ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8072

3656 HSTA HB 49 - HB 50

532

their lobbying with funds for which political contribution credits are paid.

5. Establish reporting requirement for employers who withhold payroll for political contributions.

Rationale - Employer willingness to provide payroll withholding can encourage participation in campaigns without allowing the employer to exert undisclosed influence. Labor laws are such that employees are protected from dismissal for not participating and it might be easier to establish the conditions under which payroll withholding for political contributions is allowed than to ban it entirely.

AS 05.15 - Games of Chance and Skill

6. Remove political organizations from those eligible to raise funds through raffles, bingo, monte carlo, etc., by amending the definition of "qualified organization" in AS 05.15.210(15).

Rationale - There are two aspects of this kind of fund-raising by candidates and political groups which are almost impossible to control: compliance with the detailed reporting requirements of AS 15.13 and the difficulty in separating out the funds used for political activity from those use for other purposes. In the case of candidates, the difficulty in complying honestly with the contribution limit and the itemized information about contributors leaves uncontrollable loopholes in the requirements of AS 15.13. Presumably the Department of Revenue has similar difficulties in screening applications for political contribution credits in order to avoid inappropriate payments to those who made their political contribution by buying a raffle ticket or attending a monte carlo night.

1984 SENATE EXPENDITURES OVER $75,000

Primary: 2 of 33

KERTTULA, JALMAR	$109,200
COGHILL, JOHN	78,000

General: 1 of 21

KERTTULA, JALMAR	$104,200

TOTAL: 7 of 33 (21%)

KERTTULA, JALMAR	$213,400
LACHER, BARBARA	113,500
FLOOD, JOE	117,600
JOSEPHSON, JOE	100,400
WARD, JERRY	78,600
COGHILL, JOHN	99,500
BENNETT, DON	115,300

1984 HOUSE EXPENDITURES OVER $50,000

Primary: 1 of 137

PIGNALBERI, MARCO	$ 60,700

General: 4 of 79

SZYMANSKI, MIKE	$ 64,500
PEARCE, DRUE	65,500
COWDERY, JOHN	66,800
PIGNALBERI, MARCO	57,100

TOTAL: 16 of 137 (12%)

OBORN, PAXTON	$ 59,200
SZYMANSKI, MIKE	105,000
BRUCE, KEVIN	73,400
RIEGER, STEVEN	62,000
LYUU, CHRIS	74,800
PEARCE, DRUE	114,500
BOUCHER, HENRY	75,100
COWDERY, JOHN	115,900
COLLINS, VIRGINIA	60,100
MCKINNON, MARY	54,300
GRUENBERG, MAX JR.	57,000
UEHLING, RICK	86,600
POURCHOT, PAT	63,100
PIGNALBERI, MARCO	117,800
COTTON, SAMUEL	59,300
KOPONEN, NIILO	54,200

1984 HOUSE EXPENDITURES OVER $25,000

Primary: 16 of 137

OBORN, PAXTON	$ 31,700
SZYMANSKI, MIKE	40,500
BRUCE, KEVIN	41,300
LYOU, CHRIS	32,100
PEARCE, DRUE	49,000
BOUCHER, HENRY	40,700
COWDERY, JOHN	49,100
COLLINS, VIRGINIA	32,900
DONLEY, DAVID	25,700
MCKINNON, MARY	25,900
UEHLING, RICK	47,200
BARNES, RAMONA	41,300
PIGNALBERI, MARCO	60,700
HURLEY, KATHERINE	25,900
FRANK, STEPHEN	25,600
ADAMS, AL	27,900

GENERAL: 22 of 79

OBORN, PAXTON	$ 27,500
SZYMANSKI, MIKE	64,500
BRUCE, KEVIN	32,100
RIEGER, STEVEN	39,600
LYOU, CHRIS	42,700
PEARCE, DRUE	65,500
BOUCHER, HENRY	34,400
COWDERY, JOHN	66,800
COLLINS, VIRGINIA	27,200
MUNSON, JOYCE	30,900
MCKINNON, MARY	28,400
GRUENBERG, MAX JR.	38,300
TISCHER, MAE	26,900
UEHLING, RICK	39,400
POURCHOT, PAT	41,400
PIGNALBERI, MARCO	57,100
COTTON, SAMUEL	34,300
LISKA, JOHN	28,700
NORDALE, JAMES	34,700
KOPONEN, NIILO	41,100
BINKLEY, JOHNE	25,400
RATCLIFF, MARY	29,700

TOTAL: 40 of 137 (29%)

TAYLOR, ROBIN	$ 27,600
ELKINS, JIM	33,100
SUND, JOHN	35,900
SIKORSKI, MERRILL	28,500
OBORN, PAXTON	59,200
SZYMANSKI, MIKE	105,000
HEDDERLY-SMITH, DAVID	38,900
BRUCE, KEVIN	73,400
RIEGER, STEVEN	62,000
LYOU, CHRIS	74,800
PEARCE, DRUE	114,500
HANLEY, ALYCE	26,700
BOUCHER, HENRY	75,100
COWDERY, JOHN	115,900
COLLINS, VIRGINIA	60,100
MUNSON, JOYCE	46,900
DONLEY, DAVID	25,700
MCKINNON, MARY	54,300
GRUENBERG, MAX JR.	57,000
TISCHER, MAE	37,100
RATCLIFF, MARY	34,800
UEHLING, RICK	86,600
POURCHOT, PAT	63,100
WARD, MARGARET	35,300
BARNES, RAMONA	41,300
PIGNALBERI, MARCO	117,800
FURNACE, WALTER	26,000
COTTON, SAMUEL	59,300
LISKA, JOHN	46,200
HURLEY, KATHERINE	44,700
JOHNSON, RICHARD	29,000
BURGER, SAMUEL	28,700
RIBAR, MICHAEL	33,800
FRANK, STEPHEN	49,000
NORDALE, JAMES	42,500
RINGSTAD, JOHN	29,700
COPUS, GARY	26,700
KOPONEN, NIILO	54,200
ADAMS, AL	48,200
BINKLEY, JOHNE	33,100

1984 SENATE EXPENDITURES OVER $50,000

Primary: 3 of 33

KERTTULA, JALMAR	$109,200
COGHILL, JOHN	78,000
BENNETT, CON	61,300

General: 5 of 21

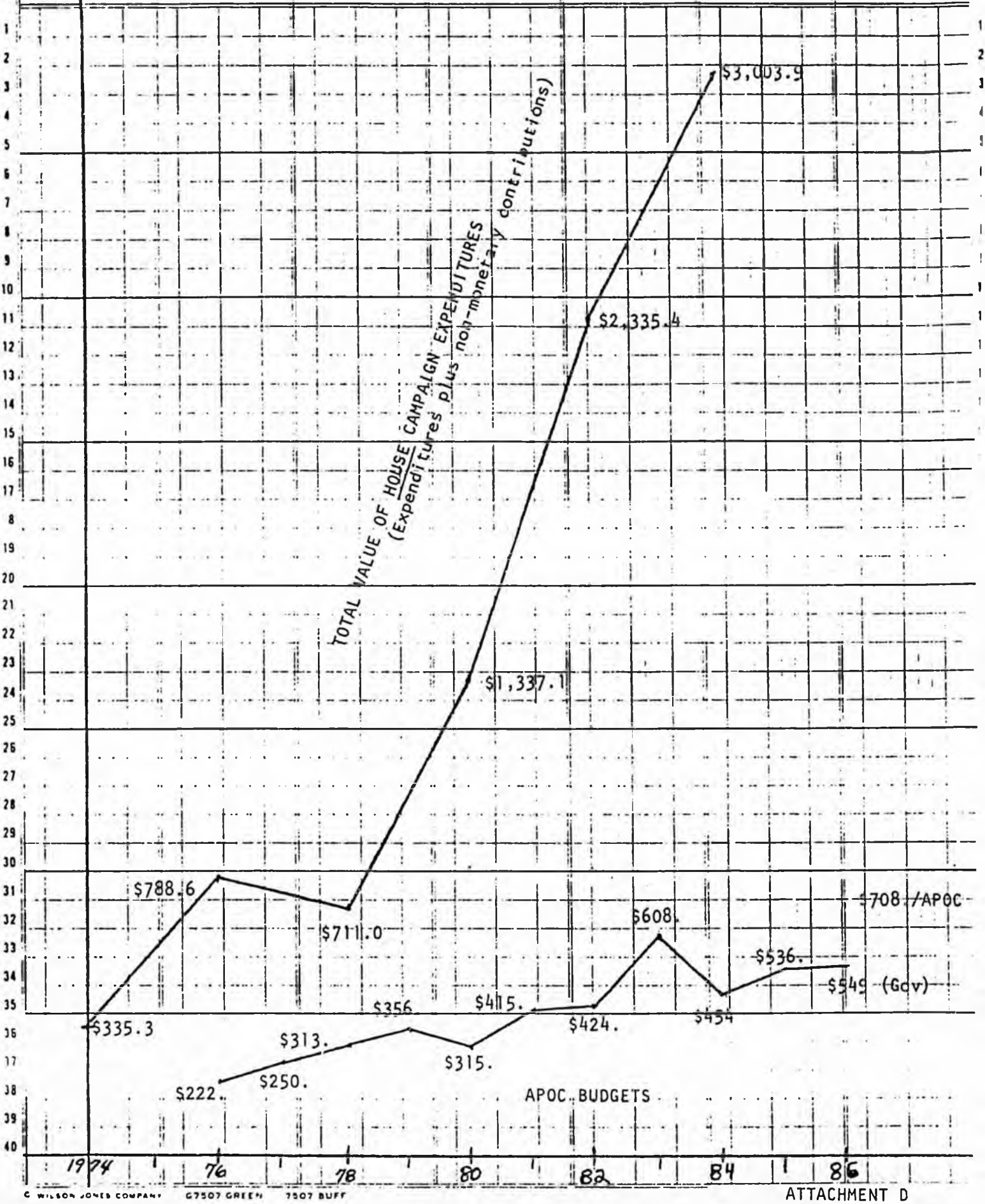
KERTTULA, JALMAR	$104,200
LACHER, BARBARA	71,100
FLOOD, JOE	70,800
JOSEPHSON, JOE	59,800
BENNETT, DON	54,000

TOTAL: 9 of 33 (27%)

KERTTULA, JALMAR	$213,400
LACHER, BARBARA	113,500
SASSARA, CHARLES	68,600
ABOOD, MITCH	72,000
FLOOD, JOE	117,600
JOSEPHSON, JOE	100,400
WARD, JERRY	78,600
COGHILL, JOHN	99,500
BENNETT, DON	115,300

ATTACHMENT C (2 of 2)

Public Offices Commission -- 1/22/85



ATTACHMENT D

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 9981
907 465 3800

MEMORANDUM January 21, 1985

SUBJECT: Limitations on campaign financing (HB49)

TO: Representative Katie Hurley
Chair, House State Affairs Committee

FROM: Richard A. Bradley
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

The bill adds a sec. 75 to AS 15.13, the chapter dealing with state election campaigns. It provides that a "resident individual" may obtain a refund for a contribution of a candidate for governor, lieutenant governor, or member of the legislature under AS 43.20.013 only if the candidate has filed a statement agreeing to limit expenditures under this section during the primary and general election. Certain specific aspects of the section may be noted:

(1) Only a resident individual may qualify. That is, a corporation, partnership, association, labor union, etc. cannot make the contribution and be eligible for the contribution refund. And only a resident of the state may apply; this qualification had more meaning, perhaps, when the credit was to be applied against existing personal income taxes owed to the state; as you may know, many individuals who were nonresidents of the state were paying income taxes to the state; they were not eligible for the refund before or under this legislation. See AS 43.20.013.

(2) This amendment has no implications to the applicability of the existing law to all other political or other candidates or to contribution to their campaigns for office. See the list in the amendment to AS 43.20.013 in sec. 3 of the bill.

(3) The statement of the candidate agreeing to accept the limitation must be on file with the commission at the time of the contribution, if the contribution is made to the candidates for governor, lieutenant governor, and member of the legislature.

(4) The limitation covers all expenditures, whether made by the candidate before the statement was filed or not.

(5) The statement, once made during a campaign, remains in effect for the remainder of the campaign and may not be rescinded.

Section 2 of the bill amends the existing penalty provisions of AS 15.13.120(a) to deal with the implications of sec. 1 of the bill; see sec. 120(a)(6). Sec. 120(a)(2) is repealed because the paragraph is obsolete and has been for several years; the amendment is a clean-up of existing law and does not deal with the issues raised by this bill.

Section 3 is the provisions authorizing the campaign contributions refund; it is amended simply to acknowledge the implications of sec. 1 of the bill.

Section 4 of the bill amends obsolete law; the amendment has nothing directly to do with the goals of this legislation.

Since the bill does not have an effective date, it is effective 90 days after enactment.

If I may be of further assistance, please advise.

RAB:ojb
J11/017

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date

REQUEST
Bill/Resolution No: HB 49
Title: An Act relating to limitation on campaign financing
Sponsor: M. M. Miller and Duncan
Requestor: House State Affairs
Date of Request: 1/17/85

FISCAL DETAIL
Agency Affected: REVENUE
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected:
1) Administration and Support - Admin Srvc
2) Refundable Credits

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	LANDS & STRUCTURES	-	-	-	-	-	-
700	GRANTS, CLAIMS	-	-	-	-	-	-
800	MISCELLANEOUS	-	-	-	-	-	-
	TOTAL OPERATING	0	-	-	-	-	-
	CAPITAL	0	-	-	-	-	-
	REVENUE	0	-	-	-	-	-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

(See attached)

ANALYSIS: Attach a separate page for analysis.

Prepared By: Erwin D. Jones
Division: Administrative Services
Phone: 465-2313
Date: 1/21/85

Approved by Commissioner:
Agency: Revenue
Date: 1/21/85

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

FISCAL NOTE, HB 49
Attachment

The effect of this bill is to limit the refundable political campaign contribution credit to claimants who contributed to candidates (for Governor, Lt. Governor, and Alaska Legislature) who filed a statement on or before the day the contribution was made, said statement agreeing to limit campaign expenditures.

The Refundable Credits system is run on the Department of Revenue's mini-computer and so there is little out-o- pocket cost associated with the modification envisioned by this bill. There is considerable re-programming which will have to be done and the claim form for 1985 claims should reflect a statement of the new law, but those efforts can be accomodated with current staff. Specifically, the changes to the automated system would be as follows:

1) Create a sub-program for those candidates who ran for Governor, Lt. Governor, or Alaska Legislature.
2) Data entry and build a file of those candidates who filed such a statement with APOC, including the name of the candidate and the date of filing the statement.
3) Isolate "candidate names" in their derivatives (e.g., Duncan for House, Jim Duncan, Jim Duncan for Representative, Re-Elect Jim Duncan, etc.) and group by the name of the candidate.
4) Compare candidate name and date of contribution to list from APOC.
5) Generate denial or adjustment letter to the claimants whose claim is based in whole or part on a contribution to a candidate who did not file a statement with APOC on or before the date of the claimant's contribution

The following two amendments are offered for consideration to make the administration of the changes more workable and in the interest of fair notice.

1) An implementation date should be set which gives adequate public notice, e.g., amend line 11 to read "...who makes a contribution after July 1, 1985 to a candidate..."
2) Section 1 should have a paragraph added which reads:
(d) On or before January 15 of each year, the Executive Director of the Alaska Public Office Commission shall prepare and submit to the Commissioner of Revenue a list of all candidates for Governor, Lt. Governor and the Alaska Legislature who filed a statement under AS 15.13.075(a) during the previous calendar year.

Senator Vic Fischer
Alaska State Legislature
Pouch V • Juneau, Alaska 99811 • (907) 465-4954

Date: 1/17/85

To: Represenative Katie Hurley, Chair, House State Affairs Committee

From: Senator Vic Fischer

Re: Campaign Financing -- Background and Perspective

I appreciate Chair Katie Hurley's invitation to discuss campaign financing issues with the House State Affairs Committee.

Over the last two years, the Senate State Affairs Committee under my chairmanship has been involved in an extensive analysis of the impact of money in elections. We have reviewed other states' and federal policies, evaluated information available at the Alaska Public Offices Commission (APOC), investigated several instances of possible coercion and other improprieties, and held numerous public hearings.

At the request of the chair, we have supplied this committee with copies of reports, comparative reviews, and other publications and documents.

THE CRISIS IN CAMPAIGN FINANCING

The heart of the campaign financing issue is to recognize the overwhelming increase in the cost of elections and to understand the implications of this infusion of big money on politics and public policy.

A recent review of APOC contribution reports describes the phenomenal increase in campaign expenditures in Alaska:

* The average House campaign cost 500% more this past year than in 1974; while the average Senate campaign increased 550% over this same period.
* In last two years, the average expense for a contested general election in the House rose 21%, from $25,400 to $30,800.
* In 1984, the average expense for a contested general Senate campaign was $67,100, compared to $30,700 in 1982, an increase of 120%.
* This year, of the 40 House races, 32 were won by the candidate spending the most money; of the 11 Senate races, 9 were won by the candidate spending the most money. Thus, 1984 candidates spending the most money in the general election were four times as likely to win.

What does this all mean? The possibility of a truly viable campaign is less and less based upon the qualifications, the personality, and the experience of the candidate. Instead it is becoming a function of money. If you are not independently wealthy, you may become, consciously or not, beholden to those who are. The fundamental principle of one person - one vote is gravely shaken. The public's faith in our government and leaders gives way to cynicism and apathy.

Worse yet, the horrendously escalation cost of elections means that to be elected, candidates are forced to rely ever more on special interest group donations. This means that those who have a stake in controlling public policy have an opportunity to buy elections, to buy legislators. It puts special interests beyond the point of influence -- it gives them the power to dictate to legislators and the legislature.

CAMPAIGN FINANCE REFORM

There are three basic approaches to campaign financing reform that have been proposed to resolve this potential crisis in our representative democracy: (a) disclosure, (b) campaign expenditure limits, and (c) public financing. I will briefly discuss each approach.

Disclosure

The reporting of who gave how much to which candidates and other forms of disclosing information about the financing of campaigns has been a principal means of reform over the last 15 years.

The idea is that opening the records to public scrutiny would expose who was giving and receiving large contributions. Any potential incriminating link between an office holder's voting patterns and the size of the contribution is then revealed. Unfortunately, as campaign costs have increased, the need for cash has limited the effectiveness of disclosure alone as a tool of campaign reform.

Expenditure Limits

Campaign expenditure limits and restrictions on the types and amounts of acceptable contributions are another means of campaign financing reform.

Corporations, labor unions, utilities, government contractors, and others have been prohibited from making contributions in some states and in federal elections. Other states have limited the aggregate that any political action committee, group, or individual can contribute in any year or election.

Some states that provide tax reductions or refunds based upon campaign contributions also have placed expenditure limits on candidates whose contributors receive this benefit. Legislation introduced by Representative Miller and Senator Halford this session follows this concept; it is based on work we did in Senate State Affairs. Combined with disclosure, contribution restrictions and expenditure limits can provide meaningful reform.

Public Financing

Public financing of campaigns means that public dollars are used to partially or completely fund the election.

The presidential election and some states' gubernatorial and legislative races are supported this way. Alaska's $100 political campaign contribution credit (pccc) is a simple form of public financing. The

Miller and Halford bills are also forms of public financing. Matching funds and grants are used by other states. In all cases, public financing is tied to expenditure limits.

The idea here is that public dollars are neutral, thereby limiting the potential corrupting influence of private contributions. In addition, overall campaign costs can be reduced. Public financing in combination with disclosure, contribution restrictions and expenditure limits provide the best assurance that elections will be won and not bought.

BUCKLEY V. VALEO

Finally, it is important to note the implications of US Supreme Court decision Buckley v. Valeo. This ruling has shaped how campaign financing laws have been written for the last ten years.

In brief, it allows restrictions on contributions, but not on expenditures. However, if a candidate has agreed to receive some other benefit, such as public financing, then expenditure limits can be imposed.

It has also been interpreted not to establish a limit on independent campaign expenditures. For example, a limit may be placed on a candidate as described above, but not on a political action committee, group, or individual that supports the candidate. Thus, the amount of money in elections is not reduced, and worse, the limitations and prohibitions become meaningless obstacles.

However, there is a silver lining. Many constitutional law experts and election law attorneys understand that the Buckley position on independent campaign expenditures was a statement on the particular limits presented in this instance. They insist that the allowable expenditure limits discussed were too low and therefore did, in fact, intrude upon one's freedom of speech. These experts believe that a measure with significantly higher independent expenditure limits would meet a constitutional challenge.

CONCLUSION

In Alaska, the people are getting impatient, angry. There is a critical need to act before money engulfs the electoral process established to guarantee a people's government. I am sure that if the legislature does not act, the people will through the initiative process.

Therefore, I do believe that this committee, and the legislature as a whole, must consider campaign financing reform a top priority this session.

STATE OF ALASKA

ALASKA PUBLIC OFFICES COMMISSION

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☑ 610 C STREET, SUITE 211
ANCHORAGE, ALASKA 99501-3598
(907) 276-4176

☐ JUNEAU BRANCH OFFICE
POUCH CO
JUNEAU, ALASKA 99811-0222
(907) 465-4864

January 22, 1985

House State Affairs: HB 49
Theda Pittman, Exec. Dir.
Public Offices Commission

Thank you for this opportunity to review HB 49 which proposes amendments to Alaska's Campaign Disclosure Law.

First, I'd like you to be aware of the fact that the Commission has a strong concern about the fact that no substantive amendments to AS 15.13 have become law in the last few years. Since 1980 there have been several major pieces of legislation proposed which have fallen prey to damaging amendments. Nonetheless the Commission remains willing to work with those who have new proposals to offer in hopes of accomplishing simplified reporting requirements which preserve the public's right to meaningful information about campaign finances.

Attached to this memo are several items for your reference. Attachment A is a brief overview of the major amendment efforts since 1980 and attachment B is a summary of six items related to campaign disclosure which the Commission submitted to the Governor last summer in response to his call for legislative proposals.

With respect to the bill before you, I would like to offer the following comments, observations, or suggestions:

1. Statement of Intent - strongly urge its inclusion both to make clear the goal of the legislation and to facilitate enforcment in any future court cases.

2. State Candidates -

a. Page 1, line 15 - perhaps the statement required of "candidates" should be a modification of the current registration and include the year of the election in which they plan to run. However, for legislative prospects, a requirement to show the particular office and seat might discourage such filing. Consider specifying that a "candidate" who files such a statement is subject to all the requirements of AS 15.13 which would include reporting at year-end (even if no declaration had been filed) and proper identification of campaign material. Reverse the present ban on expenditures before filing (a declaration) in AS 15.13.100.

b. Duration of Statement - Suggest Dec. 31 of year of election. Those who have debts to pay off should be required to file a statement annually until they have paid off their debts and filed a final report. Those who are simply accepting contributions for a new campaign should also be required to have a current statement on file.

c. Page 1, line 24 - require candidates to provide contributors with an identification number. The provision of a coordinated numbering system between Revenue and the Public Offices Commission would help assure accurate information about payments and help keep track of those who have more than one campaign, e.g., a previous campaign in debt and a current campaign.

d. Page 1, line 25 - delete "of the group" unless some group requirements are added.

e. Ability to rescind statement -

(1) What about those who never file declarations?

(2) What about a date, such as one month after the deadline for filing a declaration, by which a candidate might voluntarily rescind his or her statement through notification to the Commission and through certified letters to his or her contributors?

f. Potential requirements/prohibitions to consider -

(1) segregated campaign account?

(2) ban against use of campaign account for office expenses?

3. Penalty Provisions - It would cost nothing to violate the agreement unless a candidate was successfully prosecuted of for a misdemeanor and then the fine could be no more than $5,000.

a. Page 2, line 11 should be amended as follows: (2) making a campaign contribution that [OR EXPENDITURE WHICH] exceeds the limitations of AS 15.13.070 [15.13.070(f)];

b. Consider strengthening the consequences for exceeding the limitation -

(1) Authority to order repayment to the general fund?

(2) Civil penalty of 4 x the amount of the excess spending?

4. Administrative Concerns - the Commission's workload will be affected in several respects. A preliminary summary of candidate expenditures shows the 7 of 33 Senate candidates (21%) and 16 of 137 House candidates (12%) exceeded the proposed limitations in their 1984 campaigns. Attachment C. Under the $50,000/$25,000 limits proposed by SB 34, 9 Senate candidates and 40 House candidates spent more than the proposal. Under HB 49, it seems doubtful that the limitations will significantly reduce the Commission's workload in routine desk audits, but there are two areas in which there will plainly be increases in workload:

(a) interpretation requests for "non-campaign" expenditures; &

(b) formal complaints alleging excessive expenditures which will require field-type audits of candidate records.

Attachment D provides information about the history of the Commission's funding which has always been inadequate, but is steadily getting worse as campaigns become more vigorous and creative.

5. AS 15.13.070(a) should be amended as follows: (a) No person or group, including but not limited to all political committees, businesses, corporations, and labor unions, may contribute [TO OR EXPEND] more than..

6. Additional Considerations for the future - strengthening of group registration requirements to address questions about whether payments of political contribution credits to group contributors are consistent with legislative intent.

Memo to the File

January 21, 1985

276-4176

Theda Pittman, Executive Director
Public Offices Commission

Legislative History;
Campaign Disclosure

The following summary covers the major Legislative action concerning the Commission beginning in 1980. It is my understanding that prior to this time, bills which amended the disclosure laws were proposed, in response to court decisions or Commission request, by those who had helped establish the disclosure laws.

In 1980 Senator Glenn Hackney, on the floor of the Senate, successfully amended House Bill 230 dealing with initiative signatures so that AS 15.13 was abolished. The House declined the amended version and Governor Hammond vetoed FCCS HB 230 which had been frantically worked out in the remaining days of the Session and contained amendments to all three of the disclosure laws. The changes to Campaign Disclosure reporting deadlines which eliminated 30 Day Pre-election reports were highly objectionable and it appeared that reducing the complexity of reports, rather than the number, would be more helpful to campaigns without undermining the intent of disclosure.

In 1981, Senator Kelly, hoping to salvage the positive work of the free conference committee, introduced SB 167 which was a duplicate of the vetoed bill. The Commission worked with Senate State Affairs and Senate Judiciary on committee substitutes which contained only amendments to AS 15.13, but the bill was not sent to the Senate floor.

At the beginning of the 1982 Session, the Commission first recommended that the contribution limitation be raised to $2,000 and that both contributions and expenditures be itemized on reports only if they exceeded $250. Senate Rules agreed to incorporate the new recommendations into a rules substitute. CSSB 167 (Rls) am passed the Senate with a provision that a successful candidate must first be convicted of a misdemeanor violation before the election was voided by the Division of Elections. (In the fall of 1981 the Commission had petitioned the Supreme Court to void the election of Fairbanks municipal candidate Joe Marshall, but the court's decision to do so did not occur until the fall of 1982.) On the House side, the State Affairs committee chaired by Ray Metcalfe with Abood, Fanning, Martin and Mike M. Miller as members, produced a committee substitute which abolished the Commission; made the Director of Elections responsible for AS 15.13; made the Commissioner of Administration responsible for AS 24.45 and AS 39.50; and made Libertarians a political party under the provisions of AS 15.13.

The House Judiciary Committee Substitute removed only the section making limited political parties exempt from the contribution limitation and the bill was never put on the House floor. A House Bill, sponsored by Rep. Fred Brown, which specified that a candidate convicted of a misdemeanor could be removed from office did pass, repealing AS 15.13.120(b) and adding subsections (f) through (h).

File Memo: Campaign Disc.
Legislative History
January 21, 1985

In 1983 the Commission decided that it would continue to support an increase in the contribution limitation and in the threshold for disclosing contributors' names, but would not push changes to expenditure reporting based on the suggestions of experienced treasurers. Rep. Uehling introduced HB 165 which deleted the 7-Day pre-election reporting deadline, but indicated a willingness to work with alternate proposals which the Commission might suggest. Subsequent versions included the $250 disclosure threshold but increasing the limitation was not addressed.

The House Committee Substitute was amended on the floor of the House to delete the requirement to list occupation/employer of contributors and it passed. Senate State Affairs restored the requirement and the bill went to Senate Finance where an amended was added, without testimony, which exempted dentists, morticians, doctors, pharmacists, and veterinarians from reporting clients or customers when filing a Conflict of Interest Statement. The Governor's veto of SCS CSSSHB 165(Fin) was supported by the Commission.

In 1984 Senate Rules introduced SB 425, an Administration bill, which raised the contribution limitation to $2,000, raised the threshold or disclosing contributor names to $250, and repealed unconstitutional thresholds on expenditures by candidates. Senate State Affairs deleted the $2,000 limitation change and the bill went to Senate Finance.

In Finance, Senators Vic Fischer and Joe Josephson discussed a proposed amendment reversing the prohibition against expenditures before filing and requiring those who made such expenditures to report as though they were candidates. The Commission supported the proposed amendment. Senate Finance took no action on any version of the bill. Senators Faiks, Ferguson and Sackett expressed the view that a declaration should be filed before making campaign expenditures. The bill did not go to the Senate floor.

Public Offices Commission
Legislative Recommendations for Campaign Disclosure
August, 1984

1. Increase contribution limitation in AS 15.13.070(a) to a maximum of $2,000.

Rationale - Inflation is the simplest and most direct explanation. In addition, allowing contributions in larger amounts may simplify reports and make it somewhat easier to track large contributors. The issue of whether its appropriate for a campaign to accept $2,000 contributions should be largely left up to the campaigns and the voters.

2. Increase threshold for disclosure of itemized information about contributors to $250.

Rationale - The first $100 of an individual's contribution or the first $200 of a couple's contribution is rebated by the state under the political contribution credit. The ever-increasing size of state campaigns makes contributions of $250 or less almost neglible in terms of potential influence. The burden on the campaigns is not justified in terms of the goal of public information on the most significant contributors.

3. Reverse "expenditures before filing" prohibition and require that those who act like candidates are subject to AS 15.13 even though they've not filed a declaration of candidacy.

Rationale - The original prohibition against pre-filing expenditures (except for personal travel and opinion polls) was germaine to the limitation on expenditures which has subsequently been determined to be unconstitutional. In fact, it is almost impossible to enforce a prohibition on pre-filing expenditures especially since incumbents are not precluded from using campaign surpluses for office expenses or personal income. Public access to information about campaigns and the potential candidates themselves would be better served by allowing campaign expenditures before filing, but requiring that they be reported at year-end even though the individual has not filed for office at year-end.

4. Consolidate and expand the requirements of group registration (AS 15.13.050) with the concept of controlled groups [AS 15.13.130(3)]. Require more detail on group registration and require annual renewal if group contributors are to be eligible for political contribution credits. Require groups which employ lobbyists to segregate their AS 15.13 funds from their AS 24.45 funds to assure that political contribution credits are not used to lobby. Establish civil penalties for failure to update registration on an annual basis.

Rationale - The two major types of groups in Alaska (PACs and political party subdivisions) are expanding their activity at a substantial rate. Although Alaska's PAC phenomena doesn't approach that in federal elections, it is clear that the trend toward more and larger groups is irreversible. AS 15.13's requirements for groups are primitive and do not give the Commission the authority it needs to assure that groups disclose the relevant information. Particularly frustrating is the lack of ability to prevent PACs or organizations which employ lobbyists from subsidizing

their lobbying with funds for which political contribution credits are paid.

5. Establish reporting requirement for employers who withhold payroll for political contributions.

Rationale - Employer willingness to provide payroll withholding can encourage participation in campaigns without allowing the employer to exert undisclosed influence. Labor laws are such that employees are protected from dismissal for not participating and it might be easier to establish the conditions under which payroll withholding for political contributions is allowed than to ban it entirely.

AS 05.15 - Games of Chance and Skill

6. Remove political organizations from those eligible to raise funds through raffles, bingo, monte carlo, etc., by amending the definition of "qualified organization" in AS 05.15.210(15).

Rationale - There are two aspects of this kind of fund-raising by candidates and political groups which are almost impossible to control: compliance with the detailed reporting requirements of AS 15.13 and the difficulty in separating out the funds used for political activity from those use for other purposes. In the case of candidates, the difficulty in complying honestly with the contribution limit and the itemized information about contributors leaves uncontrollable loopholes in the requirements of AS 15.13. Presumably the Department of Revenue has similar difficulties in screening applications for political contribution credits in order to avoid inappropriate payments to those who made their political contribution by buying a raffle ticket or attending a monte carlo night.

1984 SENATE EXPENDITURES OVER $75,000

Primary: 2 of 33

KERTTULA, JALMAR	$109,200
COGHILL, JOHN	78,000

General: 1 of 21

KERTTULA, JALMAR	$104,200

TOTAL: 7 of 33 (21%)

KERTTULA, JALMAR	$213,400
LACHER, BARBARA	113,500
FLOOD, JOE	117,600
JOSEPHSON, JOE	100,400
WARD, JERRY	78,600
COGHILL, JOHN	99,500
BENNETT, DON	115,300

1984 HOUSE EXPENDITURES OVER $50,000

Primary: 1 of 137

PIGNALBERI, MARCO	$ 60,700

General: 4 of 79

SZYMANSKI, MIKE	$ 64,500
PEARCE, DRUE	65,500
COWDERY, JOHN	66,800
PIGNALBERI, MARCO	57,100

TOTAL: 16 of 137 (12%)

OBORN, PAXTON	$ 59,200
SZYMANSKI, MIKE	105,000
BRUCE, KEVIN	73,400
RIEGER, STEVEN	62,000
LYOU, CHRIS	74,800
PEARCE, DRUE	114,500
BOUCHER, HENRY	75,100
COWDERY, JOHN	115,900
COLLINS, VIRGINIA	60,100
MCKINNON, MARY	54,300
GRUENBERG, MAX JR.	57,000
UEHLING, RICK	86,600
POURCHOT, PAT	63,100
PIGNALBERI, MARCO	117,800
COTTON, SAMUEL	59,300
KOPONEN, NIILO	54,200

1984 HOUSE EXPENDITURES OVER $25,000

Primary: 16 of 137

OBORN, PAXTON	$ 31,700
SZYMANSKI, MIKE	40,500
BRUCE, KEVIN	41,300
LYOU, CHRIS	32,100
PEARCE, DRUE	49,000
BOUCHER, HENRY	40,700
COWDERY, JOHN	49,100
COLLINS, VIRGINIA	32,900
DONLEY, DAVID	25,700
MCKINNON, MARY	25,900
UEHLING, RICK	47,200
BARNES, RAMONA	41,300
PIGNALBERI, MARCO	60,700
HURLEY, KATHERINE	25,900
FRANK, STEPHEN	25,600
ADAMS, AL	27,900

GENERAL: 22 of 79

OBORN, PAXTON	$ 27,500
SZYMANSKI, MIKE	64,500
BRUCE, KEVIN	32,100
RIEGER, STEVEN	39,600
LYOU, CHRIS	42,700
PEARCE, DRUE	65,500
BOUCHER, HENRY	34,400
COWDERY, JOHN	66,800
COLLINS, VIRGINIA	27,200
MUNSON, JOYCE	30,900
MCKINNON, MARY	28,400
GRUENBERG, MAX JR.	38,300
TISCHER, MAE	26,900
UEHLING, RICK	39,400
POURCHOT, PAT	41,400
PIGNALBERI, MARCO	57,100
COTTON, SAMUEL	34,300
LISKA, JOHN	28,700
NORDALE, JAMES	34,700
KOPONEN, NIILO	41,100
BINKLEY, JOHNE	25,400
RATCLIFF, MARY	29,700

TOTAL: 40 of 137 (29%)

TAYLOR, ROBIN	$ 27,600
ELKINS, JIM	33,100
SUND, JOHN	35,900
SIKORSKI, MERRILL	28,500
OBORN, PAXTON	59,200
SZYMANSKI, MIKE	105,000
HEDDERLY-SMITH, DAVID	38,900
BRUCE, KEVIN	73,400
RIEGER, STEVEN	62,000
LYOU, CHRIS	74,800
PEARCE, DRUE	114,500
HANLEY, ALYCE	26,700
BOUCHER, HENRY	75,100
COWDERY, JOHN	115,900
COLLINS, VIRGINIA	60,100
MUNSON, JOYCE	46,900
DONLEY, DAVID	25,700
MCKINNON, MARY	54,300
GRUENBERG, MAX JR.	57,000
TISCHER, MAE	37,100
RATCLIFF, MARY	34,800
UEHLING, RICK	86,600
POURCHOT, PAT	63,100
WARD, MARGARET	35,300
BARNES, RAMONA	41,300
PIGNALBERI, MARCO	117,800
FURNACE, WALTER	26,000
COTTON, SAMUEL	59,300
LISKA, JOHN	46,200
HURLEY, KATHERINE	44,700
JOHNSON, RICHARD	29,000
BURGER, SAMUEL	28,700
RIBAR, MICHAEL	33,800
FRANK, STEPHEN	49,000
NORDALE, JAMES	42,500
RINGSTAD, JOHN	29,700
COPUS, GARY	26,700
KOPONEN, NIILO	54,200
ADAMS, AL	48,200
BINKLEY, JOHNE	33,100

1984 SENATE EXPENDITURES OVER $50,000

Primary: 3 of 33

KERTTULA, JALMAR	$109,200
COGHILL, JOHN	78,000
BENNETT, CON	61,300

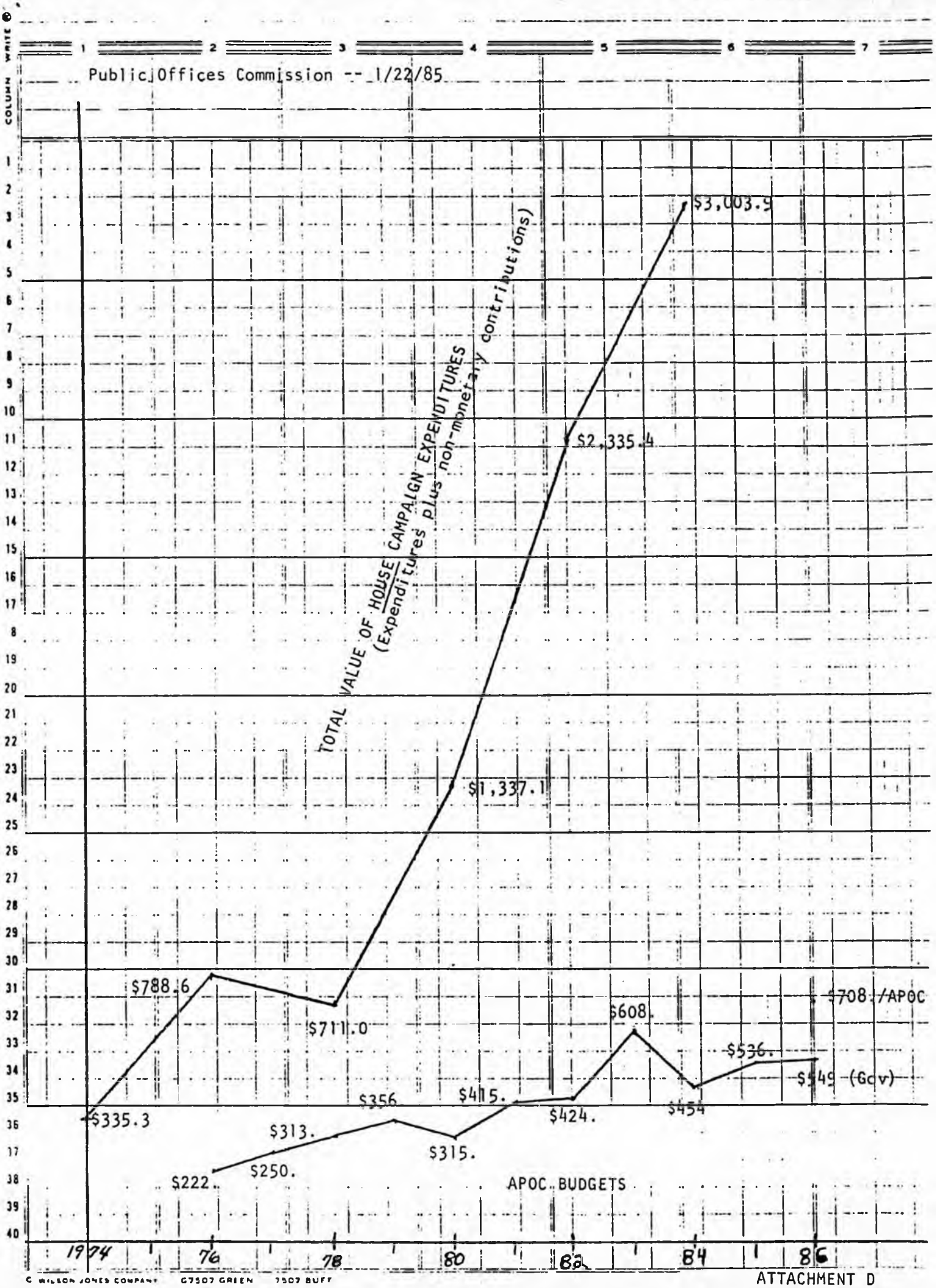
General: 5 of 21

KERTTULA, JALMAR	$104,200
LACHER, BARBARA	71,100
FLOOD, JOE	70,800
JOSEPHSON, JOE	59,800
BENNETT, DON	54,000

TOTAL: 9 of 33 (27%)

KERTTULA, JALMAR	$213,400
LACHER, BARBARA	113,500
SASSARA, CHARLES	68,600
ABOOD, MITCH	72,000
FLOOD, JOE	117,600
JOSEPHSON, JOE	100,400
WARD, JERRY	78,600
COGHILL, JOHN	99,500
BENNETT, DON	115,300

ATTACHMENT C (2 of 2)



ATTACHMENT D

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.

Signature of Camera Operator

9/11/89
Date

02-519 (REV 8/78)


HB
50

HOUSE STATE AFFAIRS COMMITTEE

Bill Number SO Title Alaska Bidder Preference Date Rec'd 1/15/85

Fiscal Note	Position Paper	Date requested	From	Amount	Date Rec'd Note	Date Rec'd Paper
DOA			Gen Servs	-0-	1/4/85	
DOA	2/7 to come		R Burch			

CONTACTS

Grussendorf (Jerry) Sponsor
S. Trivett / Anch. Municipality 6-2401
L. Anderson / Fbks. N-Star Borough 6-1977

BACKUP LIST

- Sponsor letter & Analysis
- DOA Fiscal Note
- H. Research 83-130

HEARING INFORMATION heard 2/14/85

Mary Hallorans representing sponsor
DOA & Labor group to be represented
Pignalberi wants to testify

NOTES:

Muni d'trict notified 2/4/85
Municipality has problem?
2/23 requested CSHB 50(SA) from Legal

FINAL ACTION

passed out CSHB 50 (SAM) 2/26/85

COMMITTEE REPORT

HOUSE

(7)

1/14/85

FURTHER: Finance

Date: 2/26/85

The Committee on State Affairs has had HB 50

"An Act relating to Alaska bidder preference."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[✓] replace with CS for HB 50 (SA) [✓] 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:

CHAIRMAN

Original sponsors: Grussendorf, Sund,
Szymanski and Pignalberi

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 50 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to Alaska bidder preference."

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

* Section 1. AS 37.05 is amended by adding a new section to read:

Sec. 37.05.225. PURPOSE. The legislature finds that there exists in the state continuing high unemployment, underutilization of resident construction and supply firms, and high costs unfavorable to the welfare of Alaskans and to the economic health of the state. The purpose of bidder preference for resident firms when the state acts as a market participant is to encourage local industry, strengthen and stabilize the economy, decrease unemployment, and strengthen the tax and revenue base of the state.

* Sec. 2. AS 37.05.315 is amended by adding a new subsection to read:

(e) If a contract for a project that is funded in whole or in part by a state grant is competitively bid, the municipality may comply with AS 37.05.230(1)(A).

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 50
Title: An act relating to Alaska bidders preference
Sponsor: Grussendorf and Sund
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: All
BRU, Program or Subprogram(s) Affected: All

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

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Robert J. Link Phone: 465-2250
Division: General Services & Supply Date: January 18, 1985

Approved by Commissioner: Lisa Rudd Date: 1/31/85
Agency: Department of Administration

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

HB 50
Fiscal Note Analysis
Prepared by Division of General Services & Supply
Department of Administration
January 18, 1985

This legislation proposes two changes to existing law. First, the current five percent (5%) "handicap" given Alaskan bidders would be raised to ten percent (10%). Second, that preference would apply when a project funded by a grant to a municipality is competitively bid.

Neither of these changes will have an appreciable fiscal impact on the Division of General Services & Supply. It should be noted, however, that there will be impact on agency budgets for commodities and nonprofessional services in that their funds will not have the same buying power under the increased vendor preference.

Additionally, when a project funded by a grant to a municipality is competitively bid, this preference would apply. This change may encourage avoiding that process.

REPRESENTATIVE
BEN GRUSSENDORF

P O Box 928
SITKA, ALASKA 99835
(907) 747-8458

RULES COMMITTEE
LEGISLATIVE COUNCIL

DISTRICT 3
ELFIN COVE
PELICAN
PORT ALEXANDER
SITKA
TENAKEE

Alaska State Legislature

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3824
(907) 465-3720

House of Representatives

SPEAKER OF THE HOUSE

TO WHOM IT MAY CONCERN:

Sectional Analysis of House Bill 50

This bill adds two sections and amends one section of existing law (AS 37.05) as follows:

Section 1. Adds a new section (as 37.05.225) to establish a legislative purpose for having an Alaska bidder's preference.

Section 2. Amends AS 37.05.230 (1)(A) by increasing the current bidder's preference percentage from "....not more than 5 percent higher...." to "....not more than 10 percent higher than the lowest nonresident bidders;..".

Section 3. Adds a subsection (e) to AS 37.05.315 that would allow municipalities using state grant funds for contracts or projects, that are competitively bid, to utilize the bidder's preference in Section 2.

Except for the three sections above, all remaining provisions of AS 37.05 would remain, as is, in existing statutes.

REPRESENTATIVE
BEN GRUSSENDORF

P O Box 928
SITKA, ALASKA 99835
(907) 747-8458

RULES COMMITTEE
LEGISLATIVE COUNCIL

DISTRICT 3
ELFIN COVE
PELICAN
PORT ALEXANDER
SITKA
YENAKEE

Alaska State Legislature

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3824
(907) 465-3720

House of Representatives

SPEAKER OF THE HOUSE

TO WHOM IT CONCERNS:

House Bill 50 would add a section to establish a legislative purpose that is based primarily on economic situations in Alaska. That is, continuous high unemployment and underutilization of resident construction and supply firms. I feel it is important to show that the State of Alaska has a genuine and legitimate purpose in having a bidders preference clause in Alaska statutes and that the Legislature is not just establishing a discriminatory practice.

Increasing the bidders preference allowance from 5 percent higher than the lowest nonresident bidder's to 10 percent should increase the participation by residents in contracts and projects throughout the state. This should in turn have some effect on the high unemployment rate and on local economies.

This bill also adds a provision that would allow municipalities the same opportunity as the state in awarding contracts and projects, that are partially or wholly funded with state funds, utilizing a bidder's preference. This provision should provide for more resident jobs and keep, at least a portion of, state funds flowing into local communities.

This will become increasingly more important as state revenues began declining and fewer projects become available for local areas. The bidder's preference could help ease the impact of reduced construction funds available to local areas.

HB 48, (cont'd)

Introduced January 14 and referred to State Affairs, Judiciary, then Finance.

Campaign Financing (spending limits)

HOUSE BILL NO. 49, by Reps. M. M. Miller and Duncan. Individuals making contributions to candidates would be eligible for a refund of that contribution only if the candidate has filed a statement with the Alaska Public Offices Commission (APOC) agreeing to limit expenditures during the primary and general election. The contributor is not entitled to a tax credit unless gubernatorial candidates limit spending to $750,000, lt. governor to $500,000, state senate candidates to $75,000 and state house candidates to $50,000.

Campaign chairs would be responsible for advising contributor about eligibility for refund. Statements agreeing to limit spending could not be rescinded. Persons violating campaign spending agreement would be guilty of a misdemeanor, and punishable by imprisonment of up to a year and a fine of up to $5,000.

Repeals AS 15.13.070 (f) and (g), campaign expenditure limits currently on the books in Alaska. The statutes note that the Supreme Court decision, Buckley v. Valeo, required invalidation of certain provisions of the Federal Election Campaign Act of 1971 relating to campaign spending limitations since the provisions "... placed substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression. This holding has been accepted as law in Alaska and the expenditure limits in this chapter have not been enforced. ..." Does not provide for an effective date (takes effect 90 days after Governor signs bill).

Introduced January 14 and referred to State Affairs, Judiciary, then Finance.

Alaska Bidder Preference (increasing)

HOUSE BILL NO. 50, by Reps. Grussendorf and Sund. Would require state contracts to be awarded to an Alaska bidder if the bid is not more than 10 percent higher than the lowest nonresident bidder's (current law requires the bid go to an Alaska bidder if the bid is not more than 5 percent higher). Adds a new section that would require a municipality to conform to the Alaska bidder preference requirement. Amends AS 37.05.230 (Competitive Bids) and AS 37.05.315 (Grants to Municipalities). Does not provide for an effective date (takes effect 90 days after Governor signs bill).

Introduced January 14 and referred to State Affairs, then Finance.

Mortgage Loan Reserve Accts.

HOUSE BILL NO. 51, by Reps. Duncan, Sund, Marrou and Gruenberg. See Senate Bill 6, page 2, identical.

Introduced January 14 and referred to the House Special Committee on State Loans, then Finance.

ALASKA CHAPTER

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

POSITION STATEMENT

ON LEGISLATION INCREASING

THE

ALASKA BIDDER PREFERENCE (HB 50)

POSITION PAPER ON HB 50

The Alaska Chapter, Associated General Contractors of America, Inc. (A.G.C.) represents more than 900 member companies, including most of the general contracting companies engaged in Alaska's commercial construction.

A.G.C. is opposed to HB 50 which proposes to raise the Alaska bidder preference percentage, contained in AS 37.05.230, from 5% to 10%. Primarily, A.G.C. opposes any local preference for the construction industry including the existing 5% preference. A.G.C.'s opposition is founded on both practical and philosophical considerations.

From a practical perspective, a preference for local contractors:

- inflates the cost to the owner
- increases the uncertainty in the bidding process
- increases construction bidding requirements
- increases the potential for litigation
- delays the awarding of projects

Further, there is a strong likelihood that such a scheme is unconstitutional. In Attorney Robert Goldberg's recent study submitted to the Department of Labor, pages 50 and 51 state in part:

> ". . . While that court has not decided the constitutionality of the five percent bidder preference in AS 37.05.230, two of the five justices (Rabinowitz and Burke) have already announced that they regard the preference as manifestly unconstitutional because: 'A discrimination between residents and non residents solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses.' Irby-Northface v. Commonwealth Electric Co., 664 P.2d 557, 562 (Alaska 1983) (Rabinowitz, J., concurring), quoting Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975)"

From a philosophical perspective, A.G.C. opposes government regulations of the construction industry. A.G.C. supports the free market, competitive bidding system for awarding construction contracts. This system has stood the test of time as the most economical system for the owner and a fair system for the contractors. Consistency dictates that A.G.C. not seek special regulatory favor for Alaska contractors. Further, a local preference is not consistent with the competition free market system.

Although this legislation has no effect on projects awarded by the Department of Transportation and Public Facilities, it would affect such State agencies as: The Alaska Power Authority, University of Alaska, Department of Corrections, Department of Administration, Pioneer Homes and the Court System. The Alaska Power Authority has experienced bidder preference law suits, including a case that had to be settled by the Supreme Court before the bid could be let. Litigation prior to project award increases the cost and is not in the best interest of the construction industry or the general public.

A 10% bidder preference will unnecessarily and substantially increase the cost of building Alaska's infrastructure. At a time of dwindling oil revenues we suggest that the 10% bidder preference not be approved.

D. Statutory Provisions Governing Public Contracts

Title 36 of the Alaska Statutes, which governs public contracts, includes three chapters granting preferences to Alaskan individuals and businesses. AS 36.10, discussed above, requires preferential hiring of Alaska residents for the performance of public works contracts. AS 36.15 requires the use, wherever practicable, of Alaska forest products in state-funded construction. AS 36.20.010 provides that: "In making purchases or awarding contracts for supplies, commodities or material for an office or institution of this state preference shall be given, whenever practicable, to producers and dealers in the state, price and quality being equal." This provision is implemented in AS 37.05.230(1) which establishes competitive building requirements but provides that "a bid shall be awarded to an Alaska bidder if the bid is not more than five percent higher than the lowest nonresident bidder's..."

The future of these preferences, however, appears uncertain at best. The Superior Court has recently ruled AS 36.10.010 to be violative of the privileges and immunities clause in Francis v. Robison, et al., 3AN 83-9969 Civil, a decision the state is currently appealing to the Alaska Supreme Court. While that court has not decided the constitutionality of the five percent bidder preference in AS 37.05.230, two of the five

justices (Rabinowitz and Burke) have already announced that they regard the preference as manifestly unconstitutional because: "A discrimination between residents and non residents solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses." Irby-Northface v. Commonwealth Electric Co., 664 P.2d 557, 562 (Alaska 1983) (Rabinowitz, J., concurring), quoting Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975).

Conspicuous by their absence from Alaska's public contract statutes are provisions in effect in some jurisdictions permitting or requiring bidding preferences or set-asides for small business and/or minority business enterprises. Nor does Alaska have a statutory requirement that contractors have affirmative action programs, although such requirements are in practice included in some state contracts. As discussed below, measures such as these could serve as constitutionally permissible means of fighting unemployment in Alaska.

E. DOT & PF Affirmative Action Program

One major state agency has made commitments to increase contracting opportunities for minority business enterprises. In 1980, the Department of Transportation and Public Facilities (DOT & PF) entered into a settlement agreement

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

May 5, 1983

MEMORANDUM

TO: Representative Barbara Lacher
Attention: Sarah Robinson

FROM: David Teal
Research Staff

RE: Alaska Bidders' Preference
Research Request 83-130

You asked for information on the bidding process used by the Alaska Power Authority (APA) for the Anchorage-Fairbanks electrical intertie. Sarah Robinson, of your staff, called to modify the request after the Alaska Superior Court ruled that a bid submitted by a joint venture was not entitled to Alaska's five percent resident bidders preference unless all the parties to the joint venture individually qualify for preferential treatment. Sarah limited the scope of the research to an exploration of the potential effects of legislation designed to put the Superior Court decision into law. This memorandum discusses several points related to the bidders preference statute.[1]

Clarity of the Law

Current statutory language concerning eligibility for the resident bidders preference is clear except in the case of joint ventures. The APA has interpreted the language in a way that grants the preference to joint ventures as long as at least one of the partners is eligible for the preference. As you know, the Superior Court ruled on April 1 that this interpretation was incorrect and the Alaska Supreme Court reversed the decision of the Superior Court on April 29. Given the latest legal ruling, your interest in implementing the ruling of the Superior Court can be accomplished only by revising the law to clarify this intent.

---

[1]The relevant language is found in AS 37.05.230.

Practical Application of the Law

Executive-branch contracts for professional services and for procurement of materials go through the Department of Administration. The Division of General Services and Supply handles the bidding process for all contracts which go to bid. Vince Isturis, from that Division, said that joint ventures are rare and that Alaska firms are very competitive even without the five percent preference. He supplied the attached statistical report which shows that the bidders preference altered the outcome of the bidding process in only 2.97 percent of the bid awards in FY 1982.

Contracts for construction of most State facilities are handled by the Department of Transportation and Public Facilities (DOT/PF). According to AS 37.05.230(7), the bidders preference rules do not apply to DOT/PF contracts which are estimated to exceed $5,000. Assistant Attorney General Don McClintock ascribes the exemption to 1) use of federal funds in many projects and 2) former Governor Keith Miller's opinion that local construction firms already enjoy a natural competitive advantage because of their closer proximity to the job.

I spoke with representatives of the University of Alaska, the Legislature, the Court system and the Alaska Power Authority to determine if other state-level public entities apply the resident bidders preference. The University and the APA apply the bidders preference to all contracts, and the court system applies the preference to procurement contracts.

According to Gerald Dubie, manager of materiel operations for the court system, the Judicial branch has used standard forms obtained from DOT/PF for Court system construction contracts. As mentioned above, DOT/PF is exempt from the bidders preference on major construction contracts. The result of using DOT/PF forms is that language related to bidders preference has been omitted from bid requests issued by the Court system.

Myrt Charney, Executive Director of the Legislative Affairs Agency, said that the agency does not necessarily accept the low bid and that no preference is given to Alaska firms. He added that most, if not all, construction projects have been awarded to Alaska firms despite the lack of bidders preference.

Supreme Court Interpretation of the Law

The Supreme Court's interpretation of the bidders preference statute is the broadest possible reading of the law. Page 11 of the Court's ruling points out that the only means by which the legislative purpose of

giving a preference to an Alaska business can be fullfilled when an eligible Alaska business enters a joint venture with an ineligible firm is to grant the preference to the joint venture. The Supreme Court did not rule on whether or not granting preference to Alaska businesses is a constitutional purpose or whether or not the statute is reasonably related to that purpose. However, Justice Rabinowitz and Chief Justice Burke joined in a concurring opinion which stated that the bidders preference is clearly unconstitutional as written.

Constitutional Challenge

The constitutional challenge to the bidders preference legislation is serious. The obvious intent of the legislation is to provide favorable treatment on the basis of residency; under Alaska's constitution, that purpose may not be legitimate. According to Assistant Attorney General Don McClintock, a constitutional challenge has been set up and awaits only a firm willing to litigate.

Ways to Reduce Vunerability to Legal Challenge

Assistant Attorney General Don McClintock suggested several means of reducing the probability that the bidders preference statute would be challenged in court. He said that the sentiment expressed in the concurring opinion which accompanied the recent Supreme Court ruling might be softened somewhat if a preamble which specified intended results were inserted into statute. Mr. McClintock said that favorable treatment based on place of residence is not a legitimate purpose of legislation, but goals such as impact on employment, standard of living, or the general health of the state economy are consistent with the current statutory language and may be less vulnerable to legal challenge.

Mr. McClintock added that demonstrating a need for the bidders preference and providing evidence that the legislation accomplishes its intent might also reduce the probablility of legal challenge and may increase the probability that the bidders preference statute could withstand a legal challenge. Ms. Astrid de Parry, legal counsel for

the University of Alaska, suggested that laws or regulations which define actions necessary to establish a "place of business" in Alaska might also help avoid legal challenges.[2]

Actions that may Increase Vulnerability to Legal Challenge

Dave Eberle, project manager for the APA, and Assistant Attorney General Don McClintock concur that increasing the bidders preference to 15 percent will intensify an already controversial situation. A 15 percent preference might so severely offset profit margins that firms would be forced to set up "shell" offices in Alaska if they expect to win contract awards. Legal disputes over the "place of business" requirement could be expected, and the larger preference could also increase the probability of a challenge on constitutional grounds due to the increased chance that the preference statute would affect the outcome of contract awards.

Mr. Eberle also noted that larger contracts might also increase the legal vulnerability of the bidders preference statute. Larger contracts not only increase the chances that firms will respond as joint ventures, they also increase the probability that a contract award would be worth the expense of a legal challenge. The APA is particularly concerned about contract size because they anticipate putting several multi-million dollar contracts to bid in the next decade.

Revising the law to comply with the more restrictive interpretation of the Superior Court might also increase the vulnerability of the bidders preference to a challenge on constitutional grounds. As Don McClintock points out, more restrictive language would increase the chances that the preference would influence the outcome of contract awards. Justices Rabinowitz and Burke of the Supreme Court have warned that even the liberal interpretation by that court is open to constitutional challenge.

---

[2]The University of Alaska is currently involved in a dispute over eligibility for the five percent bidders preference. The apparent low bidder on a construction project did not meet the "normal" requirements for establishing a place of business in Alaska yet claimed to be eligible for the bidders preference. I can provide more details on this subject if you wish, but you may wish to speak directly with Astrid de Parry. Her phone number is 474-7259.

Cost of the Bidders Preference Statute

It may appear that the cost to the State of the bidders preference is directly related to the amount of the bidders preference. That is, it may seem that a five percent bidders preference costs the State five percent on all contracts and that increasing the preference to 15 percent would triple the cost of preference legislation. The intertie contracts awarded by the APA can be used to demonstrate two points: 1) not all contracts are affected by the bidders preference and 2) even those contracts which are affected by the bidders preference do not cost the State the full five percent which is allowed by law.

There have been 9 procurement contracts awarded for the intertie project. For 6 of the contracts, Alaska firms submitted the low bid so that no bidders preference was involved. One contract went to an out-of-state firm even after application of the bidders preference, and the two remaining contracts were awarded to Alaska firms that beat the manufacturers' bids by virtue of the 5 percent preference. In these cases, the State received the identical product but paid a fee to Alaska firms which then obtained the products from the manufacturer.

In making a contract award for a conductor, the APA paid an additional $60,000 because the low bidder did not qualify for Alaska's five percent bidders preference. According to Joe Perkins, of the APA, the contract award for the conductor was $4.56 million. The $60,000 "premium" paid to the Alaska supplier represents less than .5 percent of the value of the contract. A full 5 percent would have cost the State $225,000.

Through April of 1983, the total value of procurement contract awards for the intertie was $19,461,808. The portion of these awards attributable to the bidders preference is $76,208, or .4 percent of the total contract awards. The Tyee project shows similar results; procurement contract awards total $10,282,600, of which $40,271 (.4 percent) is attributable to the bidders preference. Bidders preference did not affect any construction awards for either project.

The attached statistical report of the Division of General Services and Supplies shows similar results. As mentioned earlier in this memorandum, the statistical report shows that the bidders preference affected the outcome of contract awards in less than three percent of contracts awarded in FY 1982. The amount attributable to bidders preference was $22,754, or .5 percent of the $4.88 million value of contracts awarded in FY 1982.

Potential Impact of the Bidders Preference

You asked what questions might be raised in analyzing a revision of the preference legislation so that it would comply with the Superior Court's interpretation of existing statutes. Although the following questions haven't been fully explored, you may wish to consider them in your deliberation of this issue.

Would a more restrictive interpretation than that of the Supreme Court encourage the growth of small Alaska firms or would it eliminate them from the bidding process because of their inability to handle large contracts? Do joint ventures with larger out-of-state firms provide an opportunity for growth of the smaller Alaska firms or do they simply give the larger firms a cost advantage in the bidding process? Would out-of-state firms cut profit margins in order to obtain work in Alaska and to establish bidders preference on future contracts? Would out-of-state firms establish "shell" offices in Alaska in order to qualify for the bidders preference? What is the best definition of an Alaska firm? Do the benefits of preference legislation outweigh the costs? Are there better ways of accomplishing the desired result?

The questions are especially relevant because of the large-scale projects planned for Alaska and the simultaneous world-wide recession. Alaska has become an attractive market for both manufacturers and construction companies. The APA pointed out that Kanematso-Gosho and other Japanese and Korean trading companies will qualify for the Alaska bidders preference on future contracts. They foresee the day that Alcoa or some other American company which does not qualify for the Alaska bidders preference (but otherwise has the low bid) will lose a contract to a foreign company which qualifies for the preference by virtue of an agent acting in its behalf.

Additional Information

The attached article from the Colorado Law Review discusses preference laws enacted by various states. Although the tone of the article is negative, I believe the information will be useful to you. I have also attached portions of legal briefs for preference legislation which has been upheld by State Courts in Wyoming and Arizona. The Washington statutes have also been upheld by State Courts, but I was unable to obtain a copy of the brief for attachment to this memorandum.

I was also unable to find any reference to the U.S. Supreme Court and its treatment of bidders preference legislation in New Mexico. The Department of Law performed a thorough search of decisions and is fairly

certain that the U.S. Supreme Court has not ruled on any state bidders preference legislation. Don McClintock also pointed out that court decisions on other states' statutes do not have a direct impact on Alaska's ruling because Alaska has a relatively stringent equal protection clause and because the statutory language varies from state to state.

* * *

I hope you find this information useful. If you have additional questions or would like additional material, please contact the agency.

DT

Attachments

MEMORANDUM State of Alaska

TO: George Elgee
Director
Division of General Services & Supply
Department of Administration

DATE: August 5, 1982

FILE NO:

TELEPHONE NO: 465-2250

THRU: Bob Link

FROM:
Robert L. Schofield
Purchasing and Facility Manager
Division of General Services & Supply
Department of Administration

SUBJECT: FY 82 Purchasing Action

The following is a statistical report of business transacted by your Purchasing Section in Juneau and Anchorage. It is more comprehensive and covers fiscal year 1982, July 1, 1981 to June 30, 1982.

PURCHASE REQUISITIONS RECEIVED DURING FY 82

		TOTAL P.R.'s	TOTAL LINE ITEMS
01	Governor	58	96
02	Administration	185	486
03	Law	46	74
04	Revenue	25	56
05	Education	102	1,835
06	Health and Social Services	548	10,569
07	Labor	95	151
08	Commerce and Economic Development	53	92
09	Military Affairs	35	46
10	Natural Resources	187	459
11	Fish and Game	351	1,197
12	Public Safety	177	387
18	Environmental Conservation	59	137
21	Community and Regional Affairs	27	38
25	DOT/PF	447	1,004
30	Ombudsman	0	0
31	Legislative Council	1	1
33	Legislative Audit	1	1
41	Alaska Court System	15	15
	TOTALS -	2,412	16,644

As a result of the above, the following bids (formal and informal) and negotiation were accomplished.

BIDS PUBLISHED FY 82

	FORMAL	INFORMAL	NEG
JULY	22	1	27
AUGUST	22	0	50
SEPTEMBER	26	0	54
OCTOBER	26	0	63
NOVEMBER	35	16	31
DECEMBER	34	13	19
JANUARY	39	0	30
FEBRUARY	27	0	24
MARCH	38	0	75
APRIL	35	0	72
MAY	29	0	35
JUNE	33	0	66
TOTALS -	366	30	546

TOTAL ANCHORAGE AND JUNEAU - 942

Subsequent to the above, purchase orders were issued as follows:

(1) Total number of PURCHASE ORDERS issued to IN-STATE vendors -

TOTAL - 1002

(2) Total DOLLAR VALUE of PURCHASE ORDERS issued to IN-STATE vendors -

TOTAL - $ 24,372,083.25

(3) Total number of PURCHASE ORDERS issued to OUT-OF-STATE vendors -

TOTAL - 406

(4) Total DOLLAR VALUE of PURCHASE ORDERS issued to OUT-OF-STATE vendors -

TOTAL - $ 9,993,085.68

(5) Total COST of AWARDS made as a direct result of 5% BIDDERS PREFERENCE LAW-

TOTAL - $ 22,753.79

This amount is the result of 28 separate awards of which 4 awards were responsible for $ 17,946.35. Balance of $ 4,807.44 resulted from the remaining 24 awards, 24 of which were for less then $ 1,000. The awards based on the 5% bid preference generated $ 4,789,672.91 in in-state business.

The 5% preference made the difference in only 2.97% of the bid awards in FY 82, again emphasizing the highly competetive nature of the Alaskan vendor.

PURCHASE ORDERS ISSUED TO MAJOR STATE METROPOLITAN AREAS - FY 82

Anchorage	782 PO's	=	$ 18,569,441.81
Fairbanks	32 PO's	=	$ 317,594.53
Juneau	127 PO's	=	$ 4,732,420.19
SUB-TOTAL	941 PO's		$ 23,619,456.53
Other Areas	61 PO's	=	$ 752,626.72
TOTAL	1,002 PO's		$ 24,372,083.25

The Purchasing Section issued the following term contract awards, many of which have estimated values.

CONTRACT AWARDS ISSUED DURING FY 82

NO. OF CONTRACT AWARDS	DOLLAR VALUE
TOTAL - 658	TOTAL - $ 65,241,064.46

Of 658 contract awards, 485 were issued to Alaskan firms for a total dollar volume of $ 42,936,690.70.

As an overview, $ 94,411,900.58 or 75% of the $ 125,098,474.00 spent during FY 82 was spent with Alaskan vendors.

JM/je
5/0805-05/GSS1

FIVE PERCENT BID PREFERENCE ANALYSIS
FISCAL 82

$ 212.00	July	Anchorage Juneau	0 1	$ 123.00	January	Anchorage Juneau	0 1
$ 1,396.50	August	Anchorage Juneau	1 2	$ 2,735.00	February	Anchorage Juneau	1 0
$ 87.80	September	Anchorage Juneau	0 2	$ 335.42	March	Anchorage Juneau	1 3
$ 1,067.94	October	Anchorage Juneau	2 2	$13,007.35	April	Anchorage Juneau	1 2
$ 541.50	November	Anchorage Juneau	1 3		May	Anchorage Juneau	0 0
$ 2,539.00	December	Anchorage Juneau	1 1	$ 708.28	June	Anchorage Juneau	1 2

Awarded Alaskan Bidders: TOTAL - $ 4,789,672.91

5% Bid Preference: TOTAL - $ 22,753.79

GRAND TOTAL DOLLAR VOLUME - $ 4,883,543.22

JM/je
5/0805-04/GSS1

IN-STATE AND OUT-OF-STATE PURCHASES
MADE FOR DEPARTMENTS

	Non-Alaska Vendors		Alaska Vendors		Total	
	No.POs	Amount	No.POs	Amount	No.POs	Amount
01 Governor	5	$ 80,659.00	21	$ 132,884.25	26	$ 213,543.25
02 Administration	55	990,176.19	57	1,278,795.93	112	2,268,972.12
03 Law	0	0	9	100,227.32	9	100,227.32
04 Revenue	6	51,927.00	5	28,608.58	11	80,535.58
05 Education	27	254,491.71	76	423,534.98	103	678,026.69
06 Health & Social Services	93	368,353.14	464	1,629,278.39	557	1,997,631.53
07 Labor	6	104,212.80	48	228,919.87	54	333,132.67
08 Commerce & Econ. Develop.	4	144,383.15	15	43,203.34	19	187,586.49
09 Military Affairs	1	29,500.00	4	65,875.00	5	95,375.00
10 Natural Resources	30	1,456,718.38	43	563,935.52	73	2,020,653.90
11 Fish and Game	74	1,139,170.38	83	568,253.72	157	1,707,424.10
12 Public Safety	23	932,043.70	51	978,450.92	74	1,910,494.62
18 Environmental Conserv.	7	94,645.50	6	31,930.29	13	126,575.79
21 Community & Reg'l Affairs	0	0	7	18,645.37	7	18,645.37
25 Transportation	74	4,234,034.18	150	17,561,245.72	224	21,795,279.90
31 Legislative Affairs	0	0	2	1,875.75	1	1,875.75
Total -	405	9,880,315.13	1,041	23,655,664.94	1,445	33,535,980.08

5/0803-07/GSS1

FY'82

BREAKDOWN OF $ AMOUNT OF PO'S:

	How many PO's	$ Amount
0 - $2,500	461	$ 435,938.89
2,501 - 5,000	314	1,147,920.43
5,001 - 10,000	270	1,931,161.80
10,001 - 25,000	200	3,214,251.55
25,001 - 50,000	88	3,083,589.41
50,001 - 100,000	46	4,107,297.75
over $100,000	55	20,445,009.10
	1,434	$34,365,168.93

SUMMARY CHART - FISCAL YEAR 81 vs FISCAL YEAR 82

PURCHASING SECTION ACTIVITY

DOCUMENTS PROCESSED	NUMBER RECEIVED & ISSUED FY-81 TOTAL	NUMBER RECEIVED & ISSUED FY-82 TOTAL	AVERAGE TRANSACTION TIME FY-81 TOTAL	AVERAGE TRANSACTION TIME FY-82 TOTAL	AVERAGE - P.A. PER MONTH FY-81 TOTAL	AVERAGE - P.A. PER MONTH FY-82 TOTAL
PURCHASE REQUISITION	2,445	2,412	21.83			
INVITATION TO BID	1,212	942	10.82			
PURCHASE ORDER	1,879	1,434	16.78		255,954.29	
CONTRACT AWARD	515	658	4.60		319,911.38	
LEASE	119	100	1.06		24,483.19	

CONTRACT AWARDS

	NO. ISSUED FY-81 TOTAL	NO. ISSUED FY-82 TOTAL	TOTAL VALUE FY-81 TOTAL	TOTAL VALUE FY-82 TOTAL
ISSUED TO ALASKAN FIRMS	428	485	$27,133,849.97	$44,547,576.71
ISSUED TO OUT-OF-STATE FIRMS	87	173	8,696,224.65	20,693,487.75
TOTAL	515	658	$35,830,074.62	$65,241,064.46

PURCHASE ORDERS

	NO. ISSUED FY-81 TOTAL	NO. ISSUED FY-82 TOTAL	TOTAL VALUE FY-81 TOTAL	TOTAL VALUE FY-82 TOTAL
ISSUED TO ALASKAN FIRMS	1,272	1,002	$17,875,744.67	$24,372,083.25
ISSUED TO OUT-OF-STATE FIRMS	607	406	10,791,135.26	9,993,085.68
TOTAL	1,879	1,408	$28,666,879.93	$34,365,168.93

LEASES

	FY-82 TOTAL	TOTAL VALUE	FY-82 TOTAL
NO. LEASES ISSUED:	100		$25,492,240.62

	FISCAL 1981	FISCAL 1982
GRAND TOTAL DOLLAR AMOUNT:	$67,239,071.77	$125,098,474.00

JM/dlr

Colorado Law Review – Volume 49

COMMENT

IN-STATE PREFERENCES IN PUBLIC CONTRACTING: STATES' RIGHTS VERSUS ECONOMIC SECTIONALISM

Every state, either by statute or by administrative practice, extends some type of special preference to businesses operating within the state when awarding public contracts. The advantage may extend to those who build roads as well as to those who sell pencils to public schools. Although the type of preference granted varies among the states, there are several types which have been widely adopted. It may at first seem reasonable that a state would want to keep tax dollars inside the state by buying from local businesses, but preference laws may have a substantial adverse impact on businesses located in other states. Close analysis also suggest that even states which have in-state preference practices are not actually benefited.

In this effort to analyze and evaluate the validity and desirability of in-state preference laws, their scope and application will be examined first. An assessment then will be made of their overall effects, both on interstate commerce and on the economy of an individual state. In light of those findings, the constitutional validity of preference laws will be discussed in terms of the commerce clause, the fourteenth amendment, and the privileges and immunities clause. Finally, it will be determined whether congressional action could or should directly preempt such laws.

Interstate Variations In Preference Laws

Basic Classifications

In-state preference laws can be divided into five general categories.[1] Perhaps the most controversial type of preference is known as a "percentage" preference. Under such a system, in-state bidders are given a specified advantage over those from other states in the award of public contracts. If, for example, the percentage preference were five percent, a business from out-of-state would have to bid at least five percent lower than any resident before it would be awarded

1. The wide variety of preference laws could be categorized more narrowly or more broadly. For example, statutes which may impose burdens on non-resident contractors other than in bid evaluations, such as additional bonding or prequalification requirements, are not discussed in this Comment. *See* Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126 (1966), *on remand*, 95 N.J. Super. 109, 230 A.2d 176 (1967), *rev'd*, 53 N.J. 71, 248 A.2d 427 (1968).

the contract. At least twelve states,[2] Guam,[3] Puerto Rico,[4] and the Virgin Islands[5] have statutes providing for such preferences, and percentages range from two[6] to nineteen percent.[7] At present Hawaii has the most elaborate statute,[8] but a recently enacted New York law has the potential for even greater administrative complexity.[9]

tie bid

A second group of preference laws are known as "tie bid" preferences. Provided for by statute or administrative practice in at least twenty-eight states,[10] the "tie bid" is the most common type of preference. An in-state bidder is preferred only when its bid is the same as that of a non-resident. Statutes typically provide that quality also must be equal; but, for standardized products, meeting the minimum specifications is all that is normally required of the lowest bidder.

A third general type of in-state preference laws consists of those which are general preferences, with the size of the preference uncer-

---

2. ALA. CODE tit. 55, § 506 (Supp. 1973); ALASKA STAT. § 37.05.230 (1976); ARIZ. REV. STAT. §§ 34-241, 242, 243 (1974); ARK. STAT. ANN. §§ 14-119, 14-6142 (Supp. 1977); HAW. REV. STAT. §§ 103-41 to 103-45, 103-53.5 (1968); IDAHO CODE § 60-103.1b) (Supp. 1977); LA. REV. STAT. ANN. §§ 38:2251, 38:2255 (West 1965); MONT. REV. CODES ANN. §§ 82-1137 (1966), 82-1924 (Supp. 1975); N.M. STAT. ANN. §§ 6-5-32-A, B, and C (1974); N.Y. STATE FIN. LAW §§ 163-174 (McKinney Supp. 1977-78); W. VA. CODE § 5A-3-41 (Supp. 1977); WYO. STAT. §§ 9-664, 9-667, 9-669 (1957).

3. *See* COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING, Appendix A at 8 (1975).

4. P. R. LAWS ANN. tit. 3, § 918b (1965).

5. V. I. CODE ANN. tit. 31, § 236a(b) (1976).

6. *E.g.*, W. VA. CODE § 5A-3-44 (Supp. 1977).

7. HAW. REV. STAT. §§ 103-41 to 43 (1976). Although the maximum preference under these sections is ten percent, Section 103-51 (1976) provides a fifteen percent preference for public printing. Finally, Section 103-53-5 requires that an extra four percent be added to the bids of all non-residents. The four percent addition is justified as an adjustment for a retail excise tax, but such a tax is not assessed in sales to the state. Thus, it appears that the total preference would be nineteen percent for printing, and fourteen percent for many other goods and services.

8. HAW. REV. STAT. §§ 103-41 to 48 (1976) award a preference of three to ten percent, depending on the proportion of manufacturing or production cost that was incurred in Hawaii. A state agency is required to compile a list of Hawaiian products fitting into the various categories, and it is distributed to all public procurement officials in the state.

9. N.Y. STATE FIN. LAW §§ 163-74 (McKinney Supp. 1976-77) provide that the New York State Job Retention Board shall examine "preferential bidding" forms to ensure that "a bidder has substantial economic ties with New York State and/or contributes heavily to the state's economy so that an informed determination can be made as to whether the award of a state contract to the lowest bidder is in the best interest of the state." *Id.* § 163-a. The forms require detailed information about items such as where the products are manufactured, employment of New York residents, and the amount of taxes paid in New York.

10. ALA. CODE tit. 55, §§ 502, 514 (Supp. 1973); ALASKA STAT. § 36.20.010 (1973); ARK. STAT. ANN. § 14-221 (1968); CAL. GOV'T CODE § 4331 (West 1966); COLO. REV. STAT. § 24-30-404(1) (1973); FLA. STAT. ANN. § 287.082 (West 1975); GA. CODE ANN. §§ 40-1903, 1920 (1975), 40-1934 (Supp. 1977); IDAHO CODE § 67-5718 (Supp. 1977); IOWA CODE ANN. § 73.2 (West 1973);

tain.[11] Depending on specific language and administrative interpretations, the preference could range from a tie bid preference to a relatively large percentage preference. Terms such as "comparable,"[12] "in the best interests of the state,"[13] and "as far as may be practicable"[14] are often used in these statutes.

general

A fourth category includes states with an "absolute" preference. Under these laws, certain classes of goods or services must be procured from within the state, sometimes with an exception in very narrow circumstances. Seven states require that some or all public printing be done within the state,[15] and at least thirteen insist that certain categories of public contractors' employees be in-state residents.[16]

absolute

ANN. STAT. § 75-3740 (1969); LA. REV. STAT. ANN. § 38:2184 (West 1968); ME. REV. STAT. tit. 5, § 1816.8 (1964); MICH. STAT. ANN. § 3.395 (1977); MISS. CODE ANN. § 31-7-15 (1972); MO. ANN. STAT. §§ 34.070 (Vernon 1969), 71.140 (Vernon 1949), N.Y. STATE FIN. LAW § 168 (McKinney 1974), N.C. GEN. STAT. § 143-59 (Supp. 1975), N.D. CENT. CODE § 61-21-25 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 6 and § 9 (West 1963), OR. REV. STAT. § 279.021 (1975); S.C. CODE § 1-25 (Supp. 1975), TEX. CIV. CODE ANN. tit. 664-2, § 1 (Vernon 1964); UTAH CODE ANN. § 63-2-50 (1965). Five states, Connecticut, Illinois, Louisiana, Nebraska, and New Hampshire, reported that they had tie bid preferences in COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING Appendix A at A.1 to A.9 (1975). Even without statutory authority, such preferences could be created by administrative regulation or informal practices.

11. IOWA CODE ANN. §§ 18.6 (West Supp. 1977-78), 384.99 (1976); KY. REV. STAT. § 57.285 (Baldwin 1975), LA. REV. STAT. ANN. § 39.173 (West 1968); MASS. ANN. LAWS ch. 7, § 22(17) (Michie Law Co-op 1973), MINN. STAT. ANN. § 16.34 (West 1977); MISS. CODE ANN. § 19-13-107 (1972); MO. ANN. STAT. § 8.280 (Vernon 1969); MONT. REV. CODES ANN. § 82-1926 (Supp. 1977); NEV. REV. STAT. § 333.160-2 (1973); N.J. STAT. ANN. § 52:25-23 (West Cum. Supp. 1977-78); N.Y. STATE FIN. LAW § 164.9 (McKinney Supp. 1976-77); N.D. CENT. CODE §§ 48-02-10 to 10.2 (1960); OKLA. STAT. ANN. tit. 74, § 85.3(7) (West 1963), tit. 74, § 85.3 (West Cum. Supp. 1977-78); S.C. CODE § 1-21, 22 (1962), S.D. COMPILED LAWS ANN. § 5-19-1 (1974); TENN. CODE ANN. §§ 12-348, 349 (Supp. 1977), 12.301 (1973); VT. STAT. ANN. tit. 29, § 903(a) (1970); VA. CODE § 2.1-284 (1973); WIS. STAT. ANN. § 16.75(1)(a) (West Cum. Supp. 1977-78); WYO. STAT. § 9-066 (1957); *see also* P.R. LAWS ANN. tit. 3, § 915a (1), (1965).

12. E.g., IOWA CODE ANN. § 18.6 (West Supp. 1977-78); MONT. REV. CODES ANN. § 82-1926 (1947).

13. E.g., IOWA CODE ANN. § 384.99 (West 1976); VT. STAT. ANN. tit. 29, § 903(a) (1970); *see also* N.Y. STATE FIN. LAW § 163-a (McKinney Supp. 1977-78) where such language was the justification for an addition to the statute which authorized as much as a 10% preference.

14. E.g., KY. REV. STAT. § 57.285 (Baldwin 1975); LA. REV. STAT. ANN. § 39:173 (West 1968); NEV. REV. STAT. § 333.160-2 (1973); VA. CODE § 2.1-252 (1973).

15. FLA. STAT. ANN. §§ 283.03, 287.102 (West 1975); IND. CODE ANN. § 4-13-4-8 (Burns 1974); MONT. REV. CODE ANN. § 16-1230 (1947); NEV. REV. STAT. § 269.070 (1975); N.J. STAT. ANN. § 52:36-3 (West 1955); OHIO REV. CODE ANN. § 125.56 (Page 1978); OR. REV. STAT. § 282.210(1) (1975).

16. ALASKA STAT. § 36.10.010 (1973); ARK. STAT. ANN. § 14-807 (1968); COLO. REV. STAT. § 43-2-208 (1973); CONN. GEN. STAT. ANN. §§ 31-52(a), 52a (1958); DEL. CODE tit. 29, § 6913 (1974); IOWA CODE ANN. § 73.3 (West Supp. 1977-78); LA. REV. STAT. ANN. § 38:2185 (West 1968); MISS. CODE ANN. §

Four states have absolute requirements that certain goods be procured from within the state.[17]

Finally, fourteen states have "reciprocal" in-state preferences laws.[18] Clearly enacted in retaliation to preference practices in other states, these statutes only prefer residents against those from states with preference laws. As might be expected, the size of the preference is determined by that preference imposed against an out-of-state bidder in the non-resident's home state. For example, for a number of years Pennsylvania has had a statute which forbids *any* procurement from residents of states with "absolute" preference laws.[19] Its strict enforcement in the middle sixties is credited with the repeal of preference laws in several eastern states.[20]

reciprocal

interesting. Foreign R.

Diversity in Application

Even within each of the five basic categories discussed above there are broad variations in the scope and method of administration of in-state preference laws. While most preferences are mandatory,[21] a few may be invoked or disregarded at the option of the purchasing

---

31-5-17 (1972); N.D. CENT. CODE § 43-07-20 (Supp. 1977); S.D. COMPILED LAWS ANN. § 5-19-6 (1974); TEX. REV. CIV. STAT. ANN. art. 667-4p, §1 (Vernon 1977); VT. STAT. ANN. tit. 19, § 27 (1968); WYO. STAT. § 9-680-3 (Supp. 1975).

17. ALASKA STAT. § 36.15.010 (1973) (timber and lumber products used in state-financed projects must be grown or produced in Alaska); N.M. STAT. ANN. § 6-6-5 (1953) (public works contractors must use materials from New Mexico unless there is evidence of price fixing); R.I. GEN. LAWS § 37-2-5 (1956) (food products grown in Rhode Island must be purchased for state institutions at prevailing market prices); S.D. COMPILED LAWS ANN. § 5-23-2 (1974) (all state purchasing or leases of motor vehicles must be from dealers licensed in the state).

18. ILL. ANN. STAT. ch. 127, § 132.6e (Smith-Hurd Supp. 1977); KAN. STAT. § 75-3740a (Supp. 1976); LA. REV. STAT. ANN. § 38:2221A (West Cum. Supp. 1977); MINN. STAT. ANN. § 16.365-1 (West 1977); MISS. CODE ANN. § 31-7-47 (1972); NEB. REV. STAT. § 73-101.01 (1943); N.D. CENT. CODE § 44-08-01 (Supp. 1977); OKLA. STAT. ANN. tit. 61, § 14 (West Cum. Supp. 1977-78), tit. 74, § 85.17 (West 1965); PA. STAT. ANN. tit. 71, § 203 (Purdon 1962); S.D. COMPILED LAWS ANN. § 5-19-3 (1974); VA. CODE § 11-20-1 (1973); WASH. REV. CODE ANN. § 39-16-005 (Supp. 1976); WIS. STAT. ANN. § 35-012 (West Supp. 1977-78); WYO. STAT. § 9-667 (1957).

19. PA. STAT. ANN. tit. 71, § 203 (Purdon 1962). It is ironic that a provision intended to discourage preference laws in other states might itself be challenged as unconstitutional. Although the constitutional issues are not directly under attack, the application of § 203 is being challenged in Lutz Appellate Printers, Inc. v. Commonwealth of Pa. Dept. of Property and Supplies, 370 A.2d 1210 (Pa. 1977) (affirming the denial of New Jersey printer's request for a preliminary injunction).

20. *See* COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, REPORT TO THE NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS: "The In-State Preference Story" (September 1966).

21. *E.g.*, COLO. REV. STAT. § 24-30-404(1) (1973); NEB. REV. STAT. § 73-101.01 (1943).

or contracting official.[22] Others require that the residents request a preference before the bids are opened.[23]

Many preferences are extended to businesses which are residents of the state,[24] but an almost equal number apply only to products manufactured or produced, or services performed in the state.[25] Some extend to either or both.[26] Definitions of residency and domestic production vary widely, and often reflect an effort to curb the ingenuity of those who seek to evade such laws.[27]

Another important variable in the application of preference statutes involves the types of contracts or purchases subject to the in-state preference. Most laws apply only to contracts made through a state procurement official.[28] Many preference statutes, however, apply to all public contracts entered into by all levels of government.[29] A few statutes, on the other hand, apply only to very narrow categories of public procurement.[30]

The Effect of In-State Preferences

Assessment of the impact of in-state preference laws on interstate commerce and on the economies of individual states is a necessary prerequisite to the evaluation of their constitutionality and desirability. The task is complicated by the lack of data on the impact of such laws, as well as by the difficulty of determining the preference practices of local governments.

Burden on Interstate Commerce

Each time a contract is awarded to a resident because of an in-state preference, what otherwise would have been interstate com-

22. *E.g.*, Md. Ann. Code art. 41, § 231-I (1957). N.Y. State Fin. Law § 163-a (McKinney Supp. 1977-78).

23. *E.g.*, Ark. Stat. Ann. § 14-119 (1968); N.Y. State Fin. Law § 163-a McKinney Supp. 1977-78).

24. *E.g.*, Colo. Rev. Stat. § 24-30-404(1) (1973), Kan. Stat. §§ 75-3740 (1967), 37-10a (Supp. 1976); Wyo. Stat. §§ 9-664 to 667 (1957).

25. *E.g.*, Fla. Stat. Ann. § 287.082 (West 1975); Wyo. Stat. § 9-669 (1957). For simplicity, the term "resident" will be used to refer to both types of preferences.

26. *E.g.*, Mont. Rev. Codes Ann. § 82-1920 (Supp. 1977); Nev. Rev. Stat. § 333.400 (1975); N.Y. State Fin. Law § 163-a (McKinney Supp. 1977-78).

27. *E.g.*, Mont. Rev. Codes Ann. § 82.1925 (Supp. 1977) provides that a business will be prima facie eligible for a preference after one year in the state, but it may be disqualified if the public procurement official finds that the business is a wholly owned subsidiary of a foreign corporation, or if it was formed for the purpose of circumventing the residency requirement.

28. *E.g.*, Colo. Rev. Stat. § 24-30-404(1) (1973); Me. Rev. Stat. tit. 5, § 1816 (1964).

29. *E.g.*, Cal. Gov't Code § 4331 (West 1966), Kan. Stat. § 75-3740 (1969).

30. *E.g.*, Iowa Code Ann. § 73.1 (West 1973) (coal produced in Iowa must be used by state government); Vt. Stat. Ann. tit. 19, § 27 (1968) (trucks owned in Vermont must be used in highway construction).

merce is reduced by an amount equal to the value of that contract. At the heart of the success of our national economy is the protection of free trade between the states. The removal of virtually all interstate trade barriers in the private sector has allowed greater efficiency and productivity through specialization, raising the standard of living for the nation as a whole. In the public sector, on the other hand, preference laws force a reduction in the flow of interstate commerce. As a result, the cost to taxpayers of a given level of governmental goods and services is correspondingly increased.

Any preference which gives in-state bidders an affirmative advantage operates essentially as a tariff on out-of-state goods in the public sector market.[31] The size of a percentage preference would be the amount of the tariff. Similarly, an absolute preference is the functional equivalent of an embargo on foreign goods. Tie bid preferences are rarely used in contract awards, but widespread enaction of tie bid preference laws may indicate a substantial total impact on commerce. Although the impact on interstate commerce will vary depending on the degree of potential competition from businesses in surrounding states, the impact will be more severe when a stronger preference is in effect.

In 1976, state and local spending was $246.2 billion,[32] and purchases alone amounted to $102 billion.[33] With statutes or practices in every state overtly intended to prefer residents for much of that public spending, the overall impact on interstate commerce is surely substantial.[34] Preference practices may be more prevalent on the local

31. Although no actual charge is made on goods from other states, the nonresident business must underbid residents by more than the amount of the preference before it will be awarded the contract. The competitive disadvantage is identical whether a tariff or a preference is imposed, since certain categories of resident businesses are "protected" at the expense of non-residents.

32. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, 57 SURVEY OF CURRENT BUSINESS No. 9 (Sept. 1977).

33. *Id.*

34. Although it is difficult if not impossible to precisely calculate to what extent interstate commerce would be increased if such trade barriers in governmental procurement were eliminated, the amount is surely at least several billion dollars per year. In a closely related area, it has been estimated that the federal government's policy of procuring from domestic firms (the "Buy American policy") reduced expected imports in the public sector by $0-$5%. Lowinger, *Discrimination in Government Procurement of Foreign Goods in the U.S. and Western Europe*, 42 S. ECON. J. 451 (1976). Although most in-state preferences are not as strong as the 50% preference reportedly imposed by the Department of Defense during this period, there is normally far more trade between states than there is with other countries. The burden on commerce is diminished to the extent that public officials, particularly at the local level, may be unaware of statutory requirements; but misunderstanding may also result in overapplication of the preference. *See* D. MINGE, EFFECT OF LAW ON COUNTY AND MUNICIPAL EXPENDITURES 119 (1975). Criminal penalties for an infraction probably encourage broader interpretations, especially when the preference laws are ambiguous in the first place. A majority of the states provide criminal penalties for

level than on the state level,[35] adding further to the impact on interstate commerce.

The impact of in-state preferences may also be manifested in subtle ways. A strong policy of favoring local bidders could encourage a procurement official to reject all bids when an outsider submits the lowest one.[36] If the contract is rebid, a nonresident may simply become discouraged and withdraw from the competition. The frustration of competing against residents who are protected by an in-state preference practice will cause some contractors to stop bidding entirely for contracts in that state. In addition, a combination of such factors might induce the procurement official to be less aggressive in soliciting bids from out-of-state. Thus, the total impact on commerce may be far greater than statutory provisions would indicate.

Finally, preference laws may generate animosity between states that extends beyond public procurement. The commercial feud between the states is even older than the union,[37] and preference laws may only be another battle in that war. Reciprocal preferences are an overt form of counterattack.

Costs and Benefits to Individual States

Despite widespread disparagement by purchasing organizations and others,[38] there are many supporters of preference laws, often

---

procurement officials who do not honor local preference statutes. *E.g.*, ARIZ. REV. STAT. § 34-246 (1974); ARK. STAT. ANN. § 14-625 (1968).

35. *See* Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 140 (1940); COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING 26 (1974).

36. Most states give purchasing officials discretionary power to reject all bids, often for reasons such as "when in the best interests of the state," which makes this discretion virtually unlimited. *E.g.*, LA. REV. STAT. ANN. § 38:2255 (West Supp. 1978); VT. STAT. ANN. tit. 29, § 903 (1970). The practice can easily be exercised in a manner which will effectively exclude non-local suppliers. *Cf.* UTAH CODE ANN. § 63-2-50 (1953) (residents are given a second opportunity to underbid non-residents in certain circumstances).

37. It is widely agreed that one of the principle failures of the Articles of Confederation was the absence of a prohibition on tariffs and other barriers to trade between the states. *See* C. Beard, *Forty-Eight Sovereigns*, *reprinted in* J. JOHNSON, INTERSTATE TRADE BARRIERS 178-80 (1940).

38. *See* COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL PURCHASING 9.4 (1975); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10, 49-67 (1965); Comment, *Competitive Bidding on Public Works in Wyoming: Determinations of Responsibility and Preference*, 11 LAND & WATER L. REV. 243 (1976); Comment, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576 (1973). A large number of preference laws and related trade barriers were enacted during the depression, and a flurry of criticism was generated in the late thirties and early forties. *See* COUNCIL OF STATE GOVERNMENTS, TRADE BARRIERS AMONG THE STATES: PROCEEDINGS OF THE NATIONAL CONFERENCE ON INTERSTATE TRADE BARRIERS (1939); J. JOHNSON, INTERSTATE TRADE BARRIERS (1940); E. MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE

among business and labor organizations in individual states.[39] It could be conceded that purchasing costs will be increased, but argued that procurement officials take too narrow a view of the role played by preference laws. As with many types of special preferences,[40] other socio-economic goals are sought through such laws.

Older cases sometimes stated that public purchases involved the expenditure of funds specially entrusted by the taxpayers to procurement officials.[41] As such, there was a *duty* to spend the funds inside the state. This theory was based upon the questionable assumption that people of the state were benefited when purchases were made from residents. Although the assertion may have merit in terms of federalism, it says nothing about the actual benefits flowing from a policy of in-state preference.

With spurious justifications set aside, it is clear that the primary purpose of preference laws is to protect local public contractors.[42] It is felt that spending tax revenues within the state will promote new industry, reduce unemployment, and eventually increase the tax base of the state. In addition, profits made on the transaction by local businesses will be taxed by the state, thus "offsetting" the higher pur-

---

COMMERCE IN THE UNITED STATES (1937). Trade publications uniformly condemn such laws. *E.g.*, R. FOWLES, GOVERNMENTAL PURCHASING 178-80 (1929); C. JENNINGS, STATE PURCHASING 96-7 (1969); NATIONAL ASSOCIATION OF STATE PURCHASING OFFICIALS, COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, IN-STATE PREFERENCES IN PUBLIC PURCHASING 1 (1970): "A policy of in-state preference in public purchasing is a bad policy, a shortsighted policy, and worse, bad governmental purchasing." The Council of State Governments and The National Association of State Purchasing Officials have been strongly and actively opposed to preference laws for many years. They have recently been joined by the National Governors Conference through a policy statement denouncing preference laws as anticompetitive and inefficient. N.G.C. POLICY POSITIONS (1976-77).

39. In National Oil and Supply Co., Inc. v. Gray, Civ. No. F.S.-76-73-C (W. D. Ark., filed May 3, 1973) (voluntarily dismissed in 1977 after statutory change), the Arkansas five percent preference was to have been constitutionally challenged. The Arkansas Chapter of Associated General Contractors of America, Inc. successfully intervened as a defendant on April 5, 1977. Labor and management testimony generally favored proposals to strengthen the federal counterpart to preference laws, the "Buy American Act," 41 U.S.C. § 10a (1970). *Proposed Amendments to the Federal "Buy American Act:" Hearings on H. R. 13283 and Related Bills Before the Subcom. on Public Buildings and Grounds of the House Comm. on Public Works*, 92d Cong., 2d Sess. (1972).

40. Procurement preferences exist in many states for small or minority owned businesses, the handicapped, and for prison-made goods. For a partial collection of such laws, see NATIONAL SUBSTANTIVE COMMITTEE ON SOCIO-ECONOMIC POLICIES OF THE COORDINATING COMMITTEE ON A MODEL PROCUREMENT CODE OF THE AMERICAN BAR ASSOCIATION, MODEL PROCUREMENT CODE SOCIO-ECONOMIC PROVISIONS INDEX (1977).

41. People v. Crane, 214 N.Y. 154, 108 N.E. 427 (per Justice Cardozo), *aff'd*, 239 U.S. 195 (1915); Atkin v. Kansas, 191 U.S. 207, 222-23 (1903).

42. Other justifications cited for preference laws are better service or a higher level of responsibility from local businesses. Those factors are indeed important for some contracts, but they can be required in bid specification and applied in a non-discriminatory manner in such cases.

chasing cost. Wages paid to resident workers will also be taxed and spent in the state, generating even more tax revenues and further encouraging the local economy.[43] Such arguments are very appealing on a superficial level, but the complexities of economic theory and the realities of unemployment mandate a closer examination.

As noted previously, in-state preference laws have economic and competitive effects almost identical to tariffs. Also, trade between the states is similar in many respects to trade among nations. Thus, the well-developed economic theory of tariffs is helpful in evaluating the effectiveness[44] of preference laws. Although protectionism continues to have its vocal supporters, economists are virtually unanimous in advocating free trade, except in certain very narrow circumstances.[45] At the heart of their conviction is the theory of comparative advantage.[46]

The theory of comparative advantage begins with the rather obvious assertion that the welfare of every state will increase if it specializes

---

43. At the federal level, it was estimated that each dollar of domestic federal expenditures would yield thirty-six cents in taxes from that transaction alone. *Proposed Amendments to the Federal "Buy American Act:" Hearings on H.R. 13285 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works*, 92d Cong., 2d Sess. 22-24 (1972). According to this analysis, even more tax revenue would be generated through indirect suppliers and their employees and shareholders. The intuitive appeal to this line of reasoning is summed up by a statement sometimes attributed to Abraham Lincoln. "I don't know much about the tariff. But I do know that when I buy a coat from England, I have the coat and England has the money. But when I buy a coat in America, I have the coat and America has the money." See P. SAMUELSON, ECONOMICS 694 (10th ed. 1977).

44. In this section "effectiveness" refers only to the economic advantage to a single state. The Nation as a whole would clearly be better off if such practices did not exist. See text accompanying notes 30-34 *supra*.

45. *See e.g.*, the strong assertion in P. ELLSWORTH, THE INTERNATIONAL ECONOMY 219 (3d ed. 1964):

> *The case for free trade has never been successfully refuted, nor even has an intellectually acceptable argument for long-run, enduring protection, based on economic considerations, ever been devised,* though much ingenuity has gone into the attempt. The arguments for protection that do have validity are either short-run or noneconomic in character, or require the realization of very special conditions. Yet most of the arguments advanced by protectionists are unqualified, asserted with great conviction, and what is more important, are widely believed. (Emphasis supplied.)

See also P. SAMUELSON, ECONOMICS 679-80 (10th ed. 1977); R. WYESTRA, INTRODUCTORY ECONOMICS 650-57 (1971).

46. The theory was originally stated in 1776 by Adam Smith in II THE WEALTH OF NATIONS 29-60 (1909 reprint by Oxford University Press). It has been refined and expanded upon by David Ricardo, PRINCIPLES OF POLITICAL ECONOMY 3d ed. 1821); John Stuart Mill, PRINCIPLES OF POLITICAL ECONOMY, Book III, Ch. XVIII (1848); and countless economists since their time.

It is not entirely clear how fully the theory of comparative advantage applies to trade between the states. Early formulations of the theory assumed there would be many barriers to the flow of resources and labor among nations, but very few within individual countries. But there are at least some trade barriers

in the production of goods which it can produce more efficiently than others. If Michigan is "best" at production of automobiles and California "best" at the production of wine, the consumers of each state are better off if there is free trade in those commodities. Barriers will only increase prices of the goods.

The more significant aspect of comparative advantage is less obvious. The theory also demonstrates that even if a state is inefficient in the production of two commodities relative to another state, trade will still occur, and benefits will be derived for each, if each state produces the goods which it is best at producing. Because other states would have to sacrifice output of their most efficient products to compete with that state, it is said to enjoy a "comparative advantage" over the other states.[47] This point is illustrated by positing a man who is the best lawyer and the best typist in town.[48] If he can charge clients more for his legal work than for his typing, this hypothetical worker can make the most money by spending all his time practicing law, and by hiring someone else to do his typing. In much the same way, trade will occur between states in situations where production costs for any particular traded good would be lower in a single state, but where it is unable to produce enough of the commodity to supply the entire nation.

Although there is room for some doubt,[49] the theory of comparative advantage indicates that preference laws benefit in-state public contractors only at the expense of taxpayers and other businesses. Such laws probably do little to help unemployment,[50] and it has been

---

within the United States, such as transportation costs and restrictive local regulations. Thus, economists agree that the theory of comparative advantage applies to trade between the states. *See* L. Lloyd, Tariffs: The Case for Protection 73 (1975); H. Nourse, Regional Economics 155-60, 226-36 (1968); H. Siebert, Regional Economic Growth: Theory and Policy 84-94 (1969).

47. *See* P. Ellsworth, The International Economy 59-102 (3d ed. 1964).

48. P. Samuelson, Economics 669 (10th ed. 1977).

49. As with all theories, the conclusions of economic theories which advocate free trade are virtually unassailable if their initial assumptions are a reasonable reflection of reality. Fundamental to the theory of comparative advantage is the assumption of full employment. It is assumed that some workers will be displaced by imports in the least efficient industries, but that they will be absorbed into the state's economy as it expands to accommodate the increased demand for goods which other states no longer have the capacity to produce. Economists emphasize that there should be no unemployment, and that today's experience is only a temporary phenomenon. Moreover, it is argued that far more effective and efficient ways exist to deal with unemployment, such as creating jobs through direct programs and improving fiscal and monetary policies. Also, preference laws apply only to a limited sector of the economy, one which may very well not need the special encouragement. *See* P. Stern, The Rape of the Taxpayer 206-227 (1973).

50. The overall economy would be better off if resources were encouraged to flow to the most efficient uses, rather than as a subsidy to relatively inefficient producers. The argument against using preferences to reduce unemployment was summarized by the United States-Japan Trade Council:

found that the income of in-state businesses overall may actually be *reduced*.[51] Thus, the purported economic advantage to a state from preference laws is at best minimal.

There are also several direct and indirect costs associated with preference practices. The major effect of such laws is to increase the cost of government. Indeed, an obvious cost is any amount which must be paid in excess of the lowest bid from non-residents. Many experts feel that prices for public contracts generally rise in the amount of any percentage preference.[52] Regardless of the total costs, the net effect is to distribute extra tax dollars to public contractors at the expense of taxpayers generally—both consumers and other businesses. Any tariff operates as a subsidy for particular industries; and there may be no reason why those who sell their goods and services to the government need or deserve special treatment. In this sense preference laws are similar to a tax reduction enjoyed by only a limited group of businesses.

cost
not here - if not at 5% ceiling; [illegible]
going to 15% will have little effect.

> At best, Buy National policies offer only minimal short-term assistance, and do little to overcome the more fundamental causes of trade imbalance. Rather than subsidize inefficiency, government ought to attack it at its roots. Putting the tax dollars lost by Buy American policies into basic research and development, technological advancement, and worker retraining would help to strengthen the fundamental competitive advantage of U.S. domestic industries. When that advantage is aggressively exploited in the competitive market place the long range benefits in terms of industrial expansion, more jobs, and increased tax revenues will be far greater than any short term benefits to be gained by protecting domestic industries.

Proposed Amendments to the Federal "Buy American Act": Hearings on H. R. 13253 and Related Bills Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works, 92d Cong., 2d Sess. 68 (1972).

51. Richardson, *The Subsidy Aspects of a "Buy American" Policy in Government Purchasing*, in JOINT ECONOMIC COMMITTEE OF THE CONGRESS OF THE UNITED STATES, A COMPENDIUM OF PAPERS, PART 2, INTERNATIONAL SUBSIDIES 220 (1975):

> Regardless of the goal of "Buy American" policy, however, and regardless of whether the policy takes the form of "price favoritism" or "general favoritism," the central conclusion of the analysis of this study is that the policy is always in part self-defeating and may under some circumstances be perverse in its effects.
>
> . . . .
>
> In fact, the possibility that "Buy American" policy actually reduces the income of domestic producers is shown to exist.

The primary reason for such a surprising result is that the protection of a preference law may raise domestic prices in private markets as well as in the public sector. Out-of-state prices could then be forced down to compete in the public sector. As a result, private purchasers may buy the less expensive imports, offsetting or even negating any reduction in imports from governmental purchases. *See id.* at 220-236. Ironically, the laws will *increase* interstate commerce to the extent that this effect occurs.

52. *See* NASPO COMMITTEE ON COMPETITION IN GOVERNMENTAL PURCHASING, *In-State Preference in Public Purchasing* (1965). In this respect, preference laws have the same effect as tariffs, which clearly lead to higher prices. *See* P. ELLSWORTH, THE INTERNATIONAL ECONOMY 215-19 (3d ed. 1964).

There are other adverse effects of preference laws which may be less obvious, but which may be equally significant. As an artificial incentive in the normal market mechanism, a preference law may encourage or force a business to establish two facilities when it normally would have had only one. Not only will there be additional construction and set up costs, but the single plant would probably have been more efficient overall.[53] The extra costs of this inefficiency from two plants will often be passed on to the taxpayers.

In-state preferences also may indirectly produce anticompetitive practices such as bid-rigging and other forms of collusion. Because the laws function essentially as a barrier to entry into the marketplace[54] and will reduce the pool of bidders in other ways,[55] a smaller number of firms will be competing for public contracts. The smaller the number of competitors, the more likely they will engage in collusive or oligopolistic behavior.[56] Indeed, laws which require services, such as public printing, to be performed in a particular county may lead to a single source of supply not unlike a "natural monopoly."[57]

Finally, even the superficially apparent benefits from preference laws will be negated to the extent that surrounding states engage in similar practices. Neighboring jurisdictions have a strong tendency to enact percentage preference laws.[58]

The Constitutionality of In-State Preference Laws

The Commerce Clause

In-state preference laws may be unconstitutional as unreasonable burdens on interstate commerce. As discussed above,[59] preference laws have a significant adverse impact on interstate commerce. Their economic effect is the same as a tariff, and the commerce clause[60]

53. This assumes that the business would be more likely to operate at a level which minimizes its costs if it is subject to fewer external cost barriers, such as local preference practices.

54. Since out-of-state bidders are often excluded entirely or forced to cut costs in order to compete, preference laws are analagous to many traditional barriers to entry. The effect is anticompetitive almost by definition.

55. See text accompanying notes 36-38 *supra*.

56. See McLachlan, *Monopoly and Collusion in Public Procurement: A Survey of Recent American Experience*, 8 Antitrust L. and Econ. Rev. 69, 78-9 (1976).

57. "Natural" monopolies exist where production costs or distribution mechanisms create a natural tendency toward a single supplier. Classic examples are public utilities. Strong local procurement preferences may *artificially* alter the public sector market to a point where only a single firm will be reasonably capable of supplying certain goods or services.

58. Percentage preference laws exist in many of the western states: Alaska, Arizona, Hawaii, Idaho, Montana, New Mexico, and Wyoming. The percentage preferences awarded by Arkansas and Louisiana are offset by each other as well as by the reciprocal provisions in Mississippi and Oklahoma. See notes 2 and 17 *supra*.

59. See text accompanying notes 31-39 *supra*.

60. U.S. Const. art. I, § 8, cl. 3.

was intended to mitigate if not eliminate such burdens on interstate commerce.[61] An anomaly in commerce clause doctrine, however, has generally protected in-state preference laws from successful constitutional attack.

Although commerce clause cases are not always free from inconsistency in their language, several well-accepted general principles have emerged. It is unquestioned that state laws can be invalidated under the commerce clause even absent conflict with congressional action.[62] State laws which overtly discriminate against business from other states are normally held invalid regardless of the state interest being protected. In striking down a New York law designed to protect in-state dairy farmers, Justice Cardozo wrote for a unanimous Court:

> Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing being transported. . . . [I]mposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . [I]f New York in order to promote the economic welfare of her farmers, may guard them against competition with cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . .
>
> Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It 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.[63]

---

61. *See* H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-35 (1949); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 1-10 (1937). As Madison wrote:

> The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less pensive and vexacious to themselves than they are destructive of the general harmony.

Letter by James Madison (1787) (urging that a constitutional convention be called), *reprinted in* Bane, *Interstate Trade Barriers*, 16 IND. L.J. 121 (1940).

62. Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

63. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521-23 (1935).

Many such discriminatory laws were enacted during the depression, but the commerce clause was repeatedly used to protect free trade between the states.[64]

Most of the diversity in the commerce clause cases arises where a state is pursuing a legitimate interest in a manner which affects businesses from other states and impedes the flow of interstate commerce. Such burdens might be upheld if they are found to be indirect,[65] insignificant, not undue,[66] or otherwise non-discriminatory.[67] Recently the Court has overtly recognized that a balancing approach is being used in such cases.[68] The strength of the state interest is weighed against the burden on interstate commerce, and an inquiry is made into less burdensome alternative methods of achieving the desired end.

Numerous state courts have declined to follow the normal commerce clause analysis. There were a large number of unsuccessful challenges to in-state preference laws in the early part of this century.[69] Almost without exception,[70] the laws were upheld. Although the early rationales varied somewhat, the predominant view was that individual states should be free to spend their tax dollars in any manner, without constitutional interference.[71] At that time state expenditures were relatively small,[72] there was less industrial specialization, and transportation between states was more difficult. Thus, the impact on interstate commerce was minimal.

64. *E.g.*, Edwards v. California, 314 U.S. 160 (1941); Best and Co. v. Maxwell, 311 U.S. 454 (1940); Hale v. Bimco Trading Inc., 306 U.S. 375 (1939).

65. Field v. Barber Asphalt Paving Co., 194 U.S. 618 (1904); Atkin v. Kansas, 191 U.S. 207 (1903).

66. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949).

67. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

68. Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333 (1977). Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

69. Denver v. Bossie, 83 Colo. 529, 266 P. 214 (1928); *In re* Gremmill, 20 Idaho 732, 119 P. 298 (1911); State *ex rel.* Collins v. Senatobia Blank Book and Stationary Co., 115 Miss. 254, 76 So. 258 (1917); Allen v. Lapsap, 188 Mo. 692, 87 S.W. 926 (1905); Pasche v. South St. Joseph Town-Site Co., 190 S.W. 30 (Mo. App. 1916); Hersey v. Nelson, 47 Mont. 132, 131 P. 30 (1913).

70. A rare exception was People *ex rel.* Treat v. Coler, 166 N.Y. 144, 59 N.E. 776 (1901), where a statute requiring all stone purchased by New York to be worked in the state was held invalid as a violation of the commerce clause. Unfortunately, the court's language was overbroad, and there was little sound analysis of the commerce problem. Because of language in Atkin v. Kansas, 191 U.S. 207 (1903), which was also probably overbroad, *Coler* has not been followed. *See* People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), *aff'd*, 239 U.S. 195 (1915).

71. *See* Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 901, 906 (1898).

72. In 1902, state and local governments spent only $1.1 billion, and half of that sum was for personal services. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 2 *Historical Statistics of the United States* 1127 (1975). The total had risen to $28 billion by 1950, *id.*, but is currently in excess of $247 billion per year. See note 32 *supra*.

Early decisions justified a departure from established commerce clause doctrine by distinguishing between "governmental" and "proprietary" powers of government.[73] Governmental functions were those in traditional areas of government, such as police and fire protection, and the regulation of private business. On the other hand, proprietary functions were similar to the actions of individuals or businesses, such as hiring or firing employees, and entering into contracts. This distinction had been a fiction of limited usefulness in the areas of sovereign immunity from tort liability[74] and the power to make long-term contracts.[75] The doctrine has nevertheless continued to serve as a shield for in-state preference laws.[76] Early cases used unpersuasive reasoning in asserting that such state action was immune from constitutional scrutiny altogether, but they were often cited by subsequent courts without discussion.[77] The few discussions that were made simply relied on the proprietary function rationale. Subsequent cases clearly demonstrate that proprietary functions of government are state action and thus subject to the same constitutional limitations as other functions.[78] The proper question should have been whether the burden on commerce imposed by preference laws was of such a nature or degree to constitute a commerce clause violation.

The line of authority upholding preference laws was broken in *Garden State Dairies of Vineland, Inc. v. Sills*.[79] The case involved a New Jersey statute which required businesses selling milk to any state agency to certify that (1) it had purchased from New Jersey suppliers in the prior year at least the amount of milk to be supplied under the contract, and that (2) it would purchase at least that amount in the next year. In its initial opinion the New Jersey Supreme Court acknowledged the line of cases virtually immunizing public contracting from constitutional scrutiny, but it recognized an inconsistency with more recent Supreme Court pronouncements on

---

73. *E.g.*, Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 75 N.W. 904 (1898).

74. Bailey v. Mayor of New York, 3 Hill 531 (N.Y. 1842); Hodgins v. Bay City, 156 Mich. 687, 121 N.W. 274 (1909). Although the distinction is still followed in some jurisdictions, it has been sharply criticized by scholars. *See* W. Prosser, Handbook of the Law of Torts, § 131 at 979-83 (4th ed. 1971).

75. *E.g.*, City of High Point v. Duke Power Co., 120 F.2d 866 (4th Cir. 1941).

76. *See* American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); City of Phoenix v. Super. Ct., 109 Ariz. 533, 514 P.2d 454 (1973); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 601 (1952).

77. *E.g.*, Hersey v. Neilson, 47 Mont. 132, 131 P. 30 (1913).

78. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973).

79. 46 N.J. 349, 217 A.2d 126 (1966), *on remand*, 98 N.J. Super. 109, 236 A.2d 176 (1967), *rev'd*, 53 N.J. 71, 248 A.2d 427 (1968).

the commerce clause."[80] Although many recent Supreme Court cases would indicate per se invalidity for such an overt discrimination,[81] the court held that federalism considerations mandated greater discretion for states in their internal operations. Thus, it held that in-state preferences[82] should be judged by a reasonableness standard rather than a per se rule of invalidity; the inquiry in such cases would be whether the burden was "undue" or unreasonable.[83]

Under the *Sills* standard, statutes which only involved minor interference with commerce, such as tie bid preferences, would be upheld. At the same time, percentage preferences probably would be invalid because of their larger direct and indirect burdens on interstate commerce. Absolute preferences surely would be declared invalid as a prohibition of trade between states. Reciprocal preference laws would present the most difficult question. They are probably invoked less often than percentage or absolute preferences, and are somewhat justifiable as a form of self-defense against unconstitutional laws of other states. Because they present the same type of burden on commerce as percentage preferences, however, they are probably constitutionally invalid.[84]

---

80. 46 N.J. at 338, 217 A.2d at 130.

81. *E.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 301 (1964); *See also*, H. P. Hood and Sons, Inc. v. DuMond, 336 U.S. 525 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders, such has been the doctrine of this Court which has given it reality.

Id. at 526.

82. The statute involved in *Sills* was not a typical in-state preference as the term has been used in this Comment. Its effect, however, was to force in-state production at the expense of producers and distributors from other states, which is almost identical to the effect of preference laws.

83. On remand, the Superior Court found that it was unreasonable to require suppliers to purchase milk from residents in the prior year, but the requirement that a similar amount be purchased in the coming year was upheld. The finding was based on an apparently careful analysis of the New Jersey fluid milk market. 98 N.J. Super. 109, 114-15, 236 A.2d 176, 179-80 (1967). The New Jersey Supreme Court reversed and remanded again, indicating that some additional evidence may establish "significant discouragements of free bidding and additional burdens on interstate commerce." 53 N.J. 71, 74, 248 A.2d 427, 429 (1968). Also, it noted that federal activity in the area may have rendered the statute unnecessary. *Id.* at 75, 248 A.2d at 249.

84. Reciprocal provisions in other types of statutes have typically been upheld against a variety of challenges, but usually only because the legislation of the other state is legitimate. *See* B & L Motor Freight, Inc. v. Heymann, 120 N.J. Super 270, 293 A.2d 711 (1972).

The *Sills* approach was rejected in *American Yearbook Co. v. Askew*,[85] a later case involving a Florida statute which required that all public printing be performed in the state.[86] The attack was by a school yearbook printer which had no printing facilities in Florida. Relying on the older line of cases and the fiction of proprietary power, the court upheld the statute on both equal protection and commerce clause grounds. The court saw merit in the *Sills* holding, but it felt that an *ad hoc* measurement of the impact on commerce would be necessary for each bid. The court, however, misinterpreted *Sills*. The *Sills* court intended that a preference statute would be invalid in its entirety if its overall burden on commerce was unreasonable.[87]

The United States Supreme Court has never issued an opinion on the validity of preference laws.[88] A summary analysis of the recent case of *Hughes v. Alexandria Scrap Corp.*,[89] however, might indicate that in-state preference laws would be found constitutionally valid. The Supreme Court upheld a special program in Maryland which encouraged faster processing of abandoned or wrecked automobile "hulks" in the state. An important element in the success of the program was a provision for clearing titles to the automobiles. A 1974 amendment to the Act[90] withdrew part of the special title clearing device from out-of-state processors. As a result, they challenged the validity of the amendments on commerce clause and equal protection grounds. Since the case involved a state expenditure program with the effect of favoring resident processors, it resembled in-state procurement preference laws. Indeed, the issues were framed in terms of state "purchases,"[91] especially by the dissenters.

---

85. 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

86. FLA. STAT. ANN. § 283.03 (West 1975).

87. Indeed, it would be absurd to examine the impact on commerce from each transaction and to scrutinize the unconstitutionality of the statute as applied to it. The burden on commerce for the purpose of assessing the reasonableness of a statute is the *entire* burden, rather than the effect from a single transaction. It is obvious that individual purchases will most often have only minimal impact.

88. *But see* American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972). The Supreme Court can be expected to give little weight to *Askew*, particularly since it was not fully argued or briefed. *See* Edelman v. Jordan, 415 U.S. 651, 671 (1974) (Court's holding contrary to the results of three summary affirmances in previous four years); *cf.* Hicks v. Miranda, 422 U.S. 332 (1975). *Askew* has not been followed by other courts. *See* Image Carrier Corp. v. Beame, 430 F. Supp. 579, 583 (S.D.N.Y. 1977).

89. 426 U.S. 794 (1976).

90. *See* MD. TRANSP. CODE ANN. § 1-501 (1977).

91. At one point the Court noted that:

> Until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

426 U.S. at 808.

Closer scrutiny, however, suggests some important differences between the Maryland program and in-state preference laws. The Maryland program had motives other than discrimination. Its general goal was to help the environment and aesthetics in the state. Even the 1974 amendments were justifiable as an effort to minimize the dislocation and dishonesty inherent in interstate shipments and easy title clearance. The Court noted that the amendments helped Maryland avoid paying bounties to processors for hulks abandoned in other states.[92]

Also, the majority may well have been implicitly relying on federalism principles and an unspoken balancing approach. Such a viewpoint would emphasize the important role of the states as experimenters with innovative programs, and reflect a desire to encourage states to accomplish laudable goals such as environmental protection.[93] Such a holding is consistent with the rule adopted by *Sills*. Thus, even in light of the dictum in *Hughes*,[94] preference laws should not survive commerce clause scrutiny because they lack any justification as special experiments or programs with non-discriminatory motives.

The Equal Protection Clause

Many cases which involve challenges to preference laws on commerce clause grounds allege violations of the equal protection clause of the fourteenth amendment as well.[95] The analysis should be very

---

92. 426 U.S. at 404-05.

93. Courts have frequently noted reluctance to strike down state legislation which represents a novel approach to a particular problem. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977); Procter and Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975), *cert. denied* 421 U.S. 975 (1975); American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 615, 517 P.2d 691 (1973).

94. *See* note 91 *supra*. The dissenters accurately pointed out that the decision was a retreat from established commerce clause doctrine, 426 U.S. at 817-19, but their concern that the Court was abrogating its role in preserving nationalism and interstate cooperation was overstated. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (unanimous decision striking down a discriminatory New York tax on commerce clause grounds):

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

See also Great Atlantic and Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

95. *E.g.*, American Yeast Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); City of Phoenix v. Super. Ct., 109 Ariz. 533, 514 P.2d 434 (1973); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1952).

different from that under the commerce clause, but, unfortunately, courts too often use only a single rationale.[96]

While the focus of commerce clause scrutiny is on the impact upon interstate commerce, the equal protection clause addresses the rationality of using the classification scheme of the preference statute. Determining whether a preference statute is "rational" will necessarily require balancing the legitimate interests which the state seeks to achieve against the statute's impact upon a particular business or the class of non-resident businesses affected.

Some courts have been reluctant to engage in such a balancing approach. For example, in *American Yearbook Co. v. Askew*,[97] the governmental-proprietary distinction was invoked in support of the broad dictum that "[w]hen the state exercises its proprietary or business power, however, it is subject to no more limitation than a private individual or corporation would be in transacting the same business."[98] The *Askew* court, however, was clearly wrong; all state action will be subject to at least some fourteenth amendment scrutiny.[99]

Even though *Askew* was affirmed by the Supreme Court, it has not been followed by other federal courts.[100] *Askew* was not even cited by the court in *Rayco Construction Co. v. Vorsanger*,[101] in which a three judge court used a traditional equal protection analysis to find that the Arkansas three percent in-state preference statute was unconstitutional. Since the overt purpose of the act was to discriminate against non-resident bidders, the court noted that "the statute would at best be highly suspect whether considered from the standpoint of

96. *See* American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); City of Phoenix v. Super. Ct., 109 Ariz. 533, 514 P.2d 454 (1973); Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 75 N.W. 904 (1898).

97. 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

98. 339 F. Supp. at 721. The only case cited for the proposition that proprietary functions are specially protected, Atkin v. Kansas, 191 U.S. 207 (1903), involved a limitation on congressional power to regulate internal state policies, and not fourteenth amendment issues.

99. *See* Elrod v. Burns, 427 U.S. 347 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973). The flaw in the Court's reasoning is most obvious in cases involving suspect classifications or fundamental rights, but such situations are different from the normal preference law attack only in that there is a higher level of scrutiny. Proper weight can be given to federalism considerations under either standard of review without completely immunizing preference statutes from attack.

100. For example, in Image Carrier Corp. v. Beame, 430 F. Supp. 579, 583 (S.D.N.Y. 1977), the court saw "no justification in the case law, the language of the Amendment, or in reason for restricting the reach of the equal protection clause. Indeed, such a course would be fought with danger to the very principles underpinning the Amendment." The court rejected the *Askew* approach and declared that a New York City practice of not contracting with non-union printers constituted an equal protection violation.

101. 397 F. Supp. 1105 (E.D. Ark. 1975).

the Equal Protection Clause or from the standpoint of the Commerce Clause."[102] The state had attempted to justify the act on a variety of bases, including enhancement of the state's economy and an eventual increase in tax revenues. The court replied, however, that:

> The trouble with that proposition is that its truth is not self-evident, and there is no evidence before us tending to show that the preference has in fact served the fiscal interests of State and local government in Arkansas in any significant way or that it is likely to do so in the future.
>
> On the other hand, it is clear to us what Act 264, including its criteria, is reasonably calculated to do is discourage persons from entering the public contracting field in Arkansas, reduce competition in the field, and substantially increase the cost of public work in this State as it would have done in this case but for our holding.[103]

Once such an overtly discriminatory motive is shown, the burden shifts to the state to prove the legitimacy and rationality of the practice.[104] It is doubtful that a state could establish that attempting to gain an economic advantage at the expense of citizens of other states is a legitimate interest.[105] Normally legislative judgments about disputed economic issues would be entitled to deference by the judiciary, but judicial control is far more important when a state legislature is burdening those from other states. Without supervision by the courts, citizens of other states could protect themselves only through retaliatory measures and other forms of economic warfare.[106] Although tie bid preferences may be justified because of their minimal impact, percentage preference laws would probably be found invalid under the equal protection clause.

Although in-state preference laws which require contractors to employ only residents or citizens for certain public projects involve slightly different considerations, they are also probably unconstitutional under the equal protection clause. Those statutes typically require a period of residency and often both state and United States

---

102. *Id.* at 1111.

103. *Id.* at 1112.

104. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

105. *See* Toomer v. Witsell, 334 U.S. 385 (1948); Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975): "A discrimination between residents and nonresidents based solely on the object of assisting one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses."

106. In Austin v. New Hampshire, 420 U.S. 656 (1975), the Supreme Court used a stricter standard of review in invalidating a New Hampshire tax on nonresident workers because retaliation in their home state would be their only other effective remedy.

citizenship.[107] Two recent cases[108] have declared such laws unconstitutional through the use of a strict scrutiny standard of review. That standard was held to be appropriate because a durational residency requirement may violate the penumbral "right to travel,"[109] and a citizenship requirement may discriminate against resident aliens.[110] Both courts held that the states could still require public contractors to employ only bona fide residents, as long as duration of residency and citizenship were not factors. The rights of the parties before those courts might be adequately protected under such a ruling, but public contractors from other states could be severely harmed.[111] An employer may be able to successfully challenge a resident employment preference under the equal protection clause, but he could not vicariously assert the rights of his employees to obtain a higher standard of review.

The Privileges and Immunities Clause

In-state preference laws could also be challenged based on the privileges and immunities clause.[112] When the state creates a classification based on in-state residency, the privileges and immunities analysis is somewhat similar to that under the equal protection clause.

The case of *Toomer v. Witsell*[113] considered the validity of a group of South Carolina statutes with many similarities to in-state preference laws. One of the sections imposed an annual license fee of $25.00 on shrimp boats owned by residents, and $2,500.00 on nonresidents who were engaged in shrimping off the North Carolina coast.[114] As with preference laws, such statutes discriminate overtly against businesses from other states. Most significant in the opinion is the Court's restatement of the underlying values furthered by the privileges and immunities clause:

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It

107. See note 15 *supra*.

108. Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), *probable jurisdiction noted*, 46 U.S.L.W. 3293 (Oct. 31, 1977); People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill.2d 255, 335 N.E.2d 469 (1975).

109. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

110. *See* Graham v. Richardson, 403 U.S. 365 (1971).

111. A requirement to employ only residents may in practice operate to preclude them from competing for projects in states with such laws. The impact could be particularly severe to the extent that the project required a large proportion of skilled employees, since it would be more difficult to hire such individuals locally for a temporary job.

112. U.S. CONST., art. IV, § 2. The clause provides simply that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

113. 334 U.S. 385 (1948).

114. S. C. CODE ANN. § 3379 (1947).

> was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation . . .
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that State.[115]

Because the degree of discrimination did not bear a close relationship to any valid state objective, the Court found that the licensing scheme violated the privileges and immunities clause.[116]

Toomer, then, stands for the proposition that businesses should be able to compete in other states under substantially the same conditions as residents of those states. The argument which is sometimes asserted that an in-state preference is compensation for lost tax revenues is unconvincing. A state will lose some tax revenues *any* time goods are produced or services performed outside the state. If there is unrestricted free trade among states, specialization in one state will leave a vacuum to be filled by goods which can be best produced elsewhere. Thus, allowing freer trade will increase efficiency and total output, and ultimately *increase* the tax base in each state.[117] The privileges and immunities clause "outlaw[s] classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."[118] Insulation of home-state businesses is simply not a legitimate interest under the privileges and immunities clause.

The Foreign Affairs Theory

In-state preference laws may also be invalid to the extent that they interfere with the broad national power over foreign affairs. Although the power to regulate interstate and foreign commerce is

---

115. 334 U.S. at 395-96 (footnotes omitted).

116. 334 U.S. at 396.

117. It makes no difference that the government is purchasing the goods rather than private businesses. In this area the wisdom of our Nation's founders is amply supported by the latest economic theories. See text accompanying notes 45-58 *supra*.

118. Toomer v. Witsell, 334 U.S. 385, 398 (1948); *but see* People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill.2d 258, 335 N.E.2d 469 (1975), where reducing unemployment was found to be a valid state interest under both the equal protection and the privileges and immunities clauses. Although such a goal appears even more compelling on its surface than the "retention" of tax dollars, in principle it is the same. Reducing unemployment is surely an important state interest, but doing it at the expense of jobs in other states is an activity that the privileges and immunities clause was intended to prohibit.

granted to Congress in the same clause of the Constitution,[119] state activities in the two areas are governed by very different standards. An important and legitimate state interest may justify even substantial burdens on interstate commerce;[120] but in the area of foreign affairs, state regulation which could embarrass or interfere with federal policy is prohibited regardless of the state's interest.[121]

The federal government may legitimately discriminate against businesses from foreign countries. Since 1933 the federal procurement system has pursued a "Buy American" policy,[122] with percentage preferences set by executive order at six to twelve percent.[123] A fifty percent domestic preference was imposed in 1964 for all defense department spending in an effort to assist in balance of payments problems.[124] About one third of the states also have Buy American statutes.[125] Although such laws superficially appear consistent with the federal Buy American program, they are unauthorized and clearly have an adverse effect on foreign trade.[126] Accordingly, California's

119. U.S. CONST. art. I, § 8, cl. 3.

120. *E.g.*, Parker v. Brown, 317 U.S. 341 (1943); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977).

121. U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); U.S. v. Belmont, 301 U.S. 324, 330 (1937); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); *see* B. SCHWARTZ, II A COMMENTARY ON THE CONSTITUTION § 206, at 97-98 (1963). The exclusive power of the federal government over foreign affairs is an implied power inherent in our national system and is broader than the power to regulate commerce or the power to make treaties with foreign nations. Zschernig v. Miller, 389 U.S. 429 (1968); U.S. v. Pink, 315 U.S. 203, 230-34 (1942). Since foreign commerce is included in the broader category of foreign affairs, different standards apply to state interference with interstate as opposed to foreign commerce. *Cf.* Hale v. Bimco Trading Co., 306 U.S. 375 (1939).

122. 47 STAT. 1520 (1933), 41 U.S.C. §§ 10a-d (1970).

123. Exec. Order No. 10582, 19 Fed. Reg. 3983 (1952).

124. Memorandum from Cyrus Vance to Assistant Secretary of Defense, (March 7, 1964), *reprinted in* Trainor, *The Buy American Act: Examination, Analysis, and Comparison*, 64 MIL. L. REV. 101, 120 n.125 (1974). In 1976, defense spending for procurement and other contracting amounted to almost 70% of all federal expenditures other than for personal services. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, 57 *Survey of Current Business* No. 9 (Sept. 1977).

125. *E.g.*, HAWAII REV. STAT. § 103-24 (1976); N.J. STAT. ANN. §§ 52:33-2 (West 1970), OKLA. STAT. ANN. tit. 61, § 51 (West 1955); PA. STAT. ANN. tit. 71, § 637 (Purdon 1962). *See* National Association of State Purchasing Officials Committee on Competition in Government Purchasing, 1963 *Survey of In-State Preference Practices, Domestic vs. Foreign Purchases.*

126. Particularly because state expenditures are presently so large, the interference with foreign policy could be substantial. Indeed, some states have a policy of purchasing *no* foreign goods, even absent statutory authorization. And since restrictive licensing or inspection policies can accomplish similar results, at least some foreign businesses completely withdraw from the competition. *See* Comment, *State "Buy American" Policies—One Vice, Many Voices*, 32 GEO. WASH. L. REV. 584, 586, 604 (1964); Comment, *State Buy-American Statutes: Their Relation to the General Agreement on Tariffs and Trade and the Federal Constitution*, 32 OHIO ST. L.J. 563 (1971).

Buy American law was declared unconstitutional in *Bethlehem Steel Corp. v. Board of Commissioners.*[127]

In-state preference laws accomplish a result similar to Buy American statutes.[128] The resemblance of in-state preference laws to state imposed tariffs is even more striking when such preferences are applied to foreign contractors. Although there may be no direct conflict between most in-state preference laws and the General Agreement on Tariffs and Trade,[129] they lead to inconsistent and often unfair treatment of foreign businesses. Thus, to the extent in-state preference laws interfere with our foreign relations, they represent an invalid exercise of state power.

In-state preference laws, however, are unlikely to be attacked on a foreign affairs theory. Domestic contractors would lack standing to assert the violation, and it is rarely worth the effort for a foreign contractor to bring suit in the United States over such an issue. Also,

---

127. 276 Cal.App.2d 221, 80 Cal. Rptr. 800 (1969).

> The California Buy American Act, in effectively placing an embargo on foreign products, amounts to an usurpation by this state of the power of the federal government to conduct foreign trade policy. That there are prevailing state policies which are served by the retention of such an act is "wholly irrelevant to judicial inquiry . . . ." Only the federal government can fix the price of fair competition when such competition is on an international basis. Foreign Trade is properly a subject of national concern, not state regulation. State regulation can only impede, not foster international trade policies.

Id. at 225-26, 80 Cal. Rptr. at 803; *but cf.* K. S. B. Technical Sales v. No. New Jersey Dist. Water Comm'n, 150 N.J. Super. 555, 376 A.2d 203 (Super. Ct. 1977) (dictum); *aff'd on other grounds*, 151 N. J. Super. 218, 376 A.2d 960 (App. Div.); Am. Institute for Imported Steel v. County of Erie, 58 Misc.2d 1059, 297 N.Y.S.2d 602 (Sup. Ct. 1968), *rev'd on other grounds*, 32 A.2d 251, 302 N.Y.S.2d 61 (1969).

128. California's attorney general later concluded that the in-state preference laws also had an adverse impact on foreign commerce, and he declared that they also were unconstitutional. 53 Op. Att'y Gen. of Cal. 72-73 (1970).

129. 61 Stat. Pt. 5, T.I.A.S. No. 1700 (1947). The agreement (GATT) prohibits state or local governments from imposing any restriction or regulation which results in less favorable treatment for foreign goods than is accorded to domestic or in-state products in any aspect of the distribution, transportation, or selling process. *Id.* at A 19. But another section states:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale.

61 Stat. Pt. 5, 67-68, T.I.A.S. No. 1700 (1947). Thus, most public procurement would be exempt from the GATT requirements, with the exception of purchases for functions such as publicly funded utilities. Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal.App.2d 803, 25 Cal. Rptr. 798 (1962); K. S. B. Technical Sales v. No. New Jersey Dist. Water Supply Comm'n, 151 N.J. Super. 218, 376 A.2d 960 (1977). *See* Note, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STANFORD L. REV. 119 (1964).

more subtle mechanisms could accomplish similar results.[130] Thus, the foreign affairs theory will probably generate only rare litigation.

Preemption

Even if in-state preference laws are not found unconstitutional, federal power over commerce might be invoked to supercede, or preempt, them. Because public contracting is often considered an internal state function, however, federalism considerations and the tenth amendment [131] may limit the reach of the commerce power in such a situation.

Federal regulation of virtually all aspects of business and many state activities has become commonplace in recent times. Indeed, the expansion of uniform national requirements was probably essential to the rapid development and prosperity of our commercial system. There can be no doubt that the relative importance of state governments has been diminished in the process. The need for protection of states' rights, however, was recognized recently by the Supreme Court in *National League of Cities v. Usery*.[132]

Writing for the majority of five, Justice Rehnquist found that the ability to determine wages and hours for state employees were "functions essential to separate and independent existence," so that Congress could not interfere with the states' decisions by extending minimum wage and overtime provisions to them. Important to his conclusion was the finding that the federal requirements would impose substantial financial burdens on the states, so that many programs would have to be cut back, and some even discontinued. In contrast, the absence of in-state preferences would directly reduce the expense of governmental procurement, and might even benefit the overall state economy.[133] Although some of the language in *National League of*

---

130. Many of the practices are informal, unwritten policies of state procurement officials. *See* Note, *State "Buy American" Policies—One Vice, Many Voices*, 32 Geo. Wash. L. Rev. 584, 596 (1964). Also, foreign contractors could be effectively excluded through restrictive bid specifications, excessive bonding requirements, unfair inspections, licensing restrictions, inadequate advertising of bids.

131. U. S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

132. 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)). *National League of Cities* involved a 1974 amendment to the Fair Labor Standards Act which expanded the definition of "employer" to include most state and local governmental agencies. Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 58 (1974) (codified at 29 U.S.C. § 203(d), (s)(5), (k) (1970). This had the effect of making the entire Act applicable to those activities, but the only extension at issue was that of the minimum wage and overtime provisions. 29 U.S.C. §§ 206, 207 (1970).

133. See text accompanying notes 45-58 *supra*.

Cities is broad enough to preclude virtually all federal regulation of state activities,[134] its actual holding appears to be much narrower. Contrary to the fears expressed in Justice Brennan's dissent,[135] the case has not been expanded beyond the narrow factual situation it involved. It has been held that the equal pay provisions of the Fair Labor Standards Act[136] could still be justified under the commerce power since the intrusions are less significant and discrimination cannot be considered an "essential governmental function."[137] Also, the application of Title VII of The Civil Rights Act[138] to the states was upheld by the Court without dissent under section five of the fourteenth amendment.[139] Under such an analysis, discrimination against those from other states could be considered an illegitimate governmental purpose under the commerce clause, the privileges and immunities clause, and perhaps even under the equal protection clause.[140] Thus, the reach of the commerce clause should extend far enough to preempt in-state preference laws.[141]

---

134. *E.g.*, 426 U.S. at 852:

> We hold that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl. 3.

135. 426 U.S. at 858-800, 875.

136. 29 U.S.C. §§ 206(d)(1) (1970).

137. Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976); Usery v. Dallas Ind. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976); Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977). Stating that discrimination is not an important attribute of state sovereignty is somewhat conclusory, but it reflects a judicial conclusion about the weight given to the state's interest when balancing it against national concerns. Such a weighing process was inherent in the *National League of Cities* decision. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L. J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977); Note, *National League of Cities v. Usery: A New Approach to State Sovereignty?*, 48 U. COLO. L. REV. 467 (1977).

138. 42 U.S.C. § 2000e-2(a) (1970).

139. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (per Rehnquist, J.).

140. Some courts have upheld the application of the equal pay provisions of the Fair Labor Standards Act to the states on the basis of section five of the fourteenth amendment instead of on the commerce clause. *See* Usery v. Allegheny County Institution Dist., 544 F.2d 148 (3d Cir. 1976); Usery v. Edward J. Meyer Memorial Hospital, 428 F. Supp. 1368 (W.D.N.Y. 1977).

141. If Congressional power over interstate commerce was sufficient to supercede in-state preference laws, federal administrative action might accomplish a similar result. The Federal Trade Commission has recently been granted broad rulemaking powers, 15 U.S.C.A. § 57a(a)(1)(B) (West Supp. 1976), and the anticompetitive effects of preference laws could readily bring them within the realm of "unfair trade practices" over which the F.T.C. might exercise its jurisdiction. *See* F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). There is some doubt as to whether the states fall within the jurisdiction of the F.T.C. even in its rule-making capacity. *See* California *ex rel.* Christensen v. F.T.C., 549 F.2d 1321 (9th Cir. 1977). But recent activities have begun probing deeper and deeper into anticompetitive activities on the part of states. Rule-making pro-

Conclusion

The wisdom and ultimate efficacy of in-state preference laws are open to serious question. Such laws impose substantial burdens on interstate commerce, and very likely constitute commerce clause violations for that reason. Most would probably not be upheld under a fourteenth amendment attack, and they also appear to violate the privileges and immunities clause. Further, such laws are invalid to the extent that they represent an intrusion by the states into the federal domain of foreign affairs. Finally, preference laws could be directly preempted by action of the federal government through its power over interstate commerce.[142] It is unfortunate that such laws have been so widely enacted, and surprising that they have not been successfully challenged more often.

Donald E. Jordan

---

ceedings or investigations are underway which would effectively invalidate state prohibitions of advertising by sellers of prescription drugs, veterinarians and the eyeglass industry, and the commentators uniformly advocate F.T.C. jurisdiction over anticompetitive state practices. *See* Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 ADMIN. L. REV. 239 (1977); Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L. J. 225; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976).

142. In light of the many attacks which might be made on preference laws, it is sometimes too easy to overlook the fact that they could be modified or repealed at any time by individual states. The American Bar Association Sections on Local Government Law and Public Contract Law are nearly finished with their joint project of drafting a model procurement code. Sections on Local Government Law and Public Contract Law of the American Bar Association, Model Procurement Code, (Preliminary Working Paper No. II 1977). It will represent the "state of the art" in purchasing laws, and will encourage efficiency and competition at all levels of government. The present version of the Code contains the alternatives of a tie bid or a percentage preference. The percentage preference is properly discouraged, and should not be adopted by any state contemplating a reform of their procurement laws.

State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1043, 87 S.Ct. 784, 17 L.Ed.2d 687 (1967).

[6, 7] The fact that Savoy was not present during the replaying of the tapes is not reversible error. Bustamante v. Eyman, 456 F.2d 269 (9th Cir. 1972) held narrowly that in a capital case the defendant's right to be present in the courtroom is constitutional and cannot be waived. However, in less than a capital case it may be harmless error. Therefore Savoy's absence during the replaying of the tape falls under the rule of State v. Bustamante, supra and State v. Cuffo, 12 Ariz.App. 461, 471 P.2d 763 (1970) holding that unless prejudice is shown the error is harmless. No prejudice was shown here.

Affirmed.

HAYS, C. J., CAMERON, V. C. J., and STRUCKMEYER, and HOLOHAN, JJ. concur.

109 Ariz. 533

CITY OF PHOENIX, a political subdivision of the State of Arizona, City of Mesa, a political subdivision of the State of Arizona, and Zurn Engineers, a corporation, Petitioners,

v.

The SUPERIOR COURT of the State of Arizona IN AND FOR the COUNTY OF MARICOPA and Morris Rozar, Judge thereof, and M. M. Sundt Construction Co., an Arizona corporation, Respondents.

No. 11094.

Supreme Court of Arizona,
In Banc.
Sept. 20, 1973.

Special action to prevent the enforcement of the decision of Superior Court which ordered the award of certain construction contract by the city to certain contractor. The Supreme Court, Holohan, J., held, inter alia, that the statute requiring that a contract for public work which would be paid from public funds be let to contractor who has paid certain state and county taxes in case a better bid from nonqualified contractor is less than 5% lower is not unconstitutional as denying equal protection of the laws or as violating the commerce clause of the Federal Constitution.

Relief sought denied.

1. **Commerce ⇨54**
Constitutional Law ⇨211
Municipal Corporations ⇨327

Statute providing, in letting of contracts for expenditure of public funds, for granting of 5% preference to contractors who had paid county and state taxes for two successive years immediately prior to making of bid is not unconstitutional as violating the equal protection provision of the Fourteenth Amendment and the commerce clause of the Federal Constitution. A.R.S. § 34-241, subd. B; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

2. **Municipal Corporations ⇨336(1)**

ceeds of revenue bonds for con- of water treatment plant to sup- estic water for city constituted ic funds" within statute requiring a 5% preference to be given in letting bids on contracts for public work to be paid from public funds in case of contractors who have paid state and county taxes. A.R.S. §§ 9-521 et seq., 9-536, 34-241, subd. B.

See publication Words and Phrases for other judicial constructions and definitions

3. **Statutes ⇨219(1)**

Courts give great weight to opinions of those charged with duty of administering the regulation of a pursuit involving technical expertise.

4. **Appeal and Error ⇨1010.1(6)**

The Supreme Court will not disturb findings of trial court when supported by substantial evidence.

tated 151 A.L.R. 781, 796. In *Liberty Mutual Insurance Company v. Jones*, 344 Mo. 932, 130 S.W.2d 945, 125 A.L.R. 1149 (1939), annotated in 125 A.L.R. 1173, at 1182, it was said that an insurance adjuster should not state or act upon his own opinion as to the legal rights of the insured. Steps taken against the unauthorized practice of law are not primarily for the protection of attorneys but for the protection of the public from potential injury resulting from reliance on laymen for the performance of acts requiring the training, knowledge, and responsibility of a licensed attorney. *Herman v. Prudence Mutual Casualty Company*, 41 Ill.2d 468, 244 N.E.2d 509 (1969).

We, therefore, find an underlying reason why the adjuster would not authorize the contractor to proceed but required Moewes to do that. He was ignorant about materialmen's liens and not in a position to give Moewes any advice in that regard; and, if he had, he might have unlawfully engaged in the practice of law.

In *White v. Hartford Casualty Company*, La.App., 297 So.2d 744 (1974), it was held that a lay adjuster has no duty to advise claimants of the law, citing *Green v. Grain Dealers Mutual Insurance Company*, La. App., 144 So.2d 685 (1962), where it was said a simple inquiry to a Louisiana lawyer would have avoided the difficulty. In the case now before us, it is undisputed that Moewes and the adjuster were equally ignorant of the law of materialmen's liens. There was certainly no evidence that Moewes was deliberately or even, as the basis for an action, constructively lulled into any sense of security. In *Smith v. City of Dallas*, Tex.Civ.App., 425 S.W.2d 467 (1968) it was held an adjuster was under no duty in adjusting a claim to interpret for the claimant a notice provision of the city charter, of which he was not even aware, or even advise claimant to employ an attorney; his duty was to investigate and attempt to settle claims for the insurance company. That is all that the insurance adjuster here was doing.

We conclude and hold that an adjuster for an insurance company, under the circumstances of this case, is under no duty to give an insured the legal advice she claims should have been given.

Affirmed.

GALESBURG CONSTRUCTION COMPANY, INC. OF WYOMING, Plaintiff,

v.

The BOARD OF TRUSTEES OF MEMORIAL HOSPITAL OF CONVERSE COUNTY, Defendant.

No. 5607.

Supreme Court of Wyoming.

March 9, 1982.

A constitutional question was reserved from the District Court of Converse County, William A. Taylor, J., as to whether statute giving preference to residents on public contracts was unconstitutional. The Supreme Court, Raper, J., held that: (1) statute as applied to nonresident corporation did not warrant strict scrutiny analysis, because resident corporation was not a member of a suspect classification, and because the fundamental rights of interstate travel and the right to vote do not extend to a corporation; (2) as applied to nonresident corporation bidding on public contract, statute was not unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, because the purpose of the statute, that is, to encourage local industry, was a legitimate state interest, and because the statute as drawn was rationally related to the advancement of that interest; and (3) argument by nonresident corporation that statute should be declared unconstitutional on a public policy basis would not be considered.

Question answered.

Rooney, J., dissented and filed opinion.