COMMENTS

The Use of Hiring Preferences by Alaska Native Corporations After Malabed v. North Slope Borough

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I. INTRODUCTION

In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), granting Alaska Natives title to 40 million acres of land and nearly a billion dollars in exchange for extinguishing their claims to Alaskan land. ANCSA authorized the creation of two tiers of Native corporations, regional and village, to receive the settlement offer on behalf of Alaska Natives. Under ANCSA, each regional and village corporation was required to incorporate under the laws of Alaska as a business for profit, and every Alaska Native in each region alive at the time received 100 shares of stock.

Since that time, the thirteen regional Native corporations have become an economic force, employing more than 12,000 employees in

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2. Alaska Natives comprise a number of distinct groups including Aleuts, Alutiiq, Athabascans, Yup'ik, Cup'ik, Inupiaq, the St. Lawrence Island Yup’ik, Eyak, Tlingit, Haida, and Tsimshian. Information About Alaska Native Cultures, Alaska Native Heritage Center, at http://www.alaskanative.net/2.asp. (last visited Nov. 12, 2004).


4. §§ 1606, 1607. Although ANCSA is often referred to as a settlement offer, Alaska Natives could not reject the “offer” because it was a congressionally imposed act.

Alaska and boasting a portfolio of $2.3 billion in 2003.\textsuperscript{6} Alaska Native corporations are in a wide range of businesses, including petroleum services, pipeline construction and maintenance, oil drilling, mining and mining support work, catering and camp services, timber harvesting, and construction.\textsuperscript{7} Although many of the corporations have diversified with assets and employees outside of Alaska, the focus of the Native corporations remains in Alaska.\textsuperscript{8}

According to the 2000 census, the Alaska Native population amounted to 98,043 of the total Alaska population of 626,932.\textsuperscript{9} The number of working-age Alaska Natives is much smaller than the total population of Alaska Natives, with more than forty percent of Alaska Natives being under the age of eighteen.\textsuperscript{10} As a result of the proportionally large number of young Alaska Natives, the number of those who will need employment in the coming decades is likely to increase dramatically.\textsuperscript{11} Consequently, employment availability and job growth will prove to be critical issues in the coming decades as the number of Alaska Natives entering the work force increases.\textsuperscript{12}

Currently, most Native corporations offer hiring preferences to Alaska Natives in some form, either to Native Americans, Alaska Natives, shareholders, or those closely related to shareholders of ANCSA stock.\textsuperscript{13} These corporations provide jobs for 3,100 Alaska Natives within the state and hiring of Alaska Natives is considered to be part of the


\textsuperscript{8} See 2003 Annual Report, supra note 6, at 3.


\textsuperscript{10} 2000 Census Redistricting Data, Alaska Dep't of Labor Census 2000, at http://146.63.75.45/census2000/.

\textsuperscript{11} The white population of Alaska under age eighteen is approximately twenty-five percent of the total white population. Id.

\textsuperscript{12} Id.

\textsuperscript{13} A survey of Native corporations conducted by the author indicates that AHTNA, Inc., Arctic Slope Regional Corp., Bristol Bay Regional Corp., Calista Corp., Chugach Alaska Corp., Cook Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., NANA Regional Corp., and Sealaska Corp. all provide Alaska Native or shareholder hiring preferences. Most regional Native corporations have an explicit policy of hiring shareholders, which includes shareholders' spouses and descendents. Several other Native corporations provide hiring preferences for Alaska Natives in general. One Native corporation even offers a more general "commitment to shareholder recruitment" policy.
Native corporations’ commitment to welcoming shareholder and Native participation in company operations and growth.\footnote{14}

The legal questions arising from the use of hiring preferences by Native corporations are complex because of the overlapping considerations of federal and state discrimination laws and the Alaska Natives’ need for distinct employment opportunities. The competing goals of ANCSA—to provide quick settlement of the land claims while remaining in conformity with the real economic and social needs of Natives—also contribute to the complexity of the legality of hiring preferences.\footnote{15} For example, employers are generally prohibited from discriminating in hiring practices under federal law,\footnote{16} but at least with respect to hiring preferences, Native corporations are exempt from such antidiscrimination laws.\footnote{17} Despite this fact, however, Native corporations are nonetheless organized under Alaska state law, and as such they are subject to state corporation laws, unless federal law preempts those laws.\footnote{18}

The Alaska Supreme Court recently overruled the legality of a Native American hiring preference implemented by ordinance in \textit{Malabed v. North Slope Borough}.\footnote{19} North Slope Borough is a political subdivision in Alaska.\footnote{20} In 1997, the borough enacted an ordinance that granted an employment preference to Native Americans, whom it defined as members of federally recognized tribes.\footnote{21} The Ninth Circuit Court of Appeals

\footnotesize{\begin{itemize}
\item\footnote{14}{2003 \textit{ANNUAL REPORT}, \textit{supra} note 6, at 15. "The corporations have policies encouraging the hiring of Alaska Natives, shareholders, and their families." \textit{Id}.}
\item\footnote{15}{See 43 U.S.C. § 1601(b) (2000).}
\item\footnote{16}{Title VII of the Civil Rights Act of 1964 provides:
It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2).}
\item\footnote{17}{§ 2000e(b)(1).}
\item\footnote{18}{43 U.S.C. § 1606(d).}
\item\footnote{19}{See \textit{Malabed v. N. Slope Borough}, 335 F.3d 864, 874 (9th Cir. 2003); \textit{Malabed v. N. Slope Borough}, 70 P.3d 416, 427–28 (Alaska 2003).}
\item\footnote{20}{Alaska is unique among the fifty states in that most of its land mass is not organized into political subdivisions because of sparse population in several areas of the state. Local government is a system of organized boroughs, much like counties in other states, and such boroughs generally provide more limited services than cities provide. A borough has three mandatory powers: education, land use planning, and tax assessment and collection. The major difference between the two classes is in how they may acquire other powers.}
\item\footnote{21}{\textsc{North Slope Borough, Alaska, Code} § 2.20.150(A)(27) (1987). As the area’s largest local employer, the borough consulted with the federal Equal Employment Opportunity Commission to determine whether the borough might qualify for an exemption from federal equal employment opportunity laws. \textit{Malabed}, 70 P.3d at 418. Specifically, the borough asked about an exemption under § 703(i) of the Civil Rights Act of 1964 (codified as 42 U.S.C. § 2000e-2(i) (1994)), which would exempt hiring preferences favoring Native Americans working on or near Indian reservations.}\
\end{itemize}
certified the question of the ordinance’s legality to the Alaska Supreme Court because it was a state law question with no controlling precedent in previous Alaska Supreme Court decisions. In response, the Alaska Supreme Court held the following:

The borough’s hiring preference violates the Alaska Constitution’s guarantee of equal protection because the borough lacks a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted is not closely tailored to meet its goals.

Thus, the question remaining after Malabed is whether Native corporations can continue to provide employment preferences to Alaska Natives. If they can, the next question is whether such hiring preferences enacted pursuant to ANCSA are protected by virtue of federal preemption of Alaska state law regarding hiring preferences.

This Comment argues that Native corporations can provide employment preferences for Alaska Natives, so long as they are appropriately tailored to provide employment preferences to that corporation’s shareholders or those closely related to the shareholders. Moreover, a hiring preference based on shareholder status is not a preference based on race and, as such, does not violate Alaska state law. But even if the Alaska Supreme Court found that these hiring preferences did violate the state constitution, given the federal government’s unique relationship with Native corporations and Congress’s clear intent for Native corporations to favor Alaska Natives in their hiring practices, federal courts would likely find that under ANCSA, Congress has preempted Alaska state law that would disallow hiring preferences for shareholders and their families. Thus, if properly tailored, Native corporations could use hiring preferences to meet the needs of shareholders, their spouses, and their closely related descendants.

from the strictures on discriminatory hiring under Title VII. Id. The commission responded that, in its view, the 703(i) exemption’s reference to “any business or enterprise” extended to the borough, allowing it to adopt a hiring preference in favor of Native Americans without violating Title VII’s equal employment opportunity provision, assuming that the borough met the exception’s other requirements. Id. After receiving this response, the borough assembly enacted the preference by an ordinance passed in February 1997; the borough implemented the preference later that year. Id. at 418–19.

22. Malabed, 335 F.3d at 867.
24. The Alaska Constitution provides that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.” ALASKA CONST. art I, § 1.
25. The federal government created the Native corporations to provide the settlement of land claims, but also created several protections for these corporations, including the inalienability of stock and exemption from Title VII of the Civil Rights Act. See discussion infra Part III.
This Comment is divided into six parts. Part I provides background about the Alaska Native corporations and their justifications for using hiring preferences. Next, Part II discusses related federal law issues and provides background on Native American hiring preferences in the lower forty-eight states under the Morton v. Mancari decision. Part III addresses Congress's extension of hiring preferences to Native corporations. Then, Part IV discusses Alaska constitutional law, Alaska statutes, and Malabed v. North Slope. Part V draws from the previous discussion and considers the future of hiring preferences in Native corporations after Malabed, particularly in the context of Alaska state law, federal preemption, and permissible forms of hiring preferences. Finally, Part VI concludes by suggesting congressional amendments that might strengthen Congress's intent to preempt state laws to allow hiring preferences for Alaska Natives.

II. BACKGROUND

A. Why Native Corporations Need and Use Hiring Preferences

Hiring preferences provide jobs for Alaska Natives within their communities and contribute to their economic well-being. Although there is only one Indian reservation in Alaska, the majority of Alaska Natives live in rural or semi-rural villages with limited employment. The high unemployment rate has not changed substantially since the enactment of ANCSA in 1971. Mayor Nageak of the North Slope Borough provided an affidavit for the North Slope litigation showing that, in contrast to an unemployment rate as high as 25% reported in 1971, the unemployment rate for Inupiat in 1994 had improved to only 17%. Unemployment rates of 32% to 50% in many Alaska Native villages have been documented. Alaska Natives are often dependent on highly variable seasonal work, such as the limited number of jobs available during the summer construction season. One joint federal-state commission

26. On December 18, 1971, all Alaska Native reservations, with the exception of the Metlakatla Reservation in the southernmost part of southeast Alaska, were abolished by the ANCSA. See DAVID S. CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 65 (2d ed. 2002).


29. Id. at 4.

30. ALASKA NATIVES COMM'N REPORT, supra note 27, at 91.

31. As a result of the Bureau of Indian Affairs training programs that focus on trade and construction work with the Trans-Alaska Pipeline, Alaska Natives are highly concentrated in the construction trades. ALASKA NATIVES COMM'N REPORT, supra note 27, at 91. Forty-two percent of the
noted that a primary cause of Native unemployment is the "in-flow to rural areas of non-residents who take many of the few jobs that are available." Non-residents have an advantage over Alaska Natives in hiring because they tend to be better educated, are willing to move away from their communities to find work, and perhaps most importantly, they are not likely to be involved in the mix of economies that require Alaska Natives to forego long-term positions to maintain aspects of their traditional lifestyles.

The mix of economies of Alaska, particularly in Alaskan villages, is substantially different than the economies of the lower forty-eight states. Alaska Natives often work in two or three economies at the same time, and the interplay between the modern economy and subsistence economies is often evident.

Economic development for Fort Yukon is hunting, trapping, and fishing. We got a project right now at Fort Yukon, the airport project... with all kind[s] of work. Monday morning there was eight job opening[s]. Not one [of them] was filled, because the kings happened to show up. When September hunting come[s] around, you're not going to find anybody work in Fort Yukon, because this is their economic development you're talking about, their livelihood.

In light of these mixed economies, in order to promote Alaska Native employment, jobs must be structured to accommodate this dependence on subsistence. Even when jobs are available, and Alaska Natives have the skills to fill them, most employers have not shaped the jobs to account for the differing life and work patterns of Alaska Natives.

approximately 16,000 Alaska Native men in the state's civilian labor force work in a trade or construction-related field. Id. at 92.

32. Id. at 97.
33. The "mix of economies" refers to the combination of the subsistence economies (hunting, fishing, and gathering) with the modern economy.
35. "Village Alaska" refers to the small Native villages located throughout the state.
36. "Kings" refers to a king salmon run on the Yukon River.
37. ALASKA NATIVES COMM'N REPORT, supra note 27, at 88 (quoting Jonathan Solomon, Second Chief of the Fort Yukon Tribal Council). Although there are commercial salmon fisheries on the Yukon River, the salmon fishing discussed in this excerpt refers to subsistence harvests by Alaska Natives.
38. See id. at 88.
39. Id. at 97.
Former executive vice-president of NANA Corporation, Inc., John Shively, expressed similar concerns as he discussed NANA Corporation’s experiences with the Red Dog Mine:

One of the places that we have not succeeded, we’ve tried with Cominco, is the idea that they should stop looking to individual workers’ careers. I mean, some people will do that, but they should be more flexible in terms of offering people [jobs] that maybe only want to work their operations six months of the year, or developing a big cadre of people, let’s say millwrights, they know that they’ve got 60 or 70 in the region, and they just run people in and out, because… people aren’t, in our region, into wealth accumulation, which is the basis for western economy. They’re… into other cultural activities; and it’s a strength that has never been used, to my knowledge, very well in this state in any sort of ongoing business that can keep a broader work force working. Actually, money from projects like Red Dog, I think, goes much farther in the Native community than it would in the non-Native community, because it doesn’t go to the people that earn it, it goes to their immediate and extended family.

The ability of Native corporations to offer hiring preferences to Alaska Natives is critical to federal Indian policy toward Alaska Natives because of (1) the unique position of Native corporations; (2) the diminished role that tribes play in the economic lives of Alaska Natives; and (3) the underlying purposes of ANCSA.

First, because the Native corporation leaders are drawn from the shareholder population, these corporations are uniquely able to structure jobs in a manner that is compatible with the subsistence needs of their shareholders and other village residents. Alaska Natives have lived a subsistence lifestyle for thousands of years—a lifestyle that for many continues to contribute to a substantial part of their protein-rich diets.

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40. NANA Regional Corp. was formed as a result of the ANCSA and is based in Kotzebue, on the western coast of Alaska.
41. Red Dog Mine is owned by NANA Regional Corp., but is operated by Teck Cominco, Ltd., a large Canadian mining company.
42. ALASKA NATIVES COMM’N REPORT, supra note 27, at 88.
43. The leaders of a Native corporation are thus more acutely aware of the elements of its employees’ traditional lifestyles because these individuals are drawn from the Native population.
44. Subsistence includes the customary and traditional uses of fish and game in all of Alaska’s rural areas. Therefore, if a person moves into a rural area and adopts that way of living for his own, that person, whether Alaska Native or non-native, may legally fish and hunt for subsistence. Robert Wolfe, Alaska Dep’t of Fish and Game Frequently Asked Questions: Myths, What Have You Heard? at http://www.subsistence.adfg.state.ak.us/geninfo/about/subfaq.cfm#q1 (last modified Nov. 11, 2003).
45. After 15 years of study, the Alaska Dep’t of Fish and Game found that in forty-five of the ninety-eight Alaska communities surveyed in the 1980s, subsistence harvests equaled or surpassed...
Native corporation leaders can more effectively structure employment that takes subsistence into account because many are keenly aware of the needs of the shareholders in their regions and often participate in the subsistence activities themselves. Limiting the Native corporations’ ability to use hiring preferences for Alaska Natives could substantially limit opportunities that accommodate the subsistence lifestyle needs of Alaska villages.

The importance of subsistence hunting and fishing to Alaska Natives cannot be overstated. An Alaska government report concluded that “whatever the reasons for difficulty in translating short-term government monies into long-term jobs in villages, one consequence of high and increasing levels of unemployment is that subsistence activities, which have always been of great importance to the villages, will grow in absolute and relative importance.”46

Second, Native corporations must be allowed to engage in preferential hiring because ANCSA diminished the role that tribes play in the economic lives of Alaska Natives, particularly in the area of employment support. Alaska Native “tribes” are exempt from enforcement of federal and state employment discrimination claims because (1) they are not state-recognized entities; (2) they are specifically exempted from the definition of “employer” under Section 701(b)(1) of the Civil Rights Act;47 and (3) as federally recognized tribes, they are immune from suit.48 However, the economic resources of Alaska Natives are not found in the tribes, but rather in the Native corporations.49 Because it was the Native corporations that received all the land and money from the settlement, while tribal entities essentially received nothing,50 Native corporations are uniquely capable of filling the void left in Alaska Natives’ economic lives.

Another factor that has limited the power of tribes to provide employment support for Alaska Natives is the decision in Alaska v. Native Village of Venetie Tribal Government.51 In Venetie, Alaska brought suit challenging the Native Village of Venetie’s authority to tax a state-

the quantity of western U.S. standard for average annual capita purchases of meat, fish, and poultry. ALASKA NATIVES COMM’N REPORT, supra note 27, at 98.


48. See CASE, supra note 26, at 402.

49. Both the 44 million acres of land retained by Alaska Natives and the nearly $1 billion granted to Native people are controlled by Native boards of directors of Native corporations, who also have complete control over their corporate assets. 2003 ANNUAL REPORT, supra note 6, at 7.


funded construction project. The Ninth Circuit Court of Appeals concluded that because a tribe exercises its sovereign authority to tax nonmembers only within the confines of tribal territory, a tax is valid only over nonmembers within the confines of "Indian Country." The case was remanded to the district court for factual determinations and then, before making its way back to the court of appeals, was consolidated with several other cases to address the question of what constitutes "Indian Country." Although the court of appeals upheld the Native corporation lands as "Indian Country," the United States Supreme Court overturned the decision in a unanimous opinion written by Justice Thomas. He concluded that after the enactment of ANCSA, the Village of Venetie lands did not meet the qualifications for "Indian Country." After Venetie, Alaska Native tribes essentially have no land over which to exercise sovereignty, with the possible exception of non-ANCSA lands such as allotments and town sites. Without this sovereignty, the Native villages cannot exercise taxing powers over the lands that they possess. Without tax income from nonmembers, the tribes have substantially less income to provide economic opportunities for their members than they would otherwise.

Finally, although ANCSA's stated purpose was to settle Alaska land claims "rapidly" and "with certainty," the settlement also intended to accomplish those goals "in conformity with the real economic and social needs of Natives." Allowing Native corporations to use Alaska Native hiring preferences conforms to ANCSA's goals by taking into account the economic and social needs of Alaska Natives. Alaska Natives may not have a uniform need for hiring preferences, but taking away this option from Native corporations forecloses one of the benefits that Native corporations can and should be able to provide to Alaska Natives.

52. Id. at 525.
53. Alaska v. Native Vill. of Venetie, 856 F.2d 1384, 1390 (9th Cir. 1988).
54. Alaska v. Native Vill. of Venetie, 101 F.3d 1286 (9th Cir. 1996); see also CASE, supra note 26, at 424-27. "Indian Country" refers to a limited category of Native lands that are neither reservations nor allotments, and that satisfy two requirements: first, they must have been set aside by federal government for use of the Indians as Native land; second, they must be under federal superintendence. See Venetie, 522 U.S. at 527.
55. Relying on 18 U.S.C. § 1151, the Court concluded that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community" (Indian Country). The Court also noted that "after the enactment of ANCSA, the Tribe's lands are neither validly set apart for the use of Indians as such, nor are they under the superintendence of the Federal Government." Venetie, 522 U.S. at 531-32.
56. Id. at 527.
57. See id.
58. See CASE, supra note 26, at 424-27.
B. The Form of Hiring Preferences

A hiring preference for Alaska Natives can be structured in a variety of ways. Hiring preferences constitute a continuum stretching from the narrowest preference—a shareholder-only hiring preference—to the broadest—a hiring preference for any Native American with a tribal status that is recognized by the federal government. A Native corporation can structure its hiring preferences along this continuum to be more inclusive or exclusive.

First, Native corporations could implement the narrowest hiring preference, a preference offered only to shareholders of the hiring corporation. Second, Native corporations could offer a slightly broader preference based on shareholder, shareholder-spouse, or shareholder-descendant status for the specific Native corporation in which the applicant, or his close family member, is a shareholder. Third, Native corporations could offer an even broader hiring preference to any shareholder, spouse, or descendant of a shareholder from any Alaska Native corporation, not just the specific corporation in which the individual or his or her relative owns stock. Fourth, Native corporations could offer an even broader preference to any Alaska residents recognized as Alaska Natives by the Bureau of Indian Affairs. Finally, the Native corporations could offer the most inclusive hiring preference by offering it to any Native American. The hiring preference struck down in Malabed was the latter, offering an employment preference—including hiring, promotions, transfers, and reinstatements—for any Native American applicant.

The narrowest preference, the shareholder-only preference, would be far too narrow to accomplish Congress’s goals of encouraging Native corporations to use hiring preferences. The shareholder-only preference would exclude those members of Alaska Native villages who were born

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60. This would essentially be the same as a hiring preference for any Alaska Native because anyone who is an Alaska Native is likely to be a spouse or descendant of a shareholder of one of the Alaska Native corporations.


62. This classification would refer to a Native American registered with any tribe recognized by the Bureau of Indian Affairs.

63. Malabed v. N. Slope Borough, 70 P.3d 416, 418 (Alaska 2003). This list does not address the internal hiring policies of the Native corporations or the implementation of such hiring preferences, which could vary substantially even within the same category.

64. Congress has indicated a strong interest in allowing Native Alaskan hiring preferences by Native corporations by amending ANCSA several times.
after 1971. In addition, many shareholders alive during the initial conveyance of shares in 1971 are likely to exit the work force as they age. Thus, a broader preference that provides a benefit to a wider cross section of Alaska Natives is preferable because it would extend preferences to those who have not yet entered the work force and do not have shareholder status because they were born after 1971.

Based on the current hiring preferences offered, Native corporations also seem to disfavor the narrow shareholder-only preference. For example, NANA Corporation, AHTNA Corporation, and Cook Inlet all have shareholder hiring preferences that include advantages for spouses and descendents of shareholders. Calista Corporation “maintains a hiring preference for Alaska Natives and American Indians, in general.” Calista Corporation’s employment application also incorporates preferences in its hiring because it asks applicants whether they are Calista shareholders, spouses of Calista shareholders, descendents of Calista shareholders, shareholders of another region, or members of a Native American tribe. Only one of the thirteen regional Native corporations indicates a narrow preference in its “commitment to hiring shareholders.”

Even if a Native corporation adopts a “commitment to hiring shareholders” policy, it does not necessarily exclude broader hiring preferences because this policy traditionally suggests only a focus on shareholder hiring. Throughout the remainder of this Comment, the following two hiring preferences will be considered: (1) hiring preferences for

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65. Only Alaska Natives who were alive in 1971 received original shares from the regional corporations. Although some regional Native corporations have extended shareholder status to its younger members, many Alaska Natives will not receive shares until shares pass through shareholders’ estates. Case, supra note 26, at 159–60.

66. The survey discussed in note 13 indicates that most Native corporations use a wider preference than a “shareholders only” preference. See supra note 13.

67. NANA Regional Corp. is on the western Alaska coast; AHTNA Corp. is located in the Copper River region; and Cook Inlet is in south-central Alaska.


69. Calista Corp. is the second largest of the thirteen regional corporations formed under ANCSA. The Calista land entitlement is located in two major river deltas, the Yukon and Kuskokwim, and comprises fifty-six villages and approximately 20,000 people. Calista Corp., Calista Corporate Profile, at http://www.calistacorp.com/profile.html (last modified Dec. 11, 2003).


shareholders and individuals related to shareholders and (2) hiring preferences for Alaska Natives as defined by the federal government.

III. HIRING PREFERENCES AND ISSUES OF FEDERAL LAW

A. Federal Hiring Preferences for Native Americans

The 150-year history of Native American employment preferences makes hiring preferences a critical part of federal Indian policy. Native American employment and contracting preferences have also developed considerably in the second half of the twentieth century. In fact, three key Indian employment preferences are codified in the United States Code: Section 12 of the Indian Reorganization Act offers a Bureau of Indian Affairs employment preference; section 7(b) of the Indian Self-Determination and Education Assistance Act provides employment and contracting preferences related to federal contracts "benefiting" Indians; and Title VII, section 703(i) of the Civil Rights Act of 1964 adopts employment preferences as a policy of "any business or enterprise on or near an Indian reservation." The first two preferences apply only to federal jobs and federal contracts. The third preference is a broader provision that allows any business "on or near an Indian reservation" to enact a hiring preference without violating federal civil rights legislation. This final preference is also applicable to Native corporations because it specifically identifies them as groups that may enact hiring preferences.

The Civil Rights Act of 1964, also referred to as the Equal Employment Opportunity Act, broadly seeks to eliminate and remedy discrimination in the workforce by banning employment discrimination based on race, gender, religion, and political differences. By excluding businesses "on or near . . . reservations" from the Act, Congress has impliedly expressed the goal of promoting reservation economies by stimulating employment for Native Americans, both on the reservation and off. Such an enactment is effective, at least within the reservations, be-

74. Case, supra note 26, at 249.
75. Id.
77. Id. § 458(e)(b).
80. § 2000e(b).
81. § 2000e-2(a).
82. Morton v. Mancari, 417 U.S. 535, 545–46 (1974) (noting that the unique status of Indians and the need to promote employment on reservations were motivating factors behind 42 U. S.C. § 2000(e)-2(i)).
cause tribal sovereignty over the reservation precludes state jurisdiction over the businesses.\textsuperscript{83} States have jurisdiction only for the limited purposes of collecting taxes from nonmembers.\textsuperscript{84} Non-reservation lands could arguably fall under state jurisdiction and therefore could be subject to state discrimination laws. However, this question remains untested in the courts.

Despite the courts’ mixed treatment of business entities related to tribal interests on non-reservation lands, Native American tribes in the lower forty-eight states have a distinct advantage over the Alaska Natives in implementing hiring preferences because tribes in the lower forty-eight states have sovereignty over their reservations.\textsuperscript{85} As discussed above, after \textit{Venetie}, Alaska Native tribes and villages do not have sovereignty over lands granted to the Native corporations because the Court held that ANCSA land was not “Indian Country” for the purposes of sovereignty.\textsuperscript{86} By removing ANCSA land from “Indian Country,” Alaska Native tribes and villages became “sovereigns without territorial reach.”\textsuperscript{87} Hence, despite being recognized as tribes by the United States government, Alaska Native tribes do not have sovereignty over lands that would enable them to enact hiring preferences completely without state intervention being aroused.

\textbf{B. Federal Indian Preference Decisions}

Federal courts have upheld the legitimacy of federal governmental hiring practices that favor Native Americans. For example, the United States Supreme Court upheld the Indian Reorganization Act employment preference\textsuperscript{88} at issue in \textit{Morton v. Mancari} by deeming the preference to be based on the unique political status of Native Americans as members


\textsuperscript{84} In \textit{Moe v. Confederated Salish and Kootenay Tribes of the Flathead Reservation}, 425 U.S. 463 (1976), the Court held that the state can require Indian tribes to collect tax on sales of tobacco products to nonmembers. In the most recent case addressing this issue, \textit{Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe}, 498 U.S. 505 (1991), the Court reached the same conclusion, reasoning that the state’s interest in collecting taxes justified the minimal burden imposed on the tribe in collecting the tax and did not violate the tribe’s sovereignty.

\textsuperscript{85} There are 314 recognized reservations in the United States. U.S. DEP’T OF COMMERCE, \textit{supra} note 34, at 7.

\textsuperscript{86} Alaska v. Native Vill. of Venetie, 522 U.S. 520, 531 (1998); Alaska v. Native Vill. of Venetie, 101 F.3d 1286, 1297 (9th Cir. 1996). (finding that ANCSA effected “a significant diminution of the power of Congress and the executive agencies over Alaska Native tribes, suggesting a shift from government superintendence to self-regulation.”).

\textsuperscript{87} \textit{CASE, supra} note 26, at 424–27; see also \textit{Venetie}, 101 F.3d at 1303.

\textsuperscript{88} The Indian Preference Act provides a preference for “qualified Indians” for appointment to vacancies for positions in the Bureau of Indian Affairs. 25 U.S.C. § 472 (2000).
of Indian Tribes, and not based on race.\textsuperscript{89} In dismissing the notion that
the hiring preference was a racial preference, the Court stated that "it is
an employment criterion reasonably designed to further the cause of In-
dian self-government."\textsuperscript{90}

Since \textit{Morton v. Mancari}, the federal courts of appeal have con-
cluded that employment preferences are a viable part of federal Indian
policy. The Ninth Circuit has upheld both Indian Self-Determination and
Education Assistance Act\textsuperscript{91} employment and contracting preferences in
Alaska.\textsuperscript{92} In \textit{Preston v. Heckler}, the court noted that "Congress [clearly]
considers Indian [hiring] preferences to be an important element of fed-
eral Indian Policy."\textsuperscript{93} Also, in \textit{Livingston v. Ewing}, a Tenth Circuit Court
of Appeals upheld the practice of allowing only Native Americans to
display and sell handcrafted jewelry in the city square.\textsuperscript{94} The court justi-
fied the discriminatory treatment by finding that furthering of the pub-
lc's education of Indian culture was a legitimate governmental interest.\textsuperscript{95}
In upholding the preference, the court cited \textit{Morton v. Mancari} to sup-
port its own holding that the Title VII exception also applies to non-
reservation lands near reservations.\textsuperscript{96}

The principles set forth in \textit{Morton v. Mancari} remain important to
present cases. The Supreme Court has, in fact, recently upheld the con-
tinued viability of \textit{Morton v. Mancari}. In \textit{Rice v. Cayetano}, a case in-
volving the status of Hawaiian Natives, Justice Kennedy distinguished
the status of Hawaiians from American Indians, reiterating that the \textit{Man-
cari} doctrine applied only to "federally recognized tribes."\textsuperscript{97} With regard
to Alaska Natives, although their tribes and villages are federally recog-
nized tribes, they do not have their own governmental territory, but have
instead been given Native corporations under ANCSA. Under ANCSA,
the federal government has conferred benefits upon Native corporations
through the provision of stock restrictions, tax exemptions, creditor pro-
tections for undeveloped lands, and by using hiring preferences similar to

\textsuperscript{89} 417 U.S. 535, 554 (1974).
\textsuperscript{90} \textit{Id.} at 554 n.24.
\textsuperscript{91} See \textit{supra} note 77 and accompanying text. Section 7(b) of the Indian Self-Determination
and Education Assistance Act provides employment and contracting preference related to federal
contracts "benefiting" Indians.
\textsuperscript{92} See \textit{Preston v. Heckler}, 734 F.2d 1359 (9th Cir. 1984) (employment preference); Alaska
General Contractors \textit{v.} AVCP Hous. Auth., 694 F.2d 1162 (9th Cir. 1982) (contracting preference).
\textsuperscript{93} \textit{Preston}, 734 F.2d at 1370.
\textsuperscript{95} \textit{Id.} at 1115–16.
\textsuperscript{96} \textit{Id.} at 1113–14.
\textsuperscript{97} \textit{Rice v. Cayetano}, 528 U.S. 495, 518 (2000).
those offered to Native Americans in the lower forty-eight states "on or near reservations." 98

IV. NATIVE CORPORATIONS AS AN EXTENSION OF THE FEDERAL INDIAN POLICY FOR HIRING PREFERENCES

Despite the statement in ANCSA disfavoring the creation of long-term "racially" defined institutions, 99 Congress expressed a clear intent to continue the policy recognizing Native corporations as unique entities and allowing Native corporations to provide hiring preferences for Alaska Natives. These intentions are manifested by several ANCSA amendments: (1) the indefinite extension of the inalienability of the shares; 101 (2) the express exclusion of the Native corporations from the Civil Rights Act for the specific purpose of allowing hiring preferences; 102 and (3) the express authority of Native corporations to provide benefits to its shareholders. 103

First, Congress's extension of the inalienability of shares indicates that Congress abandoned the goal of completely integrating Native corporations into the marketplace. Unlike the prior United States aboriginal claim settlements in the lower forty-eight states, the lands and assets conveyed to Natives under ANCSA were not initially held in trust or other form of permanent protection. 104 Instead, they were conveyed to state-chartered business corporations 105 and were subject to the sole re-

98. See CASE, supra note 26, at 168–70.
99. Section 1601 of ANCSA predates the 1993 Department of Interior Federally Recognized Indian Tribe List. With the congressional ratification of the list in 1994, Alaska Natives gained the same recognized political status as Native Americans in the lower forty-eight states and, therefore, the “racially defined” language of § 1601(b) may no longer be strictly applicable. See Federally Recognized Indian Tribe List, 58 Fed. Reg. 54,364, 54,368 (Oct. 21, 1993) (codified at 25 U.S.C. § 479(a)(2000)).
100. Congress directed that:
The settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.
103. 43 U.S.C. § 1606(r).
104. Id. § 1601; see also CASE, supra note 26, at 159.
105. The Native corporations were formed primarily as a means of receiving federal benefits on behalf of Alaska Natives.
striction that stock would be inalienable for a period of twenty years.\textsuperscript{106} However, in 1987, Congress amended ANCSA\textsuperscript{107} to provide permanent inalienability for the ANCSA stock, unless the shareholders of individual ANCSA corporations allowed otherwise.\textsuperscript{108} The recognition of the long-term inalienability under these amendments effectively ended the potential for Native corporations to become fully integrated corporations under Alaska law because the amendments no longer set any timeframe for the inalienability to end.\textsuperscript{109}

Second, Congress formally excluded Native corporations from the Civil Rights Act.\textsuperscript{110} Specifically, an amendment to ANCSA exempted Alaska Native corporations from the definition of "employer" under section 701(b)(1) of the 1964 Civil Rights Act.\textsuperscript{111} Based on this amendment, a Native corporation, like businesses "on or near reservations" in the continental United States, is excluded from the definition of "employer" and could therefore discriminate based on "race, color, religion, sex, or national origin" without violating federal law.\textsuperscript{112} However, the primary purpose of the amendment was to allow Alaska Native hiring preferences.\textsuperscript{113} The legislative history of the provision indicates that the exemption is intended to "facilitate Alaska Native shareholder employment programs by resolving any uncertainty as to the applicability of the Civil Rights Act of 1964 to certain business enterprises in which Native corporations participate."\textsuperscript{114}

Finally, section 1606(r) of ANCSA has explicit language allowing Native corporations to provide benefits to their shareholders and immediate family members.\textsuperscript{115}

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or de-

\textsuperscript{106} § 1606(b)(1)(B).
\textsuperscript{107} CASE, \textit{supra} note 26, at 173.
\textsuperscript{108} § 1636.
\textsuperscript{109} See \textit{id}.
\textsuperscript{110} 43 U.S.C. § 1626(g) (2002).
\textsuperscript{111} 42 U.S.C. § 2000e(b)(1) (2000). Section 1626(g) of the Civil Rights Act of 1964 provides the following:

For the purposes of implementation of the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.), a Native Corporation and corporations, partnerships, joint ventures, trusts, or affiliates in which the Native Corporation owns not less than 25 per centum of the equity shall be within the class of entities excluded from the definition of "employer" by section 701(b)(1) of Public Law 88-352 (78 Stat. 253), as amended (42 U.S.C. § 2000e(b)(1)), or successor statutes).

\textsuperscript{112} CASE, \textit{supra} note 26, at 250.
\textsuperscript{114} See \textit{id}.
\textsuperscript{115} 43 U.S.C. § 1606(r).
scendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.  

In essence, a hiring preference can be read as a benefit that provides for the welfare of "such shareholders or family members" as defined in this section. As discussed below, unlike the Civil Rights Act exemption for Native corporations, section 1606(r) includes explicit preemption language.  

V. MALABED v. NORTH SLOPE BOROUGH  

In 1997, the North Slope Borough, a political subdivision of the Alaska, enacted an ordinance granting employment preferences to "Native Americans," defined as members of federally recognized tribes. Three non-Native Americans, Robert Malabed, Morris David Welch, and Charles Michael Emerson, applied for jobs or promotions with the North Slope Borough and were rejected in favor of Alaska Natives. Malabed, Welch, and Emerson sued the North Slope Borough, contending that the borough rejected their applications for less qualified Native Americans based upon the ordinance. They argued that the ordinance impermissibly discriminated on the basis of race, national origin, and political affiliation in violation of several state and local laws, including the Alaska Constitution's Equal Protection Clause, Alaska's statutory scheme, and the borough's charter.

Although the parties originally filed Malabed in federal court, the case was actually decided under the Alaska Constitution's Equal Protection Clause after the Ninth Circuit Court of Appeals directed the Alaska

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116. Id.  
117. See id.  
120. Malabed, 70 P.3d at 419.  
121. ALASKA STAT. § 29.20.630 (2002) specifically prohibits Alaska’s municipalities like the North Slope Borough from engaging in racial and national origin discrimination.  
122. At the time of litigation, the North Slope Borough Code stated: The granting of employment preference to Native Americans. The preference shall apply to hirings, promotions, transfers, and reinstatements. A Native American applicant who meets the minimum qualifications for a position, the best qualified among these shall be selected. A Native American is [a] person belonging to an Indian tribe as defined in 25 U.S.C. § 3703(10).  
123. Malabed, 42 F. Supp. 2d at 927.
Supreme Court to interpret its own constitution. The case returned to the circuit court for the final dispensation on the question of federal pre-emption.

A. The Violation of the Alaska Constitution

The Alaska Constitution guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law" and that "no person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." Accordingly, the Alaska Supreme Court analyzes equal protection claims using a three-step, sliding scale equal protection test:

To implement Alaska's more stringent equal protection standard, we adopted a three-step, sliding scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: [F]irst, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.

The Alaska Supreme Court, in answering the certification from the circuit court, held that "the Borough's hiring preference violate[d] the Alaska Constitution's guarantee of equal protection because the Borough lack[ed] a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted [was] not closely tailored to meet its goals." The court applied its three-step equal protection standard to reach this conclusion.

The court addressed the first step of the equal protection standard to determine if the weight of the individual interest was impaired by the classification. The court concluded that because the borough's hiring preference impaired Mr. Malabed's right to seek and obtain employment in his profession, an important right had been violated.

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124. Malabed v. N. Slope Borough, 335 F.3d 864, 866 (9th Cir. 2003).
125. See id. at 868.
126. ALASKA CONST. art. I, §§ 1, 3.
127. Malabed, 70 P.3d at 420–21.
128. Id. at 427–28.
129. Id. at 420.
130. Id. at 421.
131. Id.
In the second step, the court examined the importance of the purposes of the government’s action. The court cited the following reasons for its conclusion that the borough had no legitimate interest in creating a hiring preference that favored one class of Alaskans over another: (1) “[T]he Alaska Constitution [did] not give the Borough a legitimate interest in adopting the preference” because the Alaska Constitution did not radiate the “implied guardianship powers allowing the state or its boroughs to treat Alaska Natives as if they were wards;” (2) the state law, Alaska Statutes section 29.20.630, referred to as the “Prohibited Discrimination Statute,” specifically prohibited Alaska’s municipalities from engaging in racial and national origin discrimination; (3) the borough’s charter prohibited these forms of discrimination; (4) the ordinance was actually intended to benefit Inupiat Eskimos and was thus a classification based on race; and (5) the Civil Rights Act exemption for Native corporations was too attenuated from the borough ordinance to justify its application in the present case.

Finally, although the court could have ended its analysis by finding no legitimate state interest, it also addressed the means-to-end fit. The court noted that the ordinance did not meet the means-to-end fit requirement because the ordinance was “stunningly broad” in light of its purpose of reducing Native American unemployment. The court reasoned that the ordinance extended borough-wide and to all aspects of employment, was limitless in duration, covered all aspects of promotions, transfers and reinstatements, and applied absolutely to allow those without minimum qualification to be hired over a non-Native applicant who was qualified.

Despite the apparent failure of the ordinance under the three-step equal protection analysis, the court explicitly limited its holding:

We by no means suggest that boroughs are categorically barred from adopting hiring preferences. Nor do we suggest that all state or local legislation pertaining to Alaska Natives or tribal governments should be assumed to establish suspect classifications presumptively

132. Id. at 420.
133. Id. at 421–22.
134. Id. at 422.
136. “No person may be discriminated against in any borough employment because of race, age, color, political, or religious affiliation, or national origin.” NORTH SLOPE BOROUGH CHARTER § 16.020 (1997).
137. Malabed, 70 P.3d at 424.
138. See id.
139. Id. at 427.
140. Id.
141. Id.
barred by equal protection. Our focus is considerably narrower: [W]e simply hold, in keeping with Enserch, that the borough has no legitimate basis to claim a general governmental interest in enacting hiring preferences favoring one class of citizens over others; and we find that the borough has failed to identify any source of a legitimate, case-specific governmental interest in the preference it actually adopted—a hiring preference favoring Native Americans.

By limiting its holding to the facts before the court, the Alaska Supreme Court indicated that hiring preferences may not necessarily violate state law.

The court further stated that “[a]ssuming for present purposes that the borough’s ordinance reflect[ed] this kind of political classification and [did] not discriminate on the basis of race, the ordinance might [have] avoid[ed] problems with the Alaska Constitution’s bar against racial discrimination.” This language indicates that although Alaska may not recognize political classification of Alaska Natives, such recognition under federal law does not necessarily trigger a finding of racial discrimination under Alaska’s Prohibited Discrimination Statute. Thus, Alaska Native corporations, being federally recognized entities, may classify Alaska Natives and yet not run afoul of the Prohibited Discrimination Statute.

Finally, in differentiating Malabed from Morton v. Mancari, the court focused on the notion that the borough, unlike the Bureau of Indian Affairs in Morton v. Mancari, had no governmental interest in furthering Native American self-government. The court also concluded that in contrast to the federal law at issue in Mancari, Native Americans had no explicitly “unique legal status” under borough law. The fact that the Borough was a recognized entity of Alaska state government essentially was the dispositive factor in this case.

142. In State Departments of Transportation & Labor v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989), the court struck down an Alaska statute that provided hiring preferences for public works projects to residents of economically distressed zones. The Court applied the same three-step analysis and deemed that favoring one class of citizens over another violated the Equal Protection Clause of the Alaska Constitution.
143. Malabed, 79 P.3d at 426.
144. Id. at 420.
145. See id.
147. Malabed, 70 P.3d at 420.
148. Id.
149. Id. at 426–27.
B. Why Alaska State Law Was Not Preempted in Malabed v. North Slope

Upon receiving the Alaska Supreme Court’s ruling on the state law issues in Malabed, the Ninth Circuit Court of Appeals concluded that Congress did not expressly preempt Alaska state law or occupy the field. The court also deemed that section 703(i) Civil Rights Act did not conflict with state law because Congress only intended to limit the scope of section 703(i) as to otherwise valid Native American preference programs.

The circuit court began with the presumption that Congress did not intend to preempt state law. In determining whether a federal statute preempts state law, the court stated that its “sole task is to ascertain the intent of Congress.” The court concluded that “there can be no valid argument that Congress has preempted state law here by express statement or by “occupying the field” because Congress did not “recite an intent to preempt state laws forbidding discrimination nor has it occupied the field in a way that prohibits states from outlawing discrimination.” Thus, the court narrowed its discussion to whether section 703(i) of the Civil Rights Act conflicted with state discrimination laws and therefore preempted such laws.

Dismissing the borough’s contention that section 703(i) is inconsistent with state laws prohibiting the borough from giving hiring preferences and are therefore preempted, the court asserted that the plain language of section 703(i) did not support the borough’s position:

The section does no more than limit the scope of Title VII, the operative words being: “Nothing contained in this subchapter shall apply . . . .” Section 703(i) does not require employers to implement Native American employment preference programs. It does not state that employers may implement such programs without regard to any local, state, or federal law. It does not provide an incentive to give such preferences. In summary, it does not create or authorize a pref-

150. Malabed v. N. Slope Borough, 335 F.3d 864, 870 (9th Cir. 2003).
151. “Occupying the field” means that the federal government preempts a state law because the federal government has regulated that issue to the extent that nothing is left for the state to regulate. See Indus. Truck Ass'n, Inc. v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997).
153. Malabed, 335 F.3d at 871.
154. Id. at 869.
156. Id. at 870.
157. “Section 1104 permits a finding of preemption only if the Alaska Constitution’s Equal Protection Clause, here prohibiting the challenged employment preferences, is inconsistent with the purpose of Title VII or with § 703(i).” Id. at 871.
erence program. Rather, it creates an exception to the reach of Title VII for otherwise valid programs.\textsuperscript{158}

Thus, without more, the exemption to Title VII may not provide the requisite intent to preempt Alaska discrimination statutes that would be required under the Ninth Circuit Court of Appeal’s preemption analysis in \textit{Malabed v. North Slope}.\textsuperscript{159}

\section*{VI. USE OF HIRING PREFERENCES BY NATIVE CORPORATIONS AFTER MALABED}

Despite the unfavorable holdings in both the Alaska Supreme Court and the Ninth Circuit Court of Appeals in \textit{Malabed}, \textsuperscript{160} some hiring preferences are still likely permissible for Native corporations because (1) some types of hiring preferences offered by Native corporations clearly do not violate the Alaska Constitution or state discrimination laws and (2) despite \textit{Malabed}, Congress has indeed indicated an intent to preempt Alaska state law to allow some types of hiring preferences by Alaska Native corporations.

In this Part, Section A addresses the state law issues regarding hiring preferences under state law. Section B argues that hiring preferences for shareholders and their immediate family members do not violate the Alaska Constitution or other state laws. Section C considers preemption under the two common types of preferences.\textsuperscript{161} Section D then provides a summary of permissible forms of hiring preferences in light of \textit{Malabed}.

\subsection*{A. Hiring Preferences Offered by Native Corporations May Be Problematic Under State Law}

The holding of \textit{Malabed} is not applicable to hiring preferences offered by the Native corporations. The \textit{Malabed} holding does not apply to hiring preferences offered by Native corporations because (1) the \textit{Malabed} court limited its holding to entities of state government; (2) \textit{Malabed}’s equal protection analysis is not applicable to Native corporations because they are not entities of state government; and (3) such hiring preferences do not violate the statute in question in \textit{Malabed}, the Prohibited Discrimination Statute,\textsuperscript{162} which only prohibits entities of state government from distinguishing between individuals based on race. Despite

\begin{itemize}
\item \textsuperscript{158} \textit{Id.} at 868 (emphasis added).
\item \textsuperscript{159} \textit{Id.} at 874.
\item \textsuperscript{160} \textit{Id.} at 868; \textit{Malabed v. N. Slope Borough}, 70 P.3d 416, 426 (Alaska 2003)
\item \textsuperscript{161} "Alaska Native" and "shareholder and shareholder family" preferences are addressed specifically because they are not only the most common types of preferences, but are also the types of preferences outlined in federal statutory language in ANCSA. See 43 U.S.C. \textsect{1606(r)} (2000).
\item \textsuperscript{162} \textit{Alaska Stat.} \textsect{29.20.630} (2002).
\end{itemize}
Malabed's inapplicability to Native corporations, hiring preferences offered by Native corporations could still be construed to run afoul of Alaska state law.

First, the question of whether Native corporations can offer hiring preferences is distinguishable from the holding in Malabed because Malabed addressed the issue of whether a government entity could provide hiring preferences.\(^{163}\) As discussed above, the court in Malabed limited its holding to that issue.\(^{164}\) Precisely because the Malabed ruling decided whether the North Slope Borough could identify any source of legitimate, case-specific governmental interest in a preference favoring Native Americans, its holding should not be expanded to apply to cases where nongovernmental entities are involved.\(^{165}\) Because Native corporations are distinct from government entities, Malabed's holding does not reach them.

Second, even without the court's limitations on its holding, Malabed's equal protection analysis is not applicable to the question of hiring preferences by Native corporations because they are unique entities created to settle Alaska Native land claims by the federal government, not entities of state government.\(^{166}\) The state government involvement in the administration of Native corporations is far more attenuated than the administration of the hiring preferences by the North Slope Borough. In contrast to the significant state action in the North Slope Borough at issue in Malabed, the only state government action with respect to Native corporations is the fact that the state refrains from enforcing the Unlawful Employment Practices Statute.\(^{167}\) Thus, a suit brought by a party would be based primarily on the discrimination as evidenced by the violation of the state statutes because the Equal Protection Clause would not directly apply.

Finally, unlike the case in Malabed, Alaska's Prohibited Discrimination Statute does not apply to hiring preferences offered by Native corporations because the statute prohibits only Alaska's municipalities and other political subunits from engaging in racial and national origin discrimination.\(^{168}\) The statute does not address the conduct of Alaska Native corporations or other private corporations, and cannot be read to do so.

\(^{163}\) Malabed, 70 P.3d at 426–27.

\(^{164}\) See supra Part IV.A.

\(^{165}\) See supra Part IV A.


\(^{167}\) See, e.g., ALASKA STAT. § 18.80.220 (2003).

\(^{168}\) ALASKA STAT. § 29.20.630 (2002).
Despite the differences from the hiring preference at issue in Malabed, the preferences offered by Native corporations are still problematic because the Unlawful Employment Practices Statute\(^\text{169}\) may prohibit hiring preferences based on "race," and Alaska courts have not yet recognized the designation of Alaska Native as a political designation by the federal government.\(^\text{170}\)

Native corporations are formed under state law and do not have the same sovereignty over their lands owned in Alaska as Native Americans have over reservation lands in the lower forty-eight states. Instead, Native corporations must follow Alaska state laws to the extent that federal law has not preempted those laws.\(^\text{171}\) Alaska has adopted statutes that correspond with the federal Civil Rights Act.\(^\text{172}\) Alaska's Unlawful Employment Practices Statute provides that "it is unlawful for an employer to refuse employment to a person, bar a person from employment, or discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin."\(^\text{173}\) On its face, the statute limits the Native corporations' ability to provide hiring preferences by preventing corporations chartered under state law from taking race into account. Alaska has not yet recognized any political relationship with Alaska Natives and has rejected the notion that the Alaska Constitution radiates implied guardianship powers that would allow it to treat Alaska Natives "as if they were wards."\(^\text{174}\) If Alaska courts continue to refuse to recognize that Alaskan Native status is a political status, then Alaska courts could conclude that the hiring preferences for Alaska Natives are a racial designation in violation of the Unlawful Employment Practices Statute.

Because the Alaska Constitution and Alaska courts do not recognize the Alaska Native designation as political, any defendant Native corporation that raises the argument that the designation is not racial is likely to face significant challenges. Although terming a federal political designation "racial" would be disingenuous, the Alaska courts seem unlikely to recognize the political designation as anything but a racial designation, given Alaska's substantial equal protection jurisprudence.\(^\text{175}\)

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\(^{169}\) ALASKA STAT. § 18.80.220(2).

\(^{170}\) See John v. Baker, 982 P.2d 738 (Alaska 1999); In re C.R.H., 29 P.3d 849 (Alaska 2001) (declining to recognize that Alaska Natives have a different political status than other Alaskans).

\(^{171}\) See CASE, supra note 26, at 251.

\(^{172}\) ALASKA STAT. § 18.80.220 (2003).

\(^{173}\) § 18.80.220(a)(1).


\(^{175}\) See McDowell v. Alaska, 785 P.2d 1 (Alaska 1989) (invalidating the state's implementation of subsistence regulations under the Alaska National Interest Land Conservation Act on state constitutional grounds because the regulations treated rural and urban residents differently). Although the court focused specifically on state constitutional provisions related to hunting and fishing.
The court in *Malabad* expressed this view. "To the extent that the Alaska Constitution implies anything concerning the state’s relations with Alaska Natives, then, it mirrors the constitutional drafters’ well-recognized desire to treat Alaska Natives like all other Alaska citizens."\(^{176}\)

On the other hand, the issue certainly has not been completely closed by *Malabad*. As discussed above, the court raised the hypothetical that if "the borough’s ordinance reflects this kind of political classification and does not discriminate on the basis of race, the ordinance might avoid problems [with] the Alaska Constitution’s bar against racial discrimination."\(^{177}\) However, the court then reasoned that the "political nature of the classification would not necessarily insulate the ordinance from *Malabad*’s equal protection challenge."\(^{178}\) This was because the borough, unlike the Bureau of Indian Affairs in *Morton v. Mancari*,\(^ {179}\) had no obvious governmental interest in furthering Native American self-government and Native Americans have no "unique legal status" under borough law.\(^ {180}\) This reasoning, however, does not hold true for the Native corporations, for although incorporated under state laws, Native corporations are an entirely federal creation and the Alaska Natives will retain all stock as inalienable for the foreseeable future.\(^ {181}\) Thus, Alaska Natives, at least as shareholders, do have a "unique legal status" through the corporations.\(^ {182}\) Moreover, unlike boroughs or other instruments of Alaska state government, Native corporations have been charged with the task of furthering the interests of Alaska Natives.\(^ {183}\)

**B. Hiring Preferences for Shareholders and Their Family Members Do Not Violate the Alaska Constitution or State Laws**

Although Alaska’s statutes and administrative rulings disfavor the use of hiring preferences,\(^ {184}\) hiring preferences for the Native corporation

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\(^{176}\) *Malabad*, 70 P.3d at 422 ("We consider the Eskimo and the Indian a citizen just the same as all the rest of us. We don’t consider that he is any better than we are, and we don’t consider that he is any worse. He is a man just like we are; and he is entitled to all the rights and privileges and all the duties of citizenship, just as we are." (quoting Delegate Davis) See 4 Proceedings of Alaska Constitutional Convention 2525, 2527-91 (Jan. 18, 1956)).

\(^{177}\) *Malabad*, 70 P.3d at 420.

\(^{178}\) Id.

\(^{179}\) See *supra* Parts III.B, IV.A.

\(^{180}\) *Malabad*, 70 P.3d at 420.

\(^{181}\) *See supra* Part III.


\(^{183}\) § 1601.

shareholders and their close family do not violate the Alaska Constitution’s Equal Rights Clause or state discrimination statutes because, as discussed above, (1) the Malabed decision was limited to its facts,\(^ {185} \) (2) neither the Prohibited Discrimination Statute nor the Unlawful Employment Practices Statute apply to shareholder preferences, and (3) adjudication by the Alaska Human Rights Commission has held that the use of hiring preferences for shareholders would likely be permissible.

First, as discussed above, the Malabed holding is limited to its facts.\(^ {186} \) Also, in applying Malabed, the state recognition of a hiring preference for shareholders and their families would not require recognizing Alaska Natives as a political classification. Thus, there is no trigger for an equal rights violation under the Alaska Constitution.

Second, although Alaska statutes may apply to an Alaska Native preference, the statutes do not apply to shareholder and shareholder family preferences. As discussed above, Alaska does not recognize any formal trust relationship with Alaskan Native tribes and, therefore, does not have the same sort of political relationship with Alaska Natives as the federal government has.\(^ {187} \) The Malabed court premised its decision on the notion that if there is no political status, then the hiring preferences are based on race.\(^ {188} \) Shareholder status, however, cannot be so easily dismissed as a racial designation because shareholder status is based on the property right of stock ownership in a Native corporation.\(^ {189} \)

Third, the Alaska Human Rights Commission (the “Commission”), an adjudicatory body that can impose penalties for employment violations, has interpreted the ANCSA amendment to the Civil Rights Act to preempt the Prohibited Discrimination Statute only insofar as it would prohibit a Native corporation from offering shareholder hiring preferences.\(^ {190} \) In an advisory determination, the Commission indicated that Native corporations must abide by Alaska’s employment discrimination laws, even though the exemption from federal law would allow Native corporations to discriminate in their hiring practices.\(^ {191} \) The enforcement

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185. See supra section IV(A).
186. See supra section IV(A).
187. Malabed, 70 P.3d at 422 (rejecting the notion that the Alaska Constitution radiates implied guardianship powers that would allow the state or its boroughs to treat Alaska Natives as if they were wards); see supra Part IV.A.
188. See generally Malabed, 70 P.3d at 420–24.
191. See id at 18–19. “With the single exception of preferential treatment of shareholders, there does not appear to be any rational connection between discrimination by an ANCSA corporation on these bases and the economic well being of the corporation or of Native Americans.” Id. However, it should be noted that in Alaska State Commission for Human Rights v. Eyak Village, the issue before the Alaska Human Rights Commission was whether gender discrimination claims could be brought
of state statutes would probably not be preempted by Title VII under the Malabed analysis. But if the Native corporations are providing hiring based on shareholder and shareholder family member status, the preferences are based not on race or national origin, but on shareholder status.

The Commission has noted that allowing Native corporations to prefer shareholders in hiring would probably be an acceptable practice because “it is a legitimate federal goal to strengthen the Native segment of the Alaskan Economy, by permitting a shareholder hire preference for ANCSA corporations.”192 This assertion has never been tested in court; it does, however, have a “practical force, because to test it would likely require protracted litigation.”193 If the Commission allows benefits to shareholders, corporations should also be able to extend benefits to shareholders’ family members because the preference would still be based on a corporate shareholder relationship, not a racial relationship. Even if the Commission or an Alaska court were to determine that an extension of the shareholder benefit was based on a racial or other disfavored status, federal law would likely preempt state law on the matter.

C. Federal Law Would Preempt Some Violations of Alaska State Law That Result from Hiring Preferences

The conflicts between state laws and tribal governments have produced a substantial body of preemption law. If tribal self-government or the exercise of a particular power is guaranteed by a federal treaty, statute, or executive order, enforcement of state law is superseded.194 “In determining whether a federal statute preempts state law, ‘our sole task is to ascertain the intent of Congress.’”195 The Malabed court started with the presumption that Congress did not intend to preempt state law.196 The Malabed court thus used a stricter theory of preemption than is generally used for “Indians in Indian Country.”197 Despite this strict standard and

against a Native corporation. Id. at 4. Thus, such broad conclusions regarding “discrimination” by the Commission may not only be unwarranted, but also dicta on the question of whether Native corporations can offer a broader hiring preference for all Alaska Natives.

193. CASE, supra note 26, at 251.
196. Malabed, 335 F.3d at 869.
197. See Blunk v. Ariz. Dept’ of Transp., 177 F.3d 879, 882 (9th Cir. 1999); see also Ketchikan Gateway Borough v. Ketchikan Indian Corp., 75 P.3d 1042, 1046–48 (Alaska 2003) (noting that “notwithstanding the [usual] rule of strict construction [for federal preemption], where the question is whether federal law requires the exemption of tribal interests from taxation, ambiguities in federal law should be resolved in favor of the tribe.”).
the Venetie ruling that ANCSA lands are not Indian country, the standard is met by the fact that Congress has shown the intent to preempt state laws in order to allow Native corporations to provide hiring preferences.

Like the provision at issue in Malabed, the Civil Rights Act exemption to ANCSA not only authorizes Native corporations to discriminate in favor of their shareholders, but also completely exempts Native corporations from complying with the equal employment provisions of the Civil Rights Act. Native corporations could engage in overt discrimination on the basis of race, religion, sex, or national origin without running afoul of Title VII of the Civil Rights Act. If courts followed the same preemption standard used in Malabed, as courts may after the Venetie decision, then the Civil Rights Act exemption could suffer the same treatment as the federal statutory scheme at issue in Malabed. The courts could treat the section as precatory and use the reasoning of the Malabed court, that the exemption "does not state that employers may implement such programs without regard to any local, state, or federal law." However, despite the similar language of the exemption, the intent of Congress to provide preferential hiring is much clearer for Native corporations because Congress expressly allowed Native corporations to use hiring preferences.

Whereas the Native corporations are private entities with unique federal protections, the North Slope Borough in Malabed was an entity of the Alaska state government. The legislative history of the 1988 amendments to ANCSA that brought regional corporations within the Civil Rights Act exemption indicates that the very purpose of the exemption was to authorize shareholder employment programs. Standing alone, the exemption may not provide the strict preemption standard espoused in Malabed. However, section 1606(r) of ANCSA offers additional support for the notion that Congress intended to allow Native cor-

199. CASE, supra note 26, at 250.
200. In Alaska v. Native Village of Venetie, 522 U.S. 520, 531 (1998), the Supreme Court held that ANCSA lands were not "Indian Country" for the purposes of sovereignty. However, the Court indicated that allotments held by Alaska Natives may be Indian country. Id. The Indian country status of Alaska Native township sites also remains undecided. Id.
201. Malabed, 335 F.3d at 867, 871.
203. Malabed, 335 F.3d at 866.
204. See S. REP. No. 100-201 at 26 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3290 (stating that the purpose of the exemption was to "facilitate Alaska Native shareholder employment programs by resolving any uncertainty as to the applicability of the Civil Rights Act of 1964 to certain business enterprises in which Native corporations participate.").
porations to provide hiring preferences and to preempt state law that may prevent Native corporations from offering these preferences to shareholders and to individuals closely related to shareholders.\footnote{205}

Section 1606(r) expressly allows Native corporations to provide benefits for shareholders or immediate families,\footnote{206} but little explanatory legislative history accompanied this particular addition, which was passed within a much larger set of amendments.\footnote{207} Employment preferences fall into the category of an appropriate benefit to be provided by Native corporations.\footnote{208} Although the benefits are not clearly defined, the clear intent of Congress to allow hiring preferences in the Civil Rights Act exemption indicates that a hiring preference should be considered an intended benefit for shareholders and their families.\footnote{209} Even if a court could read the terms "benefits" and "welfare" narrowly, the fact that Congress exempted the Native corporations from the discrimination statutes and gave corporations instead of land means that Congress intended the Native corporations to be able to benefit their own people through these hiring preferences.

The terms "benefit" and "welfare" are not defined in this statute, but should be read to include hiring preferences as an intended benefit for shareholders. First, the term itself, "benefit," is limited only to the extent that the benefits must have the purpose of promoting the health, education, or welfare of such shareholders or family members.\footnote{210} The typical rule of construction in federal Indian law is that an ambiguous expression must be resolved in favor of the Indian parties concerned.\footnote{211} Thus, if federal courts were to apply this rule, the term "benefit" should be interpreted in favor of the Alaska Natives asserting the benefits. Second, "welfare" is a catchall phrase that could be used to cover a number of programs, so long as the programs have the purpose of providing benefits to shareholders and shareholders’ families.

\footnote{205. See § 1606(r) (2000).}
\footnote{206. Section 1606(r) provides:}
\footnote{The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders’ immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.}
\footnote{207. See ANCSA Land Bank Protection Act, HR 2000, 105th Cong. (1998) (enacted).}
\footnote{208. Id.}
\footnote{209. See § 1626(g).}
\footnote{210. See § 1606(r).}
In the long term, Congress should consider future amendments that define the term "benefits" and "welfare" as used in § 1606(r) of ANCSA. In its current form, an unfriendly court or state administrative body could read § 1606(r) to be narrowly diminishing the intent of Congress to allow shareholder and shareholder-family hiring preferences. Despite these concerns, Congress has made clear its intent to encourage hiring preferences.

Notwithstanding the definitional questions at issue, § 1606(r) clearly preempts Alaska state law. Moreover, § 1606(p) expressly provides that "in the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provisions of this section shall prevail."212 Because the "sole task is to ascertain the intent of Congress" when determining whether a federal statute preempts state law, § 1606(r) clearly preempts state law and allows Native corporations to provide such benefits for its shareholders. This express statement even meets the stringent standard set forth under Malabed.213

D. Permissible Forms of Alaska Native Hiring Preferences Under State Law

Based on the decision by the Alaska Civil Rights Commission,214 even without preemption of Alaska state law, shareholder and shareholder-family preferences would likely be permissible under current Alaska state law. Although Alaska state law may limit the ability of Native corporations to have broad hiring preferences that state officials would attribute to race, Alaska state law would likely allow hiring preferences more closely tailored to the purpose of hiring Native corporation shareholders and their close family members. Shareholders are not designated by race; rather, they are holders of the stock of the Native corporation. Based on this designation, a hiring preference could be upheld based on the shareholder relationship to the Native corporation, instead of dismissed as based on race.215 Likewise, a shareholder preference that also includes close family members is likely to withstand the Alaska discrimination statutes because it also would not be based on a racial designation.

A broad shareholder preference that would allow shareholders from any Native corporation or their close family members to enjoy a hiring preference from any other Native corporation—a sort of reciprocity

212. § 1606(p).
213. Malabed v. N. Slope Borough, 335 F.3d 864, 868–69 (9th Cir. 2003).
215. As discussed above, the state of Alaska may consider an Alaska Native designation a racial designation. See supra Part V.A.
among the Native corporations that would allow more mobility—might be more problematic. Although it may follow logically that the Native corporations would offer these cross-corporation hiring preferences based on non-racial designations, in reality the right would essentially extend to almost any Alaska Native. A court decision resulting from litigation on this issue would likely hinge on how a court decides to frame the hiring preference: whether the court considers reciprocal recognition of shareholder status as a preference for shareholders and their immediate families or as a disguised Alaska Native preference.

Like broad shareholder preferences, general Alaska Native preferences would also be more problematic than shareholder preferences without a finding that the Civil Rights Act exemption\(^\text{216}\) preempts the Alaska discrimination statutes. If the Alaska courts consider an Alaska Native preference to be a racial preference, the Native corporations would have nothing other than the political status of Alaska Natives on which they could base their preferences. Because Alaska has not yet recognized any political status in Alaska Natives,\(^\text{217}\) the Native corporations may only be able to satisfy the lesser showing required to use shareholder and shareholder-family hiring preferences.

On the other hand, because Alaska court decisions have not expressly forbidden the recognition of a political classification, the question remains open to litigation. The issue of whether a hiring preference for Alaska Natives is allowed is likely to be a mixed question of Alaska state law and federal preemption. A procedural situation similar to \textit{Malabed} may arise where a federal court certifies the question to the Alaska Supreme Court and then rules on the preemption issue. Assuming that Alaska courts do not recognize a political classification of Alaska Natives, whether federal courts read the ANCSA provisions to have the congressional intent to preempt state law and allow hiring preferences for Alaska Natives is likely to determine whether Native corporations can offer the broader "Alaska Native" hiring preference. Consequently, the preferences least likely to be permissible are general "Native American" hiring preferences. This is because the Alaska courts would likely consider the "Native American" designation a racial designation and because congressional intent does not indicate that Congress recognizes an interest in allowing Native corporations to use broad "Native American" preferences.\(^\text{218}\)

\(^{216}\) \$ 1626(g) provides the exclusion from Title VII of the Civil Rights Act.

\(^{217}\) \textit{Malabed} v. N. Slope Borough, 70 P.3d 416, 422 (Alaska 2003). ("We reject at the outset the notion that the Alaska Constitution radiates implied guardianship powers allowing the state or its boroughs to treat Alaska Natives as if they were wards.").

\(^{218}\) \textit{See} \$ 1606(g).
VII. CONCLUSION

The Alaska courts are unlikely to find that the Native corporations employing a “shareholder and their immediate family” hiring preference violate state law because it is not a preference based on race. In addition, given the federal government’s unique relationship with Native corporations and the clear intent of Congress for Native corporations to be able to provide shareholders and their immediate families with employment preferences, even if the Alaska courts were to find that hiring preferences for shareholders and close family violated the applicable state statutes, federal law would likely preempt Alaska state law and allow the use of shareholder and shareholder-family hiring preferences.

However, unlike shareholder preferences, broader hiring preferences, such as a hiring preference for “Alaska Natives” would likely be found to violate state law in the same manner as the provision at issue in Malabeled. The language of the Civil Rights Act exemption would likely be considered precatory, as opposed to preemptory. Moreover, Alaska has not recognized the unique political status of Alaska Natives as Alaska Native “tribes” by the Secretary of the Interior. Because preemption is unlikely without more specific preemptory language from Congress, broad hiring preferences for Alaska Natives would likely be considered to violate Alaska Statutes Unlawful Employment Practices Statute without state courts recognizing the federal political status of Alaska Natives.

To buttress its clear intent of encouraging hiring preferences provided by the Civil Rights Act exemption, Congress should consider amending ANCSA to define the terms “benefits” and “welfare” as the used in section 1606(r) to specifically include hiring preferences for Native corporations. Congress should also consider amending section 1606(r) to include “Alaska Natives” as the group to which Native corporations may provide benefits, as opposed to the group of “shareholders who are Natives or descendents of Natives or its shareholders’ immediate family members who are Natives or descendents of Natives.”\(^{219}\) By doing so, Congress would protect its clear intention of providing hiring preferences for Alaska Natives, as a federally recognized political class, with sufficiently preemptory language to prevent courts from reading preemption out of Congress’s intent. However, even without any additional amendments by Congress, if properly tailored, Native corporations may continue to use hiring preferences to meet the needs of their shareholders and those closely related to them, including spouses and descendents.

\(^{219}\) 1606(r).