HB

294

COMMITTEE REPORT

HOUSE

JUDICIARY

FURTHER: FINANCE

(7)

3/13/85

Date: March 27 1985

The Committee on LABOR & COMMERCE has had HB 294

"An Act relating to preferential hire of Alaskans; and providing for an effective date."

under consideration and recommends:

[X] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note [✓] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS	MEMBERS HAVING OTHER RECOMMENDATIONS:
HANLEY Mike Hanley	
KOHLHAAS Bill Kohlhaas	
COLLINS Curt Madden	
ELLIOTT D.A. Elliott	
HARNEY Duane Harney	
DAVIS Mark Davis	
FEERO	

Mike Hanley
CHAIRMAN

April 1, 1985 Monday 1:15 pm Room 102 Capitol

List of Those Testifying on
HB 294-295

1. Berry Haight -- President, Fairbanks Central Labor Council and President of Fairbanks Firefighters Assoc.

2. Mr. Robson -- Attorney for the Plumbers and Pipefitters Union

3. John Abshire -- Business Manager for the Ironworkers union.

4. Steve Cowper -- Mental Health Trust Lands case attorny, Fairbanks former State Legislator, Chair of Finance Committee, gubernatorial candidate 1982

5. Bill Jermain -- Attornye for the Ironworkers union.

6. Mano Frey -- President, Alaska Chapter of AFL/CIO

7. Kevin Dougherty -- Attorney for Alaska Insustrial Alliance

8. Richard Pelusou -- President, Western Alaskan Building Trades Council

9. Neil Fried -- Dept. of Labor in Anchorage; and key person testifying in the current Francis trial on the local hire issue.

10. Bob Goldberg -- Attorney in Anchorage; did a study for Dept. of Labor on legislative options to rural employment

11. Charles Caldwell -- Chief of Research, Department of Labor

12. Representative from the IBEW will also testify; Business Manager couldnt make it.

JAMES N. FRANCIS,

Plaintiff,

v.

JAMES ROBISON, COMMISSIONER OF LABOR, et al.,

Defendants.

JAN 83-9969 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence, the Court makes the following Findings and Conclusions:

1. The plaintiff, James N. Francis, came to the State of Alaska in September of 1983 to look for work.

2. The plaintiff claims residency in the State of Montana, and has numerous indicia of such residency, such as real and personal property in Montana, voter registration in Montana, a driver's license from Montana, a bank account in Montana, and his license plates for his vehicle are from Montana.

3. The plaintiff has never been issued an Alaska hunting, fishing or trapping license.

4. The plaintiff is in the State of Alaska for the purpose of finding work so that he can eventually return to his home in the State of Montana.

5. The plaintiff belongs to the International Association of Bridge, Structural and Ornamental Ironworkers, Local 598, in Kalispell, Montana.

6. The plaintiff is an experienced and skilled ironworker by trade.

7. Upon the plaintiff's arrival in Alaska in September of 1983, he placed his name upon the out-of-work list of Ironworkers Local 751 which has hiring halls in Anchorage and Fairbanks, Alaska.

8. Placement upon the union's out-of-work list

patched by Ironworkers Local 751 to employment with Regan Steel & Supply Company working on construction on the North Pole High School project at North Pole, Alaska.

10. The North Pole High School project is a public works construction project.

11. The plaintiff was 127th on the union's B list at the time he received this dispatch. Such list is primarily maintained for nonresident union members.

12. The procedure in Local 751 is to call all names on the A list first and then the B list in their order in both the hiring halls in Anchorage and Fairbanks simultaneously.

13. No persons on Local 751's out-of-work list on the A list were willing or able to accept the dispatch to the North Pole High School on September 19, 1983.

14. No persons above the plaintiff on Local 751's out-of-work B list were willing or able to accept the dispatch to the North Pole High School on September 19, 1983.

15. The North Pole Senior High School project became the subject of a Department of Labor enforcement effort under A.S. 36.10.010 on October 10, 1983.

16. A number of nonresidents were identified as working for plaintiff's employer, Regan Steel & Supply Company, and it was notified by the Department of Labor on October 12, 1983, that it was not in compliance with A.S. 36.10.010 because of the nonresidents employed on the job.

17. The Department of Labor, in the October 12, 1983, letter to plaintiff's employer, gave it seven days from the receipt of that letter to come in compliance with A.S. 36.10.010 or funds supporting the project would be withheld.

18. On October 17, 1983, the plaintiff's employer informed the State Department of Labor that it would come into compliance with A.S. 36.10.010 by laying off nonresidents.

19. The plaintiff received his termination notice

the plaintiff was performing prior to his termination.

21. Regan Steel & Supply's work on the North Pole High School construction project continued after the plaintiff's termination.

22. Plaintiff was terminated because of his nonresidency.

23. Termination of plaintiff's employment with Regan Steel & Supply Company was the result of the enforcement of A.S. 36.10.010.

24. Since the plaintiff's termination by Regan Steel & Supply Company at the North Pole High School construction project, the plaintiff has sought work in the State of Alaska in the construction industry by placing his name upon Ironworkers Local 751's out-of-work list and going to the union hall every day to search for work.

25. It is likely that but for enforcement of A.S. 36.10.010, plaintiff, because of his work experience, would be employed within the State of Alaska.

26. Between April, 1980, and July, 1982, the population of Alaska has grown by nearly fifteen percent (15%).

27. The population of Alaska has increased in the recent past more rapidly than at any other time in its history, and the State is growing more rapidly than other states in the union.

28. Property values in Alaska have been increasing over the last five years.

29. Alaska is not a depressed area as that term is used in the economics profession.

30. All sectors of the Alaska economy are expanding and Alaska has experienced very rapid economic growth since 1980.

31. Employment in Alaska in 1983 was at record levels, and the rate of increase was the best since the days of the Alaska Pipeline in 1974-1975.

greatest impact on the Alaska economy since the Alaska Pipeline years.

33. The construction industry in Alaska was exceptionally strong in both the public and private sectors during 1983.

34. Construction activity in the State of Alaska in 1984 is unlikely to reach the levels of 1983, but no precipitous decline is expected.

35. Numerous factors determine economic conditions, including unemployment, in the construction industry in the State of Alaska.

36. The major factor affecting the level of employment in Alaska in the construction industry is climatic changes as a result of extreme temperature differentials in the winter and summer months. Construction declines to substantially lower levels during the winter months, and increases, peaking out in August and September, during the latter summer months. During the peak periods of construction activity, the state experiences its lowest rate of unemployment.

37. The expenditure of state funds are a major factor affecting the level of employment in Alaska generally, and the construction industry in particular. The state expenditure for public works projects accounts for approximately sixty to seventy percent (60% to 70%) or more of the total annual construction dollar outlay within the state.

38. Private investment has a lesser effect on the level of construction activity from year to year in the State of Alaska, and such effect, from time to time, is affected by interest rates.

39. Unemployment is substantially greater in the rural areas than in the urban areas. The unemployment rate in Anchorage is less than the national average, while in the rural areas, it is greater than the national average and greater than the average within the State of Alaska.

41. Rural Alaskans lack the training that urban Alaskans have access to in construction work.

42. In-migration in the State of Alaska is a factor affecting unemployment in the construction industry in Alaska.

43. Alaska has the greatest proportion of out-of-state unemployment benefit payments (interstate claims). Alaska is also close to the top of all states in the dollar value of interstate claims.

44. There is no evidence in the record to establish what percent of the interstate claims are being paid to non-residents as opposed to residents who vacation or reside outside the state during the winter months. It is clear, however, from the record that interstate claims are made predominantly during the w ter months, during which time construction activity has diminished because of the climatic change.

45. Reasonable inferences from the evidence support a finding that most of the job seekers coming to Alaska intend to become residents upon their entry into the state, thus contributing to the rapid population growth within the state.

46. There is not sufficient evidence to support a finding that nonresident construction workers are a peculiar source of unemployment in the construction industry in Alaska any more than they would be in any other state. The only inference that can be drawn from the record is that nonresident construction workers come to Alaska to work during peak construction periods of time, during which there are more jobs available and less unemployment resulting.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of the proceedings.

2. At all times applicable to this proceeding, the plaintiff did not qualify for the employment preference provided by A.S. 36.10.010, since at the time of discrimination, he was a nonresident of the State of Alaska.

[illegible] of the United States Constitution.

5. A.S. 36.10.010 draws a distinction based upon state citizenship.

6. A.S. 36.10.010 on its face and in its application violates the Privileges and Immunities Clause of Article IV of the United States Constitution.

7. The right to obtain employment in any state is a fundamental right and is a privilege which shall be immune from any burden unless the State of Alaska can show a legitimate purpose for such burden. In this case, the state has failed to establish by a preponderance of the evidence such a legitimate purpose.

8. The defendants and intervenor have failed to prove by a preponderance of the evidence that nonresident construction workers constitute a peculiar source of unemployment in the State of Alaska.

9. Serious factors affecting unemployment within the State of Alaska are the extreme climatic conditions, the change in the legislative appropriation for public works construction projects, the extreme rapid growth of population experienced by Alaska, and the wildly fluctuating interest rates which have a direct effect on the private sector construction spending.

10. Statistics over the last several years demonstrate that Alaska's unemployment rate has increased at a rate lesser than the nationwide average. Whereas Alaska's unemployment rate several years was substantially greater than the nationwide rate, it now stands much closer to the national average, further supporting the conclusion that nonresident employment is not a serious factor in the unemployment rate in Alaska.

11. The State and the intervenor have failed to prove by a preponderance of the evidence that there is a substantial reason to discriminate against employment of

12. A.S. 36.10.010 provides that ninety to ninety-five percent of Alaska residents shall be employed on municipal public works construction projects where they are available and qualified.

13. A.S. 36.10.010 requires that ninety to ninety-five percent of the workers on a state-funded construction project, on a craft by craft basis, shall be Alaska state residents where they are available and qualified.

14. The State and intervenor have failed to prove by a preponderance of the evidence that the preference granted Alaska residents is closely tailored to alleviate unemployment in the construction industry in the State of Alaska.

IT IS ORDERED that plaintiff shall file and serve a proposed Partial Judgment consistent with these Findings of Fact and Conclusions of Law.

Dated at Anchorage, Alaska, this 23 day of May, 1984.

EARL S. JOHNSTONE, Judge

Steve McAlpine

① Local Hire of Alaskan Residents = one of the most important issues facing the future of our state.

Historically Whalers - Goldseekers -
Fish trap owners and processors -
pipeline construction workers

② Important to distinguish between public works contracts and private construction it is
- State difficulty ~ constitutionality of local hire preference
- Private right to contract

③ State Receives 2 principle benefits from extraction of oil

(a) direct benefit → Severance tax / Corp. income tax - property taxes.
- State then injects $ into the economy through the appropriation process
- In terms of economy govt. = the largest sustaining force in Alaska

(b) Second benefit or Indirect Benefit that Alaska receives from oil is the economy that is generated through employment and associated spending

- If we can assume that the majority of residents will earn and spend their money in Alaska - good economy

- Gov. noted last week that Dept. of Labor Stats. indicate that 600 of 2100 jobs on the North Slope are held by nonresidents - that is 28½% of some of the highest paying jobs in our state. In addition, ~~those are~~ those are 600 admitted non-residents - of the remainder, we have to ask the question, how many occupy nothing more than a Post Office Box.

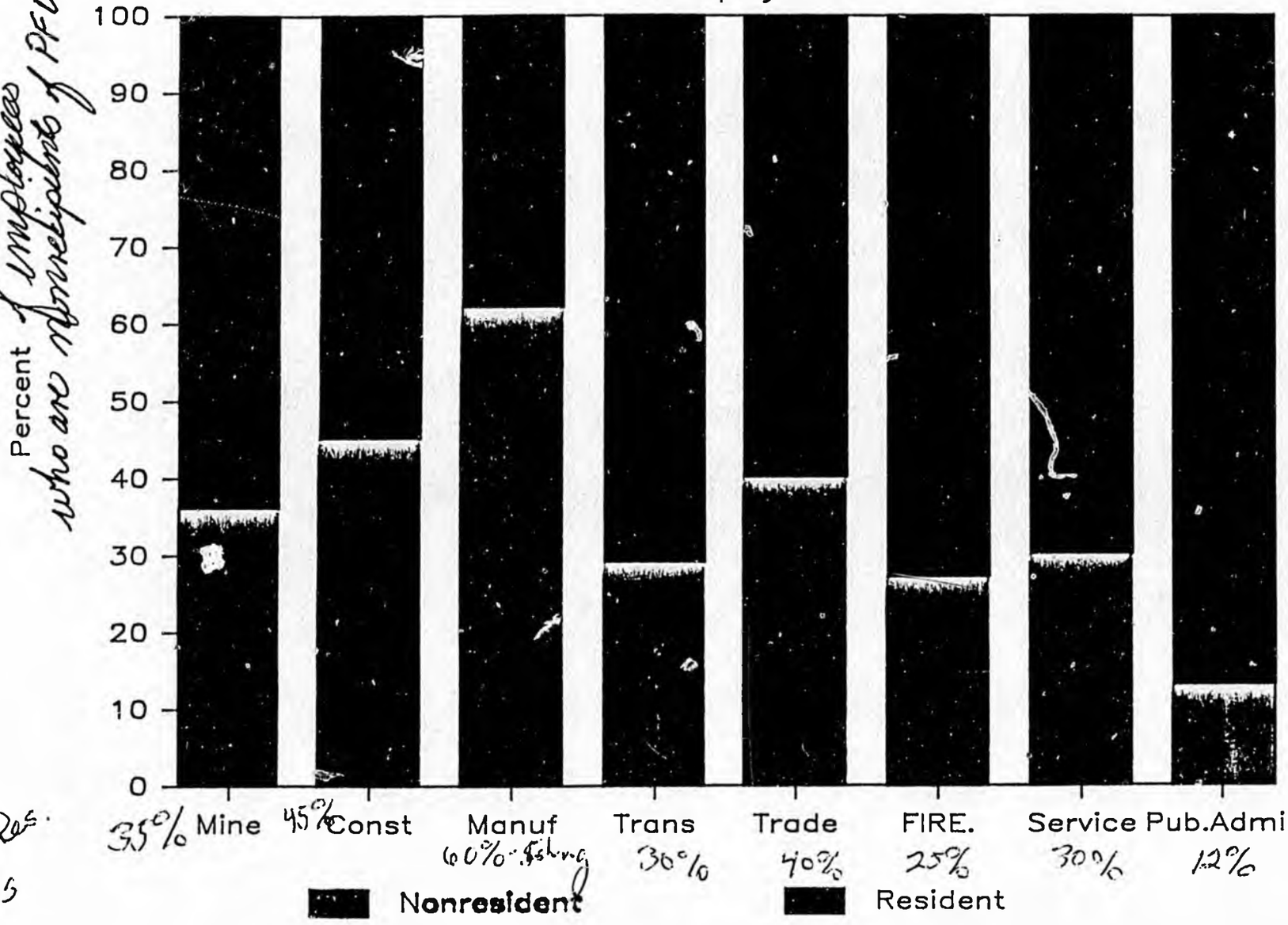
- If we have two ways to get benefits into the economy and cash
  (a) Encourage Local Hire in prot. Sector
  (b) Increase TXS.
  - Consistently opposed.

- In 1984 Wages earned by non recipients of the P.F.D. in the UI eligibility (nonresidents) Job classifications equated to $1.3 Billion or 21% of covered employees.
  - By comparison Wages earned By recipients of PFD amtd. to $4.75 Billion

- 27.3% of Wages were earned by nonrecipients of the P.F.D.

ALASKA

U.I. Covered Employment 1984



Non-Res.
0.5

Bill No. House Bill No. 294

Date March 18, 1985

Title "An Act relating to preferential hire of Alaskans; and providing for an effective date."

Contact: Robert Landau
465-2700
Eileen Plate
465-2700

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 No. 294 would provide a more solid foundation from which to defend the principle of Alaska hire. The Department of Labor, therefore, strongly endorses the comprehensive legislative findings contained in the bill.

It is noted that section 2 of the bill proposes a retroactive effective date for the provisions of section 1. The department has no problem with the retroactive date per se. However, the legality of the retroactive effective date could play a major role in determining the constitutionality of section 1 as a whole should a legal challenge to the section arise in the future. Therefore, a careful legal review may be in order to assure that the provisions of section 1 do fall within the legal parameters of the types of provisions which can be retroactive.

The Department of Labor supports House Bill No. 294. It will not have a fiscal impact on the department.

APPROVED:

Robert W. Landau, Deputy
for Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

Bill No. House Bill 295

Date March 26, 1985

Title "An Act making a special appropriation to the Department of Labor for Study of Unemployment in Alaska and other issues related to Alaska hire; and providing for an effective date."

Contact: Robert Landau
465-2700
Eileen Plate
465-2700

House Bill 295 makes an appropriation to the Department of Labor for a special study of unemployment and resident hire in Alaska.

Specifically, under this appropriation measure, the Department would collect and analyze a variety of information on the impact of nonresidents on employment in Alaska. Currently, such information is not available in a form that will withstand legal scrutiny. Although the State's counsel in the pending resident hire lawsuit wove together different kinds of information to show the impact of nonresidents on employment, the Superior Court concluded that there was insufficient evidence to show that the influx of nonresident workers was a "peculiar source" of unemployment in the construction industry in Alaska against which the resident hire law was directed.

The study which this bill provides for was also recommended by a recent legal analysis prepared by Attorney Robert Goldberg. This analysis, "Legislative Remedies for Rural Unemployment," specifically recommends that the State collect a substantial body of specific, reliable data on unemployment, income, population trends, etc. and that specific legislative and/or administrative findings be made on the basis of the data.

The Department expects that the study will support the State's contention that nonresidents are a primary cause of high unemployment in Alaska, and that it will also show that the resident hire law is necessary to remedy the problem.

The Department strongly supports this proposal to fund a study of unemployment and resident hire in Alaska.

APPROVED:

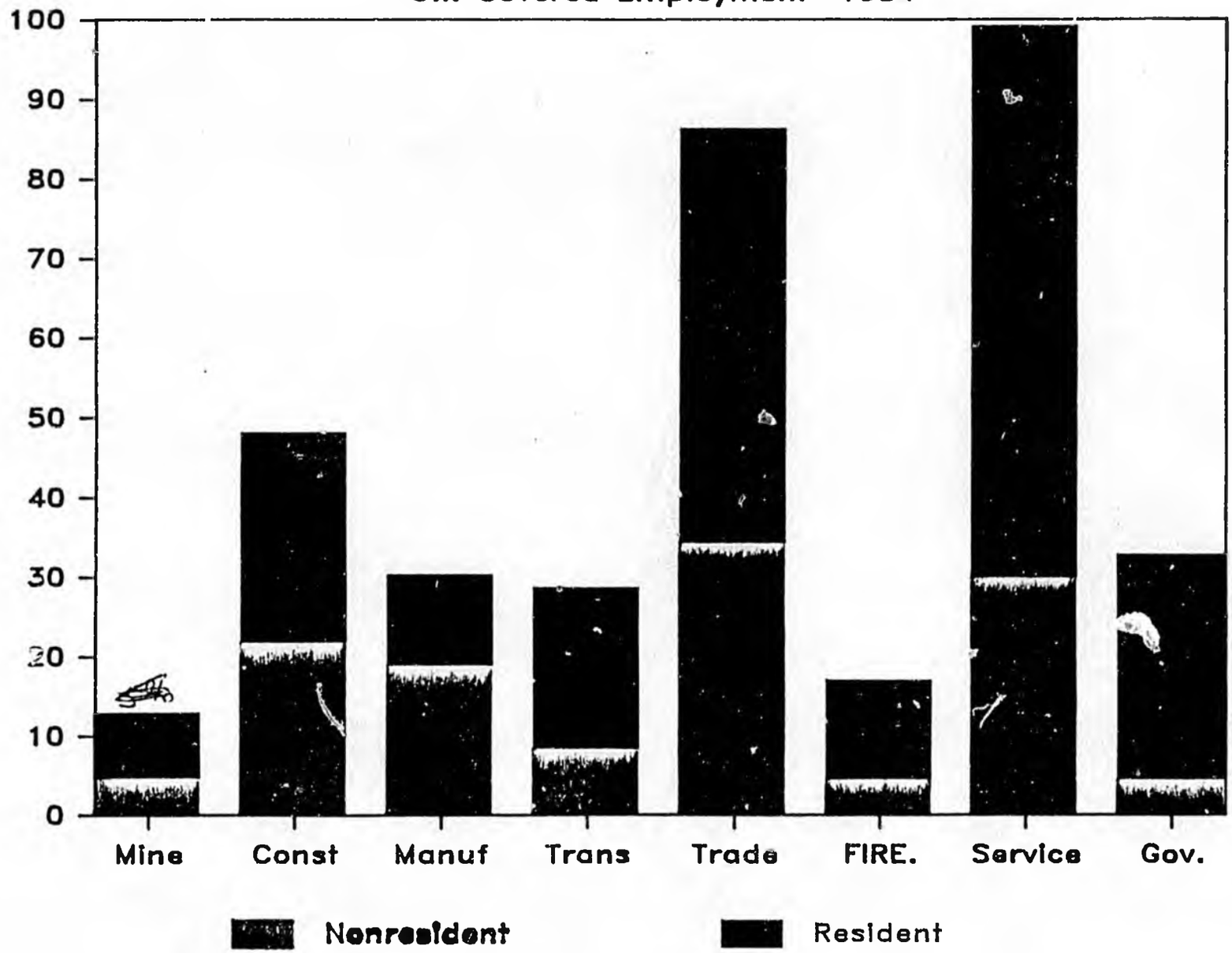
Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

ALASKA

U.I. Covered Employment 1984

#'s of employees within each group who are Res/Nonres



DAVID ARTHUR DONLEY
ATTORNEY AT LAW
1303 WEST 43rd AVENUE
ANCHORAGE, ALASKA 99503

February 25, 1985

LETTER TO THE EDITOR
RE: THE HISTORY AND FUTURE OF ALASKA HIRE

Currently there appears to be much public misunderstanding about the status of our present Alaska Hire Law AS 36.10.010. As one of the persons who helped draft that legislation I think it is important that all Alaskans understand the history behind and current status of Alaska Hire.

The history of preferential hire for residents of Alaska has been turbulent. The first Alaska Hire law was adopted in 1960. Over the years, the 1960 law was enforced with varying degrees of enthusiasm. Then in 1972, in an effort to obtain employment for Alaskans on the construction of the Trans Alaska Pipeline, the 1972 "Local Hire Under State Leases" law was adopted. The 1972 law required that Alaska residents be employed in preference to non-residents in all construction involving oil and gas development. In 1978 in Hicklin v. Orbeck, the U.S. Supreme Court struck down the 1972 law as contrary to the Privileges and Immunities Clause of the U.S. Constitution. While the 1972 law was struck down, the 1960 law was not challenged and remained in effect but was not enforced until 1963.

In 1983, in response to public desire for an enforceable Alaska Hire law and new legal developments, the Alaska legislature amended the 1960 law. The 1983 act, which is the current law, requires 95% Alaska hire on most construction projects funded by State or local funds.

Then in February 1984 in the case of United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden et al, the U.S. Supreme Court reversed a New Jersey Supreme Court holding that the Privileges and Immunities Clause of the U.S. Constitution did not apply to municipal ordinances creating preferential hire for local residents. The court held that such ordinances are properly subject to the requirements of the Privileges and Immunities Clause. The court ordered that on remand, the determination of whether the Camden ordinance violates the Privileges and Immunities Clause should be made under the appropriate constitutional standard which requires determination of whether the ordinance burdens one of those privileges and immunities protected by the clause and if so, whether there is substantial reason for the discrimination against citizens of other states. However, the U.S. Supreme Court found it impossible from the record, as it was presented to the court, to evaluate Camden's contention that its ordinance was carefully tailored to counteract the specified economic and social ills of the unemployment of state residents and a sharp decline in the city's population. On remand, the U.S. Supreme Court recognized that the New

Jersey Supreme Court may decide, consistent with state procedures, on the best method for making the necessary findings of fact.

In 1984, Alaska's current law was challenged in Francis v. Robison. Superior Court Judge Johnstone ruled the current law in violation of the Privileges and Immunities Clause of the U.S. Constitution on May 23, 1984. On request of the State of Alaska the Alaska Supreme Court stayed Judge Johnstone's action until the State could appeal his decision. This case is currently on appeal before the Alaska Supreme Court and a decision is expected in the latter half of 1985.

In January of 1985, the Supreme Court of Wyoming upheld a Wyoming Hire law that is even stronger than our current Alaska law, in that it requires 100% Wyoming hire, not just 95%, on public construction projects. The Wyoming Supreme Court overruled a lower Wyoming court which found, as Judge Johnstone found for the Alaska law. that the Wyoming law violated the Privileges and Immunities Clause. The Wyoming Supreme Court specifically referenced both the Camden desision and Hicklin v. Orbeck in it's decision.

Currently then, our Alaska Hire law is in effect and being enforced and in light of the Wyoming case has a better chance than ever of being found constitutional by our Alaska Supreme Court. Of course, even if the Alaska Supreme Court approves the current law, Alaska Hire may still be challenged in the U.S. Supreme Court.

If our current law is struck down by the Alaska Supreme Court or challenged in the U.S. Supreme Court, the key factor in its success or failure will probably be the State of Alaska's ability to prove that the resulting discrimination against non-residents is necessary to relieve unemployment among Alaskans.

To effect this proof of need legislative hearings on the subject and the adoption of legislative findings of fact may be advisable. Whether it would be better for the legislature to take action at this time, or to wait until after the Alaska Supreme Court's ruling on the pending case, is difficult to predict.

In any event the Department of Labor should be empowered to commission a study on the relationship of out-of-state workers to unemployment in Alaska and the Alaska Hire question in general. Such legislation would additionally provide the vehicle for public hearings at which evidence could be compiled to support Alaska Hire.

Sincerely,

David Arthur Donley

M E M O R A N D U M

TO: All Members, House Labor and Commerce Committee

FROM: Roger Poppe, Committee Staff

DATE: March 27, 1985

SUBJECT: Overview, HB 294,295, 266, HCR 20

On Wednesday, March 27, 1985, at 1:15 pm in Room 102 Capitol, the House Labor and Commerce Committee met on the above listed legislation, all dealing with local hire.

Last session, HB 424 and SB 174 both dealt with local hire. This session, there is a companion bill for HB 266 by Davis in the Senate, which is SB 191 by Senator Fischer. There is also companion legislation in the Senate for HB 294 (Rep. Boucher's bill), which is SB 235 by Senator Fahrenkamp. This bill was heard in Senate Judiciary Committee yesterday, March 26, and passed out unanimously. It was the only committee of referral in the Senate. There is no companion legislation in the Senate for HB 295, the appropriation bill by Rep. Boucher. Basically, HB 266, 294 and 295 relate to public construction hire, while HCR 20 also includes hiring by the private sector.

There is a good historical overview of the local hire issue in your file (#5) by David Donley. Most of the relevant court cases at the state and national level that are referred to in various letters and testimony are found in your file, or can be obtained upon request.

Based on various court decisions, it has become clear that a key place where Alaska and other states have fallen down is in the area of supplying written backup for various court cases on this issue. There was little or no public record to show testimony that was taken from either the public or from specialists or key government figures in Committee hearings. Consquently, the courts have little guidance on either public intent or legislative intent. Senator Josephson will speak to this issue today.

In an attempt to alleviate this past lack in the record, there will be a series of people providing testimony today for the public record representing various agencies. Included will be Lt. Governor McAlpine for the administration; Senator Josephson on the history of the 1983 law; Deputy Commissioner of Labor Robert Landau on the Johnstone decision and on how DOL would use the funds from HB 295; Ron Lorenson, Deputy Attorney General, on the history of Hicklin v. Orbeck; and overview information by Dave Donely, who worked extensively on the 1983 legislation with Senator Josephson and this year on HB 294 with Rep. Boucher.

On Monday, April 1, we will be having a special teleconference on these bills to Anchorage and Fairbanks LIO's only, with invitation only testimony, in order to obtain additional input from key figures in those two communities who have been involved with the local hire issue over the years, in order to get their positions into the public record as well. At a later date, probably the end of the session, we try to have complete transcripts of these two meetings typed up for future judicial reference if it becomes necessary.

March 27, 1985 Wednesday 1:15 pm Room 102 Capitol

HOUSE LABOR AND COMMERCE COMMITTEE AGENDA

1) CALL MEETING TO ORDER

2) NOTE TIME/DAY/YEAR

3) NOTE MEMBERS PRESENT AND MEMBERS ABSENT

4) RECOGNIZE ANY VIP's OR GUESTS PRESENT

5) REMIND EVEYONE PRESENT TO SIGN IN AS EITHER A WITNESS OR AS AN OBSERVOR

6) EXPLAIN THE ORDER OF BILLS BEFORE THE COMMITTEE

   a) HCR 20 Maximizing Local Hire, by Pignalberi. This should only take about 10 minutes, and Boucher thought it was okay if Pignalberi went first; as his resolution is a broad issue that covers both the public and private sector, and Boucher's bills focus more specifically on the public sector.

   b) HB 294 Preferential Hire of Alaskans, by Boucher. Rep. Boucher has worked out a whole list of people to testify in order to have the maximum amount of testimony available and documented for future court challenges of this legsilation, which was a major problem in the defeat of previous local hire legislation in the courts.

   c) HB 295 This is an appropriation to allow the study to be carried out that would give additional support and backup to the objectives Boucher is aiming for with HB 294.

   d) HB 266 I checked with Mike Davis' office, and for all intents and purposes he considers this bill to be dead, so you don't need to take additional testimony on it, but you might state for public purposes whether you want to hold it in comparison to the other pieces of legislation above.

AT THE END OF THE MEETING, YOU SHOULD ANNOUNCE THAT ALL OF THESE BILLS WILL BE HELD OVER UNTIL MONDAY, AT WHICH TIME THERE WILL BE A LIMITED TELECONFERENCE TO THE FAIRBANKS AND ANCHORAGE SITES TO TAKE SELECTED ADDITIONAL TESTIMONY ON THESE BILLS.

7) ANNOUNCE FIRST BILL BEFORE COMMITTEE, THEN SECOND, ETC.

8) MAKE SURE ALL MEMBERS SIGN ANY BILL THAT IS PASSED OUT OF COMMITTEE

9) ANNOUNCE THE TIME OF ADJOURNMENT

Note: As each witness comes forth, please request that they state their name for the record and who they are representing, and to speak up.

patients, it implemented only a precatory rule, not an outright prohibition of all such conversations in the cafeteria. See *ante*, at 502–503, n 20, 57 L Ed 2d, at 39[illegible]

The hospital failed to introduce any evidence of a reasonable possibility of harmful consequences to patients or visitors.

[437 US 517]

It relied primarily on arguments with respect to hospitals in general. No testimony was introduced that the practice at Beth Israel is to seek early rehabilitation of patients by encouraging them to leave their rooms at the earliest time compatible with their condition, and to move about the hospital. The further weakness in petitioner's case is that it introduced no medical testimony that related such practices and needs to its cafeteria.[8] Putting it differently, the undisputed evidence portrays this cafeteria as being one essentially operated for employees as their primary gathering place, and as almost wholly unrelated to patient care.

In sum, I view this case as essentially barren of the type of evidence that could be produced on behalf of many hospitals when confronted with a similar problem. See, e. g., NLRB v Baptist Hospital, Inc. 576 F2d 107 (CA6 1978). My concurrence in the judgment is based entirely on the facts, as I disagree—for the reasons above stated—with the rationale of the Board, its reliance upon a wholly inappropriate presumption, and its unrealistic distinction between hospital and retail-store cafeterias. I also note that the Court emphasizes the facts of this case, and the "critical significance [of the fact] that only 1.56% of the cafeteria's patrons are patients." Ante, at 502, 57 L Ed 2d, at 386.[9]

8. Rather, the employer rested on the allegedly inflammatory nature of a union newsletter distributed by one employee, without introducing any evidence that the newsletter had fallen or would fall into the hands of patients or visitors. Furthermore, proof of such a probability would not be relevant to the no-*solicitation* portion of the hospital's rule. The hospital allowed one-to-one solicitation in the cafeteria until after the initiation of these proceedings; yet petitioner was "unable to show any instance of injury to patients" while that more permissive rule was in effect. 223 NLRB 1193, 1197 (1976).

9. Moreover, the Court's opinion expresses no view as to the validity of prohibiting employee solicitation or distribution in other areas of a hospital which may not be devoted "strictly" or "immediately" to patient care but to which patients and visitors have access. This question was not presented in this case.

[437 US 518]

SIDNEY S. HICKLIN et al., Appellants,

v

EDMUND ORBECK, Commissioner of the Department of Labor of Alaska, et al.

437 US 518, 57 L Ed 2d 397, 98 S Ct 2482

[No. 77-324]

Argued March 21, 1978. Decided June 22, 1978.

SUMMARY

The State of Alaska enacted a statute requiring that all Alaskan oil and gas leases, easements, or right-of-way permits for oil and gas pipelines and unitization agreements contain a requirement that qualified residents of Alaska be hired in preference to nonresidents. A one-year durational residency requirement was imposed by the statute. Certain individuals who were unable to obtain jobs as a result of the statute challenged it as violative of both the privileges and immunities clause of the Federal Constitution (Art IV, § 2, cl 1) and the equal protection clause of the Fourteenth Amendment. The Superior Court of Anchorage, Alaska, upheld the statute. The Supreme Court of Alaska ruled that the residency requirement was unconstitutional under both the state and federal equal protection clauses, but held that the statute's general preference for Alaska residents was constitutionally permissible (565 P2d 159).

On appeal, the United States Supreme Court reversed. In an opinion by BRENNAN, J., expressing the unanimous view of the court, it was held that the statute violated the privileges and immunities clause, even granting the dubious assumption that a state could validly attempt to alleviate its unemployment problem by requiring private employers within the state to discriminate against nonresidents, since (1) no showing was made that nonresidents were a peculiar source of the evil the statute was enacted to remedy, namely the state's uniquely high unemployment, (2) even assuming that nonresidents were shown to be a peculiar source of the evil, the discrimination the statute worked against nonresidents did not bear a substantial relationship to the particular evil they were said to present, and (3) ownership by the state of the oil and gas that was the subject of the

Briefs of Counsel, p 1192, infra.

statute was not sufficient justification for the statute's discrimination to take the statute without the scope of the privileges and immunities clause.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Courts § 763 — state residency requirement — constitutionality — mootness

1a, 1b. An action before the United States Supreme Court challenging the constitutionality of a state statute which requires that all state oil and gas leases, easements, or right-of-way permits for oil and gas pipelines and unitization agreements contain a requirement that qualified state residents be hired in preference to nonresidents, and which imposes a one year durational residency requirement, is not moot, following the state court's invalidation of the residency requirement as to those plaintiffs who are not residents of the state, since those individuals have a continuing interest in restraining the enforcement of the statute's discrimination in favor of state residents, and therefore a controversy still exists as to them; however, the action is moot as to those plaintiffs who claim to be state residents but have not lived in the state continuously for one year, and who only challenged the statute's residency requirement, their controversy having terminated.

Constitutional Law § 349 — privileges and immunities — comity — nonresidents

2. The privileges and immunities clause of the Federal Constitution (Art IV, § 2, cl 1) establishes a norm of comity that is to prevail among the states with respect to treatment of each other's residents.

Constitutional Law § 349 — privileges and immunities — citizen — resident

3a, 3b. The terms "citizen" and "resident" are essentially interchangeable for purposes of analysis under the privileges and immunities clause of the Federal Constitution (Art IV, § 2, cl 1).

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16 Am Jur 2d, Constitutinal Law §§ 474, 480
USCS, Constitution, Article IV, Section 2, Clause 1
US L Ed Digest, Constitutional Law § 349
ALR Digests, Constitutional Law § 295
L Ed Index to Annos, Privileges and Immunities
ALR Quick Index, Privileges and Immunities
Federal Quick Index, Privileges and Immunities

ANNOTATION REFERENCES

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. 44 L Ed 2d 745.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 USCS § 2201). 40 L Ed 2d 783.

Constitutional Law § 349 — privileges and immunities — state statute — employment of nonresidents

4a, 4b. A state statute requiring that all state oil and gas leases, easements, or right-of-way permits for oil and gas pipelines and unitization agreements contain the requirement that qualified state residents be hired in preference to nonresidents, violates the privileges and immunities clause of the Federal Constitution (Art IV, § 2, cl 1), even granting the dubious assumption that a state may validly attempt to alleviate its unemployment problem by requiring private employers within the state to discriminate against nonresidents, where (1) no showing is made that nonresidents are a peculiar source of the evil the statute was enacted to remedy, namely the state's uniquely high unemployment, and (2) even assuming that nonresidents are shown to be a peculiar source of the evil, the discrimination the statute works against nonresidents does not bear a substantial relationship to the particular evil they are said to present; ownership by the state of the oil and gas that is the subject of the statute is not sufficient justification for the statute's discrimination against nonresidents to take the statute without the scope of the privileges and immunities clause, since the state has little or no proprietary interest in much of the activity within the ambit of the statute, and the connection of the oil and gas with much of the covered activity is sufficiently attenuated so that it cannot be the basis for requiring private employers to discriminate against nonresidents.

Constitutional Law § 349 — privileges and immunities clause state statute — nonresidents

5. A state statute preferring citizens of the state over noncitizens does not violate the privileges and immunities clause of the Federal Constitution (Art IV, § 2, cl 1) if the state shows something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed, and, beyond this, the state has no burden to prove that its laws are not violative of the clause.

Constitutional Law § 349 — privileges and immunities clause — state ownership of resource — nonresident

6. The fact that a state owns a resource, of itself, does not completely remove a law concerning that resource from the prohibitions of the privileges and immunities clause of the Federal Constitution (Art IV § 2, cl 1), rather than placing a statute completely beyond the clause, a state's ownership of the property with which the statute is concerned is a factor, although often the crucial factor, to be considered in evaluating whether the statute's discrimination against noncitizens violates the clause.

Commerce § 220 — natural resources — state preference — citizens

7. The commerce clause of the Federal Constitution (Art I, § 8, cl 3) circumscribes a state's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce; however, the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the state from preferring its own citizens in the utilization of that resource.

SYLLABUS BY REPORTER OF DECISIONS

Appellants, at least five of whom are not residents of Alaska, challenged in state court the constitutionality of the "Alaska Hire" statute (which was enacted professedly for the purpose of reducing unemployment within the State) that requires that all Alaskan oil and gas leases, easements, or right-of-way permits for oil and gas pipelines and unitization agreements contain a requirement that qualified Alaska residents be hired in preference to nonresi-

dents. The trial court upheld the statute. The Alaska Supreme Court affirmed except for that part of the Act that contained a one-year durational residency requirement, which it held invalid. *Held:*

1. The invalidation of the one-year durational residency requirement does not moot the case, since a controversy still exists between the nonresident appellants, none of whom can qualify as "residents" under the statutory definition, and the appellees, state officials. Those appellants thus have a continuing interest in restraining the statutory discrimination favoring state residents.

2. Alaska Hire violates the Privileges and Immunities Clause of Art IV, § 2.

(a) Though the Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," it "does bar discrimination against citizens of other States where there is no reason for the discrimination beyond the mere fact that they are citizens of other States." Toomer v Witsell, 334 US 385, 396, 92 L Ed 1460, 68 S Ct 1156. See also Mullaney v Anderson, 342 US 415, 96 L Ed 458, 72 S Ct 428.

(b) Even under the dubious assumption that a State may validly alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents, Alaska Hire cannot be upheld, for the record indicates that Alaska's unemployment was not attributable to the influx of nonresident jobseekers, but rather to the fact that a substantial number of Alaska's jobless residents were unemployed either because of lack of education and job training or because of geographical remoteness from job opportunities. Employment of nonresidents threatened to deny jobs to residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed. Moreover, even if a showing was made that nonresidents were "a peculiar source of the evil," Toomer v Witsell, supra, at 398, 92 L Ed 1460, 68 S Ct 1156, at which Alaska Hire was aimed, the statute would still be invalid, for its discrimination against nonresidents does not bear a substantial relationship to the "evil" that they are said to present, since statutory preference over nonresidents is given to all Alaskans, not just those who are unemployed.

(c) Alaska's ownership of the oil and gas that are the subject matter of Alaska Hire constitutes insufficient justification for the statute's pervasive discrimination against nonresidents. Alaska Hire's reach includes employers who have no connection with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State; and the Act's coverage is not limited to activities connected with the extraction of Alaska's oil and gas.

(d) The conclusion that Alaska Hire cannot withstand constitutional scrutiny is fortified by decisions under the Commerce Clause that circumscribe a State's ability to prefer its own citizens in the utilization of natural resources found within its borders but destined for interstate commerce. West v Kansas Natural Gas, 221 US 229, 55 L Ed 716, 31 S Ct 564; Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300, and Foster Packing Co. v Haydel, 278 US 1, 73 L Ed 147, 49 S Ct 1. The oil and gas upon which Alaska hinges its discrimination are bound for out-of-state consumption and are of profound national importance while the breadth of the discrimination mandated by Alaska Hire transcends the degree of resident bias that Alaska's ownership of the oil and gas can justifiably support.

565 P2d 159, reversed.

Brennan, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Robert H. Wagstaff argued the cause for appellants.

Ronald W. Lorensen argued the cause for appellees.

Briefs of Counsel, p 1192, infra.

OPINION OF THE COURT

[437 US 520]

Mr. Justice **Brennan** delivered the opinion of the Court.

In 1972, professedly for the purpose of reducing unemployment in the State, the Alaska Legislature passed an Act entitled "Local Hire Under State Leases." Alaska Stat Ann §§ 38.40.010 to 38.40.090 (1977). The key provision of "Alaska Hire," as the Act has come to be known, is the requirement that "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" contain a provision "requiring the employment of qualified Alaska residents" in preference to nonresidents.[1] Alaska Stat Ann § 38.40.030(a) (1977).[2] This employment preference is administered by providing persons meeting the statutory requirements for Alaskan residency with certificates of residence—"resident cards"—that can be presented to an employer covered by the Act as proof of residency. 8 Alaska Admin Code 35.015 (1977). Appellants, individuals desirous of securing jobs covered by the Act but unable to qualify for the necessary resident cards, challenge Alaska Hire as violative of

[437 US 521]

both the Privileges and Immunities Clause of Art IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment.

I

Although enacted in 1972, Alaska Hire was not seriously enforced until 1975, when construction on the Trans-Alaska Pipeline[3] was reaching its peak. At that time, the State Department of Labor began issuing residency cards and limiting to resident cardholders the dispatchment to oil pipeline jobs. On March 1, 1976, in response to "numerous complaints alleging that persons who are not Alaska residents have been dispatched on pipeline jobs when *qualified* Alaska residents were

1. The regulations implementing the Act further require that all nonresidents be laid off before any resident "working in the same trade or craft" is terminated: "[T]he nonresident may be retained only if no resident employee is qualified to fill the position." 8 Alaska Admin Code 35.011 (1977). See also 8 Alaska Admin Code 35.042(4) (1977).

2. The complete text of § 38.40.030(a) is as follows:

"In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into 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, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

3. See Trans Alaska Pipeline Rate Cases, 436 US 631, 56 L Ed 2d 591, 98 S Ct 2053 (1978); Trans-Alaska Pipeline Authorization Act, 87 Stat 584, 43 USC §§ 1651 et seq. (1970 ed Supp VI) [43 USCS §§ 1651 et seq.].

available to fill the jobs," Executive Order #76-[illegible] Alaska Dept. of Labor (Mar. 1, 1976) (emphasis in original), Edmund Orbeck, the Commissioner of Labor and one of the appellees here, issued a cease-and-desist order to all unions supplying pipeline workers[4] enjoining them "to respond to all open job calls by dispatching *all qualified* Alaska residents before *any* non-residents are dispatched." Ibid. (emphasis in original). As a result, the appellants, all but one of whom had previously worked on the pipeline, were prevented from obtaining pipeline-related work. Consequently, on April 28, 1976, appellants filed a complaint in the Superior Court in Anchorage seeking declaratory and injunctive relief against enforcement of Alaska Hire.

At the time the suit was filed, the provision setting forth the qualifications for Alaska residency for purposes of Alaska

[437 US 522]

Hire, Alaska Stat Ann § 38.40.090,[5] included a one-year durational residency requirement. Appellants attacked that requirement as well as the flat employment preference given by Alaska Hire to state residents. By agreement of the parties, consideration of a motion for a preliminary injunction was consolidated with the determination of the suit on its merits. The case was submitted on affidavits, depositions, and memoranda of law; no oral testimony was taken. On July 21, 1976, the Superior Court upheld Alaska Hire in its entirety and denied appellants all relief. On appeal, the Alaska Supreme Court unanimously held that Alaska Hire's one-year durational residency requirement was unconstitutional under both the State and Federal Equal Protection Clauses, 565 P2d 159, 165 (1977), and held further that a durational residency requirement in excess of 30 days was constitutionally infirm. Id., at 171.[6] By a vote of 3 to 2, however, the court held that the Act's general preference for Alaska residents was constitutionally permissible. Appellants appealed the State Supreme Court's judgment insofar as it embodied the latter holding, and we noted probable jurisdiction. 434 US 919, 54 L Ed 2d 275, 98 S Ct 391 (1977). We reverse.

[437 US 523]

II

[1a] Preliminarily, we hold that this case is not moot. Despite the Alaska Supreme Court's invalidation of the one-year durational residency requirement, a controversy still exists between at least five of the appellants—Tommy Ray Woodruff, Frederick A. Mathers, Emmett Ray, Betty Cloud, and Joseph G. O'Brien—and the state appellees. These five appellants have all sworn that they are not residents of Alaska, Record 43, 47, 49, 96, 124. Therefore, none of them can satisfy the element of the definition of "resident" under § 38.40.090(1)(D) that requires that an individual "has not, within the period of required residency, claimed residency in another state." They thus have a continuing interest in restraining the enforcement of Alaska Hire's discrimination in favor of residents of that State.[7]

[2, 3a] Appellants' principal challenge to Alaska Hire is made under the Privileges and Immunities Clause of Art IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." That provision, which "appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause," Baldwin v Montana Fish and Game Comm'n, 436 US 371, 379, 56 L Ed 2d 354, 98 S Ct 1852 (1978), "establishes a norm of comity," Austin v New Hampshire, 420 US 656, 660, 43 L Ed 2d 530, 95 S Ct 1191 (1975), that is to prevail among the States with respect to their treatment

[437 US 524]

of each other's residents.[8] The purpose of the Clause, as described in Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869), is

> "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute

4. App 13–14. The vast majority of pipeline jobs were filled through union dispatchment. Deposition of David Finrow, Deputy Director of the Wage and Hour Division of the Alaska Dept. of Labor, in No. 3025 (Sup Ct Alaska), pp 16–19, 28, 48.

5. Section 38.40.090 provides:
"In this chapter
"(1) 'resident' means a person who
"(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;
"(B) maintains a place of residence in the state;
"(C) has established residency for voting purposes in the state;
"(D) has not, within the period of required residency, claimed residency in another state; and
"(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence."

6. Appellees have not cross-appealed this portion of the Alaska Supreme Court's decision, which rests upon an independent and adequate state ground. Murdock v Memphis, 20 Wall 590, 22 L Ed 429 (1875).

7. **[1b]** As to the remaining three appellants—Sidney S. Hicklin, Ruby E. Dorman, and Harry A. Browning—the case does appear moot. At the time this suit was instituted, all three claimed to be Alaskan residents, but none had lived in the State continuously for one year. Record 45, 51–52, 126–127. Consequently, the only aspect of Alaska Hire they challenged was the Act's one-year durational residency requirement. When this requirement was held invalid by the Alaska Supreme Court, their controversy with the appellees seems to have terminated.

8. **[3b]** Although this Court has not always equated state residency with state citizenship, compare Travis v Yale & Towne Mfg Co. 252 US 60, 78–79, 64 L Ed 460, 40 S Ct 228 (1920), and Blake v McClung, 172 US 239, 246–247, 43 L Ed 432, 19 S Ct 165 (1898), with Southern R. Co. v Mayfield, 340 US 1, 3–4, 95 L Ed 3, 71 S Ct 1 (1950); Douglas v New Haven R. Co. 279 US 377, 386–387, 73 L Ed 747, 49 S Ct 355 (1929); and La Tourette v McMaster, 248 US 465, 469–470, 63 L Ed 362, 39 S Ct 160 (1919), it is now established that the terms "citizen" and "resident" are "essentially interchangeable," Austin v New Hampshire, 420 US 656, 662 n 8, 43 L Ed 2d 530, 95 S Ct 1191 (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause of Art IV, § 2. See Toomer v Witsell, 334 US 385, 397, 92 L Ed 1460, 68 S Ct 1156 (1948).

. the citizens of the United States one people as this."

Appellants' appeal to the protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State. For example, in Ward v Maryland, 12 Wall 418, 20 L Ed 449 (1871), a Maryland statute regulating the sale of most goods in the city of Baltimore fell to the privileges and immunities challenge of a New Jersey resident against whom the law discriminated. The statue discriminated

[437 US 525]

against nonresidents of Maryland in several ways: It required nonresident merchants to obtain licenses in order to practice their trade without requiring the same of certain similarly situated Maryland merchants; it charged nonresidents a higher license fee than those Maryland residents who were required to secure licenses; and it prohibited both resident and nonresident merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the city. In holding that the statute violated the Privileges and Immunities Clause, the Court observed that "the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." Id., at 430, 20 L Ed 449. Ward thus recognized that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.

Again, Toomer v Witsell, 334 US 385, 92 L Ed 1460, 68 S Ct 1156 (1948), the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents, invalidated a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," id., at 396, 92 L Ed 1460, 68 S Ct 1156, "[i]t 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." Ibid. A "substantial reason for the discrimination" would not exist, the Court explained, "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the

[437 US 526]

[discriminatory] statute is aimed." Id., at 398, 92 L Ed 1460, 68 S Ct 1156. Moreover, even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." Id., at 399. 92 L Ed 1460, 68 S Ct 1156. Toomer's analytical framework was confirmed in Mullaney v Anderson, 342 US 415, 96 L Ed 458, 72 S Ct 428 (1952), where it was applied to invalidate a

scheme used by the Territory of Alaska for the licensing of commercial fishermen in territorial waters; under that scheme residents paid a license fee of only $5 while nonresidents were charged $50.

[4a, 5] Even assuming that a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents —an assumption made at least dubious by Ward[9]—it is clear that under the Toomer analysis reaffirmed in Mullaney, Alaska Hire's discrimination against nonresidents cannot withstand scrutiny under the Privileges and Immunities Clause. For although the statute may not violate the Clause if the State shows "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed," Toomer v Witsell, supra, at 398, 92 L Ed 1460, 68 S Ct 1460, and, beyond this, the State "has no burden to prove that its laws are not violative of the . . . Clause," Baldwin v Montana Fish and Game Comm'n, 436 US, at 402, 56 L Ed 2d 354, 98 S Ct 1852 (Brennan, J., dissenting), certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat Ann § 38.40.020 (1977). What evidence the record does contain indicates 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 t

[437 US 527]

secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities;[10] and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

Moreover, even if the State's showing is accepted as sufficient to indicate that nonresidents were "a peculiar source of evil," Toomer and Mullaney compel the conclusion that Alaska Hire nevertheless fails to pass constitutional muster. For the discrimination the Act works against nonresidents does not bear a substantial relationship to the particular "evil" they are said to present. Alaska Hire simply grants all Alas-

9. Cf. Edwards v California, 314 US 160, 86 L Ed 119, 62 S Ct 164 (1941).

10. For example, a report quoted in the State's Memorandum in Opposition to Plaintiffs' Motion for Partial Preliminary Injunction and Second Motion for Preliminary Injunction, Record 58, observed:
"The skill levels of in-migrants and seasonal workers are generally higher than those of the unemployed or under-employed resident workers. *Their ability to command jobs in Alaska is a symptom of, rather than the cause of conditions resulting in high unemployment rates,* particularly among Alaska Natives. Those who need the jobs the most tend to be undereducated, untrained, or living in areas of the state remote from job opportunities. Unless unemployed residents—most of whom are Eskimos and Indians—have access to job markets and receive the education and training required to fit them into Alaska's increasingly technological economy and unless there is a restructuring of labor demands, new jobs will continue to be filled by persons from other states who have the necessary qualifications." Federal Field Committee for Development Planning in Alaska, Economic Outlook for Alaska 311-2 2 (1971) (emphasis added; footnote omitted).

kans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. 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. If

[437 US 528]

Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

[4b, 6] Relying on McCready v Virginia, 94 US 391, 24 L Ed 248 (1877), however, Alaska contends that because the oil and gas that are the subject of Alaska Hire is *owned* by the State,[11] this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause. As the State sees it "the privileges and immunities clause [does] not apply, and was never meant to apply, to decisions by the states as to how they would permit, if at all, the use and distribution of the natural resources which they own . . . ." Brief for Appellees 20 n 14. We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause. Although some courts, including the court below, have read McCready as creating an "exception" to the Privileges and Immunities Clause, we have just recently confirmed that "[i]n more recent years . . . the Court has recognized

[437 US 529]

that the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute." Baldwin v Montana Fish and Game Comm'n, 436 US, at 385, 56 L Ed 2d 354, 98 S Ct 1852. Rather than placing a statute completely beyond the Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause. Dispositive though this factor may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

The reason is that Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State's oil and gas

11. At the time Alaska was admitted into the Union on January 3, 1959, 99% of all land within Alaska's borders was owned by the Federal Government. In becoming a State, Alaska was granted and became entitled to select approximately 103 million acres of those federal lands. Alaska Statehood, 72 Stat 340, § 6, note preceding 48 USC § 21 [48 USCS § 21]. The selection process is not yet complete, but since 1959 large portions of land have been conveyed to the State, in fee, by the Federal Government. Full title to those lands and to the minerals on and below them is vested in the State. 72 Stat 342, § 6(i), note preceding 48 USC § 21 [48 USC § 21].

with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents. The extensive reach of Alaska Hire is set out in Alaska Stat Ann § 38.40.050(a) (1977). That section provides:

"The provisions of this chapter apply to *all employment which is a result* of oil and gas leases, easements, leases or right-of-way permits *for oil or gas pipeline purposes,* unitization agreements[12] or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must

[437 US 530]

take place either on the property under the control of the person subject to this chapter *or be directly related to activity taking place on the property under his control* and the activity must be performed directly for the person subject to this chapter *or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.*" (Emphasis added.)

Under this provision, Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil and gas or ever set foot on state land.[13] Moreover, the Act's coverage is not limited to activities connected with the extraction of Alaska's oil and gas.[14] It encompasses, as emphasized by the dissent below, "employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases." 565 P2d, at 171. The only limit of any consequence on the Act's reach is the requirement that "the

[437 US 531]

activity which generates the employment must take place inside the state." Although the absence of this limitation would be noteworthy, its presence hardly is; for it simply prevents Alaska Hire from having what would be the surprising effect of re-

12. The term "unitization agreement" is not defined in the Act. Alaska's Commissioner of Natural Resources gave the following definition of the term:
"Well, unitization agreement is an agreement between the operators and any given oil field as to the equity that each of them would have with respect to the oil and gas resources in that field. And in some cases that word is used to also include something called the 'Plan of Operations', which sets out the way in which an oil field or gas field would be operated pursuant to the State's conservation laws." Deposition of Guy R. Martin in No. 3025 (Sup Ct Alaska), p 5.

13. According to one of the administrative regulations implementing Alaska Hire, "[a]uppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor." 8 Alaska Admin Code 35.080(a) (1977).

14. The Commissioner of Natural Resources expressed this understanding of the scope of the Act:
Mr Martin: ". . . I think it would cover relationships such as anything on a work pad or an associated construction road or possibly a site for a support camp or construction camp."
Mr. Wagstaff (attorney for appellants): "What about things such as docks if shipping is being used?"
Mr. Martin: "I would think that it could possibly include that." Deposition of Guy R. Martin, supra, at 4.

quiring potentially covered our-of-state employers to discriminate against residents of their own State in favor of nonresident Alaskans. 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.[15]

Although appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art IV and the Commerce Clause—a relationship that stems from their common

[437 US 532]

origin in the Fourth Article of the Articles of Confederation[16] and their shared vision of federalism, see Baldwin v Montana Fish and Game Comm'n, 436 US, at 379–380, 56 L Ed 2d 354, 98 S Ct 1852 renders several Commerce Clause decisions appropriate support for our conclusion. West v Kansas Natural Gas, 221 US 229, 55 L Ed 716, 31 S Ct 564 (1911), struck down an Oklahoma statutory scheme that completely prohibited the out-of-state shipment of natural gas found within the State. The Court reasoned that if a State could so prefer its own economic well-being to that of the Nation as a whole, "Pennsylvania might keep its coal, the Northwest its timber, [and] the mining States their minerals," so that "embargo may be retaliated by embargo" with the result that "commerce [would] be halted at state lines." Id., at 255, 55 L Ed 716, 31 S Ct 564. West was held to be

15. Heim v McCall, 239 US 175, 60 L Ed 206, 36 S Ct 78 (1915) and Crane v New York, 239 US 195, 60 L Ed 218, 36 S Ct 85 (1915)—if they have any remaining vitality, see Sugarman v Dougall, 413 US 634, 643–645, 37 L Ed 2d 853, 93 S Ct 2842 (1973); C. D. R. Enterprises, Ltd. v Board of Education, 412 F Supp 1164 (EDNY 1976), summarily affd sub nom Lefkowitz v C. D. R. Enterprises, Ltd. 429 US 1031, 50 L Ed 2d 742, 97 S Ct 721 (1977)—do not suggest otherwise. In those cases, a New York statute that limited employment "in the construction of public works" to United States citizens and also required that an employment preference be given to New York citizens in such projects was upheld against challenges under both the Constitution and the Treaty of 1871 with Italy. Although the Art IV, § 2, Privileges and Immunities Clause, along with the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, was listed as one of the constitutional bases for attacking the statute, no out-of-state United States citizen challenged the law. As a consequence, both the appellants and the Court were concerned almost exclusively with the statute's discrimination against resident aliens. This was reflected in the Court's holding, which was limited to the Fourteenth Amendment and Treaty challenges and expressed no view on appellants' passing Art IV, § 2, privileges and immunities claim.

16. That Article provided: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition duties, or restriction, shall be laid by any State on the property of the United States, or either of them." 9 Journal of the Continental Congress 908–909 (1777) (Library of Congress ed, 1907).

controlling in Pennsylvania v West Virginia, 262 US 553, 67 L Ed 1117, 43 S Ct 658, 1 Ohio L Abs 627, 32 ALR 300 (1923), where a West Virginia statute that effectively required natural gas companies within the State to satisfy all fuel needs of West Virginia residents before transporting any natural gas out of the State was held to violate the Commerce Clause. West and Pennsylvania v West Virginia thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even

[437 US 533]

principally for that State's residents. Foster Packing Co. v Haydel, 278 US 1, 73 L Ed 147, 49 S Ct 1 (1928), went one step further; it limited the extent to which a State's purported *ownership* of certain resources could serve as a justification for the State's economic discrimination in favor of residents. There, in the face of Louisiana's claim that the State owned all shrimp within state waters, the Court invalidated a Louisiana law that required the local processing of shrimp taken from Louisiana marshes as a prerequisite to their out-of-state shipment. The Court observed that "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." Id., at 13, 73 L Ed 147, 49 S Ct 1.

[7] West, Pennsylvania v West Virginia, and Foster Packing thus establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce. Like Louisiana's shrimp in Foster Packing, Alaska's oil and gas here are bound for out-of-state consumption. Indeed, the construction of the Trans-Alaska Pipeline, on which project appellants' nonresidency has prevented them from working, was undertaken expressly to accomplish this end.[17] Although the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource. Here, the oil and gas upon

[437 US 534]

which Alaska hinges its discrimination against nonresidents are of profound national importance.[18]

17. In authorizing the construction of the Trans-Alaska Pipeline, Congress expressly found that "[t]he early development and delivery of oil and gas from Alaska's North Slope *to domestic markets* is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 USC § 1651(a) (1970 ed Supp V) [43 USCS § 1651(a)] (emphasis added).

18. In enacting the Alaska Natural Gas Transportation Act of 1976, 15 USC §§ 719 et seq. [15 USCS §§ 719 et seq.], Congress declared:

"(1) a natural gas supply shortage exists in the contiguous States of the United States;

"(2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;

"(3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and

"(4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and

On the other hand, the breadth of the discrimination mandated by Alaska Hire goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support. The confluence of these realities points to but one conclusion: Alaska Hire cannot withstand constitutional scrutiny. As Mr. Justice Cardozo observed in Baldwin v G. A. F. Seelig, 294 US 511, 523, 79 L Ed 1032, 55 S Ct 497, 101 ALR 55 (1935), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[19]

Reversed.

environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system." 15 USC § 719 (1976 ed) [15 USCS § 719]. See n 17, supra.

19. In light of our conclusion that Alaska Hire is invalid under the Privileges and Immunities Clause of Art IV, § 2, we have no occasion to address appellants' challenges to the Act under the Equal Protection Clause of the Fourteenth Amendment.

[437 US 535]

WES WISE, Mayor of the City of Dallas, et al., Petitioners,

v

ALBERT L. LIPSCOMB et al.

437 US 535, 57 L Ed 2d 411, 98 S Ct 2493

[No. 77-529]

Argued April 26, 1978. Decided June 22, 1978.

SUMMARY

In an action by certain minority-race residents of Dallas, Texas, against the Mayor of Dallas and members of the Dallas City Council, the United States District Court for the Northern District of Texas held that the at-large system of electing City Council members, as mandated in the city charter, unconstitutionally diluted the voting strength of Negro citizens, the court then affording the City Council an opportunity to prepare a constitutional reapportionment plan. Thereafter, the City Council proposed an ordinance that would provide for eight Council members to be elected from single-member districts and for the remaining three members, including the Mayor, to be elected at large; the District Court approved the plan; the City Council formally enacted the ordinance; and the District Court issued an opinion sustaining the Council's plan as a valid legislative act, notwithstanding state constitutional and statutory provisions requiring a vote of the people to amend the city charter (399 F Supp 782). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that the District Court had erred by evaluating the Council's actions only under constitutional standards rather than also applying the principle that absent exceptional circumstances, "judicially imposed" reapportionment plans should employ single-member districts (551 F2d 1043).

On certiorari, the United States Supreme Court reversed and remanded. Although unable to agree on an opinion, six members of the court agreed that the "eight/three" ordinance was a "legislative plan" to be judged under constitutional standards, rather than a "judicial plan" subject to the stricter standards requiring single-member districts in the absence of special circumstances, and all of the members of the court agreed that questions concerning the effect on the instant case of the requirement of federal approval of

Briefs of Counsel, p 1194, infra.

f under rule 60(b)(6), nor did his report ess the plaintiff's rule 60(b)(6) argu- ts. We granted the plaintiff's petition direct appellate review. We reverse.

] Rule 60(b)(4) allows relief only from judgments. A court must vacate a judgment. It may not vacate a valid No discretion is granted by the rule. Reporters' Notes to Mass.R.Civ.P.)(4), Mass.Ann.Laws, Rules of Civil and ellate Procedure at 586 (Law.Co-op. 2).

2, 3] The plaintiff argues that because medical malpractice tribunal "did not e subject matter jurisdiction" the judg- its entered in the Superior Court are l. But she errs, as did the Superior rt judge, by focusing on the *tribunal's* hority. Rule 60(b)(4) concerns the au- ity of *courts*. The Superior Court —and indeed still has—jurisdiction over plaintiff's civil action. "Jurisdiction cerns and defines the power of courts, ompassing the power to inquire into s, apply the law, make decisions and lare judgment." *Police Comm'r of ston v. Municipal Court of the Dor- ster Dist.*, 374 Mass. 640, 662, 374 .2d 272 (1978). Since the Superior rt had the authority to declare the judg- its, they are not void, and rule 60(b)(4) rds the plaintiff no relief.

he plaintiff's real complaint is that the erior Court judge erred by convening medical malpractice tribunal. We ex- ss no opinion about that contention ex- t that it is not relevant to a rule 60(b)(4) tion. "A void judgment is to be distin- shed from an erroneous one ...." *bben v. Selective Serv. Sys. Local Bd.* . 27, 453 F.2d 645, 649 (1st Cir.1972).

Because the Superior Court judge did not dress the plaintiff's rule 60(b)(6) argu- nt, we do not reach it. Nor need we ch the reported questions. See *Stowe v. Bornstein*, 377 Mass. 804, 805 2, 388 N.E.2d 674 (1979). We reverse e order of the Superior Court judge va- ting the judgments entered in favor of e doctors, and remand the case to the Superior Court for further proceedings not inconsistent with this opinion.

So ordered.

393 Mass. 1201

OPINION OF THE JUSTICES TO THE SENATE.

Supreme Judicial Court of Massachusetts.

Oct. 4, 1984.

Question was propounded by Senate to justices of the Supreme Judicial Court relating to pending bill which, if enacted, would require private contractors on state-funded projects in critical unemployment areas to employ Commonwealth residents in at least 80% of jobs covered by the contract or subcontract. The justices of the Supreme Judicial Court were of the opinion that the bill would violate privileges and immunities clause of Federal Constitution.

Question answered.

1. Constitutional Law ⇨207

Terms "citizen" and "resident" are essentially interchangeable for purposes of analysis of most cases under the privileges and immunities clause of the United States Constitution. U.S.C.A. Const. Art. 4, § 2, cl. 1.

2. Constitutional Law ⇨207(1)

Privileges and immunities clause of the Federal Constitution was intended to fu collection of independent states in nation and was designed to citizen of one state who other state is accorde joyed by citizens of t Const. Art. 4, § 2, cl. 1.

3. Constitutional Law ⇐207(2)

Bill in State Legislature that would mandate that private contractors on state-funded projects in critical unemployment areas employ state residents in at least 80% of employment positions covered by contract or subcontract burdened a protected privilege within scope of privileges and immunities clause of Federal Constitution, since opportunity to seek employment with private contractors and subcontractors engaged in public works projects was sufficiently basic to livelihood of nation. U.S. C.A. Const. Art. 4, § 2, cl. 1.

4. Constitutional Law ⇐207(1)

Privileges and immunities clause of Federal Constitution bans discrimination by one state against resident of another state if there is no substantial reason for discrimination other than fact of citizenship in another state, but does not prohibit discrimination based upon perfectly valid independent reasons. U.S.C.A. Const. Art. 4, § 2, cl. 1.

5. Constitutional Law ⇐207(2)

Bill in State Legislature that would mandate that private contractors on state-funded projects in critical unemployment areas employ state residents in at least 80% of jobs covered by contract or subcontract would violate privileges and immunities clause of Federal Constitution, since, even if there were substantial reason beyond nonresidence to justify discrimination against residents of other states, magnitude of discrimination would not bear sufficiently close relationship to that reason. U.S.C.A. Const. Art. 4, § 2, cl. 1.

To the Honorable the Senate of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit their responses to the questions set forth in an order adopted by the Senate on July 3, 1984, and transmitted to this court on July 25, 1984.[1] The order indicates that there is pending before the General Court a bill printed Senate No. 2166 entitled, "An Act to crease opportunities for Massachusetts idents on state-funded projects." A of the bill was transmitted with the or The order recites that: "Said bill w require, in part, that during periods of ical unemployment as defined by the c missioner of the division of labor and in tries, any contract or subcontract for provision of services with respect to a s funded project shall provide that at l eighty percent of the employment posit covered by the contract or subcontract to residents of the commonwealth ..

The order also indicates that grave do exists as to the constitutionality of the l if enacted into law, and requests our o ion on these questions:

"1. Would the enactment of said which, in part, mandates that priv contractors on state funded projects critical unemployment areas shall emp commonwealth residents in at le eighty percent of the employment p tions covered by the contract or subc tract violate the United States Const tion, Art. IV, Sec. 2, cl. 1, or Article of part 1 of the Massachusetts Consti tion?

"2. Would the enactment of said which, in part, mandates that priv contractors on state funded projects critical unemployment areas shall emp commonwealth residents in at le eighty percent of the employment p tions covered by the contract or subc tract violate the United States Consti tion, Art. 1, Sec. 8, cl. 3?"

[1, 2] We first examine the bill und the privileges and immunities clause (art § 2, cl. 1) of the United States Constituti "The Citizens of each State shall be entit to all Privileges and Immunities of Citiz in the several States." The terms "citize and "resident" are "'essentially int changeable' ... for purposes of analysis most cases under the ... Clause ... *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.

1. We invited interested persons to file briefs on or before August 31, 1984, and we acknowledge the assistance of a brief from the New Engl Legal Foundation.

98 S.Ct. 2482, 2486 n. 8, 57 L.Ed.2d 397 (1978). The clause was intended to fuse a collection of independent States into one nation and was designed to ensure that a citizen of one State who ventures into another State is accorded the same privileges enjoyed by the citizens of that State. See *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161, 92 L.Ed. 1460 (1948). The pending bill, according to its title, is intended "to increase opportunities for Massachusetts residents on state-funded projects."[2] We are called upon to determine whether these distinct and significant interests would conflict and, if so, whether our constitutional system requires that one of them be accorded greater weight.

[3] We observe initially that the bill would burden a protected privilege because the opportunity to seek employment with private contractors and subcontractors engaged in public works projects is "sufficiently basic to the livelihood of the Nation" as to be within the scope of the clause. *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden*, — U.S. —, 104 S.Ct. 1020, 1029, 79 L.Ed.2d 249 (1984), quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 388, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978). See *Hicklin v. Orbeck*, 437 U.S. 518, 524–525, 98 S.Ct. 2482, 2486–2487, 57 L.Ed.2d 397 (1978).

[4] The analytical framework which guides our review under the clause is that established in *Toomer v. Witsell*, *supra*, and later applied in both *Hicklin v. Orbeck*, *supra*, and in *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden*, *supra*.[3] The clause bans discrimination against a resident of another State if there is no substantial reason for it other than the fact of citizenship in another State, but it does not prohibit discrimination based upon "perfectly valid independent reasons." *Toomer v. Witsell*, *supra*, 334 U.S. at 396, 68 S.Ct. at 1162. "[T]he inquiry ... must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Id.* The Court, in restating the purpose of the clause, indicated that it "is to outlaw classifications based on ... noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398, 68 S.Ct. at 1163. The *Hicklin* Court intertwined the concepts and stated that "[a] 'substantial reason for the discrimination' would not exist ... 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil ....'" *Hicklin v. Orbeck*, *supra*, 437 U.S. at 525, 526, 98 S.Ct. at 2487, 2488.

[5] We now consider whether there is a substantial reason for the discrimination beyond the fact of residence in another State. We have before us no record of legislative findings, indeed no factual record of any kind. The proposed statutory preference for Commonwealth residents,

2. We assume that the bill is intended, at least in part, to alleviate unemployment because it would take effect only in areas of critical unemployment conditions. We expect that a bill intended merely to increase employment opportunities would not need to be structured as this one is.

3. The court followed this pattern of inquiry in *Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 473–478, 425 N.E.2d 346 (1981), in which the court concluded that a statutory preference for residents for certain positions in hiring on State-funded construction projects conflicted with the clause. Certiorari was granted to consider whether the commerce clause prevented the city of Boston from giving effect to an executive order by the mayor and the judgment was reversed. The United States Supreme Court did not review that portion of the opinion based upon the privileges and immunities clause. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 206, 103 S.Ct. 1042, 1043, 75 L.Ed.2d 1 (1983).

The court also employed this pattern in upholding a challenge to the constitutionality of our rule that an attorney seeking admission to the bar on motion must be a resident. *Matter of Jadd*, 391 Mass. 227, 461 N.E.2d 760 (1984). See also *Matter of Gordon*, 48 N.Y.2d 266, 422 N.Y.S.2d 641, 397 N.E.2d 1309 (1979) (statute prohibiting admission to the bar absent proof of six months' residence violates clause).

applicable to at least eighty per cent of the positions covered by a governed contract or subcontract, would be triggered by a finding by the Commissioner of Labor and Industries (commissioner) that critical unemployment conditions exist in an employment area and that employment opportunities for Commonwealth residents "are decreased due to the employment of nonresidents ... in that area ...." [4] It can be argued that the resulting preference or discrimination is obviously based solely on nonresidence. Nevertheless, the Supreme Court has not terminated its review at this point. In determining whether there was a "substantial reason for the discrimination," the *Hicklin* Court looked to whether noncitizens were a "peculiar source of the evil" (and concluded that no such showing had been made on the record). *Hicklin v. Orbeck*, *supra* at 525–526, 98 S.Ct. at 2587–2588. The Court in the *United Bldg.* case clearly sought to consider Camden's justification, but found it impossible to do so on the record. *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden*, *supra*, 104 S.Ct. at 1030. In following this pattern we will assume that a finding by the commissioner might, in certain circumstances, show that nonresidents are a "peculiar source of the evil." [5]

If we assume that a substantial reason beyond nonresidence were shown, the question at issue would then become that of determining whether the degree of discrimination bears a close relationship to that reason.[6] We have no assurance that the magnitude of the preference (eighty per cent of governed positions) would bear a close relationship to the reason justifying the discrimination. Moreover, all Massachusetts residents, without regard for whether they lived in the subject employment area and no matter what their employment status, education, training, or experience, would have the benefit of the preference. No distinction is made between residents who do and do not live in the area at issue or between those who are employed and those who are unemployed or are in employment training programs. The *Hicklin* Court, in reviewing a statutory preference for all Alaskans for all covered positions, stated that the means by which the State sought to reduce its level of unemployment "must be more closely tailored to aid the unemployed the Act is intended to benefit." *Hicklin v. Orbeck*, *supra*, 437 U.S. at 528, 98 S.Ct. at 2488. Although the preference before us is not so widely drawn, we nevertheless consider that comment to be instructive. Preferring employed residents would not directly serve to reduce unemployment in an area, although it could serve to increase employment opportunities for some persons. Nevertheless, the degree of discrimination must bear a close relationship to the justification. The emphasis in the bill on employment areas and critical unemployment conditions suggests the expectation that it will be of particular assistance to the unemployed. We conclude that even if we assume that a substantial reason, beyond nonresidence, were shown to justify the discrimination, the degree of discrimination

4. The bill defines "[c]ritical unemployment conditions" as "the occurrence of a rate of unemployment within an employment area ... which is equal to or greater than one hundred and twenty percent of the average rate of unemployment in the commonwealth or in the United States, whichever is lower, during the same period."

5. There is no assurance that the finding will not be merely conclusory. It is possible that the unemployment rate in an area may vastly exceed the percentage of positions held by nonresidents, and that the types of positions held by nonresidents may be different in nature from those for which Massachusetts residents are both available and appropriately trained. It is also possible that employment of nonresidents might be the result of such factors as too few trained applicants in the local labor force rather than the cause of unemployment in the local area, so that the level of local unemployment may not be directly related to the employment of nonresidents. In short, a conclusory finding might not show that nonresidents are a "peculiar source of the evil."

6. The *Hicklin* Court spoke of a "reasonable relationship" (*id.* 437 U.S. at 526, 98 S.Ct. at 2487), but this is not necessarily part of the *Toomer* standard.

would not bear a sufficiently close relationship to that reason (presumably based upon the finding required by the bill that "employment opportunities for ... residents are decreasing due to the employment of nonresidents").[7] As a result, we conclude that the bill would violate the privileges and immunities clause of the United States Constitution.

Our conclusion is consistent with those reached in other jurisdictions. The Washington Supreme Court held that a requirement in all contracts let by the State or any county or city for certain projects that the contractor or subcontractor must employ either ninety-five or ninety per cent residents violated the clause. *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wash.2d 121, 654 P.2d 67 (1982). A New Jersey court, reviewing a requirement that preference be given to residents in certain construction contracts awarded by the State or other public bodies, determined it to be in conflict with the clause. *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super. 376, 437 A.2d 733 (1981). In addition, a New York statute mandating preferential employment of residents on public works projects was held to be a violation of the clause. *Salla v. County of Monroe*, 48 N.Y.2d 514, 518, 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979), cert. denied sub nom. *Abrams v. Salla*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 262 (1980) (focusing, in part, on the absence of a "unique link between the interest served and the discrimination practiced").

We next consider whether and to what extent the Commonwealth's proprietary interest in State-funded contracts may render the discrimination nonviolative of the clause. The bill would apply to State-funded projects and the preference requirement would be applicable to contracts and subcontracts. In contrast, the statute at issue in *Hicklin* applied "to all employment which is a result of oil and gas leases ...." *Id.*, 437 U.S. at 529, 98 S.Ct. at 2489. The Court stated that it included employers who had no connection with the State's oil and gas, performed no work on State land, had no contractual relationship with the State, and who received no payment from the State. *Id.* at 530, 98 S.Ct. at 2489. State ownership of the property was not dispositive because Alaska had little or no proprietary interest in much of the encompassed activity and much of the activity was "sufficiently attenuated" that it could not "justifiably be the basis for requiring private employers to discriminate against nonresidents." *Id.* at 529, 98 S.Ct. at 2489. The impact of the bill at issue would not be that extensive, so the *Hicklin* determination that ownership was an insufficient justification for the pervasive discrimination is informative but not dispositive. Thus, the question remains, whether the Commonwealth's proprietary interest insulates the discrimination. We have also considered the Court's review of this issue in the *United Bldg.* case wherein the Court acknowledged that the fact that Camden was expending its own funds was a factor and perhaps the crucial factor to be considered; and then sought to apply the *Toomer* standards to the city's justification (concluding that it would not do so on the record before it). *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden, supra*, 104 S.Ct. at 1029–1030. From this review, we know that the Commonwealth's interest in the expenditure of State funds is a factor to be evaluated and that we must again look to whether the degree of discrimination bears a close relationship to the justification.[8] We have already determined that the magnitude of the discrimination does not bear the requisite relationship to the rationale. We also conclude, for the same reason, that the Commonwealth's interest in assuring that its limited resources are preserved for

7. See also *Rubin v. Glaser*, 83 N.J. 299, 305–306, 416 A.2d 382 (1980), and *Lang v. O'Chesky*, 94 N.M. 802, 804, 617 P.2d 1317 (1980), in which the relationships were found to be sufficiently close.

8. The strength of the proprietary interest argument is reduced if, as the bill would permit, the "State-funded project" were financed only in part by Commonwealth funds.

the benefit of its residents would not preclude the bill's violating the clause.

In *Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 477–478, 425 N.E.2d 346 (1981), the court rejected a contention that the absolute employment preference might be justified under the clause by the Commonwealth's role as a market participant. A different result is not warranted by the terms of the pending bill. See also *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden, supra.*

We have sought to fulfil our responsibility to conduct this inquiry with an appropriate regard for the principle that the Commonwealth "should have considerable leeway in analyzing local evils and in prescribing appropriate cures." See *Toomer v. Witsell, supra*, 334 U.S. at 396, 68 S.Ct. at 1162. We recognize this leeway as being an essential component of our Federal system. Nevertheless, we have also been guided by the underlying purpose of the privileges and immunities clause. We have sought to discern the appropriate relationship between such constitutional values as protection of nonresidents and respect for State autonomy.

For the reasons set forth above, we conclude, and in response to question 1 state, that the bill would, if enacted into law, violate the privileges and immunities clause, art. 4, § 2, cl. 1, of the United States Constitution. As a result, we beg to be excused from answering the remaining questions.

The foregoing opinion and answer is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 4th day of October, 1984.

EDWARD F. HENNESSEY
HERBERT P. WILKINS
PAUL J. LIACOS
RUTH I. ABRAMS
JOSEPH R. NOLAN
NEIL L. LYNCH
FRANCIS P. O'CONNOR

393 Mass. 127

COMMONWEALTH

v.

Sandy SUMERLIN.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued May 8, 1984.

Decided Oct. 10, 1984.

Defendant was indicted for unlawfully carrying pistol on his person and moved to suppress as evidence pistol seized by police. The Superior Court, Suffolk County, Richard S. Kelley, J., allowed motion, and the Appeals Court, 17 Mass.App. 1108, 458 N.E.2d 795, summarily affirmed, and the Commonwealth appealed. The Supreme Judicial Court, Abrams, J., held that officer had duty to investigate illegally parked automobile in high crime area where shootings had occurred and, having seen defendant enter vehicle on passenger side carrying bag, had right to open right front door of automobile and pat down bag for weapons.

Reversed and remanded.

1. Searches and Seizures ⇐7(29)

Burden of proof is on Commonwealth to establish reasonableness of warrantless search. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐1158(1)

Subsidiary findings of fact made by judge will be accepted on appeal, absent clear error.

3. Arrest ⇐63.5(8)

Officer had duty to investigate automobile parked with its lights out on wrong side of street with its left wheels on sidewalk and with person seated in driver's seat having his head resting back on top of driver's seat, and on observing defendant enter passenger side of vehicle carrying

HB 294 File Contents

1) Bill Summary -- Legislative Reporting Service

2) Overview -- Roger Poppe, Committee Staff

3) Fiscal Note and Position Paper -- Department of Labor, March 18

4) Backup Material -- Rep. Boucher

   a) Press Release--Rep. Boucher, Alaska Hire Legis., March 15,85
   b) Press Release--Gov. Sheffield, Job Survey Results, March 15
   c) Newspaper clippings--Unemployment problems
   d) Economic Impact of Capital Spending in Alaska-ISER, Sept. 84

5) History and Future of Alaska Hire -- David Donley, Feb. 25, 85

6) Alaska Statutes--Title 36: Public Contracts

7) Letter to Senators from Sen. Josephson on SS SB 174; May 5, 83

8) Article on Wyoming Supreme Court decision--NEWS, Vol. 30, 1-30-85 page 1311 of Construction Labor Report

9) United States Supreme Court Decision re: Hicklin v. Orbeck October Term, 1977 437 U.S., p. 518-535

10) Francis v. Robison, Findings of Fact and Conclusions of Law--decision by Karl S. Johnstone, Judge, May 23, 1984

11) Letter from Barry Haight, Fairbanks Central Labor Council, March 18, 1985 to Chairman Navarre

12) "A Regional Economic Analysis of the Impacts of Local Hire Policies," by Steven Beasley for Fairbanks Central Labor Council

13) Memo from Teresa Cramer to Senator Fischer on Alaska Hire--Feb. 14, 1985 (also attached is the United States Court of Appeals, Seventh Circuit decision of March 16, 1984 in W.C.M Window Co v. Bernardi & the State of Illinois)

14) Copy of the Wyoming Supreme Court decision in Wyoming vs. Antonich, January 10, 1985, from Arthur Lyle Robson

15) Letter from Teresa Cramer, Leg. Counsel, to Rep. Gruenberg, March 26, 85

16) APEA position paper on HB 294-295 -- Cherie Shelley, March 26,85

INTRODUCTION OF BILLS (House)

HB 295, (cont'd)

of Labor for a study of the effect of the employment of nonresidents on unemployment among residents of Alaska and other issues related to Alaska hire. The unexpended and unobligated portion of the appropriation lapses into the general fund 6/30/86. Provides Act takes effect immediately.

Introduced March 15 and referred to Labor & Commerce, Finance.

Appropriation (special) (S. Central roads)

HOUSE BILL NO. 296, by Reps. Cotten, Boucher, Clocksin, Collins, Furnace, Gruenberg, Hanley, Hurley, Jenkins, Larson, Marrou, Martin, Navarre, Pearce, Pettyjohn, Phillips, Pignalberi, Pourchot, Rieger, Shultz, Szymanski, Uehling. Makes special appropriations in the amount of $262,837,800 to the Dept. of Transportation & Public Facilities for various road construction projects. Makes special appropriations for payment as grants to the municipalities of Anchorage, Matanuska-Susitna, Kenai Peninsula, Soldotna, Homer, Kenai and Seldovia.

The appropriations total $14,448,400, and are for various construction projects in the South Central area. The amounts appropriated as grants for various construction projects are: $67,324,000 to the Municipality of Anchorage; $2,485,400 to Matanuska-Susitna; $1,870,000 to Kenai Peninsula Borough; $2,650,000 to the City of Soldotna; $2,500,000 to the City of Homer; $600,000 to the City of Kenai; $350,000 to the City of Seldovia. Provides Act takes effect immediately.

Introduced March 15 and referred to Finance.

INTRODUCTION OF RESOLUTIONS (House)

Jones Act (repeal of portions of)

SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 21, by Reps. Marrou and Martin. Urges repeal of certain portions of the Merchant Marine Act of 1920 (commonly known as "The Jones Act"). The resolution differs from the original version in that it states "...Alaska, Hawaii and the noncontiguous territories of the U.S. bear the cost of that sheltered environment even though it was created to benefit all Americans..." (original version stated Alaska, Hawaii and the noncontiguous territories of the U.S. "...pay higher freight rates imposed by the Act..."). The Sponsor Substitute states that the direct cost to Alaska's treasury "has been estimated at $63 - $176 million yearly", rather than "is $63 - $176 million yearly."

Urges repeal of "those portions of the Merchant Marine Act of 1920 that adversely effect the coastwise trade by prohibiting the use of foregin-built vessels;" (the original called for the repeal of the entire Act).

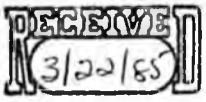
Introduced March 15 and referred to Transportation.

Bill No. House Bill No. 294

Date March 18, 1985

Title "An Act relating to preferential hire of Alaskans; and providing for an effective date."

Contact: Robert Landau
465-2700
Eileen Plate
465-2700



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 No. 294 would provide a more solid foundation from which to defend the principle of Alaska hire. The Department of Labor, therefore, strongly endorses the comprehensive legislative findings contained in the bill.

It is noted that section 2 of the bill proposes a retroactive effective date for the provisions of section 1. The department has no problem with the retroactive date per se. However, the legality of the retroactive effective date could play a major role in determining the constitutionality of section 1 as a whole should a legal challenge to the section arise in the future. Therefore, a careful legal review may be in order to assure that the provisions of section 1 do fall within the legal parameters of the types of provisions which can be retroactive.

The Department of Labor supports House Bill No. 294. It will not have a fiscal impact on the department.

APPROVED:

Robert W. Landau, Deputy
for 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 294
Title: "An Act relating to preferential hire of Alaskans..."
Sponsor: Boucher, Davis et al.
Requestor: House Labor & Commerce
Date of Request: 3/18/85

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)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
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)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Robert J. Bacolas, Sr. (Robert Bacolas by RB) Phone: 465-4870
Division: Labor Standards & Safety Date: 3/19/85

Approved by Commissioner: Jim Robison (Robert W Jordan for) Date: 3/19/85
Agency: Labor

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

7/1/84

[460 US 204]

KEVIN H. WHITE, etc., et al., Petitioners

v

MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., et al.

460 US 204, 75 L Ed 2d 1, 103 S Ct 1042

[No. 81–1003]

Argued November 1, 1982. Decided February 28, 1983.

Decision: Boston Mayor's executive order that all construction projects funded in whole or in part by city funds or funds which city had authority to administer be performed by work force consisting of at least half bona fide residents of Boston, held not to violate commerce clause (Art I, § 8, cl 3).

SUMMARY

The Mayor of Boston, Massachusetts issued an executive order requiring all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, to be performed by a work force consisting of at least half bona fide residents of Boston. The Supreme Judicial Court of Massachusetts held that the order was unconstitutional under the commerce clause (Art I, § 8, cl 3) (384 Mass 446, 425 NE2d 346).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by REHNQUIST, J., joined by BURGER, Ch. J., and BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., it was held that the commerce clause did not prevent the city from giving effect to the Mayor's order, since (1) when a state or local government enters the market as a participant it is not subject to the restraints of the commerce clause, (2) insofar as the city expended only its own funds in entering into construction contracts for public projects it was a market participant and entitled to be treated as such, and (3) insofar as the Mayor's executive order was applied to projects funded in part with funds obtained from federal programs the order was affirmatively sanctioned by the pertinent regulations of those programs.

BLACKMUN, J., joined by WHITE, J., concurring in part and dissenting in

Briefs of Counsel, p 95.7, infra.

part, expressed the view that (1) Congress unquestionably has the power to authorize state or local discrimination against interstate commerce that otherwise would violate the dormant aspect of the commerce clause so that the mayoral order as applied to projects funded in part with federal revenues pursuant to certain congressionally created grant programs was valid; (2) the executive order was not immune from commerce clause scrutiny insofar as it applied to city activities undertaken without specific congressional authorization.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Commerce §§ 157, 211 — commerce clause — mayoral executive order that at least half of workers on construction projects be city residents

1a, 1b. The application of a mayoral executive order requiring that all construction projects funded in whole or in part by city funds, or funds which the city has the authority to administer, be performed by a work force consisting of at least half bona fide residents of the city does not violate the commerce clause of the United States Constitution (Art I, § 8, cl 3), where (1) insofar as the city expends only its own funds in entering into construction contracts for public projects, it is a market participant and entitled to be treated as such under the rule that when a state or local government enters the market as a participant it is not subject to the restraints of the commerce clause, and (2) insofar as the mayor's executive order is applied to projects funded in part with funds obtained from federal programs, the order is affirmatively sanctioned by the regulations of those programs. (Blackmun and

White, JJ., dissented in part from this holding).

Commerce § 157 — commerce clause — mayoral executive order — participation in the market

2. In a case determining the validity of a mayoral executive order requiring that all construction projects funded in whole or in part by city funds or funds that the city has authority to administer be performed by a work force at least half of which are bona fide residents of the city, there is a single inquiry—whether the challenged program constitutes state participation in the market; when a state or local government enters the market as a participant it is not subject to the restraints of the commerce clause (Art I, § 8, cl 3).

Commerce §§ 157, 211 — commerce clause — mayoral executive order that at least half of workers on construction projects be city residents

3. In considering the validity, under the commerce clause of the Federal Constitution (Art I, § 8, cl 3), of the application to city funded projects of a Mayor's executive order requiring that all construction projects funded in whole or in part by city funds, or funds which the city has the authority to administer, be performed by a work force consisting of at least half bona fide residents of the city, even if the conclusion of a state's highest court—that the implementation of the mayor's order will have a significant impact on those firms which engage in specialized areas of construction and employ permanent work crews composed of out-of-state residents—is factually correct, it is not relevant to the inquiry of whether the city is participating in the marketplace when it provides city funds for building construction; 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; the same may be said of the finding by the state's highest court that the executive order sweeps too broadly, creating more burden than is necessary to accomplish its stated objectives; while relevant if the commerce clause imposes restraints on the city's activity, this characterization is of no help in deciding whether those restraints apply.

Commerce § 157 — commerce clause — limitations on state or local government's ability to impose restrictions — privity of contract

4a, 4b. There are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business; the commerce clause (Art I, § 8, cl 3) does not require a city to stop at the boundary of formal privity of contract.

Commerce § 113 — commerce clause — restrictions directed by Congress and imposed by city

5. Restrictions which are directed by Congress and imposed by a city on construction projects financed in part by federal funds present no dormant commerce clause (Art I, § 8, cl 3) issue; the commerce clause is a grant of authority to Congress and not a restriction on the authority of that body; Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the commerce clause in the exercise of its spending power; where state or local government action is specifically authorized by Congress, it is not subject to the commerce clause even if it interferes with interstate commerce.

Clause imposes restraints on the city's activity, this characterization is of no help in deciding whether those restraints apply. The Massachusetts court relied in part on our decision in Hicklin v Orbeck, 437 US 518, 57 L Ed 2d 397, 98 S Ct 2482 (1978), saying that "as in Hicklin, supra, there is a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed local residents." 384 Mass, at 480, 425 NE2d, at 355.

In Hicklin we considered an Alaska statute which required employment in all work connected with oil and gas leases to which the State was a party to be offered first to "qualified" Alaska residents in preference to nonresidents. The State sought to justify the "Alaska Hire" law on the ground that

[460 US 211]

the underlying oil and gas were owned by the State itself. Analyzing the case under the Privileges and Immunities Clause of Art IV, § 2, we held that mere ownership of a natural resource did not in all circumstances render a state regulation such as the "Alaska Hire" law immune from attack under that Clause. We summarized our view of the Alaska statute in these words:

"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." 437 US, at 531, 57 L Ed 2d 397, 98 S Ct 2482.

[4a] Even though respondents no longer press the Privileges and Immunities Clause holding of Hicklin in support of their Commerce Clause argument, we note that on the record before us the application of the Mayor's executive order to contracts involving only city funds does not represent the sort of "attempt to force virtually all businesses that benefit in some way from the economic ripple effect" of the city's decision to enter into contracts for construction projects "to bias their employment practices in favor of the [city's] residents."[7]

[460 US 212]

The Supreme Judicial Court of Massachusetts also observed that "a significant percentage of the funds affected by the order are received from Federal sources." 384 Mass, at 479, 425 NE2d, at 354. The record does indicate that of approximately $54 million expended on projects affected by the Mayor's executive order, some $34 million represented projects being funded in part

7. [4b] Justice Blackmun's opinion dissenting in part, post, p. 215, 75 L Ed 2d, at 11, argues that the Mayor's order goes beyond market participation because it regulates employment contracts between public contractors and their employees. We agree with Justice Blackmun that there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. Cf. Hicklin v Orbeck, 437 US 518, 529-531, 57 L Ed 2d 397, 98 S Ct 2482 (1978). We find it unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city." Wherever the limits of the market participation exception may lie, we conclude that the executive order in this case falls well within the scope of Alexandria Scrap and Reeves.

tively permit the type of parochial favoritism expressed in the order.[11]

[460 US 214]

III

[1b] We hold that on the record before us the application of the Mayor's executive order to the contracts in question did not violate the Commerce Clause of the United States Constitution.[12] Insofar as the city expended only its own funds in entering

[460 US 215]

into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of Hughes v Alexandria Scrap Corp., 426 US 794, 49 L Ed 2d 220, 96 S Ct 2488 (1976). Insofar as the Mayor's executive order was applied to projects funded in part with funds obtained from the federal programs described above, the order was affirmatively sanctioned by the pertinent regulations of those programs. The judgment of the Supreme Judicial Court of Massachusetts is therefore reversed, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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11. In issuing implementing regulations to carry out its authority under the UDAG program, HUD requires that a city certify that its project would not be undertaken by the private sector without public funds and that the project will alleviate economic distress by helping the poor, minorities, and unemployed. 24 CFR § 570.458(c) (1982). The regulations further provide that the city must "comply with . . . Section 3 of the Housing and Urban Development Act of 1968, as amended, and implementing regulations at 24 CFR Part 135." 24 CFR § 570.458(c)(14)(ix)(D) (1982). The regulations implementing that Act provide that "to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such program be given to lower income persons *residing in the area of such project.* . . ." 24 CFR § 135.1(a)(2)(i) (1982) (emphasis added).

Similarly, CDBG regulations provide that a recipient of funds must "comply with section 3 of the Housing and Urban Development Act of 1968, as amended, requiring that to the greatest extent feasible *opportunities for training and employment be given to lower-income residents of the project area* and contracts for work in connection with the project be awarded to eligible business concerns which are located in, or owned in substantial part by, persons residing in the area of the project." 24 CFR § 570.307(m) (1982) (emphasis added).

EDAG regulations provide:

"The maximum feasible employment of local labor shall be made in the construction of public works and development facility projects receiving direct grants and loans. Accordingly, every contractor and subcontractor undertaking to do work on any such project which is or reasonably may be done as on-site work, shall be required to employ in carrying out such contract work, qualified *persons who regularly reside in the designated area where such project is to be located,* or in the case of economic development centers, qualified persons who regularly reside in the center or in the adjacent or nearby redevelopment areas within the economic development district. . . ." 13 CFR § 305.54(a) (1982) (emphasis added).

12. Respondents ask us to decide whether the executive order offends the Privileges and Immunities Clause of Art IV, § 2, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In addressing this issue, the Massachusetts court said:

"The preference is for inhabitants of the city, and its 'negative' effect is felt in significant part by other citizens of the Commonwealth, as well as by residents of other States. In such circumstances it may be more difficult to find a violation of the privileges and immunities clause because the discrimination adversely affects citizens of the Commonwealth as well." 384 Mass 466, 478, 425 NE2d 346, 354 (1981).

Because of its disposition under the Commerce Clause, however, the court did not resolve this issue.

This question has not been, to any great extent, briefed or argued in this Court. We did not grant certiorari on the issue and remand without passing on its merits. See General Talking Pictures Corp. v Western Electric Co. 304 US 175, 177–178, 82 L Ed 1273, 58 S Ct 849 (1938).

Alaska Statutes

Title 36. Public Contracts.

Chapter
10. Employment Preference (§§ 36.10.010, 36.10.090)
95. General Provisions (§ 36.95.010)
98. Professional Services Contracts (§ 36.98.070)

Chapter 10. Employment Preference.

Section
10. Employment preference
90. Publication of list of violators

Sec. 36.10.010. Employment preference. (a) In the performance of contracts let by a municipality for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 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 residents. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as provided in AS 44.33.290, followed by other residents of the state.

(b) When a construction project is partly or wholly funded by state money and the state or an agency of the state, a department, office, agency, state board, commission, regional school board with respect to an educational facility under AS 14.11.020, public corporation or other organizational unit of or created under the executive, legislative or judicial branch of state government, including the University of Alaska, 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. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as provided in AS 44.33.290, followed by other residents of the state. (§ 1a ch 177 SLA 1960; am § 11 ch 142 SLA 1972; am § 1 ch 208 SLA 1972; am § 7 ch 277 SLA 1976; am § 15 ch 147 SLA 1978; am §§ 1, 2 ch 72 SLA 1983)

Effect of amendments. — The 1983 amendment, effective July 16, 1983, designated the existing language as subsection (a) and added subsection (b), and in the first sentence of present subsection (a) substituted "a municipality" for a former reference to the state, a political subdivision, or a regional school board.

Sec. 36.10.090. Publication of list of violators. (a) The commissioner of labor shall distribute to all departments and agencies of the state government and to all political subdivisions of the state a list of the names of persons or firms convicted of a violation of this chapter. No person appearing on the list and no firm, corporation, partnership or association in which the person has an interest may work as a contractor or subcontractor on a public construction contract for the state or a political subdivision until after three years from the date of publication of the list.

(b) A local government or school district covered by the provisions of this chapter which is found to be in violation of these provisions may be required to forfeit all or part of the state aid made available for the project in which the violation occurs and in addition may be denied up to 12 months of state revenue sharing or public school foundation money. A state department or agency head found to be in violation of this chapter may be required to forfeit the position of department or agency head.

(c) A person or governmental entity covered by the provisions of (b) of this section who is not satisfied by a decision of the Department of Labor may, as the final administrative process, appeal the decision to a committee consisting of the commissioners of transportation and public facilities, labor and administration. The commissioner of transportation and public facilities is the chairman of the committee. A quorum for conducting business is three members and any decision made must be supported by a majority of the committee members. The committee may, upon a showing of hardship, waive all or any part of the penalty provisions of this chapter. (§ 7 ch 177 SLA 1960; am § 12 ch 142 SLA 1972; am § 4 ch 208 SLA 1972; am E.O. No. 39, § 11 (1977))

Chapter 25. Contractors' Bonds.

Sec. 36.25.020. Rights of persons furnishing labor or material.

NOTES TO DECISIONS

Recovery subject to AS 08.18.151. — Recovery under this section is subject to, and not independent of, the express penalty of AS 08.18.151, which prohibits those contractors who fail to duly register from suing on the contracts in which they are unlawfully engaged. State ex rel. Smith v. Tyonek Timber, Inc., Sup. Ct. Op. No. 2813 (File Nos. 7170, 7256), P.2d (1984).

Quoted in State ex rel. Smith v. Tyonek Timber, Inc., Sup. Ct. Op. No. 2813 (File Nos. 7170, 7256), P.2d (1984).

Alaska State Legislature

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

TO: Senators Kerttula, Ellason, Mulcahy, Bennett, Sackett, and Rodey

FROM: Senator Josephson

DATE: May 5, 1983

RE: SS SB 174 Preferential Hire

Dear Colleague:

Over the past three weeks, I have received numerous letters, telephone calls and POM's concerning this legislation. You and I, and the people, want to strengthen the employment position of Alaskans in the face of outside employers using outside labor on local projects.

SB 174 was fashioned after an executive order approved in White v. Mass. Council of Constr. Emp., the United States Supreme court decision announced on February 28, 1983. The Court upheld a City of Boston executive order which required at least 50% bona fide resident hire on "any construction project funded in whole or in part by City funds, or funds which... the City expends or administers, and to which the city is signatory." The Court, in the face of a federal constitution Commerce Clause challenge, held that "the application of the mayor's executive order to the contracts in question did not violate the Commerce Clause...".

A recent Washington Supreme Court decision, has cast legal doubt about the validity of AS 36.10 as presently constituted. SB 174 takes advantage of the White decision and puts AS 36.10 in a form that should create a constitutionally permissible employment preference statute.

Subsection (a) addresses employment preference in municipalities only, thus falling well within the boundaries established in White, and avoiding the Commerce Clause challenge.

Subsection (b) addresses employment preference on construction projects partly or wholly funded by state money. This subsection requires that 95 per cent of all workers on such projects be Alaska residents. It also requires that each craft of workers be composed of 95% Alaskan residents. This craft by craft provision will insure that Alaskans will be offered jobs in all craft areas and prevent the importation of a particular craft of workers at the expense of Alaskan residents.

Joe Josephson

Senator Joe P. Josephson

ents." "If they can't take the heat, they should stay out of the kitchen," he said. The fast pace of the bill is justified because of the threats, Glenn said. "It's a potentially violent situation that shouldn't be prolonged," he said.

Jim Kerns, Idaho AFL-CIO executive director, said reports of violent threats lacked substance. He predicted that despite the rapid momentum of the legislation, the Senate may sustain the governor's veto, preventing the bill from becoming law. If the bill does become law in Idaho, Kerns said organized labor might seek a referendum on the issue, possibly delaying its implementation. Kerns said that with a right-to-work law, local unions would be weakened by decreased dues and by the "fear factor" of the legislation. "The interpretations of the law are so broad that workers would be afraid to talk to their neighbors."

Prevailing Wage Bill

Idaho's prevailing wage law for public construction also faces a challenge. A bill to repeal the state's "Little Davis-Bacon Act," H.B. 7, passed the house 68 to 16 on Jan. 22, and now is before the full Senate. Previous attempts to repeal the law have been vetoed by Evans each year since 1980.

Republican Representative Dean Haagenson, a Coeur d'Alene contractor who sponsored the bill in the House, said the prevailing wage law adds 15 to 20 percent to the cost of public work projects.

H.B. 7 also strikes the portion of the present public works law mandating an eight-hour workday on public work jobs. Haagenson said this was done to allow workers in remote sites to work four, 10-hour days at straight time.

WYOMING SUPREME COURT UPHOLDS STATE RESIDENT PREFERENCE LAW

The Wyoming Supreme Court says the state's Preference Act requiring contractors to employ state residents on publicly-funded construction projects does not violate the Privileges and Immunities Clause of the U.S. Constitution.

Although the Preference Act infringes upon the rights of out-of-state residents to some extent, it narrowly addresses the goal of reduced unemployment among the state's taxpayers who fund the projects, the court reasons.

State's Objectives

The Wyoming Preference Act says in part:

"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 employment 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." [§§16-6-201-203]

Offense Acknowledged

The case arose when the Converse County prosecuting attorney charged Roger Antonich, Westates Construction Company superintendent, with violating state code §16-6-203 by dismissing a state resident from a public school project so that out-of-state workers could be hired. A county judge dismissed the charges, finding that the statute in question violated the Privileges and Immunities Clause — Article IV — of the U.S. Constitution.

Justice Rose issues the opinion joined by Justices Rooney, Brown, and Cardine. Chief Justice Thomas concurs.

Judge Rose says:

"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) ... 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 ... [29 CLR 1649 (Feb. 29, 1984)]* ... 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."

Constitutional Balance

Despite the Act's infringement upon a recognized fundamental right, it does not violate the U.S. Constitution because of its narrow focus, Judge Rose says. The Act merely requires that state funds allocated for public works projects be used to hire qualified, available residents in preference to nonresidents. "Since the degree of discrimination bears a close relation to the state's valid resons for discriminatory treatment, we affirm the Act's validity . . . "

Chief Justice Thomas concurs, saying:

"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 *Hincklin v. Orbeck, 437 U.S. 518 . . . and United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden* . . . recognize that while the proprietary interest of the State in the property with which the statue deals is often a crucial factor in determining whether a discriminatory statute against noncitizens violates the Privileges and Immunities Clause. I perceive that, without articulating such a concept, the Supreme Court of the United States has preserved a delcate 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 its chooses to contract."

Loyalty to State Citizens

Continuing, Chief Justice Thomas says:

"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. . . ."

(*State of Wyoming v. Antonich*; Wyo SupCt, No. 84-35, Jan. 10, 1985.)

ARCO MODULE FABRICATION AWARDED TO UNION AND OPEN SHOP FIRMS

Both union and open shop firms have been awarded contracts valued at about $100 million by the Atlantic Richfield Company. The bids call for fabrication at several locations in the Pacific Northwest of oil and gas production modules and equipment for delivery by sea to Alaska's North Slope.

A contract valued at about $60 million was awarded to union contractors for the 1986 sealift of assembled modules to an ARCO's Sadelrochit site in Alaska. The Sadelrochit contract was awarded to Parsons Constructors Inc., Pasadena, Calif., construction manager for the project. Wright-Schuchart-Harbor will be the general contractor, according to spokesmen for Parsons and WSH.

Parsons' 1986 sealift work for ARCO will be performed in Tacoma, Wash., under the terms of a project agreement negotiated by Parsons, WSH, and the Tacoma building trade unions, *30 CLR 1255 (Jan. 16, 1985)*.

The ARCO work in Tacoma will provide about 1.7 million direct manhours of work for up to 1,500 building tradesmen. Construction is expected to start in about a month, according to a Parsons spokesman.

Open Shop Moves Into Portland

In Portland, Ore., ARCO awarded two module fabrication contracts to large open shop firms which will be working for the first time in this area on this type of construction. ARCO awarded a $30 million contract last month to Daniel International Corp., Greenville, S.C., for manufacture of a modular facility to be delivered by barge to the company's Lisburne site in Alaska in the summer of 1986. Work will begin in April 1985 on Swan Island in Portland, according to a Daniel spokesman. Daniel International is a subsidiary of Fluor Corp., Irvine, Calif.

Brown & Root, Inc., Houston, Tex., was awarded a smaller contract for something over $3 million at about the same time. The contract calls for fabrication of equipment to be delivered this summer by barge to six ARCO drilling sites at Kuparuk on the North Slope, according to an ARCO spokesman.

Meanwhile in Coos Bay, Ore., KRI, Inc., a subsidiary of Kellogg Rust in Houston, is working under a $10 million contract from ARCO for the assembly of equipment for delivery to Kuparuk.

0010-6836/85/$00 50

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Representative H. A. "Red" Boucher

PRESS RELEASE

SUBJECT: Alaska Hire Legislation DATE: March 15, 1985

Today I introduced in the House two pieces of legislation on the subject of Alaska Hire.

The first bill (HB 294) adds legislative findings of fact and purpose to our current Alaska Hire law AS 36.10.010. AS 36.10.010 is currently in effect and being enforced but is before the Alaska Supreme Court for review in the case of Francis v Robison.

These proposed additions to AS 36.10.010 have been drafted in cooperation with the Department of Labor and incorporate case law on the subject of local hire which has occurred since AS 36.10.010 was adopted in 1983. Most notable of such cases was the recent Wyoming Supreme Court case which upheld a local hire law similar to AS 36.10.010. House Bill 294 has been cosponsored by 33 other Representatives.

The second bill (HB 295) provides the Department of Labor with $100,000 to conduct a study into ways the state may provide preference to Alaskan workers. House Bill 295 has been cosponsored by 21 other Representatives

Both these bills have been endorsed by the Department of Labor as providing the necessary factual foundation to support a resident hire preference under current legal standards. The study would allow the Department to assemble information currently not available to support future state action to ensure that Alaskans receive preference for jobs in Alaska.

Also today Senator Fahrenkamp introduced legislation identical to HB 294 in the Senate (SB 235). Senator Fahrenkamp explained: "Most of the revenues going into public works projects comes from royalty oil money belonging to Alaskans. We want to ensure that Alaskan's will continue to be given a hiring preference on public works projects funded by money that rightfully belongs to them. Representative Boucher and I have introduced legislation that is designed to reinforce existing law and hopefully protect it from any legal challenges in the future."

For your background, I'm attaching a memorandum on this subject. Representative Gruenberg has allowed Dave Donley of his staff to assist me on this matter. Please contact Dave at 465-4986, Capitol Room 112, or Edie Russell of Senator Fahrenkamp's office for additional background.

HICKLIN ET AL. *v.* ORBECK, COMMISSIONER, DEPARTMENT OF LABOR OF ALASKA, ET AL.

APPEAL FROM SUPREME COURT OF ALASKA

No. 77-324. Argued March 21, 1978—Decided June 22, 1978

Appellants, at least five of whom are not residents of Alaska, challenged in state court the constitutionality of the "Alaska Hire" statute (which was enacted professedly for the purpose of reducing unemployment within the State) that requires that all Alaskan oil and gas leases, easements or right-of-way permits for oil and gas pipelines, and unitization agreements contain a requirement that qualified Alaska residents be hired in preference to nonresidents. The trial court upheld the statute. The Alaska Supreme Court affirmed except for that part of the Act that contained a one-year durational residency requirement, which it held invalid. *Held:*

1. The invalidation of the one-year durational residency requirement does not moot the case, since a controversy still exists between the nonresident appellants, none of whom can qualify as "residents" under the statutory definition, and the appellees, state officials. Those appellants thus have a continuing interest in restraining the statutory discrimination favoring state residents. P. 523.

2. Alaska Hire violates the Privileges and Immunities Clause of Art. IV, § 2. Pp. 523-534.

(a) Though the Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," it "does bar discrimination against citizens of other States where there is no reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer* v. *Witsell*, 334 U. S. 385, 396. See also *Mullaney* v. *Anderson*, 342 U. S. 415. Pp. 524-526.

(b) Even under the dubious assumption that a State may validly alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents, Alaska Hire cannot be upheld, for the record indicates that Alaska's unemployment was not attributable to the influx of nonresident jobseekers, but rather to the fact that a substantial number of Alaska's jobless residents were unemployed either because of lack of education and job training or because of geographical remoteness from job opportunities. Employment of nonresidents threatened to deny jobs to residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed. Moreover, even if a showing was made that nonresidents were "a peculiar source of the evil," *Toomer* v. *Witsell*, *supra*, at 398, at which Alaska Hire was aimed, the statute would still be invalid, for its discrimination against nonresidents does not bear a substantial relationship to the "evil" that they are said to present, since statutory preference over nonresidents is given to all Alaskans, not just those who are unemployed. Pp. 526-528.

(c) Alaska's ownership of the oil and gas that are the subject matter of Alaska Hire constitutes insufficient justification for the statute's pervasive discrimination against nonresidents. Alaska Hire's reach includes employers who have no connection with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State; and the Act's coverage is not limited to activities connected with the extraction of Alaska's oil and gas. Pp. 528-531.

(d) The conclusion that Alaska Hire cannot withstand constitutional scrutiny is fortified by decisions under the Commerce Clause that circumscribe a State's ability to prefer its own citizens in the utilization of natural resources found within its borders but destined for interstate commerce. *West* v. *Kansas Natural Gas*, 221 U. S. 229; *Pennsylvania* v. *West Virginia*, 262 U. S. 553; and *Foster Packing Co.* v. *Haydel*, 278 U. S. 1. The oil and gas upon which Alaska hinges its discrimination are bound for out-of-state consumption and are of profound national importance while the breadth of the discrimination mandated by Alaska Hire transcends the degree of resident bias that Alaska's ownership of the oil and gas can justifiably support. Pp. 531-534.

565 P. 2d 159, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Robert H. Wagstaff argued the cause for appellants. With him on the briefs was *Lee S. Glass.*

Ronald W. Lorensen, Assistant Attorney General of Alaska, argued the cause and filed a brief for appellees.*

*Briefs of *amici curiae* urging reversal were filed by *Edwin Vieira, Jr.*, for the National Right to Work Legal Defense Foundation; and by Peabody Testing—Bill Miller X-Ray, Inc.

Ronald Y. Amemiya, Attorney General, and *Lawrence D. Kumabe* and *Michael A. Lilly,* Deputy Attorneys General, filed a brief for the State of Hawaii as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1972, professedly for the purpose of reducing unemployment in the State, the Alaska Legislature passed an Act entitled "Local Hire Under State Leases." Alaska Stat. Ann. §§ 38.40.010 to 38.40.090 (1977). The key provision of "Alaska Hire," as the Act has come to be known, is the requirement that "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" contain a provision "requiring the employment of qualified Alaska residents" in preference to nonresidents.[1] Alaska Stat. Ann. § 38.40.030 (a) (1977).[2] This employment preference is administered by providing persons meeting the statutory requirements for Alaskan residency with certificates of residence—"resident cards"—that can be presented to an employer covered by the Act as proof of residency. 8 Alaska Admin. Code 35.015 (1977). Appellants, individuals desirous of securing jobs covered by the Act but unable to qualify for the necessary resident cards, challenge Alaska Hire as violative of

[1] The regulations implementing the Act further require that all nonresidents be laid off before any resident "working in the same trade or craft" is terminated; "[T]he nonresident may be retained only if no resident employee is qualified to fill the position." 8 Alaska Admin. Code 35.041 (1977). See also 8 Alaska Admin. Code 35.042 (4) (1977).

[2] The complete text of § 38.40.030 (a) is as follows:

"In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into 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, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

both the Privileges and Immunities Clause of Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment.

I

Although enacted in 1972, Alaska Hire was not seriously enforced until 1975, when construction on the Trans-Alaska Pipeline[3] was reaching its peak. At that time, the State Department of Labor began issuing residency cards and limiting to resident cardholders the dispatchment to oil pipeline jobs. On March 1, 1976, in response to "numerous complaints alleging that persons who are not Alaska residents have been dispatched on pipeline jobs when *qualified* Alaska residents were available to fill the jobs," Executive Order #76-1, Alaska Dept. of Labor (Mar. 1, 1976) (emphasis in original), Edmund Orbeck, the Commissioner of Labor and one of the appellees here, issued a cease-and-desist order to all unions supplying pipeline workers[4] enjoining them "to respond to all open job calls by dispatching *all qualified* Alaska residents before *any* non-residents are dispatched." *Ibid.* (emphasis in original). As a result, the appellants, all but one of whom had previously worked on the pipeline, were prevented from obtaining pipeline-related work. Consequently, on April 28, 1976, appellants filed a complaint in the Superior Court in Anchorage seeking declaratory and injunctive relief against enforcement of Alaska Hire.

At the time the suit was filed, the provision setting forth the qualifications for Alaskan residency for purposes of Alaska

[3] See *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631 (1978); Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U. S. C. § 1651 *et seq.* (1970 ed., Supp. V).

[4] App. 13-14. The vast majority of pipeline jobs were filled through union dispatchment. Deposition of David Finrow, Deputy Director of the Wage and Hour Division of the Alaska Dept. of Labor, in No. 5025 (Sup. Ct. Alaska), pp. 18-19, 28, 48.

Hire, Alaska Stat. Ann. § 38.40.090,[5] included a one-year durational residency requirement. Appellants attacked that requirement as well as the flat employment preference given by Alaska Hire to state residents. By agreement of the parties, consideration of a motion for a preliminary injunction was consolidated with the determination of the suit on its merits. The case was submitted on affidavits, depositions, and memoranda of law; no oral testimony was taken. On July 21, 1976, the Superior Court upheld Alaska Hire in its entirety and denied appellants all relief. On appeal, the Alaska Supreme Court unanimously held that Alaska Hire's one-year durational residency requirement was unconstitutional under both the state and federal Equal Protection Clauses, 565 P. 2d 159, 165 (1977), and held further that a durational residency requirement in excess of 30 days was constitutionally infirm. *Id.*, at 171.[6] By a vote of 3 to 2, however, the court held that the Act's general preference for Alaska residents was constitutionally permissible. Appellants appealed the State Supreme Court's judgment insofar as it embodied the latter holding, and we noted probable jurisdiction. 434 U. S. 919 (1977). We reverse.

[5] Section 38.40.090 provides:

"In this chapter

"(1) 'resident' means a person who

"(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

"(B) maintains a place of residence in the state;

"(C) has established residency for voting purposes in the state;

"(D) has not, within the period of required residency, claimed residency in another state; and

"(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence."

[6] Appellees have not cross-appealed this portion of the Alaska Supreme Court's decision, which rests upon an independent and adequate state ground. *Murdock* v. *Memphis*, 20 Wall. 590 (1875).

II

Preliminarily, we hold that this case is not moot. Despite the Alaska Supreme Court's invalidation of the one-year durational residency requirement, a controversy still exists between at least five of the appellants—Tommy Ray Woodruff, Frederick A. Mathers, Emmett Ray, Betty Cloud, and Joseph G. O'Brien—and the state appellees. These five appellants have all sworn that they are not residents of Alaska. Record 43, 47, 49, 96, 124. Therefore, none of them can satisfy the element of the definition of "resident" under § 38.40.090 (1) (D) that requires that an individual "has not, within the period of required residency, claimed residency in another state." They thus have a continuing interest in restraining the enforcement of Alaska Hire's discrimination in favor of residents of that State.[7]

Appellants' principal challenge to Alaska Hire is made under the Privileges and Immunities Clause of Art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." That provision, which "appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . , the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause," *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 379 (1978), "establishes a norm of comity," *Austin* v. *New Hampshire*, 420 U. S. 656, 660 (1975), that is to prevail among the States with respect to their treat-

[7] As to the remaining three appellants—Sidney S. Hicklin, Ruby E. Dorman, and Barry A. Browning—the case does appear moot. At the time this suit was instituted, all three claimed to be Alaskan residents, but none had lived in the State continuously for one year. Record 45, 51–52, 126–127. Consequently, the only aspect of Alaska Hire they challenged was the Act's one-year durational residency requirement. When this requirement was held invalid by the Alaska Supreme Court, their controversy with the appellees seems to have terminated.

ment of each other's residents.[8] The purpose of the Clause, as described in *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869), is

> "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Appellants' appeal to the protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State. For example, in *Ward* v. *Maryland*, 12 Wall. 418 (1871), a Maryland statute regulating the sale of most goods in the city of Baltimore fell to the privileges and immunities challenge of a New Jersey resident against whom the law discriminated. The statute discrimi-

[8] Although this Court has not always equated state residency with state citizenship, compare *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 78–79 (1920), and *Blake* v. *McClung*, 172 U. S. 239, 246–247 (1898), with *Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 3–4 (1950); *Douglas* v. *New Haven R. Co.*, 279 U. S. 377, 386–387 (1929); and *La Tourette* v. *McMaster*, 248 U. S. 465, 469–470 (1919), it is now established that the terms "citizen" and "resident" are "essentially interchangeable," *Austin* v. *New Hampshire*, 420 U. S. 656, 662 n. 8 (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause of Art. IV, § 2. See *Toomer* v. *Witsell*, 334 U. S. 385, 397 (1948).

nated against nonresidents of Maryland in several ways: It required nonresident merchants to obtain licenses in order to practice their trade without requiring the same of certain similarly situated Maryland merchants; it charged nonresidents a higher license fee than those Maryland residents who were required to secure licenses; and it prohibited both resident and nonresident merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the city. In holding that the statute violated the Privileges and Immunities Clause, the Court observed that "the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." *Id.*, at 430. *Ward* thus recognized that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.

Again, *Toomer* v. *Witsell*, 334 U. S. 385 (1948), the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents, invalidated a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," *id.*, at 396, "[i]t 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." *Ibid.* A "substantial reason for the discrimination" would not exist, the Court explained, "unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the

[discriminatory] statute is aimed." *Id.*, at 398. Moreover, even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.*, at 399. *Toomer*'s analytical framework was confirmed in *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), where it was applied to invalidate a scheme used by the Territory of Alaska for the licensing of commercial fishermen in territorial waters; under that scheme residents paid a license fee of only $5 while nonresidents were charged $50.

Even assuming that a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents—an assumption made at least dubious by *Ward*[9]—it is clear that under the *Toomer* analysis reaffirmed in *Mullaney*, Alaska Hire's discrimination against nonresidents cannot withstand scrutiny under the Privileges and Immunities Clause. For although the statute may not violate the Clause if the State shows "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed," *Toomer* v. *Witsell*, *supra*, at 398, and, beyond this, the State "has no burden to prove that its laws are not violative of the . . . Clause," *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S., at 402 (BRENNAN, J., dissenting), certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat. Ann. § 38.40.020 (1977). What evidence the record does contain indicates 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

[9] Cf. *Edwards* v. *California*, 314 U. S. 160 (1941).

secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities;[10] and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

Moreover, even if the State's showing is accepted as sufficient to indicate that nonresidents were "a peculiar source of evil," *Toomer* and *Mullaney* compel the conclusion that Alaska Hire nevertheless fails to pass constitutional muster. For the discrimination the Act works against nonresi does not bear a substantial relationship to the parti ar "evil" they are said to present. Alaska Hir simply grants all Alaskans, regardless of their employment status, education, or traini , a flat employment preference for all jobs covered by the Act. 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. If

[10] For example, a report quoted in the State's Memorandum in Opposition to Plaintiffs' Motion for Partial Preliminary Injunction and Second Motion for Preliminary Injunction, Record 58, observed:

"The skill levels of in-migrants and seasonal workers are generally higher than those of the unemployed or under-employed resident workers. *Their ability to command jobs in Alaska is a symptom of, rather than the cause of conditions resulting in high unemployment rates*, particularly among Alaska Natives. Those who need the jobs the most tend to be undereducated, untrained, or living in areas of the state remote from job opportunities. Unless unemployed residents—most of whom are Eskimos and Indians—have access to job markets and receive the education and training required to fit them into Alaska's increasingly technological economy and unless there is a restructuring of labor demands, new jobs will continue to be filled by persons from other states who have the necessary qualifications." Federal Field Committee for Development Planning in Alaska, Economic Outlook for Alaska 311–312 (1971) (emphasis added; footnote omitted).

Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Relying on *McCready* v. *Virginia*, 94 U. S. 391 (1877), however, Alaska contends that because the oil and gas that are the subject of Alaska Hire are *owned* by the State,[11] this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause. As the State sees it "the privileges and immunities clause [does] not apply, and was never meant to apply, to decisions by the states as to how they would permit, if at all, the use and distribution of the natural resources which they own . . . ." Brief for Appellees 20 n. 14. We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause. Although some courts, including the court below, have read *McCready* as creating an "exception" to the Privileges and Immunities Clause, we have just recently confirmed that "[i]n more recent years . . . the Court has recognized

[11] At the time Alaska was admitted into the Union on January 3, 1959, 99% of all land within Alaska's borders was owned by the Federal Government. In becoming a State, Alaska was granted and became entitled to select approximately 103 million acres of those federal lands. Alaska Statehood Law, 72 Stat. 340, § 6, note preceding 48 U. S. C. § 21. The selection process is not yet complete, but since 1959 large portions of land have been conveyed to the State, in fee, by the Federal Government. Full title to these lands and to the minerals on and below them is vested in the State. 72 Stat. 342, § 6 (i), note preceding 48 U. S. C. § 21.

that the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute." *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S., at 385. Rather than placing a statute completely beyond the Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause. Dispositive "...ough this factor may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

The reason is that Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State's oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents. The extensive reach of Alaska Hire is set out in Alaska Stat. Ann. § 38.40.050 (a) (1977). That section provides:

> "The provisions of this chapter apply to *all employment which is a result* of oil and gas leases, easements, leases or right-of-way permits *for oil or gas pipeline purposes*, unitization agreements[12] or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must

[12] The term "unitization agreement" is not defined in the Act. Alaska's Commissioner of Natural Resources gave the following definition of the term:

"Well, unitization agreement is an agreement between the operators and any given oil field as to the equity that each of them would have with respect to the oil and gas resources in that field. And in some cases that word is used to also include something called the 'Plan of Operations', which sets out the way in which an oil field or gas field would be operated pursuant to the State's conservation laws." Deposition of Guy H. Martin in No. 3025 (Sup. Ct. Alaska), p. 5.

take place either on the property under the control of the person subject to this chapter *or be directly related to activity taking place on the property under his control* and the activity must be performed directly for the person subject to this chapter *or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.*" (Emphasis added.)

Under this provision, Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil and gas or ever set foot on state land.[13] Moreover, the Act's coverage is not limited to activities connected with the extraction of Alaska's oil and gas.[14] It encompasses, as emphasized by the dissent below, "employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases." 565 P. 2d, at 171. The only limit of any consequence on the Act's reach is the requirement that "the

[13] According to one of the administrative regulations implementing Alaska Hire, "[s]uppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor." 8 Alaska Admin. Code 35.080 (a) (1977).

[14] The Commissioner of Natural Resources expressed this understanding of the scope of the Act:

Mr. Martin: ". . . I think it would cover relationships such as anything on a work pad or an associated construction road or possibly a site for a support camp or construction camp."

Mr. Wagstaff (attorney for appellants): "What about things such as docks if shipping is being used?"

Mr. Martin: "I would think that it could possibly include that." Deposition of Guy R. Martin, *supra*, at 4.

activity which generates the employment must take place inside the state." Although the absence of this limitation would be noteworthy, its presence hardly is; for it simply prevents Alaska Hire from having what would be the surprising effect of requiring potentially covered out-of-state employers to discriminate against residents of their own State in favor of nonresident Alaskans. 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.[15]

Although appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common

[15] *Heim* v. *McCall*, 239 U. S. 175 (1915) and *Crane* v. *New York*, 239 U. S. 195 (1915)—if they have any remaining vitality, see *Sugarman* v. *Dougall*, 413 U. S. 634, 643-645 (1973); *C. D. R. Enterprises, Ltd.* v. *Board of Education*, 412 F. Supp. 1164 (EDNY 1976), summarily aff'd *sub nom. Lefkowitz* v. *C. D. R. Enterprises, Ltd.*, 429 U. S. 1031 (1977)—do not suggest otherwise. In those cases, a New York statute that limited employment "in the construction of public works" to United States citizens and also required that an employment preference be given to New York citizens in such projects was upheld against challenges under both the Constitution and the Treaty of 1871 with Italy. Although the Art. IV, § 2, Privileges and Immunities Clause, along with the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, was listed as one of the constitutional bases for attacking the statute, no out-of-state United States citizen challenged the law. As a consequence, both the appellants and the Court were concerned almost exclusively with the statute's discrimination against resident aliens. This was reflected in the Court's holding, which was limited to the Fourteenth Amendment and Treaty challenges and expressed no view on appellants' passing Art. IV, § 2, privileges and immunities claim.

origin in the Fourth Article of the Articles of Confederation [16] and their shared vision of federalism, see *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S., at 379–380—renders several Commerce Clause decisions appropriate support for our conclusion. *West* v. *Kansas Natural Gas*, 221 U. S. 229 (1911), struck down an Oklahoma statutory scheme that completely prohibited the out-of-state shipment of natural gas found within the State. The Court reasoned that if a State could so prefer its own economic well-being to that of the Nation as a whole, "Pennsylvania might keep its coal, the Northwest its timber, [and] the mining States their minerals," so that "embargo may be retaliated by embargo" with the result that "commerce [would] be halted at state lines." *Id.*, at 255. *West* was held to be controlling in *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), where a West Virginia statute that effectively required natural gas companies within the State to satisfy all fuel needs of West Virginia residents before transporting any natural gas out of the State was held to violate the Commerce Clause. *West* and *Pennsylvania* v. *West Virginia* thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even

[16] That Article provided: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided, also that no imposition, duties or restriction, shall be laid by any State on the property of the United States, or either of them." 9 Journal of the Continental Congress 908-909 (1777) (Library of Congress ed., 1907).

principally for that State's residents. *Foster Packing Co.* v. *Haydel*, 278 U. S. 1 (1928), went one step further; it limited the extent to which a State's purported *ownership* of certain resources could serve as a justification for the State's economic discrimination in favor of residents. There, in the face of Louisiana's claim that the State owned all shrimp within state waters, the Court invalidated a Louisiana law that required the local processing of shrimp taken from Louisiana marshes as a prerequisite to their out-of-state shipment. The Court observed that "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." *Id.*, at 13.

West, *Pennsylvania* v. *West Virginia*, and *Foster Packing* thus establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce. Like Louisiana's shrimp in *Foster Packing*, Alaska's oil and gas here are bound for out-of-state consumption. Indeed, the construction of the Trans-Alaska Pipeline, on which project appellants' nonresidency has prevented them from working, was undertaken expressly to accomplish this end.[17] Although the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource. Here, the oil and gas upon

[17] In authorizing the construction of the Trans-Alaska Pipeline, Congress expressly found that "[t]he early development and delivery of oil and gas from Alaska's North Slope *to domestic markets* is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U. S. C. § 1651 (a) (1970 ed., Supp. V) (emphasis added).

which Alaska hinges its discrimination against nonresidents are of profound national importance.[18] On the other hand, the breadth of the discrimination mandated by Alaska Hire goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support. The confluence of these realities points to but one conclusion: Alaska Hire cannot withstand constitutional scrutiny. As Mr. Justice Cardozo observed in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." [19]

Reversed.

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[18] In enacting the Alaska Natural Gas Transportation Act of 1976, 15 U. S. C. § 719 *et seq.* (1976 ed.) Congress declared:

"(1) a natural gas supply shortage exists in the contiguous States of the United States;

"(2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;

"(3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and

"(4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system." 15 U. S. C. § 719 (1976 ed.). See n. 17, *supra*.

[19] In light of our conclusion that Alaska Hire is invalid under the Privileges and Immunities Clause of Art. IV, § 2, we have no occasion to address appellants' challenges to the Act under the Equal Protection Clause of the Fourteenth Amendment.

WISE, MAYOR OF DALLAS, ET AL. *v.* LIPSCOMB ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-529. Argued April 26, 1978—Decided June 22, 1978

Respondents, Negro and Mexican-American residents of Dallas, Tex., brought this action for injunctive and declaratory relief against petitioners, the Mayor and members of the Dallas City Council, alleging that the City Charter's at-large system of electing council members unconstitutionally diluted the vote of racial minorities. After an evidentiary hearing, the District Court orally declared that system unconstitutional and then "afforded the city an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional." The City Council then passed a resolution expressing its intention to enact an ordinance that would provide for eight council members to be elected from single-member districts and for the three remaining members, including the Mayor, to be elected at large. After an extensive remedy hearing, the District Court approved the plan, which the City Council thereafter formally enacted as an ordinance. The District Court later issued a memorandum opinion that sustained the plan as a valid legislative Act. The Court of Appeals reversed, holding that the District Court had erred in evaluating the plan only under constitutional standards without also applying the teaching of *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, which held that, absent exceptional circumstances, judicially imposed reapportionment plans should use only single-member districts. *Held:* The judgment is reversed and the case is remanded. Pp. 539-547; 547-549.

551 F. 2d 1043, reversed and remanded.

MR. JUSTICE WHITE, joined by MR. JUSTICE STEWART, concluded:

1. Federal courts, absent special circumstances, must employ single-member districts when they impose remedial reapportionment plans. That standard, however, is more stringent than the constitutional standard that is applicable when the reapportionment is accomplished by the legislature. Here, after the District Court had invalidated the Dallas at-large election scheme in the City Charter, the city discharged its duty to devise a substitute by enacting the eight/three ordinance, which the District Court reviewed as a legislatively enacted plan and held constitutional despite the use of at-large voting for three council seats. Pp. 539-543.

Fairbanks Central Labor Council
AFL-CIO

Barry L. Haight
President

819 First Ave.
Fairbanks, Alaska
99701

(907) 456-8354

NTRAL LABOR COUNCIL
of L. - C. I. O.

819 FIRST AVENUE
AIRBANKS, ALASKA

March 18, 1985

Rep. Mike Navarre
House Labor and Commerce
Committee
Pouch V
Juneau, Alaska 99811

Dear Chairman Navarre:

The Fairbanks Central Labor Council supports and endorses passage of House Bills 294 and 295.

The language of H.B. 294 is testimony to the need for this legislation in itself and does so as well as I can.

I urge you to schedule these bills for hearing as soon as possible. We feel it is important that they pass this session.

There is no doubt in my mind that passage of both into law will have a profound effect on the economy of Alaska and is of great importance to business and labor alike.

Prior to the introduction of H.B. 295, the Central Labor Council had contracted with an economist to develop a proposal for just that sort of study.

Mr. Beasley finished his proposal and presented it to me March 15, the same day H.B. 294 and 295 were introduced.

Our efforts began before the announcement of the "Wyoming Decision" which makes success more likely now.

The Fairbanks North Star Borough Community Research Center has been involved with Mr. Beasley in developing an approach to study non-residency hire and related dollar drain. The Research Center indicated a willingness to do such a study, using Mr. Beasley, should the funding be available.

Our original idea was a study involving the Greater Fairbanks Area. Then, if successful, the study could be used as a model and used

again in the South Central Area and again in the Southeast. This would in effect provide a statewide study.

We think Mr. Beasley's proposal to use an economic model traditionally applied to international trade is sound and applicable to our Alaska situation. A regional approach may also be beneficial. Of course the study will be necessary to support legislative findings of fact and be of further use in educating all Alaskans regarding the impact of nonresident workers.

We ask that our proposal be given consideration and I request that you enter this letter into the record for both bills.

Sincerely,

Barry L. Haight

Barry Haight
President
Fbks. Central Labor Council

BH:jb

A REGIONAL ECONOMIC ANALYSIS OF THE IMPACTS OF LOCAL HIRE POLICIES

A

Proposal

submitted to the

Alaska State Legislature

by the

Fairbanks Central Labor Council
819 First Avenue
Fairbanks, Alaska 99701

Prepared by

Steven D. Beasley
P.O. Box 82271
Fairbanks, Alaska 99708

March 15, 1985

Statement of the Problem and Background

The increasing participation in the Alaska economy of a highly mobile, non-resident work force is a timely, well publicized and potentially volatile issue facing the Alaska legislature (e.g., S.B. 191). In the interior, the trend is most acute in the construction industry where a significant proportion of new development in Fairbanks is being completed by so called "outside firms" and their associated non-permanent work teams. A similar situation is said to exist on the North Slope where structural changes in the mix of union vs. non-union employees have been occurring in the past several years. The spectre of a work force whose only contact with the local economy is a short stop in the airport in passage to the lower 48 has rallied a group of diverse interests into support of local hire policies (e.g., Fairbanks North Star Borough Assembly, and the Fairbanks Building and Construction Trades Council).

Local hire is not a new concept in Alaska, a state where short construction seasons and a boom-bust economy has encouraged the cyclical influx of outside workers seeking the relatively higher wages of a healthy economy. On the contrary, a protectionist philosophy concerning state jobs was reflected in the issuance of residency cards during the pipeline construction years. Present state hiring policies give residents priority status over non-resident applicants, and laws such as Alaska Statute 36.10.010 require 90-95% of the workers for all contractors and sub-contractors on Alaskan public works

projects to be residents. The constitutionality of this so called "title 36" is currently being challenged in a lawsuit before the Alaska Supreme Court (Francis vs. Robinson). At issue in this case is whether or not non-residents in fact cause unemployment in the Alaska construction industry. Critics of local hire and residency laws assert that chronic unemployment in Alaska stems from factors other than the influx of outside workers, such as weather and erratic public expenditure patterns. Following this logic, they deduce that non-residents are used as "scapegoats" for the unemployment phenomena and are innocent of any detrimental effect on local economies. Further, it is asserted that local hire policies are wasteful and invite retaliation from other states (Zobel 1985).

To counter such arguments, local hire advocates claim that the hiring of non-resident workers on construction projects is detrimental not only to the employment security of the resident construction work force, but more fundamentally to the basic economic viability of the local economy. A non-permanent work force, they claim, spend a minimal amount of their locally earned dollars within the regional economy. As a consequence of this income leakage, all sectors of the local economy suffer as potential dollar turnover is reduced. Any short term cost savings to local firms derived from utilization of cheaper non-resident workers, is claimed to be more than offset by the reduced dollar turnover (multiplier effects).

To date, no economic analysis has adequately addressed the questions raised in this controversy. Do non-resident workers

displace resident workers in similar job categories, or, is resident unemployment strictly a matter of seasonal and/or erratic public expenditure patterns as anti-local hire critics suggest? Do all actors in the local economy enjoy welfare gains from enforcement of local hire policies, or, are there gainers and losers? What are the magnitudes of these gains and losses, if in fact they exist? What economic opportunities, if any, do we forego by enforcing local hire over the status quo? Finally, will there be a net improvement in the regional economic welfare from enforcement of local hire policies?

Project Goals

The objective of this study is to analyze and measure the economic ramifications of local hire policies on the Fairbanks economy. Narrowing the scope of the research to the Fairbanks construction labor market will facilitate the analysis in terms of cost and time considerations. This study can be viewed as a case study, the methods of which will be applicable to other Alaskan localities experiencing similar labor trends.

The study will utilize an economic model traditionally applied to international trade analysis (Carbaugh 1985). Local hire policies, in this context, are analogous to a quota designed to counter the importation of outside labor. Currently there exists a significant differential between prevailing resident wages (presumably union-scale) and non-resident wages (presumably non-union scale) in the Fairbanks construction industry. Given this wage differential, theory suggests that

efforts to impede the importation of non-resident labor will make some local interests better off and some worse off.

An objective analysis of the local hire issue involves consideration of all actors in the regional economy who are affected by welfare changes. Therefore, to determine whether local hire is beneficial to the regional economy as a whole it will be necessary to consider the initial welfare changes of those directly affected by such policies, and the indirect effects of local hire--the so-called multiplier or second round effects on dollar turnover.

The initial welfare changes to be isolated and measured include:

1) Employment Effects

   A) Resident employment effect - the potential increase in construction jobs accruing to the resident work force due to local hire.

   B) Absolute employment effect - the potential decrease in total employment in the construction sector due to firms facing the higher prevailing resident wage rates.

2) Redistribution Effects

   A) Wage transfer effect - the potential transfer of wages from the non-resident work force to resident workers under local hire.

   B) Business-Labor transfer effect - the potential transfer of net income from local businesses to the resident work force. This net income was derived from the opportunity to utilize cheaper non-resident workers in construction projects.

3) Marginal project effect - the potential loss of business income derived from those marginal construction projects presently feasible with cheaper non-resident workers, but infeasible utilizing the resident work force at the prevailing wage.

4) Final products effect - the potential for increased prices of goods and services as businesses pass on higher construction labor costs.

4) Percentage of non-local businesses utilizing construction trade labor.

5) The marginal propensities of residents and non-residents to consume, respectively.

6) Income multipliers for the regional economy (Weddleton, 1985).

Budget Justification

The majority of the costs of this project will be personnel expenses. Six months of salary are requested for hiring a full-time economist to serve as principal investigator. It is anticipated that two trained surveyors will be required in the project to aid in delineating the expenditure patterns of residents vs. non-residents. Secretarial support on a part-time basis is also anticipated. Travel monies will defray costs incurred during he interview process and data collection efforts from the Alaska Department of Labor and other government agencies within the state.

A REGIONAL ECONOMIC ANALYSIS OF THE IMPACTS OF LOCAL HIRE POLICIES

A

Proposal

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Prepared by

Steven D. Beasley
P.O. Box 82271
Fairbanks, Alaska 99708

March 15, 1985

Budget Justification

A.	SALARIES	
	1. Principal Investigator (1) Economist (Alaska state level II) 6 months	$18,000
	2. Trained Survey Technicians (2) 3 months @ $10/hr	$ 9,200
B.	TRAVEL	$ 2,000
	1. (1) round trip airfare to Juneau 2. Road mileage in Fairbanks	
C.	SUPPLIES	$ 600
	Survey instruments, office supplies, postage, etc.	
D.	SERVICES	
	1. Computer time	$ 500
	2. Statistical sampling consultation	$ 1,000
	3. Secretarial support (part-time, need basis)	$ 2,000
	4. Xerox	$ 500
	5. Telephone budget	$ 1,000
E.	OVERHEAD	$ 4,800
	6 months @ $800/mo	
TOTAL COST		$38,200

Selected Bibliography

Carbaugh, R.J., International Economics, Second Edition, Wadsworth Publishers, 1985.

Fairbanks Building and Construction Trades Council, Policy Statement to Working Residents and the Business Community of the Fairbanks Area, The Arctic Dispatch, January 31, 1985.

Fairbanks North Star Borough Assembly, Policy Sta ment on Local Hire, March, 1985.

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Zobel, R., "Local Hire Self-Defeating Ineffective and Illegal," The Arctic Dispatch, February 28, 1985.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3700

2450

MEMORANDUM February 14, 1985

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

TO: Senator Victor Fischer

FROM: Teresa B. Cramer Teresa 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 confined 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. 83-1981.

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 ⇐12.3(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.

11. 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.

Patricia 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, ¶¶ 269-271. 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, 696-91 (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 2187-88. 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 2188. 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. 63, 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 who in 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, 61 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, 331, 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.Ct. at 1029, quoting *Toomer v. Witsell*, *supra*, 334 U.S. at 398, 68 S.Ct. at 1163. On this ground a state could keep out nonresidents who had been exposed to some communicable disease of which the state was still substantially free. It could even deal with "free riding" nonresidents, for example by charging higher tuition to nonresidents attending the state university than to residents. See *Martinez v. Bynum*, 461 U.S. 321, —— and n. 6, 103 S.Ct. 1838, 1845 and n. 6, 75 L.Ed.2d 879 (1983), and cases cited there. In both of these examples the justification for the state's discrimination against nonresidents is obvious. But Illinois' benefits of Illinois' home-preference law enacted in 1939 and not amended since cannot be assumed. Otherwise both the "Alaska Hire" law and the Camden residents-preference ordinance would have been upheld.

[26-28] True, the intimation in *Hicklin*, 437 U.S. at 526, 98 S.Ct. at 2487, based on strong language in *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430, 20 L.Ed. 44 (1871), that unemployment may never be a valid ground for discriminating against nonresidents can no longer be considered authoritative. The Court in *United Bldg. & Construction* not only allowed the City of Camden to attempt to justify the discrimination but quoted from *Toomer* the statement that "the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U.S. at 396, 68 S.Ct. at 1162, quoted at —— U.S. ——, 104 S.Ct. 1029. Still, *Hicklin* and *United Bldg. & Construction* make clear that there must be *some* evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents, and Illinois has presented none. We do not just mean that it has failed to put in "evidence" in the technical legal sense, though it has failed; such evidence is not essential when the issue is not the application but the validity of a statute. Illinois has presented no information—statistical or otherwise, evidentiary or subject

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 flowing 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, or [illegible] 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. 82-2170.

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(1)

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.

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

February 13, 1985

To: Each Member 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.

*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 non-citizenship 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.

Alaska Public
Employees Association APEA
State Headquarters: 340 N. Franklin, Juneau, AK 99801 (907) 586-2334

TO: Representative Mike Navarre, Chairman
House Labor and Commerce Committee

FROM: Cherie Shelley
Executive Director

SUBJECT: House Bill 294 and House Bill 295
Preferential Hire of Alaskans

DATE: March 26, 1985

Alaska's traditionally high unemployment rate and short construction season have necessitated the preferential hiring of state residents on public works projects. Alaskan residents should benefit from the construction jobs funded by state or local governments. The adoption of House Bill 294 will strengthen the current Alaska hire law (AS 36.10.010) and make it less susceptible to consitutional challenges.

The courts have held such preferential treatment of residents to be constitutional under certain circumstances. House Bill 294 adds legislative findings of fact and purpose to the Alaska hire law in response to recent court decisions.

House Bill 295 will enable the Alaska Department of Labor to conduct a comprehensive study of the effect of non-resident employment on unemployment of Alaska residents. This study will provide the statistical information necessary to defend Alaska's preferential hire law.

The Alaska Public Employees Association supports both bills. We believe publicly financed construction projects should benefit Alaskan workers who have contributed so much to the development of this State.

CS/kg

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file
HB 294

UNITED BROTHERHOOD OF

Carpenters and Joiners of America

LOCAL UNION NO. 1281

407 DENALI

PHONE 276-3533

ANCHORAGE ALASKA 99501

March 21, 1985

Labor & Commerce
Pouch V
Room 102, Capitol
Juneau, Alaska 99811

Attn: Mike Navarre, Chairman

Dear Mr. Navarre:

As an Alaskan of many years and a person active in the States labor movement, I would hope that you and your committee would give special attention and "fast track" through HB 294 and HB 295. All blue collar Alaskans thank you....

Sincerely,

CARPENTERS LOCAL 1281

William Matthews

Bill Matthews
Business Representative

BM/rm

cc: Mike Davis, H. A. "Red" Boucher, Virginia M. Collins, Alyce Hanley, Niilo Koponen, Drue Pearce

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James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)