

# SELLING ICE IN ALASKA: EMPLOYMENT PREFERENCES AND STATUTORY EXEMPTIONS FOR ALASKA NATIVE CORPORATIONS 40 YEARS AFTER ANCSA

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## ABSTRACT

*In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) in order to settle land disputes between Alaska Natives and the federal government. ANCSA established Alaska Native Corporations (ANCs), which were tasked with managing settlement funds to provide for the health, education, and economic welfare of Alaska Natives. To enable the ANCs to promote the interests of their shareholders, Congress exempted ANCs from certain employment restrictions contained in Title VII of the Civil Rights Act, but did not exempt ANCs from other worker-protective legislation. In subsequent decades, courts reviewing the preferential practices of ANCs have often construed these statutory exemptions narrowly, thus exposing ANCs to liability under various anti-discrimination statutes. This Article argues that Congress never intended to subject ANCs to these pieces of worker-protective legislation, despite court holdings to the contrary. The Article proposes two possible solutions to this discrepancy: (1) congressional amendment of ANCSA to clarify and further limit the extent of ANC liability; and (2) judicial adoption of a two-part test which would consider employment policies giving preference to Alaska Native shareholders in light of Congress's intent to protect such preferences.*

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## INTRODUCTION

Forty-five years after President Richard Nixon signed the Alaska Native Claims Settlement Act (ANCSA)<sup>1</sup> into law, Alaska Native Corporations (ANCs) dominate the state economy<sup>2</sup> and are an economic force both nationally and globally.<sup>3</sup> According to *Alaska Business Monthly*, ANCs made up eight of the top ten Alaskan-owned and operated companies in the state, based on 2012 gross revenues.<sup>4</sup> Arctic Slope Regional Corporation has topped the chart for approximately twenty years, with gross revenues of more than \$2.62 billion in 2012.<sup>5</sup> Bristol Bay Native Corporation was second with gross revenues of \$1.96 billion, NANA Regional Corporation was third with gross revenues of \$1.8 billion, and Chenega Corporation was fourth with gross revenues of \$1.1 billion.<sup>6</sup> ANCs represented around forty-five percent of all Alaskan-owned and operated entities included in *Alaska Business Monthly*, and they collectively reported \$11.8 billion in 2012 gross revenues—around seventy-four percent of all gross revenues reported.<sup>7</sup> In 2012, ANCs provided more than 59,546 jobs globally—more than 17,105 in Alaska—comprising eighty-four percent of total jobs reported by the top forty-nine Alaskan-owned businesses.<sup>8</sup> The jobs provided by ANCs represented sixty-six percent of those employed in Alaska in the private sector.<sup>9</sup>

Despite such overwhelming success, the ANCs also face a difficult challenge: sustaining jobs and economic development for the next generation of Native shareholders in a post-downturn economy while confronting a political environment as harsh as the Arctic. Congress intended that ANCs be afforded latitude and flexibility in their hiring- and employment-related decisions, allowing them to develop policies that promote the economic development and welfare of their shareholders. In the intervening decades, however, the law developed in unexpected ways and its application has sometimes caused unintended consequences. This Article explores the history and future of employment preferences and statutory exemptions for ANCs. We argue

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1. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29h (2012)).

2. Tasha Anderson, *Alaska Business Monthly's 2013 Top 49ers: Blockbusters of Business*, ALASKA BUS. MONTHLY, Oct. 2013, at 92, 94.

3. *Id.* at 92.

4. *Id.* at 96-106.

5. *Id.* at 96.

6. *Id.* at 98-100.

7. *Id.* at 122-23.

8. *Id.*

9. *Id.*

that Congress and the courts should protect and extend the ability of ANCs to adopt employment preferences that are consistent with, and advance, Congressional goals of promoting Alaska Native economic growth and stability.

## I. BACKGROUND: HOW ANCS ARE SIMILAR TO, YET DIFFERENT FROM, INDIAN TRIBES

Congress's creation of ANCs represented a radical departure from the historic way in which the federal government had dealt with the indigenous peoples inhabiting what became the United States. At the inception of this nation, the U.S. Constitution granted power to Congress to regulate commerce with the Indian Tribes.<sup>10</sup> Two-hundred years later, Indian Tribes are now viewed legally as "domestic dependent nations," a label reflecting the troubled history of misinterpreted treaties,<sup>11</sup> land disputes,<sup>12</sup> and cultural conflict<sup>13</sup> that culminated in the Indian reservation system. The reservation system dominates national Indian policy in the forty-eight contiguous states.<sup>14</sup>

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10. U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

11. See U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 7 (1978) ("The Commission Act allowed any identifiable group of Indian claimants . . . to sue the Government for . . . claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of . . . mutual or unilateral mistake, whether of law or fact . . .").

12. See, e.g., Indian Appropriations Act of 1989, ch. 412, §§ 12–15, 25 Stat. 980, 1004–06 (requiring that land taken from the Seminole Indians be disposed to settlers under the homestead laws).

13. See DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD, ix–xv (1992) (discussing the four-hundred year history of European conquest of North and South America; documenting the massacre of Indian peoples and the decimation of Indian populations through war, disease, and poverty; and characterizing that massacre as the most massive act of genocide in the history of the world).

14. There are currently about 326 Indian Reservations in the United States with a collective geographical area of 56.2 million acres, or about 2.3% of the area of the United States. *Frequently Asked Questions*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/FAQs/index.htm> (last visited Feb. 28, 2014). There are more than 550 Indian Tribes recognized by the federal government, including those in Alaska and Hawaii. *Id.* Some tribes have no reservation. Alaska has a land mass of 586,412 square miles but contains only one reservation—the Metlakatla Indian Community in Southeast Alaska, *id.*, created by Act of March 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101 (codified at 25 U.S.C. § 495 (2012)).

### A. The Tribal Reservation System in the Lower Forty-Eight States

Indian reservations are the result of early peace treaties in which Indian Tribes surrendered large portions of their land to the U.S. government in return for guarantees that other parcels of land would be “reserved” for the exclusive use of the Tribe as a sovereign nation.<sup>15</sup> Eventually, the U.S. government began to forcibly relocate Tribes to parcels of land to which they had no historical connection.<sup>16</sup> Forced relocation led to tragedies such as the Trail of Tears, in which five nations—the Cherokee, Muscogee (Creek), Seminole, Chickasaw and Choctaw—were marched from various parts of the southeastern United States to “Indian Territory.”<sup>17</sup> An estimated four thousand of the seventeen thousand Cherokee on the march died from exposure, disease, and starvation en route.<sup>18</sup> In 1851, Congress authorized the creation of Indian reservations in what was to become modern Oklahoma.<sup>19</sup> Later reservations were established by executive order, and eventually came to be regulated by the Bureau of Indian Affairs (BIA).<sup>20</sup>

During the period from the mid-1850s through the end of World War II, Congressional efforts to regulate the nation’s relationship with Indian Tribes flip-flopped between the polar-opposite goals of assimilation and autonomy. Indian assimilation laws mandated absorbing Indian Tribes into the great “melting pot” of America’s ethnically diverse population, so that Native Americans would cease to exist as separately identifiable peoples.<sup>21</sup> Indian autonomy laws, on the

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15. See, e.g., *Francis v. Francis*, 203 U.S. 233, 237 (1906) (describing how the Chippewa Nation of Indians ceded certain lands to the United States, within which tracts were reserved for the exclusive use of the Chippewa and their descendants).

16. See, e.g., Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830) (authorizing the removal of Indian Tribes from the United States to west of the Mississippi).

17. Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 *ETHNOHISTORY* 289, 289 (1984).

18. *A Brief History of the Trail of Tears*, CHEROKEE NATION, <http://www.cherokee.org/AboutTheNation/History/TrailofTears/ABriefHistoryoftheTrailofTears.aspx> (last visited Feb. 28, 2014). See also Thornton, *supra* note 17, at 292–94 (estimating eight thousand Cherokee died en route).

19. Indian Appropriations Act of 1851, ch. 14, 9 Stat. 574.

20. The Office of Indian Affairs was established on March 11, 1824 as an office of the U.S. Department of War. *BIA: History of BIA*, US DEPARTMENT INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/BIA/> (last visited Feb. 28, 2014). In 1849, it was transferred to the Department of the Interior. *Id.* In 1947, it was renamed the Bureau of Indian Affairs. *Id.*

21. See, e.g., General Allotment (Dawes) Act of 1887, ch.119, 24 Stat. 388 (repealed 2000) (breaking up the land holdings of most Tribes and authorizing the distribution of land to individual Indian families in modest parcels, with the remainder being sold off to white settlers, and extended citizenship to those Indians who accepted farm land and became “civilized”). See also DEP’T OF THE

other hand, acknowledged cultural differences and granted quasi-sovereign powers to the Indian Tribes, including the rights to form tribal governments and tribal courts, to self-govern tribal members, and to collectively control the disposition of tribal lands. These laws also granted the power to form Tribal corporations, when approved by the Bureau of Indian Affairs, and to engage in commercial enterprises on the open market.<sup>22</sup> But despite Congressional efforts, by the late 1950s the reservation system was acknowledged as a failure.<sup>23</sup> The system had succeeded only in creating an endless cycle of Indian poverty and economic dependence on the federal government.<sup>24</sup>

## B. Alaska Natives: A Different History

Unlike the Tribes of the lower forty-eight states, most Alaska Natives were not conquered by the United States in war, nor were they forced onto federal reservations. Alaska was purchased from Russia by the federal government in 1867 through a Treaty of Cession ratified by the Senate.<sup>25</sup> The federal government had no formal treaty relationship with the indigenous people of Alaska, however, and gained from Russia only the rights of conquest that Russia had obtained during its own dominion over the Alaska Territory—which, significantly, did not include the conquest of the “Uncivilized Tribes.”<sup>26</sup> Therefore, these Tribes did not automatically become citizens of the United States upon ratification of the treaty but were, instead, subject to future laws the

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INTERIOR, OFFICE OF INDIAN AFFAIRS, RULES GOVERNING THE COURT OF INDIAN AFFAIRS (1883) (making it unlawful for Indians to engage in traditional dances, feasts, polygamy, funeral practices, to become intoxicated, or to practice “heathenish rites and customs” such as “medicine men” or other Indian religious practices).

22. See, e.g., The Indian Reorganization Act of 1934, ch. 576, §§ 16–17, 48 Stat. 984, 987–88 (codified as amended at 25 U.S.C. § 476 (2012)) (granting these rights and powers).

23. See H.R. Con. Res. 108, 83d Cong., 67 Stat. 132 (Supp. B 1953) (beginning the termination policy of the United States by removing the special legal status of some Native Americans).

24. U.S. CENSUS BUREAU, *Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months: 2012 American Community Survey 1-Year Estimates*, factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\_12\_1YR\_S1703&prodType=table (last visited Mar. 3, 2014) (showing a poverty rate of 29.1% for Native Americans and Alaska Natives, compared with a poverty rate of 15.9% for the general population).

25. The U.S. Treasury paid \$7.2 million for the Alaska Territory, about two cents per acre. Treaty Concerning the Cession of the Russian Possessions in North America, U.S.-Russ., art. VI, June 20, 1867, 15 Stat. 539.

26. *Id.* at art. III.

United States would adopt.<sup>27</sup> Aboriginal land titles were not an important issue for the United States for nearly one hundred years. Even when Alaska was admitted as the forty-ninth state on January 3, 1959,<sup>28</sup> the status of aboriginal land title was left unaddressed.<sup>29</sup>

### C. Impact of Statehood & the Discovery of Oil at Prudhoe Bay

In 1968, when the Atlantic-Richfield Company discovered oil at Prudhoe Bay on the Arctic coast of Alaska, the issue of Alaska Native land entitlements caught fire and grew into a political conflict that threatened to engulf the new state.<sup>30</sup> With a national energy crisis looming, car owners would soon be lined up at the pump, waiting to buy the seemingly dwindling national supply of gasoline.<sup>31</sup> Soaring international oil prices sparked new interest in domestic oil and gas exploration.<sup>32</sup> In a single day, the newly formed State of Alaska sold nearly \$1 billion in oil leases.<sup>33</sup> The federal government was actively issuing valuable oil and mineral exploration permits in the Arctic to other private corporations—despite protests by Alaska Natives.<sup>34</sup>

Alaska Natives saw their hunting and fishing lands, essential to sustain their traditional subsistence way of life,<sup>35</sup> snatched up by

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27. *Id.*

28. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

29. For an excellent summary of the status of aboriginal title and the history of Alaska Native land claims before and after statehood, see James D. Linxwiler, *The Alaska Native Claims Settlement Act: The First Twenty Years*, 38 ROCKY MTN. MIN. L. INST. 2-1 (1992).

30. Compare *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1031 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980) (holding that ANCSA extinguished all claims of Alaska Native entitlement to damages for use of land prior to ANCSA), with *Edwardsen v. Morton*, 369 F. Supp. 1359, 1367-79 (D.D.C. 1973) (refusing to hold that ANCSA wiped out claims for prior injuries).

31. Greg Myre, *Gas Lines Evoke Memories of Oil Crises in the 1970s*, NPR: THE PICTURE SHOW (Nov. 10, 2012), [www.npr.org/blogs/pictureshow/2012/11/10/164792293/gas-lines-evoke-memories-oil-crises-in-the-1970s](http://www.npr.org/blogs/pictureshow/2012/11/10/164792293/gas-lines-evoke-memories-oil-crises-in-the-1970s).

32. See Wendy Koch, *U.S. Oil Supply Looks Vulnerable Forty Years After Embargo*, U.S.A. TODAY (Oct. 19, 2013), <http://www.usatoday.com/story/news/nation/2013/10/19/us-oil-imports-opec-embargo/2997499/> (noting quadrupled energy prices as a result of a foreign oil embargo and the subsequent energy independence movement).

33. *Atl. Richfield Co.*, 435 F. Supp. at 1017.

34. *Id.*

35. The term “subsistence way of life” refers to a culture based partly in hunting and gathering across the annual cycle of the seasons. Many villages are not located on any road system, making subsistence harvesting necessary to prevent a low standard of living. Shauna Woods, Note, *The “Middle Place”: The NPR-A Impact Mitigation Program and Alaska’s North Slope*, 30 ALASKA L. REV. 263, 268 (2013).

outsiders. Fear and outrage motivated Alaska Natives to swiftly organize themselves into groups and associations to fight the taking, selling and leasing of their lands by the state and federal governments.<sup>36</sup> Alaska Native protests quickly grew so fierce that by early 1969, the Secretary of the Interior instituted a “land freeze” where the federal process of approving state land selections and all other applications for public lands in Alaska was uniformly suspended, allowing time for a legislative settlement of the Native land rights controversy.<sup>37</sup>

#### D. A Legislative Solution: The Alaska Native Claims Settlement Act

The Alaska Native community, the oil industry, and the State of Alaska lobbied Congress heavily for three years, until a legislative settlement was reached and passed into law as the ANCSA.<sup>38</sup> ANCSA purportedly would extinguish all aboriginal title land claims in the State of Alaska,<sup>39</sup> once and for all, by granting Alaska Natives title to nearly forty-million acres of land<sup>40</sup> and a payment of \$962.5 million as a cash settlement.<sup>41</sup> The mechanism for effecting the settlement established an entirely new way of managing federal Indian policy for Alaska Natives: one free from the paternalistic oversight that marked the government’s relationship with Tribes and reservations in the lower forty-eight

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36. The Alaska Federation of Natives (AFN) was formed in 1966. *Atl. Richfield Co.*, 435 F. Supp. at 1017. By 1968, AFN and other Alaska Native groups filed forty claims covering 296,000,000 acres (approximately eighty percent of Alaska). *Id.*

37. Public Land Order 4582, issued January 17, 1969, states, in part:

Subject to valid existing rights, and subject to the conditions hereinafter set forth, all public lands in Alaska which are unreserved or which would otherwise become unreserved prior to the expiration of this order, are hereby withdrawn from all forms of appropriation and disposition under the public land laws (except locations for metalliferous minerals), including selection by the State of Alaska pursuant to the Alaska Statehood Act (72 Stat. 339), and from leasing under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181 et seq.), as amended, and reserved under the jurisdiction of the Secretary of the Interior for the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska.

Withdrawal of Unreserved Lands, 34 Fed. Reg. 1025 (Jan. 17, 1969).

38. Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–29h (2012)).

39. Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, § 4, 85 Stat. 688, 689–90 (1971) (codified at 43 U.S.C. § 1603 (2012)).

40. See ANCSA, §§ 11–16, 85 Stat. at 696–706 (codified as amended at 43 U.S.C. §§ 1610–15 (2012)) (describing the process by which specific tribes may take title).

41. ANCSA, § 6, 85 Stat. at 690–91 (codified as amended at 43 U.S.C. § 1605 (2012)).

states.<sup>42</sup>

### E. The Formation of ANCs and Enrollment of Shareholders

In ANCSA, Congress divided the State of Alaska into twelve regions (the “Regions”) based on common language and customs, and mandated that each Region form one Regional Corporation, and a number of Village Corporations, that would receive title to the land and a portion of the cash settlement.<sup>43</sup> The Alaska Natives in each Region were enrolled as common shareholders of their Regional Corporation and local shareholders of their respective Village Corporations.<sup>44</sup> The goal of those corporations, the ANCs, was to become economic engines for the Regions and Villages—developing lands, investing in business opportunities, and providing shareholders with jobs, dividends, and cultural assistance in order to preserve the Alaska Native way of life for future generations. Stock in the ANCs was restricted so that it could only be issued to Alaska Natives and could not be sold or easily alienated for the first twenty years after the effective date of ANCSA.<sup>45</sup> These restraints on alienation protected the land-base and governance of the ANCs from passing out of Alaska Native control by preventing

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42. ANCSA states, in part:

[T]he settlement shall be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

ANCSA, § 2(b), 85 Stat. at 688 (codified at 43 U.S.C. § 1601(b) (2012)).

43. ANCSA, §§ 7–8, 85 Stat. at 691–94 (codified as amended at 43 U.S.C. §§ 1606–07 (2012)).

44. ANCSA, § 5, 85 Stat. at 690 (codified as amended at 43 U.S.C. § 1604 (2012)). ANCSA also provided that Alaska Natives living outside the State of Alaska could share in the settlement by forming a thirteenth Regional Corporation. ANCSA, § 7, 85 Stat. at 692 (codified as amended at 43 U.S.C. § 1606 (2012)). The thirteenth Region was formed December 31, 1975 and allocated \$52 million in settlement funds, but no land. Jill Burke, *The 13<sup>th</sup> Regional, Alaska’s ‘Ghost Corporation,’* ALASKA DISPATCH (Jan. 18, 2011), [www.alaskadispatch.com/article/13th-regional-alaskas-ghost-corporation](http://www.alaskadispatch.com/article/13th-regional-alaskas-ghost-corporation). It was active for a number of years, but after a series of bad business transactions, it ceased functioning as a viable corporation in 2008 and has ceased filing annual reports with the State of Alaska. *Id.*

45. ANCSA, § 7(g)–(h), 85 Stat. at 692–93 (codified as amended at 43 U.S.C. §§ 1606(g)–(h) (2012)).

individual shareholders from selling or pledging their stock to non-Natives.

1. *ANC Shareholder Criteria and Enrollment by BIA*

As originally envisioned by Congress, only Alaska Natives, defined as those U.S. citizens of at least twenty-five percent Alaska Native blood quantum,<sup>46</sup> alive on December 18, 1971—the date ANCSA was signed into law—were eligible to be enrolled by BIA as shareholders in their respective Regional and Village Corporations.<sup>47</sup> Only enrolled shareholders were issued stock in the ANCs.<sup>48</sup> Shareholders did not have to pay any money for their shares, as the extinguishment of their aboriginal land claims constituted consideration in exchange for stock ownership.<sup>49</sup> Each shareholder was issued one hundred shares of Settlement Common Stock that carried with it voting rights and the right to receive dividends from the corporation, should it prove profitable.<sup>50</sup>

2. *Intent for Future Alaska Natives to Share in the Settlement*

While Congress did not initially intend for future generations of Alaska Natives born after the effective date of ANCSA to share in the

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46. ANCSA, § 3(b), 85 Stat. at 689 (codified as amended at 43 U.S.C. §§ 1602(b) (2012)).

47. ANCSA, § 5, 85 Stat. at 690 (codified as amended at 43 U.S.C. § 1604 (2012)). BIA mandated that families were to be kept together and enrolled in the same Region and Village as much as possible. ANCSA, § 5(b), 85 Stat. at 690 (codified as amended at 43 U.S.C. § 1604(b) (2012)). Those Alaska Natives living within one of the twelve designated Regions, but not associated with any local Village, were still allowed to enroll in their Regional Corporations. *See* ANCSA, § 7(j), 85 Stat. at 693 (codified as amended at 43 U.S.C. § 1606(j) (2012)) (referring to “the class of stockholders who are not residents of those villages”).

48. ANCSA, § 7(g), 85 Stat. at 692 (codified as amended at 43 U.S.C. § 1606(g) (2012)).

49. ANCSA, § 4, 85 Stat. at 689–90 (codified as amended at 43 U.S.C. § 1603 (2012)).

50. ANCSA, § 7(g)–(h)(1), 85 Stat. at 692 (codified as amended at 43 U.S.C. §§ 1606(g)–(h)(1) (2012)). But profitability was never guaranteed—many of the ANCs struggled to become profitable and issue dividends in their early years. *Alaska Native Claims Settlement Act: Alaska Native Regional Corporations*, CIRI, [www.ciri.com/content/history/regional.aspx](http://www.ciri.com/content/history/regional.aspx) (last visited Mar. 3, 2014). Recently, however, ANCs have been performing more successfully. For example, Doyon recently celebrated its twenty-seventh consecutive year of profitability, and has issued a dividend to its shareholders every year since 1987. *Dividends and Distributions*, DOYON, LTD., [www.doyon.com/shareholders/distributions.aspx](http://www.doyon.com/shareholders/distributions.aspx) (last visited Mar. 3, 2014). All twelve Regional Corporations made the *Alaska Business Monthly's* list of Top 49ers. ALASKA BUS. MONTHLY, *supra* note 2, at 96–116. The troubles faced by the thirteenth Regional Corporation are detailed *supra* note 44.

land settlement by receiving stock through gifts, that policy has since changed.<sup>51</sup> But, to keep voting power in Alaska Native hands, Congress did provide that if ANC stock passed to a person with less than twenty-five percent Alaska Native blood quantum through inheritance in the initial twenty-year period, voting rights would automatically be removed.<sup>52</sup> However, this scheme proved cumbersome<sup>53</sup> and unsustainable; the ultimate effect was that ANC stock did not transfer evenly to successive generations of Alaska Natives, leaving the majority of Alaska Natives born after 1971 with no direct shareholder participation in the ANCs or the land settlement.<sup>54</sup>

### 3. 1988 ANCSA Amendments: Options to Remove Stock Restrictions

In 1988, Congress tried to solve many of the problems that had developed during the first two decades by passing technical amendments authorizing ANC shareholders to vote on whether their corporations would continue the original alienation restrictions or remove the restrictions and offer ANC stock for public sale.<sup>55</sup> However, protecting Native ownership of the land is such a strong cultural imperative, that to date, none of the ANCs has ever elected to remove ANC stock alienability restrictions.<sup>56</sup> Shareholders of stock can now

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51. Compare ANCSA, § 7(h), 85 Stat. at 692–93 (failing to provide a gift clause), with 43 U.S.C. § 1606(h) (2012) (containing a gift clause after subsequent amendments).

52. ANCSA, § 7(h)(2), 85 Stat. at 693 (codified as amended at 43 U.S.C. § 1606(h)(2) (2012)). However, if shares of Settlement Common Stock with voting rights removed are ever lawfully transferred back to a person with at least twenty-five percent Alaska Native blood quantum, or the descendant of such a person, voting rights will automatically be restored. 43 U.S.C. § 1606(h)(2)(c)(ii) (2012).

53. See ALASKA STAT. § 13.16.705(b) (2013) (providing for owners to pass stock to the next generation through forms printed on the individual stock certificates); § 13.16.705(a) (requiring ANCs to determine the heirs of their own shareholders who died intestate).

54. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 84 & n.18 (2007).

55. Act of Feb. 3, 1988, Pub. L. No. 100-241, 101 Stat. 1788 (codified at 43 U.S.C. § 1606(g) (2012)). The Congressional scheme for removing restraints on alienation was complex and granted ANC shareholders many options and great flexibility on how to restructure their corporations. They could, for example, remove alienability restrictions on all Settlement Common Stock, or create a separate class of non-voting stock that could be freely alienated, while retaining alienability restrictions on Settlement Common Stock. *Id.* They could create new classes of stock for Alaska Natives born after 1971 or their descendants with an Alaska Native blood quantum of less than twenty-five percent, and issue additional classes of voting or non-voting stock to elders, among other things. *Id.*

56. See E. Budd Simpson, *Doing Business with Alaska Native Corporations: A New Model for Native American Business Entities*, BUS. LAW TODAY, July/August

devise to non-Alaska Natives by passing the stock to a non-Alaska Native surviving spouse of a shareholder, under the Alaska laws of intestate succession, allowing for more diversity in the shareholder base.<sup>57</sup>

As part of the 1988 technical amendments, Congress also granted ANCs the right to open enrollment to descendants of shareholders born after 1971.<sup>58</sup> ANCs were given the option to issue these new shareholders “life estate stock” that would, upon the shareholder’s death, be canceled and revert back to the ANC—thus simplifying the inheritance problems associated with original Settlement Common Stock.<sup>59</sup> A super-majority of sixty-six percent of the issued and outstanding voting shares is required to approve enrollment of new shareholders.<sup>60</sup> To date, only a small number of the Regional Corporations, including Arctic Slope Regional Corporation, Doyon, Limited, and Sea-Alaska Corporation, among others, have voted to enroll Alaska Natives born after 1971 as shareholders.<sup>61</sup>

#### 4. ANCs’ Purpose Expanded to Include Social & Cultural Support

A subsequent ANCSA amendment enacted in 1998 clarified Congressional intent by authorizing ANCs to provide “health,

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2007, at 38 (explaining that all ANCSA corporations remain in Alaska Native ownership as no corporation has lifted transfer restrictions).

57. ALASKA STAT. § 13.12.102(b) (2013) (intestate share of ANC Settlement Common Stock passes one-hundred percent to surviving spouse if there is no surviving issue and fifty percent to surviving spouse and fifty percent to surviving issue if one exists).

58. 43 U.S.C. § 1606(g)(1)(B)(i)(I) (2012).

59. See § 1606(g)(1)(B)(iii)(II)(aa) (ANC stock deemed canceled on the death of the Alaska Native shareholder to whom stock was issued with no compensation for the cancellation paid to the estate of the deceased Alaska Native or any person holding the stock).

60. See ALASKA STAT. § 10.06.504(d) (stating that an affirmative vote of at least two-thirds of all issued and outstanding shares is required to approve an amendment to the articles of incorporation for corporations existing before July 1, 1989). As ANCs were formed prior to 1989, they are governed by Alaska’s former corporations code. See § 10.05 (repealed 1989). When Alaska adopted its new corporations code, it lowered the voting standard for approval of an amendment to the articles of incorporation from a supermajority to a simple majority of the issued and outstanding shares. See § 10.06.504(a) (laying out the process for a corporation to amend its articles of incorporation). Corporations formed under section 10.05 of the Alaska Statutes could vote to amend its articles to lower the percentage to a simple majority; however, this vote would require a supermajority. See §§ 10.06.504(d)–(e) (explaining that a change in voting provisions would require the same voting standard as an amendment to the articles of incorporation).

61. ALASKA NATIVE CULTURES AND ISSUES: RESPONSES TO FREQUENTLY ASKED QUESTIONS 23 (Libby Roderick ed., 2d ed. 2010).

education, or welfare” benefits to their shareholders.<sup>62</sup> This mandate extends the ANC mission beyond that of other Alaska for-profit corporations, even allowing ANCs to give preferential treatment to some classes of shareholders over others, as long as the purpose will fulfill the mission of providing health, education or welfare benefits to the preferred group of shareholders.<sup>63</sup> For example, financial support could be given for cultural activities not available to all shareholders equally, or additional dividends could be given to elders.<sup>64</sup>

## F. Small Business Administration Program

Additionally, Congress granted ANCs advantages in federal programs designed to foster minority participation in government contracting, such as the Small Business Administration (SBA) 8(a) Business Development Program.<sup>65</sup> Many ANCs have utilize government-contracting as a means of providing shareholder jobs and increasing annual revenues (and thus shareholder dividends) to offset the difficulty of creating economic growth in remote areas of rural Alaska.<sup>66</sup> Unfortunately, because often so little is known about ANCs

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62. Act of Oct. 31, 1998, Pub. L. No. 105-333, 112 Stat. 3129 (codified at 43 U.S.C. § 1606(r) (2012)) (“The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders’ immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed.”). This ANCSA amendment was prompted by the Alaska Supreme Court’s decision in *Hanson v. Kake Tribal Corporation*, 939 P.2d 1320 (Alaska 1997), in which the court affirmed a lower court ruling that ANCs could not, consistent with state law, grant preferential distributions to one group of shareholders over another. *Id.* at 1324.

63. 43 U.S.C. § 1606(r) (2012).

64. *See id.* (“Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.”).

65. *See* 13 C.F.R. § 124.109 (2012) (describing special rules for Alaska Native Corporations under the SBA 8(a) Business Development Program). ANCs and Indian Tribes can own more than one SBA 8(a) certified Small Disadvantaged Business Entity, where most Americans can only own one. § 124.109(b)(5). This is viewed by some as an unfair advantage, but the regulation makes sense in light of the historically economically and socially disadvantaged Alaska Native shareholders for whom they are congressionally mandated to provide economic, health, and welfare benefits. ANCs also were granted an exemption from the limits on the size of sole source contracts (i.e. contracts awarded without competition). These could be awarded because ANCs generally have stronger resources to handle larger contracts than individually owned 8(a) firms. § 124.506(b).

66. *Contracting Preferences for Alaska Native Corporations: Hearing Before the Ad Hoc Subcomm. on Contracting Oversight of the Comm. on Homeland Sec. & Governmental Affairs*. 111th Cong. 5-6 (2009) [hereinafter 2009 Hearings]

outside of Alaska, congressional motivation to assist them is often lacking or misdirected.<sup>67</sup>

This can be seen in the growing political pressure in certain segments of Congress to limit or restrict employment or contracting preferences granted to ANCSA corporations, or to change the nature of those preferences.<sup>68</sup> In recent years, hostility towards employment or contracting preferences for ANCs has spread.<sup>69</sup> Sole source contracts awarded to ANCSA corporations or their joint ventures under Section 8(a) of the Small Business Act have generated much concern. Led by Senators Claire McCaskill (D-Mo.) and John McCain (R-Ariz.),<sup>70</sup> critics have voiced objections that sole source contracts are inefficient, drive up costs by eliminating competition, and create a corrupting environment in which bribes and kickbacks thrive.<sup>71</sup>

While some of this criticism may be well-taken, after extensive review by the Government Accounting Office (GAO) and the SBA Office of the Inspector General (OIG), only a small proportion of abuses involving ANCs were uncovered in the SBA's 8(a) program.<sup>72</sup> When viewed in light of the small ANC share of the total sole source government contracts awarded each year, one may infer that allegations

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(statement of Sen. Begich).

67. See, e.g., *id.* at 1-2 (statement of Sen. McCaskill) (noting the need to reduce wasteful government spending and calling for a closer look at contracting loopholes for ANCs). The hearing was called, in part, on the dramatic growth in ANC contracting, which increased by \$4.7 billion between 2000 and 2008 at a rate nearly six times faster than overall federal contract spending. See *id.* at 139-40.

68. See KATE M. MANUEL, ET AL., CONG. RESEARCH SERV., R40855, CONTRACTING PROGRAMS FOR ALASKA NATIVE CORPORATIONS: HISTORICAL DEVELOPMENT & LEGAL AUTHORITIES 21 (2012) (summarizing bills introduced in the 112th Congress to limit ANC contracting, including, among others, H.R. 598 and S. 236 that would remove all "special rules" for contracting with ANC-owned 8(a) firms and preclude them from receiving sole source awards in excess of limits imposed on individually owned 8(a) firms).

69. See 2009 Hearings, *supra* note 66, at 139 (noting concerns that critics have had for ANC contracting preferences). See also Letter from Senators McCaskill and McCain to Acting Undersecretary of Defense for Acquisition, Technology & Logistics (Oct. 12, 2011) [hereinafter McCaskill and McCain Letter] (expressing concern for special rules that apply to ANCs in defense contracting, including sole source contract awards by the Department of Defense to ANCs).

70. See McCaskill and McCain Letter, *supra* note 69 (explaining the ease of ANCs using a sole source contract to enter a "pass-through arrangement" as part of a fraud scheme).

71. E.g., Catherine Lynn Allison, Note, *Alaska Native Corporations: Reclaiming the Namesake; Effectuating the Purpose*, 42 PUB. CONT. L.J. 869, 870, 878, 880 (2013).

72. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-399, CONTRACT MANAGEMENT: INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 53 (2006).

of ANCs abuses have been overblown.<sup>73</sup> Much of the criticism seems driven by competitors in the contracting field with their own agendas to advance.<sup>74</sup> The end result is a climate suspicious of programs designed to advance the economic well-being of ANC shareholders.

### G. Differences Between ANCs and Tribes or Tribal Corporations

In some ways the difference between ANCs and Tribes or Tribal Corporations is slight: both offer the means for Native Americans to work together with the federal government to preserve and protect Native land and cultural identity, elect their own Native leaders, form subsidiary entities to engage in commercial enterprises, and provide certain benefits to their own members or shareholders.

In other ways, the differences between Tribes and ANCs are more pronounced. ANC lands have few of the binding legal restrictions that encumber Tribes and reservation lands. ANCs are not “tribal entities” and do not exercise quasi-governmental functions or powers over Tribal members.<sup>75</sup> The land ANCs received under ANCSA is not “Indian Country” for most purposes,<sup>76</sup> so ANCs have no “Tribal Police,” and have little to do with Indian Gaming or other reservation economic development schemes that apply to Tribes in the lower forty-eight states who hold land as part of a federal reserve. Instead, ANCs are “for-profit” corporations, modeled after, and subject to, most of the same rights, limitations and economic risks as other privately-held Alaska corporations.<sup>77</sup>

ANCSA envisioned a future where Alaska Natives were free from the cycle of social and economic dependency on the federal government

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73. *Native 8(a) Briefing*, NATIVE AM. CONTRACTORS ASS'N 1, 8 (Aug. 2010), [http://www.nativecontractors.org/media/pdf/Native%20a\\_%20Briefing%20Paper%20with%20Images.pdf](http://www.nativecontractors.org/media/pdf/Native%20a_%20Briefing%20Paper%20with%20Images.pdf) (noting that, in 2007, while thirty-two percent of all federal contracts awarded were sole sourced, ANCs 8(a) sole source awards represented less than 0.08 percent of all contracts issued).

74. Daniel K. Oakes, Note, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences*, 40 PUB. CONT. L.J. 777, 786-87 (2011).

75. See Indian Entities Recognized and Eligible to Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47,868 (August 10, 2012) (listing the Native Entities within Alaska eligible to receive BIA services).

76. See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27, 532 (1998) (holding lands received under ANCSA are not “Indian Country” as ANC shareholders are not dependent Indian communities in the same way as Indian Reservations in the lower forty-eight states, and therefore cannot exercise quasi-sovereign powers such as taxation on ANCSA land).

77. 43 U.S.C. § 1606(d) (2012).

that marked the reservation system in the lower forty-eight states.<sup>78</sup> ANCs are intended to be economically independent, viable corporations, governed by predominantly Native shareholders, who have ultimate authority over the use of their own land and resources.<sup>79</sup> Unlike Tribes with reservation land held in trust by the federal government, ANCs own their own land outright and can sell, trade or develop their land openly, without having to obtain the consent or approval of the BIA.<sup>80</sup> Having no tribal “sovereign immunity” has often proved to be a competitive advantage, as ANCs do not have to waive sovereign immunity in order to engage in commercial transactions on the open market, as some Tribal corporations must do.<sup>81</sup>

Moreover, Congress granted ANCs certain legal rights and exemptions that are designed to further their mission of providing economic and cultural benefits to their Alaska Native shareholders.<sup>82</sup> These rights and exemptions only partially overlap with the rights and exemptions granted to Tribes—making the development and application of Native law inconsistent and frequently uncertain with respect to ANCs and Tribes.

These generalities also tend to gloss over the challenges Alaska Natives have faced adjusting to the Congressional mandate that forced them to adopt a non-Native corporate business model as a means to preserve their traditional lands, resources, and subsistence way of life.<sup>83</sup> The differences between the ANCs and Tribes are seen most strikingly

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78. See *Native Vill. of Venetie*, 522 U.S. at 534 (noting the primary purposes behind ANCSA were to increase self-determination and end paternalism).

79. See *id.* at 532-33 (determining that ANCSA land is not under the superintendence of the Federal Government and explaining that ANCs are free to convey the land or use it for non-Indian purposes).

80. See Simpson, *supra* note 56, at 37 (explaining that ANC land “can be sold, mortgaged, or developed just like any other private land”).

81. See *id.* (explaining that it is easier to do business with ANCSA corporations because they are not subject to sovereign immunity).

82. See, e.g., 43 U.S.C. § 1620 (2012) (granting tax exemptions on land and income for specified periods of time to encourage economic development); § 1626(e) (2012) (granting minority and economically disadvantaged status to ANCs and their majority-owned subsidiaries).

83. See, e.g., LINXWILER, *supra* note 29 at 46-47 (summarizing many of the difficulties with ANCSA during the first twenty years). These challenges included massive litigation and legislative amendments which depleted resources as well as the unwise distribution of large sums of money to inexperienced Alaska Native managers which resulted in business mistakes and fraud. Additionally, political instability plagued corporations as they struggled with the imposition of cultural and political contests not normally associated with for-profit corporations. This instability and the unclear impact on Alaska Native sovereignty caused tension with local Alaska tribal entities which were disenfranchised from ownership of Alaska Native lands. *Id.*

in the tremendous economic growth and impact the ANCs have had on the state of Alaska and the national economy over the last forty years.<sup>84</sup> The jobs and benefits ANCs have provided for their own shareholders and for the broader state and national economy are self-evident and prove that the great experiment of ANCSA has been successful in achieving some important Native economic development goals. The task is far from over, however, and the ANCs face difficult challenges ahead as they work to bring economic freedom and cultural support to the next generation of shareholders. To that end, ANCs must be free to take full advantage of the statutory exemptions and federal programs designated by Congress to assist them.

## II. THE STATUTORY FRAMEWORK TO PROMOTE ECONOMIC DEVELOPMENT

Given the vast stretches of Alaska without roads or even minimal commercial infrastructure,<sup>85</sup> the ANCs' mission of developing a cash-based economy for the benefit of shareholders is truly a daunting task. Lack of infrastructure, limited availability of basic utilities, and inflated oil and gas prices have only complicated the task.<sup>86</sup>

These challenges have made federal administration and distribution of ANCSA land entitlements agonizingly slow. Distribution of land is still incomplete after more than forty years of dedicated effort by the federal Bureau of Land Management.<sup>87</sup> Even when an ANC is entitled to receive land, the cost to survey and subdivide large tracts of land located off the road system into parcels that can be booked as financial assets remains cost-prohibitive.<sup>88</sup>

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84. See ALASKA BUS. MONTHLY, *supra* note 2, at 96-106 (showing that ANCs made up eight of the top ten Alaskan-owned and operated companies in the state, based on 2012 gross revenues).

85. See Elisia Gatmen Kupris, *Protection of our Elderly: A Multidisciplinary Collaborative Solution for Alaska*, 30 ALASKA L. REV. 47, 60 (2013) (stating that approximately seventy percent of Alaska is inaccessible by road and explaining that transportation difficulties may hamper commerce).

86. How do you create economic opportunity for shareholders born and raised in rural villages where the only way in or out nine months of the year is by small plane or snow machine? Where water, sewer, and power distribution has only recently become available for residential and commercial use—if it is available at all? Where winter temperatures can plunge to eighty degrees below zero and the price of gasoline and heating fuel is double and triple the price in the lower forty-eight states?

87. Andrew Jensen, *ANCSA Land Conveyances Crawl Along*, ALASKA J. OF COMMERCE, June 17, 2011, available at [http://classic.alaskajournal.com/stories/061711/ANC\\_alcca.shtml](http://classic.alaskajournal.com/stories/061711/ANC_alcca.shtml).

88. See U.S. GOV'T ACCOUNTABILITY OFFICE, RCED-84-14, REPORT TO THE SECRETARY OF THE INTERIOR, ALASKA LAND CONVEYANCE PROGRAM—A SLOW,

### A. Congress Exempts ANCs from Title VII

Congress recognized that ANCs needed assistance to properly benefit their Alaska Native Shareholders economically and socially, and therefore provided a statutory exemption. Section 1626(g) of ANCSA exempts ANCs from the definition of an “employer” under Title VII of the Civil Rights Act of 1964.<sup>89</sup> Legislative history reflects that the purpose for this amendment was to allow ANCs to adopt shareholder hiring preferences without facing employment discrimination charges.<sup>90</sup> The House Report explained that ANCSA needed to “clarify that Native corporations can hire their own shareholders without discrimination.”<sup>91</sup> ANCs were therefore excluded from the definition of “employer” when Title VII’s definition was adopted.<sup>92</sup>

### B. Statutory Limits to ANCs Preferential Treatment

The problem, however, is that most federal and state laws do not exclude or exempt ANCs from coverage. For example, even if a state or federal remedial statute does not apply to an ANC, contracting provisions or grants may incorporate Equal Employment Opportunity laws or related provisions. Perhaps the best known instance is Executive Order 11246, which prohibits unlawful employment discrimination by federal contractors performing more than \$10,000 in government business and mandates that contractors adopt affirmative action

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COMPLEX, AND COSTLY PROCESS 24 (1984) (describing the cost of surveying ANCSA land as a costly administrative obstacle to land management). See Jensen, *supra* note 86 (explaining that without land surveyance and a patented claim, there is no true accounting of the acres conveyed).

89. 43 U.S.C. § 1626(g) (2012). ANCSA corporations and related partnerships, joint ventures, trusts, or affiliates in which an Alaska Native Corporation owns not less than twenty-five percent of the equity are exempt from Title VII’s definition of employer. *Id.*

90. See Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 11, 106 Stat. 2112, 2115 (substituting the definition of employer as a means to avoid conflict with the 1964 Civil Rights Act). ANCSA was amended “to clarify that Alaska Native corporations, like Indian tribes, are exempt from the 1964 Civil Rights Act,” thereby allowing “Alaska Native corporations, partnerships, joint ventures, trusts or affiliates in which the Native corporation owns not less than 25 per cent of the equity to hire their shareholders or other Alaska Natives without discrimination under the Civil Rights Act.” H. REP. NO. 102-673, at 19 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1450, 1456.

91. H. REP. NO. 102-673, at 15.

92. See 42 U.S.C. § 2000ff(2)(B) (adopting Title VII’s definition of employer in § 2000(e)(b)). The Genetic Information Nondisclosure Act (GINA) explicitly adopts Title VII’s definition of employer, which technically exempts ANCs from GINA restrictions. However, this is likely an oversight rather than by design.

programs.<sup>93</sup> Federal, state, or local government contracts may include other provisions that directly or indirectly affect ANC contractors' hiring policies.

More directly, the Americans with Disabilities Act (ADA) defines employer in terms comparable to Title VII, and expressly exempts Indian Tribes from its definition of employer, but does not expressly incorporate Title VII's definition.<sup>94</sup> Consequently, courts have held that ANCs are not exempt from ADA claims.<sup>95</sup> The Age Discrimination in Employment Act and the Equal Pay Act, however, do not exclude or exempt Indian Tribes, ANCs, or businesses located on or near an Indian Reservation.<sup>96</sup>

State law does not exempt ANCs. In particular, the Alaska Human Rights Act,<sup>97</sup> does not exclude Indian Tribes or ANCSA corporations.<sup>98</sup> The Alaska State Commission for Human Rights (ASCHR) takes the position that it may assert jurisdiction over ANCSA corporations.<sup>99</sup> However, ASCHR recognizes that Indian Tribes are entitled to sovereign immunity, and also recognizes ANC shareholder preferences.<sup>100</sup>

The Civil Rights Act of 1866, 42 U.S.C. § 1981, is a separate statutory basis for prosecuting an employment race discrimination claim.<sup>101</sup> The Tenth Circuit has issued an opinion suggesting that Title VII's express exemption operates to preclude liability from being imposed in any related context.<sup>102</sup> This supports an argument that ANCs are not subject to § 1981. However, the Fourth Circuit has conversely

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93. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

94. 42 U.S.C. § 12111(5).

95. See *Pearson v. Chugach Gov't Servs.*, 669 F. Supp.2d 467, 476 (D. Del. 2009) (holding that ANCs retain liability under the ADA).

96. See 29 U.S.C. § 630(b) (listing ADEA definition of employer); § 203(d) (listing Federal Labor Standards Act definition of employer which governs the Equal Pay Act).

97. ALASKA STAT. § 18.80.220 (2013).

98. See § 18.80.300(5) (definition of "employer" for the Alaska Human Rights Act does not provide explicit ANC or Indian Tribe exemption).

99. See *ASCHR v. Eyak Vill. Corp.*, ASCHR C-87-105, C-88-85, C-88-76 (1991) (taking the stance that ANCs are restricted by federal and state anti-discrimination provisions).

100. See *Mortenson v. Alutiiq Mgmt. Servs.*, ASCHR C-04-095 (2005) (recognizing ANC prerogative in shareholder preferential treatment). See also *Pankowski v. Cominco Alaska*, ASCHR C-91-093 (1993) (deeming ANC shareholder preferential treatment appropriate).

101. See *Johnson v. Ry. Express Agency*, 421 U.S. 454, 461 (1975) (holding that remedies under Title VII and the Civil Rights Act of 1866 are "separate, distinct, and independent").

102. See *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672-73 (10th Cir. 1980) (determining that the specific exemption of Indian Tribes from compliance in Title VII control the broad, general civil rights provisions which do not speak to the issue).

held that ANCs are subject to § 1981 claims.<sup>103</sup> In one recent case, the District of Alaska agreed with the Fourth Circuit, refusing to read an exemption for ANCs into § 1981 when there is a reasonable explanation as to why a difference may exist as to ANC exemption status under § 1981 as opposed to Title VII.<sup>104</sup> The Ninth Circuit has not resolved this question.

The Family and Medical Leave Act (FMLA) does not include an express exemption for ANCs or Indian Tribes.<sup>105</sup> Therefore, courts have noted that ANCs are subject to FMLA.<sup>106</sup> Neither the Fair Labor Standards Act (FLSA) nor the Alaska Wage and Hour Act (AWHA) include an express exemption for ANCs, corporations, or Indian Tribes;<sup>107</sup> therefore, ANCs are subject to these laws.

### C. Shareholder Preferences

Because most state and federal laws apply to ANCs, shareholder preferences are the only tool that ANCs may wield to protect ANCSA's goal of promoting the health, welfare, and economic well-being of ANC shareholders. ASCHR has approved ANC shareholder preferences in response to state claims under the Alaska Human Rights Act.<sup>108</sup> Two problems, however, remain.

First, there is no functional model to explain how shareholder preferences operate. Are shareholder preferences an affirmative defense or part of the manner by which we analyze claims? To use the *McDonnell Douglas* test as an example,<sup>109</sup> should we construe

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103. *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 210–11 (4th Cir. 2007). The court noted that Title VII limits exclusions to Title VII itself and that § 1981 includes no such exemption for ANCs. *Id.*

104. *See* *Becker v. Kikiktagruk Inupiat Corp.*, No. 3:09-cv-00015-TMB, slip op. at 9–10 (D. Alaska Aug. 12, 2010) (holding that ANCs are not immune from suit under § 1981). The court adopted the reasoning in *Aleman* that Title VII's more expansive obligations would provide a reasonable explanation. *Id.*

105. *See* Family and Medical Leave Act, 29 U.S.C. § 2611(4) (2012) (defining “employer” for purposes of FMLA).

106. *See* *Pearson v. Chugach Gov't Servs.*, 669 F. Supp.2d 467, 476–77 (D. Del. 2009) (noting that there is no express exemption for ANCs and therefore holding that ANCs are subject to FMLA).

107. *See* 29 U.S.C. §§ 203(d)–(e) (2006) (FLSA definition of employer); ALASKA STAT. § 23.10.145 (2013) (AWHA adopting FLSA definitions); § 23.10.060(d)(1) (exempting certain types of employees, not including ANC employees, from the overtime provisions of AWHA).

108. *Mortenson v. Alutiiq Management Servs.*, ASCHR C-04-095 (2005); *Pankowski v. Cominco Alaska*, ASCHR C-91-093 (1993).

109. *See* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing a framework for Title VII cases). The *McDonnell Douglas* test is a three-step test used to analyze disparate treatment employment discrimination

shareholder preferences as constituting a legitimate, non-discriminatory reason supporting an adverse employment action? Or are shareholder preferences something else, something along the lines of implied preemption? As of yet, no court has come to grips with this issue, leaving the law unsettled.

The second problem is more immediate: ensuring that the policy is a shareholder preference policy and that it is not applied in a manner that might give rise to any unlawful discrimination or retaliation claims. Put differently, when is a shareholder preference policy valid?

The Ninth Circuit has twice issued unpublished memoranda dispositions in which it noted that an ANC shareholder policy involved in a case was not facially discriminatory. Each time, the court avoided analyzing the extent to which the shareholder preference was permissible, relying instead on the appellant's failure to establish a prima facie case of employment discrimination.<sup>110</sup> In other words, the court did not hold that the shareholder policy was valid, did not base its decision on the shareholder policy, and it did not offer any instructive insights into how we should view such preferences.<sup>111</sup>

More recently in *Becker v. Kikiktagruk Inupiat Corporation*,<sup>112</sup> the Ninth Circuit decided a case that raised concerns related to a shareholder preference policy. However, instead of litigating the shareholder preference, the case focused on a § 1981 claim of retaliation against Kikiktagruk Inupiat Corporation (KIC).<sup>113</sup> Becker argued that he was fired after refusing to follow KIC's shareholder preference in his hiring activities.<sup>114</sup> The district court concluded that KIC could be subject to a § 1981 retaliation claim notwithstanding the ANC exemption from

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claims where there is no direct evidence of discrimination. First, the plaintiff must establish a prima facie case by showing that he or she was a member of a protected class, that he or she was qualified for the position, that he or she suffered an adverse employment action, and that the employer continued to seek applicants with the same qualifications. Second, the employer may rebut the plaintiff's case by showing that there was a legitimate, nondiscriminatory reason for the challenged decision. Third, the plaintiff may seek to rebut or refute the employer's explanation by showing that it lacks credibility; that is, that the employer's stated reason for its action is pretextual. *Id.*

110. *Conitz v. Teck Alaska Inc.*, 331 F. App'x 512, 513 (9th Cir. 2009); *Conitz v. Teck Alaska, Inc.*, 433 F. App'x 580, 580-81 (9th Cir. 2011).

111. *See Conitz v. Alaska State Commission for Human Rights*, No. S-14357, 2014 WL 895205, at \*1-2 (Alaska 2014) (discussing the scope of preceding Ninth Circuit decisions).

112. *Becker v. Kikiktagruk Inupiat Corp.*, 488 F. App'x 227 (9th Cir. 2012). Mr. Fisher's firm represented KIC in this case, but Mr. Fisher was not involved in the case or its appeal.

113. *Id.* at 228-29.

114. *Becker v. Kikiktagruk Inupiat Corp.*, No. 3:09-cv-00015-TMB, slip op. at 4 (D. Alaska Aug. 12, 2010).

Title VII.<sup>115</sup> However, the district court granted KIC summary judgment after it determined that Becker could not have reasonably believed that the shareholder preference was unlawful because it was facially neutral and he never sought clarification from anyone.<sup>116</sup>

The Ninth Circuit reversed *Becker* in an unpublished memorandum disposition. In reversing, the court did not reach the merits regarding whether or not the shareholder policy was valid. Instead, the court simply concentrated on the test for retaliation—whether Becker reasonably believed that the shareholder policy was racially discriminatory.<sup>117</sup>

Analyzing the retaliation claim, the *Becker* court concluded that there were genuine issues of material fact regarding whether or not Becker reasonably believed he was opposing an unlawful policy based on six considerations: (1) KIC’s handbook specifically stated that “Native preference is given in all hiring actions”; (2) meetings were held where shareholder and Native hiring preferences were discussed; (3) KIC’s Human Resources personnel became upset when Becker hired a Caucasian employee; (4) Becker thought some employees were being reclassified from shareholder to non-shareholder based on their race (when in fact it was because these shareholders did not fit the definition of shareholders eligible for the preference); (5) Becker was required to keep track of all hires and record whether they were shareholders or “Other Native”; and (6) every employee subject to the shareholder preference was, in fact, an Alaska Native.<sup>118</sup> In reversing, the court noted only that these factors established a prima facie case sufficient to overcome summary judgment and did not ultimately determine whether Becker’s belief was rational.<sup>119</sup>

The result in *Becker* underscores an additional problem for ANCs. Employment discrimination claims are related to, but different from, retaliation claims; that is, a valid retaliation claim does not depend upon a valid underlying discrimination claim.<sup>120</sup> Instead, a valid retaliation claim only requires that the employee reasonably believe that the underlying act was unlawful.<sup>121</sup> Consequently, shareholder preferences can actually open the door to additional risks for ANCs as employees

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115. *See id.* at 11–12.

116. *Id.* at 12.

117. *Becker v. Kikiktagruk Inupiat Corp.*, 488 F. App’x 227, 229 (9th Cir. 2012).

118. *Id.*

119. *Id.*

120. *See Equal Emp’t Opportunity Comm’n v. Luce Forward*, 303 F.3d 994, 1005 (9th Cir. 2002) (enumerating the requirements for a valid retaliation claim).

121. *Id.*

who reasonably believe that they have been adversely impacted by a shareholder preference may be able to prosecute retaliation claims.

#### D. ANC Shareholder Status as a “Political” Rather than a “Racial” Classification

*Becker* highlights the tension between a true shareholder preference, which is usually analyzed as a political or an economic classification subject to rational basis review, and a racial classification, potentially subject to heightened scrutiny. This tension, central to ANCs’ efforts to protect shareholder hiring, was first explored in *Morton v. Mancari*.<sup>122</sup> There, the U.S. Supreme Court upheld an Indian employment preference for positions with the Bureau of Indian Affairs, subjecting the preference to rational basis review after it classified the preference as implicating a political rather than a racial classification.<sup>123</sup> The Court emphasized that “the preference applies only to employment in the Indian service.”<sup>124</sup> The Court further qualified its holding by observing that “[t]he preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.”<sup>125</sup>

Since 1974, however, courts have been careful in applying *Mancari*, and it has been strongly suggested that its analysis was dictated by its specific facts (a hiring preference for Indians with respect to a federal agency responsible for Indian affairs).<sup>126</sup> In *Adarand Constructors, Inc. v. Pena*,<sup>127</sup> the U.S. Supreme Court held that minority contracting preferences were subject to strict scrutiny.<sup>128</sup> Because the minority

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122. 417 U.S. 535 (1974).

123. *Id.* at 553–55.

124. *Id.* at 554.

125. *Id.*

126. *See, e.g.,* *Rice v. Cayetano*, 428 U.S. 495, 519–20 (2000) (emphasizing that the political-racial distinction in *Mancari* was limited to the authority of the BIA); *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (interpreting *Mancari* to apply only to the special case of the Bureau of Indian Affairs executing a hiring preference for Indian applicants and therefore not protecting employment discrimination on the basis of membership in a particular tribe from a national origin discrimination claim); *Malabad v. N. Slope Borough*, 42 F. Supp. 2d 927, 937 (D. Alaska 1999) (“*Mancari* is based on the relationship between sovereign governments; that is, Indian tribes and the federal government. . . . The Ninth Circuit interprets *Mancari* as shielding only those statutes that affect uniquely Indian interests.”).

127. 515 U.S. 200 (1995).

128. *Id.* at 227.

contracting preference in question included Native Americans, the opinion has been interpreted by some as suggesting that the “political classification” analysis of *Mancari* is subject to doubt.<sup>129</sup> Whether this is a correct reading of *Adarand Constructors* has not been established.

Closer to home, in *Williams v. Babbitt*,<sup>130</sup> the Ninth Circuit held that an Indian preference regarding reindeer herding implicated a racial, and not a political, classification because the underlying activity was not related to unique matters concerning Tribal sovereignty or self-governance.<sup>131</sup> The court rejected arguments that the preference was simply a political classification based on *Mancari*.<sup>132</sup>

However, in *American Federation of Government Employees, AFL-CIO v. United States*,<sup>133</sup> the District of Columbia Circuit applied *Mancari*'s political classification analysis to uphold a defense appropriation act's preference for outsourcing to firms that claimed fifty-one percent or more Native American ownership.<sup>134</sup> The court reasoned that, in context, the preference was being applied in connection with the federal government's constitutional authority to regulate commerce with tribes.<sup>135</sup>

Similarly, in *Artichoke Joe's California Grand Casino v. Norton*,<sup>136</sup> the Ninth Circuit held that challenges to state and federal laws that allowed certain forms of gambling only on Indian tribal lands were subject to rational basis review as a political classification.<sup>137</sup> The court's reasoning seemed based on the fact that a federal law was involved that related to Congress' trust obligations towards Indians.<sup>138</sup> But in *Dawavendewa v. Salt River Project*,<sup>139</sup> the Ninth Circuit held that a tribal preference favoring one tribe over another tribe implicated a national origin, and not a political classification.<sup>140</sup>

Finally, in *Malabed v. North Slope Borough*,<sup>141</sup> the District of Alaska held that the North Slope Borough's employment preference was subject to strict scrutiny as a racial and not a political classification because, in

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129. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

130. 115 F.3d 657 (9th Cir. 1997).

131. *Id.* at 664.

132. *See id.* (pointing out that the preference in question would be broader than any other preference upheld under *Mancari*).

133. 330 F.3d 513 (D.C. Cir. 2003).

134. *Id.* at 517-23.

135. *Id.* at 521.

136. 353 F.3d 712 (9th Cir. 2003).

137. *Id.* at 735.

138. *See id.* at 729 (explaining the historical origin of the trust doctrine).

139. 154 F.3d 1117 (9th Cir. 1998).

140. *Id.* at 1121.

141. 42 F. Supp. 2d 927 (D. Alaska 1999).

adopting the preference, the North Slope Borough was acting as a state government political subdivision.<sup>142</sup> The Ninth Circuit affirmed on state law grounds after the Alaska Supreme Court confirmed that state law applied through certification proceedings.<sup>143</sup>

Based on these cases, an Indian employment or contracting preference will be classified as a “political classification” if it relates to a federal law touching upon Tribal matters and implicating the federal government’s trust responsibilities or the federal government’s authority to regulate commerce with Tribes. Other preferences will be classified as racial and not political classifications, and will be subject to strict scrutiny.

In contrast to Native American employment preferences, preferences anchored to neutral criteria stand a much better chance of surviving scrutiny. If, for example, shareholder employment preferences are characterized as political or economic preferences (and not racial), one would think there would be less concern with the scope and content of such preferences. As the District of Alaska correctly noted in one case, non-Indians may be ANCSA shareholders.<sup>144</sup>

The catch, however, is ensuring that the policy is a shareholder preference policy, and that it is not applied in a manner that might give rise to any discrimination or retaliation claims. For example, if a shareholder preference is simply a proxy for race discrimination, it is clear that the preference will support employment discrimination claims.<sup>145</sup> Moreover, current precedent instructs that employment preferences implicating a protected classification may constitute impermissible discrimination if the preferences are adopted and applied by an employer covered by state or federal law and no statutory exemption applies.<sup>146</sup> To illustrate, if an employer not exempted from coverage adopted an employment preference for Alaska Natives, such a preference could possibly be struck down as a racial classification. Moreover, an otherwise valid shareholder preference may be applied in a discriminatory manner (for example, if it could be shown that the

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142. *Id.* at 939.

143. *Malabed v. N. Slope Borough*, 335 F.3d 864, 874 (9th Cir. 2003).

144. *See Conitz v. Teck Alaska Inc.*, No. 4:09-cv-0020-RRB, slip op. at 9 (D. Alaska Nov. 4, 2009) (noting that there are ANCSA shareholders who are not Alaska Natives).

145. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303-04 (9th Cir. 1982) (rejecting shareholder preference plan that had the effect of discriminating along the lines of race, color, or national origin).

146. *See Dawavendewa v. Salt River Project*, 154 F.3d 1117, 1124 (9th Cir. 1998) (declining to read the Indian Preferences exemption so broadly as to permit an employment preference of one tribe over another and concluding that the preference violated Title VII because no exemption applied).

preference was denied to non-Natives who were also shareholders).<sup>147</sup>

Permissive as opposed to mandatory preferences are easier to defend and enforce because permissive preferences simply use a given status as a factor to weigh and consider along with all other relevant factors when making employment or contracting decisions.<sup>148</sup> Preferences that are linked to neutral criteria (such as shareholder preferences) are also easier to defend and enforce.<sup>149</sup>

### III. ANALYSIS OF THE PRESENT STATE OF THE LAW GOVERNING ANCS

In enacting ANCSA, Congress sought a new solution to long-standing problems affecting Native Americans. ANCSA's purpose was to promote the health, well-being, and economic development of Alaskan Natives by adopting a private corporation model to administer settlement rights.<sup>150</sup> One important plank established that ANCs should be allowed to adopt shareholder preferences without fear of facing employment discrimination claims. However, forty years after ANCSA was enacted, ANCs are confronted with a bewildering array of state and federal remedial laws that are inconsistently applied. The protection afforded to ANCs by section 1626(g) of ANCSA is essentially meaningless because courts are allowing race discrimination claims to proceed under § 1981 of the United States Code or under state statutes.<sup>151</sup> In other contexts, shareholder preferences offer uncertain

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147. Apart from shareholder preferences adopted under ANCSA, the Indian Self-Determination and Education Assistance Act (ISDEA) confers a separate statutory exemption related to federal contracts with tribal organizations, and mandates that contracts shall include "to the greatest extent feasible" that Indian preferences be recognized for training, employment, and subcontracts. 25 U.S.C. § 450e(b) (2012). Amendments enacted in 1994 further provide that a Tribe's employment preference laws should be honored with respect to covered federal contracts. See § 450e(c) (requiring to the greatest extent feasible preferences to Indians for federal contracts). Indian preferences adopted under ISDEA have been upheld. See *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982) (upholding regulations providing for Alaska Native preference in contracting for Alaska Native housing projects).

148. Cf. Stuart Minor Benjamin, *Equal Protections and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 594 (1996) (noting that using status as a Native Hawaiian as a mandatory factor as opposed to one of a number of factors would make reversal more likely).

149. James P. Mills, Note, *The Use of Hiring Preferences by Alaska Native Corporations After Malabed v. N. Slope Borough*, 28 SEATTLE U. L. REV. 403, 432-33 (2005).

150. See generally Simpson, *supra* note 56, at 37-38 (describing the ways in which ANCSA's corporate model provides unique advantages).

151. See *infra* Part III.A (discussing disadvantages of section 1621(g) of ANCSA).

help because precedent continues to develop regarding when, and whether, such preferences are political or economic in nature as opposed to racial or some other basis subject to heightened scrutiny. Without clarity in the law, the means Congress provided to aid ANCs in accomplishing their economic and cultural support mission is increasingly endangered.

#### **A. Congressional Action: Most Direct, but an Unlikely Option**

The current legal landscape presents a confusing picture for ANCs. On the one hand, Congress clearly intended ANCs to be excluded from the definition of “employer” for purposes of Title VII so that they could adopt shareholder preferences without fear of employment discrimination suits.<sup>152</sup> On the other hand, Congress neglected to extend this same exclusion to other federal remedial statutes. Perhaps worse, nothing prevents state or local anti-discrimination statutes from being asserted against ANCs. If those fail, plaintiffs may attempt to claim reliance on § 1981 for a race discrimination claim. The end result frustrates the Congressional intent underlying § 1626(g). ANCs find themselves confronted with claims in a variety of employment-related contexts that undermine their ability to manage their workforce in a way designed to promote the health, welfare, and economic well-being of shareholders.

The most efficient solution to the current problem would be for Congress to amend ANCSA in three ways. First, the exemption in § 1626(g) should be clarified to ensure that ANCs are exempted from the definition of “employer” for all federal anti-discrimination legislation. Second, ANCSA should be amended to expressly preempt any state or local anti-discrimination statute that acts in derogation of the § 1626(g) exemption. Express preemption is the most direct and efficient manner by which Congress could prevent application of state or local laws that threaten to erode § 1626(g). Third and finally, Congress should amend § 1981 to exempt or exclude ANCs from race discrimination claims based on the application of shareholder preferences.

Admittedly, it is unlikely that Congress would, or perhaps even could, take any such corrective steps, given the gridlock in recent years. Notwithstanding their considerable economic successes and increasing corporate sophistication, some ANCs are not schooled in Beltway lobbying. Moreover, a wave of anti-ANC sentiment has gripped a small,

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152. *Pearson v. Chugach Gov’t Servs. Inc.*, 669 F. Supp. 2d 467, 471–72 (D. Del. 2009).

but powerful, segment of Congress.<sup>153</sup> Prospects of an overhaul of ANCSA seem remote, at best.

## B. Judicial Resolution

In contrast to legislative action, judicial resolution is more promising. Courts frequently encounter ANC-related issues and have previously developed guidelines for resolving these issues against an uncertain and ill-defined statutory backdrop. For example, courts holding that ANCs are subject to § 1981 employment race discrimination claims have correctly noted that § 1981 is a separate statutory scheme advancing related but different goals and subject to less-rigorous procedural rules than those which created ANCs.<sup>154</sup> Unlike Title VII claims, plaintiffs need not administratively exhaust § 1981 claims. Moreover, Title VII addresses other forms of employment discrimination than race. Perhaps most importantly, only Title VII includes an express exemption from its rules for ANCs.<sup>155</sup> Section 1981 includes no express exemption. The content and structure of § 1981 and Title VII support the conclusion reached by the Fourth Circuit and the Alaska District Court that ANCS are not exempted from § 1981 race discrimination claims.

However, Congress clearly intended that ANCs be allowed to rely upon shareholder preferences without fear of employment discrimination claims. Section 1981 includes no express prohibition on retaliation, yet courts have reasonably implied such a right.<sup>156</sup> Consequently, there is no substantive reason why a right to rely on shareholder preferences should not also be implied in § 1981 actions. And, as already seen, courts appear ready to accept this premise, and to allow ANCs to rely upon shareholder preferences as a sort of implied defense to § 1981 claims.<sup>157</sup>

## C. Proposed Two-Part Test for Analyzing Shareholder Preferences

The recognition that ANCs may rely upon shareholder preferences

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153. See Allison, *supra* note 67, at 881 (discussing critics of ANCs in Congress and their objections).

154. See *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 212 (4th Cir. 2007) (differentiating obligations under § 1981 and Title VII).

155. See *supra* Part II.A.

156. See *CBOCS v. Humphries*, 553 U.S. 442, 446–48 (2008) (recognizing retaliation claim under § 1981).

157. See *supra* Part II.D. See also *Conitz v. Teck Cominco Alaska, Inc.*, No. 4:06-cv-0015-RRB, slip op. at 4 (D. Alaska July 21, 2008).

when facing an employment race discrimination claim filed under § 1981 or some other basis such as state law, serves as an analytical first step. In situations where there is no statutory exemption or exception for ANCs, courts should of course allow the claim to proceed. However, courts should honor the Congressional mandate underlying section 1626(g) of ANCSA by allowing ANCs to rely upon permissible forms of shareholder preferences.

We argue that a two-part test should be adopted. The first step would be to determine if the shareholder preference was valid. The second step would be to apply the shareholder preference to the specific claim at issue to determine whether or not the claim would be allowed to proceed. We address each step in turn.

1. *Step One: Is There a Valid Shareholder Preference?*

Determining whether or not the first step is satisfied should involve an analysis of the preference. Labels should not control. Just because a preference is called a “shareholder” preference should not preclude further inquiry. If there is evidence that a shareholder preference is being used as a proxy for race discrimination, or for purposes antithetical to advancing the economic well-being of ANC shareholders, then the preference should not insulate ANCs from discrimination or other employment-related claims. Racial discrimination is not consistent with ANC Native cultural values that promote tolerance and value community sharing.<sup>158</sup> However, a neutrally adopted and neutrally applied shareholder preference should be analyzed no differently than any other economic or political justification. It should be viewed as a legitimate, non-discriminatory justification to support an employment-related decision. The protection should extend to both disparate treatment and disparate impact claims.

Relevant factors could include the following: (1) whether the shareholder preference was properly adopted by a duly constituted Board; (2) whether the shareholder preference is neutral on its face; (3) whether the shareholder preference has been applied in a uniform, consistent, and nondiscriminatory manner; (4) whether the shareholder preference promotes § 1626(g)’s goals to advance the health, welfare, and economic well-being of shareholders; (5) whether the shareholder preference is, in context, independent of any other hiring or

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158. For statements of various Alaska Native Tribes’ cultural values, consult the Alaska Native Knowledge Network, available at <http://www.ankn.uaf.edu/ANCR/Values>, and click on the individual tribal links at the bottom of that page.

employment preference; (6) whether there are any facts suggesting that the shareholder preference is being applied as a proxy for race or in an impermissible manner; and (7) whether application of the shareholder preference would undermine ANCSA's fundamental goals.

These represent a non-exclusive range of factors that could be used to evaluate whether or not a shareholder preference was valid. No one factor would be dispositive. Instead, it is assumed that courts would adopt a context-sensitive analysis to evaluate the totality of the circumstances. Conceivably, there might be cases where an otherwise valid shareholder preference could be struck down because, in the specific context of the case at hand, its application would undermine ANCSA's fundamental goals. However, that would likely constitute a rare case. In most situations, an objectively neutral shareholder preference that was consistent with § 1626(g) and was applied in a uniform, consistent manner would be upheld. The first step would therefore be satisfied.

## 2. *Step Two: Analyzing the Preference Against the Claim at Issue*

Assuming the first step is satisfied, that a valid shareholder preference exists, how should one define its scope? The second step would analyze the specific claim at issue in the context of the shareholder preference. Should the claim being alleged be precluded by the shareholder preference? An existing test used in Indian Law could be adopted to analyze the application of ANC shareholder preferences.

In the absence of an express Congressional statement, courts have adopted a three-part test to determine when a statute of general applicability will not apply to Indian Tribes or tribal entities: (1) the law touches upon purely internal matters related to the tribe's self-governance (operating a housing authority or health centers are examples); (2) application of the law would abrogate rights guaranteed by treaties; or (3) there is proof that Congress did not intend the law to apply to Indian Tribes.<sup>159</sup>

Although one must be careful to distinguish ANCs from tribal corporations, it is useful to address principles governing tribal entities because those principles form an interpretative backdrop to Congressional intent underlying certain ANCSA goals. As noted, although ANCs are set up in a manner evoking the rights and responsibilities of private corporations, the analogue has never been

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<sup>159</sup> Equal Emp't Opportunity Comm'n v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1078-79 (9th Cir. 2001) (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)).

precise. Instead, a driving force behind ANCSA was and remains an expressed goal that ANCs would promote the health and economic well-being of their shareholders. This is conceptually similar to the federal government's trust responsibilities owed to Indian tribes and tribal entities. We believe, therefore, that this test provides a useful starting point for developing a similar test to be used for shareholder preferences.

To illustrate the test in operation, in *Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority*,<sup>160</sup> the Ninth Circuit held that the Age Discrimination in Employment Act did not apply to an individual's employment relationship with the Karuk Tribe Housing Authority because it touched upon purely internal matters related to the tribe's self-governance.<sup>161</sup> Applying the three-part test, the court's analysis focused on the fact that the housing authority functioned as an arm of tribal government to provide an essential service to tribal members (affordable housing), and the dispute was wholly between a tribal member and the tribe.<sup>162</sup>

A comparable result was reached in *Penobscot Nation v. Fellenner*,<sup>163</sup> where the First Circuit held that an Indian Tribe was entitled to rely on sovereign immunity precluding suit in state court alleging state employment discrimination claims because the employment decisions are internal tribal matters and therefore enjoy limited immunity.<sup>164</sup>

In *Pink v. Modoc Indian Health Project, Inc.*,<sup>165</sup> the Ninth Circuit held, in part, that Title VII's exemption for Indian Tribes included a nonprofit health organization incorporated by two tribes.<sup>166</sup> The non-profit was not itself a Tribe and so did not qualify for the Tribal exemption. However, the court likened the tribal health organization to an arm of the sovereign tribes and ruled that the Tribal exemption applied.<sup>167</sup>

*Dille v. Council of Energy Resource Tribes*<sup>168</sup> reached a similar result. There, the Tenth Circuit held that a Tribal energy council organized by thirty-nine Indian Tribes could avail itself of Title VII's exemption for Indian Tribes.<sup>169</sup> The court determined that Title VII's exemption was enacted to give Indian Tribes greater control over their economic

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160. *Id.*

161. *Id.* at 1080-81.

162. *Id.*

163. 164 F.3d 706 (1st Cir. 1999).

164. *Id.* at 708.

165. 157 F.3d 1185 (9th Cir. 1998).

166. *Id.* at 1188.

167. *Id.*

168. 801 F.2d 373 (10th Cir. 1986).

169. *Id.* at 374-75.

enterprises.<sup>170</sup>

With respect to federal or state wage and hour law, the same three-part test has been applied. Relevant factors include the nature of the business, its location, the extent to which it serves non-Indian as well as Indian customers, whether it employs non-Indians as well as Indians, whether goods and services enter interstate commerce, and the degree to which the business or entity relates to tribal self-governance.

For example, in *Snyder v. Navajo Nation*,<sup>171</sup> the Ninth Circuit held that the Fair Labor Standards Act (FLSA) did not apply to Tribal law enforcement officers because law enforcement touched upon the Tribe's exclusive rights of self-governance in an intramural affair.<sup>172</sup> However, a different result was reached in *Solis v. Matheson*,<sup>173</sup> where the Ninth Circuit held that the FLSA did apply to a business selling tobacco and other products on reservation land because, although it was owned by Tribal members and was located on the reservation, it did not relate to a purely internal matter, as it employed and sold out-of-state products to both Indians and non-Indians.<sup>174</sup>

The same principles have been applied when examining claims under the National Labor Relations Act (NLRA). In *National Labor Relations Board v. Chapa de Indian Health Program, Inc.*,<sup>175</sup> the Ninth Circuit held that a nonprofit health organization was subject to the NLRA because the nonprofit contracted to provide services with non-Indians and Indians, was financially independent from the Tribal authority, and labor relations was not a subject uniquely related to Tribal self-governance concerning purely intramural affairs.<sup>176</sup> However, in other instances where Tribal authorities on reservation land were directly involved, courts have held that Indian Tribes could rely on the government exemption to the NLRA.<sup>177</sup>

A similar three-part test could be used to determine when and whether ANCs may rely upon shareholder preferences, or the extent to which a law of general applicability should apply to ANCs: (1) whether the law directly affects the ANC's internal governance of its workforce related to the Congressional mandate to promote the health, welfare,

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170. *Id.* at 375.

171. 382 F.3d 892 (9th Cir. 2004).

172. *Id.* at 894.

173. 563 F.3d 425 (9th Cir. 2009).

174. *Id.* at 428, 431.

175. 316 F.3d 995 (9th Cir. 2003).

176. *Id.* at 1000.

177. See Nat'l Labor Relations Bd. v. Pueblo of San Juan, 280 F.3d 1278, 1285-86 (10th Cir. 2000) (upholding an employment preference for Natives by a non-Native company that was contractually required as a condition to operating on tribal lands).

and economic well-being of ANC shareholders; (2) whether application of the law abrogates or undermines Congressional intent to allow ANCs to adopt shareholder preferences for the health, welfare, and economic well-being of its shareholders; or (3) whether there is proof that Congress did not intend the law to apply to ANCs.

A sensitive, flexible analysis of this type would protect the rights and interests of ANCs to promote the well-being of their respective shareholders without undermining broader societal goals protected by federal or state remedial statutes. The benchmark in all instances would be a neutral, shareholder-pegged preference that was not linked to any racial or ethnic characteristics and that protected each ANC's interest in promoting the economic well-being of its shareholders. If the initial inquiry reveals a valid shareholder preference, the analysis shifts to step two, analyzing the preference against the claim at issue.

#### **D. Examining the Test in Context**

As stated above, we propose a two-part test where the first step is to determine whether the shareholder preference is valid and then apply the preference to the specific claim at issue and determine whether the claim should be allowed to proceed.<sup>178</sup>

The test we propose is not rigid. No black and white rule would (or should) exist. However, certain general parameters would offer predictive guidance to assist ANCs in structuring their workforces. For example, in the second part of our proposed test's two-part analysis, in most situations, it is probable that laws dealing with health, benefits, safety, or disability leave would still apply to ANCs as the Congressional goals underlying those statutes parallel the Congressional goal underlying ANCSA. Consequently, the ADA, Family and Medical Leave Act, Employment Retirement Income Security Act, and Occupational Safety and Health Administration would apply to ANCs in probably most, but not all, instances. However, laws addressing hiring, discipline, pay, placement, or workforce management would probably not apply to ANCs, so long as a permissible shareholder preference was adopted. Such laws would conflict with the underlying Congressional goal to allow ANCs to adopt shareholder preferences for the purposes of promoting the health, welfare, and economic well-being of their shareholders. Accordingly, along with Title VII, the Age Discrimination in Employment Act, Equal Pay Act, FLSA, and § 1981 would not apply to ANCs in most cases.

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178. *See supra* Part III.C.

### E. Comparing the Proposed Test to Other Existing Analyses

The test we propose is validated by comparing it to other existing analyses. It fits comfortably within long-settled preemption models. For example, the underlying principles are comparable to how preemption cases are analyzed under the Railway Labor Act. In such cases, claims that depend upon an interpretation or application of a collective bargaining agreement are preempted under the Railway Labor Act.<sup>179</sup> However, if the claim is independent of the agreement it may proceed.<sup>180</sup>

To similar effect, if a claim involved interpretation or analysis or application of the shareholder preference, it would also be precluded. For example, assuming the existence of a valid shareholder preference, if a job applicant filed an ADA claim based on the allegation that he or she was not hired for a position based on a disability, the claim should be precluded as it would involve an interpretation or analysis or application of the shareholder policy. However, if a current employee filed a claim alleging that he or she was discharged because of a disability, the claim would not involve an interpretation or analysis or application of the shareholder policy, and would be allowed to proceed.

The test we propose is also conceptually related to implied preemption cases. In implied preemption cases, state law will be precluded when it conflicts with federal law or raises an obstacle to Congressional goals or objectives (so-called “conflict preemption”),<sup>181</sup> or when federal law is so pervasive in a given area that it can be said to occupy that field to prevent states from supplementing the law (so-called “field preemption”).<sup>182</sup> Analytically, field preemption is not a good fit. However, our proposed test is quite comparable to conflict preemption. Congress spoke. It intended § 1626(g) to allow ANCs to adopt shareholder preferences to promote the health, welfare, and economic well-being of its shareholders. Any law undermining that intent should be precluded. The two-step test we propose mirrors this aspect of conflict preemption.

### F. Summarizing the Approach

As noted, the gate-keeper or first step in all cases would be to first ascertain whether a permissible form of shareholder preference existed. Assuming this first step was satisfied, courts would then apply the

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179. *Consol. Rail Corp. v. Ry. Labor Execs. Ass’n*, 491 U.S. 299, 302–07 (1989).

180. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994).

181. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

182. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

three-part test outlined above to determine whether the particular statute or regulation in question would apply to the ANC under the specific circumstances of the case presented. If it did, that law would be precluded or preempted in that particular case. If it did not, then the claim could proceed. This approach protects individual rights, protects the rights and interests of ANCs, and safeguards Congressional intent as evidenced by § 1626(g) to allow ANCs flexibility to promote the health, welfare, and economic stability of their shareholders. This approach is also consistent with existing judicial analyses, and therefore an approach that fits comfortably within a predictable, stable framework for judicial administration.

### CONCLUSION

We began by reviewing solid statistics that demonstrate the tremendous positive impact ANCs have had on both the Alaska and national economy over the last forty years. The fact that ANCs have achieved such growth and power in such a short period of time is a testament to the innovative thinking that prompted the federal government to approach the Alaska Native land claims settlement with the goal of assisting Indians in Alaska to move toward true economic and cultural independence, as well as the hard work of countless Alaska Natives and others who brought the vision of ANCSA into reality. When ANCs prosper, their shareholders, the State of Alaska, and the United States all benefit.

In this Article we have demonstrated that ANCs are a living example of how we, as a nation, can learn from mistakes of the past and change the future for the better. In this post-economic downturn economy, the state and federal government cannot afford to be indecisive. We need to consolidate and strengthen the existing legal exemptions and exceptions that assist ANCs to prosper. Congress and the state legislature must continue to support ANCs toward greater economic independence by resolving conflicts in the laws that govern Tribes and ANCs. We need clear and consistent laws that protect and foster facially neutral ANC shareholder hiring preferences that are properly applied and do not result in unlawful racial discrimination. We also need to foster better understanding of ANC history and why Congress granted ANCs preferences in government contracting, that is, to assist thousands of Native shareholders who reside in remote communities with little or no cash-based economy. Increasing understanding promotes cooperation among small businesses and disadvantaged minorities. Clarity and consistency in the law reduce legal risk, which means fewer lawsuits against ANCs, and keeps much

needed economic resources working for ANC shareholder economic and cultural welfare. Therefore, supporting changes in the law will assist ANCs to extend the goals of ANCSA into the next generation, and will result in corresponding positive benefits to the State of Alaska and the national economy as a whole.