# SCOMM

## #27:8

Con Con

*Wagstaff & Middleton*
*Lawyers*

September 20, 1980

Rep. Brian Rogers
Pouch Y
Juneau, Alaska 99811

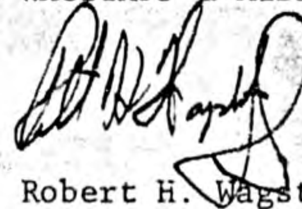
Dear Representative Rogers:

Attached is the analysis you wished me to provide concerning the current permanent fund distribution plan. My recommendation in Conclusion is that the present statute be repealed and that constitutionally sound alternatives be explored. This remedy may appear unduly harsh, but I feel it is warranted both by the extreme unlikelihood that the law will survive legal challenge and the consequences of any interim application.

I do not feel it is possible to develop a constitutionally secure plan during the short time of a special legislative session. In this context haste would seem to beget waste.

Very truly yours,

WAGSTAFF & MIDDLETON



Robert H. Wagstaff

RHW:mec

Attachments

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## OBSERVATIONS ON THE CURRENT PERMANENT FUND DISTRIBUTION PLAN

### INTRODUCTION

The present plan for public distribution of Permanent Fund revenues raises, in my judgment, significant problems under both our State and Federal Constitutions. These problems are of the first order and command both State and Federal scrutiny as the current plan runs against the basic democratic philosophy of our country. If the Alaska Supreme Court does not overturn, it is my opinion that the Supreme Court of the United States will grant review and reverse. In my judgment the question would not even be close before the United States Supreme Court notwithstanding apparent division before the Alaska Supreme Court.

### HISTORICAL VIEW

There are several dates that we could have chosen to identify as the birthdate of the United States. March 1, 1781 is the day that the Articles of Confederation were adopted, which was our first governing instrument. On September 17, 1787 the existing Federal Constitution was signed. However, the actual choice of July 4, 1776, the date of signing the Declaration of Independence, represents a significant articulation of our priorities. We hold above

all else "that all men are created equal, that they are endowed by their creator with certain inalienable rights, and among these are life, liberty and the pursuit of happiness. . . . It is to secure these rights that governments are instituted among men." After the work of the Constitution was completed it was recognized that it was incomplete. Hence a bill of rights was adopted to identify those rights which could not be abridged by government and are thought to be fundamental in a free society. After the Civil War the Thirteenth Amendment was adopted abolishing slavery, the Fifteenth Amendment holding that right to vote was not to be denied on account of race, and the most far reaching of all, the Fourteenth Amendment, providing that the fundamental rights of citizens heretofore protected from abridgement by the Federal Government were now to be protected from the states and that no state could deny to any person the equal protection of the laws. It is against the long history of our egalitarian government that the present permanent fund distribution scheme must be measured. There has been much legal discussion about the "right to travel" and "two and three tiered equal protection analyses." More talk is of "compelling state interests" and "reasonable tailoring." This shorthand is a technical way of describing the broader concept of the equalities of citizenship. This country was created in part because of the lack of basic human equality that existed elsewhere. The goverment here was and is an experiment in true democracy where it matters not where you

come from, who your parents were, or how long you have been here. Whether arrival came by the Mayflower or the Malispina is of no importance. This is a basic reality of democratic life.

In its brief before the State Supreme Court in the Zobel case the Attorney General's Office has attempted to articulate several justifications for the present distribution scheme. What is inevitable in any analysis is that the longer you have lived in Alaska the more money you get. The apparent idea is to give credit to those who, it is argued, have paid their dues. But we are all equal. The states are specifically enjoined by the Federal Constitution from "granting any title of nobility." The present scheme in effect creates a "sourdough nobility" which yields longer term residents perpetually greater benefits than the shorter term.

Identical reasons were submitted to the Alaska Supreme Court in the Bierne Homestead Initiative case of Thomas v. Bailey, 559 P.2d 1 (1979). The State Supreme Court held that the power of initiative could not be used to give away public assets to state residents. Justice Rabinowitz issued a separate opinion on the equal protection aspects of the initiative. The Bierne Initiative provided that you got more land if you lived in Alaska longer. This concept is virtually identical to the present permanent fund disbribution concept. Justice Rabinowitz's analysis of state law can scarcely be improved upon and I am therefore including it as

an Appendix to this memorandum. Justice Rabinowitz found that such a bonus for having lived in Alaska longer would "do violence" to the equal protection clauses in our constitutions. It is my opinion that Justice Rabinowitz' position is correct and the position that will ultimately prevail. It must be remembered that the Alaska Supreme Court is not the final arbitrator of this issue nor, in my judgment, will it be if a majority of the State Supreme Court decides to uphold the present distribution plan. An analogous situation existed in the Alaska Hire case of Hicklin v. Orbeck where the Alaska Supreme Court held three to two, with Justices Rabinowitz and Boochever dissenting, that a mandatory preferential hire for Alaska residents in oil and gas related activities was constitutionally permissible. But this was subsequently overturned in a unanimous opinion by the Supreme Court of the United States. The United States Supreme Court subscribed to the dissenters' views in Alaska Hire as I believe it would if the permanent fund issue survives the State Supreme Court. If a majority of the Alaska Supreme Court chooses to uphold the present scheme it is my opinion that there is a ninety percent probability that the United States Supreme Court will take review and reverse. I think that the Legislature would be ill advised to hold out hoping for a victory. I believe this is unfair to the residents of the State of Alaska, in violation of oath of office and would, I think, project a negative national image about the spirit of

Alaska. We are an immigrant state. We are an immigrant nation. "Equal Justice Under Law" is the literal facade of the United States Supreme Court. This was recognized by the French when they gave us the Statue of Liberty.

In his Bierne Initiative concurrence Justice Rabinowitz concludes:

> As I stated before, the only conceivable relationship between the duration of residency in the case of the disposal of state grant land is the notion that long term Alaska residents deserve a reward for their continued residence. It is my opinion, this contention does not meet the "fair and substantial relation" equal protection test of Isakson.

I would go one step further. The reward for length of residence not only does not meet a fair and substantial relation test but also is simply not a legitimate governmental purpose. The assets of the state are held in trust for all of residents regardless of the duration of their residency.

"Right to travel" is the slogan that is often applied to situations involving a durational residency or different temporal classes of citizens. The words "right to travel" do not appear in the constitution. It is a legal term of art. The concept emanates from the equal protection clause and privilege and immunity clauses of the Federal Constitution. It is misleading to think that questions involving the constitutional concept of right to travel can be answered through a literal interpretation of what might simply affect actual travel. The legal concept of right to travel embraces a great deal more. This, I suspect, is why

many are lead astray. Right to travel embraces at least these sections of the Constitution of the United States:

> <u>Article IV, Section II</u> provides in paragraph I: "The citizens of each state shall be entitled to all privilege and immunities of the citizens in the several states."
>
> <u>The Fourteenth Amendment</u> to the United States Constitution provides that:
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> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> and
>
> "Nor (shall any state) deny any person within its jurisdiction the equal protection of the laws."

Also involved is the Commerce Clause which prohibits states from placing undue burdens on interstate commerce. Out of all of these is distilled the concept of the right to travel, which is very broad, rather than narrow and technical. The United States Supreme Court has said: "The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . Although there have been necessary differences in emphasis within the court as to the source of the constitutional right of interstate travel, there is no need to canvas those differences further. All have agreed that the right exists." <u>State</u> v. <u>Guest</u>, 383 U.S. 745 (1966). Within all the concepts embraced

by the slogan "right to travel" emerges one crystalline idea that goes back to the fundamental concept of the Revolution -- we are all created equal. Equal protection of the law, the privileges and immunities of United States citizenship, the privileges and immunities of the residents of other states, and the universality of commerce are all overlapping.

Legal challenges based on the right to travel rarely arise because a state is trying to keep anyone out of the state but rather because a state conditions opportunities and receipt of state benefits on residency with a particular duration. These cases are usually decided on equal protection grounds rather than on the broader right to travel theory. While the theories may vary, their spirit and purpose are the same.

Perhaps the only certain content of the Fourteenth Amendment privileges and immunities of national citizenship is what has come to be known as the right to travel between states and within them. This right was encompassed in the language of the Articles of Confederation and from there by implication in the Fourth Article from which it is traveled to the Fourteenth Amendment. Shapiro v. Thompson, 394 U.S. 618 (1969) is the first case where the United States Supreme Court created a derivative right on the basis of the right to travel. Here the court said that the right to travel was unconstitutionally inhibited by a one year residency requirement for welfare recipients, a requirement imposed by the

states with the approval of the national government. The means to the end was the right to travel, a central ingredient of the privileges and immunities of American citizens. In language which could have been written about the permanent fund distribution issue the Supreme Court stated:

> But we need not rest on the particular facts of these cases. Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. . . .
>
> In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective. 1/

The Attorney General's Office has attempted to distinguish this line of cases asserting that receipt of welfare is a different economic and accounting phenomena. This may be true but the spirit and impact are the same. Moreover, any distinctions between rights and privileges were abolished by the United States Supreme Court in Graham v. Richardson, 123 U.S. 365 (1971). "Under modern analysis the question is simply whether the state has exercised its police power in

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1/ Additional legal analysis is found in Appendix I.

conformity with the federal laws and constitution." Douglas v. Sea Coast Products, 52 L.Ed 2d 308 (1977).

All persons similarly situated are to be treated equally. A resident of Alaska is a resident of Alaska and there can be no requirement that a resident live in Alaska for a certain time in order to qualify for any rights or benefits.

## CONCLUSION

Accordingly, if the Alaska Supreme Court has not ruled or has upheld the present permanent fund scheme it is recommended that the legislature, nonetheless, repeal the present scheme and attempt to forge a constitutionally permissible plan at the next general legislative session.

There are also compelling practical reasons to repeal at this time. If a distribution takes place prior to reversal by the United States Supreme Court the monies would, practically speaking, never be recovered. Those who received less than the maximum could demand, with merit, that they be paid the same. An injunction against enforcement could only occur if requested and if granted, cumulative contingencies over which the state has no control.

DATED this 20th day of September, 1980.

By
Robert H. Wagstaff

APPENDIX I

The legislature has wide latitude in appropriating state funds, subject, however, to certain constitutional provisions. 1/ This initial memorandum is intended to establish some parameters for discussion of how to distribute permanent fund monies, to solicit possible plans of distribution which individual legislators wish to have considered and report preliminarily on apparent defects of the present statutory scheme -- an issue now pending before the Alaska Supreme Court. It is not intended as an exhaustive legal brief. It does not attempt to address possible acceptable plans, many of which have not yet been conceived. Because of the interest focused through prior debate and legislation

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1/ E.g., see Alaska Constitution, Art. IX, Sec. 6 (requiring appropriations be for public purposes); Alaska Constitution Art. IX, Sec. 7 (prohibiting establishment of dedicated funds); Alaska Constitution, Art. I, Sec. 1, and U.S. Constitution, Amendment XIV, (requiring equal protection of the law be accorded all persons and the privileges and immunities of national citizenship); see also the privileges and immunities clause of Art. IV, Sec.2 of the U.S. Constitution, the due process clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, Sec. 7 of the Alaska Constitution, and the Commerce Clause of the U.S. Constitution, Art. I, Sec. 8.

as well as litigation on the issue of differentiating between long term residents and newcomers, this primarily addresses the problem of durational residency requirements.

Choosing between competing claimants for shares of the State's wealth is the proper province of legislators. Courts reviewing legislative policy judgments, however, will scrutinize certain facets of the process. Questions of what the actual objectives of the legislation are, whether those are legitimate governmental goals, and the relationship between these goals and the legislation are areas of inquiry by the courts. In areas affecting fundamental rights or discrimination between classes of people, the courts will closely examine the predicates of the legislation. Whether or not the bases asserted for a statute are correct or logically require a particular result thus become legal issues as well as policy choices.

The permanent fund distribution scheme enacted as SLA 1980, Ch. 21 (codified as A.S.43.23.010 et seq.) appears to be defective under both the state and federal constitutions. It does not treat everyone equally, as is required by law. Instead it creates a functional caste system which perpetuates distinctions among virtually all residents of Alaska. 2/

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2/ Article I, Sec. 10, cl.1 of the United States Constitution forbids states to "grant any Title of Nobility." In effect, however, the State of Alaska is creating a "sourdough nobility," ushering long term residents into the order in recognition of putative past contributions and rewarding them with an estate which grows annually but is forever greater than that of the cheechako.

The Attorney General's brief in Williams v. Zobel argues that all Alaskan residents are being treated equally. They argue that as dividend payments are to be made at the same "rate" for all everyone has equal opportunity to move into higher echelons of the caste by remaining here longer. The fallacy of this assertion is somewhat concealed by the unusual nature of the distribution scheme employed. The usual method for appropriating state wealth to the citizenry is through services and capital expenditures. Direct cash payments are uncommon, if not completely novel. 3/ Applying the residency based distributive scheme of A.S.43.23.010 to appropriations of services or facilities--the alternative means of getting permanent fund wealth to the people--4/ should illustrate why the statute is fatally flawed.

Instead of distributing cash to residents directly, the

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3/ The only other cash payments which come to mind are (a) tax credits, refunds or rebates or (b) state lottery winnings. Both are different in kind but more familiar.

4/ Cf. Thomas v. Bailey, 595 P.2d 1, 5-8 (Alaska 1979) defining appropriations as including cash as well as non-monetary state assets.

state might well choose to distribute Permanent Fund earnings through new health or social programs, or capital expenditures for schools, university buildings, ports, sewage treatment centers, and the like. 5/ If the State of Alaska were to divide all residents into twenty or more classes--as is done in A.S.43.23.010--for purposes of using state parks, receiving social services, or hunting game animals, to pick only a few examples, the illegal discrimination would be more obvious.

To illustrate, assume the state were to inventory and assign a ranking to all state parks. Then, using the State's theory that we can differentiate among residents according to past contributions or length of residence, assume we provided access to parks based on how long each person has been an Alaskan. The most beautiful and secluded parks would be available only to those who had been residents for 15-20 years. Roadside turnoffs might be the only ones open to 1-3 year residents.

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5/ Other states have spent their resource wealth in this fashion, see, e.g., Minnesota high schools (copper & mining), and Texas universities (oil). In any event cash and indirect expenditures are not mutually exclusive, and the $50.00 per share dividend program is intended to use only one half the permanent fund interest each year.

Prenatal checkups might be made available to residents of less than five years, full delivery services to those here from five to ten years, and full family health care for those here over ten years.

A sewage system might be installed in a village with individual hookups priced differently according to length of residence.

One to five year residents might be allowed to hunt geese but nothing else, five to ten year Alaskans a caribou, ten to fifteen year residents a moose, and those who had resided here fifteen years or longer could be permitted to hunt for bear.

The list of potential examples is endless. The point is the same. Whether the State's wealth is distributed through services, facilities, or cash, the present distributive scheme impermissibly discriminates among State residents.

The Alaska Hire case, by the time it reached the U.S. Supreme Court, dealt only with impermissible discriminations between residents and nonresidents. See Hicklin v. Orbeck, 437 U.S. 518 (1978). Numerous other cases have dealt with attempts by one state to discriminate against--treat differently--residents of other states. See, e.g., Austin v. New Hampshire, 420 U.S. 656, 43 L.Ed 2d 530, 95 S.Ct 1191 (1975) (unequal taxation); Ward v. Maryland, 12 Wall. 418, 20 L.Ed 449 (1871) (unequal licensing fees); Edwards v. People of State of California, 314 U.S. 160, 86 L.Ed. 1919, 62 S.Ct. 164 (1941) (prohibition against bringing indigent nonresident

into California); Lynden Transport, Inc. v. State of Alaska, 532 P.2d 700 (1975) (unequal requirements for grant of motor carrier's intrastate operating authority); but see, Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978).

Here, however, we are concerned with a discrimination by the State against certain of its own residents in favor of others. This too has been tried--and generally found illegal--in a number of instances throughout history. There are three distinct examples of states discriminating against classes of its own residents: These are (1) cases involving unequal treatment based on the length of time one has been a resident of the state (so called "durational residency" cases); (2) cases involving discrimination against resident aliens; and (3) cases concerning political reapportionment and unequal weighting of votes of certain classes of state citizens.

Most durational residency cases concern attempts to limit those who have resided in a state for less than a certain period of time--usually one year--from participating in state government, commerce, or services on an equal footing with other state residents. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed 2d 600, 89 SCt 1322 (1969) (access to public welfare assistance); Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed 2d 274, 92 SCt. 995 (1972) (voting); Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed 2d 306, 94 SCt 1076 (1974) (equal access to free nonemergency medical care); Hicklin v. Orbeck, 565

P.2d 159 (Alaska 1977) (access to oil and gas related employment stemming from State leases); State v. Adams, 522 P.2d 1125 (Alaska 1974) (one year residency requirement for divorce) State v. Wylie, 516 P.2d 142 (Alaska 1973) (preference in hiring State employees); State v. Van Dort, 502 P.2d 454 (Alaska 1972) (75 day residency requirement for voting); Thomas v. Bailey, 595 P.2d 1, 9 ("Bierne Initiative" case, Rabinowitz, Jr., concurring); but see, Gilbert v. State, 526 P.2d 1131 (Alaska 1974) (eligibility to seek state legislative office). All of the same justifications made by the Attorney General to support A.S. 43.23.010's scheme of providing greater benefits according to duration of residence have been proffered and rejected in these cases.

The Attorney General's Office has asserted several bases for the legislation, 6/ which boil down largely to

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6/ It is important to note that the statute itself specifies only three legislative goals:

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the State's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the State in management and expenditure of the Alaska Permanent Fund (Art. IX, Sec. 15, State Constitution).

SLA 1980, Ch. 21, Sec. 1(b).

These purposes are general and couched in neutral terms which do not compel any distinctions between newer and older Alaskan residents. The gloss which the Attorney General's office gives in its Zobel brief to explain and amplify these purposes is what reveals the inappropriateness or inadequacy of using the distributive formula established to accomplish them.

two themes--first a desire to recognize and reward contributions of long-term residents, and second, a desire to prevent or hinder an influx of newcomers seeking a share of the resource wealth.

The issue of rewarding longer term residents, either for prior tax contributions, enduring "the rigors of a harsh climate," contributing to the cultural, economic or political life of the State or for other reasons, is not new here or elsewhere. Justice Rabinowitz addressed this issue in his concurrence in Thomas v. Bailey, supra, rejecting it as legitimate justification for distinguishing between Alaskan residents on the basis of how long they have lived here. He observed that such a scheme

> "accomplishes nothing more than the sanctioning of a bonus or reward for having been a resident of Alaska longer than certain other classes of persons. It would do violence to the meaning of the requirement that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" 595 P.2d at 78.

He also noted the arguments concerning prior contribution were defective because the plan involved distribution of a state asset "the acquisition of which was unrelated to contributions of taxes and earnings by even the longest-term residents of Alaska." Id at 17. He stated that although it was "arguable that the longer-term resident has contributed more to the general welfare of the State over the course of his domicile" here, the asserted correlation between

such contributions and the varying lengths of residency required for each incremental distributive share of the assets being appropriated "is on its face too tenuous to satisfy" the legal tests for denial of equal protection. He noted that the parties had made no additional data available supporting their rationale, leaving the Court in the unacceptable position of having to hypothesize facts to sustain the classifications.

This is exactly what has been done with the permanent fund distribution legislation also. The Attorney General's Office asserts a number of arguments which are either illogical on their face, or which could as easily be argued the other way without providing facts to support their speculative positions.

For example, it is argued that newcomers are more likely to encourage imprudent and hasty exploitation of the resources in order to increase their share of dividends vis à vis those who will follow them here. No one would dispute that sound, prudent management of our resources is a legitimate legislative goal. However, it is at least as logical, if not more so, to assume that the distributive formula of A.S.43.23.010 encourages more immediate exploitation since under this plan 20 year residents have 20 times as much to gain from such development as newcomers do. 7/

7/ This does not even account for the fact that quite apart from permanent fund dividend distributions, longer term residents are more likely to benefit from immediate development because as a class they are more likely to own mineral leases, operate businesses and own housing that will generate income from such economic activity.

Under a plan where all Alaskans are treated equally, no class of residents has a greater incentive to promote unwise development, and all will share equally in sustained annual growth. Stable population might be encouraged by the prospect of steady annual dividends, whereas the present plan may encourage those with larger proportionate shares to push for a few large distributions before retiring to other states. But even these assertions are speculative to the extent they rely on logic rather than facts for answers--the point is that without facts classifications favoring one group of residents over another are irrational and arbitrary.

The State's position that it can discriminate against newcomers because they are likely to come to the State solely for a handout of our oil wealth, that they will not exercise good judgment with respect to resource development, and that they are not as likely otherwise to be interested in the long-term good of Alaska or to become part of a stable population base lacks merit. It ignores the history of our state and creates irrebuttable presumptions unfairly lumping all newcomers into an overinclusive class.

This State, like all others in the Union, has traditionally attracted people who hoped to use their skills or energy to utilize available resources, building a future for themselves, and in the process, for the State. Justice Rabinowitz recognized this when he stated that the protection accorded people migrating to Alaska "reflects,

in part, an awareness of the distinctive character of the State in attracting many new residents to participate in Alaska's growth and expansion." Thomas v. Bailey, supra, 595 P.2d at 16.

A similar analysis is found in the United States Supreme Court decision in Shapiro v. Thompson, supra. There states who provided their own residents with greater public assistance benefits than did other states tried to impose durational residency requirements on receipt of welfare, in large part to prevent an influx of newcomers seeking higher benefits. There, as here, the State made speculative assertions without facts to support them. The Court found:

> "The class of barred newcomers is all-inclusive, lumping together the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatsoever in any of these records supplies any basis in fact for such a presumption."

394 U.S. at 631, 22 L.Ed 2d at 613.

The U.S. Supreme Court also rejected the notion that classifications among State residents could be made on the basis of putative past contributions:

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents

who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State. But we need not rest on the particular facts of these cases. Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective."

Shapiro v. Thompson, supra, 394 U.S. at 632-633, 22 L.Ed 2d at 614.

Courts have considered other areas where states have discriminated against one class of residents in favor of another, and the results in these analogous situations compel the same result.

In the area of legislative apportionment, for example, many states discriminated among citizens by according greater weight to some residents' votes than to others'. The discrimination in those cases was based on where in the State a person lived--here it is based on how long. The remedy mandated by the Constitution in those cases was "one person, one vote". Laws which advantaged one resident over another were struck down. A.S.43.23.010 disadvantages some residents and favors others; it is constitutionally infirm. The precise remedy here is up to the legislature--but it cannot include giving twenty shares to one person and one to another.

The same arguments which are asserted by the Attorney General's Office to uphold the present Permanent Fund Distribution scheme could as well have been made to justify giving one resident ten or twenty times the voting power. For example, it might be asserted that certain residents had contributed more culturally, economically or politically to the State, that they had "paid their dues," while others had not and were therefore entitled

to more voting power.8 /

In Reynolds v. Sims, 377 U.S. 533, 12 L.Ed 2d 506, 84 S.Ct. 1362 (1964), the United States Supreme Court Stated:

> "If a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by tow, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives a unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 or them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. . . ."

8/ One formerly commonplace example of such discrimination was the denial of voting rights in school board or other local elections to those who did not own property (e.g. renters) in the community.

Quoting its opinion in the earlier apportionment case of Gray v. Sanders, 372 U.S. 368, the Court in its Reynolds opinion observed:

> "How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." 372 U.S. at 379-380.

> Continuing we stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State." And, finally, we concluded: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote." 372 U.S. at 381.

The Attorney General's office argues that by creating these distinctions between Alaska residents "the legislature created a political constituency with an interest in long term sound management of both the permanent fund and the resources on which it depended. . . " Brief in Williams

v. Zobel. at p.28. In effect, it has given some of the "voters" within this "political constituency" up to 20 times the voting power of others. This is inconsistent with our constitutional democracy.

The final analogous area which is instructive concerns attempts by states to differentiate among their residents on the basis of U.S. citizenship. Again, in most cases, such attempts to treat one class of state residents differently than another on this basis have been held unconstitutional. While the issue of alienage poses certain considerations not necessarily applicable to the legislation at hand, the cases generally indicate a presumption that all state residents should be treated equally and that distinctions between one class of state residents and another will rarely be valid.

In Graham v. Richardson, 9/ for example, the U.S. Supreme Court invalidated a Pennsylvania law attempting to distinguish between citizens and non-citizens, and an

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9/ 403 U.S. 365, 29 L.Ed 534, 91 S.Ct. 1848 (1971).

Arizona law requiring non-citizens to have been residents for a specified number of years, for purposes of receiving welfare benefits. The Court rejected the notion that a state's desire to preserve limited welfare benefits for its own citizens justified restricting benefits to citizens and long term resident aliens. It also rejected the idea that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or a "privilege." Finally, the Court explained that although a state may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program, it cannot accomplish such a purpose by invidious distinctions between classes of its residents, in violation of the Fourteenth Amendment.

The fact that natural resources are involved does not compel a different result. In Takahashi v. Fish and Game Commission, 334 U.S. 410, 92 L.Ed 1478, 68 S.Ct. 1138 (1948), the U.S. Supreme Court rejected the assertion by California that its "ownership" of all fish within three miles of its coast as trustee for all state citizens authorized it to bar resident aliens from obtaining commercial fishing licenses. The state claimed the law was passed largely as a conservation measure, as well as to protect its own citizens. The Court rejected the distinction between residents created by this legislation, and also undermined the doctrine suggested by earlier cases that a state could so discriminate where there was a "special public interest" as in public lands or

natural resources.

In summary, A.S. 43.23.010 is inconsistent with our constitutional democracy. The problems incident to distribution of wealth have long been recognized. In Democracy in America, in 1835, Alexis De Tocqueville wrote:

> "Thus the prosperity of the United States is the source of their most serious danger, since it tends to create in some of the federated states that intoxication which accompanies a rapid increase in fortune, and to awaken in others those feelings of envy, mistrust and regret which usually attend the loss of it."

(Alfred A. Knopf, Eleventh Printing (1972) edition, at 403). One check on the development of such conflicts is responsible legislative judgment. If this fails, the ultimate check, and balance, is the enforcement of the constitution by the courts.

D. JOHN McKAY

ROBERT H. WAGSTAFF

APPENDIX II

RABINOWITZ, Justice, concurring.

Though I am in accord with the majority's views regarding the nature of the Alaska Homestead Act[1] as an appropriation which may not be enacted by the voters through the initiative process, I wish to add my separate views concerning appellees' equal protection arguments.

The Alaska Homestead Act, popularly known as the Beirne Initiative, provides grants of forty acres of state land[2] to Alaska residents[3] who have resided continuously in the state for three years preceding application for land. Residents of five years duration are eligible to receive two forty-acre grants, and a person who has resided continuously within the state for ten years is entitled to four forty-acre parcels. Regardless of the length of time of residency, the Homestead Act provides that an individual is entitled to not more than one grant of forty acres per year, and no person may accumulate more than 160 acres combined total under the act.

I have concluded that these durational residency provisions violate the equal protection clause of the Alaska Constitution[4] by infringing on the right to travel to this state and make one's home here. A review of the case law illustrates the important nature of the right to travel protected by the state constitution.

33. We note that the applicant need not bear the cost of the survey. A survey must be made within five years of receiving the land, AS 38.05.440, yet the applicant may sell the land after one year.

34. If state-owned land were surveyed by private individuals, that would be valuable to the state. The value to the state is certainly insignificant, however, when the surveyed lands are in private ownership.

1. The Alaska Homestead Act, AS 38.05.410–540, created a new Article 13 of the Alaska Land Act, AS 38.05, entitled Homestead Grants of State Land.

2. AS 38.05.410 provides that "[a]ll vacant, unappropriated, and unreserved general grant land" is to remain classified and available as homestead entry land until thirty percent or 30,000,000 acres (whichever comes first) of the state general grant land (excluding trust land) has passed into private ownership under the terms of the Homestead Act.

3. A resident is defined by AS 38.05.530(4) as a person who is at least eighteen years of age and

(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 the required period;

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

(C) has established residence for voting purposes in the state and is a registered voter;

(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.

4. Art. I, § 1, of the Alaska Constitution states:

*Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Additionally, art. VIII, § 17 provides specifically with regard to disposition of the state's natural resources:

*Uniform Application.* Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

The protection extended by the Alaska Constitution to new residents of Alaska differs markedly from the level of protection afforded by the United States Constitution to new residents of a state against discriminatory treatment based solely on the duration of residency.[5] In the past, this court consistently has subjected durational residency restrictions to strict scrutiny under the equal protection clause of the Alaska Constitution. This intensified review was premised on our conclusion that "the right to interstate travel is itself a fundamental right and any classification which serves to penalize the exercise of that right must be subjected to strict judicial scrutiny."[6]

*State v. Van Dort*, 502 P.2d 453 (Alaska 1972), was the first case to challenge a durational residency requirement under Alaska law. In *Van Dort* we considered a seventy-five-day residency requirement for voting in state elections and found it to be unconstitutional. We stated there:

> It is our reading of [*Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972),] that all durational residency requirements are prima facie invalid as in contravention of the equal protection clause because they penalize the right to travel and the right to vote in elections on an equal basis with other citizens in the jurisdiction.

*Id.* at 454. The state's argument that a seventy-five-day residency requirement for voting was justified by the compelling interest in guaranteeing that only bona fide residents participated in the election was rejected. Even recognizing Alaska's uniqueness in size, population and geography, its special economic, cultural and social problems, and the communication deficiencies between different parts of the state, we found that a less restrictive alternative was available to accomplish the state's objectives in administering proper elections. Thus, a thirty-day residency requirement expressly was approved in *Van Dort*; however, the seventy-five-day period challenged in the case was struck down since that particular classification served no compelling state interest.

In *State v. Wylie*, 516 P.2d 142 (Alaska 1973), we struck down certain state personnel regulations which gave an absolute hiring preference for state employment to per-

5. Under the United States Supreme Court's interpretation, the federal constitutional right to travel is not by itself a fundamental right which triggers application of the strict scrutiny tier of equal protection analysis. The rational basis standard applies to review of durational residency requirements unless, in addition, the discriminatory treatment of new residents either deters or penalizes the federal right of interstate migration. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). *See also Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971). Deterrence of the right of interstate migration apparently never has been used by the Supreme Court as a ground for applying strict scrutiny (*see Shapiro v. Thompson*, 394 U.S. 618, 655, 89 S.Ct. 1322, 1342, 22 L.Ed.2d 600, 626 (1969) (Harlan, J., dissenting)), and the existence of a penalty on the exercise of the right requires a showing of the denial of a basic necessity of life or the denial of a separately protected fundamental right other than the right to travel. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).

6. *State v. Wylie*, 516 P.2d 142, 147 (Alaska 1973). The constitutional right to travel interstate has not been identified with any particular textual source in the Alaska Constitution. Rather, the Alaska Supreme Court appears to be in agreement with Mr. Justice Stewart's discussion of the federal right to travel in *United States v. Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239, 249 (1966) (footnote omitted):

> The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

*Id. quoted in State v. Wylie*, 516 P.2d 142, 145 n.5 (Alaska 1973). *See also Hicklin v. Orbeck*, 565 P.2d 159, 163 n.5 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

sons who had resided in Alaska for at least one year.[7] We held in *Wylie* that the right of interstate travel is itself a fundamental right under the state constitution and that any classification which serves to penalize the exercise of that right must be subjected to strict scrutiny. At the time, this holding was based in part on our reading of the United States Supreme Court's opinion in *Dunn v. Blumstein*, 405 U.S. 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274, 282 (1972), in which the Court had expressed its similar view that the right to travel was a "fundamental personal right." However, *Wylie* established that aside from its status under the federal Constitution, the Alaska Constitution unambiguously protects the right of interstate migration as a fundamental interest such that strict judicial scrutiny must be applied to any burden on the exercise of that right.

*Wylie* significantly expanded the United States Supreme Court's prior applications of the "penalty" concept to measures interfering with the fundamental right of interstate migration by holding that any differential treatment based on length of residency would be viewed as a penalty in light of the fundamental nature of the right of migration guaranteed by the Alaska Constitution. In *Wylie*, we held that state personnel rules which granted hiring preferences to persons who have satisfied the durational residency requirement penalized interstate travel. In contrast, though the precise limits of penalty analysis under the United States Constitution had not been explored fully at the time this court decided *Wylie*, the United States Supreme Court subsequently declined to classify as a penalty on the right to travel any burden other than the denial of basic necessities of life. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).[8]

In *State v. Adams*, 522 P.2d 1125 (Alaska 1974), we again differed from the United States Supreme Court's analysis of penalties on the right of interstate migration in holding that Alaska's one-year durational residency requirement for the initiation of divorce proceedings in state courts violated the equal protection clause of the Alaska Constitution. We reiterated in *Adams*:

> All durational residency requirements inherently infringe upon the fundamental constitutional right of interstate travel.

7. At the time *State v. Wylie*, 516 P.2d 142 (Alaska 1973), was decided, the United States Supreme Court had decided two durational residency cases utilizing strict scrutiny review: *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), which invalidated a one-year durational residency requirement of the State of Connecticut for eligibility for aid to families with dependent children welfare assistance; and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), which struck down Tennessee's one-year durational residency requirement for eligibility to vote in state elections. *See also Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971) (upholding on rational basis grounds Minnesota's one-year durational residency requirement for reduced tuition at the state university).

8. When we applied the strict scrutiny tier of equal protection judicial review in *State v. Wylie*, 516 P.2d 142 (Alaska 1973), the state's interests in upgrading Alaska's human resources, in reducing the level of unemployment within the state and in relieving the burden imposed by unemployment on the public purse were found not to be related sufficiently to the means selected for accomplishing the objectives (*i. e.*, discrimination against new residents in hiring) to satisfy the compelling state interest standard of review. We concluded that "[t]here are certainly available to the state other means for lowering unemployment which impose a lesser burden on the constitutionally protected right to interstate travel." *Id.* at 149 (footnote omitted). We also held that the state's interest in preferring bona fide residents over non-residents in selecting public employees in order to improve the efficiency of state government by reducing personnel turnover was not substantial enough to warrant burdening the fundamental right of interstate travel.

It should be noted that in *Wylie*, as in the present case involving the Beirne Initiative, the state's interest in preferring bona fide residents over non-residents was not challenged. Thus, the court made no determination as to the permissibility of such a classification; it ruled only on the constitutionality of discriminating between classes of actual residents based on an irrebuttable presumption that those who had lived in Alaska for less than one year should not be treated as permanent residents regardless of other indicia of intent to establish permanent residence in the state.

Hence, all such requirements are prima facie invalid and will be countenanced only when they serve a compelling state interest. There need be no actual deterrence to interstate migration to actuate strict scrutiny under the compelling state interest test. In our view, the nature of the benefit withheld by the state is relevant only to judging the relative importance of the competing state interest, not to determining the applicable standard of judicial review.

Applying strict scrutiny to the state's asserted public goals justifying the classification based on duration of residency, we found that the relationship between the goals and the means selected for furthering the objectives (the durational residency requirement) was substantially lacking. We held that the state's important interest in protecting the integrity of the basic family unit simply was not furthered by the differential treatment of new residents since it did nothing to preserve marriages of persons who had been in the state for more than one year. The state's interest in assuring the validity of its divorce decrees against collateral attacks on due process grounds, while substantial, could be satisfied by insuring that the domicile of the divorce-complainant was in this state. This reasonable, less restrictive alternative to the absolute requirement of residence of one year in the challenged divorce statute rendered the more restrictive standard less than compelling. The durational residency requirement thus failed to withstand strict scrutiny and was struck down.[9]

Following *Adams*, we decided the only Alaska right to travel case which has upheld a durational residency requirement in the face of strict judicial scrutiny of equal protection claims. *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974), involved a challenge to the state constitutional requirement, article II, § 2, of three-year residency in the state and one-year residency in the election district for eligibility to seek legislative office. The residency requirement was analyzed only under the equal protection clause of the federal Constitution since a provision of the Alaska Constitution was directly attacked by the appellant in the case. Nevertheless, we determined to apply the strict scrutiny tier of review based in part on our own prior cases relating to durational residency requirements. Two of the state's asserted justifications for the restrictions on candidacy for public office were found to be compelling: the interest of the state in assuring that those who govern it are acquainted with the diverse conditions, problems, and needs of those who are to be governed, and the interest of the electors in exposure of the potential candidate to the people during a period of time sufficient for the voters to become familiar with the candidate's knowledge, character, and reputation. In upholding the classification, we found that no viable less restrictive alternatives to the durational residency requirements imposed by the state constitution existed to fulfill the compelling state interests.

This court's most recent statement of the law relating to durational residency requirements was in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). *Hicklin* involved an

9. Subsequent to our invalidation of the one-year residency requirement in the state divorce statute, the United States Supreme Court addressed the identical issue in a case involving the State of Iowa's statutory requirement that a petitioner in a divorce action must be a resident of the state for one year preceding the filing of the petition. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The Supreme Court came to the opposite conclusion from our court in *Sosna*, however. Although the Court did not specifically identify the standard of review it was applying in upholding the durational residency requirement, its analysis was couched in language suggesting application of the rational basis test. It found that the statute in question reasonably furthered three basic public purposes: protection of the rights of the defendant spouse in the divorce proceeding, avoidance of interference in matters in which another state has a paramount interest, and assurance that the state's own divorce decrees will be afforded full faith and credit by other states. It should be noted that the third of these rationales is identical to the state interest this court had found unpersuasive in *State v. Adams*, 522 P.2d 1125 (Alaska 1974).

equal protection challenge to the so-called "Alaska Hire" law which limited eligibility for petroleum and pipeline related jobs to residents of the state who had been physically present in Alaska, with certain exceptions, for one year.[10] In holding that the proper standard for review of the durational residency preference in hiring was the strict scrutiny tier of equal protection analysis which applies to such residency requirements "because they penalize those who have exercised their fundamental right of interstate migration," [11] we expressly considered and rejected the "basic necessities" reasoning of *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). As already noted, *Memorial Hospital* had addressed a challenge under the federal Constitution and had limited application of strict scrutiny to durational residency cases in which the residency requirement penalized the right to travel by depriving the recent migrant of a basic necessity of life.[12] We noted that "[w]e have never used this 'basic necessity' reasoning," [13] and proceeded to subject the Alaska Hire law to strict scrutiny. The interests which the state sought to further through the hiring preference for one-year residents of the state in *Hicklin* were the reduction of the unemployment rate for bona fide Alaska residents and the cultivation of Alaska's human resources through extraction of the state's natural resources. We invalidated the durational residency requirements because the correlation between the classification based on length of residence and the goals of the challenged statute was tenuous and, in any case, the durational residency requirement was not the least drastic means available for accomplishing the public goals of reduced unemployment and stabilization of the economy.[14]

In my view, under the test applied in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), the three-year durational residency requirement imposed by the Beirne Initiative to qualify for land grants would fail. The general standard for judicial review of equal protection challenges arising under the state constitution was modified subsequent to the *Hicklin* decision, however. In *State v. Erickson*, 574 P.2d 1 (Alaska 1978), we abandoned the traditional two-tier approach to equal protection analysis which

10. The durational residency statute at issue in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), was nearly identical to the Beirne Initiative's residency requirements. AS 38.40.090(1) provided:

> '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.

The only differences between the statutory definition of an Alaska resident which was considered in the *Hicklin* case and the definition of resident in the Beirne Initiative are found in the duration of the residency required (one year in the *Hicklin* case and a minimum of three years in the present case), and in the addition of registered voter status and the attainment of eighteen years of age as requirements for eligibility for land grants under the Beirne Initiative. *See* note 3 *supra*.

11. *Hicklin v. Orbeck*, 565 P.2d 159, 162 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (footnote omitted).

12. In *Hicklin*, *id.* we also rejected the rational basis test as applied in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). See discussion of *Sosna* in note 9, *supra*.

13. *Hicklin v. Orbeck*, 565 P.2d 159, 163 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

14. It was pointed out in *Hicklin*, *id.* at 165, that "the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs is to give an employment preference only to the unemployed and recent trainees."

had been followed in all our prior cases [15] and adopted a new single test for evaluating equal protection claims under the Alaska Constitution. The new standard of review was explained in *Erickson* as follows:

> Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a 'compelling state interest'; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.

*Id.* at 12. Our task in applying the equal protection test adopted in *Erickson* has three steps: first, we must ascertain what the purposes of the challenged legislation are and whether they are within the legitimate police power of the state; second, we must examine the means used to accomplish the legislative objectives and establish whether the means substantially further the legislative goals; and third, we must balance the importance of the state's interest in the means actually chosen to accomplish the legislative purpose against the nature of the constitutional right which has been infringed.[16]

The *Erickson* analysis begins by considering the purposes of the challenged act, viewing the Beirne Initiative as a whole as well as the circumstances which surrounded its enactment. Since the act was passed as an initiative by the people rather than by the legislature there is no relevant legislative history of its passage to resort to. However, the Beirne Initiative makes its objectives clear in the statement of purpose which constitutes section 1 of the Homestead Act.[17] The purpose of the act, quite simply, is to accomplish the transfer of thirty percent or 30,000,000 acres of the state's vacant, unappropriated, and unreserved general grant lands into private ownership. The initiative finds that "individual land ownership is integral to the material well-being of the people and encourages more citizen awareness and involvement in the

15. We had previously expressed our increasing dissatisfaction with traditional equal protection analysis, however, in *Isakson v. Rickey*, 550 P.2d 359, 362–63 (Alaska 1976); *Lynden Transport, Inc. v. State*, 532 P.2d 700, 706–07 (Alaska 1975); *State v. Adams*, 522 P.2d 1125, 1127 n.12 (Alaska 1974); *State v. Wylie*, 516 P.2d 142, 145 n.4 (Alaska 1973). *See generally* T. Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, Duke L.J. 143 (1977); G. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1 (1972).

16. *See Erickson v. State*, 574 P.2d 1, 12 (Alaska 1978). *See also Dandridge v. Williams*, 397 U.S. 471, 508, 90 S.Ct. 1153, 1173, 25 L.Ed.2d 491, 515 (1970) (Marshall, J., dissenting).

17. Section 1 of the Beirne Initiative provides:

> The people find that only approximately one million acres of the 363 million total land acreage of Alaska is in private ownership on the effective date of this Act. The people further find that individual land ownership is integral to the material well-being of the people and encourages more citizen awareness and involvement in the affairs of the state. Further, the people are cognizant that all land was privately owned at the time of the nation's founding and [believe] that private land ownership is integral to the American system. In addition, the people are aware that the Constitution of the State of Alaska declares that it is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest (art. VIII, sec. 1), and further that the constitution permits the people to implement this policy by providing for the grant of state land (art. VIII, sec. 9). The people find that of the approximately 104 million acres to which the state is entitled under the Statehood Act, less than 75,000 acres have been made available by the state to citizens for settlement and development purposes, and that the failure to make more land available is a failure [to] implement the policy of art. VIII, sec. 1 of the Alaska Constitution. The people declare their purpose to make available to its citizens at least 30 percent or 30,000,000 acres of state land for settlement and development, and further [declare] that a policy of private land ownership is in the best interest of the people of the state.

affairs of the state." It further finds that the state unduly has delayed making public land available for private settlement and development purposes and enacts the grant program to facilitate the distribution of state land into private ownership.

The mechanism chosen for the transfer of land is a land grant initiated by filing an application which must have been recorded previously in the recording district where the land is located, together with proof of residency as required by the act and a $100 filing fee. The applicant is required to publish notice of his application and to provide a land survey within five years after the right to possession attaches. The grantee is required only to hold the land grant for one year before he "may extract timber or materials on a commercial basis, sell, subdivide, or otherwise dispose of the land . . . ." There is no requirement that the grantee actually enter upon the land and make improvements.[18]

Only persons who meet the minimum residency requirements of the Beirne Initiative may apply for grants of state land. A three-year resident is eligible for one forty-acre grant, a five-year resident may apply for two such grants, and a ten-year resident is eligible for a maximum of four forty-acre grants of state land under the act.[19] The justifications advanced by the state in support of this differential treatment based on duration of residency are basically twofold. First, it is asserted that the durational residency requirements insure that the recipients of benefits under the Beirne Initiative have earned the right to grants of state land based on their contribution to the overall state welfare by voting and paying taxes for the required periods of time. Second, it is claimed that the durational residency requirements insure that the recipients of land grants are genuinely attached to the state since they already have demonstrated their willingness to remain in Alaska for a substantial period of time.

Judicial scrutiny of the closeness of fit between the means and permissible legislative objectives, and scrutiny of the relative necessity for utilizing the particular means selected as opposed to other means less restrictive of constitutional rights, vary in intensity with the character of the classification in question under *State v. Erickson*, 574 P.2d 1 (Alaska 1978). At the upper end of this flexible equal protection formula, where fundamental rights or suspect categories are involved, *Erickson* indicates that the results of this new test will be essentially the same as under the traditional strict scrutiny tier of equal protection doctrine which requires a "compelling state interest" in the means chosen. At the lower end of the scale, the intensity of scrutiny applied will be governed by the new, more demanding "rational basis" test articulated in *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976). In *Isakson* we held:

> Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons simi-

18. The Beirne Initiative has been titled the "Alaska Homestead Act" and the state land made available under the act is referred to as "homestead entry land," but this description of the act's purposes is somewhat inaccurate. Although the act does open up state land for transfer to private ownership and, presumably, at least some of that land will actually be settled, the Beirne Initiative contains no requirement that the grantee enter upon the land and live there in the traditional mode of homestead acts. *See generally* 43 U.S.C. §§ 161-302 (*repealed by* Pub.L. 94-579, 90 Stat. 2787, effective October 21, 1976). In fact, the initiative explicitly provides that "no improvements may be required or restrictions imposed on homestead entry land, except as required by general law or home rule municipalities." *See* AS 38.08.060.

19. It should be noted that the act limits the size of the yearly grant to forty acres regardless of the duration of residency; thus, five-year and ten-year state residents may accumulate their total grant land only at the rate of forty acres a year until their respective maximums are reached.

larly circumstanced shall be treated alike."[20]

*Isakson* also concluded that "we will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard."[21]

The present challenge to the constitutionality of the durational residency requirements in the Beirne Initiative is the first post-*Erickson* case to come before this court on right-to-travel grounds. Thus, an important inquiry in this case is the determination of what standard of review should be applied. Our cases on this subject uniformly have expressed our opinion that the right of interstate migration is a fundamental constitutional guarantee which may not be infringed without showing a compelling state interest in retaining any durational residency requirement and the absence of less restrictive alternative means of accomplishing the state's legislative objectives. The uniquely important status of right-to-travel protection in the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion.[22] The risk that longer-term Alaska residents would seek to insulate themselves from sharing the public benefits of development of the state with the influx of relative newcomers already has been confronted directly in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). Significantly, this court in *Hicklin* stood fast in expressly repudiating the United States Supreme Court's "basic necessities" limitation on applying strict scrutiny to right-to-travel cases and clearly stated that "it can no longer be disputed that [the right to travel into a different state and make one's home there] is a fundamental right calling for strict scrutiny."[23] In light of the consistent pronouncements by this court concerning the fundamental nature of the right to travel under our state constitution in prior cases, I believe there is a strong case presented in favor of continuing to apply the most stringent standard of review to durational residency classifications under the new, flexible equal protection test adopted in *State v. Erickson*, 574 P.2d 1 (Alaska 1978). However, even starting from the premise that the least intensive scrutiny available under *Erickson* applies, I do not think that the classification of Alaska residents into four groups of dissimilarly treated individuals based on duration of residency[24] for purposes of disbursing

20. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), *quoting State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973) (footnote omitted).

21. *Id. Isakson* continued, *quoting* G. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. at 20 (1972):

> Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

*See also State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073, which applies the *Isakson* "rational basis" standard of review.

22. *See* Note, *Durational Residency Requirements: The Alaskan Experience*, 6 U.C.L.A.—Alaska L.Rev. 50 (1976).

23. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n.5 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (citations omitted).

In *Hicklin*, we also quoted art. VIII, § 2 of the Alaska Constitution which reads:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, *for the maximum benefit of its people.* [emphasis added]

We concluded that "[this] section is not limited to those of Alaska's people who have been here for at least twelve months." *Id.* at 164 n.8.

24. The four classes of residents created by the Beirne Initiative are (1) those persons who have lived in Alaska for less than three years and who qualify for no state land; (2) those persons who have lived in Alaska for more than three years but less than five years and thereby qualify for one grant of forty acres of land; (3) persons who have resided in the state for more than five years but less than ten years, thus qualifying for two forty-acre grants of state land totalling eighty acres altogether; and (4) residents of ten years or longer who are

grants of state land is "reasonable, not arbitrary" and " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike.' "[25]

The first rationale advanced for upholding the durational residency requirements of the Beirne Initiative is that they constitute a reasonable device for excluding from the benefits of the land grants those persons who have not made a substantial contribution to the state's economy and general welfare. The state cites *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), in support of its argument on this point. *Starns* upheld the University of Minnesota's regulation creating an irrebuttable presumption that any person who had resided in the state for less than one year was a non-resident and could not qualify for a reduced resident tuition rate at the state university. The rationale advanced in *Starns* was that the one-year waiting period for reduced tuition was an attempt to achieve partial cost equalization between those who had and those who had not contributed to the state's economy through employment, tax payments and expenditures within the state. The federal district court explained its holding as follows:

> We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced resident's fee.

*Id.* at 241. Assuming that the Alaska Supreme Court would uphold a similar one-year residency requirement for reduced tuition in this state's university system, a premise that is not altogether inevitable under the new, "more demanding" rational basis test adopted in *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), substantial differences remain between the holding in the *Starns* case and the durational residency requirements of the Beirne Initiative.

A requirement of contribution through domicile in the state which funds an institution of higher education primarily out of tax revenues bears a relatively direct relationship to the rationale of cost equalization. The current residents of the state presumably carry the primary burden for providing the educational service and it is rational (under the deferential lower tier of federal equal protection scrutiny, at least) to require the new resident to pay more for a limited period of time to attend the state university in order to approximate the greater overall cost borne by the longer term resident for access to the same educational opportunity. In contrast, the distribution of land mandated by the Beirne Initiative constitutes the disposal of a permanent state asset the acquisition of which was unrelated to contributions of taxes and earnings by even the longest-term residents of Alaska. Of course, aside from the specif-

eligible to receive four grants of forty acres each, or a total of 160 acres of state land.

25. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), *quoting State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973). It should be noted here that the general equal protection guarantee in article I, § 1 of the Alaska Constitution is not the only constitutional equal protection clause applicable in the present case. Article VIII of the state constitution relating to natural resources contains a separate guarantee:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Alaska Const. art. VIII, § 17. Inclusion in the state constitution of this separate equal protection guarantee relating specifically to the disposal of natural resources evidences the constitutional framers' particular concern that the benefits from development of Alaska's large store of natural resources be shared by all persons similarly situated with respect to those resources and the purposes to be served by their disposal. This express indication of the importance attached to the interests of the people in the state's resources is thus an independent reason for rigorous scrutiny under *Erickson* of classifications differentiating between groups of residents where the distribution of natural resources is at stake. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).

ic funding sources of the state benefit in question, it is arguable that the longer-term resident has contributed more to the general welfare of the state over the course of his domicile in the state. However, in my view the asserted correlation between the contribution of the land grantee to the state's economy and the varying periods of residency required to become eligible for each incremental forty-acre grant of land under the Beirne Initiative is on its face too tenuous to satisfy the standard of review adopted in *State v. Erickson*, 574 P.2d 1 (Alaska 1978). The parties to this action have made available no additional data supporting this rationale. Therefore, this court is left in the position of hypothesizing facts to sustain the classification on cost-equalization grounds, an exercise we expressly declined to undertake in *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976). Further, if eligibility for land grants validly may be conditioned on participation in the state's economy for such extended periods of time as the initiative requires, the state apparently would not be prohibited from distributing all of its public benefits (other than those protected by federal equal protection guarantees) proportionately to the length of continued residence in the state. I think that, upon careful evaluation, it becomes clear that the cost-equalization rationale advanced in this case in support of the durational residency requirements accomplishes nothing more than the sanctioning of a bonus or reward for having been a resident of Alaska longer than certain other classes of persons. It would do violence to the meaning of the requirement in *Isakson v. Rickey, id.* at 362 (Alaska 1976), that the classification "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation'" if this court were to uphold the durational residency requirements of the Beirne Initiative on a cost-equalization rationale.

The second justification for the Beirne Initiative's durational residency requirements advanced by the state is that they insure that state land grants made available by the act actually end up in the hands of those who have demonstrated their genuine attachment to the state and their willingness to remain in Alaska and adapt to its uniquely rigorous climate and frontier characteristics. I do not think this rationale is supported by the express provisions of the Beirne Initiative. Despite its title,[26] the act is not a homestead law in the sense that the grantee must undertake to make improvements on the grant land or even to live on the land. In fact, under the terms of the initiative, a land grant applicant need not ever even visit the land acquired and can sell the land or otherwise dispose of it after holding it for one year. This scheme of land disposal may adequately serve the initiative's purpose of transferring state land to private ownership, but it certainly does not require that the land is ultimately developed by those with any degree of attachment to the State of Alaska or that people with experience in "Alaskan living" utilize the land. The three-year durational residency requirement adds nothing to the assurance of these objectives.

Further, residence of three years duration is not reasonably required to insure that only actual residents receive grant lands. Whether or not the state has a justifiable concern that state land be distributed to bona fide residents of Alaska to the exclusion of non-resident applicants,[27] requiring a minimum of three years actual domicile to establish bona fide residence status in this state simply bears no substantial relationship to the asserted purpose of the requirement. The Beirne Initiative itself includes other less onerous indicia of

26. *See* note 18 *supra*

27. *See generally Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), which upheld large disparities in hunting license fees between residents of Montana and non-resident recreational hunters. *But see Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), invalidating the "Alaska Hire" law's statutory preference for hiring of state residents for pipeline and other petroleum industry jobs.

resident status which easily may be used to distinguish the resident from the non-resident.[28]

Given that the three-year durational residency requirement is not substantially related to the purpose of insuring that only bona fide residents with significant ties to the state receive the grant land, the five-year and ten-year requirements are even less relevant to this objective of the act. As stated before, the only conceivable relationship between the duration of residency in the case and the disposal of the state grant land is the notion that long-term Alaska residents deserve a reward for their continued residence. In my opinion, this connection does not meet the "fair and substantial relation" equal protection test of *Isakson*.[29]

CONNOR, Justice, dissenting.

I.

On the question of whether the initiative makes an appropriation, I respectfully dissent.

In *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977), we quoted favorably from *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624 (1936), which in turn states:

> "An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner as the executive officers of the government are authorized to use that money, and no more, for that object, and no other."

Courts in other jurisdictions have also defined "appropriation" for state constitutional purposes as applying to the use of money.[1] But even more persuasive is the record of the proceedings of the Alaska Constitutional Convention. As originally proposed, the provision restricting the use of the initiative and referendum prohibited their use in "making or defeating appropriations of public funds."[2] The floor discussion shows that the main concern of the delegates was that the expenditure of public money should not be subject to direct legislation by the electorate.[3]

It appears that the committee on style and drafting eliminated the words "of public funds" from the constitutional provisions because the state can only appropriate public funds. The committee chairman, Dele-

28. The initiative's other requirements of residency are set out in note 3 *supra*. Similar indicia of residency were approved in *Hicklin v. Orbeck*, 565 P.2d 159, 169-70 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (The United States Supreme Court invalidated the residency requirement portion of the "Alaska Hire" law but did not express its opinion on the appropriateness of the criteria employed to establish residence in a case where such a classification is proper.).

Though my disposition of this case on durational residency grounds makes it unnecessary for me to examine the validity of the remainder of the residency classification, I question particularly the requirement that a resident be a registered voter to qualify for a grant of land under the act. Resident aliens, who are not eligible to register to vote, would be excluded from the Beirne Initiative's land distribution scheme if this requirement were enforced. *See Nyquist v. Mauclet*, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948); *C. D. R. Enterprises, Ltd. v. Board of Educ.*, 412 F.Supp. 1164 (E.D.N.Y.1976), *aff'd*, 429 U.S. 1031, 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), all of which invalidate state discriminatory treatment of resident aliens. *See also Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978).

29. This test was also applied in: *State v. Erickson*, 574 P.2d 1 (Alaska 1978); *State v. Lewis*, 559 P.2d 630 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073.

1. *Dorsey v. Petrott*, 178 Md. 230, 13 A.2d 630 (1940); *Michigan Good Roads Federation v. Alger*, 333 Mich. 352, 53 N.W.2d 481 (1952).

2. Part 6, Appendices, December 9, 1955, at 1820, 23-24.

3. Part 2, Proceedings, December 16, 1955, at 931-33, 941-42.