ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5727 HOUSE JUDICIARY

authorized representative)

* Sec. 5. AS 47.45.010(a) is amended to read:

(a) A person who is 65 years of age or over, who resides in the state for at least <u>two years</u> [ONE YEAR] immediately preceding application for a longevity bonus under this chapter may apply to the commissioner of administration for qualification to receive a monthly bonus of $250.

* Sec. 6. AS 47.45.010 is amended by adding a new subsection to read:

(d) If a court finds the durational residency requirement under (a) of this section is invalid and no appeal is pending, the residency requirement is one year. If a court finds the one year residency requirement is invalid and no appeal is pending, the residency requirement is the longest duration permitted by law.

* Sec. . Notwithstanding the amendments to AS 43.23 made by secs. 2 - 4 of this Act, if an individual received a permanent fund dividend for 1990 the individual's eligibility to receive a dividend for 1991 shall be determined under the law as it existed before those amendments.

* Sec. 8. Notwithstanding the amendment to AS 47.45 made by secs. 5 and 6 of this Act, if an individual received a longevity bonus payment for any month during 1990, the individual's eligibility to receive bonus payments during 1991 shall be determined under the law as it existed before that amendment.

* Sec. 9. This Act takes effect January 1, 1991.

6-0107D ✓
Cook
3/7/89

Original sponsors: Donley, Boucher, Bover, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 34 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act establishing durational residency requirements, not to exceed two years, for receipt of the permanent fund dividend and receipt of benefits under the longevity bonus program; and providing for an effective date."

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

* Section 1. FINDINGS. (a) The legislature finds with respect to the permanent fund dividend program that

(1) compared with other states, Alaska has one of the highest ratios of transients to permanent state residents;

(2) a significant number of people from other states come to Alaska to work in temporary or seasonal jobs or on short-term projects;

(3) because of the large number of transients it is very difficult for the state to determine whether a person is actually a resident with the intent to remain in the state;

(4) the permanent fund dividend program is unique to the state and provides generous benefits;

(5) the generous nature of this benefit program creates an inducement for people to claim residency inaccurately;

(6) a two-year residency requirement is a reasonable way to determine bona fide residency for the purposes of eligibility for this benefit program;

(7) a two-year residency requirement will not discourage migration to the state or otherwise interfere with interstate travel;

(8) this program does not involve a basic right under the state or federal constitutions or a basic necessity of life;

(9) a two-year residency requirement will more accurately indicate actual domicile and the intent to remain a resident than the requirement under current law; and

(10) the interest of the state in determining bona fide residence for purposes of this program is at least equal to the interest recognized in Andress v. Baxter, U.S. District Court for the District of Alaska, No. A82-307 Civ., September 8, 1983.

(b) The legislature finds with respect to the longevity bonus program that

(1) the longevity bonus is immediately payable to an applicant upon acceptance into the program;

(2) acceptance into the program is primarily based on a statement from the applicant that the applicant is a resident for the purposes of eligibility for this benefit program and that the applicant intends to remain a resident of the state;

(3) a two-year residency requirement will more accurately indicate actual domicile and the intent to remain a resident than the requirement under current law;

(4) the longevity bonus program is unique to the state and provides generous benefits;

(5) the generous nature of this benefit program creates an inducement for people to claim residency inaccurately;

(6) a two-year residency requirement is a reasonable way to determine bona fide residency for the purposes of eligibility for this benefit program;

(7) the two-year residency requirement will not discourage migration to the state or otherwise interfere with interstate travel;

(8) this program does not involve a basic right under the state or federal constitutions or a basic necessity of life; and

(9) the interest of the state in determining bona fide residence for purposes of this program is at least equal to the interest recognized in Andress v. Baxter, U.S. District Court for the District of Alaska, No. A82-307 Civ., September 8, 1983.

* Sec. 2. AS 43.23.005(a) is amended to read:

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual applies to the department, and if

(1) on the date of application the individual is a state resident;

(2) the individual was a state resident for a period of at least 24 [SIX] consecutive months immediately preceding April 1 of the current dividend year; and

(3) the individual has been physically present in the state at some time during the period beginning July 1 two years before the date of application and ending on the date of application.

* Sec. 3. AS 43.23.005 is amended by adding a new subsection to read:

(e) If a court finds the durational residency requirement under (a)(2) of this section is invalid and no appeal is pending, the residency requirement is one year. If a court finds the one year residency requirement is invalid and no appeal is pending, the residency requirement is the longest duration permitted by law. The department shall change the statement of eligibility under AS 43.23.015(b) as necessary to conform to this subsection.

* Sec. 4. AS 43.23.015(b) is amended to read:

(b) The department shall prescribe and furnish an application form for claiming a permanent fund dividend. The application must

contain a statement of eligibility and a certification of residency in substantially the following form:

I certify that

( ) I am a state resident on the date of this application, I have been a state resident for at least 24 [SIX] months immediately preceding April 1 of the current dividend year, and I have been physically present in the State of Alaska at some time during the period beginning July 1 two years before the date of application and ending on the date of this application; or

( ) (name), the individual on whose behalf I am applying, is a state resident on the date of this application, has been a state resident for at least 24 [SIX] months immediately preceding April 1 of the current dividend year, and has been physically present in the State of Alaska at some time during the period beginning July 1 two years before the date of application and ending on the date of this application.

I understand that a false claim of eligibility to obtain a permanent fund dividend for myself or for another is a criminal offense, that if convicted I will forfeit future dividends, and that I must repay all dividends that have been paid to me. I understand that if I wilfully misrepresent, exercise gross negligence, or recklessly disregard a material fact regarding my eligibility for a permanent fund dividend I will forfeit the dividend, be subject to a civil fine of up to $5,000, and lose my eligibility for the next five dividends. I understand that these penalties are in addition to any criminal penalties imposed.

_____

(signature of individual, parent, guardian, or other

authorized representative)

* Sec. 5. AS 47.45.010(a) is amended to read:

(a) A person who is 65 years of age or over, who resides in the state for at least two years 'ONE YEAR, immediately preceding application for a longevity bonus under this chapter may apply to the commissioner of administration for qualification to receive a monthly bonus of $250.

* Sec. 6. AS 47.45.010 is amended by adding a new subsection to read:

(d) If a court finds the durational residency requirement under (a) of this section is invalid and no appeal is pending, the residency requirement is one year. If a court finds the one year residency requirement is invalid and no appeal is pending, the residency requirement is the longest duration permitted by law.

* Sec. 7. Notwithstanding the amendments to AS 43.23 made by secs. 2 - 4 of this Act, if an individual received a permanent fund dividend for 1990 the individual's eligibility to receive a dividend for 1991 shall be determined under the law as it existed before those amendments.

* Sec. 8. Notwithstanding the amendment to AS 47.45 made by secs. 5 and 6 of this Act, if an individual received a longevity bonus payment for any month during 1990, the individual's eligibility to receive bonus payments during 1991 shall be determined under the law as it existed before that amendment.

* Sec. 9. This Act takes effect January 1, 1991.

Mariun SCHAFER and State of Alaska, Appellants,

v.

Rodney VEST, Appellee.

No. S–289.

Supreme Court of Alaska.

April 27, 1984.

Individual who became resident of state shortly after statehood filed complaint challenging constitutionality of state "longevity bonus program." The Superior Court, First Judicial District, Juneau, Walter L. Carpeneti, J., ruled that the program was unconstitutional, and appeal was taken. The Supreme Court held that state's "longevity bonus program," under which state residents over 65 years of age who had been domiciled in Alaska for 25 consecutive years or more and who were domiciled in Alaska when it was still a territory were paid a monthly cash bonus, violated equal protection provisions of the the United States Constitution.

Affirmed.

Burke, C.J., filed a concurring opinion.

Constitutional Law ⇐234.5
States ⇐123

State's "longevity bonus program," under which state residents over 65 years of age who had been domiciled in Alaska for 25 consecutive years or more and who were domiciled in Alaska when it was still a territory were paid a monthly cash bonus, the purpose of which program was to provide that group of residents with a monetary incentive to continue uninterrupted residency in the state, violated equal protection provisions of the Fourteenth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 14; AS 47.45.010–47.45.170, 47.45.010(a).

Robert M. Maynard, Deborah Vogt, Asst. Attys. Gen., Norman C. Gorsuch, Atty. Gen., Juneau, for appellants.

Mark A. Sandberg, Henry J. Camarot, Camarot, Sandberg & Hunter, Anchorage, for appellee.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

On April 6, 1984, we affirmed summarily a trial court determination that Alaska's Longevity Bonus Program[1] violates the equal protection provisions of the ourteenth amendment to the Constitution of the United States. We now state the reasons for our decision.

The Longevity Bonus Program, created in 1972, pays a monthly cash bonus to qualified Alaska residents.[2] Persons who qualify are those meeting three separate requirements:

1. The individual must be age 65 or over.
2. The individual must have been domiciled in Alaska when it was still a territory (on or before January 3, 1959).
3. The individual must have maintained 25 years of continuous domicile in the state or territory of Alaska.[3]

The sole purpose of the Longevity Bonus Program, according to AS 47.45.170, is to offer and provide qualified Alaskans "an

1. AS 47.45.010—47.45.170.

2. The original legislation provided for a bonus of $100 per month. (§ 1 ch. 205 SLA 1972). In 1976 this amount was increased from $100 to $125 (am § 1 ch. 33 SLA 1976); in 1978 the amount was again increased to $150 (am § 1 ch. 89 SLA 1978); in 1980 the amount was increased to $200 (am § 1 ch. 147 SLA 1980); and in 1981 the amount was raised to its present level of $250 (am § 1 ch. 13 SLA 1981).

3. AS 47.45.010(a).

incentive to continue uninterrupted residency in the state." [4]

Rodney Vest became a resident of the state of Alaska in April, 1959, approximately three months after statehood. On July 6, 1982, he filed a complaint against Marian Schafer, the administrator of the Longevity Bonus Program, and the State of Alaska. At the time he filed suit, Vest was 67 years old. Vest alleged, among other things, that the limiting of the longevity bonus to persons domiciled in the territory on or before January 3, 1959, and who have maintained a continuous 25 year domicile violates his right to equal protection of the law.

On December 17, 1983, the superior court entered a Memorandum of Decision and Order. The superior court ruled that the Longevity Bonus Program was unconstitutional under the equal protection clause of the United States Constitution.[5] The trial court then held that the unconstitutionality of the residency requirements was not severable from the rest of the program.[6] That is, it rejected Vest's argument that the offending provisions could be severed, thereby opening the program to all bona fide Alaska residents over age 65. Accordingly, the trial court enjoined the state from enforcing the Longevity Bonus Program.

The state appeals the superior court's holdings that the 25 year residency requirement and pre-January 3, 1959 domicile requirement violate the equal protection clause of the federal Constitution.

Resolution of this challenge is controlled by the United States Supreme Court's decision in *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (*Zobel III*). There, eight Justices held that Alaska's permanent fund dividend program [7] violated the federal Constitution. The majority opinion of the Court found that the state's objective—"to reward citizens for past contributions"—was "not a legitimate state purpose." 457 U.S. at 63, 102 S.Ct. at 2314, 72 L.Ed.2d at 679. After *Zobel III*, it is clear that the federal Constitution will not tolerate a state benefit program which "creates fixed, permanent distinctions between ... concededly bona fide residents, based on how long they have been in the

4. AS 47.45.170 states:

> *The sole purpose of this chapter is to offer and provide* all law-abiding Alaskans capable of managing their own affairs who have maintained a domicile in the state for at least 25 years and have reached a retirement age of 65, *an incentive to continue uninterrupted residency in the state.* Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. Bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state. The legislature further finds and states that this legislation recognizes the economic hardships suffered by many elderly Alaskans. Alaskans who through their tenacity and perseverance molded Alaska as we know it through skillful application of their talents. These pioneers are the same Alaskans, who in the prime of their life were in effect treated as second-class citizens by the federal government and who paid much of their hard-earned income to a government in which they did not have the right to participate through the power of the ballot. The legislature also is aware of the fact that many of these pioneers have been forced to live out their retirement years in areas far away from the land they loved and nurtured and thereby also suffering, in many cases, the loss of familial relationship with their own kin, an experience that is sad and frustrating to them as well as depriving new generations of Alaskans of the benefits of their wisdom and experience. This legislation hopefully will provide our pioneers with the economic means to remain in and continue to serve their state and to enjoy the opportunity of aiding the new Alaskan in making this state truly "The Great Land."

(Emphasis added).

5. U.S. Const. amend. XIV, § 1. The court found it unnecessary to address Vest's further contention that the program also violates his state equal protection rights, under Alaska Const. art. I, § 1.

6. The statute itself contains a non-severability clause, which specifically prohibits any part of the statute from being enforced if any portion of it is found unconstitutional. *See* § 2, ch. 205, SLA 1972.

7. Under this program, each adult receive[s] one dividend unit for each year of residency subsequent to 1959.

State." 457 U.S. at 59, 102 S.Ct. at 2312, 72 L.Ed.2d at 677.

The purpose of the Longevity Bonus Program is set forth in the Act. AS 47.45.-170.[8] The state's brief extrapolates three purposes from this statute:

1) To provide an incentive for those who qualify to stay in Alaska so as not to deprive new generations of Alaskans of this cultural memory bank.
2) To provide compensation for past hardship suffered in territorial days.
3) To prevent present hardship by providing those who qualify with the economic means to remain in the state.

Despite the state's effort of breaking down the Act's statement of purpose into three parts, the basic purpose of the legislation is to provide a limited group of residents a monetary "incentive to continue uninterrupted residency in the state." AS 47.45.-170. Thus, it creates an exclusive class that is to receive special benefits due to the length of the class member's residence in Alaska. Just like the permanent fund dividend program, the Longevity Bonus Program rewards citizens for past contributions; it "creates fixed, permanent distinctions between ... concededly bona fide residents, based on how long they have been in the State." *Zobel III*, 457 U.S. at 59, 102 S.Ct. at 2312, 72 L.Ed.2d at 677.

Insofar as the first purpose is concerned, the state's basic premise is that the designated bonus recipients suffered a special hardship living here when Alaska was a territory and have a special memory which merits a special award not available to other older Alaskans. It is this supposition that living in territorial Alaska makes an individual entitled to special *legal* stature that is impermissible. The federal Constitution prohibits states from making such determinations. The basic predisposition to take care of one's own—and no one else's—is no longer a permissible goal for a state that has joined the federal union.

This basic tenet of federalism was cogently expressed in *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir.1970). In that case the First Circuit invalidated under equal protection a two year residency requirement for admission to federally-aided, low-rent, public housing projects. In invalidating this residency requirement, the court stated:

> [w]e [do not] believe the goal of promoting provincial prejudices toward long-time residents is cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism.

435 F.2d at 813.

The second purpose the state identifies is "to provide compensation for past hardship suffered in territorial days." *Zobel III*'s basic holding is that rewarding citizens for past contributions is not a legitimate state purpose. *Zobel v. Williams*, 457 U.S. at 63, 102 S.Ct. at 2314, 72 L.Ed.2d at 679. Thus, the purpose of the Act to compensate this select class for past hardship is impermissible.

Finally, we are left with the state's goal of preventing present hardship to a select group of senior citizens. Assuming it was permissible for the state to provide benefits to all bona fide residents over sixty-five, the singling out of residents who were here before 1959 and have resided here for 25 years is not rationally related to the goal of providing assistance to the elderly. As a class, bonus recipients do not suffer more present economic hardship than those senior citizens who do not meet the program's requirements. Accordingly, the Longevity Bonus Program's classification does not survive even the lowest level of judicial scrutiny.

The judgment of the superior court is AFFIRMED.[9]

BURKE, Chief Justice, concurring.

I concur in the court's interpretation of the requirements of the fourteenth amend-

8. AS 47.45.170 is set out in full at note 4, *supra*.

9. We would reach the same result under article I, section 1 of the Alaska Constitution, which provides in part: "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law."

ment, and its decision to affirm the judgment of the superior court. I would base our decision, however, on independent state grounds.

Alaska's founding fathers were not content merely to echo the requirements of the fourteenth amendment, which guarantees all persons "equal protection of the laws." They intended to provide the citizens of this state with broader protection than they are entitled to under the Constitution of the United States. Thus, they adopted a provision that is quite different in its terminology, declaring "that all persons are equal and entitled to equal rights, opportunities, *and* protection under the law." Article I, section 1, Alaska Constitution (emphasis added).

The proceedings of the Alaska Constitutional Convention make it abundantly clear that this difference is one of substance, rather than mere style. Delegate Awes, for example, in explaining this choice of language to the Convention, stated: "We do mean all three [guarantees]. I think [such language] means [people] are entitled to equal rights, equal opportunities, *and* equal protection under the law." 5 Proceedings of the Alaska Constitutional Convention 3863 (February 3, 1956) (emphasis added). Delegate Johnson, phrasing it somewhat differently, stated: "There are two things that are provided for here. One is that all persons are equal under the law and the other is that they are entitled to equal rights and opportunities under the law. They are two separate and distinct things." *Id.* at 1293 (January 5, 1956).

The Longevity Bonus Program, regardless of what might be said in its defense under federal notions of equal protection, fails to provide many citizens of the state with equal rights and opportunities, contrary to the express provisions of article I, section 1. It is intended, in fact, to do just the opposite. Persons who were not domiciled in Alaska prior to January 3, 1959, are automatically and forever barred from sharing in the program's monetary benefits.[1] Even those thus qualified must meet the additional requirement of 25 years of continuous domicile. Thus, the program applies only to a select class, for which one qualifies solely on the basis of the date of his or her arrival in Alaska, followed by a prescribed period of continuous domicile. I see no substantial relationship between these requirements and any legitimate state purpose. *See State v. Erickson*, 574 P.2d 1, 11–12 (Alaska 1978) (equal protection analysis under the Alaska Constitution explained).

Thus, I would affirm the superior court's judgment on the ground that the Longevity Bonus Program violates article I, section 1 of the Alaska Constitution. It does so because it denies Vest and the members of the class rights and opportunities equal to those given to other citizens of the state, for reasons that are impermissible. This is the case whether or not our interpretation of the requirements of the fourteenth amendment is correct, since article I, section 1 provides express guarantees beyond those contained in the fourteenth amendment.

Our duty, as I see it, is to look first to the requirements of the Alaska Constitution. If the protection sought is afforded by that document, it becomes irrelevant whether or not the same protection is provided by the Constitution of the United States.

1. The program in this case is distinguishable from the permanent fund dividend distribution plan that was before us in *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980), *reversed* 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). There, we observed: "Under the terms of the [dividend distribution] program, it is clear that there is no absolute denial. A new resident is immediately eligible for some portion of a dividend; and this new resident's achievement of the level of dividends currently held by a long-term resident . . . is only a matter of delay . . . ." 619 P.2d at 456. In the case at bar, one who was not domiciled in Alaska on or before January 3, 1959 can *never* qualify for receipt of longevity bonus payments.

[457 US 55]

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

v

THOMAS WILLIAMS, Commissioner of Revenue, and ALASKA

457 US 55, 72 L Ed 2d 672, 102 S Ct 2309

[No. 80–1146]

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

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

SUMMARY

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

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

BRENNAN, J., joined by MARSHALL, BLACKMUN, and POWELL, JJ., con-

Briefs of Counsel, p 977, infra.

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

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

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

HEADNOTES

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

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

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

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

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

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

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

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

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

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

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

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

SYLLABUS BY REPORTER OF DECISIONS

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

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

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

(b) Alaska has shown no valid state interests that are rationally served by

the distinctions it makes between citizens who established residence before 1959 and those who have become residents since then. Neither the State's claimed interest in creating a financial incentive for individuals to establish and maintain residence in Alaska nor its claimed interest in assuring prudent management of the Permanent Fund is rationally related to such distinctions. And the State's interest in rewarding citizens for past contributions is not a legitimate state purpose. Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency, and would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

619 P2d 448, reversed and remanded.

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

APPEARANCES OF COUNSEL

Mark A. Sandberg argued the cause for appellants.

Avrum M. Gross argued the cause for appellees.

Briefs of Counsel, p 977, infra.

OPINION OF THE COURT

[457 US 56]

Chief Justice **Burger** delivered the opinion of the Court.

[1a] The question presented on this appeal is whether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence, violates the equal protection rights of newer state citizens. The Alaska Supreme Court sustained the constitutionality of the statute. 619 P2d 448 (1980). We noted probable jurisdiction, 450 US 908, 67 L Ed 2d 331, 101 S Ct 1344 (1981), and stayed the distribution of dividend funds, 449 US 989, 66 L Ed 2d 286, 101 S Ct 524 (1980). We reverse.

I

The 1967 discovery of large oil reserves on state-owned land in the Prudhoe Bay area of Alaska resulted in a windfall to the State. The State, which had a total budget of $124 million in 1969, before the oil revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year.[1] This income will continue, and

[457 US 57]

most likely grow for some years in the future. Recognizing that its mineral reserves, although large, are finite and that the resulting income will not continue in perpetuity, the State took steps to assure that its current good fortune will bring long-range benefits. To accomplish this Alaska in 1976 adopted a constitutional amendment establishing the

1. Alaska Dept. of Revenue, Revenue Sources FY 1981-1983 (Sept. 1981). Includes General Fund unrestricted petroleum revenues of $3.3 billion and petroleum revenues directly deposited in the Permanent Fund in the amount of $400 million. An additional $900 million was transferred from the General Fund to the Permanent Fund in the 1981 fiscal year. The 1980 census reports that Alaska's adult population is 270,265, per capita 1981 oil revenues amount to $13,632 for each adult resident. Petroleum revenues now amount to 69% of the State's total government revenue. Ibid.

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

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

Appellants, residents of Alaska since 1978, brought this suit in 1980 challenging the dividend distribution plan as violative of their right to equal protection guarantees and their constitutional right to migrate to Alaska, to establish residency there and thereafter to enjoy the full rights of Alaska

[457 US 58]

citizenship on the same terms as all other citizens of the State. The Superior Court for Alaska's Third Judicial District granted summary judgment in appellants' favor, holding that the plan violated the rights of interstate travel and equal protection. A divided Alaska Supreme Court reversed and upheld the statute.[2]

II

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

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

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

assure that only persons who had established bona fide residence received rights and benefits provided for residents.

The Alaska statute does not impose any threshold waiting period on those seeking dividend benefits; persons with less

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than a full year of residency are entitled to share in the distribution. Alaska Stat Ann § 43.23.010 (Supp 1981).[4] Nor does the statute purport to establish a test of the bona fides of state residence. Instead, the dividend statute creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.

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

[457 US 60]

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

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4. Section 43.23.010(b) provides:

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

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

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

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

5. The Alaska statute does not simply make distinctions between native-born Alaskans and those who migrate to Alaska from other states; it does not discriminate only against those who have recently exercised the right to travel, as did the statute involved in Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). The Alaska statute also discriminates among long-time residents and even native-born residents. For example, a person born in Alaska in 1962 would have received $100 less than someone who was born in the State in 1960. Of course the native Alaskan born in 1962 would also receive $100 less than the person who moved to the State in 1960.

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

6. [4b] The Alaska courts considered whether the dividend distribution law violated appellants' constitutional right to travel. The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right has remained obscure. See Jones v Helms, 452 US 412, 417–419, and nn 12 and 13, 69 L Ed 2d 118, 101 S Ct 2434 (1981); Shapiro v Thompson, supra, at 629–631, 22 L Ed 2d 600, 89 S Ct 1322; United States v Guest, 383 US 745, 757–759, 16 L Ed 2d 239, 86 S Ct 1170, (1960). See also Z. Chafee, Three Human Rights in the Constitution of 1787, pp 185–193 (1956). In addition to protecting persons against the erection of actual barriers to in-

a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions are subject to more rigorous scrutiny. Appellants claim that the distinctions made by the Alaska law should be subjected to the higher level of scrutiny applied to the durational residency requirements in Shapiro v Thompson, supra, and Memorial Hospital v Maricopa County, supra. The State, on the other hand, asserts that the law need only meet the minimum rationality test. In any event, if the statutory scheme cannot pass even the minimal test

[457 US 61]

proposed by the State, we need not decide whether any enhanced scrutiny is called for.

A

The State advanced and the Alaska Supreme Court accepted three purposes justifying the distinctions made by the dividend program: (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent management of the Permanent Fund; and (c) apportionment of benefits in recognition of undefined "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency," 619 P2d, at 458.[7]

As the Alaska Supreme Court apparently realized, the first two state objectives—creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the Permanent Fund and the State's natural and mineral resources—are not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.[8]

[457 US 62]

Assuming arguendo, that granting increased dividend benefits for each

terstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents. See Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972); Shapiro v Thompson, supra. This case also involves distinctions between residents based on when they arrived in the State and is therefore also subject to equal protection analysis.

7. These purposes were enumerated in the first section of the Act creating the dividend distribution plan, 1980 Alaska Sess Laws, ch 21 § 1(b):

"(b) The purposes of this Act are

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

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

"(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art IX, sec 15, state constitution)."

Thus we need not speculate as to the objectives of the legislature.

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

year of continued Alaska residence might give some residents an incentive to stay in the State in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.[9]

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

> "[A]s population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly large numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the large population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible percentage return on the investments of the permanent fund principal, which would require investments in riskier ventures." Id., at 462.

The State similarly argues that equal per capita distribution would encourage rapacious development of natural resources.

[457 US 63]

Ibid. Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

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

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

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

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

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

(1973), we noted that "apportion-[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment." Id., at 449–450, and n 6, 37 L Ed 2d 63, 93 S Ct 2230.[10]

[457 US 64]

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence —or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.[11] It would permit the states to divide citizens into expanding numbers of permanent classes.[12] Such a result would be clearly impermissible.[13]

B

[5] We need not consider whether the State could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. Buckley v

[457 US 65]

Valeo, 424 US 1, 108, 46 L Ed 2d 659, 96 S Ct 612 (1976); United States v Jackson, 390 US 570, 585, 20 L Ed 2d 138, 88 S Ct 1209 (1968); Champlin Refining Co. v Corporation Comm'n of Oklahoma, 286 US 210, 234, 76 L Ed 1062, 52 S Ct 559 (1932). Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid:

"Sec 4. If any provision enacted

10. Even if the objective of rewarding past contributions were valid, it would be ironic to apply that rationale here. As Representative Randolph noted during debate in the state legislature on the dividend statute:

"The pipeline is the entity that has allowed us all this latitude to do all the things we're considering doing, not only today but throughout the session. And without . . . newcomers, we couldn't have built that pipeline. Without their skill, without their ability, without their money, the pipeline wouldn't be there. So I get a little bit tired of—and I've got a hunch an awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastized and penalized and discriminated against for having not been born here or not have been here 30 or 40 or 50 years."

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

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

13. Starns v Malkerson, 326 F Supp 234 (Minn 1970), aff'd, 401 US 985, 28 L Ed 2d 527, 91 S Ct 1231 (1971), cannot be read as a contrary decision of this Court. First, summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review. Fusari v Steinberg, 419 US 379, 391, 42 L Ed 2d 521, 95 S Ct 533 (1975) (concurring opinion). See also Colorado Springs Amusements, Ltd. v Rizzo, 428 US 913, 920–921, 49 L Ed 2d 1222, 96 S Ct 3228 (1976) (Brennan, J., dissenting); Edelman v Jordan, 415 US 651, 671, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Moreover, as we pointed out in Vlandis v Kline, 412 US 441, 452–453, n 9, 37 L Ed 2d 63, 93 S Ct 2230 (1973), we considered the Minnesota one-year residency requirement examined in Starns a test of bona fide residence, not a return on prior contributions to the commonweal

in sec 2 of this Act [which included the dividend distribution plan in its entirety] is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec 2 of this Act are invalid and of no force or effect." 1980 Alaska Sess Laws, ch 21, § 4.

However, it is of course for the Alaska courts to pass on the severability clause of the statute.

III

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

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

Reversed and remanded.

SEPARATE OPINIONS

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

I join the opinion of the Court, and agree with its conclusion that the retrospective aspects of Alaska's dividend-distribution law are not rationally related to a legitimate

[457 US 66]

state purpose. I write separately only to emphasize that the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion. In my view, these concerns might well preclude even the prospective operation of Alaska's scheme.

I

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

1. What is notably at stake in this case, and what clearly must be taken into account in determining the constitutionality of this legislative scheme, is the *national* interest in a fluid system of interstate movement. It may be that national interests are not always easily translated into individual rights, but where the "right to travel" is involved, our cases leave no doubt that it will trigger intensified equal protection scrutiny. See, e.g., Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972); Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). As the Court notes, the "right to travel" is implicated not only by "actual barriers to interstate movement," but also by "state distinctions between newcomers and longer term residents." Ante, at 60, n 6, 72 L Ed 2d, at 677-678.

Alaska dividend-distribution law, and this threat to free interstate migration provides an independent rationale for holding that law unconstitutional. At the outset, however, I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary. Justice O'Connor plausibly argues, post, at 78–81, 72 L Ed 2d, at 689–691, that the right predates the Constitution and was carried forward in the Privileges and Immunities Clause of Art IV. But equally plausible, I think, is the argument that the right resides in the Commerce Clause, see Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941), or in the Privileges and Immunities

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Clause of the Fourteenth Amendment, see id., at 177–178, 86 L Ed 119, 62 S Ct 164 (Douglas, J., concurring). In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to "ascribe the source of this right to travel interstate to a particular constitutional provision." Shapiro v Thompson, 394 US 618, 630, 22 L Ed 2d 600, 89 S Ct 1322 (1969). It suffices that:

> "'The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> "'. . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" Id., at 630–631, 22 L Ed 2d 600, 89 S Ct 1322, quoting United States v Guest, 383 US 745, 757–758, 16 L Ed 2d 239, 86 S Ct 1170 (1966).

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

A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its

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munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sover-

eigns into a single Nation. But a State cannot *compound* its offer of direct benefits in the inventive manner exemplified by the Alaska distribution scheme: For if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority, only to have to begin building such seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

II

The Court today reaffirms the important principle that, at least with respect to a durational-residency discrimination, a State's desire "to reward citizens for past contributions" is clearly "not a legitimate state purpose." Ante, at 63, 72 L Ed 2d, at 679. I do not think it "odd," post, at 72, 72 L Ed 2d, at 685, that the Court disclaims reliance on the "right to travel" as the source of this limitation on state power. In my view, the acknowledged illegitimacy of that state purpose has a different heritage—it reflects not the structure of the Federal Union but the idea of constitutionally protected equality. See Shapiro v Thompson, supra, at 632-633, 22 L Ed 2d 600, 89 S Ct 1322 ("The Equal Protection Clause prohibits such an apportionment of state services."); Vlandis v Kline, 412 US 441, 450, n 6, 37 L Ed 2d 63, 93 S Ct 2230 (1973). The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State's borders. The 18-year-old native resident of a State is as much a citizen as the 55-year-old native resident. But

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the Alaska plan discriminates against the recently naturalized citizen, in favor of the Alaska citizen of longer duration; it discriminates against the 18-year-old native resident, in favor of all residents of longer duration. If the Alaska plan were limited to discriminations such as these, and did not purport to apply to migrants from sister States, interstate travel would not be noticeably burdened—yet those discriminations would surely be constitutionally suspect.

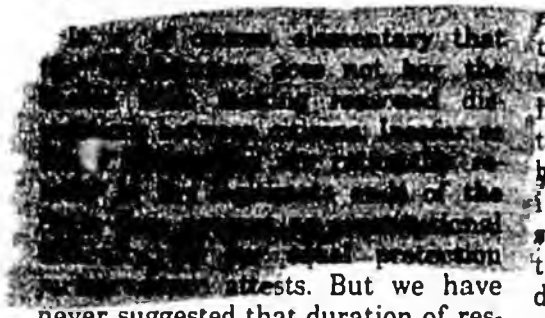
The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment does not suggest by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of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

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

Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.[3] And the Equal Protection Clause would not tolerate such distinctions.

[457 US 70]

In short, as much as the right to travel, equality of citizenship is of the essence in our Republic. As the Court notes, States may not "divide citizens into expanding numbers of permanent classes." Ante, at 64, 72 L Ed 2d, at 680.



tests. But we have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself. To be sure, allegiance and attachment may be rationally measured by length of residence—length of residence may, for example, be used to test the bona fides of citizenship—and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes. Cf. Chimento v Stark, 353 F Supp 1211 (NH), summarily affd, 414 US 802, 38 L Ed 2d 39, 94 S Ct 125 (1973) (7-year citizenship requirement to run for governor); U. S. Const. Art I § 2, cl 2, § 3, cl 3; Art II, § 1, cl 5. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics. While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need. In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future. The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future performance. In addition,

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to a limited extent, recognition and reward of past public service have independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service. But even the idea of rewarding past public service offers scarce support for the "past contribution" justification for durational-residence classifications since length of residence has only the most tenuous relation to the *actual* service of individuals to the State.

Thus, the past-contribution rationale proves much too little to provide a rational predicate for discrimination on the basis of length of

3. The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See Art I, § 9, cl 8 ("No Title of Nobility shall be granted by the United States"). See also Virginia Declaration of Rights (1776), in R. Rutland, The Birth of the Bill of Rights, App A (1955) ("no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services").

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

Justice O'Connor, concurring in the judgment.

The Court strikes Alaska's distribution scheme, purporting to rely solely upon the Equal Protection Clause of the Fourteenth

[457 US 72]

Amendment. The phrase "right to travel" appears only fleetingly in the Court's analysis, dismissed with an observation that "right to travel analysis refers to little more than a particular application of equal protection analysis." Ante, at 60, n 6, 72 L Ed 2d, at 678. The Court's reluctance to rely explicitly on a right to travel is odd, because its holding depends on the assumption that Alaska's desire "to reward citizens for past contributions . . . is not a legitimate state purpose." Ante, at 63, 72 L Ed 2d, at 679. Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973), reveals, the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration.

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

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

sire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper. The difficulty is that plans enacted to further this objective necessarily treat new residents of a State less favorably than the

[457 US 73]

longer term residents who have past contributions to "reward." This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere "league of States." See Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869). The Court's task, therefore, should be (1) to articulate this constitutional principle, explaining its textual sources, and (2) to test the strength of Alaska's objective against the constitutional imperative. By choosing instead to declare Alaska's purpose wholly illegitimate, the Court establishes an uncertain jurisprudence. What makes Alaska's purpose illegitimate? Is the purpose illegitimate under all circumstances? What other state interests are wholly illegitimate? Will an "illegitimate" purpose survive review if it becomes "important" or "compelling"?[2] These ambiguities in the Court's analysis prompt me to develop my own approach to Alaska's scheme.

Alaska's distribution plan distinguishes between long-term residents and recent arrivals. Stripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer term residents. The Privileges and Immunities Clause of Art IV, which guarantees "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States," addresses just this type of discrimination.[3] Accordingly, I would measure Alaska's

[457 US 74]

scheme against the principles implementing the Privileges and Immunities Clause. In addition to resolving the particular problems raised by Alaska's scheme, this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the Court's prior opinions.

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

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

It is settled that the Privileges and Immunities Clause does not protect corporations. See Paul v Virginia, 8 Wall 168, 19 L Ed 357 (1869). The word "Citizens" suggests that the Clause also excludes aliens. See, e.g., id., at 177, 19 L Ed 357 (dictum); L. Tribe, American Constitutional Law § 6-33, p 411, n 18 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

I

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

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of oldtimers. In its first year of operation, the distribution scheme would have given $1,050 to an Alaskan who had lived in the State since

[457 US 75]

statehood. A resident of 10 years would have received $500, while a one-year resident would have received only $50. In effect, therefore, the State told its citizens: "Your status depends upon the date on which you established residence here. Those of you who migrated to the State cannot share its bounty on the same basis as those who were here before you." Surely this scheme imposes one of the "disabilities of alienage" prohibited by Art IV's Privileges and Immunities Clause. See Paul v Virginia, supra, at 180, 19 L Ed 357.

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

4. See generally Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1871) (The Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; [and] to take and hold real estate . . . .")

under a continuous disability.[5]

[457 US 76]

If the Privileges and Immunities Clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. In Baldwin v Montana Fish and Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978), we held that States must treat residents and nonresidents "without unnecessary distinctions" when the nonresident seeks to "engage in an essential activity or exercise a basic right." Id., at 387, 56 L Ed 2d 354, 98 S Ct 1852. On the other hand, if the nonresident engages in conduct that is not "fundamental" because it does not "bea[r] upon the vitality of the Nation as a single entity," the Privileges and Immunities Clause affords no protection. Id., at 387, 383, 56 L Ed 2d 354, 98 S Ct 1852.

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

Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State.[6] It is difficult to imagine a right more

[457 US 77]

essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[7] Alaska's encumbrance on the

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

As the Court points out, ante, at 59–60, n 5, 72 L Ed 2d, at 677, Alaska's plan differentiates even among native Alaskans, by tying their benefits to date of birth. If the scheme merely distributed benefits on the basis of age, without reference to the date beneficiaries established residence in Alaska, I doubt it would violate the Privileges and Immunities Clause. Under those circumstances, a 25-year-old Texan establishing residence in Alaska would acquire the same privileges of citizenship held by a 25-year-old native Alaskan. The scheme would not treat the citizen who moves to the State differently from citizens who already reside there. The Court does not explain whether it would find such an age-based scheme objectionable.

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

7. See also Baldwin v G.A.F. Seelig, Inc., 294 US 511, 523, 79 L Ed 1032, 55 S Ct 497 (1935) (the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"); Paul v Virginia, 8 Wall, at 180, 19 L Ed 357 ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would

right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in Hicklin.

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

[457 US 78]

for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.

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

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

II

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

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not have constituted the Union which now exists"); Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941) (Constitution prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

8. Any durational residency requirement, for example, treats nonresidents who have exercised their right to settle in a State differently from longer term residents. This is not to say, however, that all such requirements would fail scrutiny under the Privileges and Immunities Clause. The durational residency requirement upheld in Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975) (one year to obtain divorce), for example, would have survived under the analysis outlined above. In Sosna the State showed that nonresidents were a peculiar source of the evil addressed by its durational residency requirement. Those persons could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in

this would come as no surprise. Article

[457 US 79]

IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.

The Clause derives from Art IV of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State," in addition to guaranteeing "the free inhabitants of each of these states . . . [the] privileges and immunities of free citizens in the several States."[9] While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Art IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, Records of the Federal Convention of 1787, p 112 (1934). Commentators, therefore, have assumed

[457 US 80]

that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.[10]

Early opinions by the Justices of this Court also traced a right to travel or migrate interstate to Art IV's Privileges and Immunities Clause. In Corfield v Coryell, 6 F Cas 546, 552 (No. 3,230) (CC ED Pa

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other States. Iowa adopted a reasonable response to this problem by requiring nonresidents to demonstrate their bona fide residency for one year before obtaining a divorce. I am confident that the analysis developed in Hicklin v Orbeck, 437 US 518, 57 L Ed 2d 397, 98 S Ct 2482 (1978), will adequately identify other legitimate durational residency requirements.

9. Even before adoption of the Articles, a few of the Colonies explicitly protected freedom of movement. The Rhode Island Charter gave members of that Colony the right "to passe and repasse with freedome, into and through the rest of the English Collonies, upon their lawful and civill occasions." Z. Chafee, Three Human Rights in the Constitution of 1787, p 177 (1956). The Massachusetts Body of Liberties provided: "Every man of or within this Jurisdiction shall have free libertie, not with standing any Civill power, to remove both himselfe and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie." Id., at 178. Massachusetts showed some of the same liberality to foreigners entering the Colony:

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

These attitudes contrasted with the more restrictive views prevailing in 17th-century Europe. See generally id., at 163–171.

10. See, e.g., id., at 185; Note, The Right to Travel and Exclusionary Zoning, 26 Hastings LJ 849, 858–859 (1975); Comment, The Right to Travel: In Search of a Constitutional Source, 55 Neb L Rev 117, 119–120, n 14 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L Rev 1129, 1130, n 7 (1975).

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

1823), for example, Justice Washington explained that the Clause protects the "right of a citizen of one state to pass through, or to reside in any other state." Similarly, in Paul v Virginia, 8 Wall, at 180, 19 L Ed 357, the Court found that one of the "undoubt[ed]" effects of the Clause was to give "the citizens of each State . . . the right of free ingress into other States, and egress from them . . . ." See also Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1871). Finally, in United States v Wheeler, 254 US 281, 297-298, 65 L Ed 270, 41 S Ct 133 (1920), the Court found that the Clause fused two distinct concepts: (1) "the right of citizens of the Stat[e] to reside peacefully in, and to have free ingress into and egress from" their own States, and (2) the right to exercise the same privileges in other States.

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel, under the Privileges and Immunities Clause. This Clause

[457 US 81]

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

Justice **Rehnquist**, dissenting.

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

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v Lake Shore Auto Parts Co. 410 US 356 [35 L Ed 2d 351, 93 S Ct 1001] (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation

[457 US 82]

of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." New Orleans v Dukes, 427 US 297, 303, 49 L Ed 2d 511, 96 S Ct 2513 (1976). See

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

Despite the highly deferential approach which we invariably have taken toward state economic regulations, the Court today finds the retroactive aspect of the Alaska distribution scheme violative of the Fourteenth Amendment. The Court concludes that the State's first two justifications are not rationally related to the retroactive portion of the distribution scheme, and that the third justification—the reward of citizens for their past contributions—is not a legitimate state objective. But the illegitimacy of a State's recognizing the past contributions of its citizens has been established by the Court only in certain cases considering an infringement of the right to travel,[1] and the majority itself rightly declines to apply

[457 US 83]

the strict scrutiny analysis of those right-to-travel cases. See ante, at 60–61 and n 6, 72 L Ed 2d, at 677–678. The distribution scheme at issue in this case impedes no person's right to travel to and settle in Alaska; if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska. The State's third justification cannot, therefore, be dismissed simply by quoting language about its legitimacy from right-to-travel cases which have no relevance to the question before us.

So understood, this case clearly passes equal protection muster. There can be no doubt that the state legislature acted rationally when it concluded that dividends retroactive to the year of statehood would "recognize the 'contributions of various kinds, both tangible and intangible,' which residents have made during their years of state residency." 619 P2d 448, 458 (Alaska 1980). Nor can there be any doubt that Alaska, perhaps more than any other State in the Union, has good reason for recognizing such contributions.[2] Because

[457 US 84]

the distribu-

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

Although I have expressed my disagreement with this holding even in the right-to-travel cases, see Memorial [illegible] pital v Maricopa County, 415 US 250, [illegible] 37, 39 L Ed 2d 306, 94 S Ct [illegible] anquist, J., dissenting); Vlan[illegible] ra, at 468–469, 37 L Ed 2d 63, [illegible] 0 (same), there is no need to rely upon that dissenting position here. The majority does not analyze this as a right-to-travel case. Compare ante, at 60–61, 72 L Ed 2d, at 677–678, with Memorial Hospital v Maricopa County, supra, at 261–262, 39 L Ed 2d 306, 94 S Ct 1076, and Shapiro v Thompson, supra, at 634, 638, 22 L Ed 2d 600, 89 S Ct 1322.

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

"'A government such as the one embodied in the Alaska constitution, [illegible] with its complete range of governmental services, was expensive for a State with limited sources of taxa-

tion scheme is thus rationally based, I dissent from its invalidation under the guise of equal protection analysis.[3] In striking down the Alaskan scheme, the Court seems momentarily to have forgotten "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." Dandridge v Williams, 397 US 471, 486, 25 L Ed 2d 491, 90 S Ct 1153 (1970).

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tion. Alaska could only boast a couple of pulp mills. . . . The State's business enterprises were small and catered mostly to local needs. In addition, Alaska's population was modest and hardly amounted to more than that of a medium-sized city in the continental United States.

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

3. I also disagree with the suggestion of Justice O'Connor that the Alaska distribution scheme contravenes the Privileges and Immunities Clause of Art IV of the Constitution. That Clause assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy: "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 395, 92 L Ed 1460, 68 S Ct 1156 (1948). We long ago held that the Clause has no application to a citizen of the State whose laws are complained of. "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens." Slaughter-House Cases, 16 Wall 36, 77, 21 L Ed 394 (1873).

Thomas WILLIAMS, Commissioner of Revenue, and State of Alaska, Appellants and Cross-Appellees,

v.

Ronald M. ZOBEL and Patricia L. Zobel, husband and wife, Appellees and Cross-Appellants.

Nos. 5400, 5421.

Supreme Court of Alaska

Sept. 19, 1980.

Suit was brought by taxpayers for declaration that state income tax statute, which completely exempts from taxation income of those individuals who have filed Alaska income tax returns and reported gross income from sources within Alaska for the last three or more years, was unconstitutional. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., concluded that statute was unconstitutional, and appeals were taken. The Supreme Court, Dimond, Senior Justice, held that: (1) where law conditions receipt of some right or benefit upon a period of residency, importance of denial of right or benefit will be balanced against those legitimate government objectives which make it justifiable to classify people on basis of their length of residency; (2) tax exemption statute is unconstitutional under Alaska's equal protection clause, and (3) while entire exemption provision had to fall, tax exemption statute was severable from entire state income tax code.

Affirmed.

Rabinowitz, C. J., filed a concurring opinion.

Connor, J., filed a dissenting opinion in which Burke, J., joined.

Burke, J., filed a dissenting statement.

See also, Alaska, 619 P.2d 448.

1. Taxation ⇐958

Discrimination against new residents created by a series of exemptions was apparent from income tax exemption statute which completely exempts from taxation income of those individuals who have filed Alaska income tax returns and reported gross income sources within Alaska for three or more years, and thus legal question concerning constitutionality of such statute was whether Alaska could selectively impose income tax on new residents. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) AS 43.20.017; Const. Art. 1, § 1.

2. Constitutional Law ⇐213.1(1)

When law conditions receipt of some right or benefit upon period of residency, importance of denial of right or benefit will be balanced against legitimate government objective which allegedly makes it justifiable to classify people on basis of their length of residency, with burden placed on state to show that classification has fair and substantial relation to legitimate governmental objective. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) Const. Art. 1, § 1.

3. Constitutional Law ⇐229.2
Taxation ⇐953

Freedom from disparate taxation is not a federally protected fundamental right for purposes of equal protection analysis under the Fourteenth Amendment, and thus income tax exemption statute, which completely exempts from taxation, those individuals who have filed Alaska income tax returns and reported gross income from sources within Alaska for three or more years, was analyzed to determine whether its durational residency requirement violated equal protection under general standard in which importance of denial of right or benefit is balanced against legitimate government objectives which justify classification of people on basis of length of residency. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) AS 43.20.017; Const. Art. 1, § 1; U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐229.2
Taxation ⇐958

Income tax exemption statute, which completely exempted from taxation those individuals who had filed Alaska income tax returns and reported gross income from sources within Alaska for three or more years, and which at best would produce a totally random tax rate and at worst would actually force those with lower incomes to pay higher taxes, violated Alaska Constitution's equal protection clause. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) AS 43.20.017(a-c); Const. Art. 1, § 1.

5. Statutes ⇐64(8)

Prior filing requirement could not be severed from state income tax exemption provision, which completely exempted from taxation those individuals who had filed Alaska income tax returns and reported gross income from sources within Alaska for three or more years, and which had been found to violate equal protection clause, without substantially redrafting statute and thus, since legal effect could not be given to tax exemption statute without prior filing requirement, exemption was not effective with regard to prior filing requirement but, rather, entire exemption provision had to fail. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) AS 43.20.017; Const. Art. 1, § 1.

6. Statutes ⇐64(8)

Constitutional invalidity of state income tax exemption, which completely exempted from taxation income of those individuals who had filed Alaska income tax returns and reported gross income from sources within Alaska for three or more years, did not invalidate entire state income tax code where eliminating all language of exemption amendment left tax code intelligible and legal effect could be given to it without invalid exemption provision, and where there was evidence that legislature may not have favored the complete elimination of income tax. (Per Dimond, Senior J., with one Justice concurring and the Chief Justice concurring in the result.) AS 43.20.017; Const. Art. 1, § 1.

Susan Burke, Asst. Atty. Gen., Avrum M. Gross, Sp. Asst. Atty. Gen., Wilson L. Condon, Atty. Gen., Juneau, for appellants.

Mark Sandberg, Camarot, Sandberg & Hunter, Anchorage, for appellees.

Robert C. Erwin, Erwin & Smith, Anchorage, for amicus curiae Kenai Peninsula Borough.

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

OPINION

DIMOND, Senior Justice.

During its 1980 session the Alaska legislature enacted two statutes, one pertaining to tax relief, and the other, to distribution of the state's oil wealth. The first enactment, AS 43.20.010-.100 (Ch. 21, SLA 1980), referred to as the Permanent Fund Statute, provides for a cash distribution of the income derived from the Alaska Permanent Fund [1] based upon the number of years an individual has been a resident of the state since 1959, the year that Alaska became a state.

The other statute, relating to the state income tax, completely exempts from taxation the income of those individuals who have filed an Alaska income tax return and

1. In 1977, the people of Alaska amended article IX, dealing with Finance and Taxation, of the Alaska Constitution, by adding section 15, which reads as follows:

> *Alaska Permanent Fund.* At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

reported gross income from sources within Alaska for three or more years. AS 43.20.-017 (Ch. 22, SLA 1980).

The Zobels, both residents of the state since 1978, filed suit against the state in superior court on April 28, 1980, seeking a declaration that both statutes were unconstitutional and an injunction prohibiting their enforcement. After extensive briefing on both sides, the superior court held a hearing on a motion for summary judgment on June 12, 1980, and issued a memorandum decision on June 27, 1980. The judge concluded that both statutes were unconstitutional because they denied the Zobels their right to equal treatment under the Alaska Constitution.[2] Both sides appealed.

On September 4, 1980, we issued an order affirming that portion of the superior court's decision which invalidated the income tax statute and indicated that an opinion would follow. In the order we reserved consideration of that portion of the superior court's judgment which pertained to the permanent fund distribution system. This opinion accordingly addresses only the tax statute.

I. The Income Tax Exemption Statute.

[1] The principal subsections of the tax exemption statute that are in dispute are AS 43.20.017(a) through (c), which are set forth in the margin.[3] Those individuals who have filed income tax returns reporting income from Alaska sources for the past three years are immediately exempt from paying any further state personal income taxes. Those who have filed tax returns in two previous years are exempt from two-thirds of the tax that would ordinarily be levied under the existing tax structure, and those that have filed in one previous year are exempt from one-third of their tax.

The state argues that the system of exemptions falls equally on residents, nonresidents, shorter term Alaskan residents and longer term residents. At oral argument, and in its brief, the state argued at length that there is no evidence of purposeful discrimination against new residents created by the system of exemptions, and that any disproportionate impact the statute may have is incidental to the legislation's main objectives.

We think the state's argument is meritless. Regardless of the lack of evidence of purposeful discrimination, the effect of the statute will be that few long-term residents of Alaska will ever have to pay income taxes,[4] while anyone moving to Alaska will have to pay taxes for three years.

All Alaskans who have lived here and filed tax returns for more than three years will be exempt from the income tax. Younger long-term residents who file state income tax returns for earnings from summer and part-time jobs can satisfy the three-year exemption requirement by the time they enter the labor force as full-time employees.

2. Article I, section 1, of the Alaska Constitution provides in pertinent part:

> [A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law; . . .

3. AS 43.20.017 provides:

> *Individual Tax Exemptions.* (a) If an individual filed an Alaska net income tax return and reported gross income earned from sources in the state for three or more tax years preceding the tax year for which an exemption is claimed under this section, the income of that individual is exempt from taxation under this chapter in each succeeding tax year.
>
> (b) An individual is exempt from payment of two-thirds of the net income tax levied under this chapter if the individual filed an Alaska net income tax return and reported gross income earned from sources in the state for two tax years preceding the tax year for which an exemption is claimed under this section.
>
> (c) An individual is exempt from payment of one-third of the net income tax levied under this chapter if the individual filed an Alaska net income tax return and reported gross income earned from sources in the state for one tax year preceding the tax year for which an exemption is claimed under this section.

4. The legislature was advised that the present statute would result in total exemption for about eighty per cent of Alaska's former taxpayers. House Debates on CCS for SB 122 and CCS for SB 394, April 15, 1980.

It is true that some nonresidents, such as fishermen who come to the state each year, will also be exempt under this statute. But we believe the pattern of the impact of the statutory scheme is so striking that it would be naive to assume that the statute does not place the principal burden of taxation on new residents. Contrary to what the state and the dissenters argue, discrimination against new residents created by the series of exemptions is apparent from the statute. Therefore, the legal question presented is whether Alaska may selectively impose an income tax on new residents.

The tax statute in effect imposes a durational period of residency before new residents are accorded tax-free status. In analyzing the Zobels' equal protection challenge, we must review those lines of cases which have considered durational residency requirements.

II. Durational Residency Requirements under the United States and Alaska Constitutions.

Case law from the United States Supreme Court interpreting the United States Constitution in this area begins with *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), which struck down a one-year durational residency requirement as a condition for receiving welfare benefits. Since then, there have been a series of cases considering the validity of such requirements. Typically the analysis has focused on the equal protection clause of the fourteenth amendment of the United States Constitution and the constitutional right to travel.[5] The relationship between these two constitutional protections, which may not be immediately clear, is that a durational residency requirement does not treat equally those individuals who have recently exercised their constitutional right to travel and those who have not. Individuals who belong to that class of people who have recently migrated to a state are denied certain rights and benefits granted to other residents. In effect, the argument is that a durational residency requirement impermissibly penalizes those who have exercised a constitutional right.

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), Justice Marshall, who wrote the majority decision, suggested that any penalty on a group of people who have recently exercised the constitutional right to travel is impermissible. In response to the argument that some evidence of actual deterrence to travel need be shown, the opinion notes:

> This view represents a fundamental misunderstanding of the law. It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence.

405 U.S. at 339-40, 92 S.Ct. at 1001, 31 L.Ed.2d at 283 (footnotes omitted). Furthermore, the opinion concludes that because "[d]urational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right", such laws "must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.'" 405 U.S. at 342, 92 S.Ct. at 1003, 31 L.Ed.2d at 284 (emphasis in original) (citations omitted).

The majority of the Supreme Court agreed in *Dunn* that the denial of the right to vote for one year was a significant enough penalty that the state would have to justify such a law by showing a counterbalancing compelling state interest. However, the view that this strict test must be used in evaluating *all* durational residency requirements has never commanded a majority of the Court. A year after *Dunn*, in *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), the Court noted in

5. *See, e. g., United States v. Guest*, 383 U.S. 745, 758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239, 249 (1966) ("freedom to travel throughout the United States has long been recognized as a basic right under the constitution").

dictum that eligibility for reduced tuition at a state university could be premised on a durational residency requirement. In support of this conclusion, the Supreme Court cited in a footnote (*id.* at 452 n. 9, 93 S.Ct. at 2236 n. 9, 37 L.Ed.2d at 72 n. 9) its affirmance of *Starns v. Malkerson*, 326 F.Supp. 234 (D.C. Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971). In *Starns*, a three-judge district court had concluded that the University of Minnesota could condition payment of in-state tuition on a one-year durational requirement, and specifically rejected the use of the "strict scrutiny" equal protection analysis. 326 F.Supp. at 238.

The following year the Court considered the question of whether free medical care for indigents could be conditioned on a one-year residency requirement. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). The majority opinion, again authored by Justice Marshall, seems to retreat from the Court's earlier unequivocal position in *Dunn* that any durational residency requirement must be justified by a compelling state interest. The opinion suggests that durational residency requirements only impinge on the right to travel when such a requirement is used by a state to condition the right to receive "basic necessities of life" or a "fundamental political right." 415 U.S. at 259, 94 S.Ct. at 1082, 39 L.Ed.2d at 315. Only because the majority found that medical care was a basic necessity of life did it conclude that a compelling state interest had to be shown to justify the requirement.

Finally, in 1975, the Court sustained an Iowa statute that conditioned divorce on one year of residency in the state. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Justices Marshall and Brennan noted in a dissenting opinion:

> [t]he Court . . . has not only declined to apply the "compelling interest" test to this case, it has conjured up possible justifications for the State's restriction in a manner much more akin to the lenient standard we have in the past applied in analyzing equal protection challenges to business regulations.

419 U.S. at 420, 95 S.Ct. at 568, 42 L.Ed.2d at 553 (citations omitted).

To summarize, in the federal courts it now appears that laws which deny or restrict certain benefits to new residents will only be subjected to strict scrutiny when they deny "basic necessities of life" or some "fundamental political right." In retrospect, one may question whether *Shapiro* and its progeny are "right to travel" cases at all, because denial of welfare benefits or political rights to any class of people, whether newly arrived migrants or some other class, would always seem to justify strict scrutiny.

A review of our durational residency cases can be easily summarized. We have never used anything but "strict scrutiny" equal protection analysis.[6] In *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), which was decided some two years after *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), we noted that "[w]e have never used this 'basic necessities' reasoning." 565 P.2d at 163. As recently as *Castner v. Homer*, 598 P.2d 953 (Alaska 1979), we used strict scrutiny to analyze a city ordinance imposing a one-year durational residency requirement on the right to run for an elective city office.

Although we found a compelling state interest, and sustained the ordinance in

6. *Castner v. City of Homer*, 598 P.2d 953 (Alaska 1979) (sustaining one-year durational residency requirement for right to run for city office); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 57 L.Ed.2d 397 (1978) (no compelling interest in one-year waiting requirement to work on state oil and gas lease projects); *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974) (compelling interest in three-year residency requirement for running for state legislature); *State v. Adams*, 522 P.2d 1125 (Alaska 1974) (no compelling interest for imposing one year of residence to bring a divorce action); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (no compelling state interest to impose one-year requirement for civil service preference); *State v. Van Dort*, 502 P.2d 453 (Alaska 1972) (no compelling state interest in seventy-five-day voting requirement).

Castner (598 P.2d at 957), it is obvious that few durational residency requirements could withstand such an analysis. In light of our holding in *State v. Erickson*, 574 P.2d 1 (Alaska 1978), we believe that it is now appropriate to reexamine our conclusion, as expressed in our prior decisions, that all durational residency requirements must necessarily trigger the highest level of equal protection scrutiny.

In *Erickson*, we noted our prior dissatisfaction with the two-tiered model of equal protection used in federal constitutional analysis. We concluded that a single test would be more appropriate, and described the functioning of that test in the following terms:

> Initially, we must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved.

574 P.2d at 12 (footnotes omitted).

We noted that where federal constitutional questions were present which involved a suspect class or fundamental right, we would still be bound to use a test at least the equivalent in severity as the compelling governmental interest or strict scrutiny test used by the United States Supreme Court. When federal strict scrutiny was not required, however, we would be free to adopt our own test in gauging the importance of the right to equal treatment under the Alaska constitution. *Id.* at 11 12.

[2] We conclude now that durational residency requirements should be measured against the test discussed in *Erickson*. When a law conditions the receipt of some right or benefit upon a period of residency, we will balance the importance of the denial of the right or benefit against those legitimate government objectives which make it justifiable to classify people on the basis of their length of residency. As we stated in *Erickson*, a burden will be placed on the state to show that a classification "has a fair and substantial relation to a legitimate governmental objective," and that a greater or lesser burden to make such a showing will be based on the nature of the right or benefit involved. *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978).

[3] Freedom from disparate taxation is not a federally protected fundamental right for the purpose of equal protection analysis under the fourteenth amendment.[7] Therefore, we shall analyze the tax law under our general standard of equal protection discussed above.

III. The Tax Exemption System under the Alaska Equal Protection Clause.

[4] Under *Erickson*, the beginning of our analysis is an examination of the legitimacy of the purposes of the enactment. The statute does not contain a statement of purposes, but in its brief the state has summarized what it believes to be the purpose of a selective, rather than a total, repeal of the income tax law. We have rearranged and reworded the statement of purposes slightly from the text of the state's brief:

(1) the plan should keep the state's income tax audit and collection staff intact;

(2) the plan should not saddle individuals with an empty and burdensome annual filing requirement;

(3) the revenue collection bureaucracy should be in proportion in size and cost to the amount of revenue collected;

(4) the plan should not redistribute the income tax burden so that it falls only on the very highest income earners, but it

7. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245, 1253 (1937) ("Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation.")

should retain the existing progressive structure;

(5) the plan should not result in a "windfall" to persons who receive the protections, services and benefits provided by the state that are closely related to the earning of income, but who have never before contributed to the costs of providing those programs;

(6) the plan should not entirely relieve individuals of their obligation to help defray the costs of government.

The first three purposes relate to the administrative convenience of the Department of Revenue. The essence of the state's position seems to be that, by requiring only one particular class of people in the state to pay income taxes, it is possible to reduce the workload and size of the bureaucracy needed to process tax returns. We have recognized the validity of administrative convenience as a legislative purpose, *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1265-66 (Alaska 1980), but have given it little weight. Restricting the income tax to any narrow class of people, however arbitrarily it might be drawn, would achieve the same result of reducing the number of tax returns filed each year. For example, the income tax could be selectively imposed on those with social security numbers ending with an odd number. In a close case, administrative convenience might tip the balance in favor of the government, but standing alone this reason cannot justify selectively imposing a tax on new arrivals to the state.

The fourth reason advanced by the state is that the present statute furthers the purpose of maintaining a progressive tax structure. What the state means by this is the familiar concept that those earning larger incomes will be in higher tax brackets and will pay a greater proportion of their income in taxes than those earning less income. The new tax law does not achieve this objective. At best it will produce a totally random tax rate, and at worst it will actually be regressive–forcing those with lower incomes to pay higher taxes.

Under the new tax system, the tax will only be progressive within a given exemption year class. For example, if one compares two new one-year residents, one who earns $10,000 in a tax year and the other who earns $50,000, it is obvious that the taxpayer earning $50,000 will pay more income tax, both in absolute terms, and as a proportion of income, than the person who earns $10,000. But if one looks at the income earning population at large in the state, this result will not follow. A three–year resident of the state who earns $50,000 will, because of the exemption scheme, pay no state income tax, while the person who has recently migrated and earns $10,000 will pay a full share. Thus the exact opposite of a progressive tax structure has been achieved by the present legislation.[8] We cannot accept this rationale for taxing new residents.

The essence of the state's fifth statement of purpose, as we understand it, is that, because former residents have had to pay income taxes for many years in the past, it would somehow not be "fair" to allow newcomers to escape this burden, even though the tax revenue itself may not be needed. If one were to accept the state's logic, it would lead to the absurd result that no tax could ever be completely repealed. The tax supposedly is needed today so that today's new residents can achieve parity with longer term residents. When today's new residents have achieved parity, future residents will be obliged to achieve parity with today's residents, ad infinitum, so that total repeal would always be "unfair" to the last preceding group that had achieved parity.

A far more serious criticism of this rationale for a tax is that discussed in *Shapiro v. Thompson*, 394 U.S. 618, 632-33, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600, 614 (1969). The Supreme Court noted that awarding bene-

8. The tax scheme may also operate in a regressive manner because new arrivals to the state are likely to be employed in lower paying jobs. Thus longer term residents who would be in higher federal tax brackets would pay no state income tax, while those in lower brackets would pay the tax.

fits to new residents based upon their past tax contributions

> would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. [Footnote omitted.]

While the Court in *Shapiro* was discussing the denial of welfare benefits, we think the same principle is applicable when forcing a state's new residents to bear a disproportionate tax burden. We believe that the reason the Supreme Court of the United States has indicated that it is not a "constitutionally permissible state objective," *Shapiro*, 394 U.S. at 633, 89 S.Ct. at 1330, 22 L.Ed.2d at 614, to apportion state benefits and services according to the past contributions of its citizenry, is that such a rationale logically could lead to pervasive and profound inequality in nearly all phases of a state's relationship with its citizens. That, in any event, is our view of the implications of the argument.

If we were to accept the state's argument, boroughs and cities in Alaska could begin granting tax exemptions in such a way that only newcomers would pay the costs of local government. Other states might decide to impose income tax surcharges on their new residents. Such a system would create a patchwork of tax havens for long term residents. Each time someone moved, he or she would face the prospect of "buying in" to a new community. Such a concept is more than an imaginary threat to the right to travel, and we conclude that it also violates our own constitutional right to equal treatment. We cannot accept the state's fifth statement of purpose as a legitimate goal of a state tax.

Finally, while we can accept the state's sixth reason for maintaining an income tax-that individuals should not be totally exempt from an obligation to help defray the costs of government-we conclude that this purpose can be achieved by means which do not discriminate against new residents. We therefore conclude that AS 43.20.017(a)-(c) is unconstitutional.

The dissenting opinion argues at some length, with frequent citation to federal authority, that the statute is constitutionally acceptable. Because the tax statute is violative of the Alaska Constitution, we do not reach the question of whether it violates the federal constitution. We do note, though, that the privileges and immunities clause of article IV, section 2 of the United States Constitution is generally regarded as prohibiting discrimination against nonresidents on "fundamental" matters such as, under the classic formulation of the doctrine by Mr. Justice Washington, "taxes or impositions".[9] Under the privileges and immunities clause the United States Supreme Court has struck down two state tax schemes which are quite similar to Alaska's new statute. *See Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975), and *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920). Both cases involved tax systems which had the effect of taxing nonresident commuters at higher rates than residents. In New Hampshire, which does not have a state income tax, the effect of the law was to force commuters from the bordering states of Maine and Massachusetts to pay income taxes to New Hampshire, while New Hampshire residents paid nothing. Although Alaska does not have nonresident commuters, the state does have something close to it in the highly transient workforce that is associated with the military and large construction projects. These Supreme Court decisions cast serious doubt on the validity of the Alaska tax law on federal constitutional grounds as well.[10]

9. Mr. Justice Washington, on circuit in *Corfield v. Corvell*, 6 Fed Cas 546 (No. 3230) (C.C.E.D. Pa.1823).

10. The rationale of the *Travis* case has been cited to hold unconstitutional a San Francisco

We also notice in the *Travis* and *Austin* decisions the wariness the Supreme Court has shown for tax schemes that impose disproportionate burdens on those persons who cannot adequately represent themselves in the legislatures of the states. This is a problem that occurs not only when states tax nonresidents, but also when states attempt to levy taxes on entities of the federal government, whose interests are similarly unrepresented in state legislatures. In *M'Culloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 428, 4 L.Ed. 579, 607 (1819), which considered the validity of a state tax on a federal bank, Chief Justice Marshall wrote:

> In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.... But the means employed by the government of the Union have no such security ....

The logic of *M'Culloch* is applicable here. Although it is true that new residents are technically represented in the legislature, as a practical matter their interests may not be adequately protected. It takes time to participate meaningfully in the political mainstream of a community. New residents are likely to be poorly organized and fragmented, which makes it too easy to impose on them "erroneous and oppressive taxation." *Id.* Furthermore, under article II, section 2, of the Alaska Constitution new residents must wait three years before they are eligible to run for election to the legislature–precisely the same period during which they must pay income taxes. For these reasons, we are not persuaded by the views expressed in the dissent.

The Zobels have cross-appealed, contending that declaring these sections of the income tax law invalid should result in the repeal of the personal income tax. They frame the issue correctly as, "Had the legislature known that this classification was impermissible, would it have repealed the tax for everyone, or would it have chosen to apply the tax across the board?" However, we disagree with their conclusion.

Here there are really two questions of severability: first, whether the prior filing requirement is severable from the tax exemption statute. If so, then the exemption would be effective without regard to the prior filing requirement–in effect, the exemption would swallow up the tax.

The second issue is whether the tax exemption statute, as a whole, is severable from the remainder of the state income tax code. If not, then the entire state income tax would fall.

The test to be applied is stated in *Lynden Transport, Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975) (footnote omitted):

> The test for determining the severability of a statute is twofold. A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

[5] We cannot sever the prior filing requirement from the tax exemption provision without substantially redrafting the statute. Without the phrases dealing with the prior filing requirement, the statute is meaningless. As such, we find that legal effect cannot be given to the tax exemption statute without the prior filing requirement, and thus the entire exemption provision must fall.

[6] Nor do we agree that the invalidity of the exemption statute must invalidate the entire state income tax code. Eliminating all the language of the 1980 amendment leaves the tax code intelligible, and thus legal effect can be given to it without the invalid exemption provision. The question then turns to legislative intent.

The Zobels contend that, as the legislature has eliminated the income tax for the majority of Alaskans, total elimination conforms more closely to the legislative intent than total reinstatement and imposition of

city tax which discriminated against different classes of state residents. *See County of Alameda v. City and County of San Francisco*, 19 Cal.App.3d 750, 97 Cal.Rptr. 175 (1971).

the income tax. For several reasons, we disagree. First, the entire code is preceded by a general severability clause, which expresses a general legislative intent in favor of severability, albeit a weak one. *See Lynden Transport, Inc. v. State*, 532 P.2d 700, 712–13 (Alaska 1975). Second, the permanent fund statute contains an explicit nonseverability clause, and the absence of such a clause in the tax exemption statute, enacted simultaneously, may indicate a legislative intent that the latter be severable. Last, the purposes put forward by the state indicate that the legislature may not have favored complete elimination of the income tax.

Because we hold the tax exemption statute severable from the entire state income tax code, sections 2, 3, 10, and 11 of chapter 22, SLA 1980, are not affected by this decision.

The judgment of the superior court insofar as it concerns the tax exemption statute, AS 43.20.017 (chapter 22, SLA 1980), is AFFIRMED.

BOOCHEVER, J., not participating.

RABINOWITZ, Chief Justice, concurring.

I concur in the result reached by Justices Dimond and Matthews regarding the unconstitutionality of the tax exemption statute.[1]

A. Nature and Extent of Infringement of Rights

The most significant dispute between the parties here is over the nature and extent of the right infringed.[2] The Zobels contend that the three-year prior filing requirement is essentially a "durational residency" requirement, thus triggering strict scrutiny and requiring a compelling state justification. The state insists that the requirement does not discourage exercise of the right to migrate.

In my view, the appropriate focus is whether, and to what extent, the operation of the statute will have the effect of *penalizing* United States citizens for exercising their constitutional right to migrate between states.[3] Although precise figures are lacking, the state has conceded that the exemption will have a differential impact

1. I agree with Justices Dimond and Matthews that the tax exemption statute would fall into the "rational basis" tier under the federal two-tier equal protection test. I also agree that our own state equal protection test as applied in the right-to-interstate-migration context in several prior cases [*Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974); *State v. Adams*, 522 P.2d 1125 (Alaska 1974); *State v. Wylie*, 516 P.2d 142 (Alaska 1973); *State v. Van Dort*, 502 P.2d 453 (Alaska 1972)] has been modified by *State v. Erickson*, 574 P.2d 1 (Alaska 1978), which announced the test which should be applied in equal protection cases.

   The test we announced in *State v. Erickson*, 574 P.2d at 12, is essentially one of balancing. On the one hand, the court must assess (1) the legitimacy of the state purpose purportedly furthered by the provision, and (2) the extent to which the relationship between the end (the asserted purpose) and the means (the classification chosen) is fair and substantial. On the other hand, the court is to determine the nature and the extent of the infringement of individual rights allegedly caused by the classification. *Id.*

2. There is no need to decide the question of whether the right to interstate migration is protected under the state constitution as well as the federal constitution. *See* Alaska Const. art. I, § 21 ("The enumeration of rights in this constitution shall not impair or deny others retained by the people."). I note that the federal right itself has no explicit source. *Shapiro v. Thompson*, 394 U.S. 618, 630, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600, 612 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.") (footnote omitted). Even assuming that the right to interstate migration is purely federal, I see no conceptual barrier to invoking the state equal protection clause to protect it.

3. I note that there is no necessity to find that the system actually deters travel; rather, the focus is on whether or not the classification system operates to penalize those persons who have exercised their constitutional right of interstate migration. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257–58, 94 S.Ct. 1076, 1081–1082, 39 L.Ed.2d 306, 314–15 (1974).

and I reach the same conclusion.[4] Proportionately, a new resident is much more likely than an old resident to be subjected to an income tax under this scheme.

The parties have devoted a significant portion of their arguments to the subject of the "intent" of the legislature in passing this enactment–*i. e.*, whether or not the statute was "intended" to discriminate against new residents. The notion that a plaintiff must show that a statute was "intended" to discriminate against a particular group is based on a line of United States Supreme Court cases dealing with racial discrimination: *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).[5]

Based on the considerations set forth in footnote five, I would not require such a showing when the effect of the legislation is shown-or is stipulated-to impact unequally on groups according to whether or not they have exercised their constitutional right of interstate migration. I would not make a showing of discriminatory intent a necessary condition of finding that a classification penalizes an individual's exercise of the constitutional right of interstate migration.

Both the nature and the extent of the infringement must be examined. Here, this

4. The state conceded below that more new residents would be paying the tax than old residents. Clearly, the appropriate comparison is not that of absolute numbers, but of ratios; but we can take judicial notice of the fact that the majority of the population in Alaska is constituted of "old residents," and thus, proportionately, a new resident is much more likely to be paying the income tax than an old resident.

5. This authority is not controlling for three reasons: first, it is based on federal equal protection law rather than state equal protection law. This court could choose to reject the *Washington v. Davis* approach, for state equal protection claims, even in cases of racially disproportionate impact.

In other contexts, we have held that a prima facie case of discrimination may be established by a showing of differential impact, as long as the individual can show that he or she is a victim of this differential impact. *See Brown v. Wood*, 575 P.2d 760, 768 (Alaska 1978), *modified*, 592 P.2d 1250 (Alaska 1979) (plaintiff showing that she is paid less than male colleagues for comparable work established a prima facie case of discrimination and thus shifted the burden to the employer to show that the difference in pay is based on other considerations); *compare Johnson v. State*, 607 P.2d 944, 947–48 (Alaska 1980) (adopting same approach in the area of alleged racial discrimination in sentencing, requiring a showing that the individual's sentence was probably higher than that which would have been imposed upon a defendant of a different race with a like criminal history who committed a similar offense). Here it is uncontested that the Zobels are prejudiced by the differential impact in this case.

Second, the authority deals with equal protection cases in the context of race, not equal protection in the context of classifications based on exercise of constitutional rights. I am not aware of any case which has required such a showing of "legislative intent" when the strict scrutiny standard is triggered, not by a racially disproportionate impact, but rather by a disproportionate impact on those who have or have not exercised certain constitutional rights; and there is some authority to the effect that *Washington v. Davis* and *Arlington Heights* are arguably "limited to equal protection claims involving alleged racial discrimination." *Socialist Workers Party v. Chicago Bd. of Election*, 433 F.Supp. 11, 14 n. 8 (N.D.Ill.), *aff'd and modified on other grounds*, 566 F.2d 586 (7th Cir. 1977) (per curiam) (adopting the district court opinion), *aff'd*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). Outside the equal protection context, there is authority to the effect that when an individual alleges that a particular administrative act (*e. g.*, a discharge, a criminal prosecution, etc.) is in retaliation for that individual's having exercised some constitutional right, he or she must show that his or her conduct was constitutionally protected, and that this conduct was a "substantial factor" or a "motivating factor" in the decision as to the administrative act; and *Washington v. Davis* and *Arlington Heights* have been cited as authority for this. *See, e. g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 484 (1977). I do not find this apposite.

Third, even if this court followed *Washington v. Davis*, and I chose to extend it to this area, the showing of intent is required to trigger the "strict scrutiny" analysis under federal law. Since I would not employ the "strict scrutiny" analysis under either federal or state law, I would not require a showing of intent as a necessary prerequisite to the *Erickson* approach.

translates into assessing exactly how the unequal impact "penalizes" the exercise of the right of interstate migration. I think that this tax can be properly characterized as an income tax levied only on an individual's first three years of contact with Alaska; or, as its differential impact is uncontested, a tax levied primarily on new residents. As such, I think that the scheme tends to penalize the exercise of an individual's right to migrate into Alaska in two ways. Its most obvious effect is the financial disincentive to enter: a new resident is subjected to three years of a tax burden which is considerably heavier, on an individual basis, than it would be were the same aggregate tax amount to be levied on new and old residents alike.[6] Secondly, it has a symbolic value which cannot be ignored. Whether or not the people of Alaska mean to do so, it projects to other United States citizens a marked hostility to new entrants by imposing a tax on them which is not imposed on long-term residents.[7]

Thus, I conclude that the differential impact on old and new residents effected by the exemption scheme clearly does penalize the exercise of an individual's right of interstate migration, in the manner noted above. As such, the state's purposes must be weightier, and the "fair and substantial relationship" between means and ends more narrowly drawn than if the statute did not penalize the exercise of the right of interstate migration (or if it penalized this to a lesser degree); but these concerns need not reach the level of being necessary to promote a compelling state interest, as we are not applying the "strict scrutiny" test.

B. State Purposes and the Relationship Between These Purposes and the Classification

Having assessed the nature and extent of the right infringed upon, the next step under *Erickson* is to analyze the purposes of the statute and assess the extent to which the classification chosen has a "fair and substantial" relationship to these purposes.

The state advances six purposes for the tax exemption provisions:

(1) the plan should not relieve individuals entirely of their obligation to help defray the costs of government;

(2) the plan should not result in the total dismantling of the state's income tax audit and collection staff;

(3) the plan should not redistribute the income tax burden so that it falls only on the very highest income earners, but should retain the existing progressive structure;

(4) the plan should not saddle individuals with an empty and burdensome annual filing requirement;

(5) the plan should not result in a revenue collection bureaucracy out of proportion in size and cost to the amount of revenue collected; and

(6) the plan should not result in a "windfall" to persons who receive the protections, services and benefits provided by the state that are closely related to the earning of income, but who have never before contributed to the costs of providing those programs.[8]

It seems clear that purposes (2) through (5), although obviously legitimate state interests, are not related to the specific provision here at issue, the prior filing require-

6. It might be argued that there is no disincentive to entry because other states impose income taxes, and thus a prospective new resident is not any worse off in Alaska than he or she was in the state of origin. However, a showing of deterrence is unnecessary to a finding of infringement of the right of interstate migration. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257-58, 94 S.Ct. 1076, 1081-1082, 39 L.Ed.2d 306, 314-15 (1974). Additionally, not all states impose an income tax. State Tax Guide (P-H) ¶ 228 (1979).

7. There is also a possible argument that the statute creates a disincentive to long-term residents to move out of Alaska, thus dampening their exercise of the right to migrate. The Zobels do not complain that this aspect of the system is a factor in their own decision of whether to exercise the right of interstate migration.

8. The state goes on to explain that it is necessary only to recast these negative statements into positive ones to establish the actual purposes of the tax exemption plan.

ment. The Zobels do not contest the power of the state to reduce taxes, to maintain some tax system infrastructure, to maintain a progressive tax system, to reduce or eliminate the filing requirement, or to cut back on a disproportionately large tax bureaucracy. None of these, however, are "fairly and substantially related" to the line drawn by the legislature between those who have filed three, two, one, or no tax returns in the state. These purposes may explain why the legislature chose to reduce, without eliminating, the income tax requirement, but they shed no light on why the legislature chose to gear this reduction to a prior filing requirement, which is the question that must be answered.

A stronger case can be made for finding a relationship between the prior filing requirement and purposes (1) and (6). As I interpret the argument, the state contends that every resident of Alaska should, at some point in his or her income earning career, be subject to an income tax. Long-term residents have already been so subjected, as they have been liable for past taxes; and, to achieve some basic equity between that group and those first, second, and third-time filers who have not yet borne their share of the burden, this classification is required.

The Zobels assert that this purpose—the notion of introducing equity between old and new residents based on past tax contributions—is impermissible under the rulings of the United States Supreme Court. In *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court rejected a "past tax contributions" argument offered to justify a durational residency requirement for welfare benefits:

> [The state's] reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

394 U.S. at 632-33, 89 S.Ct. at 1330, 22 L.Ed.2d at 614 (footnote omitted). These same concerns were repeated in dicta in a footnote in *Vlandis v. Kline*, 412 U.S. 441, 450 n. 6, 93 S.Ct. 2230, 2235 n. 6, 37 L.Ed.2d 63, 70 n. 6 (1973).

The state argues that the Court did not say that past tax contributions could never legitimately form the basis for a statutory distinction; and that the equal protection issue raised by making distinctions based on past tax contributions does not turn on the legitimacy of the purpose, but rather on whether the distinction can be rationally related to the purposes of the statute. In *Shapiro*, such a distinction could not be rationally related to the purposes of the welfare statute, but it can be so related here.

I reject the Zobels' argument that distinctions based upon past tax contributions are absolutely impermissible. The Supreme Court's affirmance of *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), stands for the proposition that the Supreme Court has approved such a distinction between residents and nonresidents, based on former tax contributions, in the context of differential tuition charges as to resident and nonresident students. I think that, in some situations, a classification based on past tax contributions would be unquestionably permissible; *e. g.*, a tax rebate made retroactive for a reasonable period could not be struck down on the equal protection ground that it distinguished past taxpayers from past nontaxpayers based solely on past tax contributions (although I express no opinion as to the other grounds on which such a statute might be attacked).

On the other hand, it cannot be ignored that this "purpose" raises potential constitutional questions in many contexts, and is clearly impermissible in some (*e. g.*, welfare programs). I would resolve these conflicting considerations by ruling that distinctions based on past tax contributions are permissible, at least in the limited context of statutes designed to grant tax relief; but considering the possible constitutional in-

firmities with this purpose noted by the Supreme Court, this "purpose" must be placed among the weaker of the vast spectrum of state purposes, and normally it will not be given a great deal of weight when the *Erickson* balancing test is struck. Of course, this "weight" is only significant in relation to the other elements of the *Erickson* test. If the statute is tightly drawn so that there are no substantial gaps in the means/ends relationship, and so that its impact, in terms of "suspect classifications" and/or constitutional rights infringed, is minimal, then this purpose may prevail.

Having found the "purpose" legitimate in this limited context, I turn to an examination of the relationship between the means and the end here. The Zobels point out, and the superior court found significance in the fact, that the only requirement is that of having filed a return, not of having incurred tax liability. Thus, the relationship is not based on past tax contributions directly, but rather on past tax return filing. In effect, it is somewhat over-inclusive. The state is correct in pointing out that over-inclusiveness does not necessarily render a statute unconstitutional. *See Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1267-68 (Alaska 1980). That is true; the over-inclusiveness is not dispositive. But it also is not irrelevant in assessing the extent to which the relationship between the classification and its purpose is a fair and substantial one.

C. Striking the Balance

The final step in the *Erickson* approach, striking the balance, is not an easy task here. However, I find that the above analysis of the various elements to be weighed tips the scale in favor of the Zobels. This conclusion is reinforced by my reading of United States Supreme Court case law which has dealt, under privileges and immunities analysis, with other states' enactments of similar statutory exemption schemes.

These are the factors which I find weigh in favor of the Zobels: The statute does, as the state has admitted, have the effect of placing a disproportionate share of the tax burden on those who have recently exercised their right to migrate, and this, although not triggering the "strict scrutiny" approach, does constitute a substantial infringement of a well-estabalished constitutional right. I think it can fairly be characterized as penalizing that right. The only proffered purpose which I find to be at all related to the distinction drawn here is that of establishing some rough notion of equity between former and future Alaskan taxpayers. This purpose is permissible in this limited context (*i. e.*, tax relief legislation), but it is not among the weightier of permissible state concerns. And considering that the relationship between means (the classification) and ends (establishing equity) is rendered somewhat less fair and substantial because the classification is not based on past tax liability, but rather on past filing of returns, I find that the balance comes out in favor of the Zobels.

In so ruling, I think it appropriate to derive guidance from the reasoning of the United States Supreme Court cases dealing with analogous problems in the privileges and immunities context. Generally, privileges and immunities analysis is applied to distinctions between residents and nonresidents, whereas distinctions between long-term and short-term residents are analyzed under the equal protection or due process clauses.[9] However, this court has recognized that privileges and immunities case law and reasoning may be helpful in assessing parallel equal protection claims. *Lynden Transport, Inc. v. State*, 532 P.2d 700, 706 (Alaska 1975). I find merit in the Zo-

9. This pattern does not always hold true. *See, e. g., Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) (both privileges and immunities grounds and equal protection grounds used in attack on distinction between residents and nonresidents).

As the Zobels here are residents of Alaska, they concede they have no standing to directly invoke the protection of the privileges and immunities clause. However, they contend that the reasoning in privileges and immunities cases is persuasive here.

bels' contention that a state probably has more authority generally to draw distinctions between residents and nonresidents than between two sets of bona fide residents based on length of residency.[10] Thus, cases striking down a distinction between residents and nonresidents are fairly persuasive authority for the proposition that that distinction cannot be drawn between long-term and short-term residents.

Two United States Supreme Court cases stand for the proposition that a state cannot place greater tax burdens on non-residents than on residents based solely on residency. In *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920), the Court found invalid a New York taxing system which, although it taxed residents and nonresidents at the same rate, granted New York residents some exemptions which were not available to nonresidents. Nonresidents were given a credit for taxes paid to their state of residence, and New York apparently thought that the state of residence would grant substantially equivalent personal exemptions, thus equalizing the tax burden between residents and nonresidents. However, some states, notably Connecticut and New Jersey, did not not have an income tax, and so of course residents of those states received neither the tax credits nor the exemptions. In effect, residents were granted exemptions which nonresidents were not. The Supreme Court had little difficulty striking this tax mechanism down:

> Whether [nor-New York resident taxpayers] must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer, but a general rule, operating to the disadvantage of all nonresidents, including those who are citizens of the neighboring states, and favoring all residents, including those who are citizens of the taxing state.

252 U.S. at 80-81, 40 S.Ct. at 232, 64 L.Ed. at 470 (citations omitted).

In a more recent case, the Court struck down the New Hampshire Commuters Income Tax in *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). The statute in that case imposed a four per cent tax rate both on income which non-New Hampshire residents earned within the state and on income which New Hampshire residents earned outside the state. (Income which New Hampshire residents earned inside the state was not taxed.) Again, however, it was the exemption provisions which altered the impact of the tax. The income which New Hampshire residents earned outside the state was exempted in three situations: (1) if such income was taxed by the state from which it was derived; (2) if it was exempted from taxation by the state from which it was derived; or (3) if the state from which it was derived did not tax such income. In short, no resident of New Hampshire was taxed on his out-of-state income. Nonresidents were still taxed at four per cent or the rate at which the nonresident's home state would tax such income had it been earned in the home state, whichever was less. Again, the Court had little difficulty striking this scheme down, noting, "The overwhelming fact, as the State concedes, is that the tax falls exclusively on the income of nonresidents; ....." 420 U.S. at 665, 95 S.Ct. at 1197, 43 L.Ed.2d at 537-38.

10. A durational residency requirement, which draws a distinction between new and old residents based on the length of their residency, must be carefully distinguished from a residency requirement, which draws a distinction between residents and nonresidents. Generally, a state has much more authority to draw distinctions between residents and nonresidents than between long term and short-term residents. *See Vlandis v. Kline*, 412 U.S. 441, 452-53, 93 S.Ct. 2230, 2236-2237, 37 L.Ed.2d 63, 72 (1973); *Fisher v. Reiser*, 610 F.2d 629, 635 (9th Cir. 1979).

I find these cases to be persuasive in reaching the conclusion that the exemption scheme in the case at bar cannot stand. If New York and New Hampshire cannot manipulate their tax exemption provisions to impact disproportionately on nonresidents, Alaska should not be able to follow this same course concerning newly arrived residents.

Finally, I agree with Justice Dimond on the severability issue presented by the cross-appeal–*i. e.*, that the invalid portions of the statute (§§ 1 and 4-9) are severable, and §§ 2, 3, 10 and 11 may stand.

Based on these considerations, I agree that the judgment of the superior court as to the tax exemption statute should be affirmed.

CONNOR, Justice, with whom BURKE, Justice, joins, dissenting.

I dissent from the holding which declares Ch. 22 SLA 1980 invalid. My basic reasons are (1) in the case before us the right of interstate migration has not been infringed, (2) even if the tax exemption statute is viewed as imposing a durational residency requirement as a precondition of receiving the benefits of the statute, it does not amount to a penalty on interstate migration, (3) the statutory classification complies with the constitutional guarantee of equal protection of the laws under both the United States Constitution and the Alaska Constitution, and (4) in the field of taxation, legislative discretion is quite broad, and judicial review of taxation statutes should be correspondingly very limited.

I.

The right of interstate migration has been recognized as basic or fundamental in decisions of both this court and the United States Supreme Court. However, the source of the right is unclear,[1] and its reach is not absolute. Our concern here is only with the right to travel as it is affected by durational residency requirements, and whether such requirements must be invalidated as violating the equal protection provisions of the state and federal constitutions.

In relation to equal protection of the laws, the right has been applied to invalidate durational residency requirements in three leading federal cases. In *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the court struck down a one-year durational residency requirement which was a condition to qualifying for welfare benefits. The reasoning was that the residency requirement discriminated against persons who had recently exercised their right of interstate travel, that it amounted to a "penalty" on them, and thereby infringed a fundamental right. It subjected the requirement to strict scrutiny and found the justification wanting. The court was careful to point out that not all waiting periods would be unconstitutional, as they might either promote compelling state interests or might not amount to a penalty upon interstate travel. 394 U.S. at 638, n.21, 89 S.Ct. at 1333, n.21, 22 L.Ed.2d at 617, n.21.

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the court struck down a one-year durational residency requirement for voting in state elections, applying a strict scrutiny standard. That case concerned both the right to vote and the right of interstate migration.

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), the court invalidated an Arizona one-year durational residency requirement for eligibility for nonemergency medical care for indigents. The court there characterized the welfare benefits considered in

1. In *Oregon v. Mitchell*, 400 U.S. 112, 216, 91 S.Ct. 260, 310, 27 L.Ed.2d 272, 333 (1970), Harlan, J., dissenting in part, described the right as a "nebulous judicial construct."

Perhaps the best basis of the right is not that it flows from any particular constitutional provision, but that it is fundamental to a federal union. *Shapiro v. Thompson*, 394 U.S. 618, 629-30, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600, 612-13 (1969). *United States v. Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239, 249 (1966). This gives the right an indefinite nature.

Shapiro, and the indigent medical care in Arizona, as "basic necessities of life," the denial of which should be subjected to strict scrutiny.

But other cases have demonstrated that not all durational residency requirements necessarily will be invalidated as infringing the right to travel and that they do not, therefore, require "strict scrutiny" under the equal protection clause. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd without opinion*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), and *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), permit states to charge higher university tuition fees to persons from out of state than to residents.[2]

Finally, in 1975, the court issued its opinion in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), in which it sustained a state one-year residency requirement as a prerequisite to filing for divorce. Nothing that Mrs. Sosna "was not irretrievably foreclosed from obtaining some part of what she sought," 419 U.S. at 406, 95 S.Ct. at 561, 42 L.Ed.2d at 544, the court held that the state's interest in assuring that those seeking divorce be genuinely attached to the state was sufficient to sustain the durational residency requirement. In other words, mere delay, rather than outright denial, did not amount to a "penalty" on interstate migration.

It is noteworthy that a number of commentators have viewed the *Shapiro* and *Maricopa* cases as having been improperly decided under either the equal protection clause or the right to travel. Professor Laurence H. Tribe views those cases as involving issues about welfare programs and poverty, and not the right to travel.[3] Professor Michael J. Perry does not think that the equal protection clause should even have been implicated in those decisions, and that it would have been enough to strike down the statutes as simply interfering with the right of interstate migration.[4] In his separate opinion in *Maricopa*, Mr. Justice Douglas thought that invidious discrimination against the poor, not the right to travel, was the basis on which the statute should have been invalidated. 415 U.S. at 273-74, 94 S.Ct. at 1089-1090, 39 L.Ed.2d at 324.

In Alaska we have also treated durational residency requirements in a series of cases. In *State v. Van Dort*, 502 P.2d 453 (Alaska 1972), we struck down a 75-day durational residency requirement for voting eligibility. In *State v. Wylie*, 516 P.2d 142 (Alaska 1973), we applied a strict scrutiny standard and struck down a durational residency requirement of one year for preference in state personnel hiring. In *State v. Adams*, 522 P.2d 1125 (Alaska 1974), which was decided prior to the Supreme Court's decision in *Sosna v. Iowa*, *supra*, we invalidated a one-year durational residency requirement for filing a divorce action.

On the other hand, in *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974), we sustained a durational residency requirement of three years in the state and one year in the election district for candidates for legislative office. In that case we found that there was a "compelling state interest" in imposing such requirements, even under a strict scrutiny test. We later sustained a one-year durational residency requirement for candidacy for a city office, even under the strict scrutiny test, in *Castner v. City of Homer*, 598 P.2d 953 (Alaska 1979).

In *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *reversed on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), we invalidated a durational residency requirement as a prerequisite to obtaining jobs on the Alaska pipeline project. We employed the strict scrutiny analysis which

2. In *Vlandis*, 412 U.S. at 452-53, 93 S.Ct. at 2236-2237, 37 L.Ed.2d at 72, the court invalidated an "irrebuttable presumption" of nonresidency on due process grounds, but still recognized that a state could, for equal protection purposes, validly distinguish between residents and nonresidents in setting tuition.

3. L. Tribe, American Constitutional Law 1003-05, 1116 (1978).

4. M. Perry, "Modern Equal Protection, A Conceptualization and Appraisal," 79 Colum.L.Rev. 1023, 1073 (1979).

we had used in *State v. Wylie, supra*. In dictum in *Hicklin*, we said, referring to the *Maricopa* case, *supra*, that, "[w]e have never used this 'basic necessities' reasoning." 565 P.2d at 163.

A cursory reading of the Alaska cases might suggest that all durational residency requirements will be subject to strict scrutiny, but [illegible] important factors suggest a contrary point of view. First, our earlier cases on durational residency were based on our initial perception of United States Supreme Court doctrine, which has proved to be inaccurate. The United States Supreme Court has not stricken down durational residency requirements since 1974, and certainly has not expanded the right to travel as some kind of primary, absolute right which automatically sweeps away any other governmental power or interest which stands in its way. Second, in *State v. Erickson*, 574 P.2d 1 (Alaska 1978), we abandoned the traditional two-tiered approach to equal protection analysis which had been employed in our earlier cases. We adopted the new single test for evaluating equal protection claims under the Alaska Constitution. The nature of the new test will be discussed below.

From the vantage point of today, as compared with several years ago, it can be said that the right to interstate migration, like all constitutional rights, must be weighed and balanced against other legitimate governmental interests, whether the weighing process takes place in defining the limits of the right or in applying other constitutional precepts such as due process and the equal protection of the laws. In assessing the claim of any general constitutional guarantee in a specific fact setting, it is necessary to consider the degree to which the claimed right is impaired, and to consider whether and to what extent that impairment is direct or indirect in its impact.

Thus, in determining claims that a state law has infringed the right to travel, we must consider the degree to which the requirement is likely to deter travel, whether its impact is direct or indirect, and the importance of the state's interests which are advanced by the law. Any other approach means a sterile application of rigid rules in situations which may vary widely in their factual and substantive content.

Seen in this light, our earlier decisions on such matters as voting rights and the right to seek employment are quite understandable. The right to vote has always been considered one of the freedoms most essential to the well being of our form of government, and our striking down of a durational residency requirement for voting in *State v. Van Dort, supra*, is quite in harmony with the similar action of the United States Supreme Court in *Dunn v. Blumstein, supra*. Similarly, the right to enter into a common occupation is deeply ingrained in our constitutional history. Therefore, it is not surprising that, whatever standards of scrutiny were used, durational residency requirements inhibiting that right should have been stricken down in *State v. Wylie* and *Hicklin v. Orbeck*. The case at bar, however, presents questions which are highly distinguishable from those which were presented in these cases of the past.

The Zobels argue that the tax exemption statute infringes their right to interstate migration. But the statute does not single out or penalize interstate migrants for treatment different from others who fall within the terms of the statute. The burden of paying state income tax falls equally upon all persons earning taxable income within the state, whether residents or not. The fact or length of such persons' residence is immaterial. This includes nonresidents who derive income from Alaska, persons who spend part of each year working in Alaska, but whose primary residence is elsewhere, and persons who have resided in Alaska for many years but who have only begun to earn income in Alaska during a three-year period before qualifying for exemption.

This statute cannot, therefore, be said to set up a durational residency requirement as a condition to receiving its benefits. Indeed, as previously noted, the statute contains *no* residency requirement. It is understandable that the superior court was

unable to conclude that any such requirement was imposed by this legislation.

Even if it is assumed that the statute does impose a durational residency requirement, the exemption is not a penalty on one's right to interstate migration. The United States Supreme Court outlined its view on what constituted a penalty in *Shapiro v. Thompson, supra*, and *Memorial Hospital v. Maricopa County, supra*. In both cases, the Court was concerned with the fear and risk the traveler would endure if he could not obtain welfare benefits or indigent nonemergency medical care upon initial establishment of residency in the state. *Maricopa*, 415 U.S. at 257–59, 94 S.Ct. at 1081–1082, 39 L.Ed.2d at 314–15. The Alaska tax exemption does not present a similar risk, nor does it, in any sense, constitute a penalty.

Moreover, as compared to the state of the previous law, Ch. 22 SLA 1980 can even be viewed as an *inducement* to migrate to Alaska, instead of a disincentive. Take, for example, the case of the Zobels compared to that of a person who moved to Alaska in 1965. Under the law as it existed in 1965, one could only look forward to paying taxes indefinitely and quite probably for the rest of his resident life here. By contrast, a person moving to Alaska under Ch. 22 SLA 1980 is assured that his individual state income tax will be decreased by one-third for each year of income-earning residence, and will be eliminated completely thereafter. The Zobels, in that respect, stand in a better position than a vast number of residents who preceded them to Alaska and who incurred tax liability over a period of many years.

Given that the tax does not fall on every new resident and does fall on some long time residents, it is difficult to view the exemption as a symbolic penalty on interstate migration. If the tax was constructed as a direct tax on each person beginning residence in the state, the symbolic penalty would be clear. Here, the symbolism is weakened considerably because the tax does not operate exclusively on new residents.

II.

The remaining question is whether the legislation meets the requirement of reasonable classification which is mandated by the equal protection clause of the Alaska Constitution. As to this subject, we have held that a classification [redacted] explicating the manner in which we should judge the reasonableness of the means or classifications chosen by the legislature, we have also stated the test as whether the classification is "reasonable, not arbitrary" and whether it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

Our adoption of this test, sometimes referred to as an "intermediate" test or an "intensified scrutiny" test, occurred because of dissatisfaction with the manner in which legislative classification had been treated in the federal system under the equal protection clause of the United States Constitution. There was nothing basically wrong with the verbal formulation of the federal "two-tiered" test. Rather, as is often the case in the judicial application of standards stated as generalities, the problem was with the way in which the test was applied in specific instances. The criticism leveled against the federal methodology was that it preordained the result in an unreflective manner. If the subject matter of the test required "strict scrutiny," the burden of showing that the legislation furthered a "compelling state interest" was so overwhelming that the legislation was almost

3. *Hilbers v. Municipality of Anchorage*, 611 P.2d 31 (Alaska 1980); *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980); *State v. Erickson*, 574 P.2d 1 (Alaska 1978); *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976).

automatically invalidated. But if the legislation did not affect fundamental rights or employ a "suspect classification" and, therefore, was subjected to the "rational basis" standard of review, the federal courts often were willing to resort to conjectural or hypothetical purposes (as contrasted with the legislature's actual purposes) in finding that the basis for the classification was rational. Needless to say, few statutes were invalidated as irrational under this latter test.

In both *Isakson v. Rickey, supra* at 362, and *State v. Erickson*, 574 P.2d 1, 12 (1978), we based our new or "intermediate" equal protection test on that suggested in a perceptive law review article by Professor Gerald Gunther.[6] A considerable portion of his article was devoted to analyzing the United States Supreme Court's (then) recent opinions under the equal protection clause as compared to the opinions of earlier years. He suggested that courts, and particularly the United States Supreme Court, should not, in applying the lower-tier "rational basis" test, resort to conjectural or hypothetical purposes in assessing whether the legislative means selected furthered a legitimate purpose. Instead, he proposed that the courts should look to the actual purposes that the legislature had in mind in enacting the statute under review.[7]

In the last analysis Professor Gunther's plea is simply for judicial moderation, "a suggestion of a direction for modest interventionism,"[8] in the review of statutes under the equal protection clause.

This is hardly a new theme. In a tightly woven analysis of judicial review of legislation, Judge Learned Hand has pointed out the difficulty of discovering the constituent factors which underlie any piece of legislation, a task which he terms "a hazardous duty." L. Hand, The Bill of Rights 37 (1958). Unless there were dissatisfaction with the existing status quo, he points out, there would be little need for a legislative enactment. The legislature must try to gain an understanding of the facts as they are and engage in a "prophetic forecast" of the probable effects of the proposed law. As he states, it is extremely difficult for a court to ascertain the policy underpinnings of the statute:

> "[N]ot only is it substantially impossible to forecast the remoter results of any social readjustment, but it is even more difficult to know how far the command will be obeyed. However, difficult as both these undertakings are, they are relatively simple compared with deciding whether the proposed change will be beneficial to the society on which it is imposed. That presupposes a choice and all choices depend upon an appraisal of the values and sacrifices to which the contemplated action will give rise. Values and sacrifices are incommensurables, not being made up of elements common to each other, unless they are themselves composite–which only multiplies the difficulty."

Id. at 37-38.

What must be understood is that when we adopted the "intermediate" test for reviewing the validity of legislative classification under the Alaska equal protection

6. G. Gunther, "Foreward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv.L.Rev. 1 (1972). The article was part of the annual review and appraisal of the 1971 term of the United States Supreme Court.

7. Even the ascertainment of purposes under the Gunther model is somewhat elastic. One approach which he suggests is that courts look to the purposes articulated by the legislature in the process of the enactment of a law. *Id.* at 44–46. But he also suggests that the purposes articulated by the defenders of the law, i. e., the state's legal representatives, should be accepted: "A state court's or attorney general office's description of purpose should be acceptable." *Id.* at 47.

He concedes that, "Identifying the purposes against which the means are to be measured is not a simple undertaking." *Id.* at 46. And, most relevant to the case at bar, he states: "A legislature may legitimately have a multiplicity of purposes, especially in carving exceptions from the scope of a general statute. Court inquiry should not be limited to a primary purpose; subsidiary purposes may also support the rationality of a means." *Id.* at 47.

8. *Id.* at 48.

clause, we did not achieve a magical liberation from the analytical difficulties presented by that clause. We merely took a position of moderation between what we perceived as the iron rigidity of the polar opposites of the federal "two-tiered" test. While the Alaska test may be less deferential toward the legislative means selected, it does not mean that we can substitute our will or judgment as to questions which are traditionally within the legislative competence. We must still remain sensitive to the complexity of many of the matters which are addressed by the legislature in dealing with the societal and economic problems of our age.

Similarly, although we require a "fair and substantial relation" between means and ends, this does not mean that we can ignore the context out of which the legislation emerged. It must be kept in mind that when the legislature deals with a group of problems in a comprehensive manner, it is unlikely that the solutions achieved will be simplistic, utterly symmetrical, or mathematically precise. If such resolutions were required, it is doubtful that government, in any sense that we have ever known it in the past, could any longer function.

After this prelude, we come closer to the problem which confronts us in this case.

One can best understand court decisions under the equal protection clause by placing them in their proper categories.[9] Legislative expressions of socioeconomic policy are in a district category.

> "The need for the pervasive regulation of socioeconomic life characteristic of government in advanced industrial society is generally acknowledged; and correspondingly, the notion that such regulation is constitutionally problematic is generally rejected. Consequently, most differences that serve as the basis of socioeconomic classification and regulation are perceived to be differences to which government may attach significance. They are *deemed* differences relevant to the legitimate aims of modern social policy."

Perry, *supra* note 4, at 1071-72 (emphasis in original).

The tax exemption is not only in the category of socioeconomic legislation, but is also in the category of tax legislation. It has been long established that a state legislature, when it acts in the field of taxation, has the widest possible latitude in setting up classifications and rates of taxation. As the United States Supreme Court stated in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245, 1253 (1937):

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. This Court has repeatedly held that inequalities that result from singling out of one particular class for taxation or exemption infringe no constitutional limitation." (Citations omitted.)

Similarly, in *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940), which sustained a discriminatory ad valorem tax on bank deposits, the court noted that, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." 309 U.S. at 88, 60 S.Ct. at 408, 84 L.Ed. at 593.

One researching the matter will find that the cases are legion in which taxation systems have been upheld against equal protection attacks. When no other specific constitutional right is infringed and only the equal protection clause is relied upon, state taxation systems are almost invariably sustained.[10]

9. Challenges under the equal protection clause are treated differently according to the classifications they establish and the means the legislature chooses. For enumeration and discussion of the major categories, see G. Gunther, Constitutional Law (9th ed. 1975), L. Tribe, American Constitutional Law (1978), M. Perry, *supra* note 4.

10. Statutes which directly impair a specific, separate constitutional right must, of course, be invalidated. Thus in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the court struck down under the First Amendment a tax which discriminated against newspapers. Taxes which discriminate against interstate commerce are similarly inval-

That the principle of broad legislative discretion is still vital can be discerned in the case of *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). In that case the Illinois Constitution had been amended so that individuals were exempted from personal property taxes, but corporations and "non-individuals" were still subject to such taxes. The court unanimously sustained the tax against an attack under the equal protection clause, and in so doing drew heavily upon its earlier cases rejecting such equal protection claims.[11]

A recent decision of one of our sister states exemplifies the same principle. In *Huckaba v. Johnson*, 281 Or. 23, 573 P.2d 305 (1978), the Oregon personal income tax act provided for an exclusion from income of certain payments received under retirement systems established by the United States, but denied this exclusion to military retirees until age 65. The court sustained the statute against an equal protection attack. The distinction was permissible because of the generally lower age of retirement by military personnel and their consequent ability to enter second careers more readily than civilian federal retirees. Even though the statute would not create anything approaching parity between the two groups, and in some instances would produce a grossly significant difference, the court nevertheless sustained the provision. It held that general rules are permissible in devising complex tax systems, and it is not necessary that the impact of taxation categories be the same as to each person affected by them.

It can be argued that these cases are not determinative because some (though not all) of them employ a conjectural rational basis test, not the Alaska test of equal protection. But a careful reading of these cases will reveal that they establish a far-reaching, underlying principle: that in matters of taxation the discretion and power of the legislature is at maximum, and the scope of judicial review or intrusion into the realm of taxation policy is correspondingly limited. Moreover, a close reading of some of the recent United States Supreme Court cases, discussed later in this opinion, will reveal that the court has been concentrating more closely on the actual purposes of the legislation being reviewed under the equal protection clause, and is not relying on mere conjecture or hypothesis as to the legislative purpose. Yet, as will be seen, these recent cases sustain the freedom of state legislatures to make broad determinations in matters of economic policy, taxation, and the management of the government itself. But, before moving on to a discussion of these recent cases, it may be helpful to place the matter of taxation and the equal protection clause in its historical context.

The notion that taxation policy is fundamentally a matter of legislative discretion, and that judicial non-intervention, except in certain discrete instances, is the norm, is deeply embedded in our traditional governmental structure. It is an old and constant theme in American constitutional law. It is, in short, a constitutional principle of first magnitude.

One of the seminal statements about the nature and operation of the taxing power was uttered by Chief Justice Marshall in his landmark opinion in *M'Culloch v. Maryland*, 4 Wheat 316, 428, 4 L.Ed. 579, 607 (1819):

"It is admitted that the power of taxing the people and their property is essential

idated. *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954).

11. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27, 79 S.Ct. 437, 440-441, 3 L.Ed.2d 480, 484-85 (1959); *Magnano Co. v. Hamilton*, 292 U.S. 40, 44-47, 54 S.Ct. [illegible], 78 L.Ed. 1109, 1114-16 (1934); *Lawrence v. State Tax Commission*, 286 U.S. 276, 283, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 1107-08 (1932); *White River Lumber Co. v. Arkansas*, 279 U.S. 692, 49 S.Ct. 457, 73 L.Ed. 903 (1929); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse."

A similar view was expressed over a century ago by Thomas M. Cooley, widely regarded as one of the pre-eminent constitutional scholars and jurists of his time:

"The power to impose taxes is one so unlimited in force and so searching in extent, that courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it.... No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through this power."

T. M. Cooley, Constitutional Limitations 479 (1868).

Mr. Justice Holmes expressed the same views in some of his trenchant dissents, which later became the accepted doctrine of the United States Supreme Court. In *Schlesinger v. Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), a state statute classified gifts made within six years of death as gifts made in contemplation of death, and thereby taxable under the inheritance tax laws. A majority of the court invalidated the statute as denying equal protection of the laws. Holmes, J., joined by Brandeis and Stone, JJ., dissented:

"[I]n dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate."

. . . . .

"[T]he law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

270 U.S. at 241, 46 S.Ct. at 262, 70 L.Ed. at 564.

This is merely a specific instance of a more general belief by Mr. Justice Holmes about the workings of our constitutional system, which he often voiced during his long span as a jurist. As he stated, dissenting in *Truax v. Corrigan*, 257 U.S. 312, 344, 42 S.Ct. 124, 134, 66 L.Ed. 254, 268 (1921):

"There is nothing that I more deprecate than the use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."[12]

As we have seen, the formulation of tax policy is at the heart of the legislative function. Because taxation affects such a wide variety of conflicting interests, and because the affected interests are often interrelated to a small or large extent, it is only right that the resolution of the contending socie-

12. Similarly, Holmes, J., dissenting in *Tyson v. Banton*, 273 U.S. 418, 446, 47 S.Ct. 426, 433, 71 L.Ed. 718, 729 (1927), said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain."

tal and economic forces should be achieved through the tug-and-pull and the dramatic tensions of the legislative process. This thesis was articulated on one occasion by Professor (later Mr. Justice) Felix Frankfurter:

> "Taxation is perhaps the severest testing ground for the objectivity and wisdom of a social thinker. The enormous increase in the cost of society and the extent to which wealth is now represented by intangibles, the profound change in the relation of the individual to government and the resulting widespread insistence on security, are subjecting public finance to the most exacting demands. To balance budgets, to pay for the costs of progressively civilized social standards, to safeguard the future and to divide these burdens fairly among different interests in the community, put the utmost strain on the ingenuity of statesmen. They must constantly explore new sources of revenue and find means of preventing the circumvention of their discoveries. Subject as they are, in English-speaking countries, to popular control, they should not be denied adequate latitude of power for their extra-ordinarily difficult tasks."

F. Frankfurter, *Mr. Justice Holmes and the Supreme Court* 70 (1961).

That the doctrine of judicial non-intervention in the field of economic and social legislation enjoys vitality today can be discerned in a number of recent opinions of the United States Supreme Court.

In *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), a Maryland statute paid a bounty to scrap processors for destroying automobile bulks abandoned in Maryland. Maryland processors were only required to submit an "indemnity" agreement to claim the bounty, but non-Maryland processors had to submit documents of title in order to claim the bounty. The statute was attacked as violating the commerce clause and the equal protection clause of the United States Constitution.

The court held that the equal protection clause was not violated. Maryland could presume that in-state processors are more likely to destroy automobile bulks which were abandoned in Maryland than were out-of-state processors. It could rationally differentiate between those two groups as to the proof of title as a prerequisite of claiming the bounty. In this connection the court stated:

> "It is well established, however, that a statutory classification impinging upon no fundamental interest, and especially one dealing only with the economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." (Citations omitted.)

426 U.S. at 813, 96 S.Ct. at 2499, 49 L.Ed.2d at 233.

In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), the court sustained a state veteran's preference law against equal protection attack. The statute provided that all veterans, male or female, who qualify for state civil service positions must be considered for appointment ahead of qualifying non-veterans. Although the statutory preference was available to both males and females, it was attacked by Feeney on the ground that the statute inevitably operated to exclude women from the Massachusetts civil service jobs, and thus violated equal protection.

Noting that significant numbers of non-veterans are men, the court was unable to conclude that the purpose of the law was to discriminate on the basis of sex. The court stated:

> "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a

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particular law reverberates in a society, is a legislative and not a judicial responsibility." (Citations omitted)

442 U.S. at 271–72, 99 S.Ct. at 2292, 60 L.Ed.2d at 883.

Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), sustained a federal statute requiring retirement of foreign service officers at age 60 against an equal protection attack.[13] The court pointed out that when a statute does not create a "suspect" classification or burden a fundamental interest,

"[C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." [Footnotes omitted.]

440 U.S. at 97, 99 S.Ct. at 942, 59 L.Ed.2d at 176.[14]

The overall purpose of the Alaska enactment at issue here was to grant relief from individual income taxation. One possibility was simply outright repeal of all income taxes. But some forces in the legislature apparently wanted to assure that persons should make some contribution to the cost of government before enjoying the benefits of a full exemption from individual income taxes. The plan can also be viewed as a way of giving some measure of parity between persons who had contributed to the cost of government in the past and those who would earn income but pay nothing if there were an outright repeal.[15] Subsidiary

13. Equal protection was here invoked as a component of the due process clause of the Fifth Amendment to the United States Constitution.

14. In *Massachussets Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam), the court sustained a state law requiring uniformed police officers to retire at age 50 against an equal protection challenge. "Perfection in making the necessary classification is neither possible nor necessary." 427 U.S. at 314, 96 S.Ct. at 2567, 49 L.Ed.2d at 525 (citation omitted).

"That the state chooses not to determine fitness more precisely through individualized testing after 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the state perhaps has not chosen the best means to accomplish this purpose." (Footnote omitted.)

427 U.S. at 316, 96 S.Ct. at 2568, 49 L.Ed.2d at 526.

15. There is some question whether achieving parity by accounting for past tax contributions is a permissible state goal. In *Shapiro*, 394 U.S. at 632, 89 S.Ct. at 1330, 22 L.Ed.2d at 614, the court noted

"that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes [That] would permit the states to apportion all benefits and services according to the past contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." (Footnote omitted.)

However, the Court later sustained one-year residency requirements for lower in-state university tuition. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd without opinion*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971); *Kirk v. Board of Regents*, 273 Cal.App.2d 430, 78 Cal.Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554, 90 S.Ct. 754, 24 L.Ed.2d 747 (1970). In both *Kirk* and *Starns*, the states justified the tuition differential based on goals of cost equalization and contribution to the state's economy. *Starns*, 326 F.Supp. at 240, *Kirk* 78 Cal.Rptr. at 269. Although in *Vlandis*, 412 U.S. at 450 n.6, 93 S.Ct. at 2235 n.6, 37 L.Ed.2d at 70 n.6, the Court repeated its concern that classification based on past contributions raised "grave problems under the Equal Protection Clause," that rationale was not part of the decision.

It appears that the Supreme Court was concerned that a state would limit essential public services, such as parks, schools, police and fire protection, *see Shapiro*, 394 U.S. at 632, 89 S.Ct. at 1330, 22 L.Ed.2d at 614, to those who had made past contributions. The tax exemption is neither a public benefit or service of the kind described. I am persuaded by the dissenting opinions in both *Shapiro* and *Vlandis*, that cost equalization is a permissible goal. *Vlandis*, 412 U.S. at 468-69, 93 S.Ct. at 2244-2245,

goals are those of retaining a competent staff to administer the income tax laws of the state and of not saddling individuals with an empty and burdensome annual filing requirement.

These are legitimate purposes. It is quite permissible for a state to grant tax relief in a retrospective fashion as to a particular class of taxpayers or, conversely, to alter a taxation system so that one class remains liable while another class is relieved of liability. In *Lehnhausen v. Lake Shore Auto Parts Co., supra*, individuals were exempted from personal property taxes, while corporations still remained subject to them. This action was held valid by a unanimous United States Supreme Court against an attack based on the federal equal protection clause. Similarly, in *White River Lumber Co. v. Arkansas*, 279 U.S. 692, 49 S.Ct. 457, 73 L.Ed. 903 (1929), a statute imposed a retroactive tax on undervalued or underassessed lands of corporations, but not on similar lands of individuals. This law was also held valid under the equal protection clause.

Tax legislation, such as the law in question here, is often based on the social and economic values of a particular legislature. Because this involves difficult political judgments, courts should be most reluctant to intervene. In addition,

> "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747, 771 (1932) (Brandeis, J., dissenting). Taxation is an area of legislative activity in which compromise between fiercely contending forces is often achieved. Excessive and improvident decisions should be rectified by the democratic processes and by the political composition of future legislatures. It is not the business of the courts to determine broad questions of taxation policy, and judicial intervention is warranted under the equal protection clause only when the legislative treatment of different groups is so unrelated to furthering a combination of legitimate purposes that we must find the action of the legislature truly irrational. In determining what is rational legislative action, one looks for

> "an affirmative relation between means and ends .... To a large extent, that is an empirical inquiry.... But such an inquiry would be neither mechanical nor value-free. Requiring compulsively neat logical correlations between classification and objective would ignore legitimate demands for legislative flexibility. The inquiry, like others entrusted to the Court, would involve questions of degree, turning on sensitivity to legislative realities and not on purely abstract considerations of fairness .... The line between means and ends will be drawn primarily in such terms of breadth of value judgments; it will present the most difficult questions of degree." (Footnotes omitted.)

G. Gunther, *supra* note 6, at 47–48.[16]

Limited guidance in these questions of degree is provided in *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920), and *Austin v.*

37 L.Ed.2d at 81 (Rehnquist, J., dissenting with whom Douglas, J., joins); *Shapiro*, 394 U.S. at 673–74, 89 S.Ct. at 1352, 22 L.Ed.2d at 638 (Harlan, J., dissenting).

16. The application of the abstract notion of equality has perplexed thinkers throughout the ages. For example,

> "In a socialistic system, you're no better or no worse than anybody else."
>
> "But that's equality!"
>
> "... Equality is not in regarding different things similarly, equality is in regarding different things differently."

T. Robbins, Still Life With Woodpecker 97 (1980). *See also* E. Bodenheimer, Power, Law, and Society 180–84 (1973).

New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). In *Travis*, the Court found invalid a New York tax scheme which, although it taxed residents and nonresidents at the same rate, granted New York residents some exemptions which were not available to nonresidents. In *Austin*, the operation of the tax provisions and exemptions allowed the tax to fall "*exclusively on the income of nonresidents*; . . ." 420 U.S. at 665, 95 S.Ct. at 1197, 43 L.Ed.2d at 537–38 (emphasis supplied). The similarity in the two cases is that the tax imposed obligations *directly* related to one's residency. In contrast, the Alaska exemption does not automatically tax nonresidents to the exclusion of residents. At the same time, the exemption does substantially further the legislative goals of assuring contribution from persons for the cost of government before enjoying the full exemption, and of achieving some degree of parity between new taxpayers and those who have made earlier contributions. In addition, the legislation provides a means to continue to train a competent staff of tax administrators. The state could have provided an exemption for all taxpayers, but still could have required returns to be filed for training purposes. This would be of little value for the state tax administrators because there would be no money at stake and it would saddle individuals with an empty and burdensome annual filing requirement. The present exemption, or a number of alternative provisions, could substantially achieve the legislative purposes.

In the area of taxation and socioeconomic legislation, our function is not to choose for the legislature the provision that would most precisely fit its stated purposes. We need only look at whether the methods are a rational means of achieving the goals.[17] Since the Alaska tax exemption does not discriminate between residents and nonresidents and because it substantially meets its purposes, I would hold that the statutory classification is rationally related to its legitimate purposes. Thus, I would declare the tax exemption statute to be valid, and would reverse the judgment of the superior court.

BURKE, Justice, dissenting.

I join in the scholarly dissent of my esteemed colleague, Mr. Justice Connor. For the reasons that he has stated, I am satisfied that the tax exemption statute, AS 43.20.017(a)-(c), violates none of the constitutional provisions relied upon by the Zobels and the superior court. Thus, I too would reverse.

Thomas WILLIAMS, Commissioner of Revenue, and State of Alaska, Appellants,

v.

Ronald M. ZOBEL and Patricia L. Zobel, husband and wife, Appellees.

No. 5400.

Supreme Court of Alaska.

Oct. 24, 1980

Suit was brought by two residents for declaration that the permanent fund statute, which provides for cash distribution of income derived from the Permanent Fund based on the number of years an individual has been a resident of the state since Alaska became a state, is unconstitutional. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, invalidated per-

17. "The equal protection clause imposes no rigid rule of equality of taxation. Inequalities which may result in singling out one particular class for a reduction in taxation are not prohibited. Only if the classification has no rational basis and is patently arbitrary may it be set aside as unconstitutionally discriminatory."
Desco Products Caribbean, Inc. v. Government of Virgin Islands, 511 F.2d 1157, 1160 (3rd Cir. 1975).

Marian SCHAFER and State of Alaska, Appellants,

v.

Rodney VEST, Appellee.

No. S-289.

Supreme Court of Alaska.

April 27, 1984.

Individual who became resident of state shortly after statehood filed complaint challenging constitutionality of state "longevity bonus program." The Superior Court, First Judicial District, Juneau, Walter L. Carpeneti, J., ruled that the program was unconstitutional, and appeal was taken. The Supreme Court held that state's "longevity bonus program," under which state residents over 65 years of age who had been domiciled in Alaska for 25 consecutive years or more and who were domiciled in Alaska when it was still a territory were paid a monthly cash bonus, violated equal protection provisions of the the United States Constitution.

Affirmed.

Burke, C.J., filed a concurring opinion.

Constitutional Law ⇐234.5
States ⇐123

State's "longevity bonus program," under which state residents over 65 years of age who had been domiciled in Alaska for 25 consecutive years or more and who were domiciled in Alaska when it was still a territory were paid a monthly cash bonus, the purpose of which program was to provide that group of residents with a monetary incentive to continue uninterrupted residency in the state, violated equal protection provisions of the Fourteenth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 14; AS 47.45.010–47.45.170, 47.45.010(a).

Robert M. Maynard, Deborah Vogt, Asst. Attys. Gen., Norman C. Gorsuch, Atty. Gen., Juneau, for appellants.

Mark A. Sandberg, Henry J. Camarot, Camarot, Sandberg & Hunter, Anchorage, for appellee.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

On April 6, 1984, we affirmed summarily a trial court determination that Alaska's Longevity Bonus Program[1] violates the equal protection provisions of the fourteenth amendment to the Constitution of the United States. We now state the reasons for our decision.

The Longevity Bonus Program, created in 1972, pays a monthly cash bonus to qualified Alaska residents.[2] Persons who qualify are those meeting three separate requirements:

1. The individual must be age 65 or over.
2. The individual must have been domiciled in Alaska when it was still a territory (on or before January 3, 1959).
3. The individual must have maintained 25 years of continuous domicile in the state or territory of Alaska.[3]

The sole purpose of the Longevity Bonus Program, according to AS 47.45.170, is to offer and provide qualified Alaskans "an

1. AS 47.45.010—47.45.170.

2. The original legislation provided for a bonus of $100 per month. (§ 1 ch. 205 SLA 1972). In 1976 this amount was increased from $100 to $125 (am § 1 ch. 33 SLA 1976); in 1978 the amount was again increased to $150 (am § 1 ch. 89 SLA 1978); in 1980 the amount was increased to $200 (am § 1 ch. 147 SLA 1980); and in 1981 the amount was raised to its present level of $250 (am § 1 ch. 13 SLA 1981).

3. AS 47.45.010(a).

State." 457 U.S. at 59, 102 S.Ct. at 2312, 72 L.Ed.2d at 677.

The purpose of the Longevity Bonus Program is set forth in the Act. AS 47.45.170.[8] The state's brief extrapolates three purposes from this statute:

1) To provide an incentive for those who qualify to stay in Alaska so as not to deprive new generations of Alaskans of this cultural memory bank.
2) To provide compensation for past hardship suffered in territorial days.
3) To prevent present hardship by providing those who qualify with the economic means to remain in the state.

Despite the state's effort of breaking down the Act's statement of purpose into three parts, the basic purpose of the legislation is to provide a limited group of residents a monetary "incentive to continue uninterrupted residency in the state." AS 47.45.170. Thus, it creates an exclusive class that is to receive special benefits due to the length of the class member's residence in Alaska. Just like the permanent fund dividend program, the Longevity Bonus Program rewards citizens for past contributions; it "creates fixed, permanent distinctions between ... concededly bona fide residents, based on how long they have been in the State." *Zobel III*, 457 U.S. at 59, 102 S.Ct. at 2312, 72 L.Ed.2d at 677.

Insofar as the first purpose is concerned, the state's basic premise is that the designated bonus recipients suffered a special hardship living here when Alaska was a territory and have a special memory which merits a special award not available to other older Alaskans. It is this supposition that living in territorial Alaska makes an individual entitled to special *legal* stature that is impermissible. The federal Constitution prohibits states from making such determinations. The basic predisposition to take care of one's own—and no one else's—is no longer a permissible goal for a state that has joined the federal union.

This basic tenet of federalism was cogently expressed in *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir.1970). In that case the First Circuit invalidated under equal protection a two year residency requirement for admission to federally-aided, low-rent, public housing projects. In invalidating this residency requirement, the court stated:

> [w]e [do not] believe the goal of promoting provincial prejudices toward long-time residents is cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism.

435 F.2d at 813.

The second purpose the state identifies is "to provide compensation for past hardship suffered in territorial days." *Zobel III*'s basic holding is that rewarding citizens for past contributions is not a legitimate state purpose. *Zobel v. Williams*, 457 U.S. at 63, 102 S.Ct. at 2314, 72 L.Ed.2d at 679. Thus, the purpose of the Act to compensate this select class for past hardship is impermissible.

Finally, we are left with the state's goal of preventing present hardship to a select group of senior citizens. Assuming it was permissible for the state to provide benefits to all bona fide residents over sixty-five, the singling out of residents who were here before 1959 and have resided here for 25 years is not rationally related to the goal of providing assistance to the elderly. As a class, bonus recipients do not suffer more present economic hardship than those senior citizens who do not meet the program's requirements. Accordingly, the Longevity Bonus Program's classification does not survive even the lowest level of judicial scrutiny.

The judgment of the superior court is AFFIRMED.[9]

BURKE, Chief Justice, concurring.

I concur in the court's interpretation of the requirements of the fourteenth amend-

8. AS 47.45.170 is set out in full at note 4, *supra*.

9. We would reach the same result under article I, section 1 of the Alaska Constitution, which provides in part: "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law."

incentive to continue uninterrupted residency in the state." [4]

Rodney Vest became a resident of the state of Alaska in April, 1959, approximately three months after statehood. On July 6, 1982, he filed a complaint against Marian Schafer, the administrator of the Longevity Bonus Program, and the State of Alaska. At the time he filed suit, Vest was 67 years old. Vest alleged, among other things, that the limiting of the longevity bonus to persons domiciled in the territory on or before January 3, 1959, and who have maintained a continuous 25 year domicile violates his right to equal protection of the law.

On December 17, 1983, the superior court entered a Memorandum of Decision and Order. The superior court ruled that the Longevity Bonus Program was unconstitutional under the equal protection clause of the United States Constitution.[5] The trial court then held that the unconstitutionality of the residency requirements was not severable from the rest of the program.[6] That is, it rejected Vest's argument that the offending provisions could be severed, thereby opening the program to all bona fide Alaska residents over age 65. Accordingly, the trial court enjoined the state from enforcing the Longevity Bonus Program.

The state appeals the superior court's holdings that the 25 year residency requirement and pre-January 3, 1959 domicile requirement violate the equal protection clause of the federal Constitution.

Resolution of this challenge is controlled by the United States Supreme Court's decision in *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (*Zobel III*). There, eight Justices held that Alaska's permanent fund dividend program [7] violated the federal Constitution. The majority opinion of the Court found that the state's objective—"to reward citizens for past contributions"—was "not a legitimate state purpose." 457 U.S. at 63, 102 S.Ct. at 2314, 72 L.Ed.2d at 679. After *Zobel III*, it is clear that the federal Constitution will not tolerate a state benefit program which "creates fixed, permanent distinctions between ... concededly bona fide residents, based on how long they have been in the

4. AS 47.45.170 states:

> *The sole purpose of this chapter is to offer and provide* all law-abiding Alaskans capable of managing their own affairs who have maintained a domicile in the state for at least 25 years and have reached a retirement age of 65, *an incentive to continue uninterrupted residency in the state.* Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. Bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state. The legislature further finds and states that this legislation recognizes the economic hardships suffered by many elderly Alaskans. Alaskans who through their tenacity and perseverance molded Alaska as we know it through skillful application of their talents. These pioneers are the same Alaskans, who in the prime of their life were in effect treated as second-class citizens by the federal government and who paid much of their hard-earned income to a government in which they did not have the right to participate through the power of the ballot. The legislature also is aware of the fact that many of these pioneers have been forced to live out their retirement years in areas far away from the land they loved and nurtured and thereby also suffering, in many cases, the loss of familial relationship with their own kin, an experience that is sad and frustrating to them as well as depriving new generations of Alaskans of the benefits of their wisdom and experience. This legislation hopefully will provide our pioneers with the economic means to remain in and continue to serve their state and to enjoy the opportunity of aiding the new Alaskan in making this state truly "The Great Land."

(Emphasis added).

5. U.S. Const. amend. XIV, § 1. The court found it unnecessary to address Vest's further contention that the program also violates his state equal protection rights under Alaska Const. art. I, § 1.

6. The statute itself contains a non-severability clause, which specifically prohibits any part of the statute from being enforced if any portion of it is found unconstitutional. *See* § 2, ch. 205, SLA 1972.

7. Under this program, each adult received one dividend unit for each year of residency subsequent to 1959.

ment, and its decision to affirm the judgment of the superior court. I would base our decision, however, on independent state grounds.

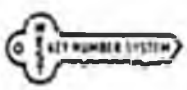
Alaska's founding fathers were not content merely to echo the requirements of the fourteenth amendment, which guarantees all persons "equal protection of the laws." They intended to provide the citizens of this state with broader protection than they are entitled to under the Constitution of the United States. Thus, they adopted a provision that is quite different in its terminology, declaring "that all persons are equal and entitled to equal rights, opportunities, *and* protection under the law." Article I, section 1, Alaska Constitution (emphasis added).

The proceedings of the Alaska Constitutional Convention make it abundantly clear that this difference is one of substance, rather than mere style. Delegate Awes, for example, in explaining this choice of language to the Convention, stated: "We do mean all three [guarantees]. I think [such language] means [people] are entitled to equal rights, equal opportunities, *and* equal protection under the law." 5 Proceedings of the Alaska Constitutional Convention 3863 (February 3, 1956) (emphasis added). Delegate Johnson, phrasing it somewhat differently, stated: "There are two things that are provided for here. One is that all persons are equal under the law and the other is that they are entitled to equal rights and opportunities under the law. They are two separate and distinct things." *Id.* at 1293 (January 5, 1956).

The Longevity Bonus Program, regardless of what might be said in its defense under federal notions of equal protection, fails to provide many citizens of the state with equal rights and opportunities, contrary to the express provisions of article I, section 1. It is intended, in fact, to do just the opposite. Persons who were not domiciled in Alaska prior to January 3, 1959, are automatically and forever barred from sharing in the program's monetary benefits.[1] Even those thus qualified must meet the additional requirement of 25 years of continuous domicile. Thus, the program applies only to a select class, for which one qualifies solely on the basis of the date of his or her arrival in Alaska, followed by a prescribed period of continuous domicile. I see no substantial relationship between these requirements and any legitimate state purpose. *See State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978) (equal protection analysis under the Alaska Constitution explained).

Thus, I would affirm the superior court's judgment on the ground that the Longevity Bonus Program violates article I, section 1 of the Alaska Constitution. It does so because it denies Vest and the members of the class rights and opportunities equal to those given to other citizens of the state, for reasons that are impermissible. This is the case whether or not our interpretation of the requirements of the fourteenth amendment is correct, since article I, section 1 provides express guarantees beyond those contained in the fourteenth amendment.

Our duty, as I see it, is to look first to the requirements of the Alaska Constitution. If the protection sought is afforded by that document, it becomes irrelevant whether or not the same protection is provided by the Constitution of the United States.



1. The program in this case is distinguishable from the permanent fund dividend distribution plan that was before us in *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980), *reversed* 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). There, we observed: "Under the terms of the [dividend distribution] program, it is clear that there is no absolute denial. A new resident is immediately eligible for some portion of a dividend, and this new resident's achievement of the level of dividends currently held by a long-term resident ... is only a matter of delay ...." 619 P.2d at 456. In the case at bar, one who was not domiciled in Alaska on or before January 3, 1959 can never qualify for receipt of longevity bonus payments.

Lodged

AUG 24 1983

FILED

SEP 08 1983

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, vs. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT LEE DEMMERT, THELMA LANGDON MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBURG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 CIV FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter is before the court on cross-motions for summary judgment by plaintiff Judith Andress and by defendants' Baxter, et al. After hearing oral argument on August 8, 1983, and after reviewing the pleadings, affidavits, depositions,

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ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
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memoranda, and other material submitted by the parties, I find that there are no genuine issues of material fact in dispute and that the matter is appropriate for disposition by summary judgment. With respect to the disposition of the cross-motions for summary judgment, the court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Alaska Scholarship Loan Program makes available up to $6,000 per year to undergraduate or vocational students, and up to $7,000 per year for graduate students.

2. The money may be used at approved post-secondary institutions anywhere in the world.

3. An undergraduate may borrow up to $30,000 while an undergraduate, and $35,000 while a graduate, with a combined total of eight years of borrowing as long as no more than five years of loans are graduate loans. Consequently, the limit on available loan money is $53,000 ($35,000 graduate, $18,000 undergraduate).

4. Alaska loans are to be repaid at 5% interest, and the borrower has ten years to repay the debt.

5. There is no needs test associated with the loan.

6. The borrower makes no payments while the borrower is in school, during the first year after ceasing full-time

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study, and during approved deferment periods. These periods of deferment do not count toward the ten-year repayment cycle.

7. Alaska is the only state to offer a general loan program in addition to the Federal Guaranteed Student Loan Program (GSL).

8. The GSL is also available in Alaska.

9. The GSL offers a maximum of $2,500 per year for undergraduates, $5,000 per year for graduates, with a maximum combined total of $25,000. Interest on the loan at the time this action commenced was 9%, and a needs test must be met in order to have interest payments deferred while in school.

10. Additional individual criteria are set by the individual banks (e.g., the borrower must be a regular bank customer, have a minimum grade point average, etc.). Although the GSL residency requirements vary, they usually require one year's residence for qualification.

11. Alaska's scholarship loan program is the most generous loan program in the nation.

12. In addition to being accepted at a qualified institution, the only requirement for qualification for the Alaska loan is that a person must be both

(1) "a resident of the state at the time of application" (AS 14.43.125(a)); and

(2) "a resident of the state for at least two years at the time of application for the loan." (AS 14.43.125(b)).

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13. Plaintiff Judith Andress was a resident of the State of Alaska for 14 months at the time of her application for an Alaska student loan.

14. Ms. Andress, at the time of application, had an intent to make Alaska her home.

15. Ms. Andress was denied an Alaska scholarship loan solely because of the two year residency requirement in AS 14.43.125(b).

16. There is evidence of ~~substantial~~ "loan-shopping" among students in the Western states.

17. Students as a class are highly mobile.

CONCLUSIONS OF LAW

1. A state may restrict the award of student loans to its own citizens. Cf. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 388 (1978); Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981).

2. A "citizen", "domicilliary", or "bona fide resident" is a person who

(a) physically resides in the state; and

(b) has an intent to remain in the state and make it his or her home indefinitely.

Margani v. Sanders, 453 A.2d 501, 503 (Maine 1982).

3. A state may impose a reasonable objective test for determining whether a person who resides in the state is

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actually a "bona fide" resident. This test may include a reasonable period of residence in the state. Martinez v. Bynum, ___ U.S. ___, 51 U.S.L.W. 4524, 4525-4526 (May 2, 1983); Michaelson v. Cox, 476 F. Supp. 1315, 1319 (S.D. Iowa 1979); Montgomery v. Douglas, 388 F. Supp. 1139 (D. Colo. 1974); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1971) aff'd mem. 401 U.S. 985 (1971).

4. A durational residency requirement for proving the "bona fides" of residence, if reasonable under the Equal Protection Clause of the United States Constitution, does not violate the Citizenship Clause of the United States Constitution, The Slaughter House Cases, 83 U.S. 36 (1873), nor does it create an irrebuttable presumption in violation of the Due Process Clause. Vlandis v. Kline, 412 U.S. 441 (1973); Black v. Sullivan, ___ F. Supp. ___, Civil 80-0164-P (D. Maine, March 31, 1983).

[redacted]

6. A durational residency requirement for the Alaska student loan program [redacted] deny access to a [redacted] nor implicate a suspect class. Consequently, it is to be reviewed under the [redacted] test of the Equal Protection Clause. Martinez v. Bynum, ___ U.S. ___, 51 U.S.L.W. 4524, 4525-4526 (1983);

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Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Black v. Sullivan, ___ F. Supp. ___, Civil 80-0164-P (D. Maine, March 31, 1983); Kuhn v. Vergeils, 558 F. Supp. 24 (D. Nev. 1982).

7. The two year durational residency requirement in AS 14.43.125 is a reasonable test for the "bona fides" of residency, particularly since

(a) it is the most generous student loan program in the nation;

(b) students are, as a class, a mobile population (see also Vlandis v. Kline, 412 U.S. 441, 452 (1973);

(c) there is evidence of loan shopping among students in at least the Western United States; and

(d) the money, up to $53,000, can be taken back out of state for up to eight years and spent at a qualified institution anywhere in the world.

8. AS 14.43.125 does not violate the Federal Constitution's Equal Protection, Citizenship, or Due Process Clauses.

ACCORDINGLY,

Plaintiff Judith Andress' motion for summary judgment is DENIED;

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Defendants' Baxter, et al. motion for summary judgment is GRANTED.

The clerk is directed to enter judgment in favor of defendants and dismissing plaintiff's causes of action and claims for relief with prejudice.

IT IS SO ORDERED THIS 8 DAY OF September, 1983.

William P. Gray
United States District Judge

cc: Ron Zobel
Robert Maynard

ATTORNEY GENERAL, STATE OF ALASKA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

BEFORE: THE HONORABLE WILLIAM P. GRAY, SENIOR U. S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA SITTING BY DESIGNATION

JUDITH ANDRESS,

PLAINTIFF,

VS.

FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALINE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBURG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION,

DEFENDANTS.

NO. A82-307 CIVIL

REPORTER'S TRANSCRIPT

MONDAY, AUGUST 8, 1983

CROSS-MOTIONS FOR SUMMARY JUDGMENT

REPORTED BY: JANIS G. ROLLER

A P P E A R A N C E S:

FOR THE PLAINTIFF:

RON ZOBEL
ATTORNEY AT LAW
340 G STREET, SUITE 201
ANCHORAGE, AK 99501

FOR THE DEFENDANTS:

NORMAN C. GORSUCH
ATTORNEY GENERAL

ROBERT M. MAYNARD
ASST. ATTORNEY GENERAL
STATE OF ALASKA
DEPARTMENT OF LAW
POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811

9:05
MONDAY, AUGUST 8, 1983

P R O C E E D I N G S

THE CLERK: ITEM NUMBER 1, A82-307 CIVIL, JUDITH ANDRESS VERSUS FRED J. BAXTER, ET AL.

COUNSEL, WOULD YOU STATE YOUR APPEARANCES FOR THE RECORD.

MR. ZOBEL: I AM RON ZOBEL. I AM THE ATTORNEY FOR THE PLAINTIFF, JUDITH ANDRESS.

MR. MAYNARD: ROBERT MAYNARD, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF ALASKA. . AM REPRESENTING DEFENDANT BAXTER, ET AL.

THE COURT: ALL RIGHT. THIS IS A CROSS MOTION FOR SUMMARY JUDGMENT, IS IT NOT?

MR. ZOBEL: YES, YOUR HONOR. THERE IS A MOTION FOR A CERTIFICATION OF A CLASS ACTION.

THE COURT: OH, YES.

MR. ZOBEL: THAT I WISH TO WITHDRAW ON THE PART OF THE PLAINTIFF.

THE COURT: JU WISH TO WITHDRAW?

MR. ZOBEL: THAT IS CORRECT.

THE COURT: ALL RIGHT. THAT IS SATISFACTORY, MR. MAYNARD?

MR. MAYNARD: NO OBJECTION.

THE COURT: ALL RIGHT. THE MOTION FOR ESTABLISHMENT

OF A CLASS ACTION WILL BE WITHDRAW, AND WE WILL REVERT TO THE MOTION FOR SUMMARY JUDGMENT.

CALL THE OTHER CASE MOMENTARILY. WOULD YOU CALL THE OTHER CASE.

(DISCUSSION REGARDING ANOTHER CASE ON CALENDAR.)

THE COURT: NOW, THE MOTION FOR SUMMARY JUDGMENT: GENTLEMEN, I HAVE READ THE PAPERS, WHICH ARE THOROUGHLY PRESENTED, AND I HAVE DEVELOPED SOME INITIAL ATTITUDES ABOUT THE MATTER WHICH I NORMALLY EXPRESS SO THAT COUNSEL WILL KNOW WHO HAS THE LABORING OAR. IF YOU FIND THAT SATISFACTORY, I WILL GIVE YOU WHAT I HAVE LEARNED.

FIRST, WITH RESPECT TO SECTION .125: AS I UNDERSTAND IT, BUT FOR THAT STATUTE, I COULD COME TO ALASKA FROM WASHINGTON ON SUNDAY, ANNOUNCE I AM HERE AS A PERMANENT RESIDENT, MY DOMICILE IS HERE, THIS IS MY HOME. AND ON MONDAY I COULD APPLY FOR ONE OF THOSE BENEFICIAL LOANS FOR A SCHOLARSHIP, ONE OF THOSE LOANS REFERRED TO IN THE STATUTE, AND BE GRANTED THE LOAN, AND ON TUESDAY GO BACK DOWN TO THE UNIVERSITY OF WASHINGTON, IN SEATTLE, AND MATRICULATE IN THE COURSE OF BIOLOGY. I DON'T KNOW WHETHER IT IS JUST FOR GRADUATE STUDENTS OR UNDERGRADUATE. BUT ANYWAY, I COULD MATRICULATE THERE, USE THE LOAN MONEY, AND NEVER SET FOOT IN ALASKA AGAIN.

IT SEEMS TO ME IT IS REASONABLE FOR THE STATE OF ALASKA TO SAY WE WANT TO MAKE SURE THAT ANYBODY WHO RECEIVES

OUR MUNIFICENT LOAN IS A DOMICILIARY OF ALASKA, AND WE WANT THEM TO PROVE THAT. AND THE BEST WAY WE KNOW OF PROVING THAT, RATHER THAN A SUBJECTIVE REPRESENTATION, IS FOR THE PERSON TO LIVE HERE FOR A REASONABLE TIME.

MY UNDERSTANDING IS THE SUPREME COURT HAS ALREADY HELD THAT A YEAR, A YEAR PREBENEFIT QUALIFICATION IS SATISFACTORY, BUT IT DOES SEEM TO ME THAT UNDER THESE CIRCUMSTANCES A REQUIREMENT THAT A PERSON BE HERE FOR TWO YEARS TO DEMONSTRATE THE EXPRESSED INTENTION OF BECOMING A RESIDENT IS NOT UNREASONABLE.

ONE OF THE PLAINTIFF'S CRITICISMS IS THAT THIS STATUTE SEEKS TO PREVENT OR CURTAIL IMMIGRATION. I DON'T SEE THAT AT ALL. THIS IS NOT LIKE THE CASE IN WHICH THE STATE MADE A RESIDENT REQUIREMENT FOR THE RECEIVING OF WELFARE BENEFITS. NATURALLY, IF A PERSON IS ON HIS UPPERS AND HAS NO JOB OR NO MEANS OF SUPPORTING HIMSELF, HE CAN'T GO TO ANOTHER STATE -- AND DEPENDS ON WELFARE -- HE CAN'T GO TO ANOTHER STATE AND EXPECT TO GET WELFARE BENEFITS, HE IS NOT GOING TO GO. BUT I CAN'T SEE HOW THIS STATUTE POSSIBLY WOULD DETER IMMIGRATION.

IN THE FIRST PLACE, WHAT DO WE CALL THOSE FEDERAL BENEFITS, THE INITIALS, THEY HAVE THEM IN ALASKA JUST LIKE ANY OTHER STATE. I ALSO BELIEVE THAT -- AND THE AVOWED PURPOSE IS NOT TO PREVENT IMMIGRATION AS IT WAS IN THAT CASE INVOLVING THE WELFARE. THE AVOWED PURPOSE IS SIMPLY TO MAKE,

TO REQUIRE A PERSON TO DEMONSTRATE THAT HE IS A DOMICILIARY.

I AM INCLINED TO AGREE WITH THE DEFENDANT. IN FACT, I GUESS WE ALL KNOW THIS IS THE MOST GENEROUS PROGRAM IN THE NATION AND THERE IS KNOWN TO BE LOAN SHOPPING BY STUDENTS. STUDENTS ARE A NOTORIOUSLY MOBILE POPULATION. I THINK THAT IT IS NOT UNREASONABLE FOR THE LEGISLATURE TO SAY WE WANT IT TO BE DEMONSTRATED BY CONDUCT, AS BEST CAN BE DONE, THAT A PERSON INTENDS TO BE A PERMANENT RESIDENT. I AM RECOGNIZING IT IS STIPULATED IN THIS CASE THAT THE PLAINTIFF IS A PERMANENT RESIDENT, IS A DOMICILIARY. THAT IS TRUE, ISN'T IT?

MR. MAYNARD: CORRECT, YOUR HONOR.

THE COURT: BUT I THINK THAT IT IS REASONABLE TO HAVE A STATUTE THAT WOULD FIT EVERYBODY. THIS ONE IS STIPULATED TO BE A PERMANENT RESIDENT, BUT TOMORROW THERE MAY COME A PERSON WHO MAKES THE SAME REPRESENTATIONS. IT WOULD BE HARD FOR THE AUTHORITIES TO SAY, WELL, MS. ANDRESS IS A PERMANENT RESIDENT, BUT MR. GRAY, WELL, WE HAVE SOME DOUBT ABOUT HIM; SO SHE GETS THE LOAN AND HE DOESN'T. I THINK THERE IS A PRECONDITION TO GETTING THE LOAN THAT ISN'T UNREASONABLE.

SO I THINK THE PLAINTIFF HAS THE LABORING OAR. DO YOU WANT TO START PULLING?

MR. ZOBEL: IT IS VERY CLEAR I HAVE A LABORING OAR. THANK YOU, YOUR HONOR.

LET'S, FIRST OF ALL, GO TO THE ISSUE OF WHAT IS THE PURPOSE OF THE STATUTE. WE ARE QUITE AWARE THAT THE STATE CONTENDS THAT THIS IS AN ATTEMPT TO HAVE A STANDARD FOR PROOF OF DOMICILIARY STATUS. WE HAVE NO DISAGREEMENT THAT THE STATE OF ALASKA CAN LIMIT ITS STUDENT LOANS TO DOMICILIARIES. THERE IS NO DISAGREEMENT WITH THAT.

WE ALSO DO NOT DISAGREE THAT THE STATE COULD IMPOSE A REASONABLE LENGTH OF TIME AS ONE ELEMENT OF PROOF OF DOMICILIARY STATUS.

WHAT WE DISAGREE WITH IS WHETHER THAT LENGTH OF TIME CAN BE TWO YEARS IN LENGTH. NO FEDERAL COURT IN THE COUNTRY HAS UPHELD TWO YEARS IN LENGTH AS A REASONABLE TEST OF DOMICILIARY STATUS.

THE COURT: BUT ONE YEAR HAS BEEN UPHELD, HAS IT NOT?

MR. ZOBEL: THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. THEN YOU SAY YOU COULDN'T COMPLAIN ABOUT ONE YEAR, BUT YOU SAY AS A MATTER OF LAW TWO YEARS IS UNREASONABLE.

MR. ZOBEL: THAT IS CORRECT.

THE COURT: I DON'T QUITE UNDERSTAND THE RATIONALE THERE. THERE HAS TO BE A RATIONAL RELATIONSHIP BETWEEN THE REQUIREMENT AND THE REASONABLE PURPOSE. IF ONE YEAR IS VALID, HOW CAN I SAY THAT TWO YEARS IS INVALID?

MR. ZOBEL: AS THE DURATIONAL PERIOD BECOMES

LONGER AND THE STATE IS USING IT AS A DEFINITION OF WHO IS A NONRESIDENT AND WHO IS A RESIDENT, AND IT BECOMES LONGER, THE STATE IS SWEEPING MORE AND MORE BONA FIDE RESIDENTS, SUCH AS MY CLIENT, INTO THAT DEFINITION AND, IN EFFECT, DECLARING BONA FIDE RESIDENTS TO BE NONRESIDENTS. SO A LINE DOES HAVE TO BE DRAWN, AND BECAUSE THE LENGTH OF TIME THAT IS CHOSEN BY THE STATE IMPLICATES IMPORTANT RIGHTS THAT ARE ESSENTIAL TO THE UNITY OF THE COUNTRY, I BELIEVE THAT THIS COURT CAN SAY THAT THERE IS A POINT AT WHICH THE LENGTH OF TIME HAS NO -- IT DOESN'T REFLECT THE FACT OF DOMICILE.

THE COURT: IMPORTANT RIGHTS ESSENTIAL TO THE UNITY OF THE COUNTRY, WOULD YOU EXPLAIN THAT A LITTLE BIT.

MR. ZOBEL: THE FIRST LINE OF THE FOURTEENTH AMENDMENT SAYS THAT PERSONS ARE THE CITIZENS OF THE STATE IN WHICH THEY RESIDE; AND, THEREFORE, THE LEGISLATURE'S IMPOSITION OF DEFINITIONS OF WHO RESIDES HERE AND WHO DOESN'T IMPLICATES SPECIFIC TEXTS OF THE UNITED STATES CONSTITUTION. THE CITIZENSHIP THAT IS GRANTED PERSONS IN THE COUNTRY AND TO THE PEOPLE THAT COME HERE TO LIVE IN ALASKA IS NOT GRANTED BY THE LEGISLATURE OF ALASKA, AND IT IS NOT A PARTIAL CITIZENSHIP OR SOME WATERED-DOWN CITIZENSHIP.

THEREFORE, THE STRINGENCY UNDER WHICH THIS REQUIREMENT SHOULD BE REVIEWED, WE BELIEVE, IS MORE THAN JUST A RATIONAL BASIS. NOW, WE DO NOT BELIEVE THAT IT IS

RATIONAL, BUT WE WOULD NOT AGREE WITH THE STATE THAT IS WHERE THE TEST NECESSARILY LIES.

IF I MAY BACK UP FOR JUST A MOMENT, YOUR HONOR, AND GO TO THIS ISSUE OF WHAT IS THE PURPOSE HERE, IT IS VERY CLEAR FROM THE CASE LAW THAT FISCAL AND ADMINISTRATIVE CONCERNS AND INHIBITING MIGRATION OR REWARDING FOR PAST CONTRIBUTIONS ARE NOT PURPOSES THAT WILL SUPPORT A DURATIONAL RESIDENCY REQUIREMENT.

THE COURT: ADMINISTRATIVE CONVENIENCE, REWARDING FOR PAST CONTRIBUTIONS AND WHAT IS THE THIRD?

MR. ZOBEL: INHIBITING MIGRATION.

THE COURT: SURE, SURE.

MR. ZOBEL: THE ONLY THING THAT WILL SUPPORT THE DURATIONAL RESIDENCY REQUIREMENT IS WHETHER IT IS A LEGITIMATE TEST OF BONA FIDE RESIDENCY.

THE COURT: UM-HUM.

MR. ZOBEL: I THINK NOTHING DEMONSTRATES MORE WHAT THE PURPOSE OF THIS LAW IS THAN THE ARGUMENTS OF THE DEFENDANTS THEMSELVES. THE ARGUMENT THEY MAKE IS THAT THIS IS THE MOST GENEROUS STUDENT LOAN PROGRAM IN THE COUNTRY.

THE COURT: YES.

MR. ZOBEL: THEREFORE, ALASKA SHOULD BE ENTITLED TO HAVE A LONGER DURATIONAL RESIDENCY REQUIREMENT THAN WHAT THE REST OF THE COUNTRY HAS. THERE IS NO RELATIONSHIP BETWEEN THE SIZE OF THE LOAN AND THE PROOF OF FACT OF DOMICILE.

THE COURT: THE MORE GENEROUS A LOAN PROGRAM, TH
MORE LIKELY IT IS THAT A PERSON WHO IS NOT A BONA FIDE
RESIDENT WILL TRY TO COME TO ALASKA TO TAKE ADVANTAGE OF I
ISN'T THAT A REASONABLE SYLLOGISM?

MR. ZOBEL: THAT IS A REASONABLE SYLLOGISM. I
WOULD NOT AGREE THAT THAT IS A LEGITIMATE CONCERN OF THE
STATE OF ALASKA. I THINK THAT THE U. S. SUPREME COURT HAS
MADE IT VERY CLEAR THAT THE RIGHT TO TRAVEL, THE RIGHT TO
MIGRATE IS NEARLY UNCONDITIONAL, AND A PERSON CAN COME TO
THE STATE BECAUSE WE HAVE GOOD ROADS, BECAUSE WE HAVE A
GOOD ECONOMY, BECAUSE WE HAVE WELFARE BENEFITS THAT ARE
HIGHER, BECAUSE WE HAVE AN EDUCATIONAL SYSTEM THAT PEOPLE
WISH TO ATTEND, AND THE REASON THAT PEOPLE COME HERE IS N
SOMETHING THAT THE STATE OF ALASKA IS CONCERNED ABOUT.
THEY CAN'T CONDITION THAT RIGHT.

THE COURT: BUT THEY CAN CONDITION THAT RIGHT U
HAVING LIVED HERE A YEAR.

MR. ZOBEL: I AGREE THAT THE CASE LAW STATES TH
ONE YEAR IS JUDGED TO BE --

THE COURT: IT CERTAINLY WOULD BE REASONABLE TO
SAY IN ORDER FOR A PERSON TO DEMONSTRATE HIS DOMICILE, HI
TO STAY HERE A WEEK BEFORE HE APPLIES FOR A LOAN. IT HA
DETERMINED THAT HE HAS TO STAY HERE BEYOND A YEAR IN ORD
TO BE ABLE TO APPLY FOR CERTAIN BENEFITS. THE GREAT TRO
THAT I HAVE IS SAYING THAT ONCE YOU GET BEYOND A YEAR,

SHE IS A RESIDENT OF ALASKA.

MR. ZOBEL: THAT IS CORRECT,YES.

THE COURT: AND IN ORDER FOR HER TO GET DOMICILIARY BENEFITS IN ALASKA SHE HAS TO HAVE BEEN HERE YEARS; SO THERE IS THAT GAP WHERE SHE IS NOT ENTITLED TO DOMICILIARY BENEFITS OF ANY STATE.

MR. ZOBEL: THAT'S CORRECT.

THE COURT: I WILL ASK THE DEFENDANTS ABOUT THA

MR. ZOBEL: ALSO ON THIS MATTER OF THIS IS THE MOST GENEROUS STUDENT LOAN PROGARM -- AND OUR ARGUMENT IS THAT IS IRRELEVANT -- IF THAT IS ACCEPTED, IF THE GENEROS: OF THE PROGRAM HERE IS SAID TO HAVE SOME IMPACT UPON THE LENGTH OF DURATIONAL RESIDENCY THAT CAN BE REQUIRED, THEN WE ARE LEFT WITH THE SITUATION OF WHAT IF THE LEGISLATURE DOUBLES IT? DOES THAT MEAN THEY CAN DOUBLE THE DURATIONAL RESIDENCY REQUIRENENTS? WHAT IF THEY GAVE AWAY A MILLION DOLLARS? DOES THAT MEAN THAT THEY HAVE A 20-YEAR REQUIREME OF COURSE.NOT.

THE GENEROSITY OF THE PROGRAM HAS NO RELATIONSHIP TO THE FACT OF DOMICILE OR THE FACTORS THAT GO INTO PROVING IT. THE DEFENDANTS HAVE ALL KINDS OF OTHER TESTS FOR WHETHER PEOPLE ARE DOMICILIARIES. THEY ASK PEOPLE WHO APPLY FOR LOANS WHETHER THEY HAVE HOMES HERE, JOBS, WHETHER THEIR KIDS GO TO SHCOOL, WHETHER THEY HAVE RELATIVES HERE, WHETHER THEY HAVE LICENSES FOR THEIR CAR HERE, WHETHER THEY PAY TAXES HERE. THERE ARE ALL OF THESE FACTORS THAT GO INTO

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DETERMINING WHETHER THOSE PEOPLE TRULY LIVE HERE.

BUT IF YOU HAVE NOT BEEN HERE TWO YEARS, THAT IS THE END OF THE INQUIRY. IT IS NOT JUST ONE ELEMENT. FOR EXAMPLE, IF WE HAD A TWO-YEAR REBUTABLE PERIOD, THAT WOULD EVEN BE A DIFFERENT SITUATION. AT LEAST THEN SOMEONE LIKE MY CLIENT WOULD BE GIVEN THE OPPORTUNITY TO SHOW THROUGH THESE OTHER FACTORS THAT SHE SATISFIES ANY FACTUAL TEST OF DOMICILE.

THE COURT: WELL, IF YOU CARRY THAT TO AN EXTREME, THAT WOULD MEAN THAT NO TIME PERIOD IPSO FACTO REQUIREMENT WOULD BE POSSIBLE. SHE SHOULD BE ABLE TO SHOW ON MONDAY, AFTER HAVING COME SUNDAY, THAT SHE IS A PERMANENT RESIDENT. DON'T YOU HAVE TO ACKNOWLEDGE THAT ALL KINDS OF ADMINISTRATIVE DIFFICULTIES WOULD COME UP IN A SITUATION OF THAT KIND? SO YOU HAVE TO ACKNOWLEDGE THAT SOME TIME PERIOD AS A CONDITION PRECEDENT IS FEASIBLE.

MR. ZOBEL: YES, WE ACKNOWLEDGE THAT. WE DO, YOUR HONOR.

THE COURT: YES, I KNOW. THEN WE HAVE THE PROBLEM THAT IF A YEAR IS REASONABLE, HOW CAN WE SAY THAT TWO YEARS IS NOT? I KNOW I AM GETTING REDUNDANT, BUT THAT IS THE THING THAT BOTHERS ME.

MR. ZOBEL: AND THE PROBLEM THAT WILL COME UP IF TWO YEARS IS SAID TO BE A TRUE TEST OF DOMICILIARY STATUS, THEN WHAT ABOUT THREE? WHAT ABOUT FOUR? SOMEWHERE THE LINE

HAS TO BE DRAW..

THE COURT: YEARS AGO WHEN LORD MANSFIELD WAS WORKING TOWARD A RULE AGAINST PERPETUITIES, SOMEBODY SAID TO HIM, WHERE WILL YOU STOP? AND HE SAID, I WILL STOP WHEN ANY VISIBLE INCONVENIENCE DOTH APPEAR. I KNOW THAT IS HARDLY SATISFACTORY IN ANTICIPATING WHAT -- IN ADVISING YOUR CLIENTS, BUT IN THESE SITUATIONS YOU CAN ALWAYS CARRY A MATTER TO AN EXTREME. I WOULD SAY, CERTAINLY, TEN YEARS WOULD BE ALTOGETHER TOO MUCH AND PROBABLY FIVE. BUT WHEN YOU GET DOWN AND ACKNOWLEDGE THAT ONE IS REASONABLE, I HAVE GREAT DIFFICULTY IN SAYING THAT THE LEGISLATURE, AS A CONSTITUTIONAL MATTER, CANNOT PROVIDE A TWO-YEAR RESIDENCY.

MR. ZOBEL: I THINK THE STATE OF ALASKA ITSELF, AT ITS UNIVERSITY, EVIDENCES WHAT A REASONABLE TEST IS. THEY HAVE A ONE-YEAR REQUIREMENT AT THE UNIVERSITY OF ALASKA.

THE COURT: THAT IS IN A LIVE-IN SITUATION. THAT IS IN A STAY-HERE SITUATION TO GO TO SCHOOL HERE. THESE OTHER ONES, WHY YOU COULD TAKE YOUR LOAN AND GO DOWN TO WASHINGTON, AND, AS I SAY, NEVER COME BACK.

MR. ZOBEL: THE SAME PERSON WHO GOES TO THE UNIVERSITY OF ALASKA, FOR EXAMPLE, WHO WOULD BE DECLARED A RESIDENT BY THE STATE, WOULD ALSO BE DENIED A LOAN.

THE COURT: SAY THAT AGAIN.

MR. ZOBEL: A PERSON WHO WENT TO THE UNIVERSITY