



10-1981

Zobel v. Williams

Lewis F. Powell Jr

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Alaska, by amendment to its Const., created a permanent Fund to receive & hold the enormous rents & revenues received by the State from its oil & other natural resources. The ^{corpus of} Fund itself must remain inviolate

But income is distributed as "dividends" to residents in units of \$50 for each year of residence in the State. Appellants attack this as a "durational residence requirement"

PRELIMINARY MEMORANDUM

February 20, 1981 Conference
List 7, Sheet 1

No. 80-1146

ZOBEL et ux.

v.

WILLIAMS, Alaska Comm'r Rev.

Appeal from Alaska S. Ct.
(Rabinowitz for the Court;
Burke, concurring; Dimond
and Matthews, dissenting)

State/Civil

Timely

1. SUMMARY: Unlike most state governments, the State of Alaska has more money than it can spend! It therefore adopted a plan to give away much of its money to its residents.

The amount of money received by any individual is a function of the number of years the individual has lived in the State. The

I would note probable jurisdiction in this unusual and interesting case. Paul C.

Let's move
to Alaska!

question is whether this system of distributing money violates equal protection or is an unconstitutional infringement on the right to travel.

2. FACTS AND DECISION BELOW: Alaska is blessed with vast natural resources which now are being developed. Rents, royalties, and lease sale proceeds are flowing into the State's coffers at a staggering rate. In 1976, Alaska adopted a constitutional amendment establishing something called the Permanent Fund. Alaska Const. art. IX, sec. 15. Proceeds from natural resources are placed in the Fund. Under the constitutional amendment, the principal of this Fund may not be appropriated by the legislature for any purpose. Only the earnings from investment of the principal may be used for government programs.

The Fund's annual yield is itself a huge amount of money, far more than the state legislature wishes to spend for services and programs. In April, 1980, the legislature enacted a "dividend program" that each year distributes to State residents some of the Fund's yield. Act of April 15, 1980, reprinted in Juris. Stmt. at 60a-70a. For the first year of the program, each dividend unit is worth \$50. Id. § 3, reprinted in Juris. Stmt. at 69a. Under the program, each state resident is entitled to one dividend unit for each year of residence in Alaska. For example, a person who had lived in Alaska since statehood would get \$1,050 in the first year of the program; a one-year resident would get only \$50. The

Example

total planned disbursement for the first year of the program is \$130 million.

In establishing this program, the legislature made several statements of policy and findings of fact. First, it concluded that "there exists in the state a serious problem of population turnover," which leads to "political, economic, and social instability." Id. § 1(e), reprinted in Juris. Stmt. at 61a. The dividend program therefore was designed "to encourage persons to maintain their residence in Alaska and to reduce population turnover." Id. § 1(b)(2), reprinted in Juris. Stmt. at 61a. Second, it stated that it intended "to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund." Id. § 1(b)(3), reprinted in Juris. Stmt. at 61a. Third, it declared that the award of dividends "based on full years of residency . . . fairly compensates each state resident for his equitable ownership of the state's natural resources." Id. § 1(c), reprinted in Juris. Stmt. at 61a.

Appts, who are recent Alaska residents, sued in the state trial court contending that the dividend program violated equal protection and the constitutional right to travel as well as provisions of the state constitution. The trial court held the program unconstitutional, but the Alaska Supreme Court reversed. That court noted that the law was not exactly a durational residence requirement, because all Alaska residents were entitled to some benefits. Juris. Stmt. at 11a. The

court acknowledged, however, that the measure of benefits was a function of the duration of residence. Id. It turned then to the scope of judicial review. Language in early Supreme Court cases suggested that durational residence requirements were to be judged under the "strict scrutiny" test. Dunn v. Blumstein, 405 U.S. 330, 342 (1972), quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The court noted, however, that Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and Sosna v. Iowa, 419 U.S. 532 (1975), stated that some durational residence requirements would not penalize the right of interstate migration, and thus not provoke strict scrutiny. 415 U.S. at 256-59. The court thus undertook to consider whether the law was entitled to the deferential review hinted at in Sosna and Memorial Hospital. It identified four factors that made a statute susceptible to strict scrutiny: (1) whether the state's basis for the residence requirement was mere budgetary, recordkeeping, or administrative concerns; (2) whether "basic necessities of life" were at issue; (3) whether the law absolutely denied, as opposed to delayed, receipt of a benefit; and (4) whether "fundamental rights," such as the right to vote, were abridged. In light of these factors, the court concluded that, "although the question is not a clear one," *Juris. Stmt.* 12a, the law had to meet only the rational basis test.

The court then discussed the three interests asserted by the state. See statutory summary supra. The Court

concluded, first, that the state legitimately could create a financial incentive for individuals to establish and maintain residence in Alaska. Excessive population turnover has presented problems in Alaska's past. Second, it thought that Alaska was entitled to use the graduated scale of benefits to encourage prudent management of the Permanent Fund. The court noted that a per capita benefit system would provide incentives for risky management of the Fund and unwise use of natural resources. That is so because, as population increases, per capita benefits would decline. Thus, current residents would have an interest in (a) speculative investments that would yield quick returns, and (b) rapacious development of natural resources to maximize the Fund's principal. Third, the court said that the state legitimately could apportion benefits in recognition of the "contributions of various kinds, both tangible and intangible, which residents have made during their years of state residency."

In conclusion, the court held that the scheme survived federal and state constitutional challenge because the "purposes put forward by the state are legitimate and sufficiently weighty, and that the classification system has a fair and substantial relationship to these purposes." Juris. Stmt. 35a.

Justice Burke wrote a brief concurring opinion, stating his "serious reservations" about certain aspects of the

plan were overcome by his belief that the court's role was not to second-guess the legislature's findings and conclusions.

Justice Dimond dissented for himself and Justice Matthews. In brief, he concluded that this case was unlike any durational residence requirement upheld by the Supreme Court, because this was an unlimited durational residence requirement. It was impossible for a new resident ever to catch up with an old resident. The dissenters noted that only "reasonable" residence requirements had been upheld in prior Supreme Court cases. This one must be unreasonable, because it is perpetual.

After the state supreme court's decision, appts sought a stay from this Court. Justice Rehnquist granted a temporary stay and referred the matter to the Conference. On November 17, 1980, this Court entered a full stay of the lower Court's judgment (A-385; Rehnquist, J., dissenting).

3. CONTENTIONS: Appts contend that the only durational residence requirements approved by this Court are brief, "reasonable" periods necessary to establish bona fide residency. The Alaska law in this case, by contrast, creates "a perpetual disparity in treatment between the citizens of a State solely on the basis of length of residency." Appts point out that the Alaska Supreme Court itself has a confused position on issues of this kind. In a companion case to this one, Williams v. Zobel, No. 2170 (Alas. S. Ct. Sept. 19, 1980) [not pending here], the Alaska Supreme Court declared unconstitutional a scheme to exempt persons who had filed three or more returns from the state income tax. Appts say it is

ludicrous that Alaska cannot constitutionally exempt long-term residents from taxation but be permitted to preferentially give them the money to pay their taxes. Appts say, in sum, that the state cannot constitutionally create a disparity in treatment among bona fide residents of the state. The state's claimed interests, even if permissible public purposes, are not so significant that they support an unending residence requirement of this sort. The scheme is so egregious that summary reversal is justified.

The state has filed a motion to dismiss or affirm that essentially tracks the reasoning of the state supreme court. The state argues that the law does not burden the right to travel; if anything, it creates an incentive to move to Alaska. The rational basis test is applicable because the law does not deny necessities of life or infringe on fundamental rights. The program is constitutional because it plainly bears a fair and substantial relation to the state's interests.

4. DISCUSSION: Appts have a substantial argument that the Alaska statute unconstitutionally imposes an unreasonable, open-ended durational residence requirement. I can find no prior case that has considered whether a state constitutionally may distinguish among residents, based on the date of their migration, in perpetuity. Earlier cases only discussed whether a state could impose a threshold period to establish bona fide residence.

I would note probable jurisdiction.

There is a motion to dismiss or affirm.

02/13/81

Cane

Opn in petn.

Court
 Argued, 19...
 Submitted, 19...

Voted on....., 19...
 Assigned, 19... No80-1146
 Announced, 19...

ZOBEL

vs.

WILLIAMS

may be no fed 9

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓		✓							
Brennan, J.						✓							
Stewart, J.						✓							
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.						✓							
Stevens, J.						✓							

join 3

GRANT

Caldwell

G

April 17, 1981 Conference
Supplemental List

No. 80-1146

ZOBEL, et al.

v.

WILLIAMS, etc., et al.

Motion of Appellants to
Waive Filing of Joint
Appendix

SUMMARY: Appellants move to dispense with the Rule 30.7 requirement that a joint appendix be printed. Appellees join in the request.

Appellants maintain that the case has been presented on an agreed set of facts, and that there has been no factual record developed below that would aid the Court.

DISCUSSION: Because both parties agree, the motion should be granted.

4/16/81

Caldwell

PJC

Grant JCB

Reviewed 9/27 (Alaska "Fund Case")

I say full
rules 8

There are six "right to travel" cases. David
discusses them in two groups:

1. Shapiro (welfare), Dunn (vote), & Memorial Hospital

df1 08/31/81

Analyses in these are consistent. The
classification in each was held to
"penalize" a "fundamental right" or deny (another
form of penalty) a "necessity" of life.

When a penalty is

2. Vlandis (tuition), Sosna (divorce residence),
and Helmer (last term case - flight from Ga. not really relevant)

Analyses was a "balancing" approach.
There was no "penalty" on exercise of
a "fundamental" right (e.g. attend University
or obtain divorce).

Balance state & individual interests

3. This case. No "fundamental right" is
penalized, as every resident except oldest
in terms of residency, receives a different
dividend.

BENCH MEMORANDUM

Thus, a "balancing" approach is appropriate.

To: Mr. Justice Powell

August 31, 1981

From: David Levi

State interest is weak. Fund was established
for important state purposes (provide for future) but

Re: No. 80-1146: Ronald M. and Patricia L. Zobel v. Thomas
Williams, Commissioner of Revenue, and State of Alaska

the "dividend" scheme based on residency does
not further these interests.

Question Presented

Personal interest is stronger. There is
an inverse tax that falls unequally.
Whether the distribution of earnings from the Alaska
Permanent Fund to State residents in proportion to the length

of their residency violates newcomers' right to travel to the
State?

Also no "limiting principle". If
State payments may be based on years of
residence, what about other benefits not
involving fundamental rights: use of state
parks, ~~museums~~ (use of facilities), tickets to
public theater or opera, & type of state scholarships?

Introduction

This case poses a finely balanced question as to the application of the Court's past right to travel cases. In several respects the durational residency requirement here appears to work only a limited infringement on the right to travel. The requirement does not divide the state's residents into two sharply defined classes of newcomers and oldtimers but rather distinguishes between all residents, long- and short-term alike, on the basis of how long they have lived in the State. The scheme does not flatly deny a state benefit to newcomers but rather provides part of the benefit to all residents, no matter how new, with the promise that each year will bring a greater share. We deal not with the right to vote or to welfare or to any other vital state service commonly available from the states, but with the distribution of the State's oil revenues through means of a unique cash gift from the State to its citizens.

Yet, from another point of view, the durational residency scheme here may appear more troubling. It is a scheme that creates a permanent set of durational distinctions for all residents, not one that seeks to identify bona fide residents and then treat them all equally. Most troubling, it is a scheme that may be replicated in a multitude of ways, throughout the wide realm of government services, not one that can easily be limited by some peculiarly strong state interest. If this plan of distribution is upheld by the

Point

Court, may the states, or indeed the federal government, condition entrance to national parks or museums, eligibility for state educational prizes, bus fare, or tax deductions, upon length of residency in the nation or the state?

The Court must decide: (1) whether the Alaska distribution scheme infringes upon the right to travel and how seriously; and (2) if the right to travel is infringed whether the State's interests here are sufficient--under whatever standard of review the Court chooses--to justify the infringement.

Background

A. The Statutory Scheme

In 1977, blessed with an oil bonanza, the citizens of Alaska adopted a constitutional amendment creating the Permanent Fund. The amendment directs that at least 25% of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State are to be placed in a fund. The principal of the Fund is inviolate; only the investment earnings from the Fund are available for government programs. The purpose of the Fund is twofold: first, to assure that ongoing government programs can be supported in the future and do not become dependent on a temporary surge of revenue and second, to limit the temptation to use oil revenues to create new and wasteful government programs.

In 1980, the Alaska legislature enacted the

*Purpose
- but
these
could be
met by
equal
distribution
of income*

Permanent Fund Statute, AS 43.20.010 (Ch 21, SLA 1980), under which 50% of the earnings from the Permanent Fund is to be returned each year to state residents in the form of cash dividends. Under the distribution, each resident receives one dividend for each year of residency since 1959, the year Alaska became a state. Thus, a resident of thirty years receives twenty-two dividends this year and twenty-three dividends next year. A resident of six months receives one-half of a dividend. The dividends are calculated by dividing the amount of the income to be distributed--one-half of the income from the Permanent Fund--by the total number of dividends to be distributed.¹ In 1980 the value of a dividend was fixed at \$50. Had the distribution not been enjoined by the Zobel's legal action, a resident from statehood would have received \$1,050 (twenty-one dividends) while a resident of a year would have received the single dividend of \$50.

50% of
Fund
income

One
dividend
for each
year of
residency
since
since
Statehood

At the same time that the legislature enacted the Permanent Fund Statute, it also passed into law a state income tax exemption statute. Under this measure, residents who filed state income tax returns for three years were immediately exempt from any further state income taxes. Those residents

¹If this calculation yields a figure of less than \$50, the legislature must appropriate money from the general fund to assure a minimum dividend of \$50.

who filed for two years were to pay only one-third of their income tax, while those who filed in one previous year were exempted from one third of their tax. The tax exemption statute is not before the Court on this appeal but was also the object of the Zobels' attack.

Tax exemption statute not in this case

The Zobels have been residents of the State since 1978. They filed suit in state superior court on April 28, 1980, seeking a declaration that both the tax exemption statute and the Permanent Fund statute were unconstitutional. The superior court held that both statutes violated the right to equal treatment under the Alaska Constitution and enjoined the state from making any distributions from the fund under the durational residency scheme. On appeal, the State Supreme Court affirmed the lower court's finding that the tax exemption statute violated the state constitution. Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Dimond & Matthews; Rabinowitz, C.J., concurring; Connor & Burke, dissenting). Immediately thereafter the state legislature completely abolished the state income tax. However, the State Supreme Court reversed the lower court's holding that the Permanent Fund Act violated the state equal protection clause and held further that neither did the Act violate the federal right of interstate migration. Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (Rabinowitz, C.J., & Connor; Burke concurring; Dimond and Matthews, dissenting). Chief Judge Rabinowitz cast the deciding vote in each of these decisions. We stayed the

Alaska S/Ct upheld Permanent Fund Act

mandate of the Alaska Supreme Court on October 28, 1980, pending timely filing and disposition of this appeal.

B. The Opinion Below

The court began its inquiry by searching for the appropriate standard of review. Language in Dunn v. Blumstein, 405 U.S. 330,² might indicate that strict scrutiny was always triggered by durational residency requirements. However, in Shapiro v. Thompson, 394 U.S. 618 (1969) and then in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) the Court indicated that durational residency requirements that did not "penalize" the exercise of the right of interstate migration would not be strictly scrutinized. Moreover, strict scrutiny was not the standard applied by the Court in Sosna v. Iowa, 419 U.S. 393 (1975), the Court's most recent examination of a durational residency requirement.

In determining whether strict scrutiny ought be applied, the Alaska court identified four possible factors on the basis of this Court's opinions. First, Sosna indicates that strict scrutiny is applied when the state seeks to justify the durational requirement solely because of

² "In sum, durational residence 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 quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original). . . . "

administrative, budgetary, or recordkeeping needs. But here the State has put forward other justifications. Second, Maricopa County suggests that if the benefit denied to new residents is a "basic necessity" of life--e.g. welfare or medical care--then strict scrutiny will be applied. But again, the requirement here falls out of the strict scrutiny category since the cash dividend cannot be considered a "basic necessity."

Third, Sosna and Vlandis v. Kline, 412 U.S. 441 (1973), indicate that where the durational requirement does not absolutely deny provision of a benefit or service but only delays it, strict scrutiny will not be applied. The court concluded that the Alaska scheme was fairly viewed as one which delays rather than denies. Although a new resident can never catch up to a current long-term resident in the lifetime of the oldtimer, he can catch up by outliving the oldtimer. And when he does catch up, the newcomer will be much better off than today's oldtimer was with the same number of dividends. Unlike today's oldtimers who received nothing as they built up their years of residency, tomorrow's oldtimers will have collected an increasing number of dividend payments on the way to building their seniority. Moreover, as the Permanent Fund grows, dividends will be worth much more in the future.

Finally, language in Maricopa County suggests that strict scrutiny will be applied when the durational residency

requirement affects a "fundamental right" such as voting. Certainly if there is no fundamental right to file for divorce, there is no fundamental right to receive an equal distribution from the permanent fund immediately upon residency.

Concluding that strict scrutiny was not the applicable standard in this case, the Alaska court turned to examine the scheme under an intermediate standard of review, balancing the extent of the infringement on the right to travel against the state's purposes and the "fairness and substantiality" of the relationship between those purposes and the classification used.³ The court considered that the infringement upon the right to travel here was so limited as to be de minimis. The scheme could be characterized as a penalty only "with great awkwardness"; if anything, the new resident was rewarded for exercising his right to migrate by immediately getting on the bandwagon to greater future dividends. The state's interests, on the other hand, were

*Alaska
did not
apply
"strict
scrutiny"
standard*

³ The court applied this balancing approach to determine whether the dividend scheme violated the state equal protection clause. The court was unsure whether or not this Court in Sosna had adopted such an intermediate approach in the right to travel context. If so, the court reasoned that its balancing approach was the equivalent. If not, then having concluded that strict scrutiny was not applicable under the federal cases, the court reasoned that if the scheme survived intermediate review under the state constitution, a fortiori it would survive rational basis review under the federal approach.

both legitimate and substantially furthered by the scheme.

The statute itself asserts three purposes: (1) to distribute the state's new energy wealth equitably; (2) to encourage residents to stay in the state; (3) to encourage increased involvement by residents in the management of the Permanent Fund. As to the first purpose, the court found that it was legitimate for Alaska, particularly in light of its unusual history, to wish to reward its older residents for their many intangible contributions to the welfare of the State. So many had come to the State, exploited its resources and left, that it was natural for the State to feel a debt of gratitude to those who had stayed. This purpose might not be compelling, but it was at the least permissible. Length of stay was a rough but acceptable measure of contributions to the community.

The second purpose, reduction of population turnover, was so clearly permissible and so clearly furthered by the distribution scheme that little needed to be said on this score.

Finally, the court considered the third justification--that the durational residency scheme encourages involvement by residents in the management of the Permanent Fund. The court accepted the State's argument on appeal that the residency requirement was a necessary component of the Permanent Fund Act. Were distributions from the Fund made on a per capita basis, residents would realize that as more

people came to the State, their individual share of the Fund's earnings would be diluted. The temptation would be great to mortgage the future of the Fund by placing its assets in risky, high yield investments so as to reap the highest possible immediate rewards before population growth. By assuring residents that each year they will get a bigger slice of the Fund, their fear that population growth will dilute the distribution from the Fund, and thus the political pressure to invest the Fund unwisely, can be neutralized. Similarly, were the distribution on a per capita basis, without regard to length of residency, the public would press for the most immediate and rapid development of the State's resources in order to increase the size of the Fund and the distribution. By contrast, the durational residency scheme creates an incentive for prudent development of resources by giving each resident an increasingly larger stake in the future development of natural resources.

The court concluded that through the Permanent Fund and the durational residency distribution scheme the State had devised a "simple but unusual" way of limiting government growth and reducing population turnover while containing the push for immediate development of Alaska's resources. In light of the very slight, if any, burden placed by the scheme on the right to travel, and in view of these legitimate state interests, the scheme was constitutional.

Writing in dissent, Justice Dimond noted that this

Dissent

was a durational residency requirement unlike any other. Certainly such requirements might be upheld where used to indicate bona fide residence as in Vlandis v. Kline, supra, or where in support of a legitimate state interest as in Sosna. But in all cases the requirement must be of reasonable length. By contrast, the requirement here is only limited by the length of the human life-span; the requirement creates distinctions between residents that remain for as long as they live.

The dissent attacked both the majority's assessment of the individual interests at stake and the strength of the State's justifications. First, it was not correct to say that newcomers were really not treated any differently because they might outlive the oldtimers. The only way to test a durational residency requirement is to examine its effect on similarly situated people--viz, Two 50 year olds, each with a 30 year life expectancy, one a newcomer, the other an oldtimer. The newcomer cannot catch up to an oldtimer with the same life expectancy, and the Court implicitly has rejected this "catching-up" rationale by its decisions in Shapiro and Memorial Hospital. Moreover, it was not fair to assume that newcomers would eventually reap their reward even if they could catch up. It is likely that the State's oil revenues will drop off sharply around 1990. Indeed, given expected population growth, it is likely that future government expenses will be so great that the dividend program

will have to be cancelled entirely. In short, it is only in the next few years that money will flow from the statehouse to the citizenry and those getting the biggest share by far will be today's oldtimers.

Nor are the State's justifications convincing. If the State wishes to combat population turnover, there is no reason why it should give greater incentives to stay to long-term residents. They are the ones who least need an incentive to stay in the State having already sunk their roots. Nor is there any reason why older residents should be given greater incentive than new residents to involve themselves in the management of the permanent fund.⁴ Finally, Justice Dimond doubted that a "past contributions" rationale was a legitimate justification for rewarding oldtimers. The Court in Shapiro rejected a past tax contribution rationale in no uncertain terms:

"Appellants' 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.

Accord Vlandis v. Kline, supra, 412 U.S. at 450 n.6.

⁴ Justice Dimond did not address the argument urged on appeal that the staggered distribution scheme was needed to provide an incentive to conservation and prudent management of the fund.

In sum, an open-ended residency requirement that distinguishes between persons all of whom are without question bona fide residents could not be justified by precedent-- certainly not by Vlandis or Sosna-- or by the interests proffered by the State. The State could impose a reasonable residency requirement, but once this requirement was satisfied all residents must be treated equally.

Discussion

In this section I first briefly review the Court's past treatment of durational residency requirements. The Court's approach appears to vary depending on its assessment of the nature of the classification and the relative strength of the individual and government interests affected or served by the classification. I then consider these three variables in the context of the Alaska scheme, adding my own observations to those of the parties and the court below. Finally, I hazard a guess as to how the balance should be struck here.

treatment has varied depending on the classification & strength of state interests

A. The Right to Travel (*six cases*)

There have been six significant "right-to-travel" cases involving durational residency requirements; in three of these cases the Court has upheld the requirement, in three it has found the requirement unconstitutional.

Shapiro, Dunn, and Memorial Hospital

"Durational residency" cases - are consistent.

The triumverate of Shapiro v. Thompson, 394 U.S. 618 (1969), Dunn v. Blumstein, 405 U.S. 330 (1972), and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), represent a

"The classification" was formed to "permeate some fundamental right or necessity of life"

consistent approach to durational residency requirements. In these cases, the Court uses a three- step analysis on its way to invalidating the residency requirement: 1) does the classification distinguish between new and old residents?; 2) is the benefit or right withheld from new residents of such importance that the right to travel is penalized?; 3) is the classification necessary to the achievement of some compelling state interests?

*Three
step
analysis*

The Court begins its analysis by focussing on the nature of the classification. The Court first assures itself that it is dealing not with a classification that distinguishes between residents and nonresidents--for such a distinction would not invoke the right to travel--but rather with a classification that distinguishes between persons all of whom are residents. The hallmark of durational residency requirements is that they "divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them" the particular state benefit or right at issue. Dunn, supra at 334-35.

*In these
three
cases
"residents"
were
divided
into two
classes
- old &
new.*

Recognizing that not all durational residency schemes are unconstitutional, the Court then examines whether or not the particular scheme places such a burden on the right to travel that it must be justified as necessary to a "compelling" state interest. This step of the analysis is the heart of the matter and the most curious. On the one hand the Court is unwilling to hold that only those restrictions

The

infringe on the right to travel that directly impede travel or can be shown in actual fact to deter migration. Thus, the Court insists that the right to travel is more than a right of locomotion, it is a right to settle in a new community without penalty. In each of these cases the Court found that it made no difference that no one was actually deterred from migrating to the particular state by the durational residency requirement--the right to travel had been infringed all the same.

Right to travel is more than right to move across state lines. It is a right to settle (to become a resident) w/out "penalty".

On the other hand, the Court is unwilling to hold that the right to travel requires that new residents be treated the same as old residents in every respect. Or, one might say, the Court does not consider classifications based on duration of residency to be suspect. Thus, the Court has emphasized that only those residency requirements which "penalize" the exercise of the right to travel infringe upon the right. And by "penalize" the Court means that the particular government benefit conditioned upon length of residence is "vital," "a basic necessity of life" or of "fundamental importance."

But not w/out some exceptions (e.g. college tuition).

The benefit withheld to new resident must be fundamental (e.g. to vote) or a "necessity"

The requirement of a penalty keeps the right to travel from invalidating all distinctions based upon duration of residency. Yet by requiring the Court to ask whether a particular government benefit or service is "fundamental," the penalty analysis forces the Court to pick and choose among government benefits in just the sort of ad hoc fashion that

of life (e.g. medical care)

But the "penalty" analysis requires ad hoc distinctions

Justice Harlan attacked when he dissented in Shapiro. Thus, although the Court may not have been acting as a "super-legislature" when it recognized the right to travel as a fundamental right, everytime it must ask whether a particular benefit affects a "vital" area of life it "pick[s] out particular human activities, characterize[s] them as 'fundamental,' and gives[s] them added protection." Shapiro, 394 U.S. at 662 (Harlan, J, dissenting). See your discussion in San Antonio School District v. Rodriguez, 411 U.S. 1, 31 (1972).

I should read again

Having determined that the scheme "penalizes" new residents, the Court applies strict scrutiny to the state's justifications, requiring both that the interests be compelling and the classification necessary to their fulfillment. In reviewing state interests the Court gives shortshrift to administrative reasons--particularly the prevention of fraud, the confirmation of bona fide residency, or budget predictability. The Court gives no weight to the state's desire to protect its fisc; such a desire cannot be satisfied through an invidious classification. Nor is the Court sympathetic to the argument that long-term residents are more deserving because of past tax contributions. The Court repeatedly rejects the "contributory" rationale. See Memorial Hospital, supra, 415 U.S. at 266. Obviously, the practical effect of finding that the scheme "penalizes" new residents, is to find the scheme invalid. Presumably, however, the

If held to be a "penalty," strict scrutiny is applied.

What about Vlandis?

So true!

converse is also true: if a scheme does not "penalize" then it need not be supported by compelling interests, but only by a rational basis, and will be upheld.

Vlandis, Sosna, and Helms

In Vlandis v. Kline, 412 U.S. 441, 452-53, the Court

suggested that a one year durational residency requirement before a student could qualify for lower in-state tuition at state universities was permissible. See Starns v. Malkerson, 326 F. Supp. 234 (Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971) (one year tuition residency requirement upheld). See also Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), aff'd without opinion, 414 U.S. 802 (1973) (7 year residency requirement to run for Governor of State is permissible). Vlandis can be seen to mark acceptance of a balancing approach to durational residency requirements. Surely what lies behind the Court's willingness to accept a durational requirement for lower tuition is the Court's sense that in this context the state needs a durational requirement to test the bona fides of claims of residence by "college students who come from out of State to attend that State's public university." Just as surely, however, this reason, howsoever legitimate, would not survive strict scrutiny.

That the Court was prepared to approve of a different approach was made clearer in Sosna v. Iowa, 419 U.S. 393 (1975) and Jones v. Helms, ___ U.S. ___ (1981). In Sosna the Court upheld the state's one year durational residency

tuition
divorce jurisdiction
flight from
(not really relevant)

Applied "balancing approach"
- no "penalty" on an important right

requirement for the use of its divorce jurisdiction without going through the 3-stage analysis used in the Shapiro line. Rather, the Court noted simply that the state's interests were not simply budgetary and administrative--as they were in Shapiro, Dunn, and Memorial Hospital--and that the individual was not absolutely denied the state benefit only asked to wait a year.

Although the Sosna Court did not articulate its method, it may be stated as follows: If the state's interests are significant, strict scrutiny will not be applied, but rather the state's interests and the need for the classification will be balanced against the individual interests affected. I think that this is a fair reading of the Court's method although it is striking that the Court would take such a sharply different tack in dealing with a right it has repeatedly described as "fundamental" without any effort to explain. Generally infringements of fundamental rights must be justified by compelling state interests under the glare of strict scrutiny. See Oregon v. Mitchell, 400 U.S. 112, 238 (1970 (opinion of Brennan, White, and Marshall, JJ)). But I am unable to describe Sosna as anything but a balancing approach. One could say that the 1-year delay for divorce did not "penalize" the right to travel under the Shapiro standard. But if that is what the Court held, then there would have been no reason to examine the strength of the State's interests so closely. And if the waiting period did "penalize," then the

*good
word*

State's interests should have been strictly scrutinized under Shapiro. But the Court nowhere indicated that strict scrutiny was applied and I very much doubt that the State's interests--strong as they were--arose to the level of compelling or that the delay period was the least restrictive means of achieving these interests.

Certainly Justice Marshall in his dissent believed that the majority in Sosna had adopted a new balancing approach, and he warned that such an approach might dilute the strength of the right to travel. But I question whether Justice Marshall was correct in his fear: one curious result of the balancing approach may be to give closer scrutiny to those durational schemes which--failing the strict Shapiro "penalty" test--would otherwise only be examined for a rational basis under the Shapiro line of cases. On the other hand, it may be that the Sosna Court only proceeded to balance after assuring itself that the durational residency requirement there "penalized" the right to travel in the Shapiro sense of affecting a vital area of life. If so, then Justice Marshall's point may be well taken, but the inarticulateness of the opinion in Sosna leaves this as a significant open question.

Finally, in the Court's most recent right to travel case, Jones v. Helms, U.S. (1981), the Court again appears to have adopted a balancing approach. In Helms the Court upheld a Georgia statute that makes it a misdemeanor to

abandon a child but makes it a felony to abandon the child and then leave the state. Helms is not a durational residency case, and may have limited precedential value in this context, even so the it is noteworthy that the Court appears to have used a balancing approach to the problem--the state's interests were strong while the individual's right to travel had been diluted by his criminal activity. In this way the opinion appears to ratify the approach in Sosna, although the peculiar nature of the right to travel affected in Helms makes the case somewhat unique. The Court was not inclined to equate the right to travel with a right to flee a state's jurisdiction.

Yes.
Helms
 involved
 "flight"
 not
 "travel"

exactly

Probably the most significant aspect of Helms is that the Court treated the right to travel as a constitutional right independent of the equal protection clause. This is made clear in Justice White's concurrence. In so treating the right, the Court tacitly acknowledged the wisdom of Justice Harlan's dissent in Shapiro. Ironically, Justice Harlan urged the Court to treat the right to travel like any other due process right because he wished to remove infringements upon the right to travel from the strict scrutiny given to violations of equal protection. Now that strict scrutiny is also given to violations of "fundamental" constitutional rights, it scarcely matters under what heading the right to travel is placed.

Yes

In sum, there appear to be two lines of analysis,

Two
 lines of
 analysis

the Shapiro line and the Sosna line. According to Justice Rehnquist's opinion in Sosna the choice of approach depends on whether the state's justifications are merely administrative or budgetary and on whether the state benefit or service is withheld entirely or merely delayed. Perhaps, too, as the majority opinion below suggests, if the benefit or service at issue is not one of the fundamental necessities of life, it may then be appropriate to examine the residency requirement under a balancing approach rather than simply under a rational basis level of scrutiny. One may argue further, as the Zobels do and as the dissent below suggests, that the choice of analysis will depend upon whether the state has a strong reason to doubt or insist upon the bona fides of a claim of residency as in Vlandis and Sosna. Where the bona fides of the claim of residency is not at issue, then the Shapiro line of analysis may be the correct one.

Point

Perhaps one should not make too much of the distinction between Sosna and Shapiro. Undoubtedly the same result may be reached under either analysis. Undoubtedly the Court must first assess the relative weight of the competing interests no matter which approach is used. On the other hand, I think that although the Zobels' argument fits poorly under the "penalty analysis in Shapiro, their argument is of considerably stronger force when viewed under a "balancing approach." Because the opinion in Sosna provides no guidance as to how this balancing approach should be undertaken, one of

I agree

Under either analysis

David views this case as an opportunity to define the "balancing approach"

the most important aspects of the opinion in this case may be to define that balancing approach, assuming that I am correct that such an approach exists.

B. Nature of the Classification, Individual and State Interests

Whichever mode of analysis is chosen--indeed as part of making the choice between the approaches--the nature of the classification, the state and individual interest affected and served, have to be identified and assessed.

nature of the classification

Much of the difficulty in this case is engendered by the unusual form of the classification. As the Zobels are quick to point out this is a durational requirement of a much longer term than any other the Court has ever supported. Here there is no waiting period after which all residents are treated equally, rather inequality is perpetual--a newcomer can never catch up to an oldtimer with the same life span. A perpetual caste of newcomers is created such that one may think of newcomers under the plan as a "discrete and insular" minority.

The State argues in response that the scheme treats newcomers no differently than anyone else. To the extent that the scheme treats persons unequally, the inequality is pervasive cutting across the whole of the society. Virtually every resident, some 70% of the population, is treated "unequally" in the sense that some other resident receives

This is a long term durational requirement

But it treats newcomers the same as other residents.

Discrete for all are based on length of residency

more dividends: the hallmark of durational residency schemes--the division of the citizenry into two classes, old and new residents--simply does not exist here. Yet every resident, no matter how new, is in fact treated equally by the scheme in the sense that each has the same right to accumulate dividends and all residents of the same vintage are treated precisely alike. In short, the State denies that the scheme includes any durational residency requirement at all; new residents are immediately eligible for dividends and are immediately treated just like everyone else.

Either of these two ways of looking at the classification is plausible. The Zobels argue that in any given year old residents get more from the fund than do new residents. In support of their view they point first to the legislative history. In speaking on behalf of the Permanent Fund Act certain legislators made derogatory comments about newcomers--"boomers and cheechakos," "Texans and Okies." It is no surprise that a majority of legislators are oldtimers. They argue second that the Court in Shapiro implicitly rejected the notion that new residents asked to wait a year for welfare were actually treated equally because they might ultimately stay for as many years in the State as older residents and thus accumulate as many years of welfare. They argue third that Mr. Zobel can never be treated equally with a man of his own age with greater seniority unless we assume that Mr. Zobel will outlive the oldtimer in which case we no

longer compare people who are similarly situated Finally, they argue that equal protection is something one is entitled to in the present; it is no solace to newcomers that if they stay in Alaska long enough and live long enough, they will acquire as many dividends as anyone else. Finally, the dissent adds a note reality: the idea that a new resident may catch up depends on the future prosperity of the State and the future existence of the Fund itself.

In support of its view, the State argues first that it is appropriate in this setting to take a long view and consider that a newcomer may well accumulate in the course of a lifetime as many or more dividends than many oldtimers. Certainly when dealing with welfare or medical care it would be absurd to take such a view; these benefits are aimed at current need. But the Alaska scheme fulfills "no current emergency need." Second, to demonstrate that the scheme really does treat all equally, the State makes the beguiling argument that the plan is no different in effect than the per capita distribution the Zobels contend for. Consider that had a per capita distribution been made every year beginning in 1959, by 1981 a long-term resident would have received 22 dividends. A newcomer to the state in 1981 has no cause for complaint that oldtimers have already received 22 dividends and that the only way he can catch up is by outstaying them by 22 years. Just as with the durational scheme, residents who have lived longer in the State during their lifetimes will have received more

a newcomer may end up with more than an old-timer

Different from medical care, for example. It meets an immediate need

dividends than someone who lives for a shorter time. If the per capita plan is permissible, so too should be the durational scheme. Finally, the State emphasizes that it is not only newcomers who receive fewer dividends than the oldest residents, it is the majority of the population. Indeed, native Alaskans, born and raised in the State, receive no dividends until their eighteenth birthdays and then are treated just like a newcomer. In short, the scheme does not isolate newcomers and there is no need for special judicial solicitude. If all the people who received fewer dividends than someone else disapproved of the scheme, they had more than sufficient political power to end it.

I doubt that there is a single proper way of looking at this scheme. If it were certain that Justice Dimond was correct in predicting an end to the Fund by 1990, then the State's argument that newcomers are treated no differently from oldtimers would be untenable. If there are to be no dividends in the future, then old residents are getting the lion's share of the distribution from the Fund. But I doubt that the Court can rely on Justice Dimond's gloomy prediction. The State's argument that the scheme treats all residents equally is of course true in one sense, but the argument begs the question of whether the scheme violates the right to travel. If the present disparity between old and new residents is such that the right to travel is infringed then it makes no difference that ultimately a new resident may receive as many

David:
no single
proper
way to
view this

agree

benefits as an older resident. This "equality" is true of all durational residency requirements. The only difference here is that the new resident is immediately eligible for some portion of the state benefit.

More convincing is the State's argument that even if there is inequality, the inequality is so pervasive that no judicial action is necessary to protect newcomers. To the extent that the "right to travel" rests on the notion that newcomers are a "discrete and insular" minority, and the Zobels emphasize this way of looking at the right, then the State's argument that the scheme affects the whole of the society has force. Yet the political argument is hard to evaluate. While 70% of the population receives less than the maximum number of dividends, a majority of the population has lived in the State for over 12 years. A resident of 15 years may believe that he is better off under the durational residency scheme than he would be under a per capita distribution. And there should be a tipping point under which a resident of a certain number of years is better off either under a per capita distribution or a seniority distribution. Perhaps the tipping point is at, for example, 5 years. Thus, it is probably not right that newer residents are within a political majority all of whom are disadvantaged by the scheme. On the other hand it is certainly true that new residents and residents of, for example, 2-5 years have much the same interest and that native Alaskans only accumulate

yes

dividends after their eighteenth birthdays. The State is therefore correct in emphasizing that the scheme does not isolate only the newest of residents, but it rather overstates the case to claim that newcomers are a political majority.

individual interests

The Zobels argue that the cash dividend falls within the class of basic necessities identified by Justice Marshall in Memorial Hospital. The legislative history indicates that the dividend was designed to help Alaskans meet high winter fuel bills and generally help offset the high cost of living in Alaska. As the dividends grow with the Fund, they will become an increasingly large percentage of a family's budget. Moreover, the dividend results from sale of the State's natural resources. For the State to declare that a new resident "owns" fewer of the State's resources than an older resident would seem to work a serious deprivation of the newcomer's property rights. For the state to share out its natural resources on the basis of residency would seem to convey a message that new residents are less than full citizens. And if natural resources may be so conditioned, could other state benefits be similarly restricted--might the best state schools be limited to long-term residents? Such a possibility is more than hypothetical; the Alaska statute books are rife with measures favoring long-term residents. These measures fundamentally alter the equality of a newcomer's citizenship. Finally, the Zobels argue that it

I can't
view
dividends
as 'necessities'.
They are not
welfare
payments

The 'fund'
is
maintained,
including
gains.
Only
income is
disbursed

cannot save the scheme that new residents receive some bit of the Fund. Could the welfare scheme in Shapiro have been saved had new residents been given, for example, one-half of what older residents received?

In response the State argues that a cash dividend is in no way comparable to welfare, the franchise, or medical care. The amount of the dividend bears no relation to individual need. Certainly some Alaskans will use the dividend for the necessities of life but others will use it on frills. Moreover, even if the Zobels are right that all residents "own" the State's resources, they have no property right to funds in the state treasury. Finally, just as the divorce in Sosna was merely delayed, here there has been no flat denial: new residents get increasingly larger shares from the very beginning of their residency.

True
Z

✓ state's interests

The statute lists three purposes. The first interest is to provide for equitable distribution of the earnings from the Fund. Here the majority opinion below emphasized the rigors of the Alaskan experience and the State's natural desire to reward its faithful. The dissent noted that Shapiro had rejected a past tax contribution rationale for durational residency requirements and that the rationale was no stronger in the context of intangible contributions. The Zobels' repeat the dissent's argument adding that many new residents--pipeline workers--are the very

ones responsible for the State's oil wealth and the Permanent Fund. Interestingly, the State does not now seek to justify the statute on this equitable basis; this purpose is scarcely mentioned in the State's brief although the scheme is best designed to further it. Normally it would not be much help to a state to meet an attack on a durational residency requirement by arguing that the State wishes to reward its older residents. That is just what the right to travel prohibits in certain contexts. But perhaps the Court need not be blind to the special history of Alaska. Perhaps older Alaskans may be treated differently for the rigors they endured.

Second, the State argues that the scheme gives everyone an incentive to stay in the State, thus reducing population turnover. The Zobels argue that to the extent the State seeks to discourage migration to the State the purpose is not permissible; to the extent the purpose is to hold on to its current residents, the purpose is not compelling and may be achieved by using the oil wealth to provide better public services etc. The dissent argued that a per capita distribution was equally effective at reducing population turnover; the State's scheme gives the greatest incentive to stay to those who are least likely to leave.

Finally, the statute's third listed purpose is to encourage public involvement in the Fund. The State made an elaborate argument on appeal, and reasserts the argument in

its brief, that the durational residency requirement is necessary to conservation of resources and to prudent management of the Fund. Neither the dissent nor the Zobel's directly address these arguments although they are central to the State's position. The Zobel's dismiss these arguments summarily on the basis that (1) the Court in Shapiro rejected the argument that the need to create political support for particular programs could justify the use of impermissible classifications; (2) were the State's purpose to create future incentives to conservation and prudent management there was no call to reward older residents retrospectively to 1959; (3) there is no indication in the legislative history that prudent management or conservation were purposes of the scheme; it is a post-hoc creation of the State Attorney-General.

The Zobel's arguments are of some force, but more convincing to me is how poorly the scheme would appear to fulfill the State's alleged purposes. The goal of prudent management of the Fund is achieved by assuring current residents that their shares will not be diluted by the influx of migrants to the State. Perhaps the Court should not second guess the State's psychological profile of its people. But I would think that to the extent residents are inclined to pressure the Fund's managers to place the Fund in high yield but risky investments, this pressure will continue unabated. Older resident may believe that with fewer years left to live,

they would like the greatest dividend possible immediately. Indeed, I think that it can be demonstrated mathematically that for these most senior residents the effect of population growth is actually magnified.⁵ One dividend more or less makes less difference to them than the size of each dividend, and the size of each dividend will vary with population growth--unless of course the fund's managers can be persuaded to increase the yield. Newcomers who may be unsure whether or not they will remain in the State have the same incentive to the largest current dividend.

The second part of the State's argument is that the dividend scheme dulls the pressure for immediate development of resources. Since individuals know that they will have more dividends in the future, they have an interest in future development and in present conservation. This purpose seems utterly irrelevant to the Permanent Fund scheme. Since money from exploitation of resources is placed in the Permanent Fund, and since the principle of the Fund is inviolate, why

⁵ Imagine that there are 10 residents in Alaska. Resident #10 has been in the State for 10 years, resident #9 for 9 years and so on. The income from the Fund to be distributed is \$100. There are then a total of 55 dividends (10 plus 9 plus 8 etc) and each dividend is worth about \$1.80. Resident #10 receives \$18.00 from the Fund. The following year a newcomer moves to the State. There are now 11 Alaskans, and 66 dividends. The Fund still generates \$100 and a dividend is worth about \$1.50. Mr. 10 of last year is now Mr. 11 but receives for his 11 dividends only \$16.50.

would anyone have an incentive to delay development? The State seems to have forgotten that income from development travels first into the Fund, where it is added to the principal, and only then to residents.

C. Privileges and Immunities

It must be noted that in addition to relying upon the right to travel, the Zobels also argue that the Alaska scheme violates the "federal component" of state citizenship. The Fourteenth Amendment states that all citizens of the United States are citizens of the state wherein they reside. Justice Bradley, dissenting in the Slaughter House Cases, 83 U.S. 36, 112-113, stated that "A citizen of the United States has a perfect constitutional right to go to and abide in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen." As Shapiro and its line indicate, the state may test for bona fide residency through a reasonable residency requirement, it may not create different degrees of state citizenship.

The State treats this argument as one based on the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. Examining the Court's recent treatment of the Privileges and Immunities Clause in Baldwin v. Montana Fish and Game Commission, 436 U.S. 37 (1978), the State argues that the Privileges and Immunities Clauses and the concept of a federal union are only implicated when the State seeks to restrict "basic and essential activities" to its own

This argument adds nothing. The "right to travel" is a "privilege" involved.

residents. Id at 387. The dividend scheme does not involve such a basic activity.

I think that this part of the argument can be included within the "personal interest" section of the right to travel analysis. The "right to travel" already includes a "federal component": the federal interest in free migration. If a state scheme does create degrees of citizenship, this should weigh in the balance of harm to the individual and of burden on the right to travel. Moreover, as the State indicates, analysis under the Privileges and Immunities Clauses looks to the importance of the conditioned benefit or activity, and again the importance of the benefit is part of the analysis under the right to travel. Finally, the origins of the right to travel are at least in part in the privileges and immunities clauses, and it should make little difference under which constitutional right the durational residency requirement is examined.

D. Conclusion: Striking the Balance *

The most striking characteristic of this case is how weak both sides of the equation are. The scheme does not divide the population into two groups, does not deprive new residents of the entire benefit and does not involve a necessity of life. The provision of a unique cash gift to new residents, even if the gift is less than that going to older residents, strains the penalty analysis. On the other hand, the only genuine State interest appears to be to reward older

Both sides have serious flaws

"Penalty analysis" not applicable

* David, you have kept me in suspense

residents.

The real "state" interest is to "reward" older residents

Even so I think that the personal interests at stake only appear weak when examined under the Shapiro line of analysis. Only with considerable effort can one equate this scheme with one that requires new residents to wait for welfare or medical care. The Zobels argue that because the duration of the inequality is so long it should be deemed a per se penalty whatever the importance of the benefit. Yet this very lengthiness of the inequality is also one of its saving features--"inequality" is pervasive throughout the resident population.

yes

The irony here is that if the scheme must be examined under Shapiro, the Zobels' case appears weak. But under a balancing approach as in Sosna the personal interests here seem more significant to me. The State Supreme Court held that the tax exemption statute could not survive a balancing approach under the state equal protection clause. It found that the tax statute projected hostility to new residents and penalized new residents to the extent that their taxes were higher than they would have been were all residents taxed. The Court further noted that tax schemes favoring residents had been disapproved by this Court in Austin v. New Hampshire, 420 U.S. 656 (1975) and Travis v. Yale and Towner Mfg. Co., 252 U.S. 60 (1920). These were cases arising under the Privileges and Immunities Clause in which nonresidents complained of discrimination. The Alaska court reasoned that

In its first decision applying the state E/P clause (subsequently changed), State S/CT found a penalty

if the state cannot tax nonresidents at a higher rate, it most certainly cannot tax new residents at a higher rate, for the State has more leeway to make distinctions between residents and nonresidents than between persons all of whom are residents.

Tax analogy

But the Permanent Fund Act is little different than a taxing statute that favors older residents. Indeed, were a State income tax ever renewed the dividend distribution would clearly have the effect of reducing older residents' taxes. Even without a state tax, the dividend operates as a negative income tax. And the distribution of money to a state's citizens, like the collection of money, would seem to involve a significant matter even though the sums involved are presently fairly small. Perhaps this interest is even stronger when the State is cashing out its natural resources.

But Alaska has no income tax now

Most important, on the side of personal interests is that if this scheme is permissible, one wonders what would not be. The Court in Shapiro attacked the contributory rationale on the basis that such a rationale would permit "schools, parks, and libraries" to be reserved to older residents. To permit this scheme, may be to permit just such distinctions in other areas. And were the country honeycombed with such schemes, I would think that the "right to travel," the right to settle in a new community, would be significantly altered. It is noteworthy that Alaska already has a number of such residency requirements on its statute books although many have

In there a limiting principle

been invalidated by the state supreme court.

One would not wish to go so far as to say that any distinction among residents on the basis of length of residency must fall. But that is the virtue of the balancing approach. It permits distinctions; it permits another case with stronger state interests--e.g. the need to identify bona fide residents--to survive.

If the Court were to approach the case in this way, by weighing the interests and finding the State's interests to be weak, the Court would need to make clear that Sosna is a balancing case and that durational residency schemes in the future will be examined under a balancing test, even when "basic necessities" of life are not at issue. The Court might wish further to discuss the standard of review of the state's alleged interests or at least suggest the words. Perhaps it would suffice to say that the state's interests must be "substantial" and "substantially related to the scheme." / you

Of course there are large questions any time the Court shifts to a balancing approach when dealing with a "fundamental" right. I think that the right to travel is particular enough--especially now that it has been removed from the equal protection rubric by Helms--that the Court need not be too concerned that anything it does in this area will carry grave weight in other areas of constitutional law where a balancing approach may not be desirable. I would think, too, that the Court would gladly leave off categorizing different

research

areas of life as "vital" or "not vital." Your concurrence in Zablocki v. Redhail, 434 U.S. 374, 397 (1978) suggests a receptivity to balancing in an area such as this. Moreover, I think that the shift to a balancing approach has already occurred; the Court just did not wish to explain what it was doing. In short, the Court in Sosna appears to have diverged from the two-tier approach in order to uphold a durational requirement. I suggest that we do the same here to invalidate one. The State's interests are either inconsequential or unrelated to the scheme; the personal interests are substantial enough that the statute ought, in my view, to be found a violation of the "right to travel."

*State's
interest
weak*

This could be the last of the great right to travel cases. Of course if the Court does uphold the law--and I guess that's most likely--there will be plenty more right to travel cases in the future! I do apologize for the length of this memorandum.

It is a beautiful text book on this area, and if we are not assigned the opinion I'll probably want to memorialize some of David's clear thinking

No 80 1146 Alaska (2nd location
two lines of cases.)

No 80 1146 Alaska (2nd location
two lines of cases.)

1. Clampreaktion (Aorta + Ventrikel)
Perikardialer Fundament nicht

(e.g.: to vote Democrat)

6

Deiner necessities (e.g. welfare (Shapero))
e.g. medical (Mum.
Case 14000).

2. "Balancing" analysis

No fundamental right of denial
of necessity. ~~At~~ The penalty

But State interest is weak.

Rewarding long after
renew none of interests
that justify the fund

Individual interest-farmer
in taxation

Can income tax

If State had income tax
the dividend would reduce
it disproportionately.

4
 1. Stent
 2. sublimation
 3. stabilization
 4. supported
 5. conspicuous

Validity of Alaska's distribution of "income" from the Fund is established to hold for future ~~50%~~ 25% oil & gas revenues. 50% of income is paid out to residents as dividends, varying with duration of residency.

5. *[Faint handwritten notes, possibly a signature or date, and a list of names or initials.]*

Verdict of \$100,000.00
"Verdict" from the jury is not binding
to hold for further 25% to 50% but 1 day
verdict. 25% of interest in land not
to overrule on grounds, comparing with
duration of ownership.

What if
Alaska
imposed
income tax

could
a state
income tax
be graduated
according to
length of residency?

Sandberg (Appellant)

Unlike other durational residence case
no other case like this.

Relies on first sentence of 14th Amend.

Relies also on violation of E/P

Argues for compelling interest test

Gross (Appellee - State of Alaska)

Compelling & interest test not applicable

Rational basis test applies.

The Chief Justice Rev.

Rev 7-2
State can't treat one citizen
differently from another. 14th Amend ex. trials.

Justice Brennan Rev

7 alternative case.

State can't justify. Even on rationality
basis, can't justify.

Quoted language from Shapiro that WB.
says is applicable - regardless of level of
scrutiny.

Alaska's scheme will inhibit travel - older
people won't leave State.

Justice White Aff. (tentative) - possibly Rev. in ~~aff.~~ part

Not a case for strict scrutiny.

State's interests are rational - stabilizes
population & promotes financial stability.

Does think going back to 1959 makes case
close, ~~or~~ But rest of statute is valid

Justice Marshall Rev.

Can't draw line bet. citizens,

14th Amend controls.

Not many Negroes in Alaska in 1959.

Justice Blackmun

Rev.

Baldwin doesn't apply

Shapiro in the guide.

This is sheer durational residency case.

Might be OK if purely prospective

Justice Powell Rev.

I'd analyze within the "right to travel" cases - balancing interests (Somo, Vlandis).

There can be distinctions - e.g. tax laws,

See my notes

Justice Rehnquist Aff.

States are experimental labs - as
F. F. said.

Citizens are classified for vs. taxes,
taxation.

Disagree with durational residency
cases

Justice Stevens Rev

State ~~interest~~ interest in non-existent
as to retroactive feature.

Even as to prospective operation,
this classification ~~was~~ is bad.

The Alaska S/Ct fashioned a new
analysis. John suggests we abandon
two-tier analysis.

Justice O'Connor Rev

Can't invalid if we apply rational
basis Test.

Now does she approve of durational
residency analysis.

Art IV, Section 2 - Privileges &
Immunities applies, & would rev.
on this ground. (Harry said there
is possibility)

See my
letter to C R
of 12/15

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: **DEC 14 1981**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1146

RONALD M. ZOBEL AND PATRICIA L. ZOBEL, APPEL-
LANTS v. THOMAS WILLIAMS, COMMISSIONER OF
REVENUE, AND ALASKA

ON APPEAL FROM THE SUPREME COURT OF ALASKA

[December —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

The question presented on this appeal is whether a statute
under which a State distributes income derived from its natu-
ral resources to the adult citizens of the State in varying
amounts based on the length of each citizen's residence vio-
lates the constitutional rights of newer state citizens. The
Alaska Supreme Court sustained the constitutionality of the
law. We noted probable jurisdiction and stayed the distribu-
tion of dividend funds, — U. S. — (1981). 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 dimensions of this fortuitous development
are suggested in the comparison of the State's 1969 total bud-
get of \$124 million with the \$3.7 billion in petroleum revenues
the State received during the 1981 fiscal year from its oil
bounty.¹ This income will continue, and most likely grow, at

¹Alaska Department of Revenue, *Revenue Sources FY 1981-1983*
(1981). (Includes General Fund unrestricted petroleum revenues of \$3.3
billion and petroleum revenues directly deposited in the Permanent Fund
in the amount of \$400 million. An additional \$900 million was transferred

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least 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 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. For example, 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 for three years, brought this suit challenging the dividend distribution plan as violative of their equal protection guarantees and their constitutional right to migrate to Alaska, to establish residency there and thereafter to enjoy the full rights of Alaska citizenship. The Superior Court for Alaska's Third Judicial District

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 89% of the State's total government revenue. *Ibid.*

agreed, holding that the plan violated the rights of interstate migration and equal protection. The court granted summary judgment in appellants' favor.

The Alaska Supreme Court reversed and, by a 3-2 vote, upheld the statute. The court reasoned that durational residency requirements which do not penalize interstate migration might not call for the high level of scrutiny called for by this Court's precedents. *Sosna v. Iowa*, 419 U. S. 393 (1975); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). The Alaska Supreme Court held that the dividend distribution plan did not require strict scrutiny because it did not deprive citizens of any basic necessities of life or fundamental constitutional rights, as did the statutes held unconstitutional in *Shapiro v. Thompson*, 394 U. S. 618 (1969), *Dunn v. Blumstein*, 405 U. S. 330 (1972), and *Memorial Hospital v. Maricopa County*, *supra*.

In the view of the Alaska court, the statute did not rest merely on considerations of administrative convenience or efficiency, and only delayed, rather than absolutely denied, receipt of full benefits. Accordingly, the validity of the plan was to be judged by whether there was a rational basis for the distinction made between long-term residents and newcomers. The court held that fixing the amount of dividend payment according to length of residency was rationally related to three state purposes: (a) rewarding Alaska citizens for their past tangible and intangible contributions to the State; (b) encouraging other persons to establish and maintain state residency; and (c) fostering citizen awareness and involvement in the prudent management of the Permanent Fund. The dissenting justices, viewed the plan as forbidden by the equal protection clauses of the United States and Alaska Constitutions.²

²The 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.

II

The right to move from one State to another has long been accepted as fundamental to our constitutional system, yet both the nature and the source of that right has remained ill-defined. In perhaps the earliest federal case to discuss the right to travel, Justice Bushrod Washington, sitting on circuit, noted that "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise" was included among those fundamental rights protected by the Privileges and Immunities Clause of the Constitution, Article IV, § 2, Clause 1. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-552 (C.C.E.D. Pa. 1825).

This Court first considered the right of interstate migration or travel in *Crandall v. Nevada*, 6 Wall. 35 (1868). Justice Miller, writing for the Court, held that the right to pass from one State to another free of hindrance or taxation was derived from the right and need of citizens to travel to the nation's capital and to the outlying offices of the federal government. Justice Clifford, with Chief Justice Chase concurring, believed that the right to migrate or travel from one State to another had its source in the Commerce Clause. 6 Wall., at 49.

Justice Miller's adopted the reasoning of Chief Justice Taney dissenting in *The Passenger Cases*, 7 How. 283, 492 (1849):

Living as we do under a common government, charged with the great concerns of the whole Union, every citi-

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 P. 2d 422 (Alas. 1980). Chief Justice Rabinowitz, the only justice in the majority in both cases, found that the tax exemption statute, but not the dividend distribution plan, could "be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." 619 P. 2d, at 458.

zen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. . . . We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Thus prior to the enactment of the Fourteenth Amendment, the right of interstate migration and travel was seen either as derived from the Commerce Clause, from the Privileges and Immunities Clause of Article IV or from the inherent right to travel to federal offices. In any event it is clear that the right was recognized prior to the adoption of the Fourteenth Amendment.

Nevertheless, more recent cases, faced with the difficulty of locating the source of this right, have looked to the Fourteenth Amendment as well as other provisions. In *Edwards v. California*, 314 U. S. 160 (1941), the Court held unconstitutional a California statute prohibiting residents from bringing indigent nonresidents into the State. Although Justice Byrnes, for the Court, held that the provision violated the Commerce Clause, four concurring Justices thought the right to travel was grounded in the Fourteenth Amendment. Justice Douglas, concurring along with Justices Black and Murphy would have rested the holding on "[t]he right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." 314 U. S., at 177-178. Justice Jackson also would have relied on the privileges and immunities clause of the Fourteenth Amendment. The cases since *Edwards* have relied on the Equal Protection Clause of the Fourteenth Amendment. See, e. g., *Sosna v. Iowa, supra*, 419 U. S., at 418

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(MARSHALL, J., dissenting); *Memorial Hospital v. Maricopa County*, *supra*; *Dunn v. Blumstein*, *supra*.

However, none of these specific constitutional provisions is entirely satisfactory as a source of the freedom of movement and travel. Reliance solely on various clauses of the Fourteenth Amendment ignores the cases decided prior to 1868 and carries the untenable implication that the right to travel did not exist before the Fourteenth Amendment was adopted. Commerce Clause analysis is not wholly satisfactory. As Justice Douglas noted in rejecting the Commerce Clause as a source of the rights found protected in *Edwards v. California*, *supra*, "the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." 314 U. S., at 177. Justice Jackson, concurring in that case, persuasively argued that migration of persons without particular business purposes hardly fits into the usual notions of commerce. 314 U. S., at 182.

The Privileges and Immunities Clause of Article IV protects citizens of one State only from discrimination in another State; it does not protect citizens already resident in a State from discrimination by that State. For example, a state law prohibiting citizens of the State from freely migrating to other States, or from leaving the State and then returning, or a law which taxes citizens who leave, as in *Crandall v. Nevada*, *supra*, could hardly violate the Privileges and Immunities Clause of Article IV but would certainly be a limitation of the right to travel. Nor is Justice Miller's rationale in *Crandall v. Nevada*—that the right to travel stems from the right to go to federal offices—satisfactory. Denying welfare benefits, medical care, or voting rights to new residents does not bear on the right to go to the nation's capital or to regional federal offices, yet such denials have been held to violate the right to travel. *Memorial Hospital v. Maricopa*

County, supra; Dunn v. Blumstein, supra; Shapiro v. Thompson, supra.

The right of interstate migration or travel has both a more fundamental and yet a less explicit source than any of those sources discussed above.

"The constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union.

". . . Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that 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." *United States v. Guest*, 383 U. S. 745, 757-745, 758 (1966).

See also, *Shapiro v. Thompson, supra*, 394 U. S., at 629-631. Whatever the reasons for the migration, the right to travel, like other rights, is so fundamental to and so inherent in our constitutional system as not to require a specific definition.³

The right of interstate migration or travel encompasses a good deal more than the right of a tourist or traveller to move freely between States. It must be understood as comprehending the right to migrate from one State to another, to establish permanent residence and become a citizen of the

³ We have often taken note that the Constitution does not mention the important guarantees of the right to vote, the presumption of innocence, the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, and the rights of association and privacy. See, e. g., *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555, 579-580 (1980). These rights, and the right of interstate migration and travel, are taken to be implicit in the system established by the Constitution and so basic as not to require specific mention.

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new State. This fundamental concept has much in common with the right of new States to join the union on an equal footing with the older States. Here also the Constitution is silent, yet equality of each State of the Union, new or old—has been accepted as inherent in the very idea of statehood in a federal union. Were this not so, Vermont, the Fourteenth State, and all subsequently admitted States would have had some kind of lesser status, perhaps like territories in relation to the original thirteen States.

The equal footing concept was first articulated, although not in those words, in *Mayor of New Orleans v. United States*, 10 Pet. 662, 737 (1836); there the Court held that "Louisiana was admitted into the Union, on the same footing as the original states." The words "equal footing" appear to have been first used in *Pollard's Lessee v Hagan*, 44 U. S. 212, 223 (1845). The most recent reference to the equal footing doctrine is found in *United States v. Texas* 339 U. S. 707 (1950) in which it was applied to deny Texas's claim that certain rights, which it previously possessed as an independent republic, were retained when Texas was admitted to the Union. Texas was held to have entered the Union on an equal footing with all other states.

We see, thus, that it is firmly settled, although nowhere mentioned in the Constitution, that a new State coming into the Union has no more, no less and no different rights than States of longer membership in the Union. Is it not similarly inherent in the very concept of state or federal citizenship that once citizenship is attained, the citizen stands on the same or equal footing with all other citizens? It is not without significance that the concept of all citizens being on an equal footing with each other is by no means new. In dealing with the Privileges and Immunities Clause, the Court in *Paul v. Virginia*, 8 Wall. 168, 180 (1869), noted that

"it was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing

with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."

We see, therefore, that more than a century ago, the Court used the equal footing concept to define the equality of rights of citizens. As a State entering the Union after the adoption of the Constitution would have neither greater nor lesser rights than the first thirteen States, an American citizen entering a State and establishing *bona fide* residence therein can be accorded no less rights or lesser treatment than those who preceded.

Equal footing

III

Of course, as we have frequently held, a State may establish reasonable criteria for determining *bona fide* residence, and those criteria may vary according to the right or benefit sought. For example, a State may require a new resident to live in the State for a year before filing for divorce in state court. ✓ *Sosna v. Iowa, supra*. A State may also establish reasonable durational criteria for purposes of reduced resident tuition at a state university. ✓ *Vlandis v. Kline*, 412 U. S. 441, 452 (1973).⁴ But once those requirements are met and state citizenship is established, all citizens are on an equal footing.

In *Sosna v. Iowa, supra*, the Court balanced the interest of an individual in obtaining a divorce in her new State with the interests of the State in enforcing a one-year waiting period

⁴ A State may even set relatively long residency requirements when necessary to serve particularly strong state interests. For example, a State may set a substantial durational residency requirement for candidates for public office, as does the federal Constitution. Such requirements serve the compelling state interest in assuring that high government officials are sufficiently aware of state problems and conditions. See *Chimento v. Stark*, 353 F. Supp. 1211 (D. N.H.) (three-judge district court), *affirmed*, 414 U. S. 802 (1973). Alaska has not undertaken to establish similar residential durational criteria to qualify for full participation in the dividend program, however.

before new residents can file for divorce. Although acknowledging that the Iowa rule might impinge somewhat on the right to travel, the Court found that the interests of a state "in minimizing the susceptibility of its own divorce decrees to collateral attack" outweighed the individual's interest in obtaining a prompt Iowa divorce. The Court emphasized that the law merely delayed, rather than denied, the newcomer's ability to obtain a divorce in the State.

Comparison of the interests of the State of Alaska and the interests of persons who have established Alaska residency since 1959 leads to a different conclusion, however. Contrary to the State's contentions, the dividend program does not involve merely a delay, rather than a denial, of benefits. Alaska's method of allocating benefits creates a permanent, irreversible distinction between those who lived in Alaska in 1959 and those who came later. The cash dividend received by more recent residents will never be equal to that received by pre-statehood residents. Moreover, the law operates to classify and thereby divide Alaska citizens into an ever growing number of classes. At the time of enactment, the dividend program created 21 separate classes of Alaskan citizenship; 10 years from now there will be 31 classes; 11 years later the original number will have doubled to 42. Appellants, residents of Alaska since 1978, will never receive the same amount as those who have lived there longer.

Although the benefit here does not involve the kind of basic necessity of life dealt with in *Memorial Hospital v. Maricopa County*, *supra*, for example, it does represent an important interest. Alaskans endure a relatively harsh climate and the highest cost of living in the nation.⁵ A program which may

⁵ See, e. g., United States Department of Labor, Bureau of Labor Statistics, *Autumn 1980 Urban Family Budgets and Comparative Indexes for Selected Urban Areas* (No. 81-195, April 22, 1981). According to this publication, the cost of living for a lower or intermediate budget family in Anchorage is higher by far than it is in any other metropolitan area.

distribute as much as \$4,200 in fiscal year 1979 to a family of four eligible recipients, and perhaps four times that amount by the 1985 fiscal year, is hardly conferring insignificant benefits. Because of the significant financial interest of residents in receiving these benefits and the invidiousness of creating multiple and permanent classes of citizens with different rights based solely upon when they exercised their constitutional right to migrate to and settle in Alaska, the State must show that the distinctions it seeks to make are warranted by the highest and most pressing of state interests.

The State advanced and the Alaska Supreme Court accepted three state purposes to justify the dividend program. First, the program was said to create a financial incentive for individuals to establish and maintain residence in Alaska. Second, the dividend plan supposedly encourages prudent management of the Permanent Fund. The State contended, and the court held, that distribution of an equal amount to each resident would provide incentives for speculative management of the fund and unwise use of natural resources. The state's theory was that in later years, as population increases, per capita benefits would decline, current residents would have an undue interest in speculative investments and in rapacious development of natural resources in order to maximize the fund's principal and therefore increase its income. Finally, in the court's view, the dividend program legitimately apportions benefits in recognition of the "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency."

The last of these objective—to reward citizens for past contributions—is clearly impermissible. A similar argument was made and rejected in *Shapiro v. Thompson, supra*, 394 U. S., at 632-633:

"Appellants argue further that the challenged classification may be sustained as an attempt to distinguish be-

tween 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."

See also *Vlandis v. Kline*, supra, 412 U. S., at 449-450 and n. 6.⁶

The other two state objectives—assuring prudent management of the plan and creating a financial incentive for individuals to establish and maintain Alaska residence—do not justify the distinctions Alaska seeks to make. No valid explanation is offered to show how granting greater dividends to persons for their residency during the 21 years prior to the enactment of the statute fosters these state interests. In any event, these state interests are simply not sufficiently compelling to outweigh the infringement of the fundamental individual rights of those *bona fide* citizens who settled in the State after 1959.

IV

Justice Miller, writing for the Court in *Crandall v. Nevada*, observed that "it may be said that a tax of one dollar

⁶ 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 money, the pipeline wouldn't be there. So I get a little bit tired of—and I've got a hunch and 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 been here 30 or 40 or 50 years."

for passing through the State of Nevada . . . cannot sensibly affect any function of government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars." 6 Wall., at 46. Similarly, if States could make the amount of a cash benefit depend on length of residence, they could vary university tuition by years of residence or limit access to overcrowded public parks, or eligibility for student loans, civil service jobs, or government contracts by length of domicile. States could also do what Alaska attempted to do and impose taxes only on relative newcomers. Alaska's reasoning "would permit the state to apportion all benefits and services according to the past tax contributions [or the intangible contributions that Alaska finds reflected in length of residency] of its citizens." Such a result would be clearly unacceptable.⁷

We hold that the Alaska dividend distribution plan infringes on the fundamental rights of those persons who have established bona fide Alaska residency subsequent to 1959. The judgment of the Alaska Supreme Court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and Remanded.

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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 14, 1981

Re: 80-1146 - Zobel v. Williams

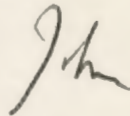
Dear Byron:

In connection with our discussion of the question whether the retroactive aspects of the Alaska distribution plan are severable from the prospective aspects, the answer may be provided by § 4 of the statute which appears at page 69a of the Jurisdictional Statement, and reads as follows:

"Sec. 4. If any provision enacted in sec. 2 of this Act 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."

I was not aware of this section at the time of the Conference.

Respectfully,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

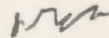
December 15, 1981

Re: No. 80-1146 Zobel v. Alaska

Dear Chief:

With the wide ranging discussion of sources of implicit and fundamental Constitutional rights which are nowhere mentioned in the Constitution which are contained in parts I and II of your proposed opinion in this case, you will soon have no one but yourself to blame for this Court's docket-congestion. In due course I will attempt a dissent.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

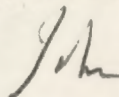
December 15, 1981

Re: 80-1146 - Zobel v. United States

Dear Chief:

In my opinion the Equal Protection Clause of the Fourteenth Amendment provides a more pertinent rationale for your conclusion than does the equal footing doctrine. Moreover, I am not at all sure that Alaska's program impairs the right to travel. It surely does not discourage travel into Alaska, even though it may have some tendency to deter emigration. In all events, I believe I shall try to write out my own analysis of the case.

Respectfully,



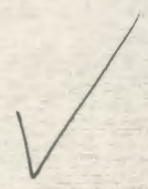
The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 15, 1981



RE: No. 80-1146 Zobel v. Alaska

Dear Chief:

This is of course a novel, complex and difficult case. But my notes of the conference discussion indicate votes to reverse based on the failure to meet the rationality standard of the Equal Protection Clause; although some of us also suggested that the first sentence of the Fourteenth Amendment equated residence and citizenship and left no room for tiers of citizens. I don't read your opinion as based on either ground and am sorry to say as presently written cannot join it.

Sincerely,

Biel

The Chief Justice

cc: The Conference

Draft

lfp/ss 12/15/81 ZOBEL SALLY-POW

80-1146 Zobel v. Williams

Dear Chief:

Your opinion is receiving a good deal of "flak", and I don't intend to add to it by a general circulation. The following observations are submitted in the hope that they may be helpful, as it appears likely some modifications in your opinion will be necessary.

The difficulty is that this case is neither controlled by any prior precedent nor does it fit neatly into any prior analytical approach. Not surprisingly, therefore, the reasons advanced at Conference varied considerably among the seven Justices who voted to reverse.

There are six "right to travel" cases. Although this case is distinguishable from each of them, and in a sense is not a "right to travel" at all, our prior case do afford the closest analogies - particularly when viewed as a hybrid type of "durational residency" case.

The first group of Shapiro, Dunn and Memorial Hospital involved a classifications that penalized a new resident by denying for a period a "fundamental right" (to vote) or a necessity of life (welfare, medical treatment). These were analyzed consistently in terms of inquiring under "strict scrutiny" whether there was a compelling state interest.

The second group of cases, Vlandis, Sosna and Helms, were different in that no penalty was imposed upon the exercise of a fundamental right (e.g., university

attendance, divorce). Thus, commencing with Sosna, we have applied a "balancing" approach in which we weigh the competing interest of the state and individual.

As I stated at Conference, it seems to me that the latter type of analysis is appropriate in this case. There is no absolute burden on any fundamental right. Nor is there any inhibiting of the right to travel into Alaska. Arguably, older citizens may be inhibited against leaving the state and thereby losing the higher dividend. But, I would not say - as your present draft does - that the right to equal "dividends" is so fundamental that the discrimination is "warranted [only] by the highest and most pressing of state interests". P. _____. Rather, I believe there is a better chance of putting a Court together if you rely on the Sosna line and apply a

balancing test, recognizing that the state interests may well be important but that the classification does not substantially serve ~~the~~ its interests.

The statute lists three purposes: (i) to provide an equitable distribution of the earnings; (ii) to provide an incentive for everyone to remain in the state; and (iii) to encourage public interest in the fund. It is not at all clear that any of these interests or purposes is significantly furthered by the state's graduated dividend system.

The individual's interest is pecuniary. The cost of living in Alaska is notoriously high. As the dividends grow with the fund, they may become an increasingly important to a family's budget. Putting it differently, the classification can be analogized to an

inverse income tax based on residency. Although this affects a significant personal interest, it does not compare with one's right to welfare or medical care when needed or to the right to vote.

In weighing the competing interests, I view the case as quite close. On balance, however, I conclude that the rationality of Alaska's distribution scheme is dubious primarily because its relationship to the asserted state purposes seems so tenuous. In reality, the state simply elects to reward length of citizenship. No doubt this is politically popular, as the people who will benefit from this "windfall" are more numerous than those on the short end. But this is not a reason to sustain the classification.

* * *

It is evident, of course, that the foregoing is a rather simplistic outline of one way to write this opinion. I do think it is a sound approach and one that would not set a troublesome precedent. Also by omitting reference to "compelling state interest", "fundamental constitutional rights" and "equal footing", you may satisfy some of the complaining Brothers.

Sincerely,

The Chief Justice

df1 12/15/81

To: Justice Powell

From: David

Re: The Chief's draft in Zobel v. Williams: No. 80-1146

~~I think that in many ways this is a remarkably good
job.~~

I have one hesitation. Part III initially gives the impression that the Chief is going to undertake a balancing approach. He notes that in Sosna "the Court balanced the interest of an individual in obtaining a divorce in her new State with the interests of the State ..." At page 10 he begins his discussion of the individual and State interests at stake in this case: "Comparison of the interests of the State of Alaska and the interests of persons who have established Alaska residency since 1959 leads to a different conclusion, however." But he then trots out the language of strict scrutiny. Having described the individual interests, he states at page 11: "the State must show that the distinctions it seeks to make are warranted by the highest and most pressing of state interest." And the discussion of the State's interests is conclusory, in the finest tradition of strict scrutiny opinions. At page 12 the Chief simply dismisses with a waive of his hand the State's major interests: "No valid explanation is offered to show how granting greater

dividends to persons for their residency during the 21 years prior to the enactment of the statute fosters these state interests. In any event, these state interests are simply not sufficiently compelling to outweigh the infringement of the fundamental individual rights of those bona fide citizens who settled in the State after 1959."

In short, part III ends up being somewhat confusing.

Divergent analysis
It suggests ^{first} that a 'balancing approach' will be followed. But then it falls back on a 'strict scrutiny sort of analysis'. I fear that this will leave the lower courts in considerable doubt as to the proper way to approach durational residency requirements. I gather from the Chief's clerk that the Chief wished to accommodate ^{my} your views in drafting this part of the opinion. But I don't think he quite succeeded.

What?

Although I'm not sure that a compelling state interest approach is necessarily incorrect, and although I'm not sure that the Chief intends to adopt such an approach, on the whole I think it would have been safer to use a straight balancing approach. *yes*
Certainly, it would have been a better opinion had the Chief taken the time to analyze the State's interests with somewhat *yes* more care. More important I am a little worried that now all distinctions based on the length of residency or the fact of prior residency will be found unconstitutional. The opinion has some rather sweeping language in it about treating all citizens equally. The Chief does leave room for durational requirements for determining the bona fides of claims to residency. See page 9 & n.4. But I am unclear whether or not a state law

permitting persons who attended state law schools to be admitted to the Bar without passing an exam, or a law permitting persons who have apprenticed in the state for a certain number of years to be admitted to the Bar, would stand. Perhaps you can think of other such regulations that may now fall. I suppose various sorts of "grandfather" clauses might now be subject to doubt. Perhaps we could discuss this further after you have had a chance to read the opinion over.

By the way, I think you might suggest that the Chief add the words "my children" to the passage appearing at page 8:

"Is it not similarly inherent in the very concept of state or federal citizenship, my children, that once citizenship is attained, the citizen stands on the same or equal footing with all other citizens?"

just kidding

Why not?!

December 15, 1981

80-1146 Zobel v. Williams

Dear Chief:

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The second group of cases, Vlandis, Sosna and Helms, were different in that no penalty was imposed upon the exercise of a fundamental right (e.g., university attendance, divorce). Thus, commencing with Sosna, we have

applied a "balancing" approach in which we weigh the competing interest of the state and individual.

As I stated at Conference, it seems to me that the latter type of analysis is appropriate in this case. There is no absolute burden on any fundamental right. Nor is there any inhibiting of the right to travel into Alaska. Arguably, older citizens may be inhibited against leaving the state and thereby losing the higher dividend. But, I would not say - as your present draft does - that the right to equal "dividends" is so fundamental that the discrimination is "warranted [only] by the highest and most pressing of state interests". P. 11. Rather, I believe there is a better chance of putting a Court together if you rely on the Sosna line and apply a balancing test, recognizing that the state interests may well be important but that the classification does not substantially serve its interests.

The statute lists three purposes: (i) to provide an equitable distribution of the earnings; (ii) to provide an incentive for everyone to remain in the state; and (iii) to encourage public interest in the fund. It is not at all clear that any of these interests or purposes is significantly furthered by the state's graduated dividend system.

The individual's interest is pecuniary. The cost of living in Alaska is notoriously high. As the dividends grow with the fund, they may become increasingly important to a family's budget. Putting it differently, the classification can be analogized to an inverse income tax based on residency. Although this affects a significant personal interest, it does not compare with one's right to welfare or medical care when needed or to the right to vote.

In weighing the competing interests, I view the case as quite close. On balance, however, I conclude that the rationality of Alaska's distribution scheme is dubious primarily because its relationship to the asserted state purposes seems so tenuous. In reality, the state simply elects to reward length of citizenship. No doubt this is politically popular, as the people who will benefit from this "windfall" are more numerous than those on the short end. But this is not a reason to sustain the classification.

It is evident, of course, that the foregoing is a rather simplistic outline of one way to write this opinion. I do think it is a sound approach and one that would not set a troublesome precedent. Also by omitting reference to "compelling state interest", "fundamental constitutional rights" and "equal footing", you may satisfy some of the complaining Brothers.

Sincerely,

The Chief Justice

lfp/ss

: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: **DEC 16 1981**

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1146

RONALD M. ZOBEL AND PATRICIA L. ZOBEL, AP-
PELLANTS *v.* THOMAS WILLIAMS, COMMISSIONER
OF REVENUE, AND ALASKA

APPEAL FROM THE SUPREME COURT OF ALASKA

[December —, 1981]

JUSTICE O'CONNOR, concurring in the judgment.

As the majority observes, Justices of this Court have suggested numerous textual sources for the constitutional right to travel or migrate interstate.¹ Finding none of these sources "entirely satisfactory," the majority eschews reliance upon any particular provision and concludes simply that the "right of interstate migration and travel . . . [is] implicit in the system established by the Constitution and so basic as not to require specific mention." *Ante*, at 6, 7 n. 3. While I agree that the right to migrate is "basic," I am reluctant to stray so far from the Constitution's text to imply such a right. This Court should strive to rest constitutional doctrine on textual supports, not upon a nebulous conception of the Constitution's "system."

Alaska's scheme distinguishes between long-term residents and recent arrivals. It denies the non-Alaskan set-

¹THE CHIEF JUSTICE proposes a new entrant in this "right to travel" sweepstakes. He analogizes the right of a citizen to establish residence in a new State on the same terms enjoyed by other residents of that State to the "equal footing doctrine," under which this Court has accorded new States entering the Union the same rights afforded older States. See generally Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817, 833-835 (1980). Since the majority does not explore the ramifications of this analogy, I resist its adoption.

✓
Received

Some
following
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9-11 await
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—!

ting in the State the same “privileges” afforded longer-term residents. The Privileges and Immunities Clause of Article IV, which guarantees “[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States,” addresses just this type of discrimination.² Accordingly, I would avoid the majority’s reliance on a makeshift right to travel and evaluate Alaska’s disbursement scheme under Article IV’s Privileges and Immunities Clause.

I

Our opinions teach that Article IV’s Privileges and Immunities Clause “was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” *Toomer v. Witsell*, 334 U. S. 385, 395 (1948). The Clause protects a nonresident who enters a State to work, *Hicklin v. Orbeck*, 437 U. S. 518 (1978), to hunt commercial game, *Toomer supra*, or to procure medical services, *Doe v. Bolton*, 410 U. S. 179 (1973).³ Similarly, the Privileges and Immunities Clause should protect the “cit-

² 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 U. S. 518, 524 n. 8 (1978) (quoting *Austin v. New Hampshire*, 420 U. S. 656, 662 n. 8 (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 (1869). The word “citizens” suggests that the clause also excludes aliens. See, e. g., *id.*, at 177 (dictum); L. Tribe, *American Constitutional Law* § 6-33, at 411 n. 18 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

³ See generally *Ward v. Maryland*, 12 Wall. 418, 430 (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. . .”).

izen of State A who ventures into State B" to settle there and establish a home.

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of old-timers. In 1979, an Alaskan who had lived in the State since statehood would have received \$1050 from the Permanent Fund's earnings. A person who had migrated to Alaska during the previous year would have received only \$50. In effect, therefore, the State told the non-Alaskan: You may establish residence in the State, but not upon the same terms enjoyed by those who are already resident. Surely this is one of the "disabilities of alienage" prohibited by Article IV's Privileges and Immunities Clause. See *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme treats nonresidents who choose to settle in the State differently from those who are already residents. The non-resident contemplating migration to Alaska knows that he will never achieve rights equal to those who migrated before him. The fact that this discrimination unfolds after the non-resident establishes Alaskan residency can not mask the fact that Alaska's scheme attaches a disability to status (or former status) as a nonresident.⁴

If the Privileges and Immunities Clause applies to Alaska's distribution system, then the Court need not rely upon the uncertain balancing test invoked by the majority. Our prior opinions describe a more definite standard of review. In

⁴See 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").

Baldwin v. Fish & Game Commission, 436 U. S. 371 (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. 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.

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*, 437 U. S. 518, 525–526 (1978) (quoting *Toomer v. Witsell*, 334 U. S. 385, 398 (1948)). Second, the Court must find a “reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.” *Id.*, at 526 (quoting *Toomer, supra*, at 399).

Certainly the right infringed in this case is “fundamental.” Alaska’s statute burdens those nonresidents who choose to settle in the State.⁵ It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to

⁵The “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.

his or her tastes.⁶ Alaska's encumbrance on the right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in *Hicklin*.

Alaska has not shown that its new residents are the "peculiar source" of any evil addressed by its disbursement scheme. The State does not argue that recent arrivals constitute a particular source of its population turnover problem. Indeed, the State urges that it has a special interest in persuading young adults, who have grown to maturity in the State, to remain there. Brief for Appellees 35 n. 24. Nor is there any evidence that new residents, rather than old, will foolishly deplete the State's mineral and financial resources.⁷

Even if new residents were the peculiar source of these evils, Alaska has not chosen a cure that bears a "reasonable 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

⁶ See also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. 511, 523 (1935) (The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."); *Paul v. Virginia*, 8 Wall. 168, 180 (1869) ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."); *Edwards v. California*, 314 U. S. 160, 173 (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.").

⁷ Alternatively, Alaska argues that its scheme compensates long-term residents for their prior tangible and intangible contributions to the State. Once again, however, 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 past years. Yet the State does not dock paupers for their prior failures to contribute. And it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.

awarded to new residents are too small to encourage them to stay in Alaska. And the size of these dividends gives new residents only a weak interest in prudent management of the State's resources. If, therefore, Alaska truly wishes to avoid population turnover and depletion of its natural resources, it has chosen a singularly inappropriate means of accomplishing that end.

For these reasons, I conclude that Alaska's disbursement scheme violates Article IV's Privileges and Immunities Clause. I thus reach the same destination as the majority, but along a course more surely charted by the Constitution.

II

The analysis outlined above applies to many cases in which a litigant asserts a right to travel or migrate interstate.⁸ To historians, this would come as no surprise. Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.

The Clause derives from Article IV of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State" as one of the "privileges and immunities of free citizens in the several

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 U. S. 393 (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 other States. Iowa adopted a reasonable response to this problem by requiring nonresidents to demonstrate their bona fide residency for one year before obtaining a divorce. I am confident that the analysis developed in *Hicklin v. Orbeck*, *supra*, will adequately identify other legitimate durational residency requirements.

States.”⁹ While the Framers of our Constitution omitted the reference to “free ingress and regress,” they retained the general guaranty of “privileges and immunities.” Charles Pinckney, who drafted the current version of Article IV, told the Convention that this Article was “formed exactly upon the principles of the 4th article of the present Confederation.” 3 M. Farrand, *Records of the Federal Convention* 112 (1934). Commentators, therefore, have assumed that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.¹⁰

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) (hereinafter Chafee). 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 seventeenth century Europe. See generally *id.*, at 163–171.

¹⁰ See, e. g., Chafee, *supra*, at 185; Note, *The Right to Travel and Exclusionary Zoning*, 26 *Hastings L. J.* 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 *U. C. L. A. L. Rev.* 1129, 1130 n. 7 (1975).

See also *Austin v. New Hampshire*, 420 U. S. 656, 661 (1975) (Article IV of the Articles of Confederation was “carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single

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

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel, under the Privileges and Immunities Clause. As THE CHIEF JUSTICE points out, this Clause does not address every conceivable type of discrimination that we might denominate a burden on interstate travel. Other constitutional guarantees, however, may independently restrain discrimination that the Privileges and Immunities Clause does not reach. The applicability of different constitutional provisions simply reflects the fact that the "right to travel" encompasses a variety of rights and a corresponding number of potential infringements.

Uneasy with this diversity, the majority attempts to gather all possible manifestations of the right to travel under

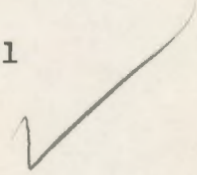
nation."); *United States v. Wheeler*, 254 U. S. 281, 294 (1920) ("[T]he text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so conclusively settled as to leave no room for controversy.").

one rubric. The price of this uniformity, however, is the judicial creation of a right expressly rooted nowhere in the Constitution's text and vindicated through a standardless and ill-defined balancing test. I would avoid implying the broad right embraced by the majority. Since, however, Alaska's distribution system violates Article IV's Privileges and Immunities Clause by denying non-Alaskans the same residential status accorded long-term residents, I agree with the majority that the scheme cannot stand.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 16, 1981

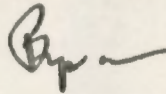


Re: 80-1146 - Zobel v. Williams

Dear Chief,

I shall await the dissent.

Sincerely yours,



The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 21, 1981

✓

RE: No. 80-1146 Zobel v. Commissioner of Revenue

Dear Chief:

I too shall await John's writing. I do not think I could join any opinion that rested in any wise on the equal footing analogy. Nor could I join an opinion that rested on the Privilege and Immunities Clause.

Sincerely,

Bill

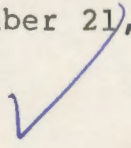
The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 21, 1981

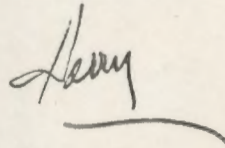


Re: No. 80-1146 - Zobel v. Commissioner of Revenue

Dear Chief:

I shall await John's writing. I could not join the Equal Footing analysis in your present draft or that to be "maintained" in your next one, as suggested in the last paragraph of your memorandum of December 18.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Personal

December 28, 1981

RE: Zobel v. Williams, No. 80-1146.

Dear Lewis:

Thank you for your personal memo of December 15.

I expected some "flak" on this case because there are several rationales for a common result. I have some problems with most of those rationales:

1. I do not see this case as really involving any literal "right to travel." The injured parties seeking relief are not travellers but established residents of Alaska.

2. No fundamental rights are involved in this case, in the Shapiro and Memorial Hospital sense. It is therefore hard to fit this case into the Equal Protection framework established by those cases.

3. I have long been skeptical of the balancing approach. It is too result oriented to suit me and it is a process more suited to legislatures than to the judiciary.

I see this case as a matter of treating all bona fide residents equally without regard to the date on which they acquired the status of resident or citizen. It was my effort to meet the views of some that we should avoid the Equal Protection approach that has encountered resistance. Realistically, "Equal Footing" and Equal Protection are not all that far apart.

As I re-examined the briefs over the past week, I was troubled by the dubious help we were given. This is a close and very important question deserving the level of advocacy

of an Erwin Griswold or Bernard Segal. I am considering moving for reargument and inviting competent amici to give us the kind of assistance this case deserves.

Would you go along with a motion for reargument?

Regards,

WRB

df1 12/28/81

To: Justice Powell

From: David

Re: Zobel--No. 80-1146

I agree with you that it makes little sense to re-argue this case. It is a difficult case that does seem to fall between the cracks. But as we have discussed the right to travel cases can be seen to apply here. Sosna in particular provides an example. The Chief suggests that no "literal" right to travel is involved here. But no literal right to travel is involved in the right to travel cases either. The "right to travel" is itself something of a misnomer. Perhaps it is better understood as a right to settle in a new community on rough equality with the existing residents. So understood it seems to take care of this case rather well.

It is hard to believe that new briefing would add much. The briefs are poor, but not shockingly so.

I wonder if the Chief's real problem is that he should be in dissent?

December 29, 1981

PERSONAL

80-1146 Zobel v. Williams

*9 recommended
E/P analysis
based on
right to travel
cases.*

Dear Chief:

This is in response to your letter of December 28.

I quite understand your sense of frustration. Neither the briefs nor oral argument provided much help, and the Justice's comments on your opinion afford inconclusive guidance. Nevertheless, I do not think it advisable to have this case reargued. We know that counsel of record cannot help us, and appointing distinguished amici might be difficult to justify. My own view is that the case is so unique that further briefing is not likely to be helpful.

It seems to me that your options are either to circulate a revised draft or reassign the case (either directly yourself or hand it to WJB).

I have reviewed my Conference notes that I now summarize. You stated that the "Fourteenth Amendment controls". WJB cited Shapiro as the closest case, and said "Alaska's scheme inhibits travel" both in and out of the state. Byron voted tentatively to affirm. Thurgood agreed with you, saying that citizens cannot be treated differently and that the Fourteenth Amendment controls. Harry said "Shapiro is the guide", and that this should be treated as a "durational residence case". I would analyze the case primarily within the "right to travel" decisions, relying primarily on Sosna and Vlandis. WHR would affirm. John talked essentially in equal protection terms, emphasizing that the "state interest is nonexistent as to the statute's retroactive feature", and that even as to "prospective operation", the classification is discriminatory. Sandra would rely on the Privileges and Immunities Clause, and does not think durational residence analysis is applicable.

Based on the foregoing, I believe you can put a Court together with an opinion written generally along the lines of my letter of December 15. The durational residency cases have applied equal protection analysis to classifications that discriminated on the basis of length of residence within a state. None of our prior cases "controls", and - as stated in my letter - they differ as to the level of scrutiny. You could write this case on a sort of middle level scrutiny analysis - as in Sosna - emphasizing - as John Stevens mentioned - that the asserted state interests simply do not justify the discrimination.

Good luck!

Sincerely,

The Chief Justice

LFP/ss

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: The Chief Justice

Circulated: _____

Recirculated: MAY 7 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1146

RONALD M. ZOBEL AND PATRICIA L. ZOBEL, APPELLANTS
v. THOMAS WILLIAMS, COMMISSIONER OF REVENUE, AND ALASKA

ON APPEAL FROM THE SUPREME COURT OF ALASKA

[May —, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence, violates the equal protection rights of newer state citizens. The Alaska Supreme Court sustained the constitutionality of the statute. *Williams v. Zobel*, 619 P. 2d 448 (Alaska 1980). We noted probable jurisdiction and stayed the distribution of dividend funds, — U. S. — (1981). 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

¹Alaska Department of Revenue, *Revenue Sources FY 1981-1983* (1981). (Includes General Fund unrestricted petroleum revenues of \$3.3 billion and petroleum revenues directly deposited in the Permanent Fund in the amount of \$400 million. An additional \$900 million was transferred

The C.J. ~~has~~ new vote generally
This. & 9+ accord with
views I have expressed.
See my letter to him

9+ in normally
written,
addressing
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reproachful
application

Reviewed
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Join

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 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

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 89% of the State's total government revenue. *Ibid.*

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

The Alaska dividend distribution law is quite unlike the durational residency requirements we examined in *Sosna v. Iowa*, 419 U. S. 393 (1975); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974); *Dunn v. Blumstein*, 405 U. S. 330 (1972); and *Shapiro v. Thompson*, 394 U. S. 618 (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 to other residents.³ The asserted purpose of the durational residency requirements was to assure that only *bona fide* state residents received rights and benefits provided for residents.

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

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 P. 2d 422 (Alas. 1980). Chief Justice Rabinowitz, the only justice in the majority in both cases, found that the tax exemption statute, but not the dividend distribution plan, could "be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." 619 P. 2d, at 458.

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

less than a full year of residency are entitled to share in the distribution. Alaska Stat. § 43.23.010(f).⁴ The law also does not 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 when they moved into the State.

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 that 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.

When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁵ Generally,

⁴Section 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.

⁵The Alaska courts considered whether the dividend distribution law violated appellants' constitutional right to travel. The right to travel and to

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 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: creation of a financial incentive for individuals to establish and maintain residence in Alaska; encouragement of prudent management of the Permanent Fund; and apportionment of benefits in recognition of undefined

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*, — U. S. —, — — — and nn. 12 and 13 (1981), *Shapiro v. Thompson, supra*, 394 U. S. at 629-631; *United States v. Guest*, 383 U. S. 745, 757-759 (1966). See also Z. Chafee, *Three Human Rights in the Constitution* 188-193 (1956). In addition to protecting persons against the erection of actual barriers to interstate 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, supra*; *Dunn v. Blumstein, supra*; *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.

"contributions of various kinds, both tangible and intangible, which residents have made during their years of residency," 619 P. 2d, at 458.⁶

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 1959.⁷ Assuming *arguendo* that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the state in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.⁸

⁶These purposes were enumerated in the first section of the act creating the dividend distribution plan, 21 Alaska Sess. Laws § 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.

⁷In response to the argument that the objectives of stabilizing population and encouraging prudent management of the Permanent Fund and 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 P. 2d, at 461-462 n. 37. See also dissenting opinion of Justice Dimond, 619 P. 2d, 469-471.

⁸In fact, newcomers seem more likely to become dissatisfied and to

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

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

Williams v. Zobel, *supra*, 619 P. 2d, at 462. The State similarly argues that equal per capita distribution would encourage rapacious development of natural resources. *Ibid.* Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

The last of the State's objective—to reward citizens for

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 seeming attitude of disdain for newcomers created by the dividend law seems a most unlikely way to convince new Alaskans that the State welcomes them and wants them to stay.

Of course, the State's objective of reducing population turnover cannot be interpreted as an attempt to inhibit migration into the State without encountering insurmountable constitutional difficulties. See *Shapiro v. Thompson*, *supra*, 394 U. S., at 629.

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 clearly not a legitimate state purpose. A similar “past contributions” argument was made and rejected in *Shapiro v. Thompson*, *supra*, 394 U. S., at 632–633:

“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.”

Similarly, in *Vlandis v. Kline*, 412 U. S. 441 (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.” 412 U. S., at 449–450 and n. 6.⁹

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, eligi-

⁹ 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 money, the pipeline wouldn’t be there. So I get a little bit tired of—and I’ve got a hunch and 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 been here 30 or 40 or 50 years.”

bility 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 ~~would~~ ^{other} open the door to state apportionment of ~~the~~ rights, benefits and services according to length of residency.¹⁰ It would permit the states to divide citizens into expanding numbers of permanent classes.¹¹ Such a result would be clearly impermissible.¹²

B

We need not consider whether the state could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. *Buckley v. Valeo*, 424 U. S. 1, 108 (1976); *United States v. Jackson*, 390 U. S. 570, 585 (1968); *Champlin Rfg. Co. v. Commission*, 286 U. S. 210, 234 (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 ren-

¹⁰ An exception might be found for "fundamental rights" and services deemed to involve "basic necessities of life." See *Memorial Hospital v. Maricopa County*, *supra*, 415 U. S., at 259.

¹¹ "Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." *The Passenger Cases*, 7 How. 283, 492 (1849) (Chief Justice Taney, dissenting).

¹² *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn 1970), *affirmed*, 410 U. S. 985 (1971) cannot be read as a contrary decision of this Court. First of all, summary affirmance by this Court cannot be read as an adoption of the reasoning of the court below. *Fusari v. Steinberg*, 419 U. S. 379, 391 (1975) (concurring opinion). See also *Colorado Springs Amusement Ltd. v. Rizzo*, 428 U. S. 913, 920-921 (1976) (BRENNAN, J., dissenting); *Edelman v. Jordan*, 415 U. S. 651, 671 (1974). Moreover, as we pointed out in *Vlandis v. Kline*, *supra*, at 452-453, n. 9, we considered the Minnesota one-year residency requirement examined in *Starns* a test of *bona fide* residence, not a return on prior contributions.

ders the whole invalid:

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

1980 Alaska Sess. Laws Chap. 21, §4. It will of course be for the Alaska courts to pass on the severability clause of the statute.

III

The only apparent justification for the retrospective aspect of the program, “favoring established residents over new residents,” is constitutionally unacceptable. *Vlandis v. Kline*, *supra*, 412 U. S., at 450. 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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

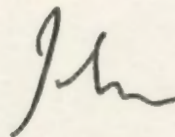
May 7, 1982

Re: 80-1146 - Zobel v. Williams

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference

Pp 1-9
Footnotes renumbered

For Journal
CJ

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: 5/8/82

2d PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1146

RONALD M. ZOBEL AND PATRICIA L. ZOBEL, APPELLANTS
v. THOMAS WILLIAMS, COMMISSIONER
OF REVENUE, AND ALASKA

APPEAL FROM THE SUPREME COURT OF ALASKA

[May —, 1982]

JUSTICE O'CONNOR, concurring in the judgment.

The Court strikes Alaska's distribution scheme, purporting to rely solely upon the Equal Protection Clause of the Fourteenth Amendment. The phrase "right to travel" appears only fleetingly in the Court's analysis, dismissed with an observation that "right to travel analysis refers to little more than a particular application of equal protection analysis." *Ante*, at 5 n. 5. The Court's reluctance to rely explicitly on the right to travel is odd, because its ~~result~~ depends on the assumption that Alaska's desire to reward past contributions of its citizens is not a legitimate state purpose. Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of *Shapiro v. Thompson*, 394 U. S. 618 (1969), reveals, Alaska's purpose is illegitimate only because it abridges a constitutionally protected right to travel. *Id.*, at 629-631, 634, 638. I prefer to confront more directly both the constitutional defects in Alaska's scheme and the constitutional roots of this enigmatic right to travel.

+ holding

Alaska's distribution plan distinguishes between long-term residents and recent arrivals. Stripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer-term residents. The Privileges and Immunities Clause of Article IV, which guarantees "[t]he

Citizens of each State . . . all Privileges and Immunities of Citizens in the several States,” addresses just this type of discrimination.¹ Accordingly, I would measure Alaska’s scheme against the principles implementing the Privileges and Immunities Clause. In addition to resolving the particular problems raised by Alaska’s scheme, this analysis supplies a needed foundation for many of the “right to travel” claims recognized by the Court.

I

Our opinions teach that Article IV’s Privileges and Immunities Clause “was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” *Toomer v. Witsell*, 334 U. S. 385, 395 (1948). The Clause protects a nonresident who enters a State to work, *Hicklin v. Orbeck*, 437 U. S. 518 (1978), to hunt commercial game, *Toomer supra*, or to procure medical services, *Doe v. Bolton*, 410 U. S. 179 (1973).² Similarly, the Privileges and Immunities Clause should protect the “cit-

¹ 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 U. S. 518, 524 n. 8 (1978) (quoting *Austin v. New Hampshire*, 420 U. S. 656, 662 n. 8 (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 (1869). The word “Citizens” suggests that the Clause also excludes aliens. See, *e. g., id.*, at 177 (dictum); L. Tribe, *American Constitutional Law* § 6-33, at 411 n. 18 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

² See generally *Ward v. Maryland*, 12 Wall. 418, 430 (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. . .”).

izen of State A who ventures into State B" to settle there and establish a home.

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of old-timers. In 1979, an Alaskan who had lived in the State since statehood would have received \$1050 from the Permanent Fund's earnings. A person who had migrated to Alaska during the previous year would have received only \$50. In effect, therefore, the State told the non-Alaskan: You may establish residence in the State, but not upon the same terms enjoyed by those who are already resident. Surely this is one of the "disabilities of alienage" prohibited by Article IV's Privileges and Immunities Clause. See *Paul v. Virginia*, 8 Wall. 168, 180 (1869).

It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme treats nonresidents who choose to settle in the State differently from those who are already residents. The non-resident contemplating migration to Alaska knows that he will never achieve rights equal to those who migrated before him. The fact that this discrimination unfolds after the non-resident establishes Alaskan residency can not mask the fact that Alaska's scheme attaches a disability to status (or former status) as a nonresident.³

³See 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").

The example of a nonresident contemplating migration to Alaska merely illustrates why Alaska's scheme implicates the Privileges and Immunities Clause; when a State attempts to classify citizens on the basis of their former residential status, the Clause also should protect those who moved to the State in the past. In this case, for example, appellants settled in

If the Privileges and Immunities Clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. In *Baldwin v. Fish & Game Commission*, 436 U. S. 371 (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. 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.

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*, 437 U. S. 518, 525-526 (1978) (quoting *Toomer v. Witsell*, 334 U. S. 385, 398 (1948)). Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the non-citizens. *Id.*, at 527.

Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State.⁴ It is difficult to imagine a right more

Alaska before enactment of the statutory scheme they challenge. Although the scheme did not actually deter their migration, the State's decision to classify citizens on the basis of former residential status still infringes the values protected by the Privileges and Immunities Clause. For the reasons explored more fully above, I would find that disabilities attached to former nonresidential status evoke the same scrutiny applied to burdens on current nonresidential status.

⁴The "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

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 U. S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.⁵ Alaska's encumbrance on the right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in *Hicklin*.

Alaska has not shown that its new residents are the "peculiar source" of any evil addressed by its disbursement scheme. The State does not argue that recent arrivals constitute a particular source of its population turnover problem. Indeed, the State urges that it has a special interest in persuading young adults, who have grown to maturity in the State, to remain there. Brief for Appellees 35 n. 24. Nor is there any evidence that new residents, rather than old, will foolishly deplete the State's mineral and financial resources.⁶

State affords citizens and noncitizens.

⁵ See also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. 511, 523 (1935) (the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"); *Paul v. Virginia*, 8 Wall. 168, 180 (1869) ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"); *Edwards v. California*, 314 U. S. 160, 173 (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").

⁶ Alternatively, Alaska argues that its scheme compensates long-term residents for their prior tangible and intangible contributions to the State. Once again, however, 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 past years. Yet the State does not dock paupers for their prior failures to contribute. And it awards

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 are too small to encourage them to stay in Alaska. And the size of these dividends gives new residents only a weak interest in prudent management of the State's resources. If, therefore, Alaska truly wishes to avoid population turnover and depletion of its natural resources, it has chosen a singularly inappropriate means of accomplishing that end.

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

II

The analysis outlined above applies to many cases in which a litigant asserts a right to travel or migrate interstate.⁷ To

every person over the age of 18 dividends equal to the number of years that person has lived in the State.

⁷Any 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 U. S. 393 (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 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

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

The Clause derives from Article 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."⁸ While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Article IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, *Records of the Federal Convention* 112 (1934). Commentators, therefore, have assumed that

Hicklin v. Orbeck, *supra*, will adequately identify other legitimate durational residency requirements.

⁸ 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) (hereinafter Chafee). 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 seventeenth century Europe. See generally *id.*, at 163-171.

the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.⁹

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

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel,

⁹ See, e. g., Chafee, *supra*, at 185; Note, *The Right to Travel and Exclusionary Zoning*, 26 Hastings L. J. 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 U. C. L. A. L. Rev. 1129, 1130 n. 7 (1975).

See also *Austin v. New Hampshire*, 420 U. S. 656, 661 (1975) (Article IV of the Articles of Confederation was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation"); *United States v. Wheeler*, 254 U. S. 281, 294 (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").

under the Privileges and Immunities Clause. This Clause may not address every conceivable type of discrimination that we might denominate a burden on interstate travel. Other constitutional guaranties, however, may independently restrain discrimination that the Privileges and Immunities Clause does not reach. The applicability of different constitutional provisions simply reflects the fact that the "right to travel" encompasses a variety of rights and a corresponding number of potential infringements.

Unwilling to acknowledge that its result rests upon a constitutionally protected right to travel, the Court avoids discussing the source and scope of that right. I would confront these problems openly and hold that Alaska's distribution system violates the Privileges and Immunities Clause of Article IV by denying non-Alaskans the same residential status accorded long-term residents. Accordingly, I concur in the Court's judgment insofar as it reverses the judgment of the Alaska Supreme Court.

May 8, 1982

80-1146 Zobel v. Williams

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 10, 1982

Re: 80-1146 - Zobel v. CIR and Alaska

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

✓

May 12, 1982

Re: No. 80-1146 - Zobel v. Williams

Dear Chief:

Please join me.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

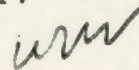
May 19, 1982

Re: No. 80-1146 Zobel v. Alaska

Dear Chief:

I intend to circulate a dissent in this case, and will try to get it around in a few days.

Sincerely,



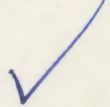
The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

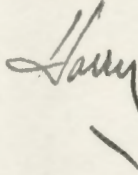


Re: No. 80-1146 - Zobel v. Williams

Dear Bill:

Please join me in your separate concurring opinion.

Sincerely,



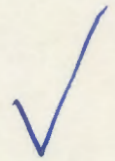
Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

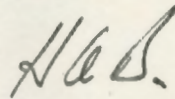


Re: No. 80-1146 - Zobel v. Williams

Dear Chief:

By joining Bill Brennan's separate concurrence, I
also join your opinion.

Sincerely,



The Chief Justice

cc: The Conference

June 1, 1982

80-1146 Zobel v. Williams

Dear Bill:

Please add my name to your concurring opinion.

Sincerely,

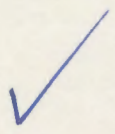
Justice Brennan

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



June 2, 1982

Re: No. 80-1146 - Zobel v. Williams

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

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[illegible]

Decided 6/14/82

no limiting principle - 35

5 kept balancing
→ 37

Individual interests - 27

State's interest - 28