ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2923 HSA RESIDENCY #2

2923

the requirements should be eliminated (although our chart of September shows the industrial incentive tax credit to be "probably" unconstitutional, it is not exactly clear to me what the basis of this unconstitutionality is).

LOAN AND GRANT PROGRAMS

The following loan programs contain five-year residency requirements which should be changed to a bona fide residency requirement: fisherman's mortgage program (AS 16.10.680(a)); commercial fishing loan (AS 16.10.310(a)); limited entry permit loans (AS 44.81.220(a)(20)); Alaska Housing Finance Corp. veterans preference (AS 18.56.101); veterans loans (AS 26.15.130(1)). Fishing loans may possibly be defensible with a residency requirement of up to two years because of special problems that would occur because of the transient nature of fisherman.

The Alaska student loan and the Alaska educational grant program have two-year residency requirements imposed by AS 14.40.765(b) and the application forms. This issue is presently being litigated in Andress v. Baxter, and probably should not be changed until that case is decided. Backup legislation should, however, be drafted for rapid action in case the court rules adversely during the upcoming legislative session. The

point preference system for loan applicants in AS 14.40.767, however, is unconstitutional and should be eliminated. This point system has never been utilized by the commission in any event.

LAND DISPOSAL PROGRAMS

Both the one-year residency requirement to qualify for the program and the 5% per year discount for each year of residency up to ten years (AS 38.05.057(b)(2) and .058) have both been challenged in Gilman v. Martin, a case before the Alaska Supreme Court. The court will almost certainly rule on these issues prior to or during the upcoming legislative session. Backup legislation for at least the 5% per year discount portion of the program should be drafted.

The homesite entry program requires three years residency in order to apply and gives an absolute priority to the longest resident. AS 38.08.030(a)(2), 040(b). These should be replaced with simple bona fide residency requirements.

SPECIAL OLD AGE PROGRAMS

The longevity bonus program (AS 47.45.010(a)); the pioneers' home program (AS 47.25.020(a), 035); and the senior

citizen exemption from fishing license requirement (AS 16.05.400) all require lengthy residency requirements as conditions for qualification. Although preference for senior citizens is not unconstitutional, attaching a lengthy residency requirement raises severe constitutional problems. The longevity bonus program has already been settled and requires immediate attention by the legislature. Although we are have ruled that the pioneers' home program is defensible, attention may be directed towards this program (although it is difficult to see how the program could be restructured without the residency requirements). The senior citizens exemption for the fishing license requirement could simply become a senior citizen program with the bona fide residency requirement.

RMM:mr

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

February 24, 1983

RECEIVED
FEB 28 1983

The Honorable Joe L. Hayes
Speaker of the House
of Representatives
State of Alaska
Pouch V
Juneau, AK 99811

FEB 24 1983

Dear Speaker Hayes:

In your letter of February 10, 1983, you requested that I provide you an update on our analysis of [redacted]ts in the following areas: longevity bonus program and the settlement reached in Vest v. Schafer; the pioneers home program; requirements for registered guides; the student loan program and the case of Andress v. Baxter challenging the program; and the State land disposal programs in the case of Gilman v. Martin challenging various aspects of these programs.

PIONEER'S HOME PROGRAM

On November 26, 1982, this office issued a comprehensive opinion on the Pioneer's Home. Basically, the opinion concluded that although there were numerous, serious and potentially fatal attacks that could be mounted against the program, this office could defend the Pioneer's Home program if it was challenged. A copy of this opinion is attached to this letter.

STUDENT LOAN PROGRAM - ANDRESS V. BAXTER

The constitutionality of the two-year residence requirement for the student loan program was challenged in Andress v. Baxter. The briefing in the case is complete and we are waiting for the Federal District Court to set a date for oral argument. We are defending the two-year residency requirement and believe that it is a constitutional provision. We cannot, of course, guarantee that the court will agree with our position. A copy of our brief before the Federal District Court is attached.

STATE LAND DISPOSAL PROGRAM - GILMAN V. MARTIN

In Gilman v. Martin, a challenge was mounted against the Kenai Land Disposal program that contained features similar to the state land disposal program; namely, a one-year residency requirement for qualification, and discounts that increased based

on length of residency. The Alaska Supreme Court requested the state to file an amicus brief concerning those provisions. The state filed such a brief, defending the programs as being constitutional. A copy of that brief is attached. We also asked the court for an expedited decision, and the court granted our motion. We are waiting the Supreme Court's decision.

Since both the student loan program and the state land disposal program are in active litigation, I am constrained from giving a full and frank evaluation of the potential chances of success or failure in a written public document. I would, however, be pleased to give you or your staff a more detailed oral briefing of our views of these two cases if such a briefing would be helpful.

REQUIREMENTS FOR REGISTERED GUIDES

The Alaska Supreme Court has recently made it clear that residence requirements for occupational licensing are invalid under the privileges and immunities clause of the U.S. Constitution. Noll v. Alaska Bar Association, P2d (AK 1982). We therefore anticipate that the governor will soon introduce legislation deleting all these residence requirements including those for guides. However, the bill will leave local experience requirements unchanged.

LONGEVITY BONUS PROGRAM - VEST V. SCHAFER

The longevity bonus program presently requires that a person have resided in the state 25 years commencing prior to statehood in order to be eligible for the program. The constitutionality of that requirement was challenged in Vest v. Schafer and a settlement agreement was signed last August by our office, the plaintiff, and the Legislative Council. That agreement provides that the Council shall use its best efforts to secure legislation which treats equally all bona fide Alaska of the age of 65 or older. "Bona fide residents" are defined in the agreement as those who have resided in the state for one year. The settlement also states that any benefits enacted this session shall be retroactive to July 1, 1982 for the plaintiff and others in the class. If legislation which meets these criteria is passed, the suit will be dismissed. Again, since the program is the subject of litigation, a more thorough evaluation would be

inappropriate herein. I would be happy to meet with you or your staff to give a more detailed oral evaluation. A copy of the settlement agreement is attached.

Sincerely,

Norman C. Gorsuch
Attorney General

Enclosure

RM/NCG/rm

DURATIONAL RESIDENCE IN ALASKA

After an exhaustive review we have come up with the attached eight page table and accompanying appendix setting forth the durational residence requirements imposed by Alaska State law. The table is organized into three main parts, I PUBLIC OFFICE HOLDING, II LICENSES, and III PUBLIC RIGHTS AND BENEFITS. The five columns in the table speak for themselves. With respect to the column "Constitutional Problem" some explanation is required. If "No" appears under Constitutional Problem, it is the opinion of the Department of Law that the durational residence requirement is constitutionally sound. Where the word "Maybe" appears in that column, it is the opinion of the Department of Law that that durational residence requirement is also constitutionally sound; however, we believe that it is possible someone might initiate litigation challenging the requirement. Where the term "Probably" appears in the Constitutional Problem column, we believe there is more than a remote possibility a court might find this durational residence requirement unconstitutional. Where "Yes" appears in the Constitutional Problem column, we believe it is highly likely that a court would find the durational residence requirement unconstitutional.

Because of the Alaska Supreme Court's recent ruling in the case of Noll v. Alaska Bar Association, ___ P.2d ___, Op. No. 2546 (August 13, 1982), we have also included all residence requirements, whether durational or not, which apply to eligibility for entrance into regulated occupations in Alaska. After the Noll decision it would appear that any residence requirement for entrance into a regulated occupation in Alaska will be held unconstitutional except in the most unusual circumstances. 1

I PUBLIC OFFICE HOLDING

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
A. General				
1. Governor	7 Years	Ak. Const. art. III, § 2	No	--
2. Lieutenant Governor	7 Years	Ak. Const. art. III, §§ 2 & 7	No	--
3. Board of Education Member	3 Years	AS 14.07.075	No	--
4. Legislator	3 Years	Ak. Const. art. II, § 2 AS 24.05.030	No	--
5. Supreme Court Justice	5 Years	AS 22.05.070	No	--
6. Court of Appeals Judge	5 Years	AS 22.07.040	No	--
7. Superior Court Judge	5 Years	AS 22.10.090	No	--
8. District Court Judge	5 Years	AS 22.15.160(a)	No	--
9. Magistrate	6 Months	AS 22.15.160(b)	No	--
10. Ombudsman	3 Years	AS 24.55.030	No	--
11. Borough Mayor	Up to 3 Years	AS 29.23.130(b)	No	--
12. Borough Assembly	Up to 3 Years	AS 29.23.050	No	--
13. City Mayor	Up to 3 Years	AS 29.23.250(a)	No	--
14. City Council	Up to 3 Years	AS 29.23.200(b)	No	--
15. Municipal Charter Commission	3 Years	AS 29.13.010	No	--

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
B. Boards and Commissions other than Occupational Licensing Boards. There are 98 Boards and Commissions, other than Occupational Licensing Boards, which are a part of or affiliated with state government. There is a durational residence requirement for membership on seven of those boards and commissions. */				
1. Rural Affairs Commission	5 Years	AS 44.19.102	Maybe **/	None
2. Board of Fisheries	1 Year	AS 16.05.221 AS 16.05.940	No	--
3. Board of Game	1 Year	AS 16.05.221 AS 16.05.940	No	--
4. Judicial Qualifications Commission	10 years practice in Alaska	Ak. Const. art. IV, § 10 AS 22.30.010	Maybe **/	--
5. Municipal Bond Bank Authority	30 days (qualified voter)	AS 44.85 030	No	--
6. Personnel Board	30 days (qualified voter)	AS 39.25.060	No	--
7. Alaska Power Authority	30 days (qualified voter)	AS 44.83.020	No	--

*/ This list includes only boards and commissions which have express durational residency requirements. Many boards have ex officio members who must meet residency requirements for those offices or positions. These boards include:

(1) Alcohol Beverage Control Board (certain licensees); (2) Capital Site Planning Commission (borough mayors); (3) Coastal Policy Council (mayors, assembly and council members); (4) Code Revision Commission (members of legislature); (5) Citizens Advisory Commission on Federal Management Areas in Alaska (governor and other public officers); (6) Commission on Conference of the Law of the Sea (members of legislature); (7) Rural Development Council (members of legislature); (8) Teacher's Retirement Board (resident who is receiving retirement benefits); (9) Tourism Advisory Board (members of legislature); and (10) Governor's Commission on the Administration of Justice (judicial officers, legislators and municipal officials)

**/ It is difficult to imagine someone complaining about any possible constitutional problems here.

II. LICENSES

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
A. Occupational Licenses. The State of Alaska requires occupational licenses in [illegible] occupational areas. Residence requirements are imposed for the receipt of these licenses in seven of these occupational areas [illegible]ons set forth in Appendix A, we believe any residence requirement, even of zero durational length, will in most cases be [illegible]nal.				
1. Public Accountant	1 Year (rebuttable)	AS 08.04.280 12 AAC 04.170	Yes	None
2. Attorney	Residence	Bar Rule 5(1)(a)	Yes	Declared unconstitutional in Noll v. Alaska Bar Ass'n 8/13/82
3. Collection Agencies	1 Year, but non-resident may receive license on same basis as resident, except fee for branch offices is higher	AS 08.24.110 AS 08.24.370	No	- -
4. Morticians	1 Year in-state apprenticeship	AS 08.42.110	Yes	None
5. Guides				
Master Guide	Residence plus hunted 10 years	AS 08.54.100	Yes	None
Registered Guide	Resident	AS 08.54.1[illegible]	Yes	None
Class A Assistant Guide	20 years experience in guide district in which he is to be employed although not a specific residence requirement.	AS 08.54.120	Yes	None
Assistant Guide	Resident	AS 08.54.140	Yes	None
Transporter	Resident	AS 08[illegible].14[illegible]	Yes	None

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
Occupational Licenses (Cont.)				
6. Junk Dealer & Metal Scrapper	No resident requirement, but defines "resident" as present for one year.	AS 08.60.030	No	--
7. Real Estate Brokers and Salesmen	Resident	AS 08.88.171	Yes	None
8. Insurance Brokers, Agents and Solicitors				
Resident Insurance Salesmen or Broker (non residents can be licensed but may pay a higher fee)	1 year	AS 21.27.090 AS 21.06.250	No	-- --
Insurance Solicitor	1 year	AS 21.27.220	Yes	None
B. Other Licenses				
1. Alcoholic Beverage License	1 year	AS 04.11.390	Maybe	None
2. Resident Fish and Game License (resident license costs less than non-resident license)	12 consecutive months	AS 16.05.940	Maybe	None
III. PUBLIC RIGHTS AND BENEFITS				
A. General				
1. Voting	30 days	AS 15.05.~~510~~ .010 ?	No	--
2. Annullment of Marriage	1 Year	AS 09.55.130	Maybe	None

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
C. Occupational Licensing Boards. There are 23 Occupational Licensing Boards in Alaska. There is a durational residence requirement for membership on eight of those Boards. They are listed below. Of the other 15, eight have no residence requirement whatsoever and seven require simple residence.				
1. Public Accounting Board	1 Year	AS 08.04.020	No	--
2. Board of Chiropractic Examiners	2 Years	AS 08.20.020	No	--
3. Board of Dental Examiners	5 Years	AS 08.36.010	Maybe */	None
4. State Board of Registration for Architects, Engineers, and Land Surveyors	3 Years	AS 08.48.031	No	--
5. Guide Licensing and Control Board	10 Years	AS 08.54.010	Maybe */	None
6. Board of Pharmacy	3 Years in-state practice although not a specific residence requirement	AS 08.80.010	No	--
7. Board of Examiners in Optometry	3 Years	AS 08.72.040	No	--
8. Board of Veterinary Examiners	5 Years in-state practice although not a specific residence requirement	AS 08.98.010	Maybe */	None

*/ It is difficult to imagine someone complaining about any constitutional problem here, however.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
General (Cont.)				
3. Low-Cost Housing Preference	1 Year	AS 18.55.330 AS 18.55.470(4)	Probably	None
4. Vocational Substitution Program	1 Year	AS 39.25.155(g)	Probably	None
5. Industrial Incentive Tax Credits	Depends on % of 1-year residents	AS 43.26.095(b)(3)	Probably	Program is for all practical purposes no longer operating.
6. Bounties for Certain Animals	1 year abode in Unit plus "continually maintained residence in the state . . ."	AS 16.35.130	Yes	The program is a dead letter because it has not been funded for several years.

B. Loan and Grant Programs. Approximately 41 loan programs are provided for under Alaska Statutes. 35 of these are currently active programs. Of these 35, seven have some sort of durational residency feature. The dormant programs are inactive because of lack of funding. The state has one grant program requiring a period of residency for eligibility.

1. Fisherman's Note and Mortgage Program	5 Years	AS 16.10.680(a)	Yes	AG opinion pending
2. Commercial Fishing Loan	5 Years	AS 16.10.310(a)	Yes	AG opinion pending
3. Limited Entry Permit Loans (CFAB)	5 Years	AS 44.81.220(a)(20)	Yes	Program inactive pending Court determination of legality of limited entry program in State v. Ostrosky.
4. Agriculture and Fishing Loan (CFAB)	1 Year	Board Policy	Maybe	None
5. Alaska Housing Finance Corp. One Percent Veterans' Housing Loan Rate Reduction	5 Years	AS 18.56.101	Yes	AG opinion 7/14/82 instructed agency not to enforce.
6. Veterans Loans	5 Years	AS 25.15.130(1)	Yes	Inactive because not currently funded.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
Loan and Grant Programs (Cont.)				
7. Mining Business Loans	Residency and 5 Years Mining Experience in State.	AS 27.09.020	Maybe	None
8. Memorial Scholarship Loan Fund	No durational requirement to apply. 1/5 loan forgiven for each year employed in specialized field in Alaska.	AS 14.40.825(c)	No	- - -
9. Student Loan Program				
(a) eligibility to apply	2 Years	AS 14.40.765(b)	Probably	Issue pending in Andress v. Baxter
(b) 1/10 forgiven for each year of residency after education up to 50% of loan.	- -	AS 14.40.763(i)	Maybe	May be covered by Gilman v. Martin which is now pending in Alaska Supreme Court
(c) Point Preference System for loan applicants	1 Point; 2-5 Years 2 Points; 5-10 Years 3 Points; 10+ Years	AS 14.40.767	Yes	Point system has not previously been utilized as Legislature has always funded all applicants.
10. Alaska Educational Incentive Grant	2 Years	Application form	Probably	Issue will be decided by result in Andress v. Baxter
C. Land Disposal Programs				
1. Land Disposal by Lottery	1 Year	AS 38.05.057(b)(2)	Maybe	Should be decided by Gilman v. Martin.
2. Land Purchase Price Discount Program	5% per year discount for each year of residency	AS 38.05.058	Probably	Should be decided by Gilman v. Martin.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING IF APPLICABLE
Land Disposal Programs (Cont.)				
3. Homesite Entry Program	3 years (or 20 years of earlier residency) to apply	AS 38.08.030(a)(2)	Yes	AG opinion pending
	Priority given longest resident	AS 38.08.040(b)		
4. Remote Parcel Leasing Program	1 Year	AS 38.08.077(i)(2)	Maybe	Should be decided by Gilman v. Martin.
D. Special Old Age Programs				
1. Longevity Bonus Program	25 years and presence in State at or before statehood.	AS 47.45.010(a)	Yes	Issue Pending in Vest v. Schafer
2. Pioneers' Home Program	15 years immediately before application; or 30 years cumulative	AS 47.25.020(a) AS 47.25.035	Yes	None
3. Senior Citizen Special Assessment Exemption	12 months	AS 29.63.065(d)(1)	Maybe	None
4. Senior Citizen Exemption from Fishing License Requirement	30 years total residence	AS 16.05.400	Yes	None

Appendix A

The federal constitution's Privileges and Immunities Clause seeks to prevent discrimination against nonresidents, to further the concept of federalism, and to create a national economic unit. Shelv v. Alaska Bar Ass'n, 620 P.2d 640, 642 (Alaska 1980) ("Shelev"). Although the Clause does not preclude some disparity of treatment between residents and nonresidents, it does protect activities which are "fundamental rights": i.e., "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).

One such "fundamental right" is the right to engage in "common callings" and to pursue "ordinary livelihoods." Toomer v. Witsell, 334 U.S. 385, 403 (1948). This includes "professional occupations" Shelev, 620 P.2d at 643.

In order to discriminate against nonresidents when a fundamental right is involved, there must be: (1) some showing that nonresidents are "a peculiar source of the evil" which the residence requirement is meant to remedy; and (2) the discrimination against nonresidents must "bear a substantial relationship to the particular 'evil' they are said to present." Hicklin v. Orbeck, 437 U.S. 518, 526-527 (1978). For example, there cannot be less restrictive means to combat the problems attempted to be solved by the residency requirement. Shelev, 620 P.2d at 645.

A good example is the recent Alaska Supreme Court case Noll v. Alaska Bar Ass'n, ___ P.2d ___, Op. No. 2546 (August 13, 1982). In Noll, a nonresident challenged the constitutionality of Alaska Bar Rule 5(1)(a), which required that an applicant for admission to the state bar be domiciled in Alaska when he or she was actually admitted. The bar association argued that the residency requirement was needed:

(1) to assure the competency of the members of the bar;

(2) to assure familiarity with local practice and local issues;

(3) to facilitate service of process and communication with other attorneys; and

(4) to assure that members of the state bar are readily amenable to discipline and fee arbitration and are available for service on the committees that administer those procedures.

The Alaska Supreme Court rejected each and every reason offered. Although recognizing the legitimacy of those goals, the court either found these goals were not "substantial" enough to justify the discrimination, could be attained by other nondiscriminatory means, or were not furthered by the discrimination. As can be seen, this constitutional test is difficult to meet. Consequently, all residency requirements for occupational licensing are called into substantial doubt.

ATTACHMENT 3

U.S. Supreme Court Report on Zobel III

RONALD M. ZOBEL and PATRICIA L. ZOBEL, Appellants,

v

THOMAS WILLIAMS, Commissioner of Revenue, and ALASKA

— US —, 72 L Ed 2d 672, 102 S Ct —

[No. 80-1146]

Argued October 7, 1981. Decided June 14, 1982.

Decision: Alaska statute distributing income derived from state's natural resources to state's citizens in varying amounts based on length of each citizen's residency, held to violate equal protection clause.

SUMMARY

Alaska adopted a constitutional amendment establishing a fund into which the state must deposit at least 25 percent of its mineral income each year. The Alaska legislature enacted a dividend program to distribute annually a portion of the fund's earnings directly to the state's adult residents. Under the plan, each citizen 18 years of age or older would receive one dividend unit for each year of residency subsequent to 1959, the first year of statehood. Plaintiffs, residents of Alaska since 1978, brought suit challenging the dividend distribution plan. The Superior Court for Alaska's Third Judicial District granted summary judgment in favor of the plaintiffs, holding that the plan violated the rights of interstate travel and equal protection. The Supreme Court of Alaska reversed and upheld the statute (619 P2d 448).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by BURGER, Ch. J., joined by BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., it was held that the Alaska dividend distribution plan violated the equal protection clause of the Fourteenth Amendment, since the state had shown no valid state interests which were rationally served by the distinction it made between citizens who established residency before 1959 and those who have become residents since then.

BRENNAN, J., joined by MARSHALL, BLACKMUN, and POWELL, JJ., concurred, expressing the view that the right to travel—or, more precisely, the federal interest in free interstate migration—was affected by the Alaska dividend-distribution law, and that this threat to free interstate migration provided an independent rationale for holding that law unconstitutional.

O'CONNOR, J., concurred in the judgment, expressing the view that the Alaska law should be measured against the principles implementing the privileges and immunities clause, and that this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the court's prior opinions.

REHNQUIST, J., dissented, expressing the view that the Alaska distribution scheme was rationally based, and that the Fourteenth Amendment gives the federal courts no power to impose upon the states their view of what constitutes wise economic or social policy.

HEADNOTES

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

Constitutional Law § 326 — equal protection — benefits based on length of residency

1a-1c. A state statute by which a state distributes income derived from its natural resources to the adult citizens of the state in varying amounts, based on the length of each citizen's residency, violates the equal protection clause of the Fourteenth Amendment, where the state has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residency before a certain year and those who have become residents since then, and where the only apparent justification for the retrospective aspect of the program, favoring established residents over new residents, is constitutionally unacceptable, the state's objective to reward citizens for past contributions not being a legitimate state purpose. (Rehnquist, J., dissented from this holding.)

Constitutional Law § 349 — privileges and immunities — benefits based on length of residency

2a, 2b. A state statute by which a state

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16A Am Jur 2d, Constitutional Law § 773
USCS, Constitution, 14th Amendment
US L Ed Digest, Constitutional Law § 326
L Ed Index to Annos, Domicil or Residence; Equal Protection of the Laws; Travel
ALR Quick Index, Equal Protection of Law; Travel
Federal Quick Index, Domicil and Residence; Equal Protection of the Laws; Travel

ANNOTATION REFERENCE

Federal constitutional right of interstate travel. 27 L Ed 2d 967

distributes income derived from its natural resources to the adult citizens of the state in varying amounts, based on the length of each citizen's residency, does not involve the kind of discrimination which the privileges and immunities clause of the United States Constitution (Art IV, § 2, cl 1) was designed to prevent, that clause being designed to insure to a citizen of one state who ventures into another state the some privileges which the citizens of the second state enjoy.

Constitutional Law § 316 — equal protection — unequal distribution of benefits — scrutiny

3. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the equal protection clause of the Fourteenth Amendment; generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose, but some particularly invidious distinctions are subject to more rigorous scrutiny.

Constitutional Law § 326 — equal protection — right to travel — residency requirements

4a, 4b. The right to travel protects persons against the erection of actual barriers to interstate movement and, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents; in reality, right to travel analysis refers to little more than a particular application of equal protection analysis.

Statutes § 38.5 — invalidation of portion of statute — effect on validity of whole statute

5. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion; the United States Supreme Court need not speculate as to the intent of a state legislature where the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid.

SYLLABUS BY REPORTER OF DECISIONS

After Alaska amended its Constitution to establish a Permanent Fund into which the State must deposit at least 25% of its mineral income each year, the state legislature in 1980 enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each adult resident receives one dividend unit for each year of residency subsequent to 1959, the first year of Alaska's statehood. Appellants, residents of Alaska since 1978, brought an action in an Alaska state court challenging the statutory dividend distribution plan as violative of, inter alia, their right to equal protection guarantees. The trial court granted summary judgment in appellant's favor, but the Alaska Supreme Court reversed and upheld the statute.

Held: The Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

(a) Rather than imposing any threshold waiting period for entitlement to dividend benefits or establishing a test of bona fides of state residence, the dividend statute creates fixed, permanent distinctions between an ever-increasing number of classes of concededly bona fide residents based on how long they have lived in the State. Sosna v. Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553; Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076; Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995; and Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322, distinguished. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause, and generally a law will survive that scrutiny if the distinctions rationally further a legitimate state purpose.

(b) Alaska has shown no valid state interests that are rationally served by the distinctions it makes between citizens who established residence before 1959 and those who have become residents since then. Neither the State's claimed interest in creating a financial incentive for individuals to establish and maintain residence in Alaska nor its claimed interest in assuring prudent management of the Permanent Fund is rationally related to such distinctions. And the State's interest in rewarding citizens for past contributions is not a legitimate state purpose. Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency, and would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

619 P2d 448, reversed and remanded.

Burger, C. J., delivered the opinion of the Court, in which Brennan, White, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Brennan, J., filed a concurring opinion, in which Marshall, Blackmun, and Powell, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Rehnquist, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Mark A. Sandberg argued the cause for appellants.

Avrum M. Gross argued the cause for appellees.

OPINION OF THE COURT

Chief Justice Burger delivered the opinion of the Court.

[1a] The question presented on this appeal is whether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence, violates the equal protection rights of newer state citizens. The Alaska Supreme Court sustained the constitutionality of the statute. Williams v Zobel, 619 P2d 448 (Alaska 1980). We noted probable jurisdiction and stayed the distribution of dividend funds, 450 US 908 (1981), 67 L Ed 2d 331, 101 S Ct 1344. We reverse.

I

The 1967 discovery of large oil reserves on state-owned land in the Prudhoe Bay area of Alaska resulted in a windfall to the State. The State, which had a total budget of $121 million in 1969, before the oil revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year.[1] This income will continue, and most likely grow for some years in the future. Recognizing that its mineral reserves, although large, are finite and that the resulting income will not continue in perpetuity, the State took steps to assure that its current good fortune will bring long-range benefits. To accomplish this, Alaska in 1976 adopted a constitutional amendment establishing the

1. Alaska Department of Revenue, Revenue Sources FY 1981-1983 (1981). Includes General Fund unrestricted petroleum revenues of $3.3 billion and petroleum revenues directly deposited in the Permanent Fund in the amount of $400 million. An additional $900 million was transferred from the General Fund to the Permanent Fund in the 1981 fiscal year.) The 1980 census reports that Alaska's adult population is 270,276, so that its 1981 oil revenues amount to $13,652 for each adult resident. Petroleum revenues also amount to 89% of the State's total revenue. Ibid.

Permanent Fund into which the State must deposit at least 25% of its mineral income each year. Alaska Const, Art IX, § 15. The amendment prohibits the legislature from appropriating any of the principal of the fund but permits use of the fund's earnings for general governmental purposes.

In 1980, the legislature enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each citizen 18 years of age or older receives one dividend unit for each year of residency subsequent to 1959, the first year of statehood. The statute fixed the value of each dividend unit at $50 for the 1979 fiscal year; a one-year resident thus would receive one unit, or $50, while a resident of Alaska since it became a State in 1959 would receive 21 units, or $1,050. The value of a dividend unit will vary each year depending on the income of the Permanent Fund and the amount of that income the State allocates for other purposes. The State now estimates that the 1985 fiscal year dividend will be nearly four times as large as that for 1979.

Appellants, residents of Alaska since 1978, brought this suit in 1980 challenging the dividend distribution plan as violative of their right to equal protection guarantees and their constitutional right to migrate to Alaska, to establish residency there and thereafter to enjoy the full rights of Alaska citizenship on the same terms as all other citizens of the State. The Superior Court for Alaska's Third Judicial District granted summary judgment in appellants' favor, holding that the plan violated the rights of interstate travel and equal protection. A divided Alaska Supreme Court reversed and upheld the statute.[2]

II

[1b] The Alaska dividend distribution law is quite unlike the durational residency requirements we examined in Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975); Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274 92 S Ct 995 (1972); and Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). Those cases involved laws which required new residents to reside in the State a fixed minimum period to be eligible for certain benefits available on an equal basis to all other residents.[3] The asserted purpose of the durational residency requirements was to assure that only persons who had established bona fide residence received rights and benefits provided for residents.

The Alaska statute does not impose any threshold waiting period on those seeking dividend benefits; persons with less than a full year of residency are entitled to share in the distribution. Alaska Stat § 43.23.010.[4] Nor does the statute purport to establish a test of the bona fides of state residence. Instead, the dividend statute creates fixed, permanent distinctions between an ever increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.

[2a] Appellants established residence in Alaska two years before the dividend law was passed. The distinction they complain of is not one which the State makes between those who arrived in Alaska after the enactment of the dividend distribution law and those who were residents prior to its enactment. Appellants instead challenge the distinctions made within the class of persons who were residents when the dividend scheme was enacted in 1980. The distinctions appellants attack include the preference given to persons who were residents when Alaska became a State in 1959 over all those who have arrived since then, as well as the distinctions made between all bona fide residents who settled in Alaska at different times during the 1959 to 1980 period.[5]

[3, 4a] When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[6] Generally,

2. The infusion of Permanent Fund earnings into state general revenues also led the Alaska legislature to enact a statute giving residents a one-third exemption from state income taxes for each year of residence; this operated to exempt entirely anyone with three or more years of residency. The Alaska Supreme Court again by a 3-2 vote, held that this statute violated the State Constitution's equal protection clause. Williams v Zobel, 619 P2d 422 (Alas 1980). Chief Justice Rabinowitz, the only justice in the majority in both cases, found that the tax exemption statute, but not the dividend distribution plan, could "be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." 619 P2d, at 458.

3. In the durational residency cases, we examined state laws which imposed waiting periods on access to divorce courts, Sosna v Iowa, supra; eligibility for free nonemergency medical care, Memorial Hospital v Maricopa County, supra; voting rights, Dunn v Blumstein, supra; and welfare assistance, Shapiro v Thompson, supra.

4. Section 43.23.010(b) provides:

"For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

The remainder of § 43.23.010 establishes the number of dividend units residents are entitled to receive and the method of payment. Section 43.23.010(c) provides that a resident entitled to benefits under subsection (b) who was a resident for less than a full year is entitled to a dividend prorated on the basis of the number of months of state residence.

5. The Alaska statute does not simply make distinctions between native born Alaskans and those who migrate to Alaska from other states; it does not discriminate only against those who have recently exercised the right to travel, as did the statute involved in Shapiro v Thompson, supra. The Alaska statute also discriminates among long-time residents and even native born residents. For example, a person born in Alaska in 1962 would have received $100 less than someone who was born in the State in 1960. Of course the native Alaskan born in 1962 would also receive $100 less than the person who moved to the State in 1960.

[2b] The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 395, 92 L Ed 1460, 68 S Ct 1156 (1948). The Clause is thus not applicable to this case.

6. [4b] The Alaska courts considered whether the dividend distribution law violated appellants' constitutional right to travel. The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right has remained obscure. See Jones v Helms, 452 US 412, ——, —— and nn 12 and 13, 69 L Ed 2d 118, 101 S Ct 2434 (1981). Shapiro v Thompson, supra, 394 US, at 629-631, 22 L Ed 2d 600, 89 S Ct 1322; United States v Guest, 383 US 745, 757-759, 16 L Ed 2d 239, 86 S Ct 1170 (1966). See also Z. Chafee, Three Human Rights in the Constitution of 1787 111

973), we noted that "apportionment] of tuition rates on the basis f old and new residency . . . would ive rise to grave problems under ie Equal Protection Clause of the ourteenth Amendment." 412 US, at 49–450 and n 6, 37 L Ed 2d 63, 93 S t 2230.[10]

If the States can make the amount a cash dividend depend on length residence, what would preclude rying university tuition on a slid- g scale based on years of residence or even limiting access to finite ublic facilities, eligibility for stu- nt loans, for civil service jobs, or r government contracts by length domicile? Could States impose dif- rent taxes based on length of resi- ence?" Alaska's reasoning could pen the door to state apportion- ent of other rights, benefits and rvices according to length of resi- ency.[11] It would permit the states to vide citizens into expanding num- rs of permanent classes.[12] Such a result would be clearly impermissible.[13]

B

[5] We need not consider whether the State could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. Buckley v Valeo, 424 US 1, 108, 46 L Ed 2d 659, 96 S Ct 612 (1976); United States v Jackson, 390 US 570, 585, 20 L Ed 2d 138, 88 S Ct 1209 (1968); Champlin Rfg. Co. v Commission, 286 US 210, 234, 76 L Ed 1062, 52 S Ct 559 (1932). Here, we need not speculate as to the intent of the Alaska legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid:

"Sec 4. If any provision enacted in sec 2 of this Act [which included the dividend distribution plan in its entirety] is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec 2 of this Act are invalid and of no force or effect."

1980 Alaska Sess Laws Chap 21, § 4. However, it is of course for the Alaska courts to pass on the severability clause of the statute.

III

[1c] The only apparent justification for the retrospective aspect of the program, "favoring established residents over new residents," is constitutionally unacceptable. Vlandis v Kline, supra, 412 US, at 450, 37 L Ed 2d 63, 93 S Ct 2230. In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.

We hold that the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the Alaska Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

SEPARATE OPINIONS

Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Powell join, concurring.

I join the opinion of the Court, and agree with its conclusion that the retrospective aspects of Alaska's dividend-distribution law are not rationally related to a legitimate state purpose. I write separately only to emphasize that the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion. In my view, these concerns might well preclude even the prospective operation of Alaska's scheme.

I

I agree with Justice O'Connor that these more fundamental defects in the Alaska dividend-distribution law are, in part, reflected in what has come to be called the "right to travel."[1] That right—or, more precisely, the federal interest in free interstate migration—is clearly, though indirectly, affected by the

10. Even if the objective of rewarding past ntributions were valid, it would be ironic to ply that rationale here. As Representative ndolph noted during debate in the state gislature on the dividend statute.

he pipeline is the entity that has allowed all this latitude to do all the things we're nsidering doing, not only today but throughout the session. And without . . . newcomers, couldn't have built that pipeline . . . . ithout their skill, without their money, the peline wouldn't be there. So I get a little bit ed of—and I've got a bunch and awful lot people who have been here five or six or ven or ten years, whatever we knock off as wcomers, get a little bit tired of being astized and penalized and discriminated nust for having not been born here or not en here 30 or 40 or 50 years."

11. Apportionment would thus be prohibited only when it involves "fundamental rights" and services deemed to involve "basic necessities of life." See Memorial Hospital v Maricopa County, supra, 415 US, at 259, 39 L Ed 2d 306, 94 S Ct 1076.

12. "Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." The Passenger Cases, 7 How 283, 492, 12 L Ed 702 (1849) (Chief Justice Taney, dissenting).

13. Starns v Malkerson, 326 F Supp 234 (D Minn 1970), affirmed, 401 US 985, 28 L Ed 2d 537, 91 S Ct 1231 (1971) cannot be read as a contrary decision of this Court. First, summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review. Fusari v Steinberg, 419 US 379, 391, 42 L Ed 2d 521, 95 S Ct 533 (1975) (concurring opinion). See also Colorado Springs Amusement Ltd. v Rizzo, 423 US 913, 920–921, 49 L Ed 2d 1222, 96 S Ct 3228 (1976) (Brennan, J., dissenting); Edelman v Jordan, 415 US 651, 671, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Moreover, as we pointed out in Vlandis v Kline, supra, at 452–453, n 9, 37 L Ed 2d 63, 93 S Ct 2230, we considered the Minnesota one-year residency requirement examined in Starns a test of bona fide residence, not a return on prior contributions to the commonweal.

1. What is notably at stake in this case, and what clearly must be taken into account in determining the constitutionality of this legislative scheme, is the *national* interest in a fluid system of interstate movement. It may be that national interests are not always easily translated into individual rights, but where the "right to travel" is involved, our cases leave no doubt that it will trigger intensified equal protection scrutiny. See, e.g., Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972); Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). As the Court notes, the "right to travel" is implicated not only by "actual barriers to interstate movement," but by "state distinctions between newcomers and longer-term residents." Ante, at [illegible] n 6, 72 L Ed 2d 677, 678.

law will survive that scrutiny if he distinction it makes rationally urthers a legitimate state purpose. ome particularly invidious distinc- ons are subject to more rigorous crutiny. Appellants claim that the istinctions made by the Alaska law hould be subjected to the higher vel of scrutiny applied to the dura- onal residency requirements in hapiro v Thompson, supra and Me- orial Hospital v Maricopa County, upra. The State, on the other hand, serts that the law need only meet he minimum rationality test. In ny event, if the statutory scheme annot pass even the minimal test roposed by the State, we need not ecide whether any enhanced scru- ny is called for.

A

The State advanced and the laska Supreme Court accepted ree purposes justifying the distinc- tions made by the dividend program: (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent manage- ment of the Permanent Fund; and (c) apportionment of benefits in rec- ognition of undefined "contributions of various kinds, both tangible and intangible, which residents have made during their years of resi- dency," 619 P2d, at 458.[7]

As the Alaska Supreme Court apparently realized, the first two state objectives—creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the Permanent Fund and the State's natural and mineral resources—are not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.[8] Assuming arguendo that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the state in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.[9]

Nor does the State's purpose of furthering the prudent management of the Permanent Fund and the state's resources support retrospective application of its plan to the date of statehood. On this score the state's contention is straightforward:

> "[A]s population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly large numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the large population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible return on the investments of the permanent fund principal, which would require investments in riskier ventures."

Williams v Zobel, supra, 619 P2d, at 462. The State similarly argues that equal per capita distribution would encourage rapacious development of natural resources. Ibid. Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

The last of the State's objectives—to reward citizens for past contributions—alone was relied upon by the Alaska Supreme Court to support the retrospective application of the law to 1959. However, that objective is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in Shapiro v Thompson, supra, 394 US, at 632-633, 22 L Ed 2d 600, 89 S Ct 1322:

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contributions they have made to the community through the payment of taxes. . . . Appellant's reasoning would permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services.*" (Emphasis added.)

Similarly, in Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230

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956). In addition to protecting persons ainst the erection of actual barriers to in- state movement, the right to travel, when plied to residency requirements, protects w residents of a state from being disadvan- ed because of their recent migration or em otherwise being treated differently from nger-term residents. In reality, right to avel analysis refers to little more than a rticular application of equal protection alysis. Right to travel cases have examined, equal protection t os, state distinctions tween newcomers and longer-term resi- nts. See Memorial Hospital v Maricopa unty, supra; Dunn v Blumstein, supra; Sha- ro v Thompson, supra. This case also in- olves distinctions between residents based on hen they arrived in the State and is there- re also subject to equal protection analysis.

7. These purposes were enumerated in the st section of the act creating the dividend tribution plan, 21 Alaska Sess Laws § 1(b):
"(b) The purposes of this Act are
(1) to provide a mechanism for equitable stribution to the people of Alaska of at least portion of the State's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;
(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and
(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art IX, sec 15, state constitution)."
Thus we need not speculate as to the objectives of the legislature.

8. In response to the argument that the objectives of stabilizing population and encouraging prudent management of the Permanent Fund and of the State's natural resources did not justify the application of the dividend program to the years 1959 to 1980, the Alaska Supreme Court maintained that the retrospective aspect of the program was justified by the objective of rewarding state citizens for past contributions. 619 P2d, at 461-462 n 37. See also dissenting opinion of Justice Dimond, 619 P2d, 469-471.

9. In fact, newcomers seem more likely to become dissatisfied and to leave the State than well-established residents, it would thus seem that the State would give a larger, rather than a smaller, dividend to new residents if it wanted to discourage emigration. The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay.

Of course, the State's objective of reducing population turnover cannot be interpreted as an attempt to inhibit migration into the State without encountering insurmountable constitutional difficulties. See Shapiro v Thompson, supra, 394 US, at 629, 22 L Ed 2d 600, 89 S Ct 1322.

Alaska dividend-distribution law, and this threat to free interstate migration provides an independent rationale for holding that law unconstitutional. At the outset, however, I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proven both inconclusive and unnecessary. Justice O'Connor plausibly argues, post, at ———, 72 L Ed 2d 699-690, that the right predates the Constitution and was carried forward in the Privileges and Immunities Clause of Article IV. But equally plausible, I think, is the argument that the right resides in the Commerce Clause, see Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941), or in the Privileges and Immunities Clause of the Fourteenth Amendment, see id., at 177-178, 86 L Ed 119, 62 S Ct 164 (Douglas, J., concurring). In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to "ascribe the source of this right to travel interstate to a particular constitutional provision." Shapiro v Thompson, 394 US 618, 630, 22 L Ed 2d 600, 89 S Ct 1322 (1969). It suffices that:

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Id. at 630-631, 22 L Ed 2d 600, 89 S Ct 1322, quoting United States v Guest, 383 US 745, 757-758, 16 L Ed 2d 239, 86 S Ct 1170 (1966).

As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation. A scheme of the sort adopted by Alaska is inconsistent with the Federal structure even in its prospective operation.

A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry. It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. But a State cannot *compound* its offer of direct benefits in the inventive manner exemplified by the Alaska distribution scheme: For if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority, only to have to begin building such seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

II

The Court today reaffirms the important principle that, at least with respect to a durational-residency discrimination, a State's desire "to reward citizens for past contributions" is "clearly not a legitimate state purpose." Ante, at ———, 72 L Ed 2d 679. I do not think it "odd," post, at —, 72 L Ed 2d 695, that the Court disclaims reliance on the "right to travel" as the source of this limitation on state power. In my view, the acknowledged illegitimacy of that state purpose has a different heritage—it reflects not the structure of the Federal Union but the idea of constitutionally protected equality. See Shapiro v Thompson, 394 US, at 632-633, 22 L Ed 2d 600, 89 S Ct 1322 ("The Equal Protection Clause prohibits such an apportionment of state services."); Vlandis v Kline, 412 US 441, 450, n 6, 37 L Ed 2d 63, 93 S Ct 2230 (1973). The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State's borders. The eighteen year old native resident of a State is as much a citizen as the fifty-five year old native resident. But the Alaska plan discriminates against the recently naturalized citizen, in favor of the Alaska citizen of longer duration; it discriminates against the eighteen year old native resident, in favor of all residents of longer duration. If the Alaska plan were limited to discriminations such as these, and did not purport to apply to migrants from sister States, interstate travel would not be noticeably burdened—yet those discriminations would surely be constitutionally suspect.

The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment has not expressed by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of the State. The Fourteenth Amendment does, however, expressly recognize one elementary basis for distinguishing between persons who may be within a State's jurisdiction at any particular time—by setting forth the requirements for state citizenship. But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence.[2] That

[2] "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." Slaughter-House Cases, 16 Wall 36, 80, 21 L Ed 394 (1873). See id., at 112-113, 21 L Ed 394 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and to abide in any State

Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.[2] And the Equal Protection Clause would not tolerate such distinctions. In short, as much as the right to travel, equality of citizenship is of the essence in our republic. As the Court notes, States may not "divide citizens into expanding numbers of permanent classes." Ante, at —, 72 L Ed 2d 680.

It is, of course, elementary that the Constitution does not bar the States from making reasoned distinctions between citizens: Insofar as those distinctions are rationally related to the legitimate ends of the State, they present no constitutional difficulty, as our equal protection jurisprudence attests. But we have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself. To be sure, allegiance and attachment may be rationally measured by length of residence—length of residence may, for example, be used to test the bona fides of citizenship—and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes. Cf. Chimento v Stark, 353 F Supp 1211 (D NH), affirmed, 414 US 802, 38 L Ed 2d 39, 94 S Ct 125 (1973) (seven year citizenship requirement to run for governor); U. S. Const, art I, § 2, cl 2, § 3, cl 3; art II, § 1, cl 4. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics. While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need. In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future. The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future performance. In addition, to a limited extent, recognition and reward of past public service has independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service. But even the idea of rewarding past public service offers scarce support for the "past contribution" justification for durational residence classifications since length of residence has only the most tenuous relation to the *actual* service of individuals to the State.

Thus, the past contribution rationale proves much too little to provide a rational predicate for discrimination on the basis of length of residence. But it also proves far too much, for "it would permit the State to apportion all benefits and services according to the past . . . contributions of its citizens." Shapiro v Thompson, 394 US, at 632 633, 22 L Ed 2d 600, 89 S Ct 1322. In effect, then, the past-contribution rationale is so far-reaching in its potential application, and the relationship between residence and contribution to the State so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination that it purports to justify. But while duration of residence has minimal utility as a measure of things that are, in fact, constitutionally relevant, resort to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

Justice O'Connor, concurring in the judgment.

The Court strikes Alaska's distribution scheme, purporting to rely solely upon the Equal Protection Clause of the Fourteenth Amendment. The phrase "right to travel" appears only fleetingly in the Court's analysis, dismissed with an observation that "right to travel analysis refers to little more than a particular application of equal protection analysis." Ante, at —, n 6, 72 L Ed 2d 677-678. The Court's reluctance to rely explicitly on a right to travel is odd, because its holding depends on the assumption that Alaska's desire "to reward citizens for past contributions . . . is not a legitimate state purpose." Ante, at —, 72 L Ed 2d 679. Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973), reveals, the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration.

I respectfully suggest, therefore, that the Court misdirects its criticism when it labels Alaska's objective illegitimate. A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. Under some circumstances, the objective may be wholly reasonable.[1] Even a generalized de-

he chooses, and to claim citizenship therein, and an equality of rights with every other citizen.")

3. The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See art I, § 9, cl 8 ("No title of Nobility shall be granted by the United States."). See also Virginia Bill of Rights (1776), Rutland, The Birth of the Bill of Rights, App A ("No man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services").

1. A State, for example, might choose to divide its largesse among all persons who previously have contributed their time to volunteer community organizations. If the State graded its dividends according to the number of years devoted to prior community service, it could be said that the State intended "to reward citizens for past contributions." Alternatively, a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants. If the State made this credit retroactive, to benefit those citizens who launched these improvements before they became fashionable, the State once again would be rewarding past contributions. The Court's opinion would dismiss these objectives as wholly illegitimate. I would recognize them as valid goals and examine only whether the

sire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper. The difficulty is that plans enacted to further this objective necessarily treat new residents of a State less favorably than the longer-term residents who have past contributions to "reward." This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere "league of States." See Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869). The Court's task, therefore, should be (1) to articulate this constitutional principle, explaining its textual sources, and (2) to test the strength of Alaska's objective against the constitutional imperative. By choosing instead to declare Alaska's purpose wholly illegitimate, the Court establishes an uncertain jurisprudence. What makes Alaska's purpose illegitimate? Is the purpose illegitimate under all circumstances? What other state interests are wholly illegitimate? Will an "illegitimate" purpose survive review if it becomes "important" or "compelling"?[2] These ambiguities in the Court's analysis prompt me to develop my own approach to Alaska's scheme.

Alaska's distribution plan distinguishes between long-term residents and recent arrivals. Stripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer-term residents. The Privileges and Immunities Clause of Article IV, which guarantees "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States," addresses just this type of discrimination.[3] Accordingly, I would measure Alaska's scheme against the principles implementing the Privileges and Immunities Clause. In addition to resolving the particular problems raised by Alaska's scheme, this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the Court's prior opinions.

implementation infringed any constitutionally protected interest.

2. The Court's conclusion that Alaska's scheme lacks a rational basis marks a puzzling aspect of its analysis. By refusing to extend any legitimacy to Alaska's objective, the Court implies that a program designed to reward prior contributions will never survive equal protection scrutiny. For example, the programs described in n 1, supra, could not survive the Court's analysis even if the State demonstrated a compelling interest in rewarding volunteer activity or promoting conservation measures. The Court's opinion, although purporting to apply a deferential standard of review, actually secures that any governmental program depending upon a "past contributions" rationale will violate the Equal Protection Clause.

3. While the Clause refers to "Citizens," this Court has found that "the terms 'citizen' and 'resident' are 'essentially interchangeable' . . . for purposes of analysis of most cases under the Privileges and Immunities Clause." Hicklin v Orbeck, 437 US 518, 524, n 8, 57 L Ed 2d 397, 98 S Ct 2482 (1978) quoting Austin v New Hampshire, 420 US 656, 662, n 8, 43 L Ed 2d 530, 95 S Ct 1191 (1975). This opinion, therefore, will refer to "nonresidents" of Alaska, as well as to "noncitizens" of that State.

It is settled that the Privileges and Immunities Clause does not protect corporations. See Paul v Virginia, 8 Wall 168, 19 L Ed 357 (1869). The word "Citizens" suggests that the Clause also excludes aliens. See, e.g., Id., at 177, 19 L Ed 357 (dictum); L. Tribe, American Constitutional Law § 6-34, at 411, n 10 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

I

Our opinions teach that Article IV's Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 395, 92 L Ed 1460, 68 S Ct 1156 (1948). The Clause protects a nonresident who enters a State to work, Hicklin v Orbeck, 437 US 518, 57 L Ed 2d 397, 98 S Ct 2482 (1978), to hunt commercial game, Toomer, supra, or to procure medical services, Doe v. Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973).[4] A fortiori, the Privileges and Immunities Clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of old-timers. In its first year of operation, the distribution scheme would have given $1050 to an Alaskan who had lived in the State since statehood. A resident of ten years would have received $500, while a one-year resident would have received only $50. In effect, therefore, the State told its citizens: "Your status depends upon the date on which you established residence here. Those of you who migrated to the State cannot share its bounty on the same basis as those who were here before you." Surely this scheme imposes one of the "disabilities of alienage" prohibited by Article IV's Privileges and Immunities Clause. See Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869).

It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them. Citizens who arrive in the State tomorrow will receive an even smaller claim on Alaska's resources. The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier. The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that "The citizen of State A who ventures into [Alaska]" to establish a home labors

4. See generally Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1870) ("The Clause" plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; and to take and hold real estate.").

der a continuous disability.[5]

If the Privileges and Immunities clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. In Baldwin v Fish & Game Commission, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978), we held that States must treat residents and nonresidents "without unnecessary distinctions" when the nonresident seeks to "engage in an essential activity or exercise a basic right." Id., at 387, 56 L Ed 2d 354, 98 S Ct 1852. On the other hand, if the nonresident engages in conduct that is not "fundamental" because it does not bea[r] upon the vitality of the Nation as a single entity," the Privileges and Immunities Clause affords no protection. Id., at 387, 388, 56 L Ed 2d 354, 98 S Ct 1852.

Once the Court ascertains that discrimination burdens an "essential activity," it will test the constitutionality of the discrimination under a two-part test. First, there must be "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." Hicklin v Orbeck, 437 US 518, 525-526, 57 L Ed 2d 397, 98 S Ct 2482 (1978) (quoting Toomer v Witsell, 334 US 385, 398, 92 L Ed 1460, 68 S Ct 1156 (1948)). Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the noncitizens. Id., at 527, 57 L Ed 2d 397, 98 S Ct 2482.

Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State.[6] It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[7] Alaska's encumbrance on the right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in Hicklin.

Alaska has not shown that its new residents are the "peculiar source" of any evil addressed by its disbursement scheme. The State does not argue that recent arrivals constitute a particular source of its population turnover problem. Indeed, the State urges that it has a special interest in persuading young adults, who have grown to maturity in the State, to remain there. Brief for Appellees 35, n 24. Nor is there any evidence that new residents, rather than old, will foolishly deplete the State's mineral and financial resources. Finally, although Alaska argues that its scheme compensates residents for their prior tangible and intangible contributions to the State, nonresidents are hardly a peculiar source of the "evil" of partaking in current largesse without having made prior contributions. A multitude of native Alaskans—including children and paupers—may have failed to contribute to the State in the past. Yet the State does not dock paupers for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.

Even if new residents were the peculiar source of these evils, Alaska has not chosen a cure that bears a "substantial relationship" to the malady. As the dissenting judges below observed, Alaska's scheme gives the largest dividends to residents who have lived longest in the State. The dividends awarded to new residents may be too small to encourage them to stay in Alaska. The size of these dividends appears to give new residents only a weak interest in prudent management of the State's resources. As a reward for prior contributions, finally, Alaska's scheme is quite ill-suited. While the phrase "substantial relationship" does not require mathematical precision, it demands at least some recognition of the fact that persons who have migrated to Alaska may have contributed significantly more to the State, both before and after their arrival, than have some natives.

For these reasons, I conclude that Alaska's disbursement scheme violates Article IV's Privileges and Immunities Clause. I thus reach the same destination as the Court, but along a course that more precisely identifies the evils of the challenged statute.

II

The analysis outlined above might apply to many cases in which a litigant asserts a right to travel or migrate interstate.[8] To historians

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5. See Note, A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv L Rev 1461, 1464-1465, n 17 (1979) (labeling contrary argument "technical").

As the Court points out, ante, at ———, n 5, 72 L Ed 2d 677, Alaska's plan differentiates even among native Alaskans, by tying their benefits to date of birth. If the scheme merely distributed benefits on the basis of age, without reference to the date beneficiaries established residence in Alaska, I doubt it would violate the Privileges and Immunities Clause. Under these circumstances, a 25-year-old Texan establishing residence in Alaska would acquire the same privileges of citizenship held by a 25-year-old native Alaskan. The scheme would not treat the citizen who moves to the State differently from citizens who already reside there. The Court does not explain whether it would find such an age-based scheme objectionable.

6. The "burden" imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State. The Clause addresses only differences in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens.

7. See also Baldwin v G.A.F. Seelig, Inc., 294 US 511, 523, 79 L Ed 1032, 55 S Ct 497 (1935) (the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"); Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869) ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"); Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941) ("constitution prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

8. Any durational residency requirement, for example, treats nonresidents who have exercised their right to travel to a State differently from longer term residents. This is not to say, however, that all such requirements would fail scrutiny under the Privileges and Immunities Clause. The durational residency requirement upheld in Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975) (one year to obtain divorce for example) would

ily would come as no surprise. Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.

The Clause derives from Article V of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State," in addition to guaranteeing "the free inhabitants of each of these states . . . the privileges and immunities of free citizens in the several states."[9] While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Article IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, Records of the Federal Convention 112 (1934). Commentators, therefore, have assumed that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.[10]

Early opinions by the Justices of this Court also traced a right to travel or migrate interstate to Article IV's Privileges and Immunities Clause. In Corfield v Coryell, 6 F Cas 546, 552 (No. 3,230) (CC ED Pa 1823), for example, Justice Washington explained that the Clause protects the "right of a citizen of one state to pass through, or to reside in any other state." Similarly, in Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869), the Court found that one of the "undoubt[ed]" effects of the Clause was to give "the citizens of each State . . . the right of free ingress into other States, and egress from them. . . ." See also Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1871). Finally, in United States v Wheeler, 254 US 281, 297–298, 65 L Ed 270, 41 S Ct 133 (1920), the Court found that the Clause fused two distinct concepts: (1) "the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from" their own States, and (2) the right to exercise the same privileges in other States.

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel, under the Privileges and Immunities Clause. This Clause may not address every conceivable type of discrimination that the Court previously has denominated a burden on interstate travel. I believe, however, that application of the Privileges and Immunities Clause to controversies involving the "right to travel" would at least begin the task of reuniting this elusive right with the constitutional principles it embodies. Because I believe that Alaska's distribution scheme violates the Privileges and Immunities Clause of Article IV, I concur in the Court's judgment insofar as it reverses the judgment of the Alaska Supreme Court.

Justice Rehnquist, dissenting.

Alaska's dividend distribution scheme represents one State's effort to apportion unique economic benefits among its citizens. Although the wealth received from the oil deposits of Prudhoe Bay may be quite unlike the economic resources enjoyed by most States, Alaska's distribution of that wealth is in substance no different from any other State's allocation of economic benefits. The distribution scheme being in the nature of economic regulation, I am at a loss to see the rationality behind the Court's invalidation of it as a denial of equal protection. This Court has long held that state economic regulations are presumptively valid, and violate the Fourteenth Amendment only in the rarest of circumstances.

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v Lake Shore Auto Parts Co. 410 US 356 [35 L Ed 2d 351, 93 S Ct 1001] (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." New Orleans v Dukes, 427 US 297, 303, 49 L Ed 2d 511, 96 S Ct 2513 (1976).

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have survived under the analysis outlined above. In Sosna the State showed that nonresidents were a peculiar source of the evil addressed by its durational residency requirement. Those persons could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in other States. Iowa adopted a reasonable response to this problem by requiring nonresidents to demonstrate their bona fide residency for one year before obtaining a divorce. I am confident that the analysis developed in Hicklin v Orbeck, supra, will adequately identify other legitimate durational residency requirements.

9. Even before adoption of the Articles, a few of the colonies explicitly protected freedom of movement. The Rhode Island Charter gave members of that colony the right "to pass and repasse with freedome, into and through the rest of the English Collonies, upon their lawfol and civill occasions." 7 Charters and Organic Laws of the United States, p 3217 (1909) (hereinafter Charters). The Massachusetts Body of Liberties provided: "Every man of or within this Jurisdiction shall have free libertie, notwithstanding any civill power, to remove both himselfe and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie." Id., at 178. Massachusetts showed some of the same liberality to foreigners entering the colony:

"Every people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured among us, according to that power and prudence god shall give us." Ibid.

These attitudes contrasted with the more restrictive views prevailing in seventeenth century Europe. See generally id., at 163–171.

10. See, e.g., Chafee, supra, at 185; Note, The Right to Travel and Exclusionary Zoning, 26 Hastings LJ 849, 858–859 (1975); Comment, The Right to Travel: In Search of a Constitutional Source, 55 Neb L Rev 117, 119–120, n 14 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L Rev 1120, 1130, n 7 (1975).

See also Austin v New Hampshire, 420 US 656, 661, 43 L Ed 2d 530, 95 S Ct 1191 (1975) (Article IV of the Articles of Confederation was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation"); United States v Wheeler, 254 US 281, 294, 65 L Ed 2d 270, 41 S Ct 133 (1920) ("The text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so concisely embodied as to leave no room for controversy").

also Minnesota v Clover Leaf Creme y Co. 449 US 456, 66 L Ed 2d 659, 101 S Ct 715 (1981); United States Railroad Retirement Board v Fritz, 449 US 166, 66 L Ed 2d 368, 101 S Ct 453 (1980); Hughes v Alexandria Scrap Corp. 426 US 794, 49 L Ed 2d 220, 96 S Ct 2488 (1976).

Despite the highly deferential approach which we invariably have taken toward state economic regulations, the Court today finds the retroactive aspect of the Alaska distribution scheme violative of the Fourteenth Amendment. The Court concludes that the State's first two justifications are not rationally related to the retroactive portion of the distribution scheme, and that the third justification—the reward of citizens for their past contributions—is not a legitimate state objective But the illegitimacy of a State's recognizing the past contributions of its citizens has been established by the Court only in certain cases considering an infringement of the right to travel,[1] and the majority itself rightly declines to apply the strict scrutiny analysis of those right-to-travel cases. See ante, at -- and n 6, 72 L Ed 2d 677-678. The distribution scheme at issue in this case impedes no person's right to travel to and settle in Alaska; if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska. The State's third justification cannot, therefore, be dismissed simply by quoting language about its legitimacy from right-to-travel cases which have no relevance to the question before us.

So understood, this case clearly passes equal protection muster. There can be no doubt that the state legislature acted rationally when it concluded that dividends retroactive to the year of statehood would "recognize the 'contributions of various kinds, both tangible and intangible,' which residents have made during their years of state residency." Williams v Zobel, 619 P2d 448, 458 (Alas 1980). Nor can there be any doubt that Alaska, perhaps more than any other State in the Union, has good reason for recognizing such contributions.[2] Because the distribution scheme is thus rationally based, I dissent from its invalidation under the guise of equal protection analysis.[3] In striking down the Alaskan scheme, the Court seems momentarily to have forgotten "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise economic or social policy." Dandridge v Williams, 397 US 471, 486, 25 L Ed 2d 491, 90 S Ct 1153 (1970).

1. The Court relies upon Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973), in holding that Alaska may not justify its dividend distribution scheme by a desire to reward its citizens for their past contributions. In Shapiro, however, the Court found that the classification at issue "touche[d] on the fundamental right of interstate movement" and therefore could be justified only if it promoted a *"compelling* state interest." 394 US, at 638, 22 L Ed 2d 600, 89 S Ct 1322 (emphasis in original). Similarly, Vlandis concerned the right to move to and establish residency in Connecticut, and noted only in dicta that rewarding citizens for their past contributions was an impermissible state objective. See 412 US, at 449-450, n 6, 37 L Ed 2d 63, 93 S Ct 2230.

Although I have expressed my disagreement with this holding even in the right-to-travel cases, see Memorial Hospital v Maricopa County, 415 US 250, 286-287, 39 L Ed 2d 306, 94 S Ct 1076 (1974) (Rehnquist, J., dissenting); Vlandis v Kline, 412 US, at 468-469, 37 L Ed 2d 63, 93 S Ct 2230 (same), there is no need to rely upon that dissenting position here. The majority does not analyze this as a right-to-travel case. Compare ante, at — and n 6, 72 L Ed 2d 677-678, with Memorial Hospital v Maricopa County, 415 US, at 261-262, 39 L Ed 2d 306, 94 S Ct 1076, and Shapiro v Thompson, 394 US, at 634, 636, 22 L Ed 2d 600, 89 S Ct 1322.

2. As the Alaska Supreme Court noted, those who have lived in Alaska from the year of its statehood have borne unusual expenses and hardships:

"'A government such as the one embodied in the Alaska constitution, . . . with its complete range of governmental services, was extensive for a State with limited sources of taxation. Alaska could only boast a couple of pulp mills . . . The State's business enterprises were small and catered mostly to local needs. In addition, Alaska's population was modest and hardly amounted to more than that of a medium-sized city in the continental United States.

Accordingly, revenues were small. Yet, the demands were great. The State government had to provide all the governmental services and social overhead required by modern American society. For instance, it would have been relatively simple to build a few roads, furnish normal police protection, and establish the customary school facilities. But nothing was normal in Alaska; it was and remains a land of superlatives. Subarctic engineering is relatively new, but the State would have to face the problem of permafrost conditions that frequently cause the roadtop to buckle and heave. Police protection would have to be provided for an area one-fifth the size of the forty-eight United States but with very few roads available. Flying would become a way of life for law enforcement officials as well as other Alaskans—an expensive way of life. "Bush schools" scattered along the Aleutian chain, through the Yukon Valley, and on the Seward Peninsula and the islands of southeastern Alaska were expensive to maintain. It was not until the discovery of oil on a large scale that the picture changed.'" Williams v Zobel, 619 P2d 448, 462, n 37 (1980) (quoting C.M. Naske, An Interpretive History of Alaskan Statehood 169-170 (1973)).

3. I also disagree with the suggestion of Justice O'Connor that the Alaska distribution scheme contravenes the Privileges and Immunities Clause of Art IV of the Constitution. That Clause assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy: "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 396, 92 L Ed 1460, 68 S Ct 1156 (1948). We long ago held that the Clause has no application to a citizen of the State whose laws are complained of. "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the State. It threw around them no safeguard; it only secured to the citizen of the State such rights as the laws or constitution of the State conferred or created. Nor did it profess to control the power of the State governments over the rights of its own citizens." The Slaughter-House Cases, 16 Wall 36, 77, 21 L Ed 394 (1873).

ATTACHMENT 4

Will Condon on Pioneers' Home Issue

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

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November 26, 1982

Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
Legislative Affairs Agency
Pouch W
Juneau, Alaska 99811

The Honorable Carole J. Burger
Commissioner
Department of Administration
Pouch C
Juneau, Alaska 99811

Re: Pioneers' Homes; Our files:
366-138-83 and J99-101-80

Dear Mr. Wilkerson and Ms. Burger:

I. INTRODUCTION

The Division of Legislative Audit has posed to this department two interpretation questions concerning the statutes establishing the Alaska Pioneers' Homes program. The Department of Administration has sought the assistance of this department with administrative regulations that raise fundamental questions as to the validity of the program.

The Alaska Pioneers' Homes program is one of the oldest Alaska institutions. It was established by the First Territorial Legislature in 1913 and has continued uninterrupted for nearly 70 years. Its operation was continuously approved by Congress until 1959, when Alaska became a state and congressional review of

territorial actions was no longer necessary (Organic Act, §§ 9, 20). Originally geared to prospectors, the program has always had as its goal the housing and care of persons who have lived in Alaska a significant period of time.

Relatively recent United States Supreme Court opinions have placed that fundamental element of the program in severe jeopardy -- the Court has ruled that discriminations between persons based on length of residency are often unconstitutional. The opinions of the Court leave only a few narrow arguments available to save the program.

II. SUMMARY

In a September 20, 1982, letter, the Division of Legislative Audit posed two questions regarding the legislative intent behind AS 47.25.030, one of the statutes governing the Pioneers' Homes program. AS 47.25.030 provides, in relevant part:

> A citizen of the United States over 65 years of age who is a resident of the state and has been a resident for not less than 15 years continuously immediately preceding his application, but who is not destitute, may on application be admitted to the home upon his agreement to pay to the state a sum for each day as the Department of Administration considers sufficient to compensate the state for the cost of care and support of the person at the home.

The division wished to know the intent behind the "sufficient to compensate the state" language and whether the legislature wanted destitute persons (those eligible for admission to the Homes

under AS 47.25.020) to have priority in admission over those able to pay.

In addition, the Department of Administration has requested our assistance in drafting and reviewing proposed regulations for the Pioneers' Homes. These regulations include implementation of the statutory standards for admission set forth in AS 47.25.020, AS 47.25.030 and AS 47.25.035. Briefly, these standards are that persons of any age who are "destitute and in need of the aid or benefit of the home because of physical disability or other cause" and have continuously resided in the state for 15 years may be admitted to the home without payment. Non-destitute persons over the age of 65 who have continuously resided in the state for 15 years may also be admitted upon payment of a certain sum to the state which is "sufficient to compensate" the state for their care. The 15-year continuous residency requirement may be forgiven if the applicant has otherwise resided in the state for 30 years.

Under AS 44.62.060(b), this department must review each regulation and make a written statement concerning a regulation's "legality, constitutionality, and consistency with other regulations." AS 44.62.060(b)(1). The lieutenant governor may not accept regulations for filing unless there is such a statement from this office approving the regulations. This opinion sets out our constitutional analysis of these regulations.

The courts analyze residency requirements under different standards of review, depending on whether the right or benefit denied is a "fundamental political right" or "a basic necessity of life." Memorial Hospital v. Maricopa County, 415 U.S. 20 (1974); Hawaii Boating Association v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980), rev'd on other grounds; Zobel v. Williams, __ U.S. __, 72 L.Ed 2d 672 (1982). If access to the Pioneers' Homes is considered to be access to a "basic necessity of life," then the state must show that a distinction based on length of residence is "absolutely necessary to promote a compelling state interest" -- a test that is rarely met. Williams v. Zobel, 619 P.2d at 453. The Pioneers' Homes residency requirement would not survive this analysis.

On the other hand, if the Pioneers' Homes program does not involve access to a "basic necessity of life," then a much less strict standard of review is used, and arguments can be advanced for the constitutionality of the program.

We believe that the Pioneers' Homes program arguably does not involve access to a "basic necessity of life" so as to invoke the strict standard of review. Consequently, there are defenses or the constitutionality of the entire program.

Finally, it is our opinion that the destitute and disabled have priority in admission to the Pioneers' Homes and

the statutory requirement that non-destitutes pay an amount "sufficient to compensate the state" was not intended to mandate the recovery of all costs of a person's care.

Our conclusion that the Pioneers' Homes program can possibly be sustained does not mean that we believe a court would, if faced with the question, necessarily rule that it is constitutional. In other words, while there are legitimate arguments to defend it, we cannot guarantee their success in court. Indeed, there are numerous serious and potential fatal attacks that could be mounted against the entire program. But, since the program has continued uninterrrupted for approximately 70 years, we believe that it is appropriate for the courts rather than this department to make the final judgment rejecting all serious arguments in support and, if it is the proper conclusion, stopping the program. In the absence of that court ruling, therefore, we believe it is appropriate to continue the program and finish the proposed regulation project.

III. ANALYSIS

History

Before addressing these questions, a brief overview of the history of the Pioneers' Homes program is helpful. The Pioneers' Homes program has been an important institution in Alaska for almost 70 years.

In 1913 the first territorial legislature in Alaska accepted the offer of the United States government to turn over

some Marine barracks buildings in Sitka for use as a home for indigent ailing persons who wished to stay in Alaska. Chapter 80, SLA 1913, set up a three-member, unpaid board of trustees to manage and control "a home for indigent prospectors and others who have spent their years in Alaska and become dependent." The home was declared open to "[e]very worthy pioneer, or other person, who shall have been a resident of the Territory of Alaska for five years preceding his application for admission and who shall need the aid or benefit of said Home in consequence of physical disability or other cause within the scope of the regulations of the board." 1/ The legislature appropriated $10,000 for the operation of the Sitka home. 2/

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1. Although nothing in the 1913 act specifically limited eligibility to men, this apparently was the intent, as evidenced by § 6, ch. 64, SLA 1915 (setting up the allowance program discussed later in this memorandum): "Women who are otherwise qualified to apply for relief under this Act, may make application hereunder, and if entitled thereto shall receive the allowance herein provided for, notwithstanding the fact that as women they might not be eligible to be received in the Alaska Pioneers' Home."

2. Also in 1913, the legislature established the Board of Aged Prospectors Home Commission, to "investigate as to the climatic and other conditions of the several hot springs in Interior Alaska, the adaptability of same for use as a home for aged prospectors, the title price and possible methods of securing same, and to secure options on property adjoining any such springs as may be determined upon as desirable for such purpose." Ch. 78, SLA 1913. Apparently nothing became of this investigation, since this legislation was repealed in 1923. Ch. 7, SLA 1923. A Pioneers' Home was finally opened in Fairbanks in 1967.

The home opened on September 2, 1913, with 5 residents, and quickly expanded to 51 residents by February, 1915. According to the initial report of the board, operations were successful. A copy of that report is enclosed with this opinion.

In 1915 the legislature enacted an alternative program for Alaska's impoverished older residents. Chapter 64, SLA 1915 established a predecessor program to the current longevity bonuses (AS 47.45): any "pioneer" 65 or older, who had resided in Alaska for ten consecutive years since 1905 and who was "entitled to the benefits of the Alaska Pioneers' Homes" could, in lieu of applying for admission to the Homes, apply to the Homes' board of trustees for a monthly allowance not to exceed $12.50, to be paid out of the "revenues" of the Homes "in excess of suitable provisions for inmates of said Homes and those likely to be admitted thereto," and set according to the applicant's needs. The board could in its discretion deny the application if it found the applicant's case not "worthy." In 1917 the age requirement for women was lowered to 60, and the ceiling on allowances for them raised to $25 a month. Chapter 49, SLA 1917. Chapter 17, SLA 1919 increased the residency requirement to 15 years immediately preceding the application, and specifically excluded from eligibility "Natives or other Indians," who were defined as not being

"pioneers." 3/ In 1923 the ceiling on allowances was raised again, to $25 a month for men and $45 for women, and the requirement that allowances be paid out of "revenues of the Home" was replaced by a provision that allowances were to be paid out of money appropriated by the legislature for them. 4/

The 1929 legislature repealed the earlier acts on both Pioneers' Homes and allowances and enacted one omnibus piece of legislation, chapter 65, SLA 1929, "to revise and codify the laws relative to the care and support of the destitute and the needy." With respect to the Homes, chapter 65 essentially reenacted the 1913 legislation, with one significant change. Under section three, a five-year resident "in need of the aid or benefit of said Home in consequence of physical disability or other cause"

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3. In 1925, however, the legislature amended the act to exclude only "any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or . . . any ward of the Government of the United States." Ch. 65, SLA 1925. This change, though, was apparently not a substantial one; evidently it still excluded most Natives. The 1925 legislature saw a heated debate over the exclusion of Natives, with one representative threatening to tie up the whole program if the exclusion were not lifted.

4. It is unclear whether the allowance program before 1923 was actually dependent on whether the Home generated revenue, i.e., spent less than the sum appropriated for it. For, from 1915 on, an appropriation was made specifically for allowances. The initial appropriation, § 7, ch. 64, SLA 1915, referred to "revenue of said Home." But some subsequent appropriations lacked this reference. For instance, the 1919-20 budget, ch. 36, SLA 1919, contained separate appropriations for the Home and for the allowance program.

was not entitled to admission unless destitute. As a corollary, section five authorized, but did not require, the board to admit non-destitute ten-year residents over age sixty-five 5/ "upon his agreement to pay to the Territory such sum per day as the Board may deem sufficient to compensate the Territory for the cost of care and support of such person at the Home." 6/ With respect to the pioneers' allowances, section nine lengthened the residency requirement so as to cover only those who had resided in Alaska continuously since January 1, 1906, and section eleven raised the maximum allowance for men from $25 to $35. (Women remained at $45.)

In 1935 the January 1, 1906 requirement of the allowance program was changed to a simple 25-year residency requirement. Ch. 47, SLA 1935. However, the entire program was abolished in 1947 (ch. 73, SLA 1947) probably because a general old age assistance program, with far less strenuous residency requirements had been enacted in 1937. Chapter 2, L. Ex. Sess. 1937.

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5. Although the Pioneers' Homes are generally thought of as senior citizens' homes, there is no age limitation for destitute residents admitted under AS 47.25.020, only for non-destitute residents admitted under § 30.

6. The 1929 legislation also provided that the members of the board of trustees other than the governor receive salaries.

Several changes have also been made to the statutory structure of the Pioneers' Homes program. In 1946 the provisions relating to the board of trustees were overhauled, and a new section defining the rights and duties of the superintendent of the home was added. Chapter 29, SLA 1946. In 1955 the legislature added the provision, now found at AS 47.25.020(b), that persons entitled to admission (i.e., destitute persons) could be required to pay to the home all income in excess of a certain sum (then $15, now $35). Chapter 158, SLA 1955. The same chapter also authorized the board to pay an allowance (then $5 per month, now $35 under AS 47.25.020(c)) to totally indigent residents. In 1961 the Alaska residency requirement for admission was raised to the present 15 years, chapter 89, SLA 1961, up from 5 years for persons entitled to admission (AS 47.25.020) and 10 for persons eligible for admission on payment (AS 47.25.030). In addition to these statutory changes, a significant physical change took place: the construction of a new Pioneers' Home in Sitka in 1934, built by the WPA on the site of the old Home. 7/

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7. During construction of the new home the residents were housed for a year or two, at facilities at Goddard Hot Springs in southeast Alaska.

Since 1961 there have only been minor changes in the statutes governing the Pioneers' Homes program. 8/ The program itself, however, has grown tremendously; its budget for the 1983 fiscal year is nearly $19 million. In addition to the Sitka Home, there are now Homes in Fairbanks (dedicated in 1967), Palmer (1971), Anchorage (1977), and Ketchikan (1981), and planning is underway for a Home in Juneau. The five existing Homes, plus a small senior center in Kotzebue run under contract with the program, are capable of housing 635 people.

Although the Pioneers' Homes are capable of housing 635 people, only 519 people are currently in residence making the actual cost per year per resident approximately $36,600. 9/

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8. Chapter 71, SLA 1963, authorized the establishment of branch Homes besides the one in Sitka. Chapter 63, SLA 1965, changed the dollar figures in AS 47.25.020(b) and (c), discussed above. Executive Order 30, issued in 1968, transferred responsibility for the Homes to the Department of Administration. Chapter 118, SLA 1968, repealed the prohibition on Indians and Eskimos, which had already been rendered ineffective by other provisions of law. Chapter 7, SLA 1971, raised the dollar figures in AS 47.25.020(b) and (c) to their current levels. And Chapter 89, SLA 1978, enacted AS 47.25.035, providing an exception to the continuous 15-year residency requirement for persons with 30 years total residency.

9. Many of the rooms in the Pioneers' Home in Sitka were designed for double occupancy but for privacy reasons are used by only one person. Due to the growing waiting list, these rooms will return to double occupancy as needed. Other current vacancies in the Homes are due to the remodeling of the Anchorage Pioneers' Home as well as to the fact that a limited number of beds in the nursing portions of the Homes must be kept vacant to allow for emergency use by current residents.

This figure and the total Pioneers' Homes program budget of nearly $19 million for fiscal year 1983 may be compared with the state's public assistance programs which include Aid to Families with Dependent Children, Adult Public Assistance (former separate programs for the blind, disabled, and aged), and General Relief. These programs require a total of approximately $34 million in state general funds matched with $21 million from the federal government. Under the AFDC program, over 13,500 people may receive assistance in any one month. A family of four with no income may be eligible for a maximum of $15,857 per year in assistance which would be allotted as follows:

$ 7,608	AFDC payments
3,264	Food stamps
425	Energy benefit
4,560	Medicaid benefit if needed
$15,857	

The recipients of AFDC assistance or other categorical aid must meet a variety of eligibility requirements depending upon the type of aid sought. All must, however, fall below specific income levels to qualify for help.

Of the 519 persons presently participating in the Pioneers' Homes program, 515 were admitted under the non-destitute, over 65 and paying clause (AS 47.25.030), while only four were admitted under AS 47.25.020 because they were destitute and disabled. Thus, the program now is for practical purposes no longer a home for the needy -- at least as the

statutes make that distinction. Instead, the program is more of a retirement home for non-destitute "pioneers."

Furthermore, even for the destitute and disabled, the ioneers' Homes program is essentially duplicative of existing programs. Alaska has chosen to participate in the medical assistance program of subchapter XIX of the federal social security program, 42 U.S.C. § 1396, et seq. See AS 47.07.010. That program provides federal money to the state to assist with medical costs of the needy, contingent upon the state's meeting a lengthy list of conditions set out in 42 U.S.C. § 1396a. Disabled persons entitled to admission to the Pioneers' Homes are also covered by subchapter XIX. See 42 U.S.C. § 1396a(a)(10) (state plan shall provide certain medical services to all individuals receiving aid or assistance under a state plan approved under subchapter XVI of Social Security Act; subchapter XVI relates to supplemental security income for the aged, blind, and disabled). Even if § 1396a(a)(10) does not require states to pay for nursing home costs of the disabled -- see subparagraph (A) and 42 U.S.C. § 1396d(a) -- Alaska has chosen to provide this care. AS 47.07.030; 7 AAC 43.005(b)(2) and (3).

The eligibility standards under the Alaska program are found in Title 7, Part 3 of the Alaska Administrative Code (Health and Social Services -- Family and Children Services). 7 AAC 40.170(a) adopts the federal definition of disability in

42 U.S.C. § 1382c(a)(3). That definition basically provides that a person is disabled only if his physical or mental impairment precludes him from engaging in any kind of "substantial gainful work." Disabled persons eligible for medical assistance are those eligible for (but not necessarily receiving) Adult Public Assistance (APA) payments, plus a few others. 7 AAC 43.020(a). APA eligibility is defined in 7 AAC 40: a person may not have resources in excess of $1,500 for an individual or $2,250 for a married couple (7 AAC 40.270), subject to numerous resource exclusions (7 AAC 40.280--290), and may not have income in excess of certain amounts, depending on the person's status and living arrangements. These amounts, based on state rather than federal law, will be listed in the soon-to-be-promulgated 7 AAC 40.310.

These standards for medical assistance differ slightly from both those currently utilized by the Pioneers' Homes in making decisions under AS 47.25.020 and those in the Homes' proposed regulations, 2 AAC 30. Under present policies, as set forth in the current Policy and Procedures Manual of the Pioneers' Homes (the section on admissions policies became effective in February 1981), income limits for destitutes are the same as for the Adult Public Assistance (aged, blind, and disabled) program, and resource limits may be tougher. The policy manual sets a ceiling of $35,000 on the value of an applicant's property, while

under 7 AAC 40.280(a)(1) the applicant's home seems to be excluded from counted resources regardless of the home's value.) The policy manual's definition of disability, though, seems laxer than the definition in 42 U.S.C. § 1382c(a)(3) cited above: according to the manual a person is eligible under AS 47.25.070 if he or she "has a physical infirmity, disability or impairment that prohibits activity, or other disability which makes it necessary for them [sic] to receive assistance from others in coping with the problems of daily living." The proposed regulation on income and resources, 2 AAC 30.030(a), seems to use the current resources guidelines, but the Aged, Blind and Disabled income limits (to be issued in 7 AAC 40.310) uses federal Office of Management and Budget poverty guidelines. The proposed regulation on need under AS 47.25.020 and 2 AAC 30.040 approximates current policy on what constitutes a disability.

Constitutionality of Residency Requirements

Addressing the most fundamental matter first, the question is whether the 15-year, continuous residence (or 30 years of total residence) requirement is constitutional. As the former and present statutes and the program's history show, there are two separate purposes of the program.

First, the Homes are to provide care to the destitute disabled of any age. Second, the Homes also are to be retirement

Homes for non-destitute persons over 65 years old who could pay for their support.

A state may not deny access to welfare benefits or "basic necessities of life" like housing and care for the needy on the basis of length of residence unless the state can show that such a classification is absolutely necessary to promote a compelling state interest. Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980); Shapiro v. Thompson, 394 U.S. 618 (1969). This "strict scrutiny" test is rarely met. The Ninth Circuit Court of Appeals recently explained the standard and its application in the following manner.

> The right to travel is a fundamental right, and it has been recognized that durational residency requirements - because they disadvantage a class of persons who may have recently exercised the right to travel - may, in certain circumstances, unduly infringe upon this right. In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court held unconstitutional a one-year durational residency requirement for welfare assistance. The Court stated, however:
>
> > "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." [Id. at 638, n.21]

> The Court held, in Dunn v. Blumstein, 405 U.S. 330 (1972), and Memorial Hospital v. Maricopa County, [415 U.S. 250 (1974)], that durational residency requirements which involved deprivations of the right to vote and free nonemergency medical care triggered strict scrutiny. In Maricopa County, however, the Court noted that "The amount of impact required to give rise to the compelling-state-interest test [has] not been made clear." [Id. at 256-7] (Footnote omitted). In Fisher v. Reiser, 610 F.2d 629 (CA9 1979) cert. denied, [447 U.S. 930 (1980)], we noted the importance of the "nature of the benefit denied." Id. at 635. In fact, Judge Hufstedler, dissenting in Fisher, after reviewing the right to travel cases, commented that "The Court [has] indicated that the 'penalty' required to invoke strict scrutiny involves a genuinely significant deprivation, such as a denial of the basic 'necessities' (as in Shapiro), or the denial of a 'fundamental political right' (as in Dunn)." Id. at 639 (footnote omitted) (emphasis added). Judge Hufstedler also noted that "Deprivations which are only uncomfortable are not enough, such as conditioning lower tuition at state institutions of higher education upon a one-year residency requirement." Id. at 639, n.5.

Hawaii Boating Association v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981).

Denial of access by the destitute to public housing and life-care aid have usually been found to be "significant deprivations" or denials of "basic necessities of life." Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); Strong v. Collatus, 593 F.2d 420 (1st Cir. 1979); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.

1971) cert. denied 404 U.S. 863 (1971). An argument can be made, however, that these rulings were conditioned on the non-existence of essentially similar public services. For example, in Cole the right denied was access to public housing. The court expressly premised its ruling that a compelling state interest had to be shown on the non-existence of an adequate alternative:

> Normally, persons eligible for public housing have only to sign up and wait six months for a vacancy. Plaintiffs were required to wait two years before they could be placed on the six-month waiting list. During that time, they were forced to live in substandard housing. Using "penalty" in what appears to be the right context, i.e., not in the sense of a criminal or civil sanction, plaintiffs and other in their class can truly be said to suffer "disadvantage, loss, or hardship due to some action."
>
> As a result of penalizing the right to travel, the Authority can successfuly defend its residency requirement only by demonstrating that the requirement furthers a compelling state interest.

435 F.2d at 811 (citations omitted; emphasis added). See also King v. New Rochelle Municipal Housing Authority, supra, 442 F.2d at 647; Strong v. Collatus, 593 F.2d at 422; Memorial Hospital v. Maricopa County, 415 U.S. at 261 ("The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.").

Here, however, there are adequate and substantially similar alternatives. As described earlier, disabled persons

denied access to the Pioneers' Home are entitled to subchapter XIX medical assistance, which, with a few differences, offers substantially similar aid.

The differences that do exist between the Pioneers' Homes program and the state's subchapter XIX medical assistance program are arguably not constitutionally significant. In other words, in no case will a person who would be eligible for the Pioneers' Homes under AS 47.25.020 but for lack of 15 years residence be deprived of necessary medical care. It might be that a 15-year resident would be considered disabled and admitted to a Home under the proposed definition of disability, while a similarly situated shorter-term resident would not be admitted to a nursing home under AS 47.07. But that would be because the state believed that that person was not really so disabled as to require the services of a nursing home; that person would still receive necessary medical care, either under subchapter XIX or, if the person did not qualify under that program, under the state's General Relief Medical program (7 AAC 47.180-- 260). Consequently, an argument can be made that these statutes do not deny access to a "basic necessity of life," and should not be reviewed under the compelling-state-interest test.

Furthermore, to the extent that the program offers care and housing to the non-needy, an even stronger argument can be made for a less intensive standard of review. Here the purpose

is to provide retirement housing and care to the non-needy, with some reimbursement of the costs of providing that service. Denial of this service to persons who are not destitute would presumably not rise to the level of a denial of access to a basic necessity of life. The United States Supreme Court has linked the economic standard of the class allegedly discriminated against to the determination of "access to a basic necessity of life":

> Whatever the ultimate parameter of the Shapiro penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Memorial Hospital, 415 U.S. at 259 (citation omitted; emphasis added). Denial of access to the Pioneers' Homes to persons who do not otherwise need the service is, using the Ninth Circuit's terminology in the Hawaii Boating case, even more arguably an "uncomfortable deprivation" rather than a "genuinely significant deprivation."

If the purpose and effect of the Homes do not trigger strict scrutiny of the program, then the program's distinction between categories of people must survive the Alaska Constitution's "intensified scrutiny" test, and the Federal Constitution's "rational basis" test. The inquiry proceeds in

three parts: (1) identifying the purpose for the distinction; (2) determining whether that purpose is a legitimate state purpose; and (3) testing the "fit" between the purpose and the distinction itself to see if the distinction accomplishes the claimed purpose.

The Alaska and federal tests differ primarily in the required closeness of the fit between the distinction made and the purpose behind the distinction. Under the Alaska approach the court

> will balance the nature and extent of the infringement (on the right to interstate travel) caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.

Williams v. Zobel, 619 P.2d at 453.

On the other hand, the federal standard is extremely forgiving, and in fact has been characterized by the Alaska Supreme Court as "virtual abdication" of the court's responsibility. Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976). The test is termed the "rational basis" test, and was explained by the United States Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

> mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426. 10/

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10. The choice of the level of scrutiny usually determines the outcome of the analysis. Zobel II, 619 P.2d at 452. This is particularly evident in durational residency cases. For a period of time there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases or was limited to only those instances where significant deprivations resulted from failure to meet the residency requirement. E.g., Memorial Hospital v. Maricopa County, 415 U.S. at 257; Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970). As a result, various courts have ruled differently on almost identical issues. E.g., compare Larsen v. Gallogly, 361 F.Supp. 305 (D. R.I. 1973) (two-year residency requirement for divorce subject to strict scrutiny; held unconstitutional) with Mendez v. Heller, 380 F.Supp. 985 (E.D. N.Y. 1974) aff'd on other grounds, 530 F.2d 457 (2d Cir. 1976) (two-year requirement for divorce subject to rational basis test; held constitutional); Bolanewski v. Raich, 330 F.Supp 724 (D.C. Mich. 1971) (three-year residency requirement for mayor subject to scrict scrutiny; held unconstitutional) with Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972) (three-year residency requirement for candidates for General Assembly subject to rational basis test; held constitutional); State v. Wylie, 516 P.2d 142 (Alaska 1973) (one-year residency requirement for state employment subject to strict scrutiny; held unconstitutional) with Ostendorf v. Turner, 411 So.2d 330 (Fla. App. 1982) (five-year residency requirement for homestead exemption subject to rational basis; held constitutional). It is extremely rare for a durational residency requirement to be overturned under the rational basis test, and usually will only occur in exceptional cases. E.g., Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978) (ten-year residency requirement in order to run for state auditor); Massey v. Appollonio, 387 F.Supp. 373, 376-377 (D. Me. 1974) (three-year residency requirement in order to be licensed as a lobsterman).

The first issue, then, is to determine the purposes of the 15- and 30-year residency requirements of AS 47.25.020, .030 and .035. Like the purposes ascribed by the legislature to the longevity bonus program in AS 47.45.170, the following purposes here appear to be paramount:

(1) to reward long-term residents for their past contributions to the state and their persevering through past economic hardship;

(2) to prevent present suffering and hardship to such persons that would be caused by their having to retire outside the state, including loss of contact with family; and

(3) to retain in Alaska those persons' personal knowledge of Alaska's past history, so that it is accessible to present and future generations.

The next and most difficult issue is to determine the legitimacy of these three purposes. All three appear to be legitimate under the Alaska Constitution. Under the Federal Constitution, the "reward for past contributions" purpose is clearly illegitimate; the other two purposes, however, are arguably legitimate. A description of the permanent fund dividend cases is essential to an explanation of the present state of the law.

In a series of cases -- Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Zobel I); Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (Zobel II); and Zobel v. Williams, ___ U.S. ___, 72 L.Ed.

2d 672 (1982) (Zobel III, reversing Zobel II) -- the Alaska Supreme Court and the United States Supreme Court ruled upon various residency distinctions relating to tax relief (Zobel I) and distribution of permanent fund dividends (Zobel II and Zobel III). In Zobel III, the United States Supreme Court overturned the then existing permanent fund dividend distribution plan.

In Zobel II, the Alaska Supreme Court found that rewarding past contributions is "a permissible purpose, albeit not a particularly compelling one." 619 P.2d at 460. Further, the court held that using length of residence as a measure of past contributions did satisfy the Alaska Constitution:

> Although we recognize that the length of residency may be an imperfect measure of past contributions, we have concluded that the state may recognize these contributions. The fit between means and ends need not be perfect. We think the relationship is fair and substantial. There clearly is a correlation between one's length of residency and the extent to which that individual has been able to make contributions to the community. We are not convinced that any workable alternative method of measuring past contributions is clearly preferable. Although the existence of a preferable alternative would not automatically render the relationship unfair or insubstantial, the absence of any preferable workable alternative is a strong indication that the classification chosen by the legislature is acceptable. We think the relationship is as fair and substantial as the Alaska Constitution requires in this context.

Id. at 461.

The second purpose of the Pioneers' Home program -- using length of residence as a measure of the present suffering that would be caused if the retiree would otherwise move out of the state, was not mentioned by the majority, but was expressly endorsed by Justices Dimond and Matthews in their dissent in Zobel II:

> [A]dmission to pioneer homes, AS 47.25.020-.030 . . . require[s] lengthy residency periods. . . . [The program is] apparently designed to help those individuals who would like to retire in the state but cannot do so because of the high cost of living. The state might well want to limit these benefits to those that would suffer the most hardship by being forced to leave, and it seems reasonable to suppose that a long period of residency would be some indicia of close ties to Alaska and the disruption that leaving might cause.

619 P.2d at 469 n.2. Therefore, at least two Justices would apparently uphold this program on the above rationale alone.

Finally, there is the third purpose of present access to the historical knowledge contained by these persons. Although probably not a compelling reason, it is a legitimate purpose and one that is directly tied to length of residence.

Therefore, a valid defense can be advanced that the Pioneers' Homes program meets the Alaska Constitution's equal protection test. The Alaska Supreme Court has expressly upheld the "past contribution" rationale and its "fit" with the residency requirement, while the "present hardship" reason was expressly

approved by the two Justices as sufficient to withstand constitutional scrutiny.

The question then becomes whether the revised program is defensible under the Federal analysis. In summary, although the "past contribution" purpose is an improper purpose under the Federal Constitution, the strength of the remaining two purposes does not have to be very great to withstand the minimal scrutiny of the federal "rational basis" test. Almost any legitimate purpose is defensible, so the real inquiry is whether the two remaining purposes are legitimate in light of the residency criteria. Although the United States Supreme Court has indicated serious concern with the use of residency as a measure of any trait beside bona fide residence and qualification for office,[2] there remains room for argument that other purposes are legitimate and that residency is not an arbitrary means to be used to further those purposes.

Despite its notoriety in Alaska, the United States Supreme Court opinion in Zobel III actually stands for only two propositions. First, making an award of benefits based on residency accumulated prior to the date of enactment of the benefits program is not rationally related to the purpose of granting

believes that such valid independent interests are few and far between:

> To be sure, allegiance and attachment may be rationally measured by length of residence - length of residence may, for example, be used to test the bona fides of citizenship - and allegiance and attachment may bear some rational relationship to a very limited number of State purposes. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Id., Brennan concurrence at 684 (citations omitted).

Although the instances where length of residence has an independent utility as a device to further a legitimate state interest may be rare, they may not be as rare as Justice Brennan implies. Justice Brennan indicated his belief that there were only two categories that would admit of an independent interest: testing bona fide residence and qualifying for public office. Id. But there may well be other legitimate instances that Justice Brennan did not think of, such as Justices Dimond and Matthews' view that length of residence might be a reasonable tool to measure the present hardship that would be caused by disrupting ties to the state. Zobel II, 619 P.2d at 469 n.13.

Thus, Zobel III does not preclude the state from arguing either (1) that the "present hardship" and "link with the past" purposes are legitimate, or (2) that length of residence is a legitimate tool to distinguish between those residents who meet

those purposes and those who do not. Consequently, given the "virtual abdication" of scrutiny under the federal test (Isakson v. Rickey, 550 P.2d at 363), a good faith defense can be mustered to uphold the constitutionality of the Pioneers' Homes program.

This is not to say, however, that there are not serious and possibly fatal arguments against the entire program. Besides the strong implication in the Zobel cases that residency can only be used as a discriminatory tool in extremely rare cases, there are other serious constitutional problems that the courts could find to be fatal.

One problem is that the courts could view the provision of housing and medical care as the provision of a "basic necessity of life" in all instances, and not just when there are no existing alternatives or where the purpose of the program is to aid indigents. Another problem is that the Alaska Supreme Court might view the Zobel III rejection of the "past contribution" purpose as a persuasive analysis to be applied under the Alaska constitution. That, in addition to an analysis that the "penalty" on interstate migration is much greater than that under the permanent fund dividend program, could shift the balance under the state's intensified scrutiny test against the lengthy residency requirement.

A third potential problem is that even if the courts recognize the legitimacy of the purposes and the potential

appropriateness of a residency requirement, either they could view this specific instance as an inappropriate means for using a residency test, or they could find that 15 continuous years or 30 years overall is an unreasonably long period to use to achieve these goals.

We do believe, however, that there is enough of a defense for the program that it is appropriate for the courts, rather than this office, to make the ultimate determination. Given the present state of confusion in the case law, the state's strong interest in this program, and the long-standing and uninterrupted 70-year history of the Pioneers' Homes program, a judicial resolution is appropriate.

Response to Division of Legislative Audit

With regard to Division of Legislative Audit's preference question, we believe that the statutory language clearly commands that destitute and disabled applicants be given preference over those able to pay, in the event that space limitations preclude acceptance of all otherwise eligible applicants. This conclusion follows from the language of AS 47.25.020(a) -- that worthy persons "destitute and in need of the aid or benefit of the Home" are entitled to admission -- and of § 030 -- that persons not destitute may on application be admitted. Since admission is automatic for the first group and discretionary for

the second, the first group must be given preference.

With regard to the "pay-for-care" provision, there is in our opinion no clear answer. The 1929 legislature may have intended through its statute -- permitting the board of trustees to admit non-destitute residents on their agreement to pay "such sum per day as the Board may deem sufficient to compensate the Territory for the cost of care and support of such person at the Home" -- to extract from paying residents the full cost. The language suggests this. though it is not unequivocal; "compensate" could be read as meaning "partially compensate" rather than fully compensate.

Although there is no record of specific legislative or administrative intent in subsequent years, it has consistently been the administrative practice not to require full payment of costs. Legislative Audit has noted that by 1967 non-destitute residents were assessed only 66% of the full costs, which figure has decreased to 21% in 1976 and to 11% in 1982. In addition, the legislature has consistently appropriated the money to make up the difference. Therefore, there has been a consistent and long-standing administrative (and even legislative) interpretation that the statute does not require the payment of the full cost of support. See generally 2A Sands, Sutherland Statutory Construction, ¶49.03-49.05, at 233-238 (4th ed. 1973).

And there is no discernable legislative intent, either originally or currently, which would inhibit the administrative ability to continue to interpret the statute to allow the payment of less than the full cost of support.

We would note, however, that there does not seem to be any formal or informal record to support either the present level of support ($225 a month for residential care and $275 a month for skilled nursing care), or any mechanism for reviewing the level of support at intervals to adjust for increased costs of service. Although an administrative agency does have reasonably broad discretion in making judgments such as these, if challenged there must be some evidence that the judgment was not arbitrary, capricious, or irrational. Kingery v. Chapple, 504 P.2d 831, 834-835 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1970). Therefore we would recommend that the agency review the costs and leave some record of the reasons for settling on a particular number or proportion of total cost. This determination should be reviewed at reasonable times in the future so that original judgments will not become irrational because of markedly changed circumstances.

IV. CONCLUSION

Therefore, it is our opinion that

(1) the Pioneers' Homes program durational residency requirements are defensible;

(2) destitute and disabled applicants receive priority over paying applicants; and

(3) paying residents do not need to pay the full cost of support.

Finally, we believe that some administrative review of the level of payment should be undertaken. Since the present set of proposed regulations can now proceed, it might be appropriate to include procedures for that review in those regulations.

Sincerely,

Wilson L. Condon
Attorney General

WLC:mr

Enclosure

891-679-603

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ALASKA PIONEERS' HOME.

To the Senate and the House of Representatives:

Chapter 80, Session Laws, 1913, providing for the acceptance and use of the United States Marine buildings at Sitka as a home for indigent prospectors and others who have spent their years in Alaska and become dependent, constitutes the Governor of Alaska a member of the Board of Trustees, provided for in the law, and directs him to appoint two citizens to act with him as members of the Board. In accordance therewith, on June 19, 1913, W. P. Mills and Sergius George Kostrometinoff, of Sitka, were appointed members of the Board, and a formal organization was effected on July 4, following. W. P. Mills was designated Treasurer and Sergius G. Kostrometinoff Secretary of the Board, and Arthur G. Shoup was appointed Superintendent, to serve without compensation.

A report giving in detail the history of the Home and its operation since its establishment, together with the cost of maintenance, receipts and disbursements, and the other information, prepared by the Superintendent, is submitted herewith and made a part of this report. The Board has endeavored to discharge its duties in a manner commensurate with the trust with which it is charged, and it is a pleasure to acknowledge the hearty sympathy which has been expressed in many ways by the people of Alaska generaly for the success and welfare of this Territorial institution. At one time it was feared by the Board that the appropriation made for the maintenance of the Home would be exhausted before another appropriation could be made by the Legislature. Happily, such fear proved groundless, and the Home was enabled to continue through appropriations received from the Federal indigent funds from the judges of the four judicial divisions for the support of inmates from their respective divisions.

Much painstaking work has been required to place the Home in its present condition: many handicaps had to be overcome in overhauling the buildings, furnishing them and getting them ready for occupancy. The Home was ready for the admission of inmates on September 2, 1913, and was opened with five members. There are now fifty-one, the number having steadily increased since that time; ten have died, three have been adjudged insane and com-

3

mitted to Morningside Sanitarium, and six have been discharged at their own request. The physical condition of a number of the inmates has resulted in making the institution a hospital as well as a home, and a hospital equipment as well as the employment of a trained nurse willl be necessary hereafter. It will be also necessary to provide for the employment of a superintendent under salary, who should be a man of executive ability and fitted in every way for the management of an institution of this kind, which calls for kindliness, patience coupled with firmness, and good judgment in all circumstances.

The Board estimates that provision should be made by the Legislature for the maintenance of eighty-five inmates of the Home, on an average, for the next two years, or until May 1, 1917, and that the sum of $50,000 will be required for the support of the institution for that period; and in addition to the above amount the sum of $6,000 will be required for the purpose of erecting and equipping a new building in order to afford the necessary accommodations that will be needed with the increase of inmates; also $2,000 for repairs and painting the present buildings.

Your attention is respectfully directed to the recommendations contained in the exhaustive report of the Superintendent, which are generaly endorsed by this Board, for such action as you may deem proper in the premises.

The Board of Trustees feel that they can not close this report without rendering due acknowledgment of the invaluable services of Honorable Arthur G. Shoup, a member of your honorable body, in the establishment and conduct of the Home. The success achieved in its management has been due largely to his unselfish efforts in its behalf without other compensation than the knowledge that he was assisting in making the declining days brighter, happier and easier for men who have spent their years in Alaska as trail-blazers and pioneers in a new land.

Respectfully submitted,

J. F. A. STRONG,
Chairman.

W. P. MILLS,
Treasurer.

S. G. KOSTROMETINOFF,
Secretary.

Sitka, Alaska, February 27, 1916.

REPORT TO THE BOARD OF TRUSTEES

By the

SUPERINTENDENT OF

THE ALASKA PIONEERS' HOME.

To the Board of Trustees,
Alaska Pioneers' Home:

Gentlemen:

I have the honor to submit herewith a detailed report of the operations of the Alaska Pioneers' Home at Sitka, Alaska, since its establishment on July 4, 1913, to the close of December 31, 1914, together with tabulated statements concerning the inmates received and cared for, and financial reports for the said period.

HISTORY AND PURPOSE.

Inasmuch as this will comprise a part of the first official report of the Trustees, and as it may be of some future interest, I shall undertake to state briefly the history of, and reasons for the establishment of this institution.

By order of the Secretary of the Navy, on March 17, 1912, the United States marine guard at Sitka, Alaska, was withdrawn, leaving the barracks and other buildings of the station abandoned. Without referring to a somewhat voluminous previous correspondence, I quote the following letter, which fully indicates the manner in which the use of these buildings was acquired by the Territory:

Department of the Interior,
Washington, April 23, 1913.

The Honorable,
The Secretary of the Navy.

Sir:

By Department letter of January 22, 1913, your attention was invited to the fact that this Department had received letters from Honorable James Wickersham, Delegate from Alaska, dated January 16, 1913, and from Hon. Arthur G. Shoup, of the Alaska Legislature, dated December 16, 1912, requesting that the abandoned buildings of the Marine Barracks at Sitka be devoted to use as a home for indigent prospectors and old men who have spent their years in Alaska and have met with misfortune; and you

were requested to advise this Department as to whether the buildings mentioned were under your jurisdiction and control, and if so as to whether they might be used for the purpose suggested.

Under date of March 10, 1913, you replied:

"The Department is willing to allow the use of these buildings as suggested by Mr. Shoup, and requests that you designate a representative at Sitka to whom the custodian may transfer them. They will be turned over with the understanding that the buildings are to be kept in as good condition as they are at present."

In response I have to advise you that the Governor of the Territory of Alaska, at Juneau, Alaska, is hereby designated as the representative to whom the custodian may transfer the buildings in question for the purpose stated.

It is requested that your representative in Alaska be advised of this action at the earliest practicable date. I have this day advised Delegate Wickersham, Mr. Shoup and Governor Clark of my action in the premises.

Respectfully,

(Signed) FRANKLIN K. LANE.

Agreeably to the foregoing letter, on May 3, 1913, Governor Clark designated Mr. Arthur G. Shoup, of Sitka, Alaska, to act as his representative in the matter of receiving these buildings from the Navy Department, with instructions to take them into his immediate charge, and on May 9, 1913, the following buildings and grounds were formally transferred to the representative of the Governor, namely:

1 Marine Barracks,
1 large coal house,
1 small coal house,
1 officers' quarters,
1 canteen building,
1 engine house,
1 store house.
U. S. Government grounds and water front belong to the above.

On December 23, 1914, the building formerly used as a residence by the Governors of Alaska, and afterwards used as a Naval Hospital, was receipted for to the representative of the Navy Department by the writer as the representative of the Governor of Alaska and the Department of the Interior. This building is about seventy years old and in a state of very poor repair. However, it is thought that with some repairs it can be used to advantage by the Alaska Pioneers' Home, and is of further value because of the excellent garden plot adjoining it. Many Alaskans feel that because of its unusual historical significance this building should be repaired and preserved by the Territory.

Under the act of the First Alaska Legislature, approved April 30, 1913, the Hon. J. F. A. Strong, as Governor of Alaska, appointed Mr. W. P. Mills, of Sitka, Alaska, Treasurer of the Board of Trustees of the Alaska Pioneers' Home, and Rev. S. G. Kostrometinoff, of Sitka, Alaska, Secretary of said Board, with the Governor as ex-officio President. On July 4, 1913, this Board met at Sitka and arranged for the use of the Marine Barracks buildings as a home for indigent prospectors and others who have spent their years in Alaska and became dependent. The Board of Trustees at this meeting appointed A. G. Shoup Superintendent, with instructions to purchase necessary furniture, make necessary repairs to the buildings, hire necessary help, make rules and regulations for the government of inmates, and to organize and operate the institution as a home for dependent men who have assisted in the exploration and development of Alaska.

The buildings at this time had been entirely unoccupied for fifteen months, and were becoming considerably dilapidated. The plumbing had frozen during the winter and a great many of the water pipes were burst, and had to be replaced. The lawns had been used as a playground by the children from the Indian village, and many of the windows were broken. The heating plant also required a number of expensive repairs. There was absolutely no furniture of any kind, excepting a kitchen range, and it was necessary to order needed furniture, dishes, cooking utensils, and other supplies. These we were able to buy at wholesale prices through the courtesy of the W. P. Mills mercantile company, which extended to the Home the benefit of its credit and buying facilities, resulting in a very material saving of funds. All of the furniture and permanent supplies purchased for the institution since its opening have been furnished by the W. P. Mills Company at actual cost.

OCCUPANCY.

The first inmates to arrive at the Home were Samuel Dutton and David Spencer, on July 28, 1914, but as the buildings were not then ready for occupancy, arrangements were made with the management of the Sitka Hot Springs, at Sanitarium, Alaska, for their temporary care. On August 10th John A. Hammill arrived from Nome, and he was also sent to Sanitarium. Frank Sears, of Circle, arrived at Sitka on August 29th, and he was cared for in a hospital at Sitka until the Home was opened. On September 2, 1914, we moved into the present quarters with five inmates. This number was increased to thirteen before the end of September. As will be seen by reference to tabulated statements herewith, the number of inmates constantly increased, as rapidly as it was possible to provide accommodations within the limits of available funds.

While it was known that many of the old-timers who had been on the frontier of Alaska were greatly battered by time and hardship, it was not anticipated that the need of a home in which they could spend their declining years was as great as the establishment of this institution has shown it to be. Owing to limited room, as well as very restricted funds, it has been necessary to refuse admission to many worthy Alaskans whom the Territory ought to provide for, and, from such investigation as it was possible to make, only the most urgent cases have been admitted.

The Legislature estblished the Home for Alaska pioneers, with the idea of providing a haven for old or disabled men who had spent their years in exploring, prospecting and developing Alaska, and had become unable to earn a living. It was thought that most of these men would still be able to do some work in connection with the operation of the institution, but experience has proved that practically all of the men who have been admitted are entirely unable to do anything at all. Many of them are altogether helpless and require constant personal attendance. This has unavoidably increased operating expenses beyond expectations, and even then the care we have been able to give the most invalid cases has been far from satisfactory. Moreover, it is inevitable that these men, who are far advanced in years and worn by severest hardships, should decline in strength after their arrival here, and I cannot too earnestly urge the provision of

more adequate hospital facilities. Another thing which has somewhat added to our troubles is that some communities, with a mistaken idea of the situation, have sent men here who were far advanced in sickness. Their condition was usually aggravated by the ordeals of travel. These men have in most cases lived but a short time after their arrival at Sitka. However, some of the apparently hopeless cases have greatly improved or recovered. A detailed statement of the physical condition of the inmates will be found in the accompanying report of the attendant physician.

RECOMMENDATIONS FOR IMPROVEMENTS.

So far as it is possible to estimate, the number of inmates in the Home will be increased in the next year to seventy-five or one hundred, and if that is so it will be necessary to increase the building space. As it is at present, we are compelled to quarter cripples, who are unable to climb stairs, in the ward with the bed-ridden invalids. That naturaly works a hardship on both the sick men and the cripples, and there should be some dormitory space on the ground floor. The dining room is small and necessitates two sittings at table with the present number of inmates. There is much need also of an assembly and recreation room. With nothing to do, life naturally becomes more or less monotonous to these old men who have led active lives. A recreation and assembly room in which entertainments could be held is highly desirable. I would recommend, therefore, that a two-story building, about forty-six feet by sixty-six feet in size, be erected at the southeast end of the "Barracks" building. This would nearly double the sleeping quarters, and provide a new dining room and assembly room. The present dining room could then be used as a ward for semi-invalid cases. Such a building should be constructed for about six thousand dollars.

The need for a trained nurse is keenly felt, and it is hoped there will be sufficient funds to keep a competent nurse in attendance next year.

The heating plant is situated in a separate building. This plant was designed by the Navy Department for the double purpose of heating the building and operating an electric light plant. It consists of one 80 H. P. tubular marine boiler eighteen feet long and four feet wide, with two doors to the fire box; one switchboard panel; one elec-

tric generator, form "C", speed 450; one marine engine; form "D", speed 450, size 6 1-4 by 6; four traps in four-foot condensing; one receiver for returns from buildings, and one Dean steam pump, six-inch stroke. There are forty-four radiators in the buildings, and the boiler consumes about 1,200 pounds of bituminous coal per twenty-four hours. A material saving in expense could be made by installing a more economical heating plant.

CEMETERY.

A plot of about one-half acre of ground was selected in the military cemetery at Sitka as a burial place for deceased inmates of the Alaska Pioneers' Home. A small portion of this has been cleared, and it is hoped that the funds will permit all of it to be put in first class shape next year. The estimated cost for clearing, grading and seeding this plot is about five hundred dollars. There should also be funds available with which to purchase permanent markings for the graves.

The men who have died in the institution have usually left a few personal belongings of nominal value. Some, however, have left a little money. Wherever there has been enough money to pay the funeral expenses it has been applied to that purpose, but the superintendent has in his possession several small amounts left by deceased inmates. This he is holding until it is decided what disposition should be made of such money. There should be a simple and uniform method of disposing of such moneys without probate procedure, either by reversion to the Home or payment to heirs. Whenever it has been possible to locate heirs such personal effects as might be valued have been sent to them.

CHARACTER OF INMATES.

Almost all of the men who have come to the Alaska Pioneers' Home are of the highest type of American trail-blazer. They are men who have lived alone in the silent places, and are of a naturally adventurous disposition. In fact, it is this very quality that has kept them upon the Alaska frontier, and it is to such men that the Territory must credit much of its development.

Some friends of the Institution have suggested that more rigid discipline should be enforced upon these old men in this Home. To me, however, it seems that to annoy these men with unnecessary restrictions would be an unkindness

that is not called for. The Alaska Pioneers' Home was established as a place where these men might spend their declining years in comfort, and is intended as a partial reward for their pathfinding services. To avoid restraint was one of the factors which made them independent prospectors and frontiersmen. And, as a matter of fact, the best way, in my opinion, to insure good conduct and avoid friction among such men is to allow them to follow their own inclinations as much as possible. They, like all of their kind, are big-hearted and generous to a fault, and are the last men in the world to impose upon the rights of others or to allow others to impose upon them. Of course, there have been some occasional cases of admitting men who never were of any use and they have given some trouble; but for such cases there is the simple remdy of summary dismissal from th Home. Instances of intoxication here have been exceptional. Owing to the weakened physical resistence of these men, if for no other reason, intoxication cannot be permitted among them under any circumstances, and that is one thing against which a positive rule has been established. The most effective factor in discouraging heavy drinking by an inmate of the Alaska Pioneers' Home is the bad standing he thereby establishes for himself among his comrades.

Much of the success of the Alaska Pioneers' Home so far, which has been under rather adverse conditions, is largely due to the hearty moral support tendered by the people of Alaska, and I wish particularly to thank those who have assisted with generous presents at each Christmas time, and in donating books for a libarary. For the support given, and confidence reposed by the Board of Trustees, I am deeply grateful.

Respectfully,

ARTHUR G. SHOUP,
Superintendent Alaska Pioneers' Home.

ATTACHMENT 5

Andress v. Baxter

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civ.

MOTION FOR SUMMARY JUDGMENT

Defendants Fred J. Baxter et al., move this court for entry of a summary judgment in their favor under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the pleadings, deposition, the accompanying memorandum in support, and on the attached Affidavit of Kerry Romesburg. These materials establish that there is no

genuine issue as to any material fact and that defendants are entitled to judgment in their favor as a matter of law.

DATED this 8th day of September, 1982.

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
Robert M. Maynard
Assistant Attorney General

Wilson L. Condon
Attorney General
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Pouch K
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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	)	No. A82-307 Civ.

DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY

The question before this court is whether Alaska's student loan program, which is by far the most generous program in the nation, can require two years residency as a condition of application in order "to make virtually certain that students who are not, in fact, bona fide residents of the State, cannot take

advantage of in-state rates." Vlandis v. Kline, 412 U.S. 441, 454 (1973) ("Vlandis") (emphasis added).

Judith Andress contends that the two-year requirement violates the Federal Constitution's Due Process Clause, Equal Protection Clause, Privileges and Immunities Clause, and the Citizenship Clause. Of these challenges, only the equal protection question merits any detailed response.

Denial of a student loan is not the denial of either a fundamental political right (such as voting), or a basic necessity of life (such as welfare or access to medical treatment). Consequently, the equal protection standard to be used is the rational basis test. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981) ("Hawaii Boating").

The courts have upheld one-year residency requirements for reduced tuition rates at state schools where all students actually remain in the state to attend school. E.g., Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971). It is not irrational to require two years of residency where the state is paying out cash and where the recipients may then take the money to attend out-of-state schools for up to eight years.

The rationality of the requirement is further enhanced by the incentive created by the Alaska loan program to come to Alaska solely to take advantage of this state benefit. Unlike loan programs in the rest of the nation, an Alaskan resident does not have to pass a needs test, nor is there a family income

limitation for recipients of loans for waiver of interest while in school. Alaska's loans are available on the same terms to all regardless of either need or family income. In addition, other states' loan programs lend only $2,500 per year to undergraduates, and $5,000 to graduates. Alaska lends $6,000 and $7,000, respectively. The maximum total allowed in other states is $12,500 for undergraduates and $25,000 for graduates (including any undergraduate loans); Alaska's totals are $30,000 for undergraduates, $35,000 for graduates, and $53,000 combined. The interest rate in other states is 9%; Alaska's is 5%. Affidavit of Dr. Romesburg. (Attached as Appendix I.)

Given the tremendous disparity between other states and Alaska, it is not irrational to require two years as a test for the bona fides of a student's residence. The state is lending large amounts of money at extremely preferential rates. It wishes that money to go to persons who presently intend to make Alaska their home after completing their education. It is reasonable to require a two-year residency requirement when money is being lent to students who previously resided out-of-state, where those students will be receiving up to $53,000 of state money, and when those students can spend that money while attending school out-of-state for up to the next eight years. The state can rationally and constitutionally require a student to meet a two-year residency test in order to show that student's bona fides and to assure the state that this money is going to persons

who intend to return upon completion of their education and make Alaska their home.

II. DESCRIPTION OF THE PROGRAM

AS 14.40.751--14.40.806 sets forth the conditions for the Alaska student loan program. Undergraduates may receive up to $6,000 per year (AS 14.40.759), while graduates may receive up to $7,000 per year (AS 14.40.763). Undergraduate students may receive loans for five years (or $30,000); graduate students may receive loans for five years (or $35,000); and total undergraduate and graduate loans may be received for eight years ($53,000). AS 14.40.763(d). The loan is to be repaid at an interest rate of 5% per year for up to ten years. AS 14.40.763(f) and (g). There is no needs test or family income limit.

As the Affidavit of Dr. Kerry Romesburg shows, the Alaska program is the most liberal program in the nation. All other states use the Federal Guaranteed Student Loan (GSL), which requires that students meet a needs test and have family incomes of less than $30,000 per year for waiver of interest while in school. The GSL lends only $2,500 per year to undergraduates, and a total of only $12,500. Graduate students under the GSL can receive $5,000 per year for a total of $25,000, but that total includes undergraduate loans. GSL's are to be paid back at an interest rate of 9% per year.

Only four other states have loan programs in addition to the GSL: Alabama, Georgia, Kansas, and Oregon. All of those

programs, however, are at least as restrictive as the GSL. Alabama provides loans for medical and dental study at a 7% interest rate and has no residency restriction. Georgia provides 9% loans for up to $1,500 per year for study in "critical fields" of study. Kansas provides "loans of last resort" to students. If a student can not qualify for a GSL, loans of up to $1,500 for a first-time freshman, $2,500 for other undergraduates, and $5,000 for graduate students are made available at 9% interest. Oregon provides loans for medical and dental study at 9% interest. The loans are for up to $2,500 per year. Affidavit of Dr. Romesburg.

In order to qualify for an Alaskan loan, an applicant must: (1) be either a full-time college student, a high school student, or scheduled to graduate from a high school within the next six months; and (2) be a resident of the state for two years at the time of application. AS 14.40.765. AS 14.40.765(b) further provides that:

> For purposes of this subsection, a person qualifies as a resident of the state if at the time he applies for the loan the person
>
> (1) has been present in the state for at least two years unless his absence from the state during any part of the two years was due to military service; or
>
> (2) is a person who is dependent on a parent or guardian for his care, and the parent or guardian has been present in the state for at least two years.

It is this two-year requirement which is challenged by Judith Andress as violating the Federal Constitution under the Equal Protection, Privileges and Immunities, Due Process, and

Citizenship Clauses. Since the only serious question arises under the Equal Protection Clause, that issue will be discussed first.

III. ARGUMENT

A. SUMMARY JUDGMENT IS APPROPRIATE.

Rule 56 of the Federal Rules of Civil Procedures provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Although defendants deny a number of Ms. Andress' allegations, even if all of Ms. Andress' factual allegations are correct, defendants are entitled to judgment as matter of law.

The only disputed fact which requires some explanation is Ms. Andress' allegation that her "application is disadvantaged by the priority given applications based on the applicant's length of residency in Alaska as required by AS 14.40.767(a)(2)." That statute provides for the award of points in order to allocate priority among late applications, with some points going for length of residency in Alaska. The Alaska Commission on Postsecondary Education has never applied that statute and will not be applying that statute with this year's applications. Affidavit of Kerry Romesburg. Instead, as Dr. Romesburg's affidavit points out, if because of limited funds priorities were to be

awarded, the awards will go to applications on a first come, first served basis. This course of action has been taken with the advice of the Department of Law. Therefore, the only question before this court is whether or not the two-year durational residency requirement contained in AS 14.40.765(b) is constitutional. For that issue, there are no material issues of fact in dispute, and summary judgment is appropriate.

B. THE TWO-YEAR RESIDENCY REQUIREMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

There is no question "length of residence may . . . be used to test the bona fides of citizenship." Zobel v. Williams, __ U.S. __, 50 U.S.L.W. 4613, 4617 (concurring opinion of Justice Brennan). In addition, the state has a legitimate interest in assuring that state money and its preferential interest rates are actually received by students who intend to make Alaska their home. The United States Supreme Court's pronouncements on resident tuition are equally applicable to student loans:

> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Vlandis v. Kline, 412 U.S. 441, 453-454 (1973) ("Vlandis").

Similarly, the issue here is whether a two-year requirement is a reasonable way to make "virtually certain" that an applicant has a present intent to return to the state after completing his or her education. The first inquiry in the equal

protection analysis is whether the requirement is to be analyzed under strict scrutiny or the rational basis test.

. . . The rational basis standard applies since neither a fundamental political right or access to a basic necessity of life is involved. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). Strict scrutiny is involved only when genuinely significant deprivations are involved:

> Deprivations which are only uncomfortable are not enough, such as conditioning lower tuitions at state institutions of higher education upon a one-year residency requirement.

Hawaii Boating Ass'n at 665, quoting from Fisher v. Reiser, 610 F.2d 629, 639, n.5 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980) (Judge Hufstedler dissent). Like student tuition, denial of the right to a state funded student loan is at best an "uncomfortable deprivation." Therefore, the two-year residency requirement need only be rationally related to its purpose of assuring that student loans go only to bona fide residents.

The rational basis test was explained by the United Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be,

> and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426.

That rational basis exists here. First, it should be noted that the choice of the level of scrutiny usually determines the outcome of the analysis. This is particularly evident in durational residency cases. For a period of time there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases or was limited to only those instances where significant deprivations resulted from failure to meet the residency requirements. E.g., Memorial Hospital v. Maricopa County, supra, 415 U.S. at 257; Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); Fisher v. Reiser, supra. As a result, various courts ruled differently on almost identical issues. E.g., compare Larsen v. Gallogly, 361 F.Supp. 305 (D. Rhode Is. 1973) (two-year residency requirement for divorce subject to strict scrutiny; held unconstitutional) with Mendez v. Heller, 380 F.Supp. 985 (E.D. N.Y. 1974) aff'd on other grounds, 530 F.2d 457 (2d Cir. 1976) (two-year requirement for divorce subject to rational basis test; held constitutional); Bolanewski v. Raich, 330 F. Supp. 724 (D.C. Mich. 1971) (three-year residency requirement for mayor subject to strict scrutiny; held unconstitutional) with Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972) (three-year residency requirement for candidates for General Assembly subject to rational basis test; held constitutional); State v. Wylie, 516 P.2d 142 (Ak.