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Constitutional Law - Equal Protection Analysis - Awarding Public Works Contracts: Granting Preference to Resident Bidders - Galesburg Construction Co. v. Board of Trustees

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CONSTITUTIONAL LAW—Equal Protection Analysis. Awarding Public Works Contracts: Granting Preference to Resident Bidders. Galesburg Construction Co. v. Board of Trustees, 641 P.2d 745 (Wyo. 1982).

Galesburg Construction Company was incorporated under the laws of Wyoming in June of 1981. In July of that year, the Board of Trustees of Memorial Hospital of Converse County invited bids for a construction project. Galesburg Construction was revealed to be the low bidder at the August 27th bid opening. On September 14, 1981, Galesburg was informed by the hospital board that it did not qualify as a resident bidder under section 9-8-301[1] of the Wyoming Statutes. The next lowest bidder, however, had qualified as a resident under the statute. Because the bid of the resident had not exceeded the bid of Galesburg by more than five percent, Galesburg was told that the contract would be awarded to the resident bidder as directed by section 9-8-302[2] of the Wyoming Statutes. In response, Galesburg filed suit in the District Court of Converse County asking that section 9-8-302 of the Wyoming Statutes be declared unconstitutional. The constitutional question[3] was reserved to the Wyoming Supreme Court.[4] The Wyoming Supreme Court evaluated

1. WYO. STAT. § 9-8-301 (1977) provides:
   As used in this act [§§ 9-8-301 to 9-8-304, 9-8-308] the word "resident" means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the State of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and place of business within the State of Wyoming.
2. WYO. STAT. § 9-8-302 (1977) provides:
   Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent (5%) higher than that of the lowest responsible nonresident bidder.
3. Whether section 9-8-302 of the Wyoming Statutes violates article I, section 6, of the Wyoming Constitution, and/or article 1, section 3, of the Wyoming Constitution and/or section I of the fourteenth amendment to the United States Constitution.
4. Reserved questions reach the Wyoming Supreme Court under the provisions of section 1-13-101 of the Wyoming Statutes. WYO. STAT. § 1-13-101 (1977) provides:
   When an important and difficult constitutional question arises in a proceeding pending before the district court on motion of either party or upon his own motion the judge of the district court may cause the question to be reserved and sent to the supreme court for its decision.

the equal protection challenge raised by Galesburg and decided the appropriate standard of review was that of traditional scrutiny.[5] The court held that section 9-8-302 of the Wyoming Statutes served a legitimate state interest and that the preference given resident bidders was rationally related to that interest.[6] The court held that, as applied to Galesburg, section 9-8-302 of the Wyoming Statutes was constitutional.[7]

This Note will begin with a discussion of equal protection analysis and a brief review of the legislative history and legal treatment afforded section 9-8-302. A discussion of the analysis employed by the Wyoming Supreme Court will follow. The Note will conclude with a critique of the court's analysis and an assessment of the significance of this case in regard to future equal protection litigation.

BACKGROUND

Equal Protection Analysis

Section 9-8-302 of the Wyoming Statutes classifies bidders on public works projects into two basic categories—residents and nonresidents. State statutes which make use of classifications have typically been judicially reviewed under the equal protection clause[8] of the fourteenth amendment.[9] The United States Supreme Court has developed two

The supreme court will not consider the question unless the district judge has complied with the preliminary fact-finding matters described in Rule 52(c) of the Wyoming Rules of Civil Procedure.

5. Galesburg Constr. Co., Inc. of Wyo. v. Board of Trustees of Memorial Hosp. of Converse County, 641 P.2d 745, 749 (Wyo. 1982).
6. *Id.* at 750.
7. *Id.* at 751.
8. The equal protection clause is found in the last clause of section 1 of the fourteenth amendment to the United States Constitution. U.S. CONST. amend. XIV, § 1 provides:

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
9. Classifications created by federal statutes are challenged as being violative of the due process protections guaranteed by the fifth amendment. Although there is no explicit equal protection clause in the fifth amendment, the Court has recognized that it has an equal protection component. Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979). Therefore, the Court will subject classifications made by either state or federal statutes to an identical equal protection analysis.

main levels of analysis to evaluate legislation challenged on equal protection grounds.[10] The Court has adopted a standard of strict scrutiny when the challenged legislation burdens a fundamental right or creates a suspect classification.[11] Under strict scrutiny, a statute passes as constitutional only if it is narrowly drawn to achieve a compelling state interest.[12] Absent a fundamental right or suspect classification, the Court imposes the standard of traditional scrutiny[13] which requires only that the challenged legislation be rationally related to a legitimate state interest.[14] Compared to the standard of strict scrutiny, traditional scrutiny is obviously a much easier standard to meet. This two-tiered equal protection analysis has been adopted by the Wyoming Supreme Court[15] and was applied by the court in the *Galesburg* decision.

When the United States Supreme Court has applied traditional scrutiny to ordinary economic or social legislation, the usual result has been to validate the legislation.[16] The Court has consistently refused to invalidate economic legislation under traditional scrutiny analysis even though the Justices may have personally believed the legislation was unwise or inartfully drawn.[17] The basic approach has been one of deference to the judgment of the legislature. The Court's deference to legislative judgment was recently highlighted by its decision in *United States Railroad Retirement Board v. Fritz*.[18] In *Fritz*, rather than looking for the actual motives

10. Recently scholars have pointed to a third level of scrutiny—intermediate scrutiny. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-30 (1978); Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525 (1980).
11. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).
12. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).
13. Also referred to as lower level scrutiny or rational basis scrutiny.
14. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).
15. Washakie County School Dist. Number One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).
16. The Court's deference to legislative judgment in this area since the late 1930's is highlighted by the fact that the Court has invalidated economic regulations solely on equal protection grounds only once. Morey v. Doud, 354 U.S. 457 (1957). Later the Court rejected the analysis in *Morey* and overruled the decision. New Orleans v. Dukes, 427 U.S. 297 (1976). *See* Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 860-861 (1980).
17. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980).
18. 449 U.S. 166 (1980). In *Fritz*, the constitutionality of a section of the Railroad Retirement Act of 1974 was challenged. 45 U.S.C. § 231 (Supp. IV 1980). Congress had restructured the railroad retirement system in

of Congress, the Court hypothesized conclusions Congress could have drawn or assumptions Congress could have made to reach its conclusion that plausible reasons existed for the classification scheme that Congress chose.[19] This extreme willingness to defer to legislative judgment has generated much debate regarding the proper scope of traditional scrutiny.[20] In fact, in *Fritz*, separate opinions revealed that the individual Justices could be characterized as favoring one of three approaches. First, the majority was satisfied that the classifications chosen by Congress were reasonable because plausible reasons existed for making such classifications.[21] The Court was willing to find those reasons from conclusions or assumptions Congress could have drawn.[22] Under this approach it would be almost impossible for a statute not to pass traditional scrutiny. Second, Justice Stevens, in a concurring opinion, argued that the Constitution required more than just a conceivable or plausible explanation for the statutorily unequal treatment.[23] He argued that there must be a correlation between the classification and either the actual articulated legislative purpose or a legitimate purpose that could reasonably have motivated an impartial legislature.[24] Third, Justice Brennan, in his dis-

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hopes of returning the retirement fund to a sound financial basis. In the past, several workers had been able to qualify for a windfall retirement benefit. For example, a person who had worked for more than ten years in the railroad industry and for more than ten years in another industry, qualified for both railroad retirement and social security benefits. As a result, he could receive larger monthly benefits than if he had worked solely for the railroad industry a corresponding number of years. In an effort to reduce the number of workers who qualified for the windfall benefit, Congress divided all railroad employees into various groups. Some workers would be allowed to obtain the extra benefits, others would not. For example, an individual with more than ten years of railroad service plus sufficient non-railroad employment to qualify for social security benefits could collect the windfall if he had worked for the railroad in 1974. But, another individual with 24 years of railroad employment plus sufficient time in non-railroad employment to qualify for social security benefits, but who had not worked in the railroad industry in 1974, could not collect the benefits. A class action suit was brought to challenge the legislation on the grounds that it irrationally distinguished between classes of annuitants. For a further discussion of *Fritz*, see, Note, *Minimum Security in Equal Protection*, 95 HARV. L. REV. 152-61 (1981).

19. 449 U.S. at 178-79.
20. *See* Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1981); Barrett, *supra* note 16.
21. 449 U.S. at 179.
22. *Id.* at 178.
23. *Id.* at 180 (Stevens, J., concurring).
24. *Id.* at 181-82 (Stevens, J., concurring).

sent, criticized the majority for relying on *post hoc* suggestions to determine the purpose of the legislation.[25] He characterized the approach of the majority as mere tautology as it presumed the purpose of the legislation from the classifications used by Congress.[26] Brennan argued that the actual purpose of a statute, as articulated by the legislative body, must be discovered and that the chosen classification must be rationally related to the articulated purpose and not merely to a plausible or conceivable purpose.[27]

Continued disagreement as to the proper scope of rational basis analysis was found in the decision of *Schweiker v. Wilson*.[28] The majority continued to apply the general standard of requiring that classifications used in a statute be rationally related to a legitimate state interest.[29] However, the language chosen in the opinion appeared to be less deferential as the majority stressed that the rational basis standard was not toothless and that the classificatory scheme should advance a reasonable and identifiable governmental objective.[30] Despite the stronger language, the Court again deferred to legislative judgment and validated the legislation. Four justices dissented and argued that when an explicit legislative statement of the purpose to be furthered by the legislation was not available, a higher level of analysis

25. *Id.* at 184 (Brennan, J., dissenting).
26. *Id.* at 187 (Brennan, J., dissenting).
27. *Id.* at 184 (Brennan, J., dissenting).
28. 450 U.S. 221 (1981). The issue in *Schweiker* was whether Congress could constitutionally decline to grant Supplemental Security Income benefits to a class of otherwise eligible individuals because they were institutionalized in public mental institutions that did not receive Medicaid funds for their care. *Id.* at 222. Congress had amended the Social Security Act in 1972 to create the federal Supplemental Security Income (SSI) program. A portion of the SSI program was challenged as being violative of the equal protection component of the fifth amendment's due process clause. Two main arguments were advanced on behalf of the class excluded from the benefits. First, the exclusion of the class (mentally ill who resided in institutions that did not receive Medicaid funds) bore no reasonable relationship to any legitimate objective of the SSI program. *Id.* at 226. Second, the members of the excluded class should be considered a suspect class, which would require that Congress show special justification for excluding them from the benefits. *Id.* at 226-27. The Court determined that the suspect class issue was irrelevant because the classification was not based on mental illness, but upon the type of institution where the patient resided. *Id.* at 231. The Court then applied traditional scrutiny and determined that Congress had acted reasonably in denying supplemental benefits to the excluded group. *Id.* at 239.
29. *Id.* at 234.
30. *Id.* at 234-35.

should be applied.[31] Absent a clearly stated legislative purpose, the dissenters maintained that the classification should bear a "fair and substantial relation" to any *post hoc* suggestion of the purpose which is not supported by legislative history.[32]

The *United States Railroad Retirement Board v. Fritz* and *Schweiker v. Wilson* decisions indicated a struggle and some dissatisfaction within the Court regarding the appropriate application of traditional scrutiny. However, the prevailing position at the conclusion of the Court's 1980 Term was still one of great deference to legislative judgment in the areas of social and economic legislation.

This controversy was rekindled during the 1981 Term. The decisions of *Logan v. Zimmerman Brush Co.*[33] and *Zobel v. Williams*[34] demonstrated that the Court was moving toward a less deferential role when engaging in traditional scrutiny. In *Logan*, although the constitutional claim was based on both due process and equal protection challenges, the statute in question was held invalid because it deprived the plaintiff of property without due process of law.[35] How-

31. *Id.* at 244-45 (Powell, J., dissenting).
32. *Id.*
33. ..... U.S. ....., 102 S.Ct. 1148 (1982). Logan had been dismissed from his job and filed a complaint alleging unlawful termination of employment. An Illinois statute required that the Fair Employment Practice Commission hold a hearing within 120 days of receiving such a complaint. ILL. REV. STAT. ch. 48, § 858(b) (1979). The Commission failed to hold the hearing until the 125th day. At the hearing, Logan's employer's motion to dismiss the claim for failure to hold a timely hearing was denied. On appeal, the Illinois Supreme Court held that the Commission had no jurisdiction to hear the claim, thereby cutting off Logan's claim. Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 82 Ill. 2d 99, 411 N.E.2d 277 (1980). The Illinois court rejected Logan's arguments that his due process and equal protection rights would be violated if the Commission's error were allowed to extinguish his cause of action. *Id.*, N.E.2d at 282.
34. ..... U.S. ....., 102 S.Ct. 2309 (1982). At issue in *Zobel* was the constitutionality of the Alaska legislature's plan to distribute income derived from mineral reserves to its citizens. The plan called for distributions in varying amounts based on the length of each citizen's residence. *Id.* at 2310. The recipients would receive one dividend unit (equivalent to $50.00) for each year of residency since 1959. Thus, for the 1979 fiscal year, a one-year resident would receive $50.00 and a person who had been a resident of Alaska since 1959 would receive $1,050.00. The statute was challenged as being violative of equal protection guarantees and the constitutional right of interstate migration. The Alaska Supreme Court had upheld the constitutionality of the statute. *Id.* at 2311.
35. 102 S.Ct. at 1159. The Court held that Logan was not granted an appropriate hearing at a meaningful time and in a meaningful manner and, therefore, his due process rights were violated. *Id.* The question having been decided on the due process claim, the Court's opinion did not address the equal protection challenge.

ever, the equal protection issue was addressed in a separate opinion[36] and a concurring opinion.[37] *Logan* was significant because it marked the first modern case in which a majority of the justices agreed that a statute should be held unconstitutional under the rational basis standard.[38]

In *Zobel*, the Court held that a distribution scheme advanced by the Alaska legislature did not pass traditional scutiny.[39] The state had advanced three purposes to be furthered by the legislation.[40] The Court found that the purpose of rewarding citizens for past contributions was not a legitimate state interest.[41] The Court then found that the purposes of creating a financial incentive to establish and maintain residence in Alaska and of furthering the prudent management of the Permanent Fund were not rationally related to the distinctions that Alaska sought to make between newer residents and those who had been in the state since 1959.[42] The Court held that the Alaska distribution plan violated the guarantees of the equal protection clause of the fourteenth amendment.[43]

The purpose of this section has been to demonstrate the changing nature of traditional scrutiny as it is applied by the Supreme Court to evaluate challenges to legislative classifications raised under equal protection guarantees. Lawyers involved in equal protection litigation should pay close

36. *Id.* at 1159 (Blackmun, J., separate opinion). The separate opinion was written by Justice Blackmun who was also the author of the opinion for the Court. Three justices joined Justice Blackmun in finding that the state's identified purposes of eliminating employment discrimination and protecting employers from unfounded charges of discrimination were not advanced by the deadilne provision. *Id.* at 1160. They felt that the statute, in effect, created two classifications of workers who filed complaints: Those who were given a hearing within 120 days and those who were not. *Id.* at 1159.
37. *Id.* at 1161 (concurring opinion). Justices Powell and Rehnquist would not join in the separate opinion, but they too felt that the state created classifications did not bear a rational relationship to legitimate governmental objectives.
38. BARRETT AND COHEN, CONSTITUTIONAL LAW, 116 (6th ed. Supp. 1982).
39. 102 S.Ct. at 2315.
40. *Id.* at 2313. The three purposes included: (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent management of the Permanent Fund; and (c) apportionment of benefits in recognition of undefined contributions of various kinds, both tangible and intangible, which residents have made during their years of residency. *Id.*
41. *Id.* at 2314.
42. *Id.* at 2313-14.
43. *Id.* at 2315.

attention to forthcoming Supreme Court decisions in the equal protection area.

History and Treatment of Section 9-8-302

The original version of section 9-8-302 of the Wyoming Statutes was adopted by the Wyoming Legislature in 1939.[44] Since that time, no changes have been made in the language of the statute. The original version of section 9-8-301 of the Wyoming Statutes, which contains definitions to be applied to section 9-8-302, was also enacted in 1939.[45] The statute was amended to its current form in 1961.[46]

The constitutionality of sections 9-8-301[47] and 9-8-302[48] was raised in *Harding v. State.*[49] The plaintiffs in *Harding* were partners in a Utah partnership. They had submitted a bid to do the mechanical work on the new Evanston High School to the general contractor who had been awarded the job. The contractor had applied sections 9-8-301 and 9-8-302 and given preference to Wyoming bidders which resulted in a rejection of the bid offered by the Utah partnership. The Wyoming Supreme Court refused to consider the claim of the Utah partnership that sections 9-8-301 and 9-8-302 violated article I, section 6[50] of the Wyoming Constitution and the equal protection clause of the fourteenth amendment to

44. 1939 WYO. SESS. LAWS Ch. 50., § 1.
45. 1939 WYO. SESS. LAWS Ch. 50., § 4:
As used in this Act the word "resident" means: Any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a corporation organized under the laws of the State of Wyoming.
46. 1961 WYO. SESS. LAWS Ch. 152., § 1. *See supra* note 1 for the current version of the statute. A number of additional amendments were also considered by the 1961 legislature. One in particular is worth noting. It would have added the following language to the current version of section 9-8-301: "provided, however, that any corporation formed by persons who are bona fide residents of the State for one year or more immediately prior to bidding upon a contract and the corporate stock of which is owned in full by such bona fide residents shall be included within the meaning of the word 'resident'." DIGEST OF JOURNALS, 36th Legislature 65 (1961). This amendment was accepted by the House on second reading, but struck on the third reading. *Id.*
47. Then codified as WYO. STAT. § 9-663 (1957).
48. Then codified as WYO. STAT. § 9-664 (1957).
49. 478 P.2d 64 (Wyo. 1970).
50. WYO. CONST. art. I, § 6 provides:
"No person shall be deprived of life, liberty or property without due process of law."

the United States Constitution.[51] The court observed that the plaintiffs had dealt with the general contractor; there was no allegation that the contractor was an agent of the state or any subdivision of the state.[52] Thus, the partnership had not been connected with a contract being let by the state or any subdivision thereof.[53] Therefore, the court held that they lacked standing to raise the constitutional issue.[54]

The constitutionality of the statute was also addressed in an opinion by the Wyoming Attorney General.[55] The attorney general[56] concluded that the statutes were constitutional and that the legislature was at liberty to encourage local industry by such means.[57]

Statutes which give a preference to resident bidders and also include a durational residency requirement are very rare. The only other state to have a similar requirement is Montana.[58] There has been some litigation of statutes which give preference to resident bidders[59] but no cases can be found that have fully litigated a constitutional challenge to a preference statute which also included a durational residency requirement.

THE *Galesburg* DECISION

The Wyoming Supreme Court's Analysis

Galesburg's question to the Wyoming Supreme Court included claims under both the federal and state constitutions.[60] The court immediately limited its analysis to the equal protection clause of the fourteenth amendment because

51. 478 P.2d at 65.
52. *Id.* at 66.
53. *Id.*
54. *Id.*
55. 49 OP. ATT'Y GEN. 236 (1963).
56. The Wyoming Attorney General at the time was John Raper, now an associate justice of the Wyoming Supreme Court and author of the *Galesburg* opinion.
57. OP. ATT'Y GEN., *supra* note 55, at 240.
58. MONT. CODE ANN. §§ 18-1-102 to -103 (1981).
59. Equitable Shipyards, Inc. v. State, 611 P.2d 396 (Wash. 1980). The Washington Supreme Court held that a Washington statute which gave resident shipbuilders a six percent bidding preference did not violate equal protection guarantees.
60. *See supra* note 3.

Galesburg had not presented arguments on the state constitutional grounds for its claims in its brief.[61] The court then decided that Galesburg's challenge must be analyzed under the two-tiered equal protection-due process analysis[62] developed by the United States Supreme Court.[63] Galesburg had argued that strict scrutiny should be applied;[64] the state contended that lower level scrutiny was appropriate.[65] The court rejected the position of Galesburg and stated that, although strict scrutiny had been applied to cases where fundamental rights such as the rights of travel or voting were at issue, these same fundamental rights had never been extended to corporations under the fourteenth amendment.[66] The court also determined that Galesburg was not a member of a suspect class, again concluding that such status had never been extended to corporations.[67] Satisfied that no fundamental right had been burdened and that no suspect class was involved, the court refused to apply strict scrutiny.[68]

The court then analyzed section 9-8-302 under the rational basis standard.[69] The court determined that the

61. 641 P.2d at 748.
62. The court's wording here is confusing as it implies that the Supreme Court applies the same test when reviewing all equal protection and due process challenges, which is not accurate. What the court probably meant was that the Supreme Court applies the same standard of review when challenges are based on statutory classifications, whether the statute is state or federal. *See supra* note 9.
63. 641 P.2d at 748.
64. Brief for Plaintiff at 14, Galesburg Constr. Co., Inc. v. Board of Trustees of Memorial Hosp. of Converse County, 641 P.2d 745 (Wyo. 1982). Galesburg cited numerous cases in which durational residency requirements were subjected to strict scrutiny including, Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).
65. Brief for Defendant at 7, Galesburg Constr. Co., Inc. v. Board of Trustees of Memorial Hosp. of Converse County, 641 P.2d 745 (Wyo. 1982). The state contended that corporations were inherently different from natural persons for the purpose of equal protection analysis.
66. 641 P.2d at 749. The court also looked to the language of the fourteenth amendment to conclude that corporations did not possess the fundamental right of travel. The court stated that the language of the fourteenth amendment "seemingly excludes corporation" by referring to all persons born or naturalized in the United States. The court's conclusion is at least misleading, if not entirely contrary to precedent, as corporations have been recognized as persons afforded equal protection by the United States Supreme Court. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) (citing Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886); Covington & Lexington Turnpike R. Co. v. Sandford, 164 U.S. 578 (1896)). However, no case can be found which stands for the proposition that the right to travel extends to corporations.
67. 641 P.2d at 749.
68. *Id.*
69. *Id.* at 750.

purpose of the legislation was "to encourage local industry," relying heavily on an Attorney General's Opinion[70] written in 1963.[71] The court held that the state interest in encouraging local industry was legitimate.[72] The court then held that the statute as drawn was rationally related to the advancement of the state interest.[73] In support of its decision, the court reasoned that the statute increased the likelihood that Wyoming bidders would be awarded contracts, thereby encouraging local industry.[74] The opinion also pointed out that the state would benefit as the money payable under the contract was more likely to remain in the state.[75]

Galesburg also advanced a number of reasons for declaring section 9-8-302 unconstitutional as contrary to public policy.[76] The court rejected the argument and correctly declared that public policy was not a reason for declaring a statute unconstitutional when the legislature had already acted on the matter.[77]

Justice Rooney wrote a dissenting opinion in *Galesburg*.[78] He argued that the constitutionality of section 9-8-301 should also have been considered by the court since that section defined the terms used in section 9-8-302.[79] In addition, he raised concerns about possible arbitrary and capricious applications of these statutes that he felt would be violative of the constitutional provisions set forth in the question reserved to the court.[80] He did not believe that the state interest in encouraging local industry was furthered when a long-time Wyoming resident was penalized as a bidder simply because he exercised his privilege to do business as a corporation within the year previous to the bid.[81]

70. *See supra* note 55.
71. 641 P.2d at 750.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Brief for Plaintiff, *supra* note 64, at 20-28.
77. 641 P.2d at 750.
78. *Id.* at 751 (Rooney, J., dissenting).
79. *Id.* at 752 (Rooney, J., dissenting).
80. *Id.* at 751 (Rooney, J., dissenting).
81. *Id.* Under section 9-8-301 if a long-time Wyoming resident formed a corporation, the corporation would be classified as a nonresident for bidding purposes for one year.

Justice Rooney concluded by stating that he would hold the statute unconstitutional because it denied equal protection to long-time Wyoming residents to do business as corporations within a year previous to the bids referred to in the statute.[82]

Critique and Implications

A significant point which must be made about the *Galesburg* decision is that the court ultimately considered a very narrow question. Only section 9-8-302 was evaluated and then only under the equal protection clause of the fourteenth amendment to the United States Constitution. The court refused to consider the challenges under the Wyoming constitutional provisions[83] because they were not fully presented and argued to the court.[84] This refusal is fully in line with precedent.[85]

The court also did not consider the constitutionality of section 9-8-301.[86] This decision by the court effectively ruined any chance that Galesburg had of prevailing in the case because the court then did not have to consider the classifications created by 9-8-301 or the one-year durational residency requirement. Justice Rooney criticized the court's refusal to evaluate section 9-8-301; he argued that section 9-8-301 had to be examined to determine the constitutionality of section 9-8-302.[87] The justice cited several cases to support his position.[88] However, they all focused on the proper inter-

82. *Id.* at 752 (Rooney, J., dissenting).
83. WYO. CONST. art. I, § 3 provides:
Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstances or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.
WYO. CONST. art. I, § 6 provides:
"No person shall be deprived of life, liberty or property without due process of law."
84. 641 P.2d at 748.
85. Salt Creek Transp. Co. v. Public Serv. Comm'n, 37 Wyo. 488, 263 P. 621, 622 (1928).
86. 641 P.2d at 750 n.10.
87. *Id.* at 752 (Rooney, J., dissenting).
88. Kuntz v. Kinne, 395 P.2d 286 (Wyo. 1964); Brinegar v. Clark, 371 P.2d 62 (Wyo. 1962); Stringer v. Board of County Comm'nrs of Big Horn County, 347 P.2d 197 (Wyo. 1959).

pretation or construction to be given a particular statute and none of the cases involved a constitutional challenge. Though one could characterize the majority's position as rigid and formalistic, the position is probably justified when one considers the importance of a constitutional challenge. Generally, there is a strong presumption in favor of constitutionality, and the Wyoming Supreme Court has specifically stated that a statute will be presumed to be constitutional unless the party mounting the challenge proves otherwise.[89] Galesburg damaged its case a great deal by not explicitly including section 9-8-301 in the question reserved to the court. If section 9-8-301 had been before the court, the rational basis analysis of the court would have been more extensive as several additional elements would have been before the court for examination, including the one-year durational residency requirement and the potentially irrational application of the statute to long-time Wyoming residents who form corporations and bid on public contracts within one year.

The court realized that the choice of level of scrutiny would play a key role in the outcome of the case.[90] The court correctly concluded that Galesburg, as a corporation, had not put forth sufficient arguments to justify subjecting section 9-8-302 to strict scrutiny. There is judicial support for the proposition that corporations are to be considered persons afforded protection under the equal protection clause of the fourteenth amendment.[91] Relying on this protection, Galesburg tried to subject section 9-8-302 to strict scrutiny on the basis of the one-year durational residency requirement found in 9-8-301. Galesburg cited a number of cases where courts had subjected durational residency requirements to strict scrutiny because the requirements had burdened the fundamental rights of travel or voting.[92] The court pointed out that the cases cited by Galseburg dealt with fundamental rights that were extended to individuals.[93] No cases can be

89. Nickelson v. People, 607 P.2d 904, 910 (Wyo. 1980).
90. 641 P.2d at 748.
91. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) (citing Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394 (1886); Covington & Lexington Turnpike R. Co. v. Sandford, 164 U.S. 578 (1896)).
92. Brief for Plaintiff, *supra* note 64, at 12-14.
93. 641 P.2d at 749.

found with holdings that stand for the proposition that corporations possess the fundamental right to travel. Absent any authority, the Wyoming Supreme Court was not willing to extend the right of travel to a corporation.[94] Since Galesburg had not met its burden of demonstrating that a corporation was entitled to the right of travel, the court correctly disposed of the argument. Since Galesburg could not demonstrate that a fundamental right had been burdened with respect to itself, or present evidence that it was a member of a suspect classification, the court properly moved to the lower level of analysis, traditional scrutiny.

Under traditional scrutiny, a statute will be validated if the court determines that the statute serves a legitimate state interest and that the statute is rationally related to advancing that interest.[95] In its analysis, the Wyoming Supreme Court attempted to follow guidelines prescribed by the United States Supreme Court. However, one must question the court's reliance on the 1957 case of *Morey v. Doud*[96] to summarize the recognized testing criteria. *Morey* was overruled in 1976.[97] The background section of this Note highlighted the present controversy within the United States Supreme Court regarding the proper scope of traditional scrutiny. The court should have demonstrated a present awareness of the Supreme Court's approach by citing the most recent cases available to the court at the time of the *Galesburg* opinion. It should be pointed out that due to the limited inquiry in this case, even applying the present criteria followed by the United States Supreme Court, the Wyoming Supreme Court would not have reached a different result in this case.

The court's attempt to determine the purpose of the legislation focused attention on a problem faced by Wyoming courts. Due to the inadequacy of records preserving the his-

94. *Id.* The court reasoned that a corporation, as a fictitious entity, was not capable of traveling.
95. *See supra* text accompanying notes 5-59.
96. 354 U.S. 457, 463-64 (1957).
97. New Orleans v. Dukes, 427 U.S. 297, 306 (1976). The Court concluded that the equal protection analysis in the Morey opinion should no longer be followed.

tory of legislation, it is difficult to determine the interest sought to be advanced by a legislative enactment. The problem is usually solved if a preamble explaining purposes is included with the statute or if full records of committee meetings or debate on the floor concerning the legislation are available. Since they often lack this information, Wyoming courts are forced to speculate on the purpose of legislation or to rely on *post hoc* suggestions of purpose. In *Galesburg*, the court gave no indication that it had searched legislative records to determine the purposes of section 9-8-302. However, it is very likely that no such records existed. For whatever reason, the court identified the legislative purpose without mentioning the aid of legislative records.[98] It determined that the likely purpose of section 9-8-302 was to encourage local industry.[99] This conclusion was reached on the basis of the 1963 Attorney General's Opinion that was discussed earlier.[100] The court observed that the opinion should be given weight as it had withstood the test of time.[101] That conclusion is certainly debatable as the opinion may or may not have had anything to do with the lack of legislative action. In defense of the court, reliance on the Attorney General's Opinion is probably much better than relying solely on *post hoc* suggestions of purposes presented in oral arguments. Such sources present at least a thoughtful analysis of the purpose of legislation at a time much closer to the enactment of the legislation than the present. Also, in this instance, it is difficult to conceive of any other purpose that could be furthered by the statute. Therefore, the court's analysis in determining the legislative purpose of section 9-8-302, is probably in line with the Supreme Court directive that the purpose must be reasonable and identifiable.[102]

98. The dissent pointed to a House action on a proposed amendment to section 9-8-301 (set out *supra* at note 46) to indicate that the legislature may not have intended to promote local industry, at least not in regard to newly formed corporations. 641 P.2d at 752 (Rooney, J., dissenting). The rejection of the proposed amendment certainly leads to some confusion as to the actual purpose of 9-8-301 and presumably the purpose of 9-8-302. However, the amendment was considered only by the House and the record gives no indication of why the amendment was proposed or why it was defeated. Since the court restricted its analysis to section 9-8-302 it may have felt justified in ignoring the legislative history of 9-8-301.
99. 641 P.2d at 750.
100. *See supra* note 55.
101. 641 P.2d at 750 n.9.
102. Schweiker v. Wilson, 450 U.S. 221, 235 (1981).

Once the court was able to identify a legitimate state interest, it quickly determined that the classifications included in the statute were rationally related to advancing the state interest in encouraging local industry.[103] Given the limited nature of the court's inquiry and United States Supreme Court precedent in the equal protection area, such a conclusion was proper. Obviously, awarding a preference to a resident bidder rather than a nonresident will increase the probability that a local bidder will be awarded the contract, thus promoting local industry.

If the constitutional challenge had also included section 9-8-301 the court would have had to deal with the variety of definitions of resident, the one-year durational residency requirement, and the possibility of irrational applications which were proposed in the dissent. The analysis would have been much more extensive and the possibility of Galesburg prevailing much greater.

In its brief, Galesburg had argued that section 9-8-302 created two classes of bidders when the definitional sections of section 9-8-301 were applied.[104] In fact, a better argument would have been to claim that the statutes, in effect, created three classifications. First, a class of Wyoming residents who have lived in the state for more than a year and who have chosen to do business as a sole proprietorship or as a partner in a partnership. Also included in the first class would be corporations organized under the laws of Wyoming which have been in existence for more than a year and have their principal office and place of business in Wyoming, which are all classified as residents for bidding purposes. The second class would consist of Wyoming residents who have lived in the state for more than a year and have decided to do business in the form of a corporation, yet who are clas-

103. 641 P.2d at 750.
104. Brief for Plaintiff, *supra* note 64, at 15-16. The first class consisted of individuals, partners, or corporations that have been residents of or been organized under the laws of Wyoming for more than one (1) year. The second class consisted of individuals, partners or corporations who are not residents or are not organized under the laws of Wyoming and individuals, partners or corporations who are residents or have been organized under Wyoming law but have not been so for a period of more than one (1) year. *Id.*

sified as nonresidents for bidding purposes until the corporation has been in existence for more than one year. The third class would include out-of-state persons and corporations who have not lived in Wyoming for more than a year or have not been incorporated in Wyoming or, if incorporated in Wyoming, have not been in existence for a year, who are classified as nonresidents for bidding purposes.

For a statute to pass traditional scrutiny the classifications chosen by the legislature must be rationally related to the advancement of a legitimate state interest. In the *Galesburg* decision, the Wyoming Supreme Court identified the purpose of the questioned statute to be the promotion of local industry, which the court concluded was a legitimate purpose. The following hypothetical examples will illustrate that it is questionable that the second classification outlined above is rationally related to the advancement of the state interest in promoting local industry.[105]

Assume that X has lived and done business in Wyoming for 25 years. Eleven months prior to submitting a bid on a construction project to be let by the state, X decides to do business as a corporation wholly owned by him. X submits a bid for $5,200,000.00 in the name of the corporation. Assume that Y is an out-of-state builder who bids $5,000,000.00 on the same project.[106] Although X's bid is not more than five percent greater than Y's bid, Y will be awarded the contract as the low bidder because both bidders will be considered nonresidents for bidding purposes under the statutes. Local industry is clearly not promoted in this example.

Now assume that A and B are long-time Wyoming residents. They had been partners in a partnership for 20 years, but the partnership was dissolved six months ago. A has entered into another partnership with C, who is also a long-time Wyoming resident. B has formed a corporation which is wholly owned by him and incorporated under Wyoming

105. Please assume that all of the parties in the following examples are responsible bidders.
106. X's bid exceeded Y's bid by four percent.

law. D is an out-of-state builder. All three parties bid on a construction project to be awarded by the state of Wyoming. The bid of the A-C partnership is $5,240,000.00, the bid of D is $5,200,000.00 and the bid of B's corporation is $5,000.000.00.[107] For bidding purposes, under sections 9-8-301 and 9-8-302, the A-C partnership will be considered a resident, while B's corporation and D will be considered nonresidents. The A-C partnership will be awarded the bid because its bid did not exceed the bid of the nonresident bidders by more than five percent. In this example, since a local bidder will be awarded the contract, the state interest in promoting local industry is advanced. However, if B's corporation had been considered a resident, a local bidder would have been awarded the contract at a savings of $240,000.00 to the taxpayers. Again, this hypothetical illustrates a situation where the rationality of the classification is questionable.

Given the apparent trend toward the less deferential application of equal protection traditional scrutiny, illustrated by the cases of *Logan v. Zimmerman Brush Co.* and *Zobel v. Williams*, an equal protection challenge under the fourteenth amendment in the situations illustrated above might be successful. However, even if a fourteenth amendment challenge fails, a statute might still be declared unconstitutional on the basis of a challenge to a provision in the state constitution. The Wyoming Supreme Court has recognized that the Wyoming Constitution's version of the right to equal protection is found in section 34 of article I[108] of the Wyoming Constitution.[109] It is important to raise constitutional challenges on state constitutional grounds because the court has recognized that, "[a] state may enlarge rights under the Fourteenth Amendment announced by the Supreme Court of the United States, which are considered minimal, and thus a state constitutional provision may be more demanding than the equivalent federal constitutional provi-

107. A-C's bid exceeded D's by less than one percent and B's by 4.8%. D's bid exceeded B's by four percent.
108. WYO. CONST. art. I, § 34 provides:
"All laws of a general nature shall have a uniform operation."
109. Washakie County School Dist. Number One v. Herschler, 606 P.2d 310, 332 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

sion."[110] The Wyoming Supreme Court has, on occasion, invalidated a statute on state constitutional grounds that it had held to be valid under the fourteenth amendment equal protection clause.[111] It is, therefore, very important to raise such challenges, especially in equal protection cases that will not be based on strict scrutiny, due to the deference that will generally be accorded legislative judgment.

CONCLUSION

Galesburg provides many lessons for future equal protection challenges to legislative classifications. Constitutional challenges should be broad. All of the statutory sections involved, including merely definitional sections, should be explicitly included in the question presented to the court. Challenges based on state constitutional provisions should also be raised. If they are raised in the question, they should be fully argued in the brief and before the court. Even if the challenge under the federal constitution fails, the statute may still be invalidated on state constitutional grounds.

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110. *Id.*
111. Nehring v. Russell, 582 P.2d 67, 76 (Wyo. 1978). The court said:

> While because of applicable federal authorities we are precluded from any finding except constitutionality for the guest statute under the Fourteenth Amendment to the United States Constitution, such a conclusion is by no means restrictive of what we may find under our own constitutional mandate, even though both provisions may have the same overall end in view.