of remedies requirements in administrative and habeas corpus cases are satisfied when adverse precedent makes remedies futile as practical matter to pursue.

9. Constitutional Law ⇐207(1)

Privileges and immunities clause of Federal Constitution does not protect corporations. U.S.C.A. Const. Art. 4, § 2, cl. 1.

10. Constitutional Law ⇐207(1)

Unincorporated association is not "citizen" within meaning of privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; Ill.S.H.A. ch. 30, ¶ 185; ch. 38, ¶ 2-15; ch. 120, ¶ 15-1501(a)(1).

11. Constitutional Law ⇐42.3(1)

Under Illinois law, association may bring equity suit on basis that law violates its member's rights under privileges and immunities clause, even though association has no rights under clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; Ill.S.H.A. ch. 30, ¶ 185; ch. 38, ¶ 2-15; ch. 120, ¶ 15-1501(a)(1).

12. Federal Courts ⇐18

Equities did not require district court to abstain in favor of state court, in which suit was filed on same day as federal civil rights action, on challenge to Illinois preference law where state was not sufficiently exercised about contractors' apparent violations of preference law to bring criminal or quasi-criminal proceeding against them, policy underlying preference law was less central to goals of state government than protecting health, safety and morals of its population, contractors would have no practical remedy in state courts if state courts adhered to prior decision upholding preference law against identical challenge, and individual federal plaintiffs might have no state court remedy at all for violation of privileges and immunities clause. U.S.C.A.

Const. Art. 4, § 2, cl. 1; Ill.S.H.A. ch. 48, ¶¶ 269-274.

13. Constitutional Law ⇐32

Commerce clause contains implicit prohibition, enforceable by courts without congressional action, of state's discriminating against or unduly burdening interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

14. Commerce ⇐51

State may not erect a tariff wall protecting its industries from competition of industries in other states and in foreign countries merely to promote economic welfare of its own citizens. U.S.C.A. Const. Art. 1, § 8, cl. 3.

15. Commerce ⇐51

Fact that state's tariff might have only a small effect on interstate trade would not save it from invalidation under commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

16. Commerce ⇐82.25

If Illinois limited preference law to construction project financed in whole or in part or administered by state, law would not violate commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

17. Commerce ⇐82.25

Where school board's window-replacement project was not even partially financed by state or being administered by state, school board was "market participant" and state was "regulator" for purpose of evaluating Illinois' preference law under commerce clause. Ill.S.H.A. ch. 122, ¶¶ 17-11 to 17-13; U.S.C.A. Const. Art. 1, § 8, cl. 3.

18. Commerce ⇐56

For purpose of evaluating state law under commerce clause, any consideration of impact on interstate commerce is precluded until state is found to be regulator of rather than participant in market. U.S.C.A. Const. Art. 1, § 8, cl. 3.

19. Federal Courts ⇐930

Summary affirmance does not commit Supreme Court to details of lower court's opinion.

20. Commerce ⇐51

Preferring welfare of residents to that of nonresidents is not a good defense under commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

21. Commerce ⇐82.25

Illinois preference law, requiring that contractor on any public works project or improvement for state or any political subdivision or other governmental unit employ only Illinois laborers unless contractor certifies that Illinois laborers either are not available or are incapable of performing particular type of work involved, violated commerce clause. Ill.S.H.A. ch. 38, ¶¶ 1005-8-3(a)(3), 1005-9-1(a)(3); ch. 48, ¶¶ 269-274; 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 1, § 8, cl. 3.

22. Constitutional Law ⇐46(1)

Court should not decide constitutional question unnecessarily.

23. Federal Courts ⇐753

Although judgment would be the same whether Illinois preference law violated commerce clause, as found, or privileges and immunities clause, where ruling on privileges and immunities issue might avoid necessity of remand should review of decision be sought and granted and Supreme Court disagree with Court of Appeals' interpretation of commerce clause, ruling might also help Supreme Court to decide whether case merited further review, and commerce clause and privileges and immunities clause were closely related in action, Court of Appeals would address privileges and immunities issue. Ill.S.H.A. ch. 38, ¶¶ 1005-8-3(a)(3), 1005-9-1(a)(3); ch. 48, ¶ 274; 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 1, § 8, cl. 3; Art. 4, § 2, cl. 1.

24. Constitutional Law ⇐207(2)

Public Contracts ⇐2

Illinois preference law, requiring that contractor on any public works project or improvement for state, political subdivision or other governmental unit employ only Illinois laborers unless contractor certifies that Illinois laborers either are not available or are incapable of performing particular type of work involved, was prima facie unlawful under privileges and immunities clause. Ill.S.H.A. ch. 38, ¶¶ 1005-8-3(a)(3), 1005-9-1(a)(3); ch. 48, ¶ 274; 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 4, § 2, cl. 1.

25. Constitutional Law ⇐207(1)

Unqualified language of privileges and immunities clause permitting states to keep out nonresidents if they constitute a "peculiar source of evil" permits state to keep out nonresidents who have been exposed to some communicable disease of which state is still substantially free. U.S.C.A. Const. Art. 4, § 2, cl. 1.

26. Constitutional Law ⇐207(1)

Under privileges and immunities clause, there must be some evidence of benefits of residents-preference law in dealing with problem created by nonresidents. U.S.C.A. Const. Art. 4, § 2, cl. 1.

27. Statutes ⇐282

"Evidence" in the technical legal sense is not essential when issue is not application but validity of statute.

28. Constitutional Law ⇐207(1)

Where Illinois, although having full opportunity in preliminary injunction proceeding to put into evidence facts justifying preference law, and although having access to data that might illuminate costs and benefits of law, failed to present any information, statistical or otherwise, concerning benefit of law, state failed to satisfy burden of justifying law's discrimination against nonresidents under privileges and immunities clause. Ill.S.H.A. ch. 38, ¶¶ 1005-8-3(a)(3), 1005-9-1(a)(3); ch. 48, ¶ 274; 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 4, § 2, cl. 1.

29. Constitutional Law ⇐48(6)

Although burden of proving that state statute violates privileges and immunities clause is on plaintiff, once he shows that statute discriminates exclusively against nonresidents in the pursuit of common callings, state has burden of justifying discrimination or, at the very least, of producing some evidence in justification of it. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[illegible]ricia Rosen, Asst. Atty. Gen., Chicago, Ill., for defendant-appellant.

M. Barry Forman, St. Louis, Mo., for plaintiffs-appellees.

Before PELL, CUDAHY and POSNER, Circuit Judges.

POSNER, Circuit Judge.

E. Allen Bernardi, the director of the Illinois Department of Labor, appeals from a decision enjoining him from enforcing Illinois' Preference to Citizens on Public Works Projects Act, Ill.Rev.Stat.1981, ch. 48, ¶¶ 269-274. The Act (in paragraph 271) provides that the contractor on "any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit thereof shall employ only Illinois laborers on such project or improvement," unless the contractor certifies, and the contracting officer finds, that Illinois laborers either "are not available, or are incapable of performing the particular type of work involved ...." Violation of the preference law (as it is called) is a misdemeanor punishable by a maximum jail sentence of 30 days and a maximum fine of $500. See Ill.Rev.Stat.1981, ch. 48, ¶ 274; ch. 38, ¶¶ 1005-8-3(a)(3), 1005-9-1(a)(3). The district court held that the law violates both the privileges and immunities clause of Article IV, section 2 of the Constitution ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"), and the commerce clause of Article I, section 8 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

The public school board of Decatur, Illinois hired the W.C.M. Window Company, an Illinois corporation, to replace some windows. W.C.M. subcontracted the work to Custom Contracting Company, an unincorporated association of Missouri residents.

On April 12, 1983, Bernardi brought suit in state court against W.C.M. and Custom, asking that they be enjoined from violating the preference law. On the same day, W.C.M., its president, and three individuals who are members of Custom Contracting brought this suit (under 42 U.S.C. § 1983) against Bernardi, and asked the district court to issue a temporary restraining order to prevent Bernardi from proceeding with his state court action. The district court issued the order and later converted it into a permanent injunction.

[1, 2] The first question we consider is whether the district court should have abstained, under the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), in favor of the state court in which Bernardi had filed his action. (The other grounds for abstention urged by the state clearly have no merit.) *Younger* held that a federal district court may not enjoin a state criminal prosecution in a civil rights suit, provided that the plaintiff in that suit can raise his federal claims in state court by way of defense to the prosecution. Its doctrine has since been expanded to cases where a state civil proceeding sought to be enjoined involved "important state interests." See, e.g., *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521–22, 73 L.Ed.2d 116 (1982) (state proceeding to discipline a lawyer for unethical conduct); see also *Ciotti v. County of Cook*, 712 F.2d 312, 313 (7th Cir.1983); *Cate v. Oldham*, 707 F.2d 1176, 1183 (11th Cir.1983); *Coruzzi v. State of New Jersey*, 705 F.2d 688, 690–91 (3d Cir.1983). We must consider whether "important state interests" are involved here, and also the significance of the facts that (1) the plaintiffs in the federal court action and the defendants in the state court action are not identical and (2) the Illinois Supreme Court in *People ex rel. Holland v. Bleigh Construction Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975), upheld the preference law against a challenge based on the same grounds urged by these plaintiffs.

[3–6] The *Younger* doctrine is based on, and its contours established by, two principles of equity jurisprudence. The first is that an injunction is an extraordinary remedy, rarely available as a matter of right and never more extraordinary than when, if granted, it would prevent government officials from proceeding under a statute founded on important state interests against a violator of the statute; such an injunction would offend comity and federalism. The second principle is that an injunction will not be issued when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction as a defense to the very proceeding that the injunction would put a stop to.

Although the plaintiffs apparently did violate the Illinois preference law, the state was not sufficiently exercised about the violation to bring a criminal proceeding, or even a quasi-criminal proceeding as in *Middlesex*. It was content to seek an injunction against continuing the violation. This is some evidence that an injunction against Bernardi's state court action would not impair "important state interests," though not much evidence; the state may simply have believed that, in the circumstances, an injunctive remedy would be cheaper, swifter, and more efficacious. An additional point, however, is that the policy underlying the preference law is less central to the goals of state government than protecting the health, safety, and morals of its population—the types of interest involved in cases where abstention under the *Younger* doctrine has been ordered. Thus, both the nature of the remedy sought by, and more important the underlying right asserted by, the state in its suit make the remedy that these plaintiffs are seeking less invasive of state sovereignty than in the usual *Younger* case.

[7, 8] Moreover, the plaintiffs may not have "an adequate opportunity in the state proceedings to raise [their] constitutional challenges." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n, supra*, 457 U.S. at 432, 102 S.Ct. at 2521–22. Although this quotation could be taken to refer just to procedural obstacles to raising a federal claim in state court, rather than also to any substantive obstacle created by adverse precedent, we know from *Gibson v. Berryhill*, 411 U.S. 564, 577–79, 93 S.Ct. 1689, 1697–98, 36 L.Ed.2d 488 (1973) (cited approvingly in *Middlesex*), that the *Younger* doctrine is inapplicable when the state tribunal is deemed to have prejudged the federal claim because the tribunal has a pecuniary interest in the outcome (see also *United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 699–700 (7th Cir.1982)); and maybe other types of prejudgment also make the doctrine inapplicable. The analogous requirements of exhaustion of remedies in administrative and in habeas corpus cases are satisfied when adverse precedent makes the remedies futile as a practical matter to pursue. See *Layton v. Carson*, 479 F.2d 1275, 1276–77 (5th Cir.1973) (per curiam); see also *Carter v. Estelle*, 677 F.2d 427, 446 (5th Cir.1982); *West v. Bergland*, 611 F.2d 710, 717 (8th Cir.1979).

If the Illinois courts were certain to adhere to *Bleigh* in Bernardi's suit against the contractors, the contractors would have no practical remedy in the state courts, so that their only federal remedy (if we abstained) would be to ask the United States Supreme Court to review the inevitable judgment against them in the state courts. The Supreme Court's heavy workload, which prevents it from accepting more than a tiny fraction of the requests for review that it gets, would make this route a chancy one. And we doubt that the Court would want us to add to its workload by expanding the *Younger* doctrine. But the Illinois Supreme Court might be willing to reexamine *Bleigh* in light of the U.S. Supreme Court's subsequent decisions in *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and *United Bldg. & Construction Trades Council v. Mayor & Council of Camden*, — U.S. —, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) the latter decided after argument in this case. The discussion of the privileges and immunities issue in *Bleigh* has been termed "cursory" in a decision which states that *Hicklin* "presumptively overruled" *Bleigh*. *Neshaminy Constructors, Inc. v. Krause*, 181 N.J.Super. 376, 384 n. 6, 437 A.2d 733, 737 n. 6 (Ch.1981), modified (on unrelated grounds) and affirmed, 187 N.J.Super. 174, 453 A.2d 1359 (App.Div.1982) (per curiam). And we are told that the Illinois Supreme Court has recently heard argument in a case in which it is being asked to overrule *Bleigh*.

Hicklin invalidated under the privileges and immunities clause an Alaska statute that required all employment, whether public or private, that was connected with oil and gas leases to which the state was a party to be offered first to Alaska residents. The Supreme Court's opinion is narrowly written, however, and emphasizes facts that have no exact counterparts in the present case. One such fact is that "the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities." 437 U.S. at 526–27, 98 S.Ct. at 2487–88. Another is that "a highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program." *Id.* at 527, 98 S.Ct. at 2488. And another is that "Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire [the name of the statute]." *Id.* at 529, 98 S.Ct. at 2489. See also *United Bldg. & Construction Trades Council v. Mayor & Council of Camden, supra*, — U.S. at —, 104 S.Ct. at 1028–29. As an original matter, the absence of these particular facts from the record of the present case may not save Illinois' preference law, as we shall see. But we doubt that a court committed, as all courts are, to *stare decisis*,

albeit in its flexible American form, would think that the *Hicklin* decision *required* the overruling of *Bleigh*—especially when, in a case decided after *Hicklin*, the Supreme Court cited *Bleigh* with approval, though apparently with reference only to its commerce clause holding. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n. 9, 100 S.Ct. 2271, 2277 n. 9, 65 L.Ed.2d 244 (1980).

United Bldg. & Construction Trades Council v. Mayor & Council of Camden involved a challenge under the privileges and immunities clause to an ordinance of the city of Camden, New Jersey that required that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be Camden residents. Although the Supreme Court did not invalidate the ordinance, it did hold that it "discriminates against a protected privilege," — U.S. at —, 104 S.Ct. at 1029, and could be upheld only if the city justified the discrimination by showing (in the language of an earlier case) that nonresidents "constitute a peculiar source of the evil at which the statute is aimed." *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S.Ct. 1156, 1163, 92 L.Ed. 1460 (1948), quoted at — U.S. —, 104 S.Ct. 1029-30. Since there had been no trial in *United*, the Court remanded the case to the trial court to give the city a chance to try to justify the ordinance.

It is quite possible that *United Bldg. & Construction* would induce the Supreme Court of Illinois to reexamine *Bleigh* at least to the extent of insisting that the state produce some concrete justification for the preference law. But it is not certain; the court might be willing to take judicial notice of conditions in Illinois justifying the law. Even if we could state with confidence that *United Bldg. & Construction* would induce the Illinois court to overrule *Bleigh* to the extent of requiring the state to make a greater effort at justification than was attempted in that case (or for that matter in this one), there would still be a serious question whether we should order abstention on the basis of a decision that was handed down after the proceedings in the district court were completed. One of the standard criticisms of abstention—that it delays litigation, sometimes inordinately—would gain additional force if abstention were ordered on the basis of events that first came into existence while the case was on appeal.

In any event, the three individual plaintiffs who are members of Custom Contracting Company may have no state court remedy at all for a violation of the privileges and immunities clause, because they were not named as defendants in that action. The omission would not be important if Custom Contracting or W.C.M., which were named, could represent those individuals' interests in that action. *Hicks v. Miranda*, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291, 45 L.Ed.2d 223 (1975); *Women's Community Health Center v. Texas Health Facilities Comm'n*, 685 F.2d 974, 981-82 (5th Cir.1982). But neither may have standing to challenge the preference law on privileges and immunities grounds. (Although Bernardi has not raised this point in the present action, his silence is not a commitment not to raise it in the state court action if we order abstention and that action is therefore allowed to proceed to judgment.)

[9, 10] The Supreme Court held long ago that the privileges and immunities clause of Article IV does not protect corporations, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177, 181, 19 L.Ed. 357 (1869); and this holding, though criticized, see Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 450-54 (1982), is too firmly established to be reexamined by a lower court, especially after its recent (if laconic) reaffirmance by the Supreme Court in *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 665, 101 S.Ct. 2070, 2081, 68 L.Ed.2d 514 (1981). On the basis of a dictum in *Paul* that confines "citizens" in the privileges and immunities clause to "natural persons," 75 U.S. at 177, 19 L.Ed. 357 the only court to consider whether an unincorporated association is a citizen within the meaning of the clause has held that it is not. *American Trucking Ass'ns, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir.1982). Given *Paul*—even without the dictum—this conclusion seems inescapable. An unincorporated association is not a natural person, and for most purposes not a citizen. Any legal protection it enjoys is, as with corporations, a matter of the state's grace. And in Illinois at least, that protection is much less extensive than what corporations enjoy. See Ill.Rev.Stat. 1981, ch. 30, ¶ 185; ch. 38, ¶ 2-15; ch. 120, ¶ 15-1501(a)(4).

[11] If Custom Contracting is not a citizen under the privileges and immunities clause, it might seem to follow ineluctably that its individual members who are plaintiffs in this suit could not hope for a favorable interpretation of that clause in the state court action, because any attempt by Custom Contracting to challenge the Illinois preference law on privileges and immunities grounds would be summarily rejected on the authority of *Paul* and *Larson*. This may well be the correct conclusion, but against it can be set the modern view that an association has standing to complain of injuries to its members. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958); *South East Lake View Neighbors v. HUD*, 685 F.2d 1027, 1032 (7th Cir.1982); 6 Wright & Miller, Federal Practice and Procedure § 1552, at pp. 693-94 (1971). This view fuses the legal identity of an association with that of its members, and if applicable here would allow Custom Contracting to complain in Bernardi's state court action that the preference law violates its members' rights under the privileges and immunities clause, even though the law could not violate the association's own rights under the clause, because it has none. There is Illinois authority for allowing an association to bring an equity suit on this basis, see *DeWitt Cty. Taxpayers' Ass'n v. County Bd.*, 112 Ill.App.3d 332, 334-35, 68 Ill.Dec. 61, 63, 445 N.E.2d 509, 511 (1983); equally should an association be able to defend itself against a suit on this basis.

Although this is a powerful argument, it cannot, after *Larson*, completely still our doubts that the state court action provides an adequate remedy for all of the plaintiffs in the present action. Another point is that Custom Contracting might not assert all the rights of its members in that action. All of these doubts are augmented by the vagueness of the state's references in this suit to the state court action. (At oral argument, for example, counsel for the state was unable to tell us what relief Bernardi had requested in that action.) While asking us to abstain, the state has given us no information on whether the state court action provides these plaintiffs with a usable vehicle for asserting their federal constitutional claims. As a further example, we are not told why Bernardi asked only for an injunction.

[12-14] For all of these reasons, we conclude that the equities did not require the district judge to abstain; we need not decide whether they would have permitted him to do so. So we come to the merits, and begin with the commerce clause. Although in words simply an authorization to Congress to regulate commerce among the states or with foreign nations, the commerce clause has long been interpreted to contain an implicit prohibition (the "negative" or "dormant" commerce clause), enforceable by the courts without congressional action, against a state's discriminating against or unduly burdening interstate commerce. See, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). In an age when all parts of the nation's economy are interconnected, so that a state can do hardly anything in the way of regulation or taxation without in a sense burdening interstate commerce, the application of this standard to particular cases is often problematic. But one thing is clear: a state may not erect a tariff wall protecting its industries from the competition of industries in other states and in foreign countries merely to promote the economic welfare of its own citizens. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522, 55 S.Ct. 497, 500, 79

L.Ed. 1032 (1935); see *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335–37, 97 S.Ct. 599, 609–10, 50 L.Ed.2d 514 (1977).

[15] The Illinois preference law erects a nearly prohibitive tariff—saved from being completely prohibitive only by the exception for cases where the requisite labor is not obtainable from Illinoians—against the use on any public project in Illinois of labor imported from another state or from a foreign country. The law has the same general effect on the flow into Illinois of labor services supplied by individuals unwilling to change their residence to Illinois as an Illinois tariff on imports of coal would have on the flow of coal into the state. The preference law may confer benefits on the state in reduced unemployment among Illinois residents and hence reduced employment insurance costs to employers in the state, though we shall see later that this is far from certain, and maybe not even likely. But a tariff on imported coal would confer the same benefit, since it would tend to increase the demand for coal mined in Illinois and thus increase employment in the coal mines in the state. True, if Illinois were an exporter as well as importer of coal, the tariff's only effects might be to cause Illinois mines to divert output from their export markets to the Illinois market and to cause out-of-state mines that formerly sold coal in Illinois to replace the Illinois mines in serving those out-of-state markets. But of course the same thing might happen as a result of the preference law (the record contains nothing about the law's effects): Illinois residents who now work either on private construction projects in the state or on public construction projects across the state line might replace, on Illinois public projects, nonresidents wh[illegible] turn would take the places on private and out-of-state projects of the Illinoians who had replaced them on Illinois public projects. But the fact that a state's tariff might have only a small effect on interstate trade would not save it from invalidation under the commerce clause; the cumulative effects of many states' modest tariffs could be staggering.

However, serious doubt is cast on the legal validity of our tariff analogy by a series of Supreme Court decisions, culminating in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), which distinguish between the state's role as a participant in, and as the regulator of, a market. White, the Mayor of Boston, had issued an executive order requiring that at least half the workers on every construction project financed, in whole or part, or administered, by the City of Boston be Boston residents. The Court upheld the order. "If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause." 460 U.S. at ——, *Id.* at 1046. So if in our coal hypothetical the State of Illinois subsidized the electrical generating plants in Illinois that buy coal, it could, without violating the commerce clause, forbid them to buy coal produced out of state.

At first glance the "market participant" concept may seem inappropriately to equate public agencies with private firms; for the state, in its proprietary or market-participant capacity, may be influenced by the same protectionist motives that but for the negative commerce clause might lead it to erect explicit tariff barriers to goods or labor from out of state. But a more realistic explanation of the concept emphasizes the freedom that states have under the Constitution to provide, often selectively, for the welfare of their residents. There are a thousand devices by which the State of Illinois could if it wanted subsidize the state's coal miners; many would have the same effects on both residents and nonresidents as a subsidy for purchasers of coal who limit their purchases to Illinois; yet the courts could not prevent all of them.

[16–18] In any event, if the State of Illinois had limited the preference law to construction projects financed (in whole or part) or administered by the state, it would be clear after *White* that the law did not violate the commerce clause. But the state has gone further. The preference law applies to every public construction contract in Illinois, even if the purchaser is a local school board, or for that matter the local dog catcher. Of course for many purposes, including many federal purposes such as those behind the due process and equal protection clauses of the Fourteenth Amendment, every local government unit in Illinois is a part of the state government; but maybe not for the purpose of evaluating Illinois' preference law under the commerce clause. Government in Illinois as in all states is decentralized, and local school boards such as that of Decatur which let the contract in issue in this case have substantial autonomy, including authority to levy taxes to support the schools. See Ill.Rev.Stat.1981, ch. 122, ¶¶ 17–11 to 17–13; *Quality Education for All Children, Inc. v. School Bd.*, 385 F.Supp. 803, 820 (N.D.Ill.1974). True, the order upheld in *White* embraced projects that the City of Boston financed in part as well as those that it financed 100 percent or administered. But according to the school superintendent's uncontradicted affidavit in this case, the window-replacement project is not even partially financed by the state; neither is it being administered by the state. The "market participant" is the school board, just as the market participant in *White* was the City of Boston. The state is a regulator, telling thousands of local government units that they must not give construction contracts to employers of nonresidents. It is particularly important to insist on the distinction because *White* prevents any consideration of impact on interstate commerce until the state is found to be a regulator of rather than a participant in the market.

[19] Against the validity of the distinction, however, may be cited the Supreme Court's summary affirmance of *American Yearbook Co. v. Askew*, 339 F.Supp. 719, 723–25 (M.D.Fla.) (three-judge district court), aff'd mem., 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972), which held that a state statute requiring all public printing to be done within the state did not violate the commerce clause. Although the district court did not discuss local government (the only public agencies involved in the case were state universities), it assumed that the statute would apply to a printing contract let by a school board or other local government agency, and was untroubled by this. See 339 F.Supp at 724. But summary affirmance does not commit the Supreme Court to the details of the lower court's opinion. *Zobel v. Williams*, 457 U.S. 55, 64 n. 13, 102 S.Ct. 2309, 2315 n. 13, 72 L.Ed.2d 672 (1982). And although the Supreme Court cited *Askew* with approval in a recent "market participant" case, *Reeves, Inc. v. Stake*, *supra*, 447 U.S. at 437 n. 9, 100 S.Ct. at 2277 n. 9, that case did not involve a state's attempting to impose home-state preference on a local government entity either; nor was this aspect of *Askew* even mentioned. The Court in the same footnote cited with approval two state cases upholding statutes requiring home-state preference by county as well as state agencies, *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917), and *Denver v. Bossie*, 83 Colo. 329, 334, 266 Pac. 214, 217 (1928), as well as the pages in *Bleigh* in which the Illinois preference law was held valid under the commerce clause. See also Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 Ia.L.Rev. 576 (1973). But in none of the cited cases was the difference between the state's own purchasing and that of its local governmental units discussed. It would be unrealistic to suppose that merely citing a case commits the Supreme Court to everything in the cited opinion, and impertinent to suppose

that citation is a deliberate technique for resolving—*sub rosa*—difficult and important questions not raised or argued in the case actually before the Court.

The difference between the state's preferring state residents in its own dealings and forcing local agencies to do so in theirs is both analytical and quantitative. When the project on which the state impresses a home-state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator. And since more public contracting in the states is done at the local level, by cities, school districts, park districts, counties, etc., than at the state level, extending *Reeves* and *White* to cases where the state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based.

[20, 21] Even if a law interferes with free trade, however, the state may be able to justify it on one ground or another. It can keep out diseased cattle, see *Asbell v. Kansas*, 209 U.S. 251, 28 S.Ct. 485, 52 L.Ed. 778 (1908); *Illinois v. General Elec. Co.*, 683 F.2d 206, 214 (7th Cir.1982)—so why not nonresidents who impose a cost on the state by taking jobs away from residents and thereby forcing them onto the unemployment or welfare rolls, which the state finances in part? And even if the state had no financial stake, would it not have a legitimate interest in protecting its residents from such adversity? But if preferring the welfare of residents (more precisely, of some residents—others, notably consumers, invariably suffer from import restrictions) to that of nonresidents were a good defense under the commerce clause, explicit tariffs would be permissible. *Baldwin v. G.A.F. Seelig, Inc., supra*, 294 U.S. at 522, 55 S.Ct. at 500, held that it is not a good defense. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), held that a state could not confine the use of its landfill waste dumps to its residents. Change "landfill waste dumps" to "public construction projects" and you have this case. In any event, more than assertion would be necessary to create a persuasive analogy from the quarantine cases; and as we shall see when we discuss the privileges and immunities clause, Illinois has presented no facts relating to actual or probable as opposed to purely conjectural harms from allowing nonresidents to work on public construction projects in Illinois. We conclude that the Illinois preference law violates the commerce clause.

[22, 23] We shall now consider whether it also violates the privileges and immunities clause of Article IV. Normally it would be otiose, or worse, for a court to decide a constitutional question unnecessarily; and the judgment in this case must be the same whether the preference law violates one constitutional provision or many. But it may avoid the necessity of a remand should review of our decision be sought and granted and the Supreme Court disagree with our interpretation of the commerce clause for us to rule on the district court's alternative ground for invalidating the preference law; this may also help the Supreme Court decide whether the case merits further review (technically, since the state has a right of appeal under 28 U.S.C. § 1254(2), whether it raises a substantial federal question). Cf. *Illinois v. General Electric Co., supra*, 683 F.2d at 214. Moreover, the commerce clause and the privileges and immunities clause are so closely related in a case of this kind (see *Hicklin v. Orbeck, supra*, 437 U.S. at 531–32, 98 S.Ct. at 2490–91) that it would be artificial to ignore one of them. Indeed, there is a respectable argument that the framers of the Constitution intended the privileges and immunities clause to play the role that has come to be played instead by the negative commerce clause. See Eule, *supra*, 91 Yale L.J. at 447–48. We could not be sure that the preference law does not pass constitutional muster under either clause without considering cases under both, as the Supreme Court did in *Hicklin*, 437 U.S. at 532–34, 98 S.Ct. at 2490–92.

[24] The privileges and immunities question was not addressed in *White*, the Court merely remarking that since the preference was for residents of a city rather than of the state the victims were not limited to out-of-state residents. See 460 U.S. at — n. 12, 103 S.Ct. at 1048 n. 12. We add: almost certainly the principal victims of the mayor's executive order were workers living in the Boston suburbs, which are in Massachusetts, and these workers had political remedies against the order that nonresidents of the state did not have. Nevertheless, the Supreme Court held in *United Bldg. & Construction Trades Council v. Mayor & Council of Camden, supra*, that an ordinance similar to that in *White* was prima facie unlawful under the privileges and immunities clause. We think the Illinois preference law must equally (or more, as we shall see presently) be deemed prima facie unlawful under the clause. Although *Hicklin* (the "Alaska Hire" case) is, as we noted earlier, factually distinguishable from the present case, it too suggests the prima facie invalidity of the Illinois preference law. There are no figures in the very sparse record of this case; but public construction projects in the State of Illinois, like projects related to state oil and gas leases in Alaska, must constitute in the aggregate a substantial employment opportunity that at least some nonresidents (besides the three individual Missourians who are plaintiffs in the case) are able, willing, and maybe even eager to take advantage of, since major centers of economic activity in the state, notably Chicago and East St. Louis, are adjacent to large population centers in other states. And the consequences for nonresidents must be much greater than those of the Camden ordinance at issue in the *United Bldg. & Construction* case.

[25] It is true despite the unqualified language of the privileges and immunities clause that states may keep out nonresidents if they constitute a "peculiar source of evil." *United Bldg. & Construction Trades Council v. Mayor & Council of Camden, supra*, — U.S. at —, 104 S at 1029, quoting *Toomer v. Witsell, su[pra]* 334 U.S. at 398, 68 S.Ct. at 1163. On ground a state could keep out nonreside who had been exposed to some commun ble disease of which the state was substantially free. It could even deal w "free riding" nonresidents, for example charging higher tuition to nonresidents tending the state university than to r dents. See *Martinez v. Bynum*, 461 U 321, — and n. 6, 103 S.Ct. 1838, 1 and n. 6, 75 L.Ed.2d 879 (1983), and ca cited there. In both of these examples justification for the state's discriminat against nonresidents is obvious. But benefits of Illinois' home-preference l enacted in 1939 and not amended sin cannot be assumed. Otherwise both t "Alaska Hire" law and the Camden r dents-preference ordinance would ha been upheld.

[26–28] True, the intimation in *Hickli[n]* 437 U.S. at 526, 98 S.Ct. at 2487, based strong language in *Ward v. Maryland*, U.S. (12 Wall.) 418, 430, 20 L.Ed. 4 (1871), that unemployment may never be valid ground for discriminating again nonresidents can no longer be considere authoritative. The Court in *United Bld & Construction* not only allowed the Ci of Camden to attempt to justify the di crimination but quoted from *Toomer* th statement that "the states should have con siderable leeway in analyzing local evi and in prescribing appropriate cures." 33 U.S. at 396, 68 S.Ct. at 1162, quoted at — U.S. —, 104 S.Ct. 1029. Still, *Hickli[n]* and *United Bldg. & Construction* mak clear that there must be *some* evidence o the benefits of a residents-preference la in dealing with a problem created by non residents, and Illinois has presented non We do not just mean that it has failed t put in "evidence" in the technical lega sense, though it has failed; such evidenc is not essential when the issue is not th application but the validity of a statute Illinois has presented no information—sta tistical or otherwise, evidentiary or subject

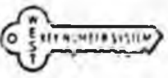
...... at trial or on appeal—concerning the benefits of the preference law. We are not told the unemployment rate in Illinois' construction industry, what such unemployment costs the state, whether it would be significantly increased by throwing open public construction projects to nonresidents (which might just cause a reshuffling of jobs between public and private projects), and whether the costs—if any—to Illinois of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, are likely to exceed any cost savings in public construction from hiring nonresident workers.

Our insistence on data may seem niggling, and would be if the effects of allowing nonresidents to work on public construction projects were as clear as those of allowing carriers of Bubonic plague to enter the state without quarantine or nonresident students to attend the University of Illinois free of charge. But they are not as clear. The preference law might have no effect on the unemployment rate in Illinois. Worse, it could boomerang, and actually increase unemployment in the construction industry. Suppose for example that a public construction project would cost $1 million if it employed both Illinois residents and nonresidents and $1.2 million if it employed only Illinois residents. If the higher price were more than the school district or other public agency was willing to pay, the project would not be authorized and the Illinois residents who would have worked on it would have to seek work elsewhere.

[29] Although the burden of proving that a state statute violates the privileges and immunities clause is on the plaintiff, once he shows that the statute discriminates explicitly against nonresidents in the pursuit of common callings," *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 387, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978), the state has the burden of justifying the discrimination, see *id.* at 402, 98 S.Ct. 1870 (dissenting opinion); *United Bldg. & Construction Trades Council v. Mayor & Council of Camden*, *supra*, — U.S. —, 104 S.Ct. 1029; *Hicklin v. Orbeck*, *supra*, 437 U.S. at 526-27, 98 S.Ct. at 2487-88. Tribe, American Constitutional Law 411 (1978), or, at the very least, of producing some evidence in justification of it (the burden of persuasion may remain on the plaintiff). After *Hicklin*, and the recent spate of state court cases invalidating, on the authority of *Hicklin*, preference laws much like Illinois', see *Laborers Local Union No. 374 v. Felton Construction Co.*, 98 Wash.2d 121, 654 P.2d 67 (1982); *Neshaminy Constructors, Inc. v. Krause*, *supra*, and *Salla v. County of Monroe*, 48 N.Y.2d 514, 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979), Illinois must have known that it could not justify the exclusion of nonresidents from employment on all public construction projects without making a better showing of justification than the State of Alaska had been able to make for the "Alaska Hire" law. In fact Alaska made a manful effort at justification, though it fell short. Illinois has made none in this proceeding, though the director of its own Labor Department, who had access to the data that might illuminate the costs and benefits of the law, was the defendant.

The remand in *United Bldg. & Construction* does not warrant a similar remand here. The City of Camden had had no opportunity to make a case for justifying the ordinance. The ordinance had been submitted for approval to a New Jersey affirmative action officer, and after "brief administrative proceedings" had been designated as a state-approved affirmative action construction program. An association of labor organizations filed a notice of appeal to a New Jersey appellate court which in turn certified the question of the ordinance's legality to the New Jersey Supreme Court. — U.S. —, 104 S.Ct. at 1023-24. In the present case the state had a full opportunity in the preliminary-injunction proceeding in the district court to put into evidence (or ask the court to take judicial notice of) facts justifying the preference law. It did nothing.

The judgment of the district court is AFFIRMED.



Raymond W. WEBER,
Petitioner-Appellant,

v.

Thomas ISRAEL, Respondent-Appellee.

No. 82-2470.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 8, 1983.

Decided March 22, 1984.

As Amended March 23, 1984.

Petition for writ of habeas corpus was brought by state prisoner. The United States District Court for the Eastern District of Wisconsin, Myron L. Gordon, J., denied relief, 537 F.Supp. 1182, and prisoner appealed. The Court of Appeals, Coffey, Circuit Judge, held that prisoner waived right to relief on claim that he was deprived of jury trial on his insanity plea by his failure to raise objection in the state trial court.

Affirmed.

1. Habeas Corpus ⇔25.1(1)

Doctrine of waiver, in context of federal habeas corpus action, provides that if state withholds right of appellate review of issues not raised at trial, federal courts will not undermine state's interest in orderly procedure by allowing defendant to litigate issue in federal habeas proceeding.

2. Habeas Corpus ⇔25.1(1)

When procedural default bars state litigation of constitutional claim, state prisoner may not obtain federal habeas relief absent showing of cause and actual prejudice.

3. Habeas Corpus ⇔25.1(4)

Doctrine of waiver barred state prisoner from obtaining federal habeas corpus relief from state conviction on ground that he had not been provided with jury trial on insanity plea where that claim had not been presented to the state trial court and where prisoner failed to show cause for or actual prejudice from his failure to raise issue at state trial court level.

4. Habeas Corpus ⇔113(12)

When Court of Appeals reviews district court's findings of fact in habeas corpus action, it may set aside such findings only if they are clearly erroneous and, unless it is left with definite and firm conviction that mistake has been committed, it must accept trial court's findings.

5. Habeas Corpus ⇔113(12)

In state prisoner's habeas corpus proceeding, district court's finding that prisoner was not entitled to relief on his claim that he had been denied jury trial on insanity plea because he had withdrawn the plea before trial commenced was supported by evidence that his attorney had informed the state trial judge that the defense would not be pursued even though the withdrawal was not made part of the trial court record.

6. Attorney and Client ⇔88

Defense counsel's withdrawal of insanity plea was not ineffective despite defendant's contention that it was not intelligently and voluntarily agreed to by him where defendant was present in the courtroom when the plea was withdrawn and gave no indication that he disagreed with withdrawal of the plea or later allege that defense counsel was ineffective in withdrawing the plea.

Allen E. Shoenberger, Prof., Loyola University, Pamela Menaker, law student, Chicago, Ill., for petitioner-appellant.

Pamela Magee-Heilprin, Asst. Atty. Gen., Wis. Dept. of Justice, Madison, Wis., for respondent-appellee.

to judicial notice, at trial or on appeal—concerning the benefits of the preference law. We are not told the unemployment rate in Illinois' construction industry, what such unemployment costs the state, whether it would be significantly increased by throwing open public construction projects to nonresidents (which might just cause a reshuffling of jobs between public and private projects), and whether the costs—if any—to Illinois of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, are likely to exceed any cost savings in public construction from hiring nonresident workers.

Our insistence on data may seem niggling, and would be if the effects of allowing nonresidents to work on public construction projects were as clear as those of allowing carriers of Bubonic plague to enter the state without quarantine or nonresident students to attend the University of Illinois free of charge. But they are not as clear. The preference law might have no effect on the unemployment rate in Illinois. Worse, it could boomerang, and actually increase unemployment in the construction industry. Suppose for example that a public construction project would cost $1 million if it employed both Illinois residents and nonresidents and $1.2 million if it employed only Illinois residents. If the higher price were more than the school district or other public agency was willing to pay, the project would not be authorized and the Illinois residents who would have worked on it would have to seek work elsewhere.

[29] Although the burden of proving that a state statute violates the privileges and immunities clause is on the plaintiff, once he shows that the statute discriminates explicitly against nonresidents in the pursuit of common callings," *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 387, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978), the state has the burden of justifying the discrimination, see *id.* at 402, 98 S.Ct. 1870 (dissenting opinion); *United Bldg. & Construction Trades Council v. Mayor & Council of Camden, supra,* — U.S. —, 104 S.Ct. 1029; *Hicklin v. Orbeck, supra,* 437 U.S. at 526–27, 98 S.Ct. at 2487–88. Tribe, American Constitutional Law 411 (1978), or, at the very least, of producing some evidence in justification of it (the burden of persuasion may remain on the plaintiff). After *Hicklin,* and the recent spate of state court cases invalidating, on the authority of *Hicklin,* preference laws much like Illinois', see *Laborers Local Union No. 374 v. Felton Construction Co.,* 98 Wash.2d 121, 654 P.2d 67 (1982); *Neshaminy Constructors, Inc. v. Krause, supra,* and *Salla v. County of Monroe,* 48 N.Y.2d 514, 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979), Illinois must have known that it could not justify the exclusion of nonresidents from employment on all public construction projects without making a better showing of justification than the State of Alaska had been able to make for the "Alaska Hire" law. In fact Alaska made a manful effort at justification, though it fell short. Illinois has made none in this proceeding, though the director of its own Labor Department, who had access to the data that might illuminate the costs and benefits of the law, was the defendant.

The remand in *United Bldg. & Construction* does not warrant a similar remand here. The City of Camden had had no opportunity to make a case for justifying the ordinance. The ordinance had been submitted for approval to a New Jersey affirmative action officer, and after "brief administrative proceedings" had been designated as a state-approved affirmative action construction program. An association of labor organizations filed a notice of appeal to a New Jersey appellate court which in turn certified the question of the ordinance's legality to the New Jersey Supreme Court. — U.S. —, 104 S.Ct. at 1023–24. In the present case the state had a full opportunity in the preliminary-injunction proceeding in the district court to put into evidence (or ask the court to take judicial notice of) facts justifying the preference law. It did nothing.

The judgment of the district court is AFFIRMED.

Raymond W. WEBER,
Petitioner-Appellant,

v.

Thomas ISRAEL, Respondent-Appellee.

No. 82-2470.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 8, 1983.

Decided March 22, 1984.

As Amended March 23, 1984.

Petition for writ of habeas corpus was brought by state prisoner. The United States District Court for the Eastern District of Wisconsin, Myron L. Gordon, J., denied relief, 537 F.Supp. 1182, and prisoner appealed. The Court of Appeals, Coffey, Circuit Judge, held that prisoner waived right to relief on claim that he was deprived of jury trial on his insanity plea by his failure to raise objection in the state trial court.

Affirmed.

1. Habeas Corpus ⟹25.1(1)

Doctrine of waiver, in context of federal habeas corpus action, provides that if state withholds right of appellate review of issues not raised at trial, federal courts will not undermine state's interest in orderly procedure by allowing defendant to litigate issue in federal habeas proceeding.

2. Habeas Corpus ⟹25.1(1)

When procedural default bars state litigation of constitutional claim, state prisoner may not obtain federal habeas relief absent showing of cause and actual prejudice.

3. Habeas Corpus ⟹25.1(4)

Doctrine of waiver barred state prisoner from obtaining federal habeas corpus relief from state conviction on ground that he had not been provided with jury trial on insanity plea where that claim had not been presented to the state trial court and where prisoner failed to show cause for or actual prejudice from his failure to raise issue at state trial court level.

4. Habeas Corpus ⟹113(12)

When Court of Appeals reviews district court's findings of fact in habeas corpus action, it may set aside such findings only if they are clearly erroneous and, unless it is left with definite and firm conviction that mistake has been committed, it must accept trial court's findings.

5. Habeas Corpus ⟹113(12)

In state prisoner's habeas corpus proceeding, district court's finding that prisoner was not entitled to relief on his claim that he had been denied jury trial on insanity plea because he had withdrawn the plea before trial commenced was supported by evidence that his attorney had informed the state trial judge that the defense would not be pursued even though the withdrawal was not made part of the trial court record.

6. Attorney and Client ⟹88

Defense counsel's withdrawal of insanity plea was not ineffective despite defendant's contention that it was not intelligently and voluntarily agreed to by him where defendant was present in the courtroom when the plea was withdrawn and gave no indication that he disagreed with withdrawal of the plea or later allege that defense counsel was ineffective in withdrawing the plea.

Allen E. Shoenberger, Prof., Loyola University, Pamela Meaaker, law student, Chicago, Ill., for petitioner-appellant.

Pamela Magee-Heilprin, Asst. Atty. Gen., Wis. Dept. of Justice, Madison, Wis., for respondent-appellee.

Bill No. House Bill 266

Date March 12, 1985

Title "An Act relating to employment preference for state residents; and providing for an effective date."

Contact: Robert W. Landau
465-2700
Robert Bacolas
465-4670

Since 1982, one of the Department's highest priorities has been the enforcement of preferential hiring of Alaska residents on state-funded public works projects, pursuant to AS 36.10.010. In late 1983, however, the state's resident hire law was challenged on constitutional grounds and resulted in a Superior Court decision that the law was unconstitutional. That decision is now on appeal to the Alaska Supreme Court.

One of the Superior Court's key findings was that there was insufficient evidence to show that the in-migration of non-residents was displacing qualified and available Alaska residents from public works employment. By explicitly setting forth the legislative findings underlying the resident hire law, House Bill 266 would provide a more solid foundation from which to defend the principle of Alaska hire.

The Department of Labor supports this proposed legislation. It will not have a fiscal impact on the Department.

APPROVED:

Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 266
Title: "An Act relating to employment preference for state residents"
Sponsor: Davis, Koponen et al.
Requestor: House Labor & Commerce
Date of Request: 3-12-85

FISCAL DETAIL
Agency Affected: Labor
Program Category Affected: Public Protection
BRU, Program or Subprogram(s) Affected:
Labor Standards & Safety
Wage & Hour Administration

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Robert J. Bacolas
Phone: 465-4870
Division: Labor Standards & Safety
Date: 3-12-85

Approved by Commissioner: Jim Robison
Date: 3-12-85
Agency: Labor

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Fairbanks Daily News Miner pg3
2/9/85

Union chief raps oil-job hiring

By JOHN CREED
Staff Writer

The oil companies are hurting the Alaska economy by contracting with non-union companies that hire out-of-state workers on the North Slope, a union leader alleged here Friday.

Jim Carroll, president of the Construction and Joint Crafts Council which represents numerous local unions, spoke Friday afternoon at a meeting of the Farthest North Press Club.

"It appears the North Slope is going non-union," Carroll said, citing Veco, Inc., as an example.

Carroll said state and local governments are "doing nothing" about the number of out-of-state workers on the North Slope. He acknowledged that because oil company records are so inaccessible, "it's hard to know how many people are being brought in from Outside."

"The economy of Fairbanks could benefit greatly if some of the money that flies by us would stay here," he said.

He admitted that change would be difficult to bring about.

"You're looking at jobs that last five or seven or 12 weeks," Carroll said. "Then they're through and they're gone. We need more people to enforce the laws on the books."

He said many workers dishonestly claim their home as Alaska.

"If you're local hire, Alaska is supposed to be your primary home," Carroll said, adding that workers shouldn't be classified as local hire "if you have your family Outside."

"But it takes a lot of checking into," he said.

Carroll said some workers "maintain" phony Alaska addresses, such as simple post office boxes or "suites" in Anchorage that are nothing more than false addresses. "They work here once and establish an Alaska address," he said.

"That's money not coming into the state economy," Carroll said, adding that the Department of Justice should go onto the job site on the North Slope "and pull the payroll" to determine the percentage of Alaska workers on the job.

"We want to let the public know we're trying to help them and not hinder them in any way," he said, adding that unions contribute to many local charitable and volunteer organizations.

Local business "should support us," Carroll said, because by hiring through local union halls, "workers' wages are put back into the Fairbanks community rather than put on an airplane and flown to the Lower 48."

"I say we can do the work better and faster," he said, estimating that union work is up to 50 percent better quality than non-union work.

Carroll predicted that this construction season "will be good" at the local military bases, although residential housing will be slow.

"It's pretty well maxed out," he said.

Minority hiring quotas on way out, Reagai

by Aaron Epstein
Knight-Ridder Newspapers

Washington — The Reagan administration's chief enforcer of civil rights' laws said Friday that court-ordered job preferences for racial minorities and women are on their way out — and that even "voluntary" hiring and promotion quotas in private employment may not stand up in court.

William Bradford Reynolds issued a warning to "corporate America" that neither civil rights law nor Supreme Court rulings permit voluntary affirmative action programs that require employers to hire or promote minorities and women in order to meet specified quotas or goals.

Such programs, often contained in collective bargaining agreements, affect tens of thousands of jobs throughout the nation.

But Reynolds, extending his crusade against job preferences based on race or sex, said that, in general, "the voluntary use of skin color to confer on, or deny to, employees or potential employees available job opportunities would needlessly trammel the interests of those more qualified (whites) who are turned away on account of race."

That "colorblind" principle applies to both private and public employment, Reynolds said. The only exceptions would occur when there is "a well demonstrated need" for racial preferences "to cure past discriminatory conduct," added Reynolds, who heads the Justice Department's civil rights division.

The Supreme Court ruled in the 1979 case of United Steelworkers v. Weber that employers and unions may design race-conscious programs to eliminate racial imbalances in traditionally segregated job categories.

But Reynolds, in a prepared text of a speech delivered to a Florida Bar group in Miami, gave a narrow interpretation to the Weber decision. He said it allowed voluntary preferential treatment only in training and recruitment programs in private employment, not in hiring, promotions or layoffs, or in any aspect of public employment.

Reynolds predicted that the Supreme Court would invalidate voluntary, preferential job plans in government employment.

As for court-ordered quotas, goals, timetables and similar remedies for discrim based on race or sex, Re predicted that it won't b before "we will be able (them) behind us for good.

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As for court-ordered quotas, goals, timetables and similar remedies for discrimination based on race or sex, Reynolds predicted that it won't be long before "we will be able to put (them) behind us for good."

John Wilson, a spokesman for the Justice Department, said Reynolds has examined 75 cases of court-ordered affirmative action.

Reynolds concluded that 46 of them ran afoul of the Supreme Court's ruling in a Memphis case last June that high-seniority white firefighters could not be laid off in order to protect low-seniority blacks.

Contending that the Memphis decision spelled the end of quotas, Reynolds wrote letters urging that the 46 plans be stripped of their racial preferences, Wilson said. He said Reynolds declines to identify the plans.

However, civil rights organizations and several federal judges do not read the Memphis ruling as sweepingly as Reynolds and the Reagan administration. Some courts have declined to apply it to situations that differ from the facts of the Memphis case.

mary / [illegible]

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ATTORNEY FOR
U/A LOCAL 375
PLUMBERS & PIPEFITTERS
AND ITS MEMBERS

February 13, 1985

To: Each Memb r of the Alaska Legislature

Lenny Arsenault found, through a national magazine, that the State of Wyoming was able to make a resident hire law stick. I had the Wyoming Supreme Court air mail me a copy of the opinion. Lenny is at a national meeting and wanted me to forward it to each of you as quickly as possible.

For use in drafting potential Alaska legislation, I note that the interest which a resident of Wyoming has in a Wyoming public funds contract can be equated to the same thing in Alaska and probably we can add the interest which Alaska residents have in any facilities producing royalty petroleum or royalty gas which belongs to the State; especially since the majority of the State's income comes from such production and it directly influences all matters of expenditure in the State.

The findings of fact or "whereas clauses" should be carefully drafted.

Good luck with this.

Sincerely,

ARTHUR LYLE ROBSON, Attorney for
U.A. Local 375 and Its Members

ALR:CLM

Enclosure: State of Wyoming Opinion

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1984

January 10, 1985

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 84-35
	)	
ROGER ANTONICH,	)	
	)	
Defendant.	)	

Bill of exceptions from the County Court of Converse County, the Honorable John Allan Holtz, Judge.

A. G. McClintock, Attorney General, Gerald A. Stack, Deputy Attorney General, John W. Renneisen, Senior Assistant Attorney General, and Michael A. Blonigen, Assistant Attorney General, for plaintiff.

Daniel E. White, Cheyenne, for defendant.

Before *THOMAS, C.J., and ROSE, **ROONEY, BROWN, and CARDINE, JJ.

ROSE, J., delivered the opinion of the Court; THOMAS, C.J., filed a specially concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in Pacific Reporter Second. Readers are requested to notify the Clerk of the Supreme Court, Supreme Court Building, Cheyenne, Wyoming 82001 of any typographical or other formal errors, in order that corrections may be made before final publication in the permanent volume.

*Became Chief Justice January 1, 1985.
**Chief Justice at time of oral argument.

ROSE, Justice.

We granted the State of Wyoming's application to file a bill of exceptions in order to address a single issue:

> "Does the Wyoming Preference for State Laborers Act, Section 16-6-201, et seq., W.S. 1977, violate the privileges and immunities clause of the United States Constitution?"

We will hold that the challenged Act is narrowly tailored to fit a particular problem identified by the State and, therefore, does not impermissibly infringe the privileges and immunities of the citizens of states other than Wyoming.1/ Accordingly, we sustain the bill of exceptions filed by the State.

WYOMING PREFERENCE ACT OF 1971

In 1971, the legislature adopted the "Wyoming Preference Act," §§ 16-6-201 through 16-6-206, W.S.1977, which requires contractors to employ available qualified Wyoming laborers for public-works projects in preference to nonresident laborers. Section 16-6-203, W.S.1977, contains the key provision of the Act:

> "Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The state employment office nearest the proposed contract or construction site shall maintain a list of laborers, classified by skills, who are residents and are available for employment. When the nearest state employment office is unable to provide the requested number of laborers from its own list, it shall immediately contact other state em-

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1/ The United States Constitution, Art. IV, § 2, provides:

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

> ployment offices and request the names of other available laborers. Every person required to employ Wyoming laborers shall inform the nearest state employment office of his employment needs. If the state employment office certifies that the person's need for laborers cannot be filled from those listed as of the date the information is filed, then the person may employ other than Wyoming laborers."

On September 22, 1983, the Converse County prosecuting attorney charged Roger Antonich, general superintendent of Westates Construction Company, with violating § 16-6-203, supra. The information alleged that Antonich fired a Wyoming worker from a public-school construction project in order to hire out-of-state workers. The county court judge dismissed the charge on the ground that § 16-6-203, supra, violates the privileges and immunities clause of the federal constitution. The court relied on Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and recent cases from other jurisdictions in which the courts have invalidated statutory preferences for local workers. After examining these and similar opinions, we conclude that certain distinguishing features in Wyoming's Preference Act sufficiently limit its scope so as to satisfy the demands of the privileges-and-immunities clause.

PRIVILEGES-AND-IMMUNITIES CLAUSE ANALYSIS

An examination of a state enactment to determine its validity under the privileges-and-immunities clause involves a two-step analysis. First, the reviewing court must determine whether the statute burdens a fundamental right or activity, since only those "privileges" and "immunities" which bear upon the concept of interstate harmony fall within the scope and purpose of the clause. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, ___ U.S. ___, ___ S.Ct. ___, 79 L.Ed.2d 249, 258-259 (1984); Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 383-388, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); Toomer v. Witsell, 334 U.S. 385, 395-396, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). Second, the court must examine the reasons for the discriminatory treatment to determine their validity and their relation to the degree of discrimination imposed by the statute. This portion of the test was developed by the United States Supreme Court in Toomer v. Witsell, supra:

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of

> other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the 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 consideration leeway in analyzing local evils and in prescribing appropriate cures." (Emphasis added.) 334 U.S. at 396.

The Toomer court established that classifications based on noncitizenship cannot stand

> "* * * unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

The State concedes that the discrimination against nonresidents under the Wyoming Preference Act burdens a fundamental right. In an early case, the United States Supreme Court held that the privileges-and-immunities clause protects the right of a citizen of one state to travel to another state for purposes of employment. Ward v. Maryland, 12 Wall 418, 430 (1870). The Supreme Court reaffirmed this principle in Hicklin v. Orbeck, supra, 437 U.S. at 525. Even more pertinent to the instant case, the Supreme Court recently held that an enactment preferring local workers for public construction projects burdens a fundamental right and, therefore, falls within the purview of the privileges-and-immunities clause. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra, 79 L.Ed.2d at 258-261. Clearly, Wyoming's Preference Act offends the privileges-and-immunities clause unless a close link exists between valid reasons for the Act and the discrimination practiced.

The State, in its brief, identifies the purpose of the Act as the reduction in unemployment among the labor force which makes possible government projects through contributions to the public treasury. Stated conversely, the evil which the Wyoming Preference Act combats is

> "* * * a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project." (State's brief.)

Thus, the Wyoming Preference Act attempts to insure that government-created jobs benefit the State's citizens.

Without question, reduction in unemployment among Wyoming citizens constitutes a valid state goal. See United Building and

Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra; Hicklin v. Orbeck, supra. We turn, therefore, to an examination of the relationship between this legitimate reason underlying the Wyoming Preference Act and the discrimination mandated against nonresidents.

Enactments to alleviate high unemployment levels through the hiring of residents in preference to nonresidents generally have swept too broadly to survive challenges brought under the privileges-and-immunities clause. The prime example of such legislation is the "Alaska Hire" Act at issue in Hicklin v. Orbeck, supra. That Act required the employment of qualified Alaska residents in preference to nonresidents for positions associated with

> "* * * all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party * * *." 437 U.S. at 520, n.2.

The United States Supreme Court cited three bases for holding that the discrimination imposed by this statute failed to bear a close relation to the problem of high unemployment in Alaska. First, the state had made no showing that nonresidents were a peculiar source of widespread unemployment. Rather than the influx of nonresidents looking for work, the major cause of unemployment appeared to be the inadequate education and training and the geographical remoteness of many jobless residents--particularly the Eskimo and Indian residents. 437 U.S. at 526-527. Secondly, the Court determined that Alaska Hire did not narrowly address the problem of unemployment, since the Act simply preferred all residents, regardless of their employment status, education or training. 437 U.S. at 527. Finally, the Supreme Court observed that the discriminatory effect of Alaska Hire extended well beyond those activities in which the state held a substantial proprietary interest:

> "* * * In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates." 437 U.S. at 531.

A number of state courts have adopted the foregoing rationale in invalidating enactments which grant an employment preference to local workers. Laborers Local Union No. 374 v. Felton Construc-

tion Company, 98 Wash.2d 121, 654 P.2d 67 (1982); Massachusetts Council of Construction Employers, Incorporated v. Mayor of Boston, 384 Mass. 466, 425 N.E.2d 346 (1981), rev'd under the commerce clause, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); Salla v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909, 423 So.2d 878, cert. denied 446 U.S. 909 (1979). We find, however, that Wyoming's Preference Act, unlike the enactments at issue in these cases and Alaska Hire, precisely fits the particular evil identified by the State.

As noted above, the act seeks to prevent a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project. The statute makes no attempt to eradicate the general unemployment in this state which may be due to factors unrelated to nonresidents. Accordingly, the Act directs its discriminatory treatment toward the nonresident applicants for jobs on public-works projects--those individuals who constitute the peculiar source of the evil identified by the State.

Secondly, the Wyoming Preference Act specifically addresses the problem of unemployment among Wyoming construction workers. Section 16-6-203, supra, requires contractors to contact the local employment office to determine whether qualified resident workers are available. If the number of qualified residents listed with state employment offices is insufficient to meet employment needs, contractors are free to hire nonresident workers. An employer need not attempt to hire residents away from other jobs or to dismiss nonresidents and hire residents as they become available. Under the Act, an employer must deny nonresidents employment only when the state employment office provides a sufficient number of residents who are qualified and available to go to work.

Finally, we attach significance to the fact that the Wyoming Preference Act confines its discriminatory effects to projects constructed from public funds. The government's proprietary interest in the subject matter of the discriminatory statute constitutes a crucial factor in support of the statute's validity:

> "* * * The fact that [the city] is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor--perhaps the crucial factor--to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the [city] ordinance completely from the purview of the Clause." United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra, 79 L.Ed.2d at 260.

The Court elaborated in that case:

> "Every inquiry under the Privileges and Immunities Clause 'must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' Toomer v. Witsell, 334 U.S. 385, 396, 92 L.Ed. 1460, 68 S.Ct. 1156 (1948). This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls." 79 L.Ed.2d at 261.

The Wyoming statute at issue in the present case requires merely that governmental funds, allocated to public-works projects, be used to hire qualified, available residents in preference to nonresidents. The statute does not effect the sort of wide-ranging discriminatory treatment fatal to Alaska Hire in Hicklin v. Orbeck, supra. Since the Wyoming Preference Act limits its discriminatory effect to government-created jobs, it presents minimal affront to the privileges and immunities of noncitizens. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra.

We hold that the Wyoming Preference Act does not violate the privileges-and-immunities clause of the federal constitution, notwithstanding the Act's infringement upon a recognized fundamental right. The Act narrowly addresses the goal of reduced unemployment among the state's taxpayers by preferring available, qualified residents for government-funded positions. Since the degree of discrimination bears a close relation to the state's valid reasons for discriminatory treatment, we affirm the Act's validity under the test established in Toomer v. Witsell, supra, and refined in subsequent cases.

Although not determinative of our decision here, we recently held in Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, Wyo., 641 P.2d 745 (1982), that Wyoming's preference for resident bidders on public-works contracts, § 9-8-302, W.S.1977, does not violate the equal-protection provisions of the state and federal constitutions. Our result in the instant case, upholding Wyoming's preference for resident workers on public-works projects, harmonizes with our decision in Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, supra.

The bill of exceptions is sustained.

THOMAS, Chief Justice, specially concurring.

I am in complete accord with the result reached by the majority in this case, but I have a concern about the adequacy of the record to support the nexus between the evil of "a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project" and the statute in question. I agree that that is a possibility, but the record does not demonstrate it. The statutory language simply makes the state employment offices a repository of information, and does not limit the "list of laborers, classified by skills, who are residents" to the unemployed. It simply requires that they be "available for employment."

I am satisfied that on the basis of existing precedent the role of the State in connection with "constructing, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation or other governmental unit" is that of a market participant pursuing essentially a proprietary function. It is inappropriate to invoke the Privileges and Immunities Clause to inhibit the State in that regard. Both Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, _____ U.S. _____, S.Ct. ___, 79 L.Ed.2d 249 (1984), recognize that while the proprietary interest of the State in the property with which the statute deals is often a crucial factor in determining whether a discriminatory statute against non-citizens violates the Privileges and Immunities Clause. I perceive that, without articulating such a concept, the Supreme Court of the United States has preserved a delicate balance between the Reservation of Powers Clause found in Amendment X to the Constitution of the United States of America and the Privileges and Immunities Clause. The line that is drawn is that between the governmental function of the State and the right of the State to participate in the marketplace, satisfy its proprietary functions, and contract freely with those with whom it chooses to contract.

In Hicklin v. Orbeck, supra, at 437 U.S. 531, the Supreme Court recognized what it described as a mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause, which it said stems from their origin in the Fourth Article of the Articles of Confederation. In Reeves, Inc. v. Stake, 447 U.S. 429, 65 L.Ed.2d 244, 100 S.Ct. 2271 (1980), the Court said:

> " * * * The State's refusal to sell to buyers other than South Dakotans is 'protectionist'

> only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. * * * Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government--to serve the citizens of the State."

Conceding that the Court there was dealing with the application of the Commerce Clause, because of the mutually reinforcing relationship between the two clauses, I find that concept applicable in this instance with respect to the Privileges and Immunities Clause.

It cannot be held objectionable for a sovereign state to adopt legislation which provides in essence that to the extent possible public works contracts benefit the citizens of the state whose contributions to the public treasury fund those projects. A state should not be foreclosed by the invocation of the Constitution of the United States of America from loyalty to interests of its own citizens. So long as a statute is narrowly drawn to protect only the right of the state to contract as it sees fit with respect to expenditures for public works projects which it owns and which it funds, I am satisfied that as a matter of law such a statute does not offend the Privileges and Immunities Clause found in Art. IV, § 2 of the Constitution of the United States of America. This, of course, makes it unnecessary for the court to pursue the remand technique invoked in United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra.

I would agree that the bill of exceptions should be sustained for the foregoing reasons.

Introduced: 2/26/85
Referred: Labor & Commerce
and Judiciary

BY V.FISCHER, RODEY,
FAHRENKAMP, JOSEPHSON
AND ZHAROFF

1 IN THE SENATE

2 SENATE BILL NO. 191

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to employment preference for state
7 residents; and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 36.10 is amended by adding a new section to read:

10 Sec. 36.10.005. LEGISLATIVE FINDINGS. (a) The legislature
11 finds that

12 (1) the rate of unemployment among residents of the state
13 is one of the highest in the nation;

14 (2) the state has a compelling interest in reducing the
15 level of unemployment among its residents;

16 (3) the construction industry in the state accounts for
17 approximately 10 percent of the available employment;

18 (4) construction workers receive approximately 30 percent
19 of all unemployment benefits paid by the state;

20 (5) historically, the rate of unemployment in the construc-
21 tion industry in the state is higher than the rate of unemployment in
22 other industries in the state;

23 (6) it is appropriate for the state to consider the welfare
24 of its residents when it funds construction activity;

25 (7) it is in the public interest for the state to allocate
26 public funds for capital projects in order to reduce unemployment
27 among its resident construction workers;

28 (8) in-migration of nonresident construction workers con-
29 tributes to or causes the high unemployment rate among resident

1 construction workers because nonresident workers compete with residents for the limited number of available construction jobs; and

3 (9) the state has a special interest in seeing that the benefits of state construction spending accrue to its residents.

5 (b) The legislature further finds that there is a legitimate and compelling governmental interest and that the public health and welfare will suffer if state residents are not afforded employment preference in state-funded construction-related work.

9 * Sec. 2. This Act takes effect immediately in accordance with AS 01.-
10 10.070(c).

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ATTORNEY FOR
U/A LOCAL 375
PLUMBERS & PIPEFITTERS
AND ITS MEMBERS

March 6, 1985

Senator Vic Fischer
Pouch V
Juneau, Alaska 99811

Steve Kadish
Aid to Senator Vic Fischer
1024 West 6th Street
Anchorage, Alaska 99501

Dear Vic and Steve:

In looking at SB 191, I think that we can proceed from the findings that exist already and start making additional findings from (10) onward relating to oil.

Before I get into the specific findings, I note from Department of Labor statistics that we do have the highest rate of unemployment currently, that our unemployment rate is higher than any nearby states, that our wages are higher because of a higher cost of living which attracts unemployed from other states, that those persons coming into Alaska often become a burden on the public welfare because of being unprepared to meet the higher cost of living in Alaska, etc., etc.

I would suggest the following:

(10) That the State of Alaska owns certain royalty oil located in oil reservoirs within the jurisdiction of the State of Alaska;

(11) That this royalty oil is removed from the earth by private corporations;

(12) That the revenue obtained from this royalty oil is a primary source of income for the State of Alaska;

(13) That the production, transporting, and sale of this oil results in a majority of the revenue annually received by the State of Alaska;

(14) That the budget of the State of Alaska at this time absolutely requires the funds obtained from oil owned by the State of Alaska and produced as either

royalty oil or oil for the benefit of the private corporations producing oil; and

(15) That without the revenue to the State produced by the oil (or oil and gas) production, transportation, and sale, the State of Alaska would be unable to construct public works projects, pay welfare benefits, or otherwise address the primary and secondary consequences of poverty and unemployment in the State of Alaska.

Maybe a lot of that is garbage, but I think it provides a basic approach for folding the petroleum industry in. As I mentioned before, as long as we hold ourselves to regulating the petroleum industry insofar as it is producing royalty oil, we should be okay.

I enclose a copy of my compilation of statistics for Tom Snapp which may provide considerable ammunition for this battle.

If I can do anything more, please let me know. Labor in Fairbanks and we here at Local 375 are tremendously impressed by SB 191 and the effort generally being made to protect our North Slope employment.

Sincerely,

ARTHUR LYLE ROBSON, Attorney for
U.A. Local 375 and Its Members

ALR:CLM

Enclosure

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ATTORNEYS FOR
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PLUMBERS & PIPEFITTERS
AND ITS MEMBERS

February 13, 1985

Tom Snapp
All Alaska Weekly
419 2nd Avenue
Fairbanks, Alaska 99701

Dear Tom:

The following are my thoughts and summaries with respect to economic matters. These should supplement your article of last week and possibly even get a reaction from the legislature.

1. I attach a proof copy air mailed from the Supreme Court of Wyoming of a case in which they found the Wyoming Preference Act of 1971 constitutional. I have underlined in red the sections crucial to understanding the opinion, as well as its references to the Hickland v. Orbeck case, and how they feel they qualify under those tests. This should give the legislature their first chance at an approach which has stood the court test and which could be used again, particularly if we substitute for the provision covering state public works contracts which are paid for by Wyoming residents, a provision which covers not only state contracts, but contracts covering the production of oil, gas, or other minerals, a portion of which belong to the State of Alaska and represent the prime source of revenue currently paying for the operating budget of the State of Alaska.

2. On the specific question of how the oil companies and their contract management contractors have been letting contracts which keep union contractors from bidding, there have been three approaches used so far:

   A. The one I mentioned last week - a cost plus contract on which the source of competition in the bid is the price in dollars per hour of man labor on the job. There is no limit on the number of hours to be spent;

   B. A contract in which the total hours within which to perform the project are set. The contractor must put in this many hours and then bids only on a total price in the sense of the dollars per hour for man in the field times the total established number of hours which must be worked. Note that in each of the cases, the number of hours to be worked has been set much much higher than any union contractor has considered necessary; and

C. What is called a "time weld procedure" where production is deliberately slowed to a very inefficient rate far below the rate at which union employees normally work, but only slightly below the rate at which non-union employees work. For instance, if a job when normally set up would permit a man to turn out 80 inches of welding per hour, the number of inches per hour that a man is allowed to weld is artificially restricted to 12 inches per hour. (This is an exact example applicable to a particular case.) They then determine as a matter of quality control that no welder can produce more than 12 inches per hour. The net result is that the production part of the job is slowed to a point where the wages become a killer and the greater speed and efficiency of union welders can't be used.

Each of these approaches obviously lead to a much higher total cost for a project than would otherwise be paid. The additional amounts paid for doing projects under this basis are in the multimillions of dollars.

Logic and a knowledge of the system on the North Slope points to three basis for oil companies throwing money away this way:

A. Producing a gathering line system or a pumping system in this manner reduces the weld head price because even under the new proposed settlement, the oil companies are permitted a period to recapture the "cost" of the work and then are returned a steady 6.4% on that sum from that point forward;

B. Creating unrest in the labor market by pitting union against non-union, residents against non-residents, and company against company will normally result in destructive competition. That destructive competition will permit the oil companies to get lower bids from a desperate company. The construction company then may well go into bankruptcy, but the oil company in the end picture will be getting work done more cheaply; and

C. Cronyism, as revealed in the VECO scandal, shows that even where VECO went into bankruptcy, Arco set out to save it and used the techniques I've referred to above to get contracts to VECO, making them again wealthy.

3. With respect to the Brown & Root Company ads and with respect to a good number of statistics; for instance, those obtained from the latest VECO payroll printout, a problem appears in the definition of resident. The non-union companies are

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currently calling a person a resident if he meets the State's definition of having been in the State for thirty days. Many residents on their payrolls have a Deadhorse or Kuparuk address because they have been up there over thirty days. They do not, however, have their homes and families in Alaska. A person who does not have his home and family in Alaska does not generally cash his paychecks in Alaska. In fact, about all that is purchased by the individuals in the camps on the slope are narcotics and alcohol so that no industry or merchandiser in Alaska gets any gain from any turn over of the dollars paid to these individuals, with the possible exception of the pushers and the package liquor stores.

Everyone accepts that a dollar paid to a worker who lives in your community will turn over a certain number of times before it finally ceases to be a factor in the community. Four turn overs is the minimum used in any economic estimate. Eleven turn overs is the maximum. Seven or eight turn overs are normally cited in various economic studies. Because of the higher rate of federal tax due to progress brackets and the lack of industry, we probably should accept that seven turn overs of a wage dollar will be all that one can safety assume in an Alaskan community.

4. Looking at miscellaneous statistics which go to butress the current crisis, I will list these by source in the hopes of making things easier. These are not necessarily listed in order of importance to the proposition or my preference for one source over another.

   A. The January, 1985 issue of Alaska Economic Trends put out by the State Department of Labor. - Pertinent statements show that as 1984 progressed, the down turn in jobs available in both the construction and mining industry had already begun, with a construction industry loss of 1,300 jobs and mining industry loss of 200 jobs. There will be more reference to the loss of the mining industry jobs later since the State treats oil and gas as approximately 90% of the mining done in Alaska. This book quotes the 1984 average employment in mining at 8,100 persons. Some of the loss of jobs in this area is explained in quotes from later sources. In the construction area, they note at page 5, "No major construction activity is planned in oil and gas in 1985." and "A significant surplus of residential and commercial space is already available in the three major communities in Alaska and (we are now on page 6) State spending is unlikely to increase for capital projects..."

E. The fall, 1984 issue of the Community Research Quarterly put out by the Fairbanks North Star Borough indicates that 2,854 Borough residents are working in construction and average $7.61 per hour. This is the larges single category of employment in the Fairbanks North Star Borough and it consists of people in non-union jobs because they were all referred to their job from the State employment service. Union employees will comprise a higher number of people actually working in 1984 and their wages range from $16.00 to $32.00 per hour. This gives one a handle on the pay received by non-union construction workers as compared with union pay. This comparison in turn proves that these people are not able to adequately support themselves in the Fairbanks community. (They earn less than $400.00 per week - and this is not enough to support a family.) This also demonstrates the number of people who are being brought into a marginal existence by being brought into the non-union construction industry.

Table 24 in this book contains the amazing notation that in oil and gas extraction during 1981 and 1982 (big years for enforcing local hire), the oil companies refused to disclose data on addresses to the State to defend the privacy of their employees. This is found at page 48 in Table 24.

As far as Borough workers are concerned, mining employed 350 people in the Borough last year and construction 3,150 people. This statistic confuses me a little because I am sure that a couple of the larger unions dispatched nearly this many people during the year. It probably, therefore, represents year around jobs.

On page 53, Table 28, residents of the Borough employed in the oil and gas extraction industry (there were 9 of them) average $3,732.00 per month. Construction workers in heavy construction (North Slope) average $7,290.00 per month.

C. The January, 1985 issue of Alaska Construction and Oil has the following statistics: They indicate that construction had a "more moderate growth curve" in 1984 and that "Alaska contractors can continue to look forward to demand from the private sector as long as the state's economy continues to grow." They cite various economists to say that construction employment throughout the State will be somewhere between 11,000 and 15,000 jobs, which is back to the 1981 or early 1982 level. At the time their article was written, they

expected a $1.2 billion State budget which produces 13,180 jobs. However, the recent oil cost problems have cut this considerably. On Tuesday's Interior Delegation conference, Don Bennett indicated that he felt a $500,000,000 cut was in order. This will probably come mostly through projects let by DOT. On the petroleum side, the statisticians are all befuddled by the continual drilling being done by the oil companies on the North Slope. They had expected activity to drop off. This is a big unknown factor at this point, but apparently the mukluk experience did not cut into the planned exploration for oil. Exxon believes that 46% of the oil remaining to be found in the entire United States will be found in Alaska. Arco has many projects on the board to enhance the percentage of recovery from an oil pool. Sohio plans to spend $2 billion in the next few years on North Slope projects. This is a concrete sum that will be the subject of the debate between local hire and free market hire, as well as all the factors mentioned above.

D. Oil & Gas Journal for January 28, 1985. - These are interesting production sidelights which can be interesting to throw in. In 1970, oil wells in the United States were producing 9.11 million barrels per day. Then came the Arab oil embargo, etc., and we tried to become nonreliant on foreign oil. Currently, U.S. wells are producing 8.71 million barrels per day. The imports of foreign oil bottomed out in 1982 and are beginning to climb back up, but they did drop substantially from the 1970 level. Translated, this means we are using much less oil now than we were in 1970. Alaskan oil production has gone as follows: In 1970 - .083 billion barrels; 1975 - .07 billion barrels; 1980 - .591 billion barrels; 1982 - .627 billion barrels; estimated 1985 - .58 billion barrels; estimated 1990 - .56 billion barrels; estimated 1995 - .54 billion barrels; and estimated year 2000 - .53 billion barrels. During the period from now through the year 2000, we will discover .1 billion barrels of oil per year in new reserves.

E. Oil & Gas Journal for January 1, 1985. - This outlines the proposed taps settlement whereby Arco would reduce the tariff for transporting oil through the pipeline. Arco owns 20% of the oil production. The reduction of the tariff will, of course, bring the well head price up. The settlement proposes a flat payment of $50 million and it will increase the value of the oil extracted for Arco, which value is taxable. The effect on Arco will be a $23 million per year increase so that the total effect on all the oil companies will be a $115

million a year increase in taxes. This is probably one-sixth of the amount of the tariff reduction.

F. The Alaska Review of Social & Economic Conditions for September, 1984. - They did a study of Alaskan costs on large construction projects. They compared them with costs throughout the United States; Boston being equal to 100. It is interesting to note that the costs in Anchorage and Fairbanks were identical; 146 for labor and 145 for materials, so that our labor and material increase in prices over the lower 48 is basically identical. It also points out that the State pay differential of 14.9% between here and Anchorage and the University's pay differential of 10% between here and Anchorage is not paralleled by heavy construction costs. The reason, of course, is that the heavy construction costs in the past (while the field was still basically all union) were no higher in the work done out of Fairbanks, namely Prudhoe Bay, than they were actually in Anchorage.

This issue is kind of interesting because they pointed out that the median household income in the U.S. is $16,841.00. In Alaska, it is $25,280.00 or 150% of the U.S. average. However, owners of homes in Alaska make 193% of the U.S. average or $32,561.00 per household. Renters, on the other hand, make only 104% of the U.S. average or $17,491.00 per household. In other words, the people who are the construction workers in 1983 and up to the middle of 1984 who are mostly union make a good high wage. The people who have taken the non-union jobs are the renters (a majority of them) and make much much less.

As long as we are on these statistics, it's interesting to note that the per capita income in Barrow is 193% of the U.S. average and that's the highest in the U.S. Fairbanks occupants make only 93% of the Alaska average. North Slope residents, such as they are, make 123% and they are tied with Juneau in this regard. The highest per capita income in the State is in the Bristol Bay area. This is not, however, compared with national averages.

G. The Alaska Journal of Commerce for December 17, 1984. - Here is states that in 1974, oil employed 3,000 people in Alaska. In 1984, they employed three times that many and point out that a great deal of the taking of seasonality out of the employment market is due to the Alaska Oil & Gas Industry. Because the 1974 figures

were before trans-Alaska pipeline and the 1984 figures are with it running full force, we can see that roughly 6,000 people are employed by the companies as their operators of the pipeline.

These companies (there are 21 of them) employee actually 6,141 people. They occupy 3,000,000 square feet of space at a cost of $7 million. Their wage package is $450 million. They purchase $9.13 million in goods and expend $1.37 billion on capital improvements annually.' According to these statistics released by the Alaska Oil & Gas Industry, these 6,141 people average 13.4 years in the period of time they have lived in Alaska. Ninety-three percent of all firms in Alaska deal with the oil companies and the average of their employees is 13.5 years in Alaska. The average Alaskan has been in Alaska 16.2 years. We need to compare this with the slope construction workers that are considered residents after they've been here thirty days and many of them do not live in Alaska at all. They simply fly out with their money.

H. The January 7, 1985 issue of Alaska Journal of Commerce goes into drilling plans for development on the North Slope and it's probably easiest to say that they are fantastic.

I. The Alaska Economic Report for October 25, 1984 points out that there has been a sizeable cutback in oil company employees during 1984.

J. Alaska Construction and Oil for November, 1984 indicates that $13 billion has been spent in the Prudhoe Bay field and $17 billion more will be spent there. In the Kuparuk field, $5 billion has been spent so far and most of the development is yet to go. In the Milne Point field, $312 million of a $787 million development costs are underway. The costs of linking the field, pumping stations, etc., have not yet been estimated. On the Lisburn field, they've started on a $2 million development. There will undoubtedly be more money to be spent there. On the Cool West Sak, only about $75 million have been spent so far. On the Endicot field, there is no real estimate. $2.06 billion would be a guestimate as to what has been done. There is $55.4 million waiting for permit clearance. On the Ugnu field, which overlaps West Sak and Kuparuk, we really do not know. They will probably use the West Sak and Kuparuk infrastructures when the time comes. This does not take, of course, into account the forthcoming Navarin Basin,

St. George, Norton Sound, Diapir, and Unnamed Beaufort Sea fields.

5. The most interesting statistics I was able to come up with were the result of a survey among building trades unions in Fairbanks. Of nine unions I surveyed, each provided me with the best estimate they could give for the following figures: First question, "Of the work now being done in your craft on the North Slope, what percent of that work is union and what percent non-union?" Four crafts indicated a basic 50/50 split. In one craft, the split was 60% union to 40% non-union. Two crafts indicated 10% union to 90% non-union and two crafts indicated 30% union to 70% non-union. Several of the unions added extra examples on a promise of anonimity such as a shop that has 13 and sometimes 14 union men in it which is next door to a shop staffed by roughly 40 non-union men. They each have equal duties and perform an equal amount of work. This simply means that because of the competition that is going on, union men are putting out as much productivity as possible.

   The second question had to do with our intelligence program and asked, "Of the non-union contractors in your craft, what percent of their employees are Alaskan residents?" Two crafts indicated a 50/50 split; one indicated no local residents hired after reviewing the payroll records of the union contractor in their area; one craft indicated 20%; two crafts indicated 30%; one craft indicated 40% and two crafts indicated 90% so that there is a sizeable spread. The figures set out before about the difference in wages make all of this more clear an economic impact. Our big problem comes with determining what is a local resident. Many people are giving Alaskan addresses. For instance, maintaining that they are residents of Deadhorse or Kuparuk because they have been in the State at that location thirty or more days. This does not seem quite right and probably will not stand scrutiny.

I hope all this helps out. Please call me if you have questions.

Sincerely,

ARTHUR LYLE ROBSON, Attorney for
U.A. Local 375 and Its Members

ALR:CLM

Enclosure

bcc: Dick Currington
Teamsters - Fairbanks

bcc: Jerry Chairman

ALASKA HIRE [illegible]2-26-85

SB 191

ONE OF ALASKA"S MAJOR PROBLEMS -- LARGE NUMBER OF NON-RESIDENTS EMPL IN AK
INDUSTRIES WHILE ALASKANS ARE UNEMPLOYED
WHILE ALASKA HAS ONE OF THE HIGHEST UNEMPLOYMENT RATES IN U.S.

PUTS A TREMENDOUS BURDEN ON THE STATE AND ALSKA"S P_ERMANENT POPULATION

PARTICULARLY SERIOUS IN CONSTRUCTION INDUSTRY WHICH ACCTS FOR 10 % OF EMPLMT IN STATE
BUT ACCTS FOR 30 % OF UNEMPLOYMENT BENEFITS PAID OUT

PATTERN OF HIGH PERCENTAGE OF NONRESIDENT EMPLOYMENT IN BOTH PRIVATE AND
PUBLIC CONSTRUCTION.
ESP. OF LATE, APPARENT CONCERTED EFFORT AT UNION BUSTING BY SOME OF THE
MAJOR OIL COMPANIES AND THEIR AFFILIATED COMPANIES ___ AND THIS ENTAILS
USE OF NON ALASKA WORKERS

AS SERIOUS, IS THE USE OF NON_RESIDENTS ON PUBLICLY FUNDED CONSTR PORJECTS.
STATE HAS SPENT BILLIONS OF DOLLARS PUBLIC WORKS, DESIGNED IN PART TO DEAL
WITH AK"S UNEMPLOYMENT -- ONLY TO SEE AN INFLUX OF NON RES. WORKERS
DEFEAT THIS PURPOSE

COURTS HAVE BEEN DEALING WITH THE ISSUE OF LOCAL HIRE.
COURT DECISIONS, BOTH STATE AND FEDERAL, HAVE BEEN INTERMITTENT AND CONFUSING
HOWEVER, A STANDARD FOR AN ACCEPTABLE LOCAL HIRE LAW IS EMERGING

COURTS ARE CONCERNED ABOUT THREE FACTORS: →

(ATTACHED)

CURRENT ALASKA HIRE LAW (AUTHORED BY JOJO 1983) IS VERY GOOD. IT DEALS ONLY
WITH PUBLICLY FUNDED CONSTRUCTION AND IS NARROWLY TAILORED TO ADDRESS A
PARTICULAR EVIL.

HOWEVER, THE LAW DOES NOT INCLUDE A FINDINGS SECTION IDENTIFYING AND DOCUMENTING
THE REASONS PREFERENCE FOR STATE RESIDENTS IS NECESSARY.

SB 191 DOES THAT AK LAW NOW IN COURT CHALLENGE SB 191

FLOOR NOTES: INTRODUCTION OF SB 191
EMPLOYMENT PREFERENCE (LOCAL HIRE)

ALASKA NEEDS A LAW PROTECTING LOCAL HIRE THAT CAN MEET A CONSTITUTIONAL CHALLANGE.

COURT DECISIONS, BOTH STATE AND FEDERAL, HAVE BEEN INTERMITTENT AND CONFUSING.

A STANDARD FOR AN ACCEPTABLE LOCAL HIRE LAW HAS EMERGED.

TRADITIONALLY, WHEN THE COURT LOOKS AT A STATES LOCAL HIRE LAW THEY CONSIDER:

1. WHETHER THE PROBLEM IS IDENTIFIED AND DOCUMENTED: (HIGH UNEMPLOYMENT IN ALASKA, PARTICULARLY IN THE CONSTRUCTION INDUSTRY).

2. WHETHER THE CLASS OF PERSONS BEING DISCRIMINATED AGAINST HAVE BEEN IDENTIFIED AS A PARTICULAR EVIL. (IN THIS CASE, NON-RESIDENTS COMPETE WITH ALASKANS FOR A LIMITED NUMBER OF JOBS, CONTRIBUTING TO OR CAUSING OUR HIGH UNEMPLOYMENT RATE)

3. WHETHER THE REMEDY FOR THE PROBLEM (I.E. LOCAL HIRE LAWS) IS NAROWLY TAILORED TO FIT THE PARTICULAR PROBLEM IDENTIFIED BY THE STATE AND IS THE MOST APPROPRIATE AND LEAST INTRUSIVE METHOD OF ADDRESSING THE PROBLEM.

OUR CURRENT ALASKA HIRE LAW (AUTHORED BY SENATOR JOSEPHSON AND PASSED IN 1983) IS A GOOD ONE. IT DEALS ONLY WITH PUBLICLY FUNDED CONSTRUCTION PROJECTS AND IS NARROWLY TAILORED TO ADDRESS A PARTICULAR EVIL.

THE ONLY ADDITION WE COULD MAKE TO OUR CURRENT LAW IS A FINDINGS SECTION IDENTIFYING AND DOCUMENTING THE REASONS THE LAW IS NECESSARY.

THAT IS WHAT SB 191 WILL DO.

PUBLIC HEARINGS ON SB 191 WILL CREATE A RECORD OF TESTIMONY FURTHER DEFINING THE BURDEN ON THE STATE THAT NON-RESIDENT HIRE CREATES.

PUBLIC TESTIMONY WILL REVEAL THAT THE STATE HAS TAKEN EXTRAORDINARY STEPS TO ADDRESS OUR UNEMPLOYMENT PROBLEM, INCLUDING FUNDING MASSIVE PUBLIC WORKS PROJECTS, ONLY TO SEE OUR PURPOSE DEFEATED BY AN INFLUX OF NON-RESIDENT WORKERS TO FILL THOSE CONSTRUCTION JOBS.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date