

# PUTTING THE LAST FRONTIER TO WORK: IN DEFENSE OF ALASKA HIRE

Brendan McGuire\*

## ABSTRACT

*Since statehood, Alaska has had one of the worst unemployment rates in the nation. The state has long combated its joblessness epidemic with a suite of laws known as Alaska Hire, which imposes a resident hiring preference on public works projects in the state. This popular law has been in place in one form or another since the state's first legislature passed an early version in 1960. Alaska Hire's story changed when former Attorney General Kevin Clarkson wrote a memo to Governor Mike Dunleavy arguing that the law is unconstitutional under the federal Privileges and Immunities Clause and the Alaska Equal Protection Clause, and that the statute should no longer be enforced. This Note provides a counterpoint to Attorney General Clarkson's memo by showing that Alaska Hire is legal under both the federal and state constitutions. The Note contends that Alaska's unique circumstances coupled with the legal improvements the current version of Alaska Hire has made in light of its predecessors' defects cut against Attorney General Clarkson's arguments. With the future of Alaska Hire in question, this Note hopes to provide a starting point for any future legal defenses of this eminently important law.*

---

Copyright © 2021 by Brendan McGuire.

\* Duke University School of Law, J.D. 2021; University of Chicago, B.A. 2016. I would like to thank Professor Rebecca Rich and my peers in the Scholarly Writing Workshop for their valuable feedback as I wrote this Note. Many thanks to the wonderful editors of the *Alaska Law Review* whose hard work and insights greatly improved this Note both above and below the line. A special thanks to Executive Editor Chase Hamilton and Lead Editor Madeline Coburn for leading this editing team. Finally, I cannot thank Katie Lew enough for her love, support, and Bluebooking expertise.

## I. INTRODUCTION

What can a state do to lift its residents out of unemployment?<sup>1</sup> This question is of acute relevance to the citizens of Alaska, whose state has the worst jobless rate<sup>2</sup> in the nation.<sup>3</sup> Since 1976, Alaska has endured stubbornly high unemployment with a jobless rate averaging nearly eight percent.<sup>4</sup> That figure is twenty-seven percent higher than the national average<sup>5</sup> and is shockingly close to the ten percent unemployment rate seen nationally at the peak of the Great Recession.<sup>6</sup> These numbers are all the more staggering when accounting for the immense economic prosperity the United States has experienced in the past several decades.<sup>7</sup>

---

1. The U.S. government defines a person as unemployed if “they do not have a job, have actively looked for work in the prior 4 weeks, and are currently available for work.” *How the Government Measures Unemployment*, U.S. BUREAU LAB. STAT., [https://www.bls.gov/cps/cps\\_htgm.htm#employed](https://www.bls.gov/cps/cps_htgm.htm#employed) (last modified Oct. 8, 2015).

2. “Unemployment” and “jobless” are used interchangeably throughout this Note.

3. U.S. BUREAU LAB. STAT., U.S. DEP’T LAB., STATE EMPLOYMENT AND UNEMPLOYMENT – JANUARY 2020, at 1 (2020), [https://www.bls.gov/news.release/archives/laus\\_03162020.pdf](https://www.bls.gov/news.release/archives/laus_03162020.pdf). In January 2020, Alaska had an unemployment rate of six percent, the highest of the fifty states and the District of Columbia. *Id.* When referring to unemployment trends in Alaska and the United States at large, this Note does not include statistics from after January 2020 unless specifically noted. This is because of the unique impact of the COVID-19 pandemic and its attendant public health measures on the national job market. *See, e.g.,* Neil Irwin, *A Jobs Report Without Silver Linings*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/upshot/jobs-report-unemployment.html> (describing job loss due to the COVID-19 pandemic); *see also Unemployment Rates for States, Seasonally Adjusted*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/web/laus/laumstrk.htm> (last modified Apr. 16, 2021) (noting that as of December 2020, Alaska has an unemployment of 5.8%, the 27th highest in the nation and Hawai’i has the largest, at 9.3%).

4. *BLS Data Series LASST020000000000003*, U.S. BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/srgate> (last modified Mar. 3, 2021) (enter series id LASST020000000000003, click “next->,” “all years,” then “retrieve data”). Unfortunately, readily available data does not go back to the start of Alaska’s statehood in 1959. 1976 is the earliest year for which data is available.

5. *Compare id., with Unemployment Rate – Seasonally Adjusted*, U.S. BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/srgate> (enter series id LNS14000000, click “next->,” “all years,” then “retrieve data”).

6. U.S. BUREAU LAB. STAT., U.S. DEP’T LAB., THE RECESSION OF 2007–2009, BLS SPOTLIGHT ON STATISTICS 2 (2012), [https://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](https://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf). The national unemployment rate reached 14.7% in April 2020, the highest jobless rate during the COVID-19 pandemic. U.S. BUREAU LAB. STAT., U.S. DEP’T LAB., *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, TED: THE ECON. DAILY (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?>

7. Between 1980 and 2019, the United States accounted for twenty to twenty-

The sources of the joblessness epidemic, including geography, demographics, and non-resident workers, form a complex puzzle.<sup>8</sup> The Alaskan legislature has confronted one piece of this puzzle, non-resident workers, with a suite of laws popularly known as Alaska Hire. Since its inception in 1960,<sup>9</sup> the legislative program has required favored hiring of Alaska residents for public works projects in the state.<sup>10</sup> The current version of the law allows the Commissioner of Labor and Workforce Development to set a resident hiring preference<sup>11</sup> for select public works projects.<sup>12</sup>

However, in October 2019, Alaska Attorney General Kevin Clarkson<sup>13</sup> wrote a memo to Governor Mike Dunleavy<sup>14</sup> opining that this iteration of Alaska Hire is unconstitutional under the Privileges and Immunities Clause of the U.S. Constitution<sup>15</sup> and Alaska's Equal Rights,

---

five percent of global Gross Domestic Product (GDP) based on Purchasing Power Parity (PPP). *GDP Based on PPP, Share of World*, INT'L MONETARY FUND, <https://www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOORLD> (last visited Mar. 26, 2020) (select "United States" on "Country" scroll menu).

8. See *infra* Section II.

9. ALASKA STAT. § 36.10.150 (2019); ALASKA STAT. § 38.40.030 (1972), *invalidated by* *Hicklin v. Orbeck*, 437 U.S. 518 (1978); 1960 Alaska Sess. Laws ch. 177 (enacted as ALASKA STAT. § 36.10.010 (1960)), *invalidated by* *Robison v. Francis*, 713 P.2d 259 (Alaska 1986).

10. See ALASKA STAT. § 36.10.150 (2019); ALASKA STAT. § 38.40.030 (1972), *invalidated by* *Hicklin*, 437 U.S. 518; 1960 Alaska Sess. Laws ch. 177 (enacted as ALASKA STAT. § 36.10.010 (1960)), *invalidated by* *Robison*, 713 P.2d 259.

11. A resident hiring preference is a required percentage of resident workers employed on a given project. See Robert A. Beauregard, *Resident Hiring Preference Ordinances: A Comparative Analysis*, 1 ECON. DEV. Q. 124 (May 1987).

12. ALASKA STAT. § 36.10.150 (2019). Imposing a hiring preference requires the Commissioner to make a determination, based on statutory factors, that a zone exists and then to set the level of the hiring preference, again based on other statutory factors. *Id.* § 36.10.150(b)–(c); see also *infra* Sections III.D–E.

13. Attorney General Clarkson resigned from his position in August 2020 after it emerged that he had sent inappropriate text messages to a state employee. See, e.g., Azi Paybarah, *Alaska Attorney General Resigns Over Texts to Female State Worker*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/us/alaska-clarkson-resignation.html>.

14. Memorandum from Kevin G. Clarkson, Att'y Gen., Alaska to Michael J. Dunleavy, Governor, Alaska (Oct. 3, 2019), [http://law.alaska.gov/pdf/opinions/opinions\\_2019/19-005\\_AK-hire.pdf](http://law.alaska.gov/pdf/opinions/opinions_2019/19-005_AK-hire.pdf) [hereinafter *Clarkson Memo*].

15. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. "The object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States [as] one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States so far as the advantages resulting from citizenship in those States are concerned.'" *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul v. Virginia*, 75 U.S. 168 (1869)). However, the Clause does not mean that "state citizenship or residency

Opportunities, and Protection Clause (the “Alaska Equal Protection Clause”)<sup>16</sup> and thus should not be enforced.<sup>17</sup> The thrust of this argument, which lacks substantive analysis of the current iteration of the Alaska Hire statute, is that mitigating unemployment is not a legitimate legislative goal and a resident hiring preference does not form a constitutionally required close nexus with that goal.<sup>18</sup> With the future of the statute in limbo, this Note offers a counterargument to the Attorney General’s memo by contending that Alaska Hire is valid under both constitutions.

The unemployment epidemic that Alaska Hire is intended to mitigate is a result of Alaska’s unique characteristics: Alaska’s geographic remoteness makes employment of most residents outside of the state infeasible;<sup>19</sup> demographic and economic trends show that more Alaskans will be vying for fewer in-state jobs in the future;<sup>20</sup> and nonresident workers account for over a fifth of the state’s workforce.<sup>21</sup> As this Note will argue, it is legally significant that these characteristics are either inherent to the state—as in the case of geography—or so deeply entrenched as to be innate features of the state economy.<sup>22</sup>

Efforts to use statutory guardrails to mitigate unemployment in Alaska date back to 1960, when the state’s first legislature took action to secure employment opportunities for the state’s residents with the first iteration of what came to be known as Alaska Hire.<sup>23</sup> This initial law, which required preferential hiring for Alaska residents on public works projects,<sup>24</sup> was supplemented in 1972 with a law that expanded the hiring

---

may never be used by a State to distinguish among persons” and States do not always have to “apply all [of their] laws or all [of their] services equally to anyone, resident or nonresident, who may request to do so.” *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978).

16. “This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.” ALASKA CONST. art. I, § 1 (emphasis added).

17. *Clarkson Memo*, *supra* note 14, at 2.

18. *Id.* at 10. The test described here is derived from *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624 (Alaska 1989). *See infra* Section III.E.

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section II.C.

22. *See infra* Section IV.B. for a discussion of how these features of Alaska create a significant state interest for purposes of the Alaska Equal Protection Clause. For a full discussion of how intractable these characteristics are, *see infra* Section II.

23. ALASKA STAT. §§ 36.10.010–.110 (1960) (repealed 1986).

24. Public works here refers to “contracts let by the state boroughs, cities and school districts for construction, repair, preliminary surveys, engineering studies or maintenance work.” *Id.* § 36.10.010.

preference to contexts involving oil and gas leases.<sup>25</sup>

In 1978, shortly after Alaska Hire was expanded to include oil and gas leases, the statutory scheme faced its first major legal challenge in *Hicklin v. Orbick*,<sup>26</sup> in which the U.S. Supreme Court invalidated the expansion on the grounds that it violated the Privileges and Immunities Clause of the U.S. Constitution.<sup>27</sup> Alaska Hire faced another constitutional challenge in 1986 with *Robison v. Francis*,<sup>28</sup> wherein the public works portion of the statute was invalidated under the Privileges and Immunities Clause.<sup>29</sup> In response to *Hicklin* and *Robison*, the Alaska legislature enacted the current iteration of the law, which significantly curtailed the reach of the statute.<sup>30</sup> In 1989, a limited provision of that law was struck down as invalid under the Alaska Equal Protection Clause in *State v. Enserch Alaska Construction, Inc.*<sup>31</sup> Since this period of upheaval, the status of Alaska Hire was relatively unchanged for thirty years and continued to be enforced by the state largely without pause.<sup>32</sup>

This legal calm came to an end in October 2019, with the release of Attorney General Clarkson's memo to Governor Dunleavy and an end to Alaska Hire's enforcement.<sup>33</sup> Not long after the memo was announced,

---

25. *Id.* §§ 38.40.010-.090 (1972), *invalidated by Hicklin v. Orbeck*, 437 U.S. 518 (1978).

26. 437 U.S. 518 (1978).

27. *Id.* at 523-30.

28. 713 P.2d 259 (Alaska 1986).

29. *See id.* at 266; *see also infra* Section III.C.

30. *See* 1986 Alaska Sess. Laws ch. 33; *see also infra* Section III.D.

31. 787 P.2d 624 (Alaska 1989).

32. *See Clarkson Memo, supra* note 14, at 5 ("Since [*Enserch*], the Department of Labor and Workforce Development has consistently designated the entire State as a 'zone of underemployment,'" allowing enforcement of Alaska Hire's resident hiring preferences on public works throughout the state); *see also State Settles Lawsuit Over Alaska Hire Employment Statute*, ASSOCIATED PRESS (Nov. 28, 2019), <https://apnews.com/dc626ff5e41649908bb3eca1d1e926ad> ("This is a law that's been on the books for over 30 years. It's been a law that probably six or eight different governors have followed and probably eight or 10 attorney generals have followed, Republicans and Democrats and independents."). The lone exception to this continual enforcement was a two-year suspension in the aftermath of the Great Recession. Elwood Brehmer, *Alaska Hire Preference in Limbo After AG Drops Defense*, ALASKA J. COM. (Oct. 30, 2019), <https://www.alaskajournal.com/2019-10-30/alaska-hire-preference-limbo-after-ag-drops-defense> ("The resident hiring preference was suspended in 2013 under former Gov. Sean Parnell when the Lower 48 was continuing to recover from the Great Recession that largely missed Alaska. It was reinstated statewide in June 2015 by Gov. Bill Walker's administration after the national unemployment rate had fallen below Alaska's . . .").

33. *See Clarkson Memo, supra* note 14, at 1 ("I have concluded that Alaska Hire violates both the U.S. and Alaska Constitutions, and that the State should stop enforcing its provisions.").

the state settled a suit challenging the validity of the statute for \$50,000.<sup>34</sup> While the memo has no binding effect, the settlement clearly signaled the executive branch's refusal to continue enforcing Alaska Hire. Without enforcement of the statute, a key tool for mitigating unemployment in Alaska has been rendered nugatory. In response to these developments, this Note offers a rebuttal to Attorney General Clarkson's opinion by arguing that Alaska Hire is indeed constitutional under the Privileges and Immunities Clause of the U.S. Constitution and the Alaska Equal Protection Clause. In making this argument, this Note aims to provide the building blocks for any legal defense of the statute that may arise in the future.

This Note proceeds in three sections. Section II begins by describing the idiosyncratic circumstances in which Alaska's unemployment problem exists. These circumstances are created by the combination of Alaska's geography, demographics, economic trends, and the prevalence of nonresidents in Alaska's economy. Having established both the conditions that Alaska Hire is meant to address and the context in which it must be legally analyzed, Section III reviews the statutory evolution of Alaska Hire alongside the various legal challenges it has faced. In so doing, this Section first illustrates the legal tests under which resident hiring preferences are analyzed and the constitutional deficiencies of the previous iterations of Alaska Hire. Section III then analyzes how the current version of the statute has cured the defects of its predecessors. Section IV argues that the current iteration of Alaska Hire is valid under both the federal Privileges and Immunities Clause and the Alaska Equal Protection Clause. This Section first contends that the unique circumstances present in Alaska coupled with the narrow tailoring of the statute's hiring preference render the law constitutionally valid under the Privileges and Immunities Clause. This Section concludes by finding the statute constitutional under the Alaska Equal Protection Clause as it addresses a compelling state interest with the least restrictive means practicable.

## II. WHY ALASKAN UNEMPLOYMENT IS UNIQUE

To understand both the necessity and the constitutionality of Alaska Hire, it is important to appreciate how idiosyncratic the state's unemployment situation is. Alaska's unemployment problem is uniquely intractable. The intransigence and sheer scale of joblessness in Alaska

---

34. Elwood Brehmer, *State Settles Alaska-Hire Lawsuit Brought by Contractor*, ANCHORAGE DAILY NEWS (Dec. 4, 2019), <https://www.adn.com/business-economy/2019/12/04/state-settles-alaska-hire-lawsuit-brought-by-contractor>.

over time puts it in a category apart from its peers. In all but six of the years since 1980, the state's unemployment rate has been in the in the top ten nationally; for nearly half of those years, it had the highest unemployment rate in the nation.<sup>35</sup> The unyielding nature of the state's jobless rate, as well as economic projections,<sup>36</sup> indicates a stark reality: unemployment will likely continue to be prevalent among Alaska's residents.

This Section analyzes the reasons behind this unique problem by identifying three contributing factors, which will be analyzed in turn: (a) the scale of Alaska's geography, (b) the impact of the state's demographics, and (c) the prevalence of nonresident workers in the state's economy. The strange brew concocted by the alchemy of these three ingredients make unemployment seemingly endemic to Alaska. However, the idiosyncratic combination of these factors highlights Alaska's exceptionalism in the context of tackling unemployment and indicates that a resident hiring preference is an appropriate tool to mitigate joblessness. Understanding the singular nature of Alaska's unemployment situation and the ways in which a resident hiring preference is suitable to address that problem makes it possible to comprehend the role – and propriety – of Alaska Hire.

## A. Alaska's Geography

The reality presented by Alaska's geography is the first factor contributing to the uniqueness of the state's joblessness problem. As any elementary school geography student knows, Alaska is big – the state's landmass is equivalent to nearly twenty percent of the contiguous United States' land.<sup>37</sup> The state is around 1,000 miles away from the lower forty-

---

35. See *States and Selected Areas: Employment Status of the Civilian Noninstitutional Population, January 1976 to Date, Seasonally Adjusted*, BUREAU LAB. STAT., <https://www.bls.gov/web/laus/ststdsadata.txt> (last visited Feb. 2020) (providing data that can be used to calculate the ranked average unemployment rate of every state by year).

36. See *infra* Section II.B.

37. See U.S. CENSUS BUREAU, U.S. DEP'T COM., ALASKA: 2010 POPULATION AND HOUSING UNIT COUNTS 10 (2012), <https://www2.census.gov/library/publications/decennial/2010/cph-2/cph-2-3.pdf> (presenting Alaska data); *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> (last visited Feb. 26, 2021) (presenting federal data); see also *How Big Is Alaska*, ALASKA.ORG, <https://www.alaska.org/how-big-is-alaska> (last visited Mar. 19, 2020) (featuring an interactive tool to compare the size of Alaska to other states).

eight at its closest point.<sup>38</sup> Within that huge area, only about sixty-six percent of residents live in urban areas,<sup>39</sup> well below the national average of over eighty percent.<sup>40</sup> Many of the state's rural communities are exceedingly isolated, and reliant on sea and air travel due to the lack of road systems.<sup>41</sup> In short, getting around – and out of – the state is not easy and “‘rural’ in Alaska carries a unique meaning.”<sup>42</sup> These inalterable geographic realities mean that employment physically located inside of the state is more practically accessible to Alaskan residents than employment located elsewhere.

## B. The Impact of Alaska's Demographics

Another factor that makes Alaska's unemployment problem distinctive is the relationship between the state's demographics and economic realities tied to employment. Between 2020 and 2025, the state's population is projected to grow by 0.6%, and then grow again by 0.5% between 2025 and 2030.<sup>43</sup> This expansion will be met with a projected

---

38. Driving Directions from Ketchikan, AK to Seattle, WA, GOOGLE MAPS, <https://www.google.com/maps> (follow “Directions” hyperlink; then search starting point field for “Ketchikan, AK” and search destination field for “Seattle, WA”). The shortest driving route between the two municipalities is 1,115 miles. *Id.*

39. “The U.S. Census Bureau identifies two types of urban areas: Urbanized Areas (UAs) of 50,000 or more people; Urban Clusters (UCs) of at least 2,500 and less than 50,000 people. *Urban and Rural*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html> (last visited Mar. 24, 2020). “‘Rural’ encompasses all population, housing, and territory not included within an urban area.” *Id.*

40. See U.S. CENSUS BUREAU, *supra* note 37, at 9 (presenting Alaska data); 2010 *Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html> (last visited Feb. 26, 2021) (presenting federal data).

41. See 99% *Invisible: Dead Cars*, RADIOTOPIA (Sept. 17, 2019), <https://99percentinvisible.org/episode/dead-cars/> (describing transportation in the Yukon-Kuskokwim Delta in light of the region's lack of road system); see also Kevin Baird, *Senators Want More Answers on Marine Highway Closure*, JUNEAU EMPIRE (Feb. 21, 2019), <https://www.juneauempire.com/news/senators-want-more-answers-on-marine-highway-closure/> (“If you shut down the ferry operations, you are . . . potentially strangling those communities because they may not make it through winter, if the airports can't support them.”).

42. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 82 (2007). This use of “rural” was in the context of voter access, but the assertion holds true in the employment context.

43. EDDIE HUNSINGER ET AL., ALASKA DEP'T LABOR & WORKFORCE DEV., ALASKA POPULATION PROJECTIONS: 2017 TO 2045, at 15 (2018), <https://edyhsg.github.io/documents/PopProj2017to2045.pdf>. It should be noted that population growth here refers to growth in the resident population. *Id.* at 5.

statewide job growth of only 0.4%, a fifty percent lag behind population growth.<sup>44</sup> Furthermore, the above-mentioned rural-urban divide<sup>45</sup> is critical, as urban areas experience notably more job growth than rural areas.<sup>46</sup> The lag in job growth in rural areas is not unique to Alaska, but the pains of that lag are particularly acute within the state. Through 2030, the population in Alaska's rural regions is projected to grow by nearly ten percent.<sup>47</sup> The job growth in those same regions is projected to be much lower than that ten percent — in some areas, there may be negative job growth.<sup>48</sup> While the projected lag is less severe in urbanized portions of the state, job growth in Alaskan cities too will likely be unable to keep up with population growth; there simply won't be enough jobs for residents of Alaska.<sup>49</sup> This problem is all the more stark in comparison with the rest of the country: prior to the COVID-19 pandemic, the nation as a whole was projected to experience 7.9% job growth, nearly 20 times higher than projections for Alaska.<sup>50</sup> The demographic and economic projections portend an Alaska with more residents and far fewer local jobs to employ them, putting the state in an extraordinary position as compared to its peers.

### C. Alaska's Emphasis on Nonresident Workers

The third factor contributing to Alaska's unique unemployment problem is the state economy's emphasis on nonresident workers. In 2019, over one-fifth of the workers in Alaska were nonresidents.<sup>51</sup> The majority of nonresident workers are employed in seasonal industries, with nearly sixty percent of such workers spending less than half the year working in

---

44. SUSAN LUND ET AL., MCKINSEY GLOB. INST., *THE FUTURE OF WORK IN AMERICA: PEOPLE AND PLACES, TODAY AND TOMORROW* 55 (2019). National job growth over the same period is projected to be nearly eight percent. *See id.* This growth in jobs will be met with a more modest population increase between 2020 and 2030 of less than seven-and-a-half percent. *See* SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. DEPT. OF COM., *PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060*, at 6 (2015).

45. *See supra* Section II.A.

46. Between 2007 and 2017, twenty-five urban areas accounted for over two-thirds of the job growth in the U.S. LUND ET AL., *supra* note 44, at 4. Twenty-five urban areas are projected to account for sixty percent of job growth through 2030. *Id.* at 10.

47. HUNSINGER ET AL., *supra* note 43, at 26.

48. LUND ET AL., *supra* note 44 at 10–11.

49. *See id.* (describing the potential for net job loss in rural and urban counties).

50. *See id.* at 55 (displaying projected net job growth for each of the fifty states).

51. SARA WHITNEY & DAN ROBINSON, ALASKA DEP'T LABOR & WORKFORCE DEV., *NONRESIDENTS WORKING IN ALASKA* 6 (2021).

Alaska.<sup>52</sup> The construction industry, which is the sector most engaged with public works contracts (and which is not considered seasonal), has a workforce that is over eighteen percent nonresident employees,<sup>53</sup> with nonresidents holding around twenty percent of unskilled positions.<sup>54</sup> The gravamen of these statistics is two-fold: one-fifth of Alaska's workforce is populated by nonresidents of the state and, while nonresidents have a significant presence in the construction industry, it is by no means the sector upon which this class of worker is most dependent. The first point illustrates that nonresidents have a massive influence on employment rates in Alaska; the second shows that even if nonresidents are disfavored in the construction industry, they would still have job opportunities in the state's other sectors.

With more Alaskans trying to fill fewer positions in the future, unmitigated economic embrace of nonresident workers will surely exacerbate unemployment among residents. Nonresident workers in Alaska have a proven willingness – and ability – to travel away from home for work. There is no such presumption for natives of Alaska. Indeed, Alaskans are uniquely tied to local jobs because of their state's geography.<sup>55</sup> This means that in the context of unskilled positions, a role filled by a nonresident equals denial of that position to a resident. Critically, the converse of this equation is not true. Thus, a tool to mitigate the displacement of residents from jobs by nonresidents, particularly in the case of unskilled positions, is an appropriate tool to stem the tide of resident joblessness.

The combination of the preceding three factors makes Alaska's unemployment problem unique. The state's unemployment problem is characterized by a number of uncontrollable factors, so the best way to address the problem is by looking to a factor which *can* be controlled. Of these factors, the one which Alaska's government can decisively and precisely impact, is the number of nonresidents working in Alaska.

### III. THE EVOLUTION OF ALASKA HIRE

To understand both the necessity and the constitutionality of Alaska Hire, it is important to appreciate the law's statutory lineage. This Section

---

52. The vast majority of nonresident workers in Alaska are employed by industries with "high seasonality." *Id.* at 4, 8.

53. *Id.* at 10.

54. ROB KREIGER & SARA WHITNEY, ALASKA DEP'T LABOR & WORKFORCE DEV., NONRESIDENTS WORKING IN ALASKA 10 (2020). For purposes of this Note, what positions the report labels as "Helpers" or "Construction Laborers" are considered unskilled positions.

55. *See supra* Section II.A.

will track the history of the statutory scheme chronologically, beginning with the original 1960 version of the law, then the 1972 expansion. After delving into *Hicklin v. Orbeck*,<sup>56</sup> the first major challenge to Alaska Hire, the Section will turn to the subsequent challenge presented in *Robison v. Francis*.<sup>57</sup> This Section then describes *State v. Enserch Alaska Construction, Inc.*,<sup>58</sup> the latest fully litigated challenge to the statute. This Section concludes by describing the current state of Alaska Hire and the Clarkson Memo. This discussion lays the groundwork for the conclusion that the current iteration of Alaska Hire lacks the constitutional defects found in its predecessors, which will be discussed fully in Section IV.

### A. The Birth of Alaska Hire

Reviewing the constitutional defects of earlier versions of Alaska Hire illuminates the constitutional strengths of the statute's current iteration. Records of Alaska's early legislative actions are sparse, so information regarding the passage of Alaska Hire's first iteration is meager. However, the text of the enacted law makes clear its goal: put Alaska residents to work. Under the law, on projects arising from public works contracts<sup>59</sup> with state, borough, and municipal governments, ninety to ninety-five percent of workers were required to be qualified state residents.<sup>60</sup> Additionally, in the event of layoffs, such resident workers were to be terminated last.<sup>61</sup> To be considered a resident, an individual had to have resided in Alaska for at least one year before their employment on the contract.<sup>62</sup> Contractors found in violation of the Act would have an amount equal to that which would be paid to "a displaced resident" deducted from their payment under the contract.<sup>63</sup>

This first version of Alaska Hire was extremely broad in its envisioned application. There were only two statutory limits on the scope of the law's requirements. First, the statute's provisions did not apply to projects receiving federal aid if doing so would conflict with federal law

---

56. 437 U.S. 518 (1978).

57. 713 P.2d 259 (Alaska 1986).

58. 787 P.2d 624 (Alaska 1989).

59. These contracts included those for "construction, repair, preliminary surveys, engineering studies or maintenance work." § 1(a), 1960 Alaska Sess. Laws ch. 177 (enacted as ALASKA STAT. §§ 36.10.010–.110) (*invalidated by Robison*, 713 P.2d 259).

60. *Id.* On qualifying projects of ten or more workers, ninety-five percent of those employed were required to be Alaska residents. *Id.* If the project employed less than ten workers, that percentage dropped to ninety percent. *Id.*

61. *Id.* § 1(d).

62. *Id.* § 1(b)(1). The statute also required that the individual be a journeyman or apprentice in their "particular trade." *Id.* § 1(b)(2).

63. *Id.* § 8.

prohibiting “preferences or discriminations among United States citizens.”<sup>64</sup> Second, contractors could petition the Commissioner of the Department of Labor (“the Commissioner”) for an exemption if resident workers were unavailable.<sup>65</sup> Beyond these two caveats, the law clearly envisioned an expansive role for itself in influencing the workforce employed on public works projects.

A decade after the enactment of the first Alaska Hire statute, the Alaska legislature expanded the law’s scope. In 1972, the statute was amended to cover all employment resulting from oil and gas leases to which the state was a party.<sup>66</sup> The expansion’s resident hiring preference covered contractors, subcontractors of contractors, and suppliers of contractors and subcontractors.<sup>67</sup> This meant that while the law was ostensibly related to oil and gas leases, its scope was so wide that jobs with only a tenuous connection to the energy sector fell under its coverage.<sup>68</sup> The legislative history is, again, unforthcoming, but the statutorily-provided legislative findings are enlightening:

“The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested to will persist without drastic governmental intervention. . . . [T]he state has an obligation to assure that the benefits of [employment from oil and gas contracts] ensure to the residents of the state.”<sup>69</sup>

Clearly, the legislature attributed Alaska’s unemployment epidemic to the state’s unique features.

## B. The First Challenge: *Hicklin v. Orbeck*

It was the expansion of coverage to include oil and gas leases that provoked the first legal challenge to Alaska Hire. Decided by the U.S. Supreme Court in 1978, *Hicklin v. Orbeck* found the resident hiring preference in oil and gas contracts to be unconstitutional under the

---

64. *Id.* § 2.

65. *Id.* § 5.

66. ALASKA STAT. § 38.40.050 (1972) (repealed 1978) (“APPLICABILITY OF CHAPTER. (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after the effective date of this chapter . . .”).

67. *Id.*

68. See *infra* Section III.B.

69. ALASKA STAT. § 38.40.020 (1972) (repealed 1978).

Privileges and Immunities Clause of the U.S. Constitution.<sup>70</sup> The lessons to be learned from *Hicklin* are three-fold. One, a resident hiring preference necessarily implicates a right that is fundamental under the Privileges and Immunities Clause.<sup>71</sup> Two, for a resident hiring preference to pass constitutional muster, (a) nonresidents must be a “peculiar source of . . . evil” such that there is a substantial reason for the discrimination against them and (b) the discrimination against nonresidents must be reasonably related to the danger this cohort poses.<sup>72</sup> Three, under Privileges and Immunities Clause analysis, state ownership of the property to which discrimination is tied is one factor – and a potentially crucial one – in support of said discrimination’s constitutionality.<sup>73</sup> The upshot is that while Alaska Hire’s resident hiring preference will necessarily face scrutiny under the Privileges and Immunities Clause, the statute has a clear road to constitutionality.

The Supreme Court has long recognized the Privileges and Immunities Clause to ensure citizens of one state can enjoy certain fundamental rights in other states.<sup>74</sup> To assess compliance with this purpose, challenges under the Clause are evaluated using a two-part test. First, the court determines whether a fundamental right protected by the clause is burdened.<sup>75</sup> This analysis is necessary because “the clause . . . secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.”<sup>76</sup> Second, if a fundamental right

---

70. *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978).

71. *See id.* (describing precedent as “recogniz[ing] that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State”).

72. *Id.* at 525–26.

73. *Id.* at 529.

74. The rights protected by the Privileges and Immunities Clause are “those which are fundamental.” *Slaughter-House Cases*, 83 U.S. 36, 76 (1872). Generally speaking, the “sole purpose” of the clause is “to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.” *Id.* at 77. The Supreme Court curbed this broad language in later cases allowing disparate treatment of non-citizens by states if doing so did not implicate rights fundamental to national unity. *See, e.g., Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 388 (1978) (holding the right to hunt not protected by the Privileges and Immunities Clause).

75. *See Baldwin*, 436 U.S. at 387. The reach of the Privileges and Immunities Clause is limited to “fundamental rights” involving “basic and essential activities, interference with which would frustrate the purposes of the formation of the Union.” *Id.*

76. *Hicklin*, 437 U.S. at 525 (quoting *Ward v. Maryland*, 79 U.S. 418, 430 (1871)).

is indeed implicated, the state must show that (a) nonresidents present a “peculiar source of the evil,” which shows that the discrimination has a substantial reason, and (b) that there is “a reasonable relationship between the danger represented by non-citizens” and the discrimination imposed upon them.<sup>77</sup>

In applying this test to the oil and gas provision of Alaska Hire, the Supreme Court found that the statute burdened the right to employment, which was determined to be fundamental for purposes of the Privileges and Immunities Clause.<sup>78</sup> The Court then determined that no showing was made that nonresidents presented a “peculiar source of evil” in the context of unemployment.<sup>79</sup> In fact, unemployment stemmed largely from residents being unqualified for positions,<sup>80</sup> a point this Note will pick up later.<sup>81</sup> Finally, it was held that the discrimination against nonresidents did not bear a substantial relationship to the evil they were said to represent.<sup>82</sup> In so holding, Justice Brennan, on behalf of the Court, wrote that the challenged provision “extends to employers who have no connection whatsoever with the State’s oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State.”<sup>83</sup> Accordingly, the provision was overinclusive to the point of having an unconstitutionally wide application.

Despite these findings, the Court did not dismiss Alaska’s argument that its interest in the jobs being regulated allowed for the challenged discrimination.<sup>84</sup> Indeed, Justice Brennan wrote that “a State’s ownership of the property with which the statute is concerned is a factor — although often the crucial factor — to be considered in evaluating whether the statute’s discrimination against noncitizens violates the [Privileges and Immunities] Clause.”<sup>85</sup> A version of Alaska Hire which targets state-owned property is therefore less problematic under the Privileges and Immunities Clause than one that encompasses activity in which the state lacks a direct interest. While state interest in the activity targeted by a resident hiring preference law gets the statute closer to constitutionality, litigation after *Hicklin* showed that more is needed to pass constitutional muster.

---

77. *Id.* at 525–26 (quoting *Toomer v. Witsell*, 334 U.S. 385, 399 (1948)).

78. *See id.* at 525 (describing Court precedent finding the right to employment to be fundamental under the Privileges and Immunities Clause).

79. *Id.* at 527.

80. *Id.* at 526–27.

81. *See infra* Section IV.A.

82. *Hicklin*, 437 U.S. at 527.

83. *Id.* at 530.

84. *See id.* at 529.

85. *Id.*

### C. The Aftermath of *Hicklin*

After *Hicklin v. Orbeck*, the future of Alaska Hire's public works provision was in question. In response to this uncertainty, the state's Attorney General wrote a memo to the Commissioner arguing that the remaining provisions of Alaska Hire were indeed constitutional under the Privileges and Immunities Clause.<sup>86</sup> This claim rested on the so-called "'market participant' exception" (more commonly known as the "market participant exception" in other constitutional contexts).<sup>87</sup> In essence, the Attorney General argued that because the state acted as a market participant when engaging in public works contracts, it was able to exercise the right to deal with whomever it chose (i.e. to prefer residents over nonresidents).<sup>88</sup>

The legal path forward put forth by the Attorney General proved to be short-lived. Just four years later, in 1986, the Alaska Supreme Court decided *Robison v. Francis*, which held the public works provision of Alaska Hire unconstitutional under the Privileges and Immunities Clause of the U.S. Constitution.<sup>89</sup> As in *Hicklin*, it was established that the challenged provision burdened a fundamental right, namely the right to employment.<sup>90</sup> The Court was also unpersuaded that nonresidents presented a peculiar evil, noting, *inter alia*, the lower court's findings that Alaska's unemployment rate was, at the time, close to the national average.<sup>91</sup> Having dispensed with these issues, the bulk of the opinion discussed the relationship between the resident hiring preference and the discrimination against nonresidents.

The Alaska Supreme Court reasoned that the relationship between the harm presented by nonresidents and the discrimination brought against them was constitutionally deficient.<sup>92</sup> The court declared that "discrimination for the purpose of benefiting local residents [is] recognized by us as improper."<sup>93</sup> To begin this analysis, the Alaska Supreme Court described the market participant exception to the Privileges and Immunities Clause as creating a sliding scale of deference, with "far-reaching" discrimination earning the state little deference and

---

86. Memorandum from Wilson L. Condon, Att'y Gen. to Edmund N. Orbeck, Comm'r 1 (June 17, 1982), 1982 WL 43792.

87. *See id.* at 3–5.

88. *Id.* at 3.

89. *Robison v. Francis*, 713 P.2d 259, 261 (Alaska 1986); *see supra* Section III.B for a description of the test applied to statutes challenged under the federal Privileges and Immunities Clause.

90. *Robison*, 713 P.2d at 265.

91. *Id.* at 262–63.

92. *Id.* at 266.

93. *Id.*

narrowly tailored discrimination granting the state greater deference.<sup>94</sup> The Court determined that Alaska was owed little deference regarding the discrimination inherent to Alaska Hire's public works provision as almost all nonresidents were discriminated against (recall that ninety to ninety-five percent of workers were required to be residents), and the statute applied to subcontractors with no direct contractual relationship to the state.<sup>95</sup> The important implication of this reasoning is that if the resident hiring preference was more narrowly tailored, Alaska would have been afforded more deference under the market participant exception.

In another thread of analysis, the Alaska Supreme Court compared the contemporary Alaskan economy with that of Camden, New Jersey.<sup>96</sup> This discussion sheds light on the contribution that a locality's unique circumstances play in analyzing the constitutionality of resident hiring preferences. The potentially flummoxing comparison between Alaska and Camden was made by the Court in light of the landmark Privileges and Immunities Clause case, *United Building & Construction Trades Council v. Mayor of Camden*,<sup>97</sup> which analyzed a municipal ordinance requiring that forty percent of employees on city construction projects be city residents.<sup>98</sup> Whereas Camden's economy was in a condition of decay with high unemployment and the challenged ordinance contained a goal of forty percent resident employment, at the time *Robison* was decided, Alaska's economy was growing, unemployment was low, and the statute required resident employment of ninety percent or more.<sup>99</sup> The court in *Robison* found that *Camden's* distinct circumstances, as well as the fact that the U.S. Supreme Court did not reach a decision on the merits, meant the case did not support Alaska Hire's constitutionality.<sup>100</sup> Still, while *Camden* was not decided on the merits, the Court appeared to look favorably on the fact that the Camden ordinance was "merely setting conditions on the expenditures of funds [the city government] control[led]."<sup>101</sup>

---

94. *Id.* at 264. The oil and gas lease provision of Alaska Hire invalidated in *Hicklin* was cited as a state action meriting little deference due to its broad reach. *Id.* at 264-65; see also *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("[T]he States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.").

95. *Robison*, 713 P.2d at 265.

96. *Id.* at 269.

97. 465 U.S. 208 (1984).

98. *Id.* at 208.

99. *Robison*, 713 P.2d at 269.

100. *Id.* A decision was not reached on the merits because there had been neither a trial nor findings of fact below, and "[i]t would not be appropriate for [the Supreme] Court . . . to make factual determinations." *Camden*, 465 U.S. at 223. Accordingly, the case was remanded. *Id.*

101. See *Camden*, 465 U.S. at 223 (noting that states are afforded particular

### D. Legislative Responses to *Hicklin* and *Robison*

In 1986, just months after *Robison v. Francis* was decided, in order “to better fulfill the state’s duty of loyalty to its citizens,”<sup>102</sup> the Alaska legislature passed the version of Alaska Hire that largely remains in place to this day.<sup>103</sup> The defeats of *Hicklin* and *Robison* were clearly on the minds of the drafters of this new law as its content largely responds to the defects of its predecessors.<sup>104</sup> The contemporary iteration of Alaska Hire corrects the deficiencies of its antecedents by being both more narrow and more flexible in its application – two characteristics relevant to Privileges and Immunities Clause analysis.<sup>105</sup>

Compared to the oil and gas provision invalidated in *Hicklin*, the 1986 version of Alaska Hire is narrowly circumscribed as it applies only to public works contracts.<sup>106</sup> The current version is also much more flexible than the iteration invalidated in *Robison* – gone are the rigid requirements that nearly all employees under eligible contracts be residents of Alaska.<sup>107</sup> In place of these requirements are two more forgiving mechanisms for determining both the applicability and the size of the hiring preference.

The first of these mechanisms is the zone of underemployment provision.<sup>108</sup> Under this provision, the Commissioner first ascertains

---

deference in “analyzing local evils and in prescribing appropriate cures” when these relate to the spending of state funds).

102. § 1, 1986 Alaska Sess. Laws ch. 33.

103. ALASKA STAT. §§ 36.10.005–.990 (2019).

104. See, e.g., § 1, 1986 Alaska Sess. Laws ch. 33 (“If the courts find that a portion of AS 36.10 is unconstitutional, the public interest requires that the remaining portions be implemented as fully as possible.”).

105. See *infra* Section IV.A.

106. See ALASKA STAT. § 36.10.180 (2019). Subsection 36.10.180(1) of the Alaska Statutes applies to contracts

for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work, or any other retention of services necessary to complete a given project that is let by the state or an agency of the state, a department, office, state board, commission, public corporation, or other organizational unit of or created under the executive, legislative or judicial branch of state government.

Subsections 36.10.180(2)–(4) of the Alaska Statutes apply to public works projects under a grant. Subsection 36.10.180(5) of the Alaska Statutes applies to “any other public works project or construction project that is funded in whole or in part by state money.”

107. See ALASKA STAT. § 36.10.010 (1960) (repealed 1986). On qualifying projects of ten or more workers, ninety-five percent of those employed were required to be Alaska residents. *Id.* If the project employed fewer than ten workers, that percentage dropped to ninety percent. *Id.*

108. ALASKA STAT. § 36.10.150 (2019).

whether a zone<sup>109</sup> of underemployment exists,<sup>110</sup> then determines what amount of work has to be performed by qualified residents within that zone.<sup>111</sup> A zone is identified as eligible for a resident hiring preference through an active consideration of statutorily-enumerated factors, which include:

- (1) the rate of unemployment within the zone is substantially higher than the national rate of unemployment;
- (2) a substantial number of residents in the zone have experience or training in occupations that would be employed on a public works project;
- (3) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and
- (4) employment of workers who are not residents is a peculiar source of the unemployment of residents of the zone.<sup>112</sup>

The required level of resident employment on applicable projects is set to a level deemed appropriate after consideration of “the nature of the work, the classification of workers, availability of eligible residents, and the willingness of eligible residents to perform the work.”<sup>113</sup> The required level is to be revisited every two years and applied on a craft-by-craft basis.<sup>114</sup> Despite Attorney General Clarkson’s memo indicating that the zone of underemployment provision will no longer be enforced, it remains on the books to this day.<sup>115</sup>

The second flexible mechanism introduced in the 1986 version of Alaska Hire was the now-invalidated economically distressed zones provision.<sup>116</sup> As with the zone of underemployment provision, the Commissioner would first determine whether an economically distressed zone existed based on statutorily enumerated factors.<sup>117</sup> These factors were:

- (1) the per capita income of residents of the zone [was] less than 90 percent of the per capita income of the United States as a

---

109. A zone “includes a census area in the state, an economic region of the state, and the state as a whole.” *Id.* § 36.10.990.

110. *Id.* § 36.10.150(c).

111. *See id.* § 36.10.150(b) (“In making this determination, the commissioner shall consider the nature of the work, the classification of workers, availability of eligible residents, and the willingness of eligible residents to perform work.”).

112. *Id.* § 36.10.150(c).

113. *Id.* § 36.10.150(b).

114. *Id.* § 36.10.150(a).

115. *See infra* Section III.F (discussing the Clarkson Memo in detail).

116. ALASKA STAT. § 36.10.160, *invalidated by* State v. Enserch Alaska Constr., Inc., 787 P.2d 624 (Alaska 1989).

117. *Id.* § 36.10.160(b).

whole, or the unemployment rate in the zone exceed[ed] the national rate of unemployment by at least five percentage points;

(2) the lack of employment in the zone . . . substantially contributed to serious social or economic problems in the zone; and

(3) employment of workers who [were] not residents [was] a peculiar source of unemployment of residents of the zone.<sup>118</sup>

Upon determination of such a zone, qualified residents were to be given preference for at least fifty percent of employment on eligible projects within the zone.<sup>119</sup> Despite its flexibility, the economically distressed zones provision was ultimately found invalid in *State v. Enserch*.<sup>120</sup>

The 1986 version of the law also includes hiring preferences for economically disadvantaged minority residents<sup>121</sup> and economically disadvantaged female residents.<sup>122</sup> Similar to the zone of underemployment and economically distressed zones provisions, the minority and female resident hiring preferences are triggered by the determination of the Commissioner.<sup>123</sup> In the case of minority residents,<sup>124</sup> the Commissioner is required to find that: “the percentage of civilian minority residents in the zone exceeds the percentage of civilian minority residents in the state;” either the percent of unemployment of the minority residents of the zone is at least two times the unemployment rate of nonminority residents, or the minority population of the zone “has suffered past economic discrimination;” the economic disadvantage has substantially contributed to “serious social or economic problems” in the zone; and employment of nonresidents of the zone “is a peculiar source of unemployment” of minority residents of the zone.<sup>125</sup> If such a zone is found to exist, qualified minority residents are given a hiring preference of either twenty-five percent, “or a percent representative of the civilian minority residents in the zone, whichever is greater” on public works sited within the zone.<sup>126</sup>

---

118. *Id.*

119. *Id.* § 36.10.160(a).

120. *See infra* Section III.E (discussing *Enserch* in more detail).

121. ALASKA STAT. § 36.10.170 (2019).

122. *Id.* § 36.10.175.

123. *Id.*; *see also* § 36.10.170 (delineating the hiring preferences for various minority residents).

124. “[A] person is considered to be a member of a minority if the person is Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, or Black as those terms are defined by the Equal Employment Opportunity Commission.” *Id.* § 36.10.170(c).

125. *Id.* § 36.10.170(b)(1)-(4).

126. *Id.* § 36.10.170(a).

Under the 1986 version of Alaska Hire, a hiring preference for women is imposed when the Commissioner determines that: either the unemployment rate of female residents of a zone is at least two times that of male residents of the zone, or “the female population of the zone has suffered past economic discrimination;” “the economic disadvantage of female residents of the zone has substantially contributed to serious social or economic problems in the zone;” and employment of nonresidents in the zone is “a peculiar source of unemployment of female residents of the zone.”<sup>127</sup> Upon such a determination, the statute requires that the workforce on public works projects within the zone be composed of at least twenty-five percent resident women.<sup>128</sup>

The type of work to which Alaska Hire’s hiring preference applied was the same regardless of whether it was being imposed under the zone of underemployment, economically distressed zones, minority resident, or female resident provision. The preference was applicable to all work performed

under a contract for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work, or any other retention of services necessary to complete a given project that is let by the state or an agency of the state, a department, office, state board, commission, public corporation, or other organizational unit of or created under the executive, legislative, or judicial branch of state government, including the University of Alaska and the Alaska Railroad Corporation, or by a political subdivision of the state including a regional school board with respect to an educational facility.<sup>129</sup>

It could also be applied to public works projects funded by state grants.<sup>130</sup> Finally, “any other public works project or construction project that is funded in whole or in part by state money” could be subject to a hiring preference.<sup>131</sup>

The current iteration of Alaska Hire was enacted with features which sought to cure the defects of its predecessors. The statute’s narrow application to public works cured the concerns highlighted in *Hicklin*, while the flexibility afforded by the zones of underemployment and economically distressed zones provisions addressed the concerns raised in *Robison*. However, this refined version still contained limited constitutional failings.

---

127. *Id.* § 36.10.175(b)(1)–(3).

128. *Id.* § 36.10.175(a).

129. *Id.* § 36.10.180(a)(1).

130. *Id.* § 36.10.180(a)(2)–(4).

131. *Id.* § 36.10.180(a)(5).

### E. The *Enserch* Challenge

The first legal challenge to the post-*Robison* version of Alaska Hire came in 1989. *State v. Enserch* arose from a contract between Alaska and Enserch Alaska Construction (“Enserch”) to build a road in the Northwest Arctic Borough (“Borough”).<sup>132</sup> The Commissioner declared the Borough an economically distressed zone after Enserch began work, meaning the project had to scale up the proportion of residents on its workforce.<sup>133</sup> Enserch filed suit, seeking a declaration that Alaska Statutes section 36.10.160 violated state and federal Equal Protection guarantees and the federal Privileges and Immunities Clause.<sup>134</sup> The trial court dismissed the Privileges and Immunities claim due to lack of standing, but found in favor of Enserch as to the state Equal Protection claim.<sup>135</sup>

On appeal, the state supreme court conducted its analysis under the Alaska Equal Protection Clause through application of Alaska’s sliding scale approach.<sup>136</sup> Courts apply the test by first determining the importance of the individual interest impaired by the challenged state action.<sup>137</sup> The court then determines the importance of the state interest underlying the action.<sup>138</sup> Depending on the importance of the individual interest, the state interest must fall “on a continuum from mere legitimacy to a compelling interest.”<sup>139</sup> Finally, the court examines the nexus between the state interest and the means used to further the interest.<sup>140</sup> Depending upon the importance of the individual interest, “the nexus must fall somewhere on a continuum from substantial relationship to least restrictive means.”<sup>141</sup>

The court in *Enserch* differentiated this sliding scale approach from the tiered test used in federal Equal Protection analysis.<sup>142</sup> In the federal test, there are three distinct standards of review in Equal Protection analysis, each related to the type of classification and right implicated.<sup>143</sup>

---

132. *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 626 (Alaska 1989).

133. *Id.* at 627.

134. *Id.* Enserch also sought damages for the increased cost incurred by complying with section 36.10.160 of the Alaska Statutes. *Id.*

135. *Id.*

136. *Id.* at 631. For a more in-depth discussion of the Alaska Equal Protection Clause, see Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209 (1998).

137. *Enserch*, 787 P.2d at 631.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 631-32.

142. *Id.* at 631.

143. The rational basis standard is the lowest level of review, requiring the means utilized by states to have a rational relation to a legitimate legislative

This contrasts (at least formally) with the continuum standard applied in Alaska Equal Protection analysis. The court noted this difference to highlight that the Alaska Constitution “often provides greater protection to individual rights than does the U.S. Constitution.”<sup>144</sup> This means that the Equal Protection Clause of the U.S. Constitution establishes the minimum level of protection for rights implicated by resident hiring preferences, while the corresponding clause of the Alaska Constitution may require more stringent safeguards.<sup>145</sup>

In *Enserch*, the impaired individual interest was the right to engage in an economic endeavor in a particular industry, an “important” right for state equal protection purposes.<sup>146</sup> The fact that the challenged provision only applied to public works was not found to reduce the impact of the disparate treatment it imposed.<sup>147</sup> This was because public works accounted for the majority of commercial construction in Alaska.<sup>148</sup> The court also noted that because the hiring preference was limited to residents of the economically distressed zone, the measure “impose[d] significant limitations on construction workers’ overall employment opportunities” and did not effectively address state-wide unemployment.<sup>149</sup> Finally, limiting the hiring preference to fifty percent of a workforce created a nexus between the state interest and the means used to further it, which was overly restrictive in light of the implicated individual interest.<sup>150</sup>

---

objective. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (applying rational basis standard to a statute restructuring railroad retirement benefits). Strict scrutiny applies to statutes that purposefully discriminate against suspect classifications, such as racial classifications. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 192–93 (1964) (applying strict scrutiny to a statute that implicated racial classifications). The standard requires that the objective of the statute be actual and compelling, and that the means employed be necessary and narrowly tailored to accomplish the objective. *See, e.g., id.* at 193–94 (finding unconstitutional a statute prohibiting overnight cohabitation of members of different races on the grounds that there was no legislative purpose to “punish promiscuity” selectively based upon race). Intermediate scrutiny applies to cases involving, *inter alia*, sex-based classifications and requires that the classification is substantially related to an actual and important government interest. *See, e.g., United States v. Virginia*, 518 U.S. 515, 545–46 (1996) (finding unconstitutional the practice of only admitting men to a state school because the goal of producing citizen-soldiers was not “substantially advanced” by the discrimination).

144. *Enserch*, 787 P.2d at 631.

145. *See* ALASKA CONST. art. I, § 23 (“The constitution does not prohibit the State from granting preference, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the U.S. Constitution.”).

146. *Enserch*, 787 P.2d at 632.

147. *Id.* at 633.

148. *Id.*

149. *Id.*

150. *Id.*

Turning to the state's interest, the court identified the stated purposes of the law to reduce resident unemployment, remedy social harms associated with unemployment, and assist economically disadvantaged residents as important.<sup>151</sup> However, the court indicated that these purposes "conceal[ed] the underlying objective of economically assisting one class over another."<sup>152</sup> This led to the conclusion that "the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region" was not a legitimate purpose.<sup>153</sup> In reaching this conclusion, the court noted that the Alaska Equal Rights Clause affords "at least as much protection intrastate to fundamental rights that the privileges and immunities clause affords interstate," and that it would be "anomalous" to afford nonresidents a higher degree of constitutional protection than residents who are also discriminated against.<sup>154</sup>

To conclude its equal protection analysis, the court described the economically distressed zone provision as "seriously over- and underinclusive [sic] because it does not prioritize relief for those areas most affected by nonresident employment."<sup>155</sup> Because less distressed zones were subject to the same hiring preference as more distressed zones, residents of the former were unfairly advantaged over residents of the latter.<sup>156</sup> Furthermore, the economic criteria for designating an economically distressed zone coupled with Alaska's historically high unemployment rate made it easy for the Commissioner to designate many regions as distressed at any time.<sup>157</sup>

#### F. Alaska Hire Today and the Clarkson Memo

Currently, most of the 1986 version of Alaska Hire remains on the books.<sup>158</sup> While the economically distressed zones provision was invalidated in *Enserch*,<sup>159</sup> the zone of underemployment, disadvantaged minority resident, and female resident provisions are still in effect.<sup>160</sup> This means that the Commissioner may impose hiring preferences for all residents, minority residents, and female residents within pre-

---

151. *Id.* at 634.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 635.

158. See ALASKA STAT. §§ 36.10.005-990 (2019).

159. See *supra* Section III.E.

160. ALASKA STAT. §§ 36.10.150, 170-75 (2019).

determined zones throughout the state of Alaska.<sup>161</sup> The entire state has “consistently” been designated a zone of underemployment since *Enserch*.<sup>162</sup> Accordingly, the Commissioner is statutorily able to impose a hiring preference for residents on public works located anywhere in Alaska.

Alaska Hire may still be on the books, but Alaska’s executive branch has decided to cease enforcing the zone of underemployment provision of the statute. This decision arose out of Attorney General Clarkson’s memo asserting that the provision was unconstitutional under both the Privileges and Immunities Clause of the U.S. Constitution and the Alaska Equal Protection Clause.<sup>163</sup> In analyzing the zone of underemployment provision under the Privileges and Immunities Clause, Attorney General Clarkson argues that “Alaska Hire’s primary purpose is and always has been protectionism.”<sup>164</sup> This so-called protectionism derives from the statute’s effect of “economically benefit[ing] Alaska residents at the expense of nonresidents.”<sup>165</sup> Citing *Robison*, Clarkson contends that the Alaska Supreme Court has found that “this is not a legitimate government purpose under the Privileges and Immunities Clause.”<sup>166</sup>

Turning to the Alaska Equal Protection Clause, Clarkson asserts that the provision is unconstitutional on two grounds. First, “the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal.”<sup>167</sup> Second, Clarkson argues that the nexus between the state interest in alleviating unemployment and the means of furthering it via a hiring preference is insufficiently close.<sup>168</sup> He contends that the zone of underemployment provision is both over- and under-inclusive because it allows the Commissioner to provide relief to regions less “affected by nonresident employment” while denying relief to “more distressed zones.”<sup>169</sup>

When the executive branch declines to enforce a statutory scheme that has been on the books in one form or another for half a century, the decision should not be met with silence. Accordingly, the remainder of this Note offers a voice in defense of Alaska Hire’s constitutionality.<sup>170</sup>

---

161. *Id.*

162. *Clarkson Memo, supra* note 14, at 5.

163. *Id.* at 1–2.

164. *Id.* at 8.

165. *Id.* at 7–8.

166. *Id.* at 8.

167. *Id.* at 10 (quoting *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 634 (Alaska 1989)).

168. *Id.*

169. *Id.*

170. Attorney General Clarkson does not mention the disadvantaged minority

#### IV. THE CONSTITUTIONALITY OF ALASKA HIRE TODAY

In order to rebut the arguments put forth by Attorney General Clarkson, it is necessary to show that Alaska Hire is constitutional under both the federal Privileges and Immunities Clause and the Alaska Equal Protection Clause.<sup>171</sup> This Section will begin with an analysis of Alaska Hire under the former. The road to legality is paved by two factors. First, the “peculiar evil” posed by nonresidents in light of Alaska’s unique circumstances. Second, the substantial relationship between the danger posed by nonresidents and the discrimination brought against them by the narrowly tailored, flexible version of Alaska Hire currently on the books. The Section will then analyze the statute under the Alaska Equal Protection Clause. Alaska Hire succeeds under the Alaska Equal Protection Clause because, while the law implicates an important interest for nonresidents, it also furthers a compelling state interest. Additionally, the means used in furtherance of that state interest are the least restrictive available.

##### A. The Validity of Alaska Hire Under the Federal Privileges and Immunities Clause

Alaska Hire is constitutional under the federal Privileges and Immunities Clause. The statute is constitutional because (a) nonresidents are a peculiar source of evil to resident Alaskans in the employment context and (b) there is a reasonable relationship between the danger posed by nonresidents and the discrimination imposed upon them. Alaska’s unique circumstances warrant the former conclusion, while the narrow focus and flexible application of Alaska Hire ensure the latter.

The first hurdle for Alaska Hire to overcome is whether it burdens a fundamental right.<sup>172</sup> “[O]ne of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.”<sup>173</sup> This means that the Clause holds “the right of a citizen of

---

resident or female resident provisions in his memo. *See generally Clarkson Memo, supra* note 14. As the constitutionality of those provisions has not been called into question, this Note does not engage with arguments in their defense.

171. *See supra* Section III.F (discussing Alaska Hire and the Clarkson Memo).

172. *See supra* Section III.B.

173. *Supreme Court v. Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). However, the Clause does not require that “state citizenship or residency may never be used by a State to distinguish among persons.” *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978). Furthermore, a state does not always have to “apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do.” *Id.*

one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation" to be a fundamental one.<sup>174</sup> In the case of Alaska Hire, the fundamental right to engage in trade (i.e. to seek employment) appears to be burdened for nonresidents. By imposing a hiring preference for residents, nonresidents are disadvantaged from engaging in trade on the basis of their residency. Because Alaska Hire burdens a fundamental right, determining the statute's constitutionality requires further analysis.

For Alaska Hire to pass constitutional muster, nonresidents must pose a peculiar source of evil in the context of employment and that threat must have a reasonable relationship to the discrimination the statute imposes upon them.<sup>175</sup> In *Hicklin v. Orbeck*, the oil and gas provision of Alaska Hire was not supported by sufficient evidence that nonresidents posed a peculiar source of evil, so the Court was unable to find a constitutionally sufficient reason for the statute's discrimination.<sup>176</sup> There, the evidence indicated that unemployment among residents was attributable to their lack of training in the oil and gas context, not the competition of nonresident workers.<sup>177</sup> In *Robison v. Francis*, the court was similarly unable to find that nonresidents posed a peculiar source of evil, this time reasoning that because Alaska's unemployment rate was close to that of the national average, there was no evil to address.<sup>178</sup>

In Alaska today, nonresidents surely pose a peculiar source of evil to the employment prospects of residents, thus creating a constitutionally sufficient reason for Alaska Hire's discriminatory effect. The reasoning of *Hicklin* and *Robison* are inapplicable to the contemporary context. First, the gap in skills between residents and nonresidents has closed. The plurality of construction workers in Alaska are classified as unskilled laborers.<sup>179</sup> This means that in Alaska today, unskilled residents are not competing with skilled nonresidents as in the Alaska of 1978 seen in *Hicklin*. Instead, the contemporary public works employment situation features unskilled nonresidents taking positions that could be filled by unskilled residents. For skilled positions, both Alaska and the federal government have implemented job training programs which did not exist at the time of *Hicklin*.<sup>180</sup> These programs mean that more Alaskans today

---

174. *Ward v. Maryland*, 79 U.S. 418, 430 (1870).

175. *See supra* Section III.B.

176. *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978).

177. *Id.* at 526-27.

178. *Robison v. Francis*, 713 P.2d 259, 262-63 (Alaska 1986).

179. *See* KREIGER & WHITNEY, *supra* note 54, at 10 (noting construction laborers account for the largest occupation cohort in Alaska's construction industry).

180. *See generally* Workforce Innovation and Opportunity Act, 29 U.S.C. §§ 3101-3361 (2018) (increasing coordination among workforce development programs); ALASKA DEP'T LAB. & WORKFORCE DEV., PY 2012-2016: ALASKA

are skilled workers able to compete with skilled nonresidents than was the case in 1978. Residents are thus on more even footing with their nonresident competitors. Second, Alaska's unemployment rate is not growing closer to the national average as it was in *Robison*.<sup>181</sup> Instead, it has stubbornly remained higher than the national average.<sup>182</sup> This trend has held steady for nearly 40 years since *Robison*. Furthermore, the Alaska of *Robison* was less than 30 years removed from the onset of economic benefits associated with statehood.<sup>183</sup> Then, the effect of nonresidents on unemployment in a still-developing economy could be expected to dissipate with time.<sup>184</sup> Now, over 60 years after statehood, what could have been dismissed as a dying trend in unemployment among residents has proven to be a permanent condition.

The combination of these two factors means that there is indeed an evil in the form of intransigent unemployment and that nonresidents are a source of that evil in the public works context; the barriers to finding nonresidents a peculiar source of evil found in previous cases are thus no longer applicable to Alaska Hire. One might suggest that this is the case in every state, not just Alaska. However, the situation in Alaska is truly unique among all states. The state's massive size makes it hard for residents to travel elsewhere for work – residents must work near where they live, or likely not work at all.<sup>185</sup> Weak or negative job growth means that there are fewer and fewer positions in Alaska, compounding the problem created by residents' reliance on local jobs.<sup>186</sup> Finally, nonresidents represent a large portion of the Alaskan workforce, meaning they take up a particularly high percentage of positions that could be filled by qualified residents.<sup>187</sup> These nonresidents have shown a capacity to travel to work, meaning they can readily compete for jobs elsewhere.<sup>188</sup> The alchemy of these factors means the argument that nonresidents

---

INTEGRATED WORKFORCE DEVELOPMENT PLAN (2012) (describing Alaska's workforce training programs, includes the Adult and Dislocated Worker Programs, and the Youth Program); *State Training and Employment Program (STEP)*, ALASKA DEP'T LAB. & WORKFORCE DEV., <https://labor.alaska.gov/dets/step.htm> (last visited Apr. 21, 2021) (describing the STEP program, which is limited to Alaska residents, and its goal "to enhance the quality [sic] and make Alaska job training and employment assistance easily available to employers, employees, and future workers").

181. *Robison*, 713 P.2d at 263.

182. See *supra* notes 3–6 and accompanying text.

183. Cf. J. TOMAS HEXNER ET AL., *HEX, INC., PUERTO RICAN STATEHOOD: A PRECONDITION TO ECONOMIC GROWTH* 1 (1993) (asserting that statehood is "essential" to "future economic growth").

184. *Id.*

185. See *supra* Section II.A.

186. See *supra* Section II.B.

187. See *supra* Section II.C.

188. See *supra* Section II.C.

compete with residents everywhere does not carry the same cache in Alaska. Due to the idiosyncratic situation in the state, there is a constitutionally sufficient substantial reason for Alaska Hire's discrimination against nonresidents.

To underline this contention, it should be noted that the economic situation in contemporary Alaska looks remarkably similar to that described in *United Building and Construction Trades Council v. Mayor of Camden*.<sup>189</sup> There, the United States Supreme Court refused to overturn the challenged resident hiring preference under the Privileges and Immunities Clause.<sup>190</sup> The city of Camden had implemented its resident hiring preference for public works to address a combination of unabated joblessness and demographic changes that were leading to a reduced tax base, as well as nonresidents "'liv[ing] off' Camden without 'liv[ing] in'" the city.<sup>191</sup> Similarly, Alaska today faces stubborn unemployment and demographic trends that reduce residents' economic power, while employed nonresident workers prosper from economic benefits that would otherwise flow to residents.<sup>192</sup> Nonresident workers experience the upsides of the Alaskan infrastructure and economy, but do not live in the state, shoulder a full tax burden, or vote – the very things which make their employment possible. Alaska residents should be able to reap what they sow.

The final consideration in determining the constitutionality of Alaska Hire under the Privileges and Immunities Clause is if there is a reasonable relationship between the threat posed by non-citizens and the discrimination imposed upon them. The *Hicklin* court found that the oil and gas lease provision of Alaska Hire lacked a substantial relationship because it applied to work contractors that were not in a contractual relationship with the state.<sup>193</sup> The *Robison* court found the requirement that residents account for ninety percent of a workforce constitutionally deficient because it was almost entirely preclusive of nonresident workers.<sup>194</sup> As in *Hicklin*, the provision was also problematic as it applied to entities not in a contractual relationship with the state.<sup>195</sup> In *Robison*, the court found that this far-reaching discrimination merited little deference to the state when analyzing the relationship between the discrimination and the threat it responded to.<sup>196</sup> Conversely, the *Camden* court looked

---

189. 465 U.S. 208 (1984).

190. *Id.* at 210.

191. *Id.* at 222.

192. *See supra* Section II.

193. *Hicklin v. Orbeck*, 437 U.S. 518, 527, 530 (1978).

194. *Robison v. Francis*, 713 P.2d 259, 265 (Alaska 1986).

195. *Id.*

196. *Id.* at 264–65.

favorably upon the fact that the relevant hiring preference was “limited in its scope to” contractors and subcontractors.<sup>197</sup> This limit was found to cure the constitutionally problematic “ripple effect” exhibited in *Hicklin*.<sup>198</sup>

While the courts in *Hicklin* and *Robison* found the relationship between the threat posed by nonresidents and the hiring preference constitutionally deficient, the court in *State v. Antonich*<sup>199</sup> found the opposite.<sup>200</sup> In *Antonich*, the Wyoming Preference Act required contractors to employ available qualified Wyoming laborers for public works projects in preference to nonresident workers.<sup>201</sup> In analyzing the link between the reasons for the statute and the discrimination practiced, the court noted that historical resident hiring preference statutes had “swept too broadly to survive challenges brought under the privileges-and-immunities clause,” specifically citing the portion of Alaska Hire struck down in *Hicklin*.<sup>202</sup> The court viewed the Wyoming statute favorably in comparison to these broad laws, finding the Wyoming version to be sufficiently tailored as it (a) did not seek to eradicate unemployment due to factors unrelated to nonresidents, (b) addressed a specific sector of the economy (construction), and (c) limited its reach to public works.<sup>203</sup>

The contemporary version of Alaska Hire looks more like the statute at issue in *Antonich* than it does the earlier version of the statute challenged in *Hicklin* and *Robison*. The iterations of Alaska Hire that have been overturned were broad in scope and rigid in application. Today’s version of the law is much narrower in its scope than the statute’s previous iterations. This is because the law does not apply to suppliers of contractors and subcontractors, thus restraining the scope of the discrimination to employment positions in close contractual relation to state funding.<sup>204</sup> This contrasts with the law overturned in *Hicklin*, which

---

197. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984).

198. *Id.*

199. 694 P.2d 60 (Wyo. 1985).

200. *Id.* at 64. Of course, *Antonich* is a Wyoming Supreme Court case. Absent some truly unprecedented legal gymnastics, the *Antonich* court’s reasoning would be afforded only persuasive authority in a challenge to Alaska Hire.

201. *Id.* at 60–61.

202. *Id.* at 62.

203. *Id.* at 63.

204. ALASKA STAT. § 36.10.180(a) (2019). It should be noted that the provision does explicitly apply to subcontractors. *But see* ALASKA DEP’T LAB. & WORKFORCE DEV., ALASKA RESIDENT HIRE EMPLOYMENT PREFERENCE INFORMATION, <http://www.labor.state.ak.us/lss/forms/employment-pref-info.pdf> (last visited Apr. 2, 2020) (stating that “[t]his hiring preference . . . must be met every workweek by each contractor/subcontractor”). While the scope of the

applied to contractors, subcontractors of contractors, and suppliers of contractors and subcontractors,<sup>205</sup> creating a constitutionally problematic “ripple effect.”<sup>206</sup>

The contemporary version of Alaska Hire further differentiates itself from the iteration overturned in *Robison* by offering a more flexible method of application. Requiring the Commissioner to determine whether or not a zone of underemployment exists is critical in differentiating the current version from its forbearers. The determination process means the resident hiring preference no longer indiscriminately applies to every single public works contract in the state.<sup>207</sup> Instead, the preference only applies to declared ‘zones,’ which are identified through an active consideration of various factors before such a declaration is made.<sup>208</sup> The contemporary version of the statute also lacks a hiring requirement like the one overturned in *Robison*, which effectively required public works projects to be fully staffed by residents.<sup>209</sup> Instead, the required level of resident employment is set to a level that is considered on a zone-by-zone basis.<sup>210</sup> Where the *Robison* hiring preference had a blanket level of application,<sup>211</sup> the current version is set to a level that is determined after deliberation.<sup>212</sup> Additionally, the resident hiring preference of a zone is revisited every two years, meaning the temporal scope of the discrimination is also circumscribed.<sup>213</sup> These

---

contemporary statute is narrower than its predecessors, the hiring preference’s application to subcontractors is potentially problematic. *See Hicklin v. Orbeck*, 437 U.S. 518, 530 (1978) (finding the extension of Alaska Hire’s oil and gas lease provision “to employers who have no connection whatsoever with the State’s oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State” supportive of the law’s unconstitutionality); *Robison v. Francis*, 713 P.2d 259, 265 (Alaska 1986) (finding that the application of Alaska Hire to entities not directly party to a contract with the State weighed against the statute’s constitutionality); *see also supra* Sections III.B,III.C.

205. ALASKA STAT. § 38.40.050 (1972) (repealed 1978).

206. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984).

207. *Compare* ALASKA STAT. § 36.10.150 (2019) (requiring a determination that a zone is eligible for a resident hiring preference before imposing a preference rate that is set on a zone-by-zone basis and revisited bi-annually), *with* ALASKA STAT. § 36.10.010 (1960) (repealed 1986) (“In all cases of public works projects, preference must be given to Alaska residents.”).

208. ALASKA STAT. § 36.10.150(c) (2019).

209. § 1(a), 1960 Alaska Sess. Laws ch. 177 (enacted as ALASKA STAT. §§ 36.10.010–.110 (1960)), *invalidated by Robison*, 713 P.2d 259 (requiring ninety to ninety-five percent of workers be residents).

210. ALASKA STAT. § 36.10.150(b) (2019).

211. § 1(a), 1960 Alaska Sess. Laws ch. 177.

212. ALASKA STAT. § 36.10.150(b) (2019).

213. *Id.* § 36.10.150(a).

characteristics combine to make the current iteration of the law much more flexible than its unconstitutionally rigid predecessors.

Like the statute upheld in *Antonich*,<sup>214</sup> the current version of Alaska Hire focuses on inherently local public works contracts, which deal specifically with state-owned property. Any discrimination mandated in relation to those contracts must be analyzed under the federal Privileges and Immunities Clause with a degree of deference to the state.<sup>215</sup> This is because states are granted “more leeway . . . in [their] perception of ‘local evils and in prescribing appropriate cures’ when [they are] acting in a proprietary capacity, as where ‘[they are] merely setting conditions on the expenditures of funds [they] control[.]’”<sup>216</sup> This means the state will be accorded deference if it determines that a resident hiring preference on projects funded by state money is substantially related to the ‘evil’ posed by nonresidents. This also means that the hiring preference is not the protectionist cudgel that Attorney General Clarkson describes.<sup>217</sup> Instead, it is a finely-honed tool for Alaska to rectify an unemployment problem caused by state-specific circumstances. This focus on a specific sector of the economy and limited application to public works mimics the constitutionally sufficient statute upheld in *Antonich*.<sup>218</sup>

The contemporary version of Alaska Hire is constitutionally sufficient under the Privileges and Immunities Clause because it cures the defects of its forbearers. While earlier versions of the statute failed to muster defenses that established nonresidents as a peculiar source of evil, the contemporary conditions of Alaska make circumscribed discrimination against this group for the benefit of residents lawful. In addressing this peculiar evil, the current iteration of Alaska Hire is a narrow, flexible law where its predecessors were broad and rigid. The contemporary version of Alaska Hire has key differences from its unconstitutional precursors, the sum of which make the current statute constitutional under the Privileges and Immunities Clause of the United States Constitution.

---

214. *State v. Antonich*, 694 P.2d 60, 61–62 (Wyo. 1985).

215. *Hicklin v. Orbeck*, 437 U.S. 518, 529 (1978) (“[A] State’s ownership of the property with which the statute is concerned is a factor – although often the crucial factor – to be considered in evaluating whether the statute’s discrimination against noncitizens violates the [Privileges and Immunities] Clause.”).

216. *Robison v. Francis*, 713 P.2d 259, 264 (Alaska 1986) (quoting *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984)).

217. *See supra* note 164 and accompanying text.

218. *See supra* note 200 and accompanying text.

## B. The Validity of Alaska Hire Under the Alaska Equal Protection Clause

Showing that Alaska Hire is constitutional under the federal Privileges and Immunities Clause is only half the battle, as Attorney General Clarkson also attacks the statute as violative of the Alaska Equal Protection Clause. The Attorney General's analysis of Alaska Hire is, again, flawed. Under the Alaska Equal Protection Clause, the statute is constitutional because (a) protecting the employment prospects of Alaskans is a compelling state interest and (b) a resident hiring preference is the least restrictive means to further that interest.

For Alaska Hire to withstand constitutional scrutiny, a court must first identify the importance of both the individual interest impaired by the statute and the state interest motivating the law.<sup>219</sup> The individual interest at issue here is the right to engage in an economic endeavor in a particular industry. In *Enserch*, this was held to be an "important" right for purposes of the Alaska Equal Protection Clause.<sup>220</sup> The state interest is the reduction of resident unemployment. The *Enserch* court found that citing this interest in the economically distressed zones provision "conceal[ed] the underlying objective of economically assisting one class over another."<sup>221</sup> Accordingly, the court found that the statute had the illegitimate purpose of economically benefitting unemployed workers in one region at the expense of workers in another region.<sup>222</sup>

Here, because an important right is burdened, the state interest must be compelling in order to survive a constitutional challenge.<sup>223</sup> Looking beneath the hood, it might appear that the current version of Alaska Hire seeks to economically assist one class over another as in *Enserch*. However, the contemporary iteration of the statute makes a critical distinction between itself and the version of the law overturned in *Enserch*: currently, the Commissioner can determine that the entire state is a zone of underemployment,<sup>224</sup> thus benefiting all qualified residents of the state with a hiring preference. In fact, the entire state has historically been subjected to a resident hiring preference under the current version of Alaska Hire.<sup>225</sup> This undermines the concern of the *Enserch* court that

---

219. *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631 (Alaska 1989).

220. *Id.* at 632.

221. *Id.* at 634.

222. *Id.*

223. *Id.*

224. ALASKA STAT. § 36.10.990 (2019).

225. See *Clarkson Memo*, *supra* note 14, at 5 ("Since [*Enserch*], the Department of Labor and Workforce Development has consistently designated the entire State as a 'zone of underemployment.'").

one class of Alaskans would be favored over others. In keeping with arguments made above, the disparate treatment the statute affords nonresidents must yield to the unique situation Alaska finds itself in.<sup>226</sup> Indeed, it is these unique circumstances which create a compelling state interest in reduction of resident unemployment in the specific context of Alaska. The problem is so profound that to find alleviating it is not a compelling state interest would be to raise the requirements for such an interest untenably high.

The importance of the state interest can be further strengthened by comparing the case of Alaska Hire to that of the Alaska Workers Compensation Act (“the Act”) as seen in *Alaska Pacific Assurance Co. v. Brown*.<sup>227</sup> The Act required that disability assistance granted to nonresident workers be adjusted based on a comparative ratio between the average weekly wage in Alaska and that in the other state.<sup>228</sup> The court found that “the State has important interests in avoiding disincentives to rehabilitation and in creating incentives for injured workers to go back to work . . . .”<sup>229</sup> The court further found that “the effectiveness of these incentives may depend on” factors which differentiate residents from nonresidents.<sup>230</sup> Alaska Hire hews as closely to the interest it furthers – reduction of resident unemployment – as the Act did to the interest *it* furthers. The tight fit of Alaska Hire and the relevant interest is especially close given the geographical and economic constraints that make unemployment such a problem in Alaska. As in the Act, Alaska Hire incentivizes resident employment through differentiation based upon resident status. Accordingly, *Brown* supports the contention that Alaska Hire furthers an important state interest via permissible differentiation between residents and nonresidents.

A fundamental individual interest is implicated in the case of Alaska Hire, which requires the means used to further the state interest to be the least restrictive available.<sup>231</sup> In *Enserch*, the court noted that because the hiring preference was limited to residents of economically distressed zones, the measure was tailored to address local, not state-wide, unemployment.<sup>232</sup> Furthermore, because the provision imposed the same

---

226. The difficulty Alaskans face in overcoming unemployment due to geographic, demographic, and economic reasons makes joblessness a problem that is uniquely difficult for the state to overcome. *See supra* Section II. The exceptionalism of the state’s unemployment epidemic is highlighted by the fact that it has not abated for over sixty years. *See supra* Section IV.A.

227. 687 P.2d 264 (Alaska 1984).

228. *Id.* at 266–67.

229. *Id.* at 273.

230. *Id.*

231. *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631–32 (Alaska 1989).

232. *Id.* at 633.

hiring preference on all distressed zones, regardless of the level of need within the zone, residents of areas in less distress were unfairly advantaged over residents of areas in more distress.<sup>233</sup>

The current version of Alaska Hire cures the defects that made the iteration overturned in *Enserch* legally deficient. First, the contemporary law allows the hiring preference to cover the entire state of Alaska, not just discrete zones.<sup>234</sup> Rather paradoxically, the statute's broader applicability in this context means that it more closely fits the state interest that it furthers than was the case in *Enserch*. This is because the state interest is unemployment *throughout* the state, not just in discrete regions. The compelling state interest in Alaska Hire covers the entire state, so the statute's geographic applicability will necessarily have a broad sweep.

The resident hiring preference requirement is the least restrictive means possible in this context because it gets to the essence of the state interest: ensuring resident unemployment does not stem from nonresidents obtaining employment at the expense of residents. Requiring a certain level of resident employment on projects funded through state expenditures is highly targeted. Furthermore, only a certain industry is targeted, and only projects with state funding are targeted within that industry. The zone of underemployment provision requires residents to be qualified for the work, meaning residents that qualify for the preference would already be competing for the positions protected by the statute.<sup>235</sup> Unlike the economically distressed zones provision invalidated in *Enserch*, which imposed a rigid fifty percent hiring preference requirement, the zone of underemployment provision requires that the hiring preference requirement be set after consideration of various factors.<sup>236</sup> This pre-implementation deliberation ensures that the level of the hiring preference is closely tailored to fit the prevailing economic conditions. Accordingly, the resident hiring preference in the current version of Alaska Hire represents the least restrictive means by which the compelling state interest of reducing unemployment among Alaska residents can be furthered.

---

233. *Id.* at 634.

234. ALASKA STAT. § 36.10.990 (2019).

235. *Id.* § 36.10.150(b) (2019).

236. Compare *id.* § 36.10.160(a) (2019) (requiring a hiring preference of at least fifty percent), *invalidated by* State v. Enserch Alaska Constr., Inc., 787 P.2d 624 (Alaska 1989), with *id.* § 36.10.150(b) (2019) (requiring the determination of a hiring preference be set based upon statutory factors).

Alaska Hire is legally sufficient under the Alaska Equal Protection Clause. The statute furthers a compelling state interest, and it does so through the least restrictive means practicable. By not falling for the legal traps that previously invalidated provisions did, the current version of Alaska Hire should survive Equal Protection scrutiny.

## V. CONCLUSION

When Attorney General Clarkson's memo cast doubt on the constitutionality of Alaska Hire, he imperiled an important part of the state's arsenal in combating its unemployment problem. While the future of the statute remains unknown, this Note will hopefully prove useful in any legal defense of the law that may arise. While any such defense may not be an easy one, this Note has shown that Alaska Hire is constitutional under both the federal Privileges and Immunities Clause and the Alaska Equal Protection Clause.

However, the statute is not a cure-all. In fact, it represents only one piece in the larger puzzle that is the solution to Alaska's unemployment epidemic. If the state is to overcome its historically high unemployment rate, it will need to invest more in general education, job training, and economic diversification. Alaska Hire is an important piece in this puzzle as it is a solution that works narrowly within the domain of the state's control. By limiting itself to public works projects, Alaska Hire enables the state to directly intervene in the joblessness crisis on its own turf, from the urban hub of Anchorage to the remote dirt roads of Utqiagvik. The need for public works projects will never dry up, and so as long as Alaska Hire is on the books, it will contribute to mitigating Alaska's unemployment epidemic.