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General Preference Laws

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GENERAL PREFERENCE LAWS

Preference to local laborers, business firms, and products in the expenditure of government funds is common in nearly every state in the Union. Motivated by the desire to benefit resident laborers and business firms, preference legislation normally increases during periods of economic stress. Thus, during the last depression such statutes became extensive.¹

Preference laws protecting the local labor market in the field of public employment from out-of-state competition have been enacted by approximately two-thirds of the states. The strictness of this regulation ranges from mere directory preferences of residents and the prohibition of alien employees to the imposition of residence or citizenship qualifications as conditions to employment on public works.²

²³ Ind. Stat. Ann (Burns Supp. 1939) §§12-1001 to 12-1007.

²⁴ Giving the states enough rope is perhaps the most significant contribution of the Supreme Court's surprising interpretation of the Twenty-First Amendment for we can test by experience the necessity of the commerce clause as an instrument of national unity. See McAllister, *Court, Congress and Trade Barriers*, supra p. 144.

¹ MARKETING LAWS SURVEY, W.P.A. (1939) 83-88.

² Statutes merely requiring that residents be preferred: Conn. Gen. Stat. Supp. (1931, 1933, 1935) c. 279, §1603c; Idaho Laws 1935, c. 140; Iowa Code (1939) §1171.03. Preference requested only by resolution of the legislature: Texas Laws 2d Called Sess. 1931, S.C.R. No. 10, p. 73. Preference of citizens: Rev. Code Del (1935) c. 90 §3644; Rev. Stats. N.J. (1937) §34:9-2. Prohibition of employment of aliens: Ga. Laws Ex. Sess. 1937-38, Title IV, No. 376, p. 189. Requirement that as a condition to employment, the laborer must have been a resident for a certain minimum length of time: Stats. Ark. (Pope's Digest,

Two kinds of preference laws restrict the purchase of materials and supplies by governmental agencies. A few states base the preference upon the residence of the firm.³ The more common type bases the preference on the place of production, requiring purchasing agents to give preference to materials that have been grown, produced, or fabricated within the state.⁴ Not infrequently particular items have been singled out to be granted preferences.⁵ Coal and building stone are widely favored in this respect.⁶ One somewhat specialized field in which preference laws are extant is that of public printing. The usual provision is the requirement that public printing be done within the state.⁷

Statutes requiring government agencies to purchase supplies from prisons and other institutions of the state, though not establishing a preference among private firms, do tend to restrict a state's markets.⁸ But the ordinary problems presented by purchase preference laws do not arise in connection with this latter type of statute, for as among private producers and business firms, there is no discrimination along state lines.

It is perfectly clear that government preference laws constitute interstate trade barriers. They are enacted for the very purpose of discriminating against out-of-state persons and products, and in favor of state residents and products. It is likewise clear that in line with their purpose, the statutes do discriminate in fact. The keenness of such discrimination is illustrated by the pressure brought to bear on one state legislature to secure the abrogation of preferences enacted by another. A resolution of the Wisconsin legislature prohibited all departments of that state from furnishing any plans for the erection of public buildings

1937) §§8533, 8534; Fla. Laws 1933, vol. 1, c. 16183, p. 747; Wis. Laws 1931, c. 22, §4 (5), p. 36.

Indiana requires that in construction of state highways and bridges all unskilled laborers employed thereon must be residents of the county in which such work is being done. Ind. Stat. Ann. (Burns' 1933, 1938 Supp.) §36-114.

³ Stats. Ark. (Pope's Digest, 1937) §13060; N. Dak. Laws 1935, c. 218. For preference of resident contractors: Ore. Code Ann. (1930) §67-1103.

⁴ West Va. Code (1937) §2625 (16); Md. Code Ann. (1939) Art. 15A, §25; Md. Laws 1933, J. R. 8 & 9, p. 1353; Mass. Ann. Laws (1932) c. 7, §22. Where a price differential is granted in favor of state products: Rem. Rev. Stats. Wash. (1939 Supp.) §§10322-11, 10322-14.

⁵ Kansas enumerates several articles that must be purchased from state dealers. Gen. Stats. Kans. Ann. (1935) §76-101a, p. 1936. Louisiana gives preference as to office and school supplies. La. Stats. Ann. (Dart. 1939) §7824. Nebraska requires use of Nebraska butter in state institutions. Neb. Laws 1931, c. 21, p. 93.

⁶ Preference of coal: Ind. Stats. Ann. (Burns' 1933) §46-1111; Ill. Rev. Stats. (Jones, Supp. 1938) §126, 317 (1); N. Dak. Laws 1933, c. 241. Preference of building stone: Ind. Acts. Sp. Sess. 1938, c. 7, p. 27; Laws Md. 1933, J. R. 8 and 9, p. 1353.

⁷ Ind. Stats. Ann. (Burns', 1933) §§63-1628, 63-1629; Ohio Gen. Code (Page's, 1936) §763.

⁸ Ind. Stats. Ann. (Burns', 1933) §§13-101 to 13-104; Mass. Ann. Laws (1933) c. 69 §25, c. 127 §57.

to the various building exchanges in Minnesota until Minnesota should repeal all laws discriminating against labor and materials of Wisconsin.⁹

Just as it is clear that such preference laws are barriers to trade, it is equally clear that they are constitutional. They have been upheld as an exercise of the government's proprietary powers.¹⁰ The states are not limited by the clauses of the federal constitution relating to interstate commerce,¹¹ privileges and immunities,¹² due process,¹³ or equal protection¹⁴ in the conduct of the business of government.¹⁵ In *Heim v. McCall*¹⁶ and *Crane v. People*,¹⁷ the United States Supreme Court sustained the New York Labor Law prohibiting employment on public works of anyone except United States citizens and requiring that preference be given to residents of the state. In upholding the validity of the statute the court relied on the authority of *Athen v. Kansas*,¹⁸ where it had formerly said that "it belongs with the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf. . . ." In spite of the rapidly increasing significance of government purchasing in the national economy, there is little cause to doubt that the authority of these cases will stand.

C.D.S.

⁹ Wis. Laws 1st Spec. Sess. 1928, J. R. No. 7, pp. 22, 23. Minnesota repealed such laws in 1933. Minn. Laws 1933, c. 17.

The Nevada legislature passed a resolution urging change of a federal ruling to permit employment of Nevada labor on the Boca Dam in California. Nev. Laws 1937, A. J. R. No. 8, p. 551.

¹⁰ Other forms of discrimination have been upheld under the state's proprietary powers, as where Virginia denied to citizens of other states the privilege of planting oysters in the navigable rivers of Virginia. In upholding this statute, the Court said that the privileges and immunities clause of the federal constitution does not vest the citizens of one state with any interest in the common property of the citizens of another state. *McCready v. Virginia*, 94 U.S. 391 (1876). Cf. *Geer v. Connecticut*, 161 U.S. 519 (1895); *Patsone v. Pennsylvania*, 232 U.S. 138 (1913).

¹¹ *Geer v. Connecticut*, 161 U.S. 519 (1895).

¹² *McCready v. Virginia*, 94 U.S. 391 (1876).

¹³ *State v. Senatobia Blank Book and Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917).

¹⁴ *In re Gemmill*, 20 Idaho 732, 119 Pac. 298 (1911), *City and County of Denver v. Bossie*, 83 Col. 329, 266 Pac. 214 (1928).

¹⁵ There may be provisions in state constitutions or city charters which would invalidate attempted preferences. Consider *St. Louis Quarry and Construction Co. v. Von Versen*, 81 Mo. App. 519, (St. Louis Ct. of App., 1899).

¹⁶ 239 U.S. 175 (1915).

¹⁷ 239 U.S. 195 (1915). For the opinion of the New York Court in the case, see *People v. Crane*, 214 N.Y. 154, 185 N.E. 427 (1915).

¹⁸ 191 U.S. 207 (1903).