ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3484 HLAB HB 278 - HB 294

360

Why not contract for architectural services on a competitive-bid basis?

Agency representatives who are experienced in the procurement of commodities are used to taking competitive bids from vendors, selecting contractors and awarding contracts on the basis of price. They may wonder why the bidding process is seldom used to procure professional design services.

There are good reasons why the federal government, and many states, have formalized their A/E procurement procedures with laws that specifically exclude A/E procurement from competitive bidding requirements.

Public-sector building projects involve public health and safety considerations. The agency that builds a facility is responsible to the taxpayers for obtaining the best project possible. To insure that the public interest is being properly served, the designers selected should be talented in both design and management.

The successful purchase of goods or services on a competitive-bid basis depends on the ability to provide the would-be supplier with a very complete set of specifications as to what is required.

At the start of an architectural project, the exact nature and scope of services can rarely be defined, since much depends on the type of project, the capabilities within the agency itself, and how much groundwork has already been done.

Also, professional design services involve many intangibles such as technical knowledge, esthetic judgment and decision-making skills that are difficult to compare on an "apples and apples" basis.

The American Bar Association (ABA), in developing a model procurement code for state and local governments,[4] recognized the unique character of professional design services. Article 5 of the code deals specifically with procurement of construction, architect-engineer and land surveying services. In a commentary on Article 5, the ABA stated, "The principal reasons supporting this selection procedure (i.e., selection based on qualifications and negotiation rather than on low bid) . . . are the lack of a definitive scope of work . . . and the importance of selecting the best qualified firm."

One purpose for competitively bidding goods and services is to keep the selection process free from political influences. But bidding isn't the only way to avoid political problems. Alternative procedures such as open records and the public announcement of projects can effectively keep the selection process out of the political arena, while still obtaining the best available design talent.

Procurement of design services on the basis of their costs can also be extremely shortsighted. Most agencies have begun to calculate the cost of their physical facilities on a life-cycle basis; that is, initial construction cost plus operating cost over the building's anticipated useful life.

A recent article in Dun's Review calculates the intial cost of a building with a 40-year life as one-seventh of its life-cycle cost, with the remaining six-sevenths representing maintenance and operation costs

With professional fees that come to only a small percentage of construction cost, it is easy to see that they represent a much smaller proportion of life-cycle cost Yet a particular type of expertise on the part of the architect—in energy-efficient design, for example—can have a dramatic effect on maintenance and operating costs, year after year.

Clients should also consider that the bidding process is time consuming, and that time spent in preparing bidding documents, holding prebid conferences, etc., can be extremely costly, given the constant escalation in material and labor costs characteristic of an inflationary economy.

Architects do not oppose competition. In fact, the architectural profession is extremely competitive, and competition is a healthy and desirable factor for architects in marketing their services. But they realize that to serve the needs of their clients and the users of the buildings they design, they must compete on the basis of their skills, experience and ability to perform the services required—not on the illusory "economy" that a low-bid may seem to provide.

---

[1]Appendix A contains the text of Public Law 92-582, the Architect/Engineer Selection Act passed by the U.S. Congress in 1972 Representative state laws, in effect in California and Minnesota, are set out in Appendix B

[2]Copies of SF 254 and 255 may be obtained by writing to the Superintendent of Documents, U.S. Government Printing Office Washington, D.C. 20402 or calling (202) 783-3238 Cost for SF 254 25 copies/$7.50, SF 255 20 copies/$8 Enclose payment with order Visa and MasterCard charges accepted

[3]Appendix C contains a representative project announcement from the state of California to illustrate typical evaluation criteria and other architect-selection procedures

[4]Appendix D contains the text of section 5-501 Architect-Engineer and Land Surveying Services of the American Bar Association Model Procurement Code for State and Local Governments

Introduced: 3/1/85
Referred: Community & Regional Affairs and Finance

IN THE SENATE BY STURGULEWSKI AND RODEY

SENATE BILL NO. 204

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date."

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

* Section 1. AS 36.98 is amended by adding a new section to read:

Sec. 36.98.043. ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING CONTRACTS. (a) Notwithstanding the provisions of AS 36.98.010(3) and 36.98.040, a state agency shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services.

(b) If negotiations with the most qualified and suitable firm or person under (a) of this section are not successful, the state agency shall negotiate a contract with other qualified persons or firms of demonstrated competence, in order of public ranking. The state agency may reject all or part of a proposal.

(c) This section does not apply to contracts awarded in a situation of public necessity if the person responsible for execution of the contract on behalf of the state agency certifies in writing that a situation of public necessity exists.

(d) In this section "state agency" has the meaning given in

AS 36.98.080(5), but also includes political subdivisions of the state when the political subdivision seeks architectural, engineering, or land surveying services for a project that is funded entirely or partially by state funds.

* Sec. 2. This Act applies to requests for bids or proposals for architectural, engineering, and land surveying services issued after the effective date of this Act.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.--10.070(c).

 HB-278

The 700% Solution—A Billion Dollar Ripoff

By Paul J. Andrews

(A commentary in the April 1980 edition of Government Executive addressed the issue of the high cost of architect-engineer services in Federal contracts. The following opinion/commentary is an update on that same issue and was submitted by a longtime (1946-1978) Federal employee who is now retired from Government service but retains a strong interest in Federal expenditures. An attorney, Mr. Andrews spent much of his Federal service in the areas of supply, contracts, claims and compliance.)

One of the obvious ways to reduce the federal deficit is to reduce the outlay of funds for federal procurement; and an important procurement technique to reduce prices is by competitive bidding or negotiation. On August 11, 1983, President Reagan called on the heads of departments and agencies to increase price competition in the $160 billion spent annually in federal procurement and restrict the use of noncompetitive procurement. As a part of its deficit reduction package, both houses of Congress drafted a "competition in contracting" bill (S. 338 and H.R. 5184).

The one exception, in the latter bill, to more "fair and open competition" is the procedures in the Brooks Act (sponsored by Rep. Jack Brooks and passed on October 27, 1972), which forbids price competition for architect-engineer (A/E) services. A/E fees in federal procurement total about $5 billion annually. In the "Deficit Reduction Act of 1984" (P.L. 98-369, enacted July 18, 1984), which combined the two bills, the Federal Property Act was amended to provide (sec. 309 (b)) that—"the term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such terms also includes—

(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq) [the Brooks Act]".

On April 25, 1978, antitrust action against the A/E industry (National Society of Professional Engineers v. U.S.) culminated in the Supreme Court's decision that the traditional method of selecting A/Es without comparison of prices was a "frontal assault on the basic policy" of the Sherman Anti-trust Act. But by then the A/E code of ethics prohibiting comparison of prices had been written into law (the Brooks Act, dated October 27, 1972).

The current NSPE Code of Ethics (as revised, July 1981) rescinds section 11(c) of its previous code, recognizing the Supreme Court decision, and permits price negotiation for A/E services. The private client may now compare prices offered by competing A/Es; but the federal government client is forbidden by the Brooks Act from making price comparisons. The new NSPE Code also notes that "Engineers and firms may individually refuse to bid for engineering services. Clients are not required to seek bids for engineering services ... State registration board rules of professional conduct, including rules prohibiting competitive bidding for engineering services, are not affected and remain in full force and effect." As we shall observe later, the absence of price comparison results in a 600 to 700 per cent price spread in the cost of A/E services. In other words, the Brooks Act alone ensures that A/E services which could be obtained for $50,000, will cost the federal government as much as $350,000.

A survey of the largest construction firms in the east revealed a definite move toward price comparison in the A/E selection process. Joe Wood of Marriott Corporation said that for the design of hotels and facilities around the world they ask for A/E design proposals with prices, then select the proposals in the lower half of the price range and negotiate with the best qualified A/E. Alan Brangman said Oliver T. Carr Co. was paying time and service rates for A/E services but found the costs so high that the project managers are now going into the market place to expand the pool of eligible A/Es and to negotiate lump sum prices with all A/Es qualified for the particular design job. Steve Hayes, Project Manager for the Washington-Baltimore area for Cabot and Forbes, who construct multi-story office buildings, said they use Skidmore, Owings and Merril as the A/E for their largest buildings; but in suburban areas (for designs of smaller facilities) a feasibility design is developed, a pool of qualified A/Es is selected and price is negotiated with all of them. The consensus was that price comparison for A/E services is the definite trend—in order to reduce costs of design work and continue to obtain highly qualified A/Es.

In its December 1972 report, the Commission on Government Procurement recommended price competition as a "non-dominant factor" in selections of A/Es. Congressman Brooks, in the ensuing 12 years has never sought review of the Brooks Act, although for most of these years he has been in a prime position, as Chairman of the House Government Operations Committee, to do so. He has repeatedly stated that the Act calls for 'fair and reasonable" prices and if administration of A/E procurement fails to curb excessive profits, it is not his concern. Section 2753 of the recently enacted Deficit Reduction Act of 1984 finally calls for a study of all factors in the procurement with recommendations from the Office of Federal Procurement Policy (OFPP), where the survey will be conducted.

In August, 1983, the Inspector General of the Department of Transportation published an investigative report in which he reviewed 102 A/E grant-funded contracts and concluded that there had been a loss of tens of millions of dollars to the American taxpayer. Fifty three percent of the contracts were entered into without the benefit of adequate cost estimates and analyses of A/E costs and 68 percent of the contracts were not sufficiently documented to show that reasonable prices were obtained. Ten of the contracts showed a price spread of 7 to 733 percent for the same services. Frank Musica, Washington Counsel for the American Society of Civil Engineers, explained that price spreads of $50,000 to $300,000 (600 percent) were not unusual for A/E proposals on the same project because the federal agencies were unable to define adequately the scope of work. The anomaly in this assertion is that federal agencies also claim they cannot define adequately the scope of work for a particular project for the purpose of price comparison among the three best qualified A/Es selected. Having said that, the agency immediately enters into a contract with the best qualified A/E in which

scope of work is defined sufficiently to measure the A/E's performance.

The significance of the price spread is that so much of A/E design work is repetitive (such as rooms and other space units in a building) that prices paid in the past become the basis for estimates by the government or the client for future design projects. Prices near the top of the 600 to 700 percent spread, therefore, create a plateau estimated price for future projects. If the three best qualified A/Es are permitted to offer prices for comparison by the client, and the plateau price offered by the best qualified A/E is at the top of the 700 spread, the prices offered by the other two best qualified A/Es could introduce competition at the 300 percent and 100 percent level. The A/E industry price fixing rate schedules, of course, keep prices at the 700 level. And if over 98% of A/E contracts are awarded by the federal government to the best qualified A/E at the 700 level the inflationary trend in prices is obvious. Notwithstanding this inflationary trend, in the 12 years that the Brooks Act has been in effect, no effort has been made by the Federal Government to survey the prices for A/E services.

The absence of requirements for competitive price negotiation in the A/E selection process is the crux of the problem of excessive profits. The DOT audit found that "in 36 percent of the 102 A/E contracts reviewed, available evidence indicated that A/E firm proposals were apparently accepted without analysis or efforts to negotiate reasonable prices. It appeared that these grantees did not have either the capability or the incentive to conduct meaningful (price) negotiations with the A/E firms."

From the time the Brooks Act was enacted, price neogitation has been a charade. The A/E selected as best qualified prescribes the industry fixed price for the services required. The federal or grantee client must accept this price or lose that A/E. The client knows if he goes to the other selected A/Es he will be offered the same industry rates on a take-it or leave-it basis. So, why lose the best qualified A/E?

Statistics bear this out. In 1979, the Department of Defense reported to a House Committee that "It is estimated by the military that less than two percent of contract negotiations are formally terminated with the top-ranked (A/E) firm and negotiations undertaken with the second-most-qualified firm, and almost non-existent when negotiations are undertaken with the third or lesser-ranked firm". In the Military Construction Program in fiscal years 1979, 1980 and 1981 the Navy and Army awarded 480 A/E contracts—474 to the best-qualified firm and 6 to the second (or 98.7 percent to the best-qualified firms). Efforts by the Corps of Engineers to test competitive pricing for A/E services were thwarted by the Department of Defense and Congressional committees on the ground that such tests were forbidden by the Brooks Act.

The Comptroller General continues to issue reports favoring a form of price-competition for A/E services but refrains from raising the subject when testifying on procurement legislation. However, in presenting the views of the Department of Justice on the OFPP draft "Proposal for a Uniform Federal Procurement System", dated February 12, 1982, Assistant Attorney General Robert A. McConnell, in his letter of February 20, 1982, stated that although Justice supported the pro-competitive policy objectives of the proposal, "... we strongly believe it to be deficient in not requiring competitive procurement of architect and engineering services." Justice recommended repeal of the Brooks Act and elimination of "the current anticompetitive restraints upon A/E services procurement." Apparently in conformance with the Administration's pro-industry policy, the OFPP ignored the "strong" advice of Justice with respect to A/E procurement reform when it sent its final System proposal to the Congress.

The primary factors in the selection process for other professional services is the professional competence of those who will do the work and the relative merits of proposals for the end products. The fee to be charged is not a dominant factor but price comparison is required. It is this latter factor which is missing under the Brooks Act.

Professionals who perform work similar to that performed by A/Es have sought to be included under the Brooks Act. Appeals to the Comptroller General of the United States by the Association of Soil and Foundation Engineers, and by other engineering firms referenced in that opinion, to be exempt from price competition for services their members performed that were related to A/E services, were denied because the Brooks Act procedures are strictly limited to such services "when performed by A/E firms." However, the surveyors and mappers have prevailed; 97 Stat. 311 adds their services to the Brooks Act. This was accomplished by a floor amendment introduced by Senator Charles Percy to the supplemental appropriations act of 1983 (P.L. 98-63). Other professionals (real estate appraisers, lawyers and others) have sought, over the years, to get aboard the gravy train that has profited the A/Es so much.

With the support of the Brooks Act, sole source procurement of A/E services at prices fixed by the industry have lulled state and federal contracting and administrative officials into a state of euphoric disregard of all sound contracting principles. Money is poured into A/E projects with no evaluation of cost or accountability required. The rationale is that the ultimate cost of the design concept, whatever it is, will be justified in the construction to which it is applied. The logical control is to be found in some kind of price competition. The A/E lobby in Congress is betting its money against such a retreat from the status quo.

It is encouraging that the Deficit Reduction Act of 1984, in its final provision, calls for a study of procurement of professional services, including A/E services. The report on the legislation (House Report 98-861) proposes a system in which all qualified persons be encouraged to submit a competitive proposal in response to each solicitation for services "and in which the award is made to the bidder on the list who can perform the service for the lowest over-all cost." This is the light at the end of the tunnel. May this commentary contribute to the study of procurement of A/E services.

RECORDS CERTIFICATION

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

James O. Smith
Signature of Camera Operator

9/5/89
Date

02-619 (REV 8/78)

HB

294

COMMITTEE REPORT

HOUSE

JUDICIARY

FURTHER: FINANCE

(7)

3/13/85

Date: March 27 1985

The Committee on LABOR & COMMERCE has had HB 294

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

under consideration and recommends:

[X] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

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

and recommends _____

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

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

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

Mike Hanley
CHAIRMAN

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

List of Those Testifying on
HB 294-295

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

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

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

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

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

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

7. Kevin Dougherty -- Attorney for Alaska Insustrial Alliance

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

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

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

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

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

JAMES N. FRANCIS,

Plaintiff,

v.

JAMES ROBISON, COMMISSIONER OF LABOR, et al.,

Defendants.

JAN 83-9969 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. The plaintiff received his termination notice

the plaintiff was performing prior to his termination.

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

22. Plaintiff was terminated because of his nonresidency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

[illegible] of the United States Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

EARL S. JOHNSTONE, Judge

Steve McAlpine

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

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

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

③ State Receives 2 principle benefits from extraction of oil

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

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

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

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

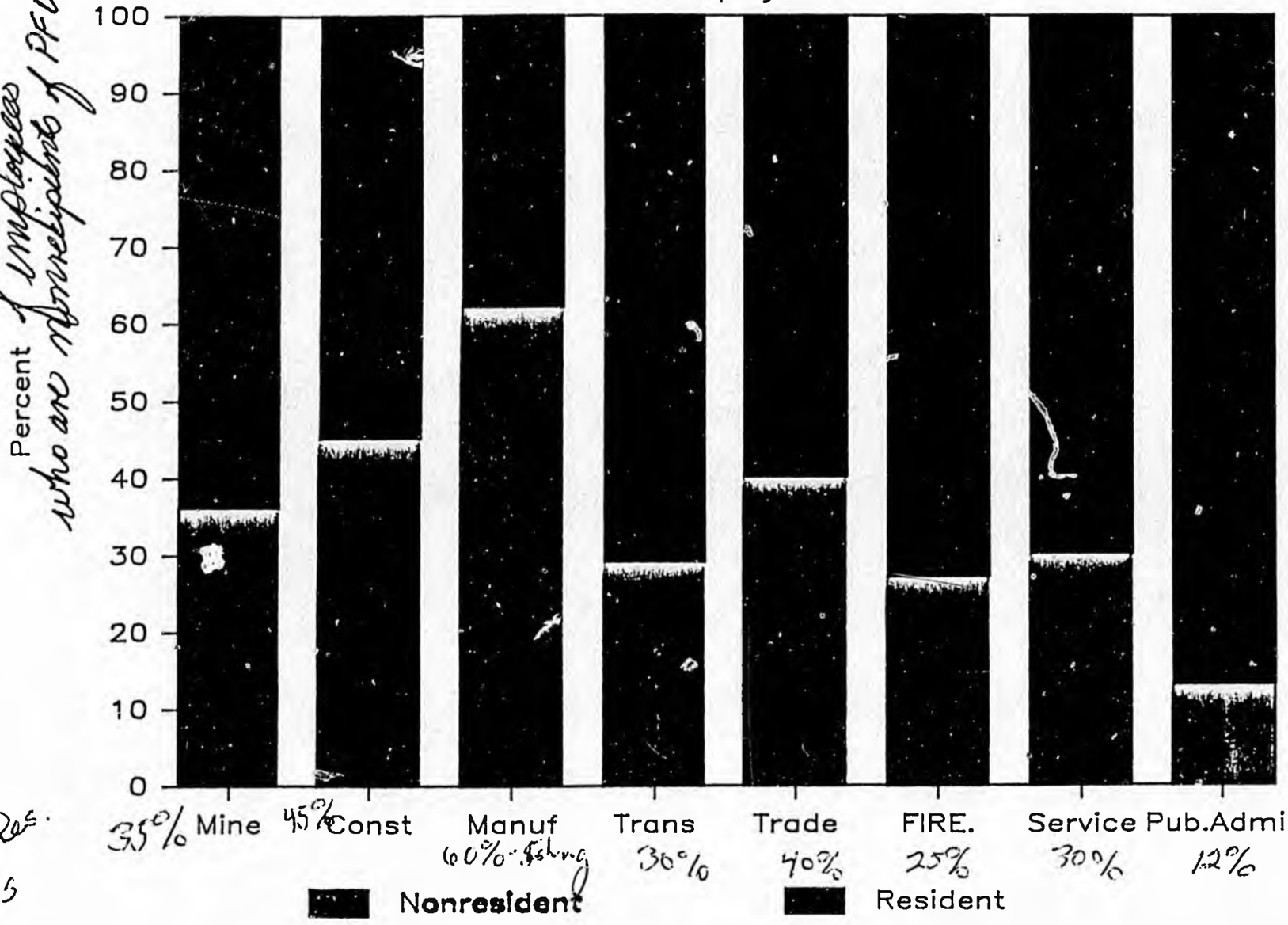
- If we have two ways to get benefits into the economy and cash
  (a) Encourage Local Hire in prot. Sector
  (b) Increase TXS.
  - Consistently opposed.

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

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

ALASKA

U.I. Covered Employment 1984



Non-Res.
0.5

Bill No. House Bill No. 294

Date March 18, 1985

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

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

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

One of the Superior Court's key findings was that there was insufficient evidence to show that the in-migration of non-residents was displacing qualified and available Alaska residents from public works employment. By explicitly setting forth the legislative findings underlying the resident hire law, House Bill No. 294 would provide a more solid foundation from which to defend the principle of Alaska hire. The Department of Labor, therefore, strongly endorses the comprehensive legislative findings contained in the bill.

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

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

APPROVED:

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

POSITION PAPER/Department of Labor

Bill No. House Bill 295

Date March 26, 1985

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

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

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

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

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

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

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

APPROVED:

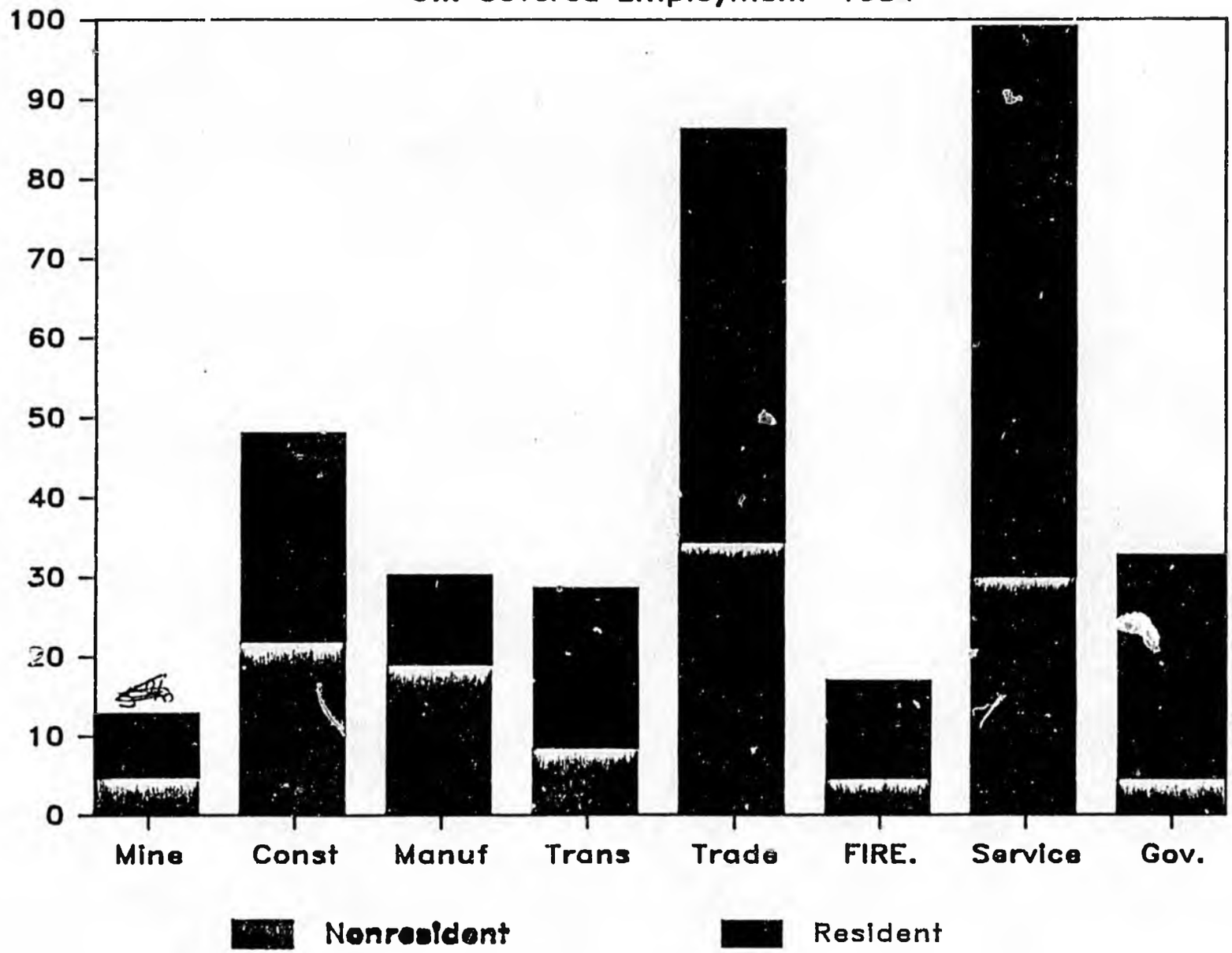
Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

ALASKA

U.I. Covered Employment 1984

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



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

February 25, 1985

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

David Arthur Donley

M E M O R A N D U M

TO: All Members, House Labor and Commerce Committee

FROM: Roger Poppe, Committee Staff

DATE: March 27, 1985

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

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

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

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

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

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

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

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

HOUSE LABOR AND COMMERCE COMMITTEE AGENDA

1) CALL MEETING TO ORDER

2) NOTE TIME/DAY/YEAR

3) NOTE MEMBERS PRESENT AND MEMBERS ABSENT

4) RECOGNIZE ANY VIP's OR GUESTS PRESENT

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

6) EXPLAIN THE ORDER OF BILLS BEFORE THE COMMITTEE

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

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

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

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

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

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

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

9) ANNOUNCE THE TIME OF ADJOURNMENT

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

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

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

[437 US 517]

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

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

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

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

[437 US 518]

SIDNEY S. HICKLIN et al., Appellants,

v

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

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

[No. 77-324]

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

SUMMARY

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

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

Briefs of Counsel, p 1192, infra.

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

HEADNOTES

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

Courts § 763 — state residency requirement — constitutionality — mootness

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

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

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

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

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

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

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

ANNOTATION REFERENCES

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

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

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

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

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

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

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

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

Commerce § 220 — natural resources — state preference — citizens

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

SYLLABUS BY REPORTER OF DECISIONS

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

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

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

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

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

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

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

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

565 P2d 159, reversed.

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

APPEARANCES OF COUNSEL

Robert H. Wagstaff argued the cause for appellants.

Ronald W. Lorensen argued the cause for appellees.

Briefs of Counsel, p 1192, infra.

OPINION OF THE COURT

[437 US 520]

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

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

[437 US 521]

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

I

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

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

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

"In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

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

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

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

[437 US 522]

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

[437 US 523]

II

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

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

[437 US 524]

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

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

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

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

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

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

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

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

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

[437 US 525]

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

Again, Toomer v Witsell, 334 US 385, 92 L Ed 1460, 68 S Ct 1156 (1948), the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents, invalidated a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," id., at 396, 92 L Ed 1460, 68 S Ct 1156, "[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." Ibid. A "substantial reason for the discrimination" would not exist, the Court explained, "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the

[437 US 526]

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

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

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

[437 US 527]

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

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

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

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

kans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If

[437 US 528]

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

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

[437 US 529]

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

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

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

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

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

[437 US 530]

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

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

[437 US 531]

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

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

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

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

quiring potentially covered our-of-state employers to discriminate against residents of their own State in favor of nonresident Alaskans. In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates.[15]

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

[437 US 532]

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

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

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

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

[437 US 533]

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

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

[437 US 534]

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

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

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

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

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

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

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

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

Reversed.

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

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

[437 US 535]

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

v

ALBERT L. LIPSCOMB et al.

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

[No. 77-529]

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

SUMMARY

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

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

Briefs of Counsel, p 1194, infra.

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

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

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

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

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

So ordered.

393 Mass. 1201

OPINION OF THE JUSTICES TO THE SENATE.

Supreme Judicial Court of Massachusetts.

Oct. 4, 1984.

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

Question answered.

1. Constitutional Law ⇨207

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

2. Constitutional Law ⇨207(1)

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

3. Constitutional Law ⇐207(2)

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

4. Constitutional Law ⇐207(1)

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

5. Constitutional Law ⇐207(2)

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

To the Honorable the Senate of the Commonwealth of Massachusetts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

393 Mass. 127

COMMONWEALTH

v.

Sandy SUMERLIN.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued May 8, 1984.

Decided Oct. 10, 1984.

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

Reversed and remanded.

1. Searches and Seizures ⇐7(29)

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

2. Criminal Law ⇐1158(1)

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

3. Arrest ⇐63.5(8)

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

HB 294 File Contents

1) Bill Summary -- Legislative Reporting Service

2) Overview -- Roger Poppe, Committee Staff

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

4) Backup Material -- Rep. Boucher

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

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

6) Alaska Statutes--Title 36: Public Contracts

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

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

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

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

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

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

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

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

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

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

INTRODUCTION OF BILLS (House)

HB 295, (cont'd)

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

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

Appropriation (special) (S. Central roads)

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

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

Introduced March 15 and referred to Finance.

INTRODUCTION OF RESOLUTIONS (House)

Jones Act (repeal of portions of)

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

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

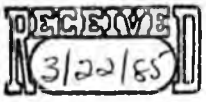
Introduced March 15 and referred to Transportation.

Bill No. House Bill No. 294

Date March 18, 1985

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

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



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

One of the Superior Court's key findings was that there was insufficient evidence to show that the in-migration of non-residents was displacing qualified and available Alaska residents from public works employment. By explicitly setting forth the legislative findings underlying the resident hire law, House Bill No. 294 would provide a more solid foundation from which to defend the principle of Alaska hire. The Department of Labor, therefore, strongly endorses the comprehensive legislative findings contained in the bill.

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

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

APPROVED:

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

POSITION PAPER/Department of Labor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 294
Title: "An Act relating to preferential hire of Alaskans..."
Sponsor: Boucher, Davis et al.
Requestor: House Labor & Commerce
Date of Request: 3/18/85

FISCAL DETAIL

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

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

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

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

7/1/84

[460 US 204]

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

v

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

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

[No. 81–1003]

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

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

SUMMARY

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

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

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

Briefs of Counsel, p 95.7, infra.

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

HEADNOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[460 US 211]

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

"In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." 437 US, at 531, 57 L Ed 2d 397, 98 S Ct 2482.

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

[460 US 212]

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

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

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

[460 US 214]

III

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

[460 US 215]

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

It is so ordered.

---

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

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

EDAG regulations provide:

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

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

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

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

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

Alaska Statutes

Title 36. Public Contracts.

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

Chapter 10. Employment Preference.

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

Sec. 36.10.010. Employment preference. (a) In the performance of contracts let by a municipality for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 95 percent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In all cases of public works projects, preference shall be given residents. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as provided in AS 44.33.290, followed by other residents of the state.

(b) When a construction project is partly or wholly funded by state money and the state or an agency of the state, a department, office, agency, state board, commission, regional school board with respect to an educational facility under AS 14.11.020, public corporation or other organizational unit of or created under the executive, legislative or judicial branch of state government, including the University of Alaska, is a signatory to the construction contract, the contract shall require that the worker hours on a craft-by-craft basis shall be performed at least 95 percent by bona fide state residents. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as provided in AS 44.33.290, followed by other residents of the state. (§ 1a ch 177 SLA 1960; am § 11 ch 142 SLA 1972; am § 1 ch 208 SLA 1972; am § 7 ch 277 SLA 1976; am § 15 ch 147 SLA 1978; am §§ 1, 2 ch 72 SLA 1983)

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

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

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

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

Chapter 25. Contractors' Bonds.

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

NOTES TO DECISIONS

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

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

Alaska State Legislature

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

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

FROM: Senator Josephson

DATE: May 5, 1983

RE: SS SB 174 Preferential Hire

Dear Colleague:

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

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

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

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

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

Joe Josephson

Senator Joe P. Josephson

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

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

Prevailing Wage Bill

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

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

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

WYOMING SUPREME COURT UPHOLDS STATE RESIDENT PREFERENCE LAW

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

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

State's Objectives

The Wyoming Preference Act says in part:

"Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The state employment office nearest the proposed contract or construction site shall maintain a list of laborers, classified by skills, who are residents and are available for employment. When the nearest state employment office is unable to provide the requested number of laborers from its own list, it shall immediately contact other state employment offices and request the names of other available laborers. Every person required to employ Wyoming laborers shall inform the nearest state employment office of his employment needs. If the state employment office certifies that the person's need for laborers cannot be filled from those listed as of the date the information is filed, then the person may employ other than Wyoming laborers." [§§16-6-201-203]

Offense Acknowledged

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

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

Judge Rose says:

"The State concedes that the discrimination against nonresidents under the Wyoming Preference Act burdens a fundamental right. In an early case, the United States Supreme Court held that the Privileges and Immunities Clause protects the right of a citizen of one state to travel to another state for purposes of employment. *Ward v. Maryland*, 12 Wall 418, 430 (1870) ... Even more pertinent to the instant case, the Supreme Court recently held that an enactment preferring local workers for public construction projects burdens a fundamental right, and therefore, falls within the purview of the Privileges and Immunities Clause. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden ... [29 CLR 1649 (Feb. 29, 1984)]* ... Clearly, Wyoming's Preference Act offends the Privileges and Immunities

Clause unless a close link exists between valid reasons for the Act and the discrimination practiced."

Constitutional Balance

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

Chief Justice Thomas concurs, saying:

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

Loyalty to State Citizens

Continuing, Chief Justice Thomas says:

"It cannot be held objectionable for a sovereign state to adopt legislation which provides in essence that to the extent possible public works contracts benefit the citizens of the state whose contributions to the public treasury fund those projects. A state should not be foreclosed by the invocation of the Constitution of the United States of America from loyalty to interests of its own citizens. So long as a statute is narrowly drawn to protect only the right of the state to contract as it sees fit with respect to expenditures for public works projects which it owns and which it funds, I am satisfied that as a matter of law such a statute does not offend the Privileges and Immunities Clause. . . ."

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

ARCO MODULE FABRICATION AWARDED TO UNION AND OPEN SHOP FIRMS

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

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

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

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

Open Shop Moves Into Portland

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

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

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

0010-6836/85/$00 50

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4931

DISTRICT 10
BOX 111038
ANCHORAGE, ALASKA 99511
(907) 349-2192

CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

PRESS RELEASE

SUBJECT: Alaska Hire Legislation DATE: March 15, 1985

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

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

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

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

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

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

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

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

APPEAL FROM SUPREME COURT OF ALASKA

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

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

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

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

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

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

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

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

565 P. 2d 159, reversed.

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

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

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

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

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

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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

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

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

"In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

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

I

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

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

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

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

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

[5] Section 38.40.090 provides:

"In this chapter

"(1) 'resident' means a person who

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

Again, *Toomer* v. *Witsell*, 334 U. S. 385 (1948), the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents, invalidated a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," *id.*, at 396, "[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Ibid.* A "substantial reason for the discrimination" would not exist, the Court explained, "unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the

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

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

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

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

Moreover, even if the State's showing is accepted as sufficient to indicate that nonresidents were "a peculiar source of evil," *Toomer* and *Mullaney* compel the conclusion that Alaska Hire nevertheless fails to pass constitutional muster. For the discrimination the Act works against nonresi does not bear a substantial relationship to the parti ar "evil" they are said to present. Alaska Hir simply grants all Alaskans, regardless of their employment status, education, or traini , a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

activity which generates the employment must take place inside the state." Although the absence of this limitation would be noteworthy, its presence hardly is; for it simply prevents Alaska Hire from having what would be the surprising effect of requiring potentially covered out-of-state employers to discriminate against residents of their own State in favor of nonresident Alaskans. In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates.[15]

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

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

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

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

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

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

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

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

Reversed.

---

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

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

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

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

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

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

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

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

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

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

551 F. 2d 1043, reversed and remanded.

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

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

Fairbanks Central Labor Council
AFL-CIO

Barry L. Haight
President

819 First Ave.
Fairbanks, Alaska
99701

(907) 456-8354

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

819 FIRST AVENUE
AIRBANKS, ALASKA

March 18, 1985

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

Dear Chairman Navarre:

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Barry L. Haight

Barry Haight
President
Fbks. Central Labor Council

BH:jb

A REGIONAL ECONOMIC ANALYSIS OF THE IMPACTS OF LOCAL HIRE POLICIES

A

Proposal

submitted to the

Alaska State Legislature

by the

Fairbanks Central Labor Council
819 First Avenue
Fairbanks, Alaska 99701

Prepared by

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

March 15, 1985

Statement of the Problem and Background

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

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

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

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

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

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

Project Goals

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

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

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

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

The initial welfare changes to be isolated and measured include:

1) Employment Effects

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

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

2) Redistribution Effects

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

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

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

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

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

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

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

Budget Justification

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

A REGIONAL ECONOMIC ANALYSIS OF THE IMPACTS OF LOCAL HIRE POLICIES

A

Proposal

submitted to the

Alaska State Legislature

by the

Fairbanks Central Labor Council
819 First Avenue
Fairbanks, Alaska 99701

Prepared by

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

March 15, 1985