ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672
2694 SLC HB 16 - HB 62

Refers to appeal procedure is (d)

or decision of the rating organization in approving or rejecting a proposed change in or addition to the filings of the rating organization and the director shall, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization, issue an order approving the action or decision of the rating organization or directing it to give further consideration to the proposal, or, if the appeal is from the action or decision of the rating organization in rejecting a proposed addition to its filings, he may, in the event he finds that the action or decision was unreasonable, issue an order directing the rating organization to make an addition to its filings, on behalf of its members and subscribers, in a manner consistent with his findings, within a reasonable time after the issuance of the order

(b) If the appeal is based upon the failure of the rating organization to make a filing on behalf of the member or subscriber, which is based on a system of expense provisions which differs, in accordance with the right granted in § 30 (a) (3) of this chapter, from the system of expense provisions included in a filing made by the rating organization, the director shall, if he grants the appeal, order the rating organization to make the requested filing for use by the appellant. In deciding the appeal the director shall apply the standards set out in § 30 of this chapter. (§ 1 ch 120 SLA 1966)

Sec. 21.39.090. Information to be furnished insureds: Hearings and appeals of insureds. Each rating organization and each insurer which makes its own rate shall, within a reasonable time after receiving written request and upon payment of the reasonable charge as it may make, furnish to an insured affected by a rate made by it, or to the authorized representative of the insured, all pertinent information concerning the rate. Each rating organization and each insurer which makes its own rates shall provide within this state reasonable means for a person aggrieved by the application of its rating system to be heard, in person or by his authorized representative, on his written request to review the manner in which the rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject the request within 30 days after it is made, the applicant may proceed in the same manner as if his application had been rejected. A party affected by the action of the rating organization or the insurer on the request may, within 30 days after written notice of the action, appeal to the director, who, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization or insurer, may affirm or reverse the action. (§ 1 ch 120 SLA 1966)

Sec. 21.39.100. Advisory organizations. (a) Each group, association or other organization of insurers, whether located inside

Alaska State Legislature

Representative Milo Fritz
District 5
P.O. Box 158
Anchor Point, Alaska 99556
(907) 235-8366

While in Juneau
Pouch V
Juneau, Alaska 99811
(907) 465-4833

House of Representatives

MILO FRITZ

MEMORANDUM

TO: Senator Dick Eliason

FROM: Representative Milo H. Fritz M.D.

DATE: May 7, 1984

SUBJECT: HB 16 An Act Relating To Premium Increases For Automobile Insurance Policies

I introduced HB 16, An Act Relating to Premium Increases For Automobile Insurance Policies because of a large number of Complaints by my constituents. These people have felt that their insurance premiums were unjustly raised and that they had no procedure to appeal the insurer's decision. This bill that the insurance company notify the insured of the simple procedure for an appeal process which is presently the law.

Bulletin 73-5 from the department of Commerce, Division of Insurance is additional proof that there has been a problem for some time. The fact is that this bulletin and the present statute, Title 21, which governs insurance, has not taken care of this problem.

HB 16 was written in consultation with the Insurance Industry lobbyist, and the Division of Insurance, Department of Commerce. It further clarifies the present law and gives the ordinary citizen an explanation of his/her rights. This bill covers private, personal vehicles only, and does not effect commercial insurance coverage.

If there are any further questions, please contact me at 465 - 4833. I would appreciate this bill being back on the Senate Floor as soon as possible. Your help would be appreciated.

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF COMMERCE

DIVISION OF INSURANCE / POUCH D — JUNEAU 99801

February 26, 1973

BULLETIN 73-5

TO: ALL INSURERS WRITING AUTOMOBILE INSURANCE FOR DELIVERY IN THE STATE OF ALASKA

RE: USE OF ACCIDENT INFORMATION APPEARING ON MOTOR VEHICLE RECORD ABSTRACTS ISSUED BY THE ALASKA DEPARTMENT OF PUBLIC SAFETY

An increasing number of complaints reveal that a substantial degree of abuse is occurring in connection with accident information appearing on individual motor vehicle record (MVR) "Abstracts issued by the Alaska Department of Public Safety." We have found that insurers are applying "Safe Driver Points" or rate surcharges for accidents shown on the abstract without first determining that such accidents are "At Fault" accidents.

Since the MVR abstract displays accidents without regard to fault, it is improper for an insurer to rely solely upon such an indication as justification for an additional charge. No insurer may blindly charge points or surcharge a risk for an accident appearing on the MVR abstract. In the same light, cancellations or non-renewals based on accident information appearing on the abstract will not be condoned unless supporting determination is made concerning the fault of the accident.

"Safe Driver Points" or rate surcharges may be charged for "At Fault" accidents involving injury to person or damage to property in excess of $100 in which the insured or person covered under the policy is involved except accidents where:

1. The automobile was lawfully parked (An automobile rolling from a parked position need not be considered as lawfully parked, but may be considered as the operation of the last operator); or

2. Reimbursement by or on behalf of a person responsible for the accident has been made or a judgement against such persons exist; or

ANALYSIS OF PROPOSED AMENDMENTS TO CSSSHB 16(Fin). 4/13/84
Division of Insurance

Proposed ammendment #1.
Page 1, line 16. After "unless" delete "the insured or another person who resides in the insured's household and is covered by the policy" and add "the person charged".

We would urge that this ammendment not be adopted. The effect of the change is to permit the insurer to charge a premium surcharge or increase the premium for the violations of a person who is not normally an insured under the policy. Insurers do not have the tools available to apply such a rule with equality. Motor vehicle records of an individual are confidential records under AS 28.15.151. While an insurer can access the record of its insured and members of his household with the agreement of those persons, it cannot do so with others. Further, the MVR does not identify the vehicle in which the violation occured, so the rule would not lend itself to practical application. The extension of this provision to persons not living in the household will result in a hit or miss situation as far as charging the additional for the violation. The logic behind allowing an insurer to make a charge of this kind is that it is a measure of the increased propensity of the driver with violations to have accidents. This logic does not readily extend to the incidental driver who is not a member of the household. That driver may never again produ a driving exposure under that particular policy.

The driver that generates a violation while driving a vehicle belonging to someone else does not avoid a charge on his or her own policy for that incident. The drivers own insurer has the ability to charge for the violation. The proposed approach merely doubles the penalty.

Proposed ammendment #2.
Page 1, line 25. After "right" delete "of appeal" and add "to a hearing and to appeal".

Under AS 21.39.090, an insured does not have an automatic right to a hearing before the insurer or its rating organization. The insurer has a "right" to reject or fail to grant a hearing. This is not unreasonable as some requests are going to be frivilous and should not be heard. Nevertheless, the insurer is going to want to cleaqn its own laundry whenever possible. Still, an insured denied a hearing has a right to an appeal of that action before the director. The proposed ammendment tends to suggest a right to a hearing before the insurer and that is not precisely the way AS 21.39.090 is structured. An insured is still entitled to "his day in court", so abuses by an insurer will be detected. We are very much concerned that this proposal will result in increased costs for automobile insurance. An alternative change on line 25 would be to change the words "right of appeal" to read "rights".

ANALYSIS OF PROPOSED AMENDMENTS TO CSSSHB 16(Fin). 3/28/84
Division of Insurance

KCM

Senator Eliason has requested an analysis of several proposed ammendments to CSSSHB 16(Fin). These are set forth below with the requested comment.

Proposed ammendment #1.
Page 1, line 16. After "unless" delete "the insured or another person who resides in the insured's household and is covered by the policy" and add "the person charged".

We would urge that this ammendment not be adopted. The effect of the change is to permit the insurer to charge a premium surcharge or increase the premium for the violations of a person who is not normally an insured under the policy. The extension of this provision to persons not living in the household will result in a hit or miss situation as far as charging the additional for the violation. The insurer will not have reasonable access to the name and drivers license number of an incidental driver. The logic behind allowing an insurer to make a charge of this kind is that it is a measure of the increased propensity of the driver with violations to have accidents. This logic does not readily extend to the incidental driver who is not a member of the household. That driver may never again produce a driving exposure under that particular policy. If that were true it would be unreasonable to charge for an exposure that does not exist under that policy.

Proposed ammendment #2.
Page 1, line 18. After "been" delete "convicted" and add a word that covers the situation of an individual pleading guilty without trial or who merely pays a fine.
This situation is already handled by insurers in the way described. If clarity is still further desired, we would suggest that the language be left as it is with an additional sentence to subsection (b) on line 18 to read: "In this subsection, 'convicted' includes a plea of guilty without trial, and the uncontested payment of a fine for the charged violation."

Proposed ammendment #3.
Page 1, line 25. After "right" delete "of appeal" and add "to a hearing and to appeal".

Under AS 21.39.090, an insured does not have an automatic right to a hearing before the insurer or its rating organization. The insurer has a "right" to reject or fail to grant a hearing. This is not unreasonable as some requests are going to be frivilous and should not be heard. Still the insured denied a hearing has a right to an appeal of that action before the director. The proposed ammendment tends to suggest a right to a hearing before the insurer and that is not precisely the way AS 21.39.090 is structured. An insured is still entitled to "his day in court", so abuses by an insurer will be detected. An alternative change on line 25 would be to change the words "right of appeal" to read "rights".

SUMMARY OF HB 16

Ued Reached

HB 16 REQUIRES THAT AN INSURANCE COMPANY INCREASING AUTOMOBILE INSURANCE PREMIUMS MUST ADVISE THE AFFECTED PERSON BEFORE THE INCREASE CAN TAKE EFFECT, AND MUST ALSO APPRISE THE AFFECTED PERSON OF HIS/HER APPEAL RIGHTS.

THIS LEGISLATION WAS INTRODUCED IN RESPONSE TO A LARGE NUMBER OF COMPLAINTS. HB 16 WILL RESOLVE THOSE SITUATIONS WHERE AN INSURANCE COMPANY INCREASES ITS PREMIUMS UNJUSTLY AND WITHOUT EXPLANATION.

MORE INFORMATION

HB 16 REQUIRES INSURANCE COMPANIES TO GIVE THEIR CLIENTS A 15-DAY WRITTEN NOTICE OF RATE INCREASES AND IF THE CLIENT FEELS THAT THE INCREASE IS UNMERITED, HE/SHE MAY RESOLVE THE ISSUE WITH THE INSURANCE COMPANY RATHER THAN GOING TO A HEARING.

HB

48

CHAPTER = 21.09
SECTION = 21.09.220
TITLE = 21

EADINGS TITLE 21.
INSURANCE.
CHAPTER 09.
AUTHORIZATION OF INSURERS AND GENERAL REQUIREMENTS.

ITATION SEC. 21.09.220.

ATCH LINE
COUNTER SIGNATURE BY RESIDENT AGENT - APPLICATION OF TITLE.

EXT NO COMPANY, ASSOCIATION, RECIPROCAL EXCHANGE, PERSON OR PERSONS AUTHORIZED TO TRANSACT INSURANCE OR OFFER INDEMNITY CONTRACTS IN THIS STATE EXCEPTING RECIPROCAL MUTUALS ORGANIZED UNDER THE LAWS OF THIS STATE AND LIFE INSURANCE COMPANIES OR LIFE INSURANCE CONTRACTS AND HEALTH AND ACCIDENT CONTRACTS AND ANNUITY CONTRACTS WRITTEN THEREIN, MAY MAKE, WRITE, PLACE OR CAUSE TO BE MADE, WRITTEN OR PLACED, A POLICY OR CONTRACT OF INSURANCE OR INDEMNITY OF ANY KIND OR CHARACTER, OR A GENERAL OR FLOATING POLICY COVERING RISKS ON PROPERTY LOCATED IN THE STATE, LIABILITY CREATED BY OR ACCRUING UNDER THE LAWS OF THIS STATE, OR UNDERTAKINGS TO BE PERFORMED IN THIS STATE, EXCEPT THROUGH THEIR LICENSED RESIDENT INSURANCE AGENTS, WHO SHALL COUNTERSIGN ALL POLICIES, RIDERS AND ENDORSEMENTS OR INDEMNITY CONTRACTS SO ISSUED AND COLLECT THE PREMIUMS, OR SEE TO THEIR COLLECTION IN DUE COURSE, AND WHO SHALL KEEP A RECORD OF THE SAME. THE RECORD SHALL CONTAIN THE USUAL AND CUSTOMARY INFORMATION CONCERNING THE RISK UNDERTAKEN, INCLUDING THE FULL PREMIUM PAID OR TO BE PAID, TO THE END THAT THE STATE MAY RECEIVE THE TAXES REQUIRED BY LAW

TO BE PAID ON PREMIUMS COLLECTED FOR INSURANCE ON PROPERTY OR UNDERTAKINGS LOCATED IN THIS STATE. NO AGENT SHALL PAY OR FORWARD A PREMIUM OR APPLICATION FOR INSURANCE OR IN ANY MANNER SECURE, HELP OR AID IN THE PLACING OF INSURANCE, OR EFFECT A CONTRACT OF INSURANCE OR INDEMNITY UPON PROPERTY, LIABILITY OR UNDERTAKINGS LOCATED IN THIS STATE WITH AN INSURER WHICH IS NOT AUTHORIZED TO TRANSACT ITS BUSINESS IN THIS STATE; EXCEPT THAT IF TWO OR MORE INSURERS ISSUE A SINGLE POLICY OF INSURANCE, THE POLICY MAY BE COUNTERSIGNED ON BEHALF OF ALL INSURERS APPEARING ON IT BY A LICENSED AGENT, RESIDENT OF THE STATE, OR ANY ONE OF THE INSURERS. THE PRACTICE OF SIGNING POLICIES IN BLANK IS LIKEWISE PROHIBITED.

ISTORY (SEC. 1 CH 120 SLA 1966)

CHAPTER = 21.09
SECTION = 21.09.230
TITLE = 21

ADINGS TITLE 21.
INSURANCE.
CHAPTER 09.
AUTHORIZATION OF INSURERS AND GENERAL REQUIREMENTS.

ITATION SEC. 21.09.230.

ATCH LINE
EXCEPTION.

EXT NOTHING CONTAINED IN SEC. 220 OF THIS CHAPTER SHALL BE CONSTRUED AS PREVENTING THE FREE AND UNLIMITED RIGHT TO NEGOTIATE WHOLLY OUTSIDE THIS STATE CONTRACTS OF INSURANCE BY LICENSED NONRESIDENT AGENTS AND BROKERS, PROVIDED THE POLICIES, DAILIES, ENDORSEMENTS OR EVIDENCE OF THE CONTRACTS COVERING PROPERTIES OR INSURABLE INTERESTS IN THIS STATE ARE COUNTERSIGNED BY THE RESIDENT AGENT OF THIS STATE, IN WHICH EVENT THE COUNTERSIGNING AGENT SHALL RECEIVE A COMMISSION OF NOT LESS THAN FIVE PER CENT OF THE PREMIUM PAID; PROVIDED, HOWEVER, THAT THE COUNTERSIGNING COMMISSION MAY NOT EXCEED ONE-HALF OF THE TOTAL COMMISSION AND PROVIDED FURTHER THAT FOR COUNTERSIGNING THESE INSURANCE POLICIES THE RESIDENT AGENT SHALL NOT BE PAID MORE THAN $50 NOR LESS THAN $1 FOR COUNTERSIGNING A POLICY OR BOND; AND PROVIDED FURTHER, THAT IF THE LICENSED NONRESIDENT AGENT OR BROKER OR THE INSURER ASSUMING THE RISK DESIRES THE RESIDENT AGENT TO RENDER ADDITIONAL SERVICES DURING THE LIFE OF A POLICY THE COMPENSATION TO BE PAID TO THE COUNTERSIGNING AGENT SHALL BE A MATTER OF CONTRACT BETWEEN THE PARTIES IN INTEREST. SECTIONS 220 - 250 OF THIS CHAPTER DO

NOT APPLY TO THE FOLLOWING CONTRACTS:

(1) POLICIES COVERING PROPERTY RECEIVED FOR SHIPMENT OR DELIVERY, OR IN TRANSIT WHILE IN POSSESSION OR CUSTODY OF A COMMON CARRIER, OR THE ROLLING STOCK, VESSELS, AIRCRAFT, OR OTHER PROPERTY OF A COMMON CARRIER USED AND EMPLOYED BY IT IN INTERSTATE OR FOREIGN COMMERCE, OR INSURANCE OF AIRCRAFT OWNED OR OPERATED BY MANUFACTURERS OF AIRCRAFT;

(2) POLICIES ISSUED BY INSURERS NOT USING AGENTS IN THE GENERAL SOLICITATION OF BUSINESS;

(3) CONTRACTS OF REINSURANCE OR RETROCESSIONS MADE BY AND FOR ADMITTED COMPANIES;

(4) CONTRACTS OF LIFE AND DISABILITY INSURANCE AND ANNUITY CONTRACTS;

(5) CONTRACTS OF TITLE INSURANCE;

(6) BID BONDS ISSUED IN CONNECTION WITH A PUBLIC OR PRIVATE CONTRACT;

(7) WET MARINE AND TRANSPORTATION INSURANCES.

ISTORY (SEC. 1 CH 120 SLA 1966)

0601 * END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.

CHAPTER = 21.09
SECTION = 21.09.240
TITLE = 21

EADINGS TITLE 21.
INSURANCE.
CHAPTER 09.
AUTHORIZATION OF INSURERS AND GENERAL REQUIREMENTS.

ITATION SEC. 21.09.240.

ATCH LINE
AFFIDAVIT ATTACHED TO ANNUAL STATEMENT.

EXT AT THE TIME THE ANNUAL STATEMENT OF EVERY SUCH COMPANY IS FILED WITH THE DIRECTOR THERE SHALL BE ATTACHED TO IT AN AFFIDAVIT OF THE PRESIDENT, MANAGER OR CHIEF EXECUTIVE OFFICER IN THE UNITED STATES STATING THAT SECS. 220 - 250 OF THIS CHAPTER HAVE NOT BEEN VIOLATED.

ISTORY (SEC. 1 CH 120 SLA 1966)

LAST YEAR THE SENATE LABOR & COMMERCE COMMITTEE STUDIED HB 48 - "AN ACT REPEALING CERTAIN INSURANCE LAWS" AND RECOMMENDED "DO PASS".

THIS BILL REPEALS THE COUNTERSIGNATURE LAW WHICH REQUIRES THAT AN INSURANCE POLICY ISSUED FOR DELIVERY IN ALASKA OR COVERING A SUBJECT IN ALASKA BE SIGNED BY A LICENSED RESIDENT ALASKA INSURANCE AGENT. THE LAW WAS ORIGINALLY INTENDED AS A PROTECTIVE MEASURE FOR ALASKA INSURANCE AGENTS AND BROKERS, TO GIVE THEM AN ADVANTAGE OVER THEIR NONRESIDENT COUNTERPARTS.

THE LAW HAS NOT WORKED AS EXPECTED. IT TENDS TO IMPEDE THE ORDERLY FLOW OF BUSINESS AND DELAYS DELIVERY TO THE POLICYHOLDER OF THOSE POLICIES AFFECTED. SOME NONRESIDENT AGENTS AND BROKERS LEGALLY CIRCUMVENT THE LAW THROUGH THE USE OF A CONTRACT WITH A RESIDENT AGENT, A POWER OF ATTORNEY AND A FACSIMILE SIGNATURE.

REPEAL OF THIS LAW WILL NOT REDUCE PROTECTION OF THE PUBLIC. THIS LEGISLATION IS SUPPORTED BY THE ADMINISTRATION AND THE INSURANCE AGENTS.

FURTHER INFORMATION

1) THE COUNTERSIGNATURE LAW WAS PASSED IN 1966 AS A MEASURE TO ENCOURAGE IN-STATE BUSINESS. HOWEVER, THE INSURANCE INDUSTRY IS NOW WELL ESTABLISHED AND THIS ADDED PROTECTION IS NOT NEEDED. (JOE MacLEAN, REPRESENTING INSURANCE AGENTS AND BROKERS, TESTIFIED IN FAVOR OF HB 48. THE COUNTERSIGNATURE LAW WAS ONE OF THE FEW MEASURES HE HAD SUCCESSFULLY WORKED ON AS A LEGISLATOR. BUT NOW HE IS URGING REPEAL AS IT DOES NOT ACCOMPLISH THE ORIGINAL GOAL.)

2) MANY OTHER STATES ARE REPEALING THEIR COUNTERSIGNATURE LAWS. IN FACT, 19 STATES REPEALED THIS LEGISLATION THIS YEAR.

SIGN-IN SHEET

Proposed Legislation HB548

Name (please print)	Address	Representing	Testify?? (YES or NO)	Phone Number
DAN KOCH	ROUGH D	DIV INSURANCE	YES	257J
Joe MacLean				6-3210

SENATE LABOR AND COMMERCE COMMITTEE

HEARING DATE 5/19/83

Repeal Insurance Laws

SENATE LABOR AND COMMERCE
STANDING COMMITTEE
May 19, 1983
1:30 pm

Members Present: Senator Dick Eliason, Chair
Senator Bob Mulcahy
Senator Pat Rodey

Members Absent: Senator Don Bennett
Senator John Sackett

COMMITTEE CALENDAR

SB 251
An Act establishing the low cost and low income multiple family housing development fund in the Department of Community and Regional Affairs.

SB 252
An Act transferring and reappropriating a portion of an appropriation made to the multifamily housing loans security fund in the Alaska Industrial Authority to the low-cost and low-income multiple family housing development fund in the Department of Community and Regional Affairs; and providing for an effective date.

CSHB 311(L&C)
An Act relating to Workers' Compensation; and providing for an effective date.

CSSSHB 16(Fin)
An Act relating to premium increases for automobile insurance policies.

CSSB 177 (HESS)
An Act relating to insurance trade practices; and providing for an effective date.

HB 48
An Act repealing certain insurance laws.

WITNESS REGISTER

(SB 251 and SB 252)

Barbara Morse-Quinn, Director
Division of Housing Assistance, Department of Community and Regional Affairs
2600 Denali, Suite 400
Anchorage, Alaska 99501
275-4585
Spoke in support of SB 251 and in opposition to SB 252.

Terry Elder, Deputy Commissioner
Dept. of Commerce and Economic Development
Pouch D
Juneau, Alaska 99811
465-2502
Spoke in support of SB 251 and in opposition to SB 252.

(HB 311)

Jackie McClintock, Director
Workers' Compensation Division
Department of Labor
P. O. Box 1149
Juneau, Alaska 99811
465-2790
Spoke in support of HB 311.

Kevin Dougherty
AC Laborers
Anchorage, Alaska
276-1640
Spoke in support of HB 311.

William Reeves, Associated General Contractors
Anchorage, Alaska
Spoke in support of HB 311 and amendment.

(HB 16)

Dave Schade
Rep. Fritz' staffperson
Pouch V
Juneau, Alaksa 99811
465-4833
Provided information from prime sponsor of HB 16, Rep. Fritz.

Don Koch, Chief of Market Surveillance
Division of Insurance (DCED)
Pouch D
Juneau, Alaska 99811
465-2577
Spoke in support of HB 16.

(CSSB 177[HESS])

David Bruce, Deputy Director, Div. of Public Health
Dept. of Health and Social Services
Pouch H-06
Juneau, Alaska 99811
465-3090
Spoke in support of CSSB 177(HESS).

Don Koch
(see above)

Spoke in support of CSSB 177(HESS)

(HB 48)

Don Koch
(see above)
Department supports HB 48.

Joe MacLean, representing insurance agents and brokers
Juneau, Alaska 99801
586-3210
Supports HB 48.

PREVIOUS ACTION

No previous action in Senate Labor and Commerce on any of these bills.

ACTION NARRATIVE

Tape #29
007

Sen. Eliason called the meeting to order at 1:35 p.m. with members Senator Rodey and Sen. Mulcahy in attendance. The agenda includes SB 251, SB 252, HB 311, HB 16, HB 48, and SB 177.

022

(SB 251 and 252)

Sen. Eliason explained that Sen. Josephson was due at the meeting shortly and that the teleconference network would enable testimony to be provided from Anchorage on SB 251 and 252.

Barbara Morse-Quinn, Director of the Division of Housing Assistance in the Dept. of Community and Regional Affairs, assisted in the drafting of SB 251 and 252. SB 251 would establish the low cost and low income multiple family housing development fund in the Department. The Department will be able to absorb the effects of passage of SB 251 without any problem. The appropriation measure, SB 252, provides $15 million, anticipated to develop 400 units of low cost and low-income multifamily housing.

101

Barbara Morse-Quinn presented a section by section analysis of the measures, and stated that she did not support SB 252. She would like to see a committee substitute which provides for approriation from the General Fund, rather than transferring funds from the Alaska Industrial Development Authority, as provided in the present form of the bill. She stated that regardless of the source of funds, they are willing to participate and allow grants to go to local groups, etc.

198

Barbara Morse-Quinn stated that Dick Pride was available to answer questions from the Anchorage teleconference site.

205

Terry Elder, Deputy Commissioner of the Department of Commerce and Economic Development, underscored Barbara Morse-Quinn's remarks on SB 252. The Department does not favor transfer of funds from AIDA to the Department of Community and Regional Affairs.

310

(HB 311)

Jackie McClintock, Director of the Workers' Compensation Division, Dept. of Labor, testified in favor of HB 311, "An Act relating to Workers' Compensaton". She explained that the bill is the product of two years of work by an ad hoc committee including members from labor (big and small) and management (big and small). She proposed an amendment supported by a majority of the Workers' Compensation Board members. The amendment reduces the monetary penalty assessed against employers for failure to properly notify the board of changes in the status of payment of compensation. (Reduced from $25 per day to $10. Also reduces total penalty limit from $2,500 to $1,000.)

350

Kevin Dougherty, legal counsel for the Alaska Council of Laborers, and a labor member of the ad hoc committee, provided testimony "from the labor standpoint". He supports the amendment to HB 311 as written, and supports HB 311. He described the ad hoc committee as a unique situation to work together, and stated that the bill takes care of problems labor had with the program. The Workers' Compensation Division has been working well all year. The Act itself, however, really need to be improved.

390

William Reeves, employed by the Associated General Contractors, and a management member of the ad hoc committee, stated that in February of last year, management and labor got together in the creation of the legislation. He supports HB 311 and agrees wholeheartedly with the proposed amendment.

410

(SB 251 and 252)
Sen. Eliason addressed remarks to Sen. Josephson regarding SB 251 and SB 252. He indicated that the committee would pass out the measures as soon as a CS had been drafted. The opposition to the bill is the funding source. He asked that staff work together to resolve the problem.

434

(HB 311)

Sen. Eliason requested that a committee substitute be drafted for HB 311, reflecting inclusion of the proposed amendment.

445

(HB 16)

Dave Schade, staffperson for Rep. Fritz, conveyed the Representative's regrets at being unable to attend, and provided information in support of CSSSHB 16(Fin), of which Rep. Fritz is the prime sponsor. The bill relates to premium increases for auto insurance policies. Rep. Fritz had received numerous complaints about injust increases in insurance premiums, combined with lack of an appeal process. The bill sets forth the procedure for an appeal process by which the general public can have justice served. It will not allow insurance companies to raise the insured's premium unless they are uniform in their policy and have given the insured an opportunity to refute the insurer's claim. A bulletin from the Dept. of Commerce, Div. of Insurance is additional proof that there has been a problem for some time.

500

(CSSB 177[HESS])

David Bruce, Deputy Director of the Division of Public Health, testified on this measure relating to insurance trade practices. He stated that the bill has been amended, and the Division no longer has objections to the bill.

522

Don Koch, Chief of Market Surveillance under the Division of Insurance, testified in support of the measure. (Position paper from DCED states that the "Administration supports this bill".) It is appropriate for an insurance company to decide what sorts of care they will cover, but not for them to decide what sort of practitioner will offer that care, as long as the practitioner is providing service within the scope of his or her occupational license.

540

(HB 16)

Don Koch testifed on HB 16 (premium increase, auto insurance), stating support for the bill. If a person is aggrieved by a rating given by a certain agency, he or she has a right to appear before that agency and appeal the decision.

No further testimony on SB 77 and HB 16.

582

(HB 48)

Don Koch testified on HB 48, an Act repealing certain insurance laws. This bill would repeal the counter signature law, providing that a policy from out-of-state must be co-signed by an Alaska broker. When it is working the way it is supposed to work it delays getting the policy to the insurer.

Side 2
024

When it is not working the policy is facsimile-rubber-stamped, and sent to the insurer in an evasion of the law. The Division supports repeal.

090

Joe MacLean, representing the insurance agents and brokers urged repeal of HB 48, noting that it was one of the only measures he had worked on and succeeded in getting passed as a legislator. It is no great savings to the insurance companies, and will smooth service to public.

130

Sen. Eliason stated that the testimony would be provided to members in memo form and the measures would be taken up by the committee the following day.

130

Meeting adjourned.

SENATE LABOR AND COMMERCE
STANDING COMMITTEE
May 20, 1983
11:20 am

Members Present: Senator Dick Eliason, Chair
Senator Bob Mulcahy
Senator Pat Rodey

Members Absent: Senator Don Bennett
Senator John Sackett

COMMITTEE CALENDAR

SB 251
An Act establishing the low cost and low income multiple family housing development fund in the Department of Community and Regional Affairs.

SB 252
An Act transferring and reappropriating a portion of an appropriation made to the multifamily housing loans security fund in the Alaska Industrial Development Authority to the low-cost and low-income multiple family housing development fund in the Department of Community and Regional Affairs; and providing for an effective date.

CSHB 311(L&C)
An Act relating to Workers' Compensation; and providing for an effective date.

CSSSHB 16(Fin)
An Act relating to premium increases for automobile insurance policies.

HB 48
An Act repealing certain insurance laws.

CSSB 177(HESS)
An Act relating to insurance trade practices; and providing for an effective date.

HB 274
An Act relating to the regulation of public utilities; and providing for an effective date.

CSHB 299
An Act relating to public records.

WITNESS REGISTER

Members of the public attended this work session, however there was no testimony offered.

PREVIOUS ACTION

For previous action in Senate Labor and Commerce see minutes for 5-19-83.

ACTION NARRATIVE

Tape #30
007

Sen. Eliason called the meeting to order with Senators Mulcahy and Rodey in attendance.

018

Sen. Eliason stated that the agenda did not list HB 299, which would be taken up in addition to SB 251 and 252, CSHB 311, CSSSHB 16, HB 48, CSSB 177, and HB 274.

038

Sen. Eliason announced that the committee would take up the bills in order. They would begin with SB 251. Committee staff Sheila Peterson stated that Sen. Jospehson had not presented a proposed CS for SB 252.

058

Sen. Rodey moved that SB 251 be passed out of committee with individual recommendations. There were no objections.

066

The committee took up CSHB 311(L&C). Senator Mulcahy moved that the proposed Labor and Commerce Committee substitute for CSHB 311 be adopted. There were no objections. Senator Mulcahy moved that Labor and Commerce CS for CSHB 311 be passed out of committee with individual recommendations. There were no objections.

075

The committee took up CSSSHB 16(Fin). Sen. Rodey moved that the bill be reported out of committee with individual recommendations. There were no objections.

083

The committee took up HB 48. Sen. Rodey moved that the bill be passed out of committee with individual recommendations. There were no objections.

For the benefit of those attending the meeting, Sen. Eliason noted that the committee had held public hearings on the measures, and that if something controversial were to come up the committee would discuss it.

100

The committee took up CSSB 177(HESS). Sen. Rodey moved that the bill be passed out with individual recommendations. There was no objection.

107

The committee took up HB 274. Sen. Eliason stated that Sen. Sackett had asked that the bill be held for a day or two (as he wanted to investigate some concerns he had about it). Sen. Sackett's concerns will be addressed in another bill.

116

Sen. Mulcahy moved that the committee pass out HB 274 with individual recommendations. There was no objection.

121

The committee took up the proposed Labor and Commerce CS for HB 299, the public records measure. Sen. Eliason brought to the attention of the committee members a report by Tom Sofo (legal services).

128

Sen. Rodey moved that they adopt the proposed CSHB 299. There was no objection.

132

Committee staff Sheila Peterson stated that new language in the CS was provided by the Office of the Attorney General in order that a department of the state would not have to give in excess of ten hours free research time.

Sen. Mulcahy moved that the Labor and Commerce Committee Substitute for HB 299 be passed out with individual recommendations. There was no objection.

153

The meeting adjourned.

ENDED TITLE:

AN ACT REPEALING CERTAIN INSURANCE LAWS

IME SPONSOR: MARTIN.

O-SPONSORS:

URRENT STATUS: 5/03/84 CHAPTER 0041 SLA 84

DATE	SEQ	PAGE	LEGISLATIVE ACTION
1/18/83	01	0032	FIRST READING -- COMMITTEE REPORTS
2/04/83	02	0169	L&C -- DP06
3/07/83	03	0417	L&C F/NOTE EQUALS ZERO
4/06/83	04	0745	JUD -- DP04, NR02
4/06/83	05	0745	JUD F/NOTE EQUALS ZERO
4/18/83	06	0900	SECOND READING
4/18/83	07	0900	ADVANCED TO 3RD READING BY UNAN CONSENT
4/18/83	08	0900	THIRD READING
4/18/83	09	0901	PASSED BY DIV 38-01-01
4/17/84	18	3361	TRANSMITTED TO GOVERNOR
5/03/84	19	3642	SIGNED BY GOVERNOR-CH0041, EFF 08/01/84
****	**	**	*** *** ***

DATE	SEQ	PAGE	LEGISLATIVE ACTION
4/19/83	10	0749	FIRST READING -- COMMITTEE REPORTS
5/23/83	11	1080	L&C -- DP01, NR02
3/15/84	12	2557	JUD -- DP05
4/16/84	13	2736	RLS -- OTHER05
			TAKEN UP IMMEDIATELY
4/16/84	14	2738	SECOND READING
4/16/84	15	2738	ADVANCED TO 3RD READING BY UNAN CONSENT
4/16/84	16	2738	THIRD READING
4/16/84	17	2738	PASSED BY DIV 16-00-04
****	**	**	*** *** ***

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY

4/19/83

Date: 5/20/83

Mr. President:

The Committee on LABOR & COMMERCE has had SB 43

repealing certain insurance laws

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[✓] 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

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

Hal Harper

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Hal Harper

Hal Harper
CHAIRMAN

Department of Commerce & Economic Development / POSITION PAPER

HB 48: An Act repealing certain insurance laws.

The Administration supports this bill. This bill repeals the countersignature law which requires that an insurance policy issued for delivery in Alaska or covering a subject in Alaska be signed by a licensed resident Alaska insurance agent. The law was originally intended as a protective measure for Alaska insurance agents and brokers, to give them an advantage over their nonresident counterparts. The law has not worked as expected. It tends to impede the orderly flow of business and delays delivery to the policyholder of those policies affected. Some nonresident agents and brokers legally circumvent the law through the use of a contract with a resident agent, a power of attorney and a facsimile signature. Repeal of this law will not reduce protection of the public.

Richard A. Lyon, Commissioner

DATE: 5/16/83

513a

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 48
Title An act repealing certain insurance laws
Requested by Martin Date 1/18/83

II. FISCAL DETAIL
Agency Affected Division of Insurance
Program Category Affected Public Protection
BRU, Program, Or Subprogram(s) Affected Division of Insurance
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND	0					
FEDERAL FUNDS	0					
OTHER (Specify Source)	0					

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE January 25, 1983 PREPARED BY Kenneth C. Moore, Div of Insurance
AGENCY Commerce & Economic Development
PHONE 465-2515

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev.)

HOUSE LABOR & COMMERCE
STANDING COMMITTEE
February 2, 1983
8:30 a.m.

Members Present: Rep. Furnace, Chairman
Rep. Uehling, Vice-Chairman
Rep. Cowdery
Rep. Koponen
Rep. Wendte
Rep. Ringstad

Members Absent: Rep. Malone

COMMITTEE CALENDAR

HB 48 "An Act repealing certain insurance laws."

HJR 17 Relating to commercial fishing by foreign fleets in the 200-mile fishery conservation zone along Alaska's coast.

WITNESS REGISTER

Kenneth Moore, Director
Division of Insurance
Department of Commerce & Economic Development
Pouch D
Juneau, Alaska 99811
465-2515
Position Statement: Supports HB 48.

Representative Bob Bettisworth
Alaska State Legislature
Capitol Building, Room 500
Pouch V
Juneau, Alaska 99811
465-4967
Position Statement: Prime sponsor of HJR 17.

Gail Von Drashek
Administrative Assistant
Representative Fred Zharoff's Office
Behrends Building, Room 219
Pouch V
Juneau, Alaska 99811
465-4968
Position Statement: Was available to answer questions; representing Representative Zharoff.

PREVIOUS ACTION

HB 48	None
HJR 17	None

ACTION NARRATIVE

TAPE#6 (Side A) Recording Number 0000	The meeting was called to order by Chairman Furnace at 8:30 a.m. Members present were Representatives Furnace, Uehling, Cowdery, Koponen, Wendte and Ringstad. Representative Malone was absent.
Number 0022	Kenneth Moore, Director of the Division of Insurance, Department of Commerce and Economic Development, came before the committee to advocate the passage of HB 48. He discussed the intent of the bill and gave reasons why he supported it. There was discussion.
Number 0190	Rep. Ringstad recommended that the committee pass the bill; it passed without objection.
Number 0193	The Chairman called for a brief recess.
Number 0195	The meeting was called to order. Chairman Furnace presented HJR 17.
Number 0200	Rep. Bob Bettisworth came before the committee. He expressed his support of the amendment introduced by Rep. Fred Zharoff. He recommended that the committee incorporate it into the resolution. Rep. Bettisworth shared some other concerns with the committee:
Number 0223	He said the Alaskans are poorly represented by the North Pacific Fisheries Commission;
Number 0235	He said that we need a method of monitoring the amount of fish that is being taken by foreign fleets; and
Number 0257	Rep. Bettisworth also expressed dissatisfaction with the 200-mile limit. He said that it should be re-examined and adjusted. Discussion followed.

Number 0369 — Gail Von Drashek, Aide to Rep. Zharoff, came before the committee on behalf of Rep. Zharoff to answer questions.

Number 0387 — Rep. Ringstad moved that the committee pass the resolution with individual recommendations with adopting the amendments as proposed by Rep. Zharoff.

Number 0388 — Chairman Furnace accepted the motion and suggested an editorial notice that the amendment be placed on page 2, line 6.

Number 0393 — The resolution passed with unanimous consent. There being no further items to come before the committee at this time, the meeting was adjourned at 9:20 a.m.

Bill Fact Sheet

Date Received _____

Bill Number _____ Title _____

Fiscal Note - Date Requested _____ Date Received _____

- Or Whom _____

Dept. Position Paper - Date Requested _____ Date Received _____

- Of Whom _____

Resource People

Initial Hearing - Date _____

People Contacted

Martin - will come if called - 3783

Follow-up Hearing - Date _____

Final Action _____ Date _____

HB

62

Sofo
6/20/83

Original sponsors: Lindauer and
Grussendorf

IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

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

* Section 1. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may not spend public money to employ or contract with a nonresident person to provide expertise or professional services to the state unless a written report is filed with the Department of Administration. The report shall include a brief description of the work to be done by the nonresident person, the reasons why the state failed to identify an Alaskan person and the effort made to locate a qualified Alaskan person. The legislative audit division shall prepare the forms necessary to comply with this section.

(b) In this section "state" includes any state department, state agency, and state university.

* Sec. 2. Contracts that are exempt from the provisions of AS 36.98 as provided in AS 36.98.010(1, are exempt from the provisions of sec. 1 of this Act.

* Sec. 3. Section 1 of this Act is repealed July 1, 1985.

STATE OF ALASKA 1984 LEGISLAT[illegible] SESSION
FISCAL NOTE

Revision Date:

I. REQUEST
Bill/Resolution No.: SCSSSHB 62
Title: Nonresident Contractual Services
Sponsor: Lindaur and Grussendorf
Requestor: Senate Labor and Commerce
Date of Request:

II. FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: General Gov't.
BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	F	FY 89
OPERATING						
100 PERSONAL SERVICES	-0-					
200 TRAVEL						
300 CONTRACTUAL	-0-		50.0			
400 COMMODITIES	-0-					
500 EQUIPMENT	.5					
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	.5		50.0			
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	.5		50.0			
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL	.5		50.0			

POSITIONS:

FULL-TIME	-0-		-0-			
PART-TIME						
TEMPORARY						
TOTAL	-0-		-0-			

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

A

Prepared By: Bob Link /s/ Bruce Moore Lgl Phone: 465-2250
Division: General Services & Supply Date: November 15, 1983

Approved by Commissioner: Lisa Rudd /s/ Lisa B Rudd Date: 12/21/83
Department: ADMINISTRATION

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

9/14/83

20/2011D3/1125-02/1
FISCAL NOTE/BDGSF1

IV. ANALYSIS:

House Bill SCSSSHB 62
November 15, 1983

The bill only applies to those professional services defined in AS 36.98. This will reduce the annual work load to a maximum of 3,000 forms. The forms would be filed by professional category. During fiscal year 1986, the forms would be reviewed with the intent of identifying and encouraging the development of those professional services and areas of technical expertise lacking in Alaska.

Equipment:

Files and materials	$ .5

Contractual Services:

Review	50.0
Total -	$ 50.5

FISCAL NOTE Revision Date: May 24, 1983

I. REQUEST
Bill/Resolution No.: SSHB 62
Title: Nonresident Contractual Services
Sponsor: Lindauer & Grussendorf
Requestor: Senate Labor & Commerce

II. FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected:
General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link Phone: 465-2250
Division: General Services & Supply Date: 5-24-83

Approved by Commissioner: Lisa Rudd Date: 5/24/83
Department: ADMINISTRATION

Distribution:
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3/8/83

7/0506-02/BDG571

Personal Services

Admin. Asst. II (R14)		$25,740	
Clerk III (R8)		18,360	
Clerk II (R7)		16,896	
		$60,996	
	Benefits (.2208)	13,468	
	Health Ins.	7,033	
	Legal Trust	270	$ 81.8

Contractual Services

Phones	$ 4.0	
Printing-forms Leg. Audit	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development/Tracking, Matching	100.0	$139.0

Supplies and Materials

Office Supplies	$ 3.0	
Filing Cabinets	.9	$ 3.9

Equipment

Work Stations	$ 10.5	$ 10.5
		$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill. This bill applies to all purchases made by any State agency, State university, borough, city, village, school district or other State subdivision. Not included in this fiscal note is the cost of time necessary to fill out all these forms. This version of the bill also requires that the form be filed with the Department of Education and University of Alaska in addition to Office of the Governor and Legislative Audit. The bill further includes non-profit corporations that use State money as well as State agencies, etc. as previously defined.

HOUSE BILL NO. 62

POSITION PAPER

HB 62 would require that a written report be filed with the Office of the Governor and the Division of Legislative Audit where public money is paid to a nonresident individual or business. Information to be provided includes a work description, reasons a nonresident was chosen, efforts made to use residents and recommendations to use residents in the future.

The use of resident contractors is certainly desirable. Our concern is that there are lower cost methods to conduct the information gathering and review function attempted by this bill. The Division of Legislative Audit or other agency could conduct a peformance review of employment of nonresident contractors, targeting those areas necessary. They can do this with much greater efficiency and without the cost of additional resources, forms, further bureaucracy, etc.

It is necessary that the bill define "nonresident" so there is no confusion as to which group this bill is to be applied to; also to insure consistency with any other legal rulings as to the definition of residency.

Prepared by:

Anselm Staack, Deputy Commissioner — 3/28/83 Date

Lisa Rudd, Commissioner — 3/23/83 Date

(3/28/83)

FISCAL NOTE (Revision Date: , 1983)

I. REQUEST

Bill/Resolution No.: HB 62
Title: Nonresident Contractual Servises
Sponsor: Lindauer
Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Administration
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected: General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link
Phone: 465-2250
Division: General Services & Supply
Date: May 6, 1983

Approved by Commissioner: Lisa Rudd
Date:
Department: ADMINISTRATION

Distribution:
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Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

7/0506-02/BDGSF1

Personal Services

Admin. Asst. II (R14)		$25,740	
Clerk III (R8)		18,360	
Clerk II (R7)		16,896	
		$60,996	
	Benefits (.2208)	13,468	
	Health Ins.	7,033	
	Legal Trust	270	$ 81.8

Contractual Services

Phones	$ 4.0	
Printing-forms & Leg. Audit Review	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development	100.0	$139.0

Supplies and Materials

Office Supplies	$ 3.0	
Filing Cabinets	.9	$ 3.9

Equipment

Work Stations	$ 10.5	$ 10.5
		$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill.

1/0506-02/2/BDGSF1

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SSHB 62
Title An Act relating to the use of public money for the payment of non- (+) resident individuals or businesses.
Requested by Reps. Lindauer and Grussendorf Date

II. FISCAL DETAIL
Agency Affected Legislative Audit Division
Program Category Affected
BRU, Program, or Subprogram(s) Affected
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 84	FY 85	FY 86	FY87	FY 88	FY 89
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL						
400	COMMODITIES	1.0	1.0	1.0			
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND	1.0	1.0	1.0			
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Form design and printing costs

IV. DATE March 7, 1983 PREPARED BY Gerald L. Willerson
AGENCY Division of Legislative Audit
PHONE 465-3830

Original: Legislative Finance
cc: OMB
Prime Sponsor (First Legislator Named)

Sofo
6/15/83

At Lindauer's Request
Renumber accordingly
6/20/83

Original sponsors: Lindauer and Grussendorf

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

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

* Section 1. FINDINGS AND PURPOSE. The legislature finds that the state often employs nonresident consultants, advisors, and businesses to provide expertise and professional services to the state. In some instances this practice results in qualified Alaska individuals and businesses being overlooked. In other instances, where there may be no qualified Alaska individual or business, the legislature further finds that the practice of employing nonresidents addresses only a specific problem or need without necessarily encouraging the development of needed expertise or services within the state. The purpose of this Act is to assist the state in identifying and encouraging the development of those services and areas of technical expertise that are lacking in Alaska.

* Sec. 2. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may not spend public money to employ or contract with a nonresident person to provide expertise ~~or professional~~ or services to the state unless a written report is filed with the Department of Administration. The report shall include a brief description of the work to be done by the nonresident person, the reasons why the state failed to identify an Alaskan person and the effort made to locate a qualified Alaskan person. The legislative audit division shall prepare the forms necessary to comply with this section.

(b) In this section "state" includes any state department, state

agency, and state university.

* Sec. 3. Contracts that are exempt from the provisions of AS 36.98 as provided in AS 36.98.010(1) are exempt from the provisions of sec. 2 of this Act.

* Sec. 4. Section 2 of this Act is repealed July 1, 1985.

Sofo
5/26/83

OLD

Original sponsors: Lindauer and Grussendorf

IN THE HOUSE

BY THE LABOR AND COMMERCE COMMITTEE

SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

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

* Section 1. FINDINGS AND PURPOSE. The legislature finds that the state often employs nonresident consultants, advisors, and businesses to provide expertise and professional services to the state. In some instances this practice results in qualified Alaska individuals and businesses being overlooked. In other instances, where there may be no qualified Alaska individual or business, the legislature further finds that the practice of employing nonresidents addresses only a specific problem or need without necessarily encouraging the development of needed expertise or services within the state. The purpose of this Act is to assist the state in identifying and encouraging the development of those services and areas of technical expertise that are lacking in Alaska.

AS 37.10 is amended by adding a new section to read: ARTICLE 5 Sec. 37.10.61

* Sec. 2. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may not spend public money to employ or contract with a nonresident person to provide expertise or professional services to the state unless a written report is filed with the Department of Administration. The report shall include a brief description of the work to be done by the nonresident person, the reasons why the state failed to identify an Alaskan person, and the effort made to locate a qualified Alaskan person, [and a recommendation for the development of qualified Alaskan persons to satisfy projected future needs of the state.] The legislative audit division shall prepare the forms necessary to comply with this section.

(b) In this section "state" includes any state department, state agency, and state university.

* Sec. 3. Contracts that are exempt from the provisions of AS 36.98 as provided in AS 36.98.010(1) are exempt from the provisions of sec. 2 of this Act.

* Sec. 4. Section 2 of this Act is repealed July 1, 1985.

DRAFT

STATE OF ALASKA
FISCAL NOTE

Revision Date: June 1, 1983

I. REQUEST

Bill/Resolution No.: SCSSSHB 62
Title: Nonresident Contractual Services
Sponsor: Lindauer & Grussendorf
Requestor: Senate Labor & Commerce

II. FISCAL DETAIL

Agency Affected: Administration
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected:
General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		-0-				
200 TRAVEL						
300 CONTRACTUAL		-0-		50.0		
400 COMMODITIES		-0-				
500 EQUIPMENT		.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		.5		50.0		
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		.5		50.0		
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		-0-		-0-		
PART-TIME						
TEMPORARY						
		-0-		-0-		

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link Bob Link Phone: 465-2250
Division: General Services & Supply Date:

Approved by Commissioner: Lisa Rudd Date: 6/9/83
Department: ADMINISTRATION

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

DRAFT

7/0506-02-1/BDGSF1

FISCAL NOTE SCSSSHB 62

Assumptions

This note differs from the previous one due to revised assumptions based on the changes in the Committee Substitute. It is now clear that the bill only applies to those professional services defined in AS 36.98. This will reduce the annual workload to a maximum of 3,000 forms. The forms would be filed by professional service category. During fiscal year 1986 the forms would be reviewed with the intent of identifying and encouraging the development of those professional services and areas of technical expertise lacking in Alaska.

Equipment	
Filing cabinets and materials	.5
Contractual services	
Final review	50.0
Total -	$ 50.5

7/0506-02-3/BDGSF1

Sofo
5/24/83

Original sponsors: Lindauer and
Grussendorf

IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

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

* Section 1. FINDINGS AND PURPOSE. The legislature finds that the state often employs nonresident consultants, advisors, and businesses to provide expertise and services to the state. In some instances this practice results in qualified Alaska individuals and businesses being overlooked. In other instances, where there may be no qualified Alaska individual or business, the legislature further finds that the practice of employing nonresidents addresses only a specific problem or need without necessarily encouraging the development of needed expertise or services within the state. The purpose of this Act is to assist the state in identifying and encouraging the development of those services and areas of technical expertise that are lacking in Alaska.

* Sec. 2. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state ~~and a nonprofit corporation~~ may not spend public money to employ or contract with a nonresident person to provide expertise or services to the state unless a written report is filed with the Department of Administration. The report shall include a brief description of the work to be done by the nonresident person, the reasons why the state ~~or the nonprofit corporation spending public money~~ failed to identify an Alaskan person, the effort made to locate a qualified Alaskan person, and a recommendation for the development of qualified Alaskan persons to satisfy projected future needs of the state. The legislative audit division shall prepare the forms necessary to

comply with this section.

(b) In this section "state" includes any state department, state agency, and state university.

* Sec. 3. Section 2 of this Act is repealed July 1, 1984.

Alaska State Legislature

Representative John Lindauer
District 10-A
3933 Geneva Place
Anchorage, AK 99508

While in Juneau
Pouch V
Juneau, AK 99811
465-3709

House of Representatives

TO: Senator Eliason
Chairman
Senate Labor & Commerce

FROM: Representative John Lindauer

RE: HB 62

This Committee substitute is just fine.

John

Sofo
6/20/83

Original sponsors: Lindauer and
Grussendorf

IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

SENATE CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 62 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

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

* Section 1. USE OF PUBLIC FUNDS TO PAY NONRESIDENTS. (a) The state may not spend public money to employ or contract with a nonresident person to provide expertise or services to the state unless a written report is filed with the Department of Administration. The report shall include a brief description of the work to be done by the nonresident person, the reasons why the state failed to identify an Alaskan person and the effort made to locate a qualified Alaskan person. The legislative audit division shall prepare the forms necessary to comply with this section.

(b) In this section "state" includes any state department, state agency, and state university.

* Sec. 2. Contracts that are exempt from the provisions of AS 36.98 as provided in AS 36.98.010(1) are exempt from the provisions of sec. 1 of this Act.

* Sec. 3. Section 1 of this Act is repealed July 1, 1985.

STATE OF ALASKA
FISCAL NOTE Revision Date: , 1983

I. REQUEST
Bill/Resolution No.: HB 62
Title: Nonresident Contractual Servises
Sponsor: Lindauer
Requestor: House Finance Committee

II. FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected:
General Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		81.8				
200 TRAVEL						
300 CONTRACTUAL		139.0				
400 COMMODITIES		3.9				
500 EQUIPMENT		10.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		235.2				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		235.2				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		3.0				
PART-TIME						
TEMPORARY						
		36.0				

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Bob Link Phone: 465-2250
Division: General Services & Supply Date: May 6, 1983

Approved by Commissioner: Lisa Rudd Date:
Department: ADMINISTRATION

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

7/0506-02/BDGSF1

Personal Services

Admin. Asst. II (R14)		$25,740	
Clerk III (R8)		18,360	
Clerk II (R7)		16,896	
		$60,996	
	Benefits (.2208)	13,468	
	Health Ins.	7,033	
	Legal Trust	270	$ 81.8

Contractual Services

Phones	$ 4.0	
Printing-forms & Leg. Audit Review	5.0	
Terminal rental (2)	10.0	
Legislative Audit Review	20.0	
System Development	100.0	$139.0

Supplies and Materials

Office Supplies	$ 3.0	
Filing Cabinets	.9	$ 3.9

Equipment

Work Stations	$ 10.5	$ 10.5
		$235.2

Filing of forms alone does not satisfy the intent of the bill. The forms and the data on them must be compiled and turned into information which will enable the State to develop expertise as described by the bill.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SSHB 62
Title An Act relating to the use of public money for the payment of non- (+
Requested by Reps. Lindauer and Grussendorf Date

(+) resident individuals or businesses.

II. FISCAL DETAIL
Agency Affected Legislative Audit Division
Program Category Affected
BRU, Program, or Subprogram(s) Affected
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 84	FY 85	FY 86	FY87	FY 88	FY 89
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL						
400	COMMODITIES	1.0	1.0	1.0			
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND	1.0	1.0	1.0			
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Form design and printing costs

IV. DATE March 7, 1983 PREPARED BY Gerald L. Wilkerson
AGENCY Division of Legislative Audit
PHONE 465-3830

Original: Legislative Finance
cc: OMB
Prime Sponsor (First Legislator Named)

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES AND SUPPLY

POUCH C (MS 0210)
JUNEAU, ALASKA 99811

(907) 465-2150

March 8, 1982

Honorable John Lindauer
Alaska State Legislature
House of Representatives
Pouch V (MS 3100)
Juneau, AK 99811

Dear Representative Lindauer:

Re: HB 62

After discussion with you and further thought I find that I agree with your points regarding HB 62. Though it would be easier to apply if "resident" and "expertise or services" were defined, it would not be impossible to implement the bill as is.

Sincerely,

Robert Link
Acting Director

RL/dlr
6/0308-01/6GSS2
cc: Commissioner Lisa Rudd
Department of Administration

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M May 17, 1983

SUBJECT: Use of public monies
(SSHB 62)

TO: Senator Richard I. Eliason
Chairman, Senate Labor and
Commerce Committee

FROM: Thomas A. Sofo /TAS
Legislative Counsel

You have asked this office for an opinion concerning the constitutionality of SSHB 62. SSHB 62 is arguably constitutional, however, there is a possibility that a court would find the statute unconstitutional in some of its application. The state has a legitimate concern in employment of its residents and the development of expertise and services locally within the state. Since there is no durational residency requirement, it can be argued that the statute is constitutional. Nevertheless, there is authority that any discrimination in favor of residents versus nonresidents is unconstitutional when there is no reason for the discrimination beyond the mere fact that the nonresidents are citizens of other states has been held by our United States Supreme Court. Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed.2d 397, 98 S.Ct. 2482 (1978). This bill does not reach into the private sector, and only addresses the expenditure of public money. This distinction may take the statute out from under the full effect of the Hicklin v. Orbeck, supra. In addition the bill does not unconditionally prohibit employment of nonresidents but rather requires a report to be filed in those cases where a nonresident is to be hired.

However, whether the state has a sufficient proprietary interest in the subject matter of each possible contract or hiring under this bill is debatable. A recent Washington case evidences the reluctance of a state court to find a sufficient proprietary interest in a public works (sewer) project because the statute in question affected private employers who had no direct dealings with the state.

Laborers Local Union No. 374 v. Felton Construction, 654 P.2d 67 (Wash 1982). There was a strong dissent to that opinion and the case represents a good survey of the relevant arguments. I have attached a copy for your convenience.

The recent (February 28, 1983) decision of the United States Supreme Court in White v. Massachusetts Council of Construction Employees, Inc. may add strength to arguments supporting the constitutionality of SSHB 62. I have attached a copy of the slip decision in that case for your review.

The case certainly seems to stand for the proposition that the state, as a market participant rather than regulator, may prefer its own residents without a violation of the Commerce Clause. The Court did not decide whether there is a Privileges and Immunities Clause violation. Inasmuch as SSHB 62 involves the use of the state's own money in providing services to the state, the parallel to the White case may support a defense to a constitutional challenge to the bill.

TAS:ljb

Enclosures
20/010

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81-1003. Argued November 1, 1982—Decided February 28, 1983

Petitioner Mayor of Boston, Mass., issued an executive order requiring all construction projects funded in whole or in part by city funds or funds that the city had authority to administer to be performed by a work force at least half of which are bona fide residents of the city. The Massachusetts Supreme Judicial Court held the order unconstitutional under the Commerce Clause.

Held: The Commerce Clause does not prevent the city from giving effect to the Mayor's executive order. Pp. 2–11.

(a) When a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794; *Reeves, Inc.* v. *Stake*, 447 U. S. 429. In a case like the instant one, the only inquiry is whether the challenged program constituted direct state or local participation in the market. Pp. 2–4.

(b) 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 under the rule of *Alexandria Scrap Corp.* Even if implementation of the Mayor's order might have a significant impact on specialized construction firms employing out-of-state residents, this is not relevant to the inquiry of whether the city is participating in the marketplace when it provides funds for construction. 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. And, even if the Mayor's order is characterized as sweeping too broadly, such

Syllabus

characterization is relevant only if the Commerce Clause imposes restraints on the city's activity and is no help in deciding whether those restraints apply. Pp. 5–7.

(c) Insofar as the Mayor's order was applied to projects funded in part with funds obtained from certain federal programs, the order was affirmatively sanctioned by the pertinent regulations of those programs. Where the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress, then no dormant Commerce Clause issue is presented. Pp. 7–9.

384 Mass. 466, 425 N. E. 2d 346, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 81-1003

KEVIN H. WHITE, ETC., ET AL., PETITIONERS *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[February 28, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979 the mayor of Boston, Massachusetts, issued an executive order[1] which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston.[2] The Supreme Judicial Court of Massachusetts decided that the order was unconstitutional, observing that

[1] The executive order provides:

"On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

a. at least 50% by bona fide Boston residents;

b. at least 25% by minorities;

c. at least 10% by women."

Only the residency requirement is being challenged.

[2] In 1980, of approximately $482 million expended on construction in the City of Boston, some $54 million, or 11%, was spent on projects to which the executive order applied. Of this latter amount, approximately $34 million represented projects being funded in part through federal Urban Development Action Grants (UDAGs).

the Commerce Clause "presents a clear obstacle to the city's order." 384 Mass. 446, 425 N. E. 2d 346 (1981). We granted certiorari to decide whether the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, prevents the city from giving effect to the mayor's order. 455 U. S. 919 (1982). We now conclude that it does not and reverse.

I

We were first asked in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as "regulators" but as "market participants." In that case, the Maryland legislature, in an attempt to encourage the recycling of abandoned automobiles, offered a bounty for every Maryland-titled automobile converted into scrap if the scrap processor supplied documentation of ownership. An amendment to the Maryland statute imposed more exacting documentation requirements on out-of-state than in-state processors, who in turn demanded more exacting documentation from those who sold the junked automobiles for scrap. As a result, it became easier for those in possession of the automobiles to sell to in-state processors. "The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." 426 U. S., at 803, n. 13. In upholding the Maryland statute in the face of a Commerce Clause challenge, we said that "[n]othing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnotes omitted). Because Maryland was participating in the market, rather than acting as a market regulator, we concluded that the Commerce Clause was not "intended to require independent justification," *id.*, at 809, for the statutory bounty.

We faced the question again in *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), when confronted with a South Dakota policy to confine the sale of cement by a state operated cement plant to residents of South Dakota. We underscored the holding of *Hughes* v. *Alexandria Scrap Corp.*, saying:

> "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [Citation omitted]. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U. S., at 436–437.[3]

We concluded that South Dakota, "as a seller of cement, unquestionably fits the 'market participant' label" and applied the "general rule of *Alexandria Scrap*." *Id.*, at 440.

Alexandria Scrap and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As we said in *Reeves*, in this kind of case there is "a single inquiry: whether the challenged 'pro-

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[3] We also noted the policy in support of this limitation on the Commerce Clause:

"Restraint in this area is also counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people,' *Heim* v. *McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin* v. *Kansas*, 191 U. S. 207, 222–223 (1903), and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U. S., at 438–439 (footnotes omitted).

gram constituted direct state participation in the market.'" *Id.*, at 436, n. 7. We reaffirm that principle now.

The Supreme Judicial Court of Massachusetts concluded that the City of Boston is not participating in the market in the sense described in *Alexandria Scrap Corp.* and *Reeves* because the order applies where the city is acting in a nonproprietary capacity, has a significant impact on interstate commerce, is more sweeping than necessary to achieve its objectives, and applies to funds the city receives from federal grants. 384 Mass., at ——, 425 N. E. 2d, at 354–355. For the same reasons the court found that the city is not a market participant, it concluded that the executive order violated the substantive restraints of the Commerce Clause.[4] *Ibid.*

II

Petitioners and respondents both, to a greater or lesser extent, seek to have us decide questions not presented by the record in this case. In support of the Massachusetts court's finding that the city is acting in a nonproprietary capacity, respondents urge that much of the construction subject to the mayor's order involved nonpublic projects that were financed largely through private funds. While the mayor's order by its terms would appear to apply to such construction, there is simply nothing in the record before us to support the conclusion that city funds were used for these types of construction projects. Respondents, had they wished to raise this question, were obligated to offer some evidence that city funds and private funds were used jointly to finance construction of some of the projects which were in fact subjected to the provisions of the mayor's order; nothing in the record supports such a conclusion.[5] The only issues before us, then, are the

[4] Respondents made several other challenges to the order, none of which are before us. Respondents also directed challenges to resident preferences contained in other state and local laws. None of these provisions is before us.

[5] The case was submitted below on an agreed statement of facts. The

propriety of applying the mayor's executive order to projects funded wholly with city funds and projects funded in part with federal funds. We address first the application of the order to city funded projects.

The Supreme Judicial Court of Massachusetts expressed reservations as to the application of the "market participation" principle to the city here, reasoning 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 works crews composed of out-of-State residents." 384 Mass., at ——, 425 N. E. 2d, at 354. Even if this conclusion is factually correct,[6] it is not relevant

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only reference in that statement to the funds affected by the order provides:

"The approximate dollar value of construction, both private and public, within the City of Boston in 1980 was $482,886,000; of that amount approximately 54,421,040 represented construction projects 'funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract' to which the Executive Order, by its terms, was applicable. Of that $54,421,040 approximately $34,000,000 represented projects involving Urban Development Action Grants." Agreed Statement of Facts, at A-42.

[6]The record does not readily support a finding of "significant impact" on firms employing out-of-state residents. The parties stipulated that a "*small number* of plaintiff contractors are out-of-state contractors who have regular and permanent work crews comprised entirely of out-of-state residents. These contractors for the most part are those who perform specialty work. . . ." Agreed Statement of Facts, at A41 (emphasis added). Although the parties also stipulated that some out-of-state workers who would otherwise have been employed on the projects would be unemployed and that some out-of-state contractors would be discouraged from bidding on public construction work, Agreed Statement of Facts, at A–37, the record does not reveal that any significant number of out-of-state workers or contractors has withdrawn from the construction market because of the order. Furthermore, the data in the record does not show that the increased employment of city residents in publicly funded construction projects has been accompanied by a decline in the percentage of

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 Massachusetts court's finding that the executive order sweeps too broadly, creating more burden than is necessary to accomplish its stated objectives. *Id.*, at ——, 425 N. E. 2d, at 355. 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. The Massachusetts court relied in part on our decision in *Hicklin* v. *Orbeck*, 437 U. S. 518 (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." *Ibid.*

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 the underlying oil and gas were owned by the State itself. Analyzing the case under the Privileges and Immunities Clause of Art. IV, § 2, cl. 1, 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:

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out-of-state residents. See Agreed Statement of Facts, at Appendix E.

> "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 U. S., at 531.

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]

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 ——, 425 N. E. 2d, 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 through Urban Development

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[7] JUSTICE BLACKMUN's opinion dissenting in part, *post*, 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 U. S. 518, 529–531 (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*.

Action Grants (UDAGs).[8] While the record assigns specific dollar amounts only for UDAGs, the parties also have stipulated that the executive order applies to Community Development Block Grants (CDBGs) and Economic Development Administration Grants (EDAGs).[9]

But all of this proves too much. The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. See *American Power & Light Co.* v.

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[8] Not all UDAG projects in Boston have been subjected to the executive order. HUD publications indicate that in 1980 Boston received $28,600,000 through UDAGs and that this money was to be spent on projects costing a total of $397,000,000. UDAG Project Approval List, Region I, Department of Housing and Urban Development, at 1 (Boston, Mass., Feb. 9, 1982). While we do not know what percentage of the $34,000,000 spent on projects affected by the executive order was in fact UDAG money, we do know that overall UDAG funds comprised 7% of the total costs of projects they were expended on.

[9] UDAGs are administered by the Department of Housing and Urban Development pursuant to the Housing and Community Development Act of 1977, 42 U. S. C. § 5318 (Supp. IV 1980). The HUD regulations governing the program are found at 24 CFR Part 570, Subpart G (1982). CDBGs are administered by HUD pursuant to the Housing and Community Development Act of 1974, 42 U. S. C. § 5301 et seq. (1976 & Supp. IV 1980), and the implementing regulations at 24 CFR Part 570 (1982). EDAGs are administered by the Department of Commerce in accordance with the Public Works and Economic Development Act of 1965, 42 U. S. C. § 3131 et seq. (1976 and Supp. IV 1980), and the implementing regulations at 13 CFR Part 305 (1982).

Respondents have asserted in this Court that the executive order also applies to funds the city receives from the Department of Transportation. In the Agreed Statement of Facts the parties stipulated that a resident preference in a state statute challenged below applied to DOT funds. Agreed Statement of Facts, at A45. There is, however, nothing in the record to indicate that DOT funds are affected by the order. In fact, the parties stipulate that the affected federal funds come from UDAGs, CDBGs, and EDAGs. Agreed Statement of Facts, at A43–A44. Without support in the record for a contrary conclusion, we decide this case as though DOT funds are not involved. See *Ramsey* v. *UMW*, 401 U. S. 302, 312 (1971); *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 4–6 (1917).

SEC, 329 U. S. 90 (1946); *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). 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. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 (1945). Thus, if the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress then no dormant Commerce Clause issue is presented.

An examination of the applicable statutes reveals that these federal programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed.[10] Examination of the regulations set forth in the margin indicates that the mayor's executive order sounds a harmonious note; the federal regulations for each program affirmatively permit the type of parochial favoritism expressed in the order.[11]

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[10] See 42 U. S. C. § 5318 (Supp. IV 1980) (UDAGs); 42 U. S. C. § 5301 (1976 and Supp. IV 1980) (CDBGs); 42 U. S. C. 3131 (1976) (EDAGs).

[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,

III

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 en-

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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 that

"[t]he 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 c nter 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, cl. 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in 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 immunites clause because the discrimination adversely affects citizens of the Commonwealth as well." 384 Mass., at ——, 425 N. E. 2d, at 354.

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 U. S. 175, 177–178 (1938).

tering 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.*, *supra*. 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.

SUPREME COURT OF THE UNITED STATES

No. 81-1003

KEVIN H. WHITE, ETC., ET AL., PETITIONERS *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[February 28, 1983]

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, concurring in part and dissenting in part.

I agree with the Court that this case presents two issues: (1) the validity of the mayor's executive order as applied to projects funded entirely by the city of Boston with its own revenues, and (2) the validity of the order as applied to projects funded in part with federal revenues pursuant to certain congressionally created grant programs.

I

Respecting the second issue, I am in agreement with the Court's conclusion that Congress, in creating the grant programs in question, specifically authorized "the type of parochial favoritism expressed in the order." *Ante*, at 9. As the Court holds, 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. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 418–427 (1946).[1]

[1] Because the Court does not pass on the possible invalidity of the executive order under the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2, cl. 1, it has no occasion to determine whether Congress may authorize, through affirmative legislation, what otherwise would be a violation of that Clause. This question may present considerations different from those presented by the dormant Commerce Clause. See L. Tribe, American Constitutional Law § 6–31, at 403, n. 18 (1978). For the reasons

II

I do not agree, however, with the Court's holding that the executive order is immune from Commerce Clause scrutiny insofar as it applies to city activities undertaken *without* specific congressional authorization.

The Court rejects certain arguments advanced by the Supreme Judicial Court of Massachusetts as relevant only if the order were "regulation of," rather than "participation in," the market. *Ante*, at 6–7. The Court holds that the order is the latter rather than the former because, in the Court's view, it "falls well within the scope," *ante*, at 7, n. 7, of the Court's decisions in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), and *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980). With due respect, this plainly is not so.

In *Alexandria Scrap*, the effect of the Maryland statute was to offer a subsidy only to scrap processors located within the State. See 426 U. S., at 803, n. 13. The Court held that a State, free from Commerce Clause scrutiny, may enter "the market as a purchaser, in effect, of a potential article of interstate commerce" and "restrict[t] its trade to its own citizens or businesses within the State." *Id.*, at 808. *Alexandria Scrap* thus permits a State to prefer its residents as direct recipients of certain subsidies. See *Reeves*, 447 U. S., at 440, n. 14 (discussing *Alexandria Scrap*).

In *Reeves*, South Dakota refused to sell cement to out-of-state consumers until the orders of all in-state customers were filled. The Court held that the Commerce Clause is not implicated when a State prefers its own residents as direct purchasers of state-produced goods. Neither *Reeves* nor *Alexandria Scrap*, however, went beyond ensuring that the States enjoy "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with

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given by the Court, *ante*, at 10, n. 12, I also decline to reach this issue.

whom he will deal.'" *Reeves*, 447 U. S., at 438–439, quoting *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).

Boston's executive order goes much further. The city has not attempted merely to choose the "parties with whom [it] will deal."[2] Instead, it has imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs.[3] Thus, the order directly restricts the ability of private employers to hire nonresidents, and thereby curtails nonresidents' access to jobs with private employers. I had thought it well established that, under the Commerce Clause, States and localities cannot impose restrictions granting their own residents either the exclusive right, or a priority, to private sector economic opportunities. See *H.P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); cf. *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978) (decided under the Privileges and Immunities Clause).

Such restrictions are not immune from attack under the Commerce Clause solely because the city has imposed them as conditions to its contracts with private employers. In *Reeves*, the Court, I thought, carefully explored reasons the policy there at issue might not have been entitled to the market participant exemption, notwithstanding the policy's essentially proprietary nature. 447 U. S., at 440–447. The Court also observed that the line between "market participant" and "market regulator" is not always bright: "South Dakota, as a seller of cement, unquestionably fits the 'market

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[2] Had the city decided to limit its *own* hiring to Boston residents, its decision would almost certainly have been permissible under *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U. S. 645 (1976), as well as *Reeves* and *Alexandria Scrap*.

[3] That the order limits the preference to 50% of the covered jobs is, of course, not relevant to the applicability of the market participant exemption. If such preferences do not implicate the dormant Commerce Clause, they are immune even if they apply to 100% of a contractor's jobs.

participant' label more comfortably than a State acting to subsidize local scrap processors." *Id.*, at 440. See *id.*, at 440, n. 14 ("We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity").

The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves*, the most important of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding private trade in the national marketplace"; it was not designed "to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437 (emphasis added). The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438–439. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.

The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private eco-

nomic relations.[4] When exercised by government, such a power is the essence of regulation.

Attempts directly to constrict private economic choices through contractual conditions are particularly akin to regulation because, unlike simple refusals to deal but like conven-

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[4]Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919) (unquestioned right of trader unilaterally to refuse to deal with those retailers who do not adhere to retail price schedule), relied upon in *Reeves*, 447 U. S., at 439, with *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 45–46 (1960) (trader violates Sherman Act by inducing wholesalers to refuse to deal with retailers who will not adhere to price schedule), and *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 382 (1967) ("[o]nce the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred" violates the Sherman Act), and *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977) (overruling *Schwinn* in part; nonprice vertical market restrictions are not *per se* unlawful, but should be judged individually under the "rule of reason" to determine whether they "should be prohibited as imposing an unreasonable restraint on competition").

Conditioning a willingness to deal with potential bargaining partners on their derivative refusals to deal with others is particularly suspect where those whom the trader attempts to isolate are its competitors. See *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 154–155 (1951). Here, the citizens of Boston, through their mayor, have sought to do just this by requiring those wishing to deal with their city government to refuse to hire nonresidents competing with citizens for jobs. This anticompetitive and suspect goal will be present whenever a unit of state or local government requires recipients of public contracts or government subsidies to deal only with that government's constituents.

Congress, in § 8(e) of the National Labor Relations Act, has expressly prohibited labor organizations from requiring employers to agree "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person," and has declared any such agreement to be void. 29 U. S. C. 158(e). On the other hand, permitting labor unions to refuse to deal with the primary employer is the staple of federal labor policy, and nothing prevents an employer from refusing unilaterally to deal with others for any lawful reason. To be sure, in the construction industry, at issue in the executive order, collective bargaining agreements are ex-

tional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest. A requirement that firms wishing to deal with the State hire a certain percentage of their workforce from among state residents in practice may constrict the opportunities of nonresidents to work on projects with no connection whatever with the governmental entity imposing the condition. A firm that relies to any significant degree on a permanent workforce will be compelled to favor local residents for these positions. An analogous requirement that such firms purchase only from in-state suppliers the goods used in state projects also might constrict interstate trade wholly unrelated to government business. If economic considerations counsel in favor of stable relationships with suppliers, a firm wishing to deal with the State will be compelled to favor local firms across the board. The effect of such "conditions" on the ability of nonresidents to deal with affected firms would be virtually identical to the effect of a conventional market regulation requiring such practices.

In *Reeves*, the Court cited "considerations of state sovereignty" as another factor counseling restraint in applying the Commerce Clause to "proprietary" activity. The States have a sovereign interest in some freedom from federal interference when hiring state employees. It might be argued that because the city could have chosen to build the projects covered by the order itself and, free from dormant Commerce Clause restraint, could have hired local residents, the

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pressly exempted from this proscription of "hot cargo" clauses. *Ibid.*; see *Woelke & Romero Framing, Inc.* v. *NLRB*, —— U. S. ——, —— (1982). That Congress has chosen, however, for reasons peculiar to labor policy and the history and nature of collective bargaining in the construction industry, *id.*, at ——, to exclude collective agreements in that industry from this restriction does not detract from my basic point: there is a world of difference between the kind of "proprietary" activity at issue here and the kind exempted from dormant Commerce Clause scrutiny in *Reeves* and *Alexandria Scrap*.

city may contract to have the work done by private firms on the condition that the firms hire local residents.[3] But the Court never has suggested that the State's special sovereign interest in determining whom it will hire, and in setting the terms and conditions of public employment, extends to dictating whom private parties with which it contracts will hire, or the terms and conditions of private employment. In my view, the State's interest in managing its relations with its employees is fully safeguarded by its power to do the work itself if it so chooses, with such immunity from the Commerce Clause as attaches in that situation. The Court's observation in *Reeves*, 447 U. S., at 438–439, tying concerns for state sovereignty to a merchant's customary power to exercise his independent discretion as to the parties with whom he will deal, is fully consistent with this view. But when a State attempts to arrogate unto itself the "independent discretion" of others to deal with whom they please, it exercises regulatory power that must be consistent with the requirements of the Commerce Clause. See generally Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 560–564 (1981).

This approach fully safeguards the power of the State to limit to state residents the direct benefits of subsidy programs supported with state funds. It permits a State to prefer local businesses as providers of the goods it purchases in the marketplace, and to prefer local residents as direct purchasers or recipients of state-created bounty. But it does not permit a State to impose clear market regulations as a condition of a contract or of a subsidy, using the tremendous power of the state treasury directly to impede the free flow of private trade in interstate commerce, or, what may be worse, to discriminate against such commerce. South Dakota should not be immune from the Commerce Clause if, for

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[3] Indeed, the Court appears to rely on this argument. See *ante*, at 7, n. 7.

example, it imposes as a condition on the sale of state-owned cement that purchasers employ only South Dakota residents, or resell the cement only to South Dakota customers. Cf. *Reeves*, 447 U. S., at 444, n. 17 ("Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers"). Similarly, Maryland should not be free of Commerce Clause scrutiny if it imposes as a condition of receiving a bounty, like that at issue in *Alexandria Scrap*, that scrap processors employ only Maryland residents, or resell the processed scrap only in-state. In my view such conditions, like the condition at issue here, directly intrude upon the historic Commerce Clause concern with "measures impeding free private trade in the national marketplace." *Reeves*, 447 U. S., at 437.

I do not intend to suggest that the Court necessarily would decide these variations of *Alexandria Scrap* and *Reeves* as it has decided this case; evidently, the Court acknowledges that "restrictions that reach beyond the immediate parties with which the government transacts business" pose Commerce Clause questions more profound than did the restrictions at issue in *Alexandria Scrap* and *Reeves*. *Ante*, at 7, n. 7. The Court indicates that it upholds the executive order on the understanding that, with the exception of the federal grant programs, it is applied solely to construction projects funded entirely by the city. *Ante*, at 4–5. Because many construction contractors hire a substantially different work crew for each project they undertake, applied to such projects the mayor's order is arguably limited, as the Court says, to a "discrete, identifiable class of economic activity in which the city is a major participant." *Ante*, at 7, n. 7.[6]

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[6]See S. Rep. No. 187, 86th Cong., 1st Sess., 27 (1959) ("The occasional nature of the employment relationship makes [the construction] industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon

This unique aspect of employment in the construction industry—and of public works construction projects—must also underlie the Court's related justification that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Ibid.*

I am not persuaded, however, that even the comparatively limited terms of the executive order constitute "market participation" rather than "market regulation." The "sense" in which those affected by the mayor's order "work for the city" is so "informal," in my view, as to lack substance altogether. The city does not hire them, fire them, negotiate with them or their representative about the terms of their employment, or pay their wages. In the case of the employees of subcontractors regulated by the order, the city does not even pay, or contract directly with, their employers. In short, the economic choices the city restricts in favor of its residents are the choices of private entities engaged in interstate commerce. Thus, the executive order directly impedes "free private trade in the national marketplace," and for that reason I would not hold it immune from Commerce Clause scrutiny. I therefore reach the question whether the order imposes an impermissible burden on interstate commerce.

III

As the Court recognizes, the order constitutes "parochial favoritism" of Boston residents over nonresidents of Boston and Massachusetts for access to private sector jobs. *Ante*, at 9. Thus, the order is a "protectionist measure" subject to the rule of virtually *per se* invalidity established by many of this Court's cases. See, *e. g.*, *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).[7]

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various stages of construction"). It is noteworthy, however, that in this case the parties have stipulated that the order affects some "contractors who have regular and permanent work crews." Agreed Statement of Facts, in App. to Pet. for Cert. A41.

[7] I reject the suggestion that the record does not establish a cognizable burden on interstate commerce. See *ante*, at 5, & n. 6. The city has stip-

That the order burdens Massachusetts residents living outside Boston to the same extent as residents of other States does not save the order from this rule. First, the order derives in part from a state statute encouraging *all* Massachusetts communities to institute similar measures. Mass. Gen. Laws Ann. ch. 149, § 26 (West 1982).[8] That statute is clearly designed to benefit all Massachusetts residents at the expense of all residents of other States. In carrying out this statutory mandate, Boston, a creature of the Commonwealth, is tainted by participation in the Commonwealth's larger and clearly discriminatory scheme.

Second, and more significant, the order would be improper under *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), even absent the state statute. In *Dean Milk*, this Court held that a Madison, Wis., city ordinance "plainly discriminate[d] against interstate commerce," even though "Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce." *Id.*, at 354, & n. 4. This was so because the ordinance "erect[ed] an economic barrier protecting a major local industry against

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ulated that, as a result of this order, some construction workers who are nonresidents of Massachusetts will be unemployed; contractors from outside Massachusetts will be discouraged from bidding on affected projects; and the costs of construction on affected projects will increase. Agreed Statement of Facts, App. to Pet. for Cert. A37.

[8]The mayor's executive order itself states that one of its purposes is to satisfy the city's "statutory obligation to give preference to its residents in hiring for public[ly] funded construction projects pursuant to [Massachusetts] G.L. c. 149, § 26." App. to Pet. for Cert. A19. The statute to which the order refers provided: "Each county, town or district in the construction of public works, or persons contracting or subcontracting for such works, shall give preference [in hiring] to veterans and citizens who are residents of such county, town or district." Mass. Gen. Laws Ann., ch. 149, § 26 (West 1982). In its decision holding the city order unconstitutional, the Supreme Judicial Court of Massachusetts also struck down this statute. —— Mass. ——, ——, 425 N. E.2d 346, 352–353 (1981). The Commonwealth has not appealed that ruling.

competition from without the State." *Id.*, at 354. The Court held that the ordinance was invalid because "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, [were] available." *Ibid.*

Boston has at its disposal reasonable alternatives to accomplish its central goal—the alleviation of unemployment among Boston residents. It can create training programs for its unemployed residents or establish aggressive referral practices aimed at promoting employment for its residents at *all* construction projects in the city without implicating Commerce Clause concerns. It also can undertake some of the construction projects itself, and hire Boston residents to work on them, without imposing discriminatory restraints on the private market.

Moreover, as in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), the order is ill-suited to eliminating unemployment because it applies the preference to all Boston residents, not just the underemployed or undertrained. See *id.*, at 527–528. Finally, since *Dean Milk*, the Court has indicated that a discrimination against interstate commerce is unjustified unless there is a legitimate reason, apart from their out-of-state origin, to treat differently articles of commerce or individuals engaging in commerce originating outside the State. *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627. No such reason has been shown in this case.

Insofar as the Massachusetts court held Boston's executive order violative of the Commerce Clause as applied outside the context of federal grant programs, I would affirm its judgment. To this extent, therefore, I respectfully dissent.

public right and justice" and not performing acts of service to his employer. *State v. Kurtz*, 78 Ariz. 8, 278 P.2d 406, 408 (1954). The activities transcended his duties as ity guard; thus, I concur in the that the trial judge erred by dis- the aggravated assault charge filed t to A.R.S. § 13-1204(A)(5).

ajority opinion does not distinguish law enforcement and unrelated ac- and therefore presumes that the would apply even though a peace ight be engaged in some function nrelated to law enforcement pur- ecause we need not decide whether te applies regardless of the peace ctivities, I would limit the holding se to the standard enunciated by me court in *Kurtz*—"were the ting 'in vindication of public right or were they merely performing rvice to their private employer?"

on appeal defendant has not contest- ficiency of Officer Worley's verbal on of himself to her in the parking

LABORERS LOCAL UNION NO. 374, a labor organization, Paul Hamilton, and Phil Cameron, Appellants,

v.

FELTON CONSTRUCTION COMPANY, and City of Aberdeen, a municipal corporation, Respondents.

No. 47681-1.

Supreme Court of Washington, En Banc.

Nov. 24, 1982.

Action was brought based on alleged violation of statute requiring that contractors and subcontractors on public works projects have Washington residents as 90% to 95% of their employees, depending upon the number of persons employed. The Superior Court, Grays Harbor County, John W. Schumacher, J., entered judgment in favor of construction company in city, and plaintiffs appealed. The Supreme Court, Utter, J., held that the statute violated the privileges and immunities clause.

Affirmed.

Dore, J., dissented and filed an opinion in which Dimmick, Rosellini, and Pearson, JJ., concurred.

1. Constitutional Law ⇐207(1)

Purpose of privileges and immunities clause is to place citizens of each state upon same footing with citizens of other states so far as advantages resulting from citizenship in those states are concerned. U.S.C.A. Const. Art. 4, § 2, cl. 1.

2. Constitutional Law ⇐207(1)

Threshold inquiry in case of challenge based on privileges and immunities clause is whether interest subject to state legislation is a privilege or immunity within meaning of the clause. U.S.C.A. Const. Art. 4, § 2, cl. 1.

3. Constitutional Law ⇐207(1)

If particular legislation deals with a privilege or immunity, state must demonstrate valid independent reason for discriminating against nonresidents by showing something to indicate that noncitizens constitute a peculiar source of evil at which the statute is aimed and that there is a reasonable relationship between the danger represented by noncitizens as a class and discrimination practiced upon them. U.S.C.A. Const. Art. 4, § 2, cl. 1.

4. Constitutional Law ⇐207(1)

Fundamental interests which are protected by the privileges and immunities clause are those interests basic to the maintenance or well-being of the union. U.S.C.A. Const. Art. 4, § 2, cl. 1.

5. Constitutional Law ⇐207(2)

Statute requiring that contractors or subcontractors working on public works employ a certain percentage of Washington residents regulated a fundamental interest protected by the privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; West's RCWA 39.16.005.

6. Constitutional Law ⇐207(2)
Public Contracts ⇐2

There was no showing that nonresidents of Washington presented particular evil with respect to employment by contractors working on public projects or that statute requiring that 90% to 95% of the employees of a contractor or subcontractor on a public works project be Washington residents was closely tailored to achieving some legitimate state purpose and statute thus violated privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1; West's RCWA 39.16.005.

7. Constitutional Law ⇐207(1)

Fact that legislation involves a state in its proprietary capacity does not justify discrimination against nonresidents which is prohibited by the privileges and immunities clause. U.S.C.A. Const. Art. 4, § 2, cl. 1.

8. Commerce ⇐3, 12

Commerce clause focuses on undue burdens on interstate commerce and it is an affirmative grant of power to Congress and an implied restriction on the power of states. U.S.C.A. Const. Art 1, § 8, cl. 3.

1 Felton and the City denied appel-
allegations. The City admitted the
project was a public work. Felton
. Felton moved to dismiss the com-
for failure to state a claim. The City
for a declaratory judgment on the
utionality of RCW 39.16.005. Appel-
iled a cross motion for an order ad-
the statute to be constitutional.
r hearing arguments on the motions,
l court declined to dismiss the action
ure to state a claim, but ruled that
9.16.005 "is void because it violates
vileges and Immunities Clause of the
States Constitution." We accepted

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rivileges and immunities clause of
st. art. 4, § 2 states:
citizens of each state shall be enti-
o all privileges and immunities of
ns in the several states.

The purpose of the privileges and
ties clause is "to place the citizens of
te upon the same footing with citi-
other States, so far as the advan-
sulting from citizenship in those
re concerned." *Paul v. Virginia*, 75
Wall.) 168, 180, 19 L.Ed. 357 (1869).
ory of the clause reflects a concern
ramers for keeping the newly inde-
states from adopting highly protec-
conomic policies. The Articles of
ation provide, "The better to se-
perpetuate mutual friendship and
se among the people of the differ-
s in this union, the free inhabitants
these states . . . shall be entitled
vileges and immunities of free citi-
e several states . . ." 9 *Journals
ontinental Congress 1774–1789*, at
ord ed. 1907).

cerns expressed in the Articles of
tion did not dissipate with the
the Articles, but were reiterated
d (if briefer) force in the comity
the constitution. The privileges
nities clause "implicates not only
dual's right to nondiscriminatory
but also, perhaps more so, the
structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed.2d 530 (1975).

II

[2] With these purposes in mind, the United States Supreme Court fashioned a test for determining if state legislation violates the privileges and immunities clause. The threshold inquiry is whether the interest subject to state legislation is a privilege or immunity within the meaning of the clause. In *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354 (1978), the court stated:

> Only with respect to these "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens resident and nonresident, equally.

The *Baldwin* court referred to such interests as "fundamental".

[3] Once within the ambit of the clause, a state must demonstrate a "valid independent" reason for discriminating against nonresidents by showing:

> (1) "'something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed'". *Hicklin v. Orbeck*, 437 U.S 518, 526, 98 S.Ct. 2482, 2487, 57 L.Ed.2d 397 (1978), quoting from *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S.Ct. 1156, 1163, 92 L.Ed. 1460 (1948); and
>
> (2) "there must be a 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Hicklin*, at 526 98 S.Ct., at 2487, quoting from *Toomer*, at 399, 68 S.Ct., at 1163. The *Hicklin*, court also stated the discrimination must "bear a substantial relationship" *Hicklin*, at 527, 98 S.Ct., at 2488, and must be "closely tailored", *Hicklin*, at 528, 98 S.Ct., at 2488, to the particular evil nonresidents present.

We will refer to this 2-part test as the *Toomer/Hicklin* test.

[4] A. Addressing *Baldwin*'s threshold question, we must first clarify the meaning of the term "fundamental". By using the term the *Baldwin* court revived the somewhat anachronistic discussion of the privileges and immunities clause by Justice Washington in *Corfield v. Coryell*, 6 F.Cas. 546 (C.C.E.D.Pa.1823) (No. 3,230). In its use of the term, the Court did not mean to embrace the analytical structure for identifying fundamental rights requiring strict scrutiny under the equal protection clause. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). To the extent the term "fundamental" is helpful, it points to those interests "basic to the maintenance or well-being of the Union." *Baldwin*, at 388, 98 S.Ct., at 1862.

From the very beginning, "the right to ply one's trade in any State in the Nation was at the heart of the clause's guarantees." *Salla v. County of Monroe*, 48 N.Y.2d 514, 522, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) *cert. denied sub nom. Abrams v. Salla*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 262 (1980). *See Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 20 L.Ed. 449 (1871).

> [I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of *substantial equality with the citizens of that State.*

(Italics ours.) *Toomer v. Witsell*, *supra* at 396, 68 S.Ct., at 1162 (citing *Ward v. Maryland*, *supra*). *See Hicklin*, *supra*. *Baldwin* itself affirmed this principle in stating the "right to pursue a livelihood in a State other than his own [is] a right that is protected by the Privileges and Immunities Clause." *Baldwin*, at 386, 98 S.Ct., at 1861 (citing *Toomer v. Witsell*, *supra*); *see also Northwest Gillnetters Ass'n v. Sandison*, 95 Wash.2d 638, 647–48, 628 P.2d 800 (1981) (sport fishing is not a privilege or immunity, but commercial fishing is protected).

[5] Appellants claim RCW 39.16 does not regulate a fundamental interest, but their arguments in this regard are misplaced. They argue first that inasmuch as

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Privileges and immunities clause is a direct limitation on states and explicitly secures privileges and immunities for individuals who move from one state to another. U.S.C.A. Const. Art. 4, § 2, cl. 1.

Hafer, Cassidy & Price, Richard H. Robblee, Seattle, for appellants.

Perkins, Coie, Stone, Olsen & Williams, Russell Perisho, Seattle, David Foscue, Asst. City Atty., Aberdeen, for respondents.

UTTER, Justice.

The trial court declared RCW 39.16 violated U.S.Const. art. 4, § 2, the privileges and immunities clause. The matter is on direct review to this court. We affirm.

RCW 39.16.005 provides in pertinent part:

> In all contracts let by the state ... or any county, city ... for the erection, construction, alteration, demolition, or repair of any public building ... or any other kind of public work or improvement, the contractor or subcontractor shall employ ninety-five percent or more bona fide Washington residents as employees where more than forty persons are employed, and ninety percent or more bona fide Washington residents as employees where forty or less persons are employed ...

Failure to comply with these provisions results in a criminal sanction. RCW 39.16.-040.

In the spring of 1980, the City of Aberdeen awarded a sanitary sewer project to the lowest bidder, the Felton Construction Company, a Montana corporation. The project was funded by 25 percent state and local monies and 75 percent federal monies. After work commenced, appellants, Laborers Local Union 374 and two of its unemployed members, sued Felton and the City for a writ of mandamus and for injunctive relief. They alleged Felton had not employed the statutorily required percentage of Washington residents on the sewer project.

Both Felton and the City denied appellants' allegations. The City admitted the sewer project was a public work. Felton did not. Felton moved to dismiss the complaint for failure to state a claim. The City moved for a declaratory judgment on the constitutionality of RCW 39.16.005. Appellants filed a cross motion for an order adjudging the statute to be constitutional.

After hearing arguments on the motions, the trial court declined to dismiss the action for failure to state a claim, but ruled that RCW 39.16.005 "is void because it violates the Privileges and Immunities Clause of the United States Constitution." We accepted review.

I

The privileges and immunities clause of U.S.Const. art. 4, § 2 states:

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[1] The purpose of the privileges and immunities clause 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." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1869). The history of the clause reflects a concern by the framers for keeping the newly independent states from adopting highly protectionist economic policies. The Articles of Confederation provide, "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 ... shall be entitled to all privileges and immunities of free citizens in the several states ..." 9 *Journals of the Continental Congress 1774–1789*, at 908 (C. Ford ed. 1907).

The concerns expressed in the Articles of Confederation did not dissipate with the demise of the Articles, but were reiterated with equal (if briefer) force in the comity article of the constitution. The privileges and immunities clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the

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economic welfare. *See Hughes v.*
'ria Scrap Corp., 426 U.S. 794, 96
38, 49 L.Ed.2d 220 (1976). We as-
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ne statute under the *Toomer/Hick-*

oking to the first part of the *Hicklin* test, the "peculiar evil" residents represent is indicated by e only by implication. By produc-ndary economic activity and max-the return of tax dollars to the CW 39.16.005's restrictions on con-for public works benefit the state's . Eliminating the statute, we ssume, would undermine the sec-conomic activity and reduce maxi-of state tax dollars by diverting it of the state.

r appellants nor the State provides ence that hiring out-of-state work-d constitute a peculiar evil by di-vages out of the state. No proof is l regarding the extent to which ite contractors or subcontractors ing their employees to the jobsite nan hire locally (which is not an ar practice with respect to nonsu-d employees). Nor do appellants ny evidence regarding the extent wages would be diverted out of ndoubtedly, out-of-state contrac-nase supplies and equipment in the some wages are spent here. In ome secondary economic activity ited only by having out-of-state with their additional requirements nd shelter. Finally, even if we ssume some wages would be di-of state, we have been provided ation by which to compare how would compare with the advan-wer bids on public works by out-ntractors.

ts of the *Toomer/Hicklin* test, we will orced to reject the purpose of the invalid.

In essence, we are presented with a bare allegation that the state benefits from RCW 39.16 and that nonresidents are the peculiar evil that would eliminate that benefit. The State seems to acknowledge its paucity of evidence in stating if the statute were struck down, nonresidents "might otherwise drain the economy." Brief of Amicus Curiae, at 12. Neither appellants nor the State has shown "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer*, at 398, 68 S.Ct., at 1163. RCW 39.16.005's discrimination against nonresidents is not justified by any "substantial reason ... beyond the mere fact that they are citizens of other States." *Toomer*, at 396, 68 S.Ct., at 1162.

D. Absent an identified "peculiar evil", it is difficult to determine if the statute is closely related to eliminating the alleged evil nonresidents present. Needless to say, if the evil is not identified, legislation can hardly be closely related to eliminating it. We have no way of ascertaining if the statute is closely tailored to serving the purpose of benefiting the state economy. We have not been told the magnitude of the economic gain to the state the statute provides by its employment restrictions or the loss it occasions by discouraging competitive bids.

[6] Neither appellants nor amicus has demonstrated that nonresidents are a peculiar evil, nor has either shown how the statute is "closely tailored" to achieving a legitimate state purpose.

[7] E. Appellants and amicus nevertheless argue that since the legislation involves the state in its proprietary capacity, it may with justification discriminate against nonresidents. Addressing a similar proprietary interest argument in *Hicklin*, the Court refused to establish an exception under the privileges and immunities clause, stating:

> 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.

437 U.S. at 529, 98 S.Ct. at 2489. The *Hicklin* Court concluded Alaska had "little or no proprietary interest in much of the activity swept within the ambit" of the statute. *Id.*

As a public work involving state tax dollars, the Aberdeen sewer project is one to which the State may claim some proprietary interest. No one questions that the sewer project will enure to the benefit of the City of Aberdeen or that if the City had desired to, it could have built the system itself. The statute is not limited to the ownership rights of the State, however. It specifically places limitations on private contractors and their subcontractors. While the economic impact of RCW 39.16 on the private sector is not as far ranging as the Alaska Hire Statute, it nevertheless affects private employers who have no direct dealings with the State. *See Hicklin*, at 532, 98 S.Ct., at 2490.

Furthermore, while the *Hicklin* court did not dispute Alaska's ownership of its oil and gas, we have good reason to question the extent of the state's ownership here. State and local tax dollars were used for Aberdeen's sewer project, but 75 percent of the funding came from the federal government. This public works project is not solely a state endeavor, and its funding is an example of the principle embodied in the constitution that "the peoples of the several states must sink or swim together". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935) (Cardozo, J.).

[8, 9] The interdependent nature of the funding for public works projects makes this case distinguishable from the commerce clause cases appellants cite in support of their proprietary interest argument. First, it must be remembered that while the commerce clause and privileges and immunities

RCW 39.16.005 applies only to contractors and subcontractors engaged in public works, such livelihood interests are not fundamental. The capacity to pursue work is fundamental whether in a public or private context. Appellants also argue that since RCW 39.16.005 sweeps much less broadly than the Alaska statute at issue in *Hicklin*, the interest affected is not fundamental. This point may be relevant to evaluating the statute under the *Toomer/Hicklin* test, but it does not make the interest any less fundamental. The State, in its amicus brief, concedes that RCW 39.16 operates to discriminate against nonresident workers in a limited context of public works construction. The *Toomer/Hicklin* test must therefore be applied.

B. The State suggests the purpose of RCW 39.16.005 is to strengthen the economic welfare of state and local economies. We must first question the validity of such a legislative motive for purposes of privileges and immunities analysis. In *Hicklin*, at page 526, 98 S.Ct., at 2487, the Court questioned as "at least dubious" the validity of the Alaska Hire Statute's purpose of alleviating state unemployment. Here, the State has suggested no "evil" that nonresidents present. It has only suggested that by keeping within the state wages from public works projects, local economies will be strengthened. This is an example of the highly protectionist economic policies the privileges and immunities clause was designed to protect against. The State argues that since state tax dollars are being used on public works projects, the economic purposes of the statute "reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves, Inc. v. Stake*, 447 U.S. 429, 442, 100 S.Ct. 2271, 2280, 65 L.Ed.2d 244 (1980). The State thus seeks to justify the statute's purpose based on its proprietary role with respect to public works projects. While the State's proprietary role would not exempt it from privileges and immunities scrutiny (see discussion *infra* at 71), it might justify an otherwise illegitimate legislative purpose of seeking to foster state economic welfare. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976). We assume arguendo the legitimacy of the purpose of RCW 39.16.005 for purposes of analyzing the statute under the *Toomer/Hicklin* test.[1]

C. Looking to the first part of the *Toomer/Hicklin* test, the "peculiar evil" that nonresidents represent is indicated by the State only by implication. By producing secondary economic activity and maximizing the return of tax dollars to the state, RCW 39.16.005's restrictions on contracting for public works benefit the state's economy. Eliminating the statute, we should assume, would undermine the secondary economic activity and reduce maximal use of state tax dollars by diverting wages out of the state.

Neither appellants nor the State provides *any* evidence that hiring out-of-state workers would constitute a peculiar evil by diverting wages out of the state. No proof is presented regarding the extent to which out-of-state contractors or subcontractors would bring their employees to the jobsite rather than hire locally (which is not an unfamiliar practice with respect to nonsupervisorial employees). Nor do appellants provide any evidence regarding the extent to which wages would be diverted out of state. Undoubtedly, out-of-state contractors purchase supplies and equipment in the state and some wages are spent here. In addition, some secondary economic activity is generated only by having out-of-state workers with their additional requirements of food and shelter. Finally, even if we were to assume some wages would be diverted out of state, we have been provided no information by which to compare how that "loss" would compare with the advantage of lower bids on public works by out-of-state contractors.

1. Notwithstanding this assumption, to the extent our discussion reveals the State's proprietary interest argument does not satisfy the requirements of the *Toomer/Hicklin* test, we will also be forced to reject the purpose of the statute as invalid.

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leges and immunities clause.

NBACH, C.J., and STAF-
.IVER and WILLIAM H.
J., concur.

DORE, Justice, dissenting.

I would have held that RCW 39.16 was constitutional and not in violation of the privileges and immunities clause of the United States Constitution because RCW 39.16 does not apply to projects supported by public money but only to those organized by private persons and organizations, or by private employers who bid for state purchase contracts.

I

States May Discriminate Constitutionally on the Basis of Residency When Acting in a Sovereign or Proprietary Capacity

The Washington statute applies only to those with whom the state or local government contracts to build a public work. By definition, money raised from residents finances the project. The State is, therefore, acting in a proprietary capacity when discriminating against nonresidents under RCW 39.16.

The mutually reinforcing relationship between the privileges and immunities clause and the commerce clause stems from their common origin in the fourth article of the Articles of Confederation and their shared vision of federalism. *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 379, 98 S.Ct. 1852, 1858, 56 L.Ed.2d 354 (1978). This unique relationship renders analogy to recent commerce clause proprietary cases particularly appropriate.

The United States Supreme Court recently found permissible under the commerce clause a state policy which limited the sale of a state-owned resource to state residents. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980). At stake in *Reeves* was the distribution policy of a cement plant owned and operated by the State of South Dakota. During a period of cement shortage, the State refused to supply cement to out-of-state customers. A Wyoming customer alleged that South Dakota's residents-only policy violated the commerce clause. Placing its support of the residents-only policy squarely on the rights of South Dakota when acting as a proprietor, the Supreme Court found no constitutional deficiency. Following the earlier case of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), the court found that the commerce clause did not restrict a state when acting as a proprietor from favoring its own citizens over others. As a "general rule", states, when acting as market participants or as proprietors, were not engaged in "the kind of action with which the Commerce Clause is concerned". *Hughes*, at 805, 96 S.Ct., at 2495.

Reeves was grounded on three identifiable principles. First, states in their proprietary capacity should be free to set the terms of their own contracts. "[W]hen acting as proprietors, States should similarly [to private market participants] share existing freedoms from federal constraints, *including the inherent limits of the Commerce Clause.*" *Reeves*, at 439, 100 S.Ct., at 2278 (Italics mine). *See also Reeves*, at 438 n. 10, 100 S.Ct., at 2278 n. 10 ("States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal").

Second, the favoring of residents comports with the very purpose of a state. The Wyoming customer had argued that the residents-only policy was "protectionist" and not an appropriate government objective. The court disagreed, emphasizing the right of a state to limit state benefits to those it serves and by which it is funded.

Third, the court was influenced by "considerations of state sovereignty" and its related role as "guardian and trustee for its people". *Reeves*, at 438, 100 S.Ct., at 2278. Earlier authority held that Congress could not interfere with certain employment relations with state workers affecting integral state operations "in areas of traditional governmental functions". *Reeves*, at 438 n. 10, 100 S.Ct., at 2278 n. 10, *quoting National League of Cities v. Usery*, 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976) (Congress under the commerce clause could not apply Fair Labor Standards Act to state governments).

clause have a "mutually reinforcing relationship", *Hicklin*, at 531, 98 S.Ct., at 2490, the two clauses are not coextensive. Analogy to commerce clause cases here is simply that. The commerce clause focuses on undue burdens on interstate commerce. It is an affirmative grant of power to Congress and an implied restriction on the power of states. The privileges and immunities clause is a direct limitation on states and explicitly secures privileges and immunities for individuals who move from state A to state B. *Toomer*, at 395, 68 S.Ct., at 1161.

In *Reeves, Inc. v. Stake, supra*, South Dakota had by itself initiated cement production, and the court felt it was entitled to benefit from its "foresight, risk, and industry". 447 U.S. at 446. In *Hughes v. Alexandria Scrap Corp., supra*, Maryland used only its own funds for bounties on junk cars to clean up the state's landscape and protect the state's environment. *Cf. Baldwin v. Fish & Game Comm'n, supra* (where the Court's reason for upholding a game-licensing statute reflected its appreciation of Montana's protection of its environment).

Even under the commerce clause, the United States Supreme Court has declined to permit states to pursue "simple economic protectionism" where the state's ownership of the resource protected is attenuated. *See New England Power Co. v. New Hampshire*, — U.S. —, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

Also, appellants' citation to *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980) in support of its proprietary interest argument is inappropriate. *Equitable Shipyards*, a case upholding a statutory preference for in-state shipbuilders, concerned the equal protection clause. Since residency is not a suspect category, the statute in *Equitable Shipyards* was subject only to a minimum rationality test. By contrast, the *Toomer/Hicklin* test establishes a standard at least comparable to the intermediate level of scrutiny, *Massachusetts Council of Constr. Employees, Inc. v. Mayor of Boston*, — Mass. —, 425 N.E.2d 346, 352 n. 7 (1981) (U.S. appeal pending), and possibly consonant with the strict level of scrutiny under equal protection analysis. *See* L. Tribe, *American Constitutional Law* 411 (1978).

F. The statute before us specifically restricts nonresidents in their pursuit of a livelihood and the State's ownership interest here does not obviate the need for scrutiny under the privileges and immunities clause.

As the court in *Toomer* stated:

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

(Footnote omitted.) 334 U.S. at 402, 68 S.Ct. at 1165.

The state's proprietary interest, represented by its tax dollars, is too attenuated to justify RCW 39.16.005's discrimination against nonresidents. Our conclusion is entirely consistent with a trio of decisions by other state courts which have struck down remarkably similar statutes under the privileges and immunities clause. *Neshaminy Constructors, Inc. v. Krause*, 181 N.J.Super. 376, 437 A.2d 733 (1981); *Massachusetts Council of Constr. Employees, Inc. v. Mayor of Boston, supra; Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) *cert. denied sub nom. Abrams v. Salla*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 262 (1980). We do not hold that the State is proscribed from distributing resources it creates to its own citizens, but such a case is not before us. The state's proprietary interest is insubstantial and RCW 39.16.005's discrimination against nonresidents violates the provisions of the privileges and immunities clause.

BRACHTENBACH, C.J., and STAFFORD, DOLLIVER and WILLIAM H. WILLIAMS, JJ., concur.