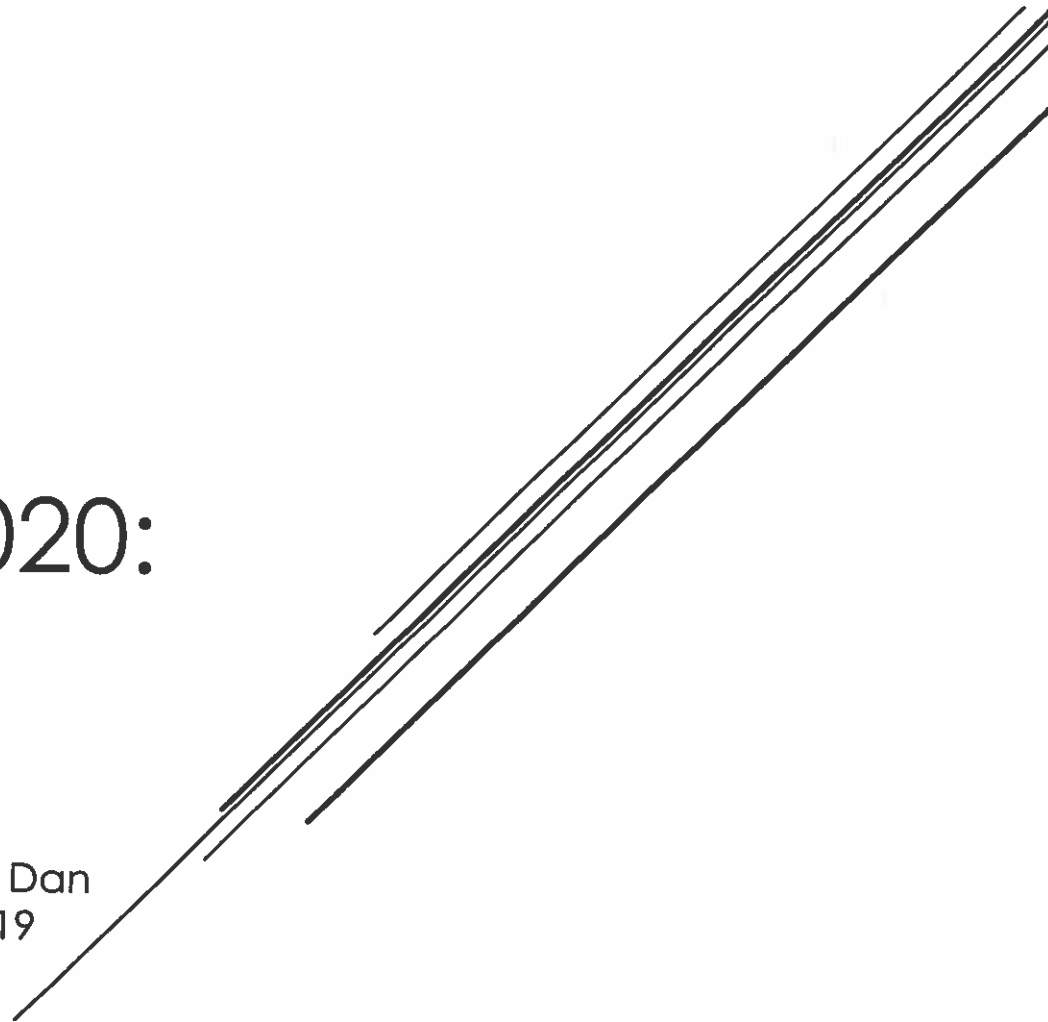


ALASKA HIRE IN 2020: Is it unconstitutional?

Prepared for the Alaska State Legislature by Dan
Wayne, Legislative Counsel, February 13, 2019

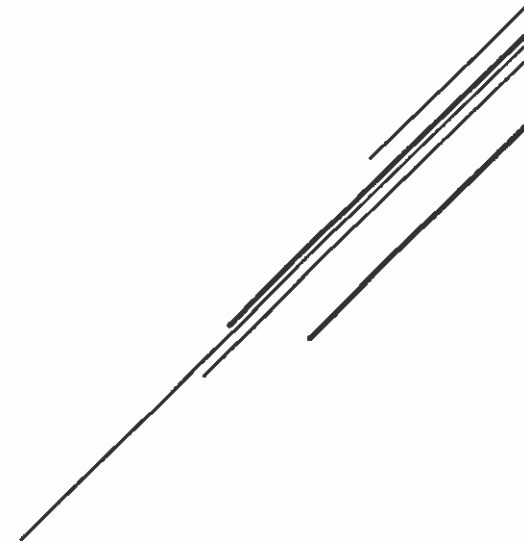


- ▶ P&I Clause = Privileges and Immunities Clause of the 14th Amendment, U. S. Constitution
- ▶ Hicklin = *Hicklin v Orbeck*, 98 S.Ct. 2482 (U.S. 1978)
- ▶ Alaska Hire 1983 = former AS 36.10
- ▶ Camden = *United Building and Construction Trades Council v City of Camden*, 104 S.Ct. 1020 (U.S. 1984)
- ▶ Robison = *Robison v Francis*, 713 P.2d 259 (Alaska 1986)
- ▶ Alaska Hire 2020 (aka "150") = AS 36.10.150 (law since 1986)
- ▶ 160 = AS 36.10.160 (unconstitutional since *Enserch*, (Alaska 1989))
- ▶ Enserch = *State v Enserch Inc.*, 787 P.2d 624 (Alaska 1989)
- ▶ 1989 residential preference amendment = Art. I, sec. 23, Constitution of the State of Alaska

LEGAL CITATIONS

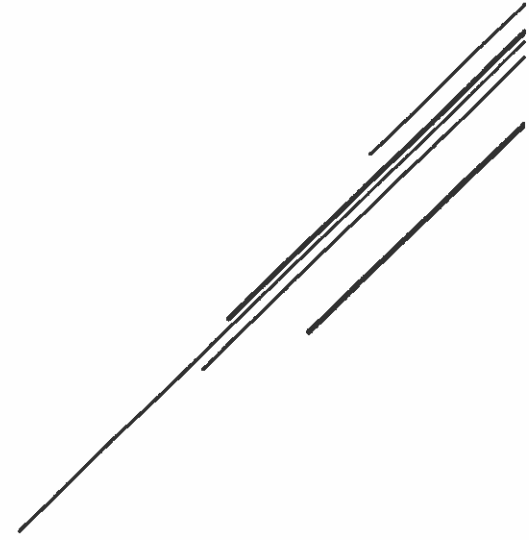
- ▶ Based on the department of law's analysis of numbers reported by the Dept. of Labor and Workforce Development in 2017, the department has concluded as follows:
- ▶ "the State cannot show that nonresidents are a peculiar source of any high unemployment of Alaskans." *Letter from Attorney General Clarkson to Senator Giessel*, page 2, October 29, 2019.
- ▶ "there is no evidence to support the idea that Alaskan workers with necessary qualifications and skills are being passed over for permanent employment in Alaska in any significant numbers in favor of nonresident workers." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.
- ▶ "Employers . . . only hire nonresidents when constrained by the realities of the Alaska labor market." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.

ATTORNEY GENERAL IN 2019: STATE NOT
ABLE TO JUSTIFY ALASKA HIRE WITH
AVAILABLE EVIDENCE



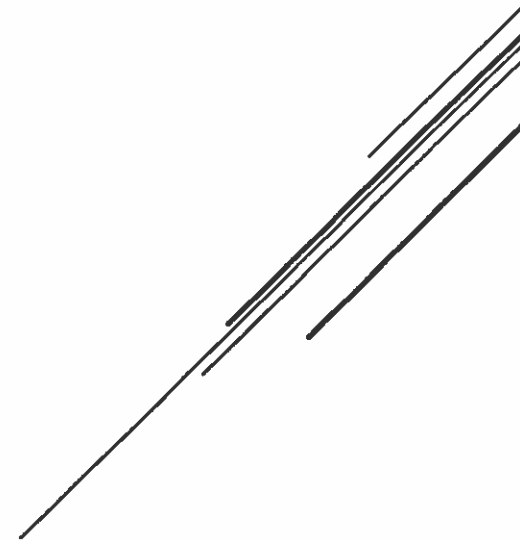
- ▶ See, 2019 Op. Alaska Att'y Gen. (Oct. 3), and 2019 Letter from Alaska Att'y Gen. to Senator Cathy Giessel (Oct. 29). These opinions cite two main legal reasons:
 - ▶ (1) Enserch, a 1989 Alaska Supreme Court decision finding that 160, allowing determination of "economically distressed" zones in the state, violated equal protection provision in state constitution.
 - ▶ (2) P&I Clause, federal constitutional provision which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

ATTORNEY GENERAL IN 2019: ALASKA
HIRE IS UNCONSTITUTIONAL



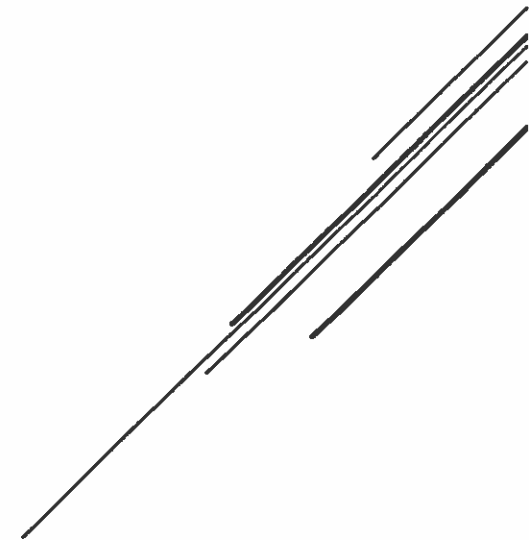
- ▶ Purpose of AS 36.10.160, which discriminates between residents of various regions within the state, is to "preserve the social structure in an economically distressed zone by providing employment opportunities for qualified workers on state-funded construction projects there. While these goals are important, they conceal the underlying objective of economically assisting one class over another. We have held that this objective" violates the state equal protection clause." *State v Enserch*, 787 P.2d 624, 634 (Alaska 1989)(Underline added).

ENSERCH: AS 36.10.160 DISCRIMINATES
BETWEEN RESIDENTS BASED ON REGION



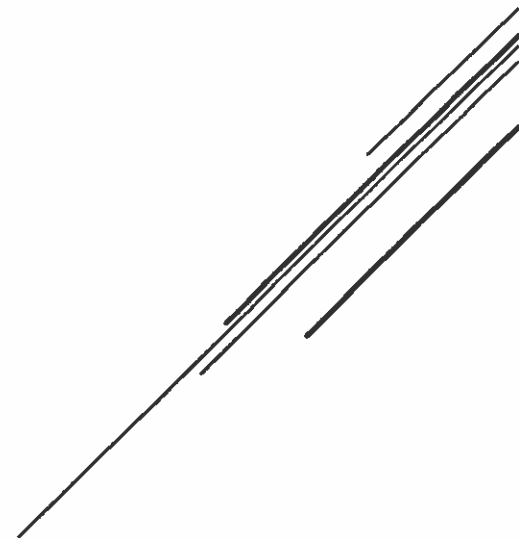
- ▶ Enserch was
- ▶ (1) about discrimination between residents, not between residents and non-residents; and
- ▶ (2) based on equal protection.
 - ▶ Enserch Court invalidated only the "economically distressed zone" provision of AS 36.10.160, not the "zone of underemployment" provision of AS 36.10.150.
 - ▶ Enserch Court found that discriminating against residents of one part of the state by granting a hiring preference to residents of another part of the state violated equal protection under art. I, sec. I, Alaska Constitution.

ENSERCH: VIOLATES STATE EQUAL
PROTECTION



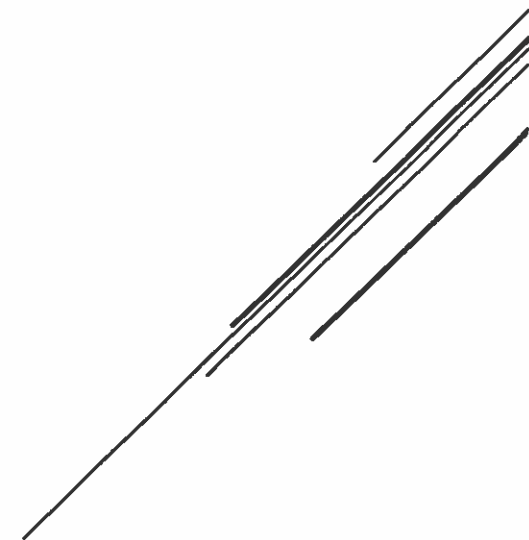
- ▶ Commissioner determines amount of hiring preference work based on
 - ▶ (1) nature of the work
 - ▶ (2) classification of workers
 - ▶ (3) number of qualified residents available

ALASKA HIRE 2020 (ADOPTED 1986)



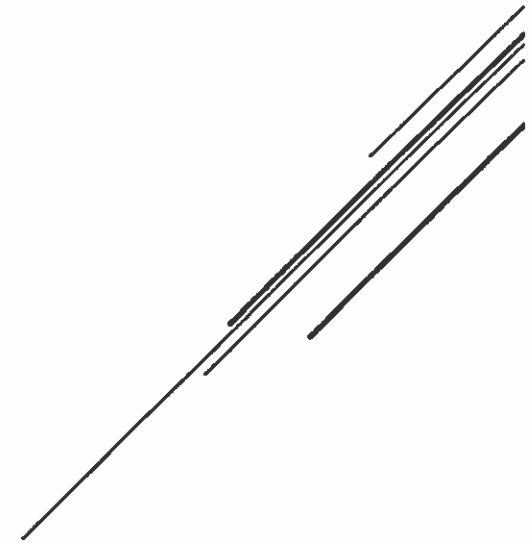
- ▶ residents must qualify (under AS 36.10.140) by
 - ▶ (1) receiving unemployment benefits;
 - ▶ (2) being eligible to receive unemployment but benefits ran out;
 - ▶ (3) being unemployed but registered to find work;
 - ▶ (4) being underemployed or marginally employed; or
 - ▶ (5) completing approved job-training and still being unemployed or underemployed

ALASKA HIRE 2020 (ADOPTED 1986)



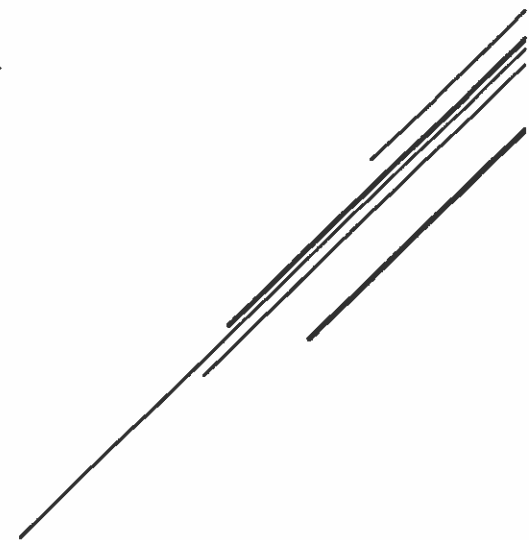
- ▶ Enserch (Alaska, 1989) invalidated AS 36.10.160, but left 150 intact
- ▶ "Between 1989. . . and the present, no past administration was confronted with the constitutional infirmities of the current Alaska Hire law or was presented with the question of whether to defend it in court." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.

EXCEPT FOR ENSERCH, ALASKA HIRE NOT
CHALLENGED IN COURT UNTIL 2019



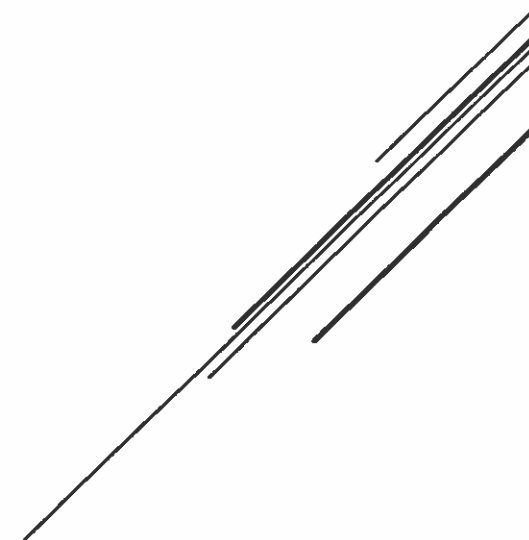
- ▶ Maybe, or maybe not. The answer is unknown until the law is challenged in court and the state defends it.
- ▶ The answer may be yes or no, depending on whether the state persuades the court, with evidence, that
 - ▶ the law is substantially justified by facts
 - ▶ the purpose of the law is not economic protectionist;
 - ▶ the court is persuaded that nonresidents constitute a peculiar source of the problem(s) at which Alaska Hire is aimed; and
 - ▶ The court is persuaded there is a reasonable relationship between the danger represented by nonresidents, as a class, and the discrimination against them by Alaska Hire.

IS ALASKA HIRE UNCONSTITUTIONAL?



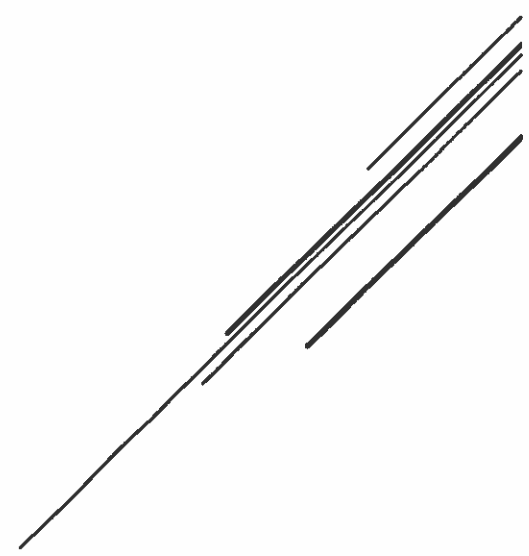
- ▶ ARTICLE I, SECTION 23. *Resident Preference. This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.*
 - ▶ This amendment not applied by a court since adoption in 1989, but may prevent a court from holding that Alaska Hire 2020 violates equal protection under art. I, sec. I, Alaska Constitution because, unlike 160, invalidated by Enserch, 150 discriminates only against nonresidents.

1989 RESIDENT PREFERENCE AMENDMENT - ALASKA CONSTITUTION



- ▶ The Privileges and Immunities Clause bars discrimination against citizens of other States where there is no substantial reason for it.
- ▶ There is no substantial reason for resident hire preference unless there is evidence that non-citizens constitute a peculiar source of the problem at which the discriminatory statute is aimed.
- ▶ Even where nonresidents cause or exacerbate the problem the statute is aimed at, there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the discrimination practiced upon them.
 - ▶ (*Hicklin v. Orbeck*, 98 S.Ct. 2482, 2487 (U.S.1978), summarizing "Toomer test," from *Toomer v Witsell*, 334 U.S. 385 (1948)).

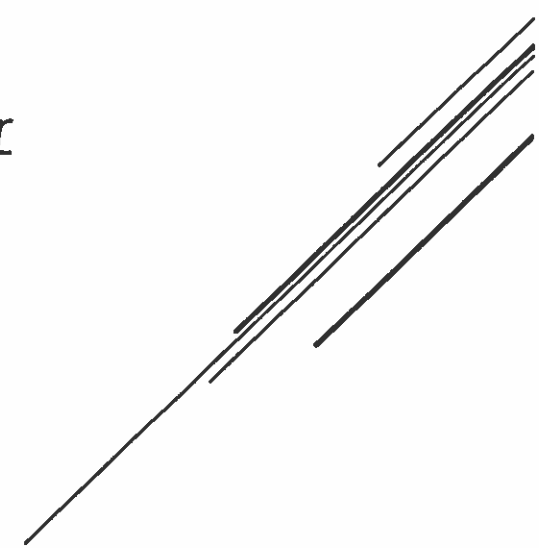
PRIVILEGES AND IMMUNITIES CLAUSE OF 14TH AMENDMENT, U.S. CONSTITUTION



- ▶ "Regarding Alaska Hire: although the statute may not violate the Clause if the State shows something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed, and, beyond this, the State has no burden to prove that its laws are not violative of the Clause, certainly no showing was made on this record that nonresidents were a peculiar source of the evil"

▶ Hicklin, page 2488 (U.S. 1978)

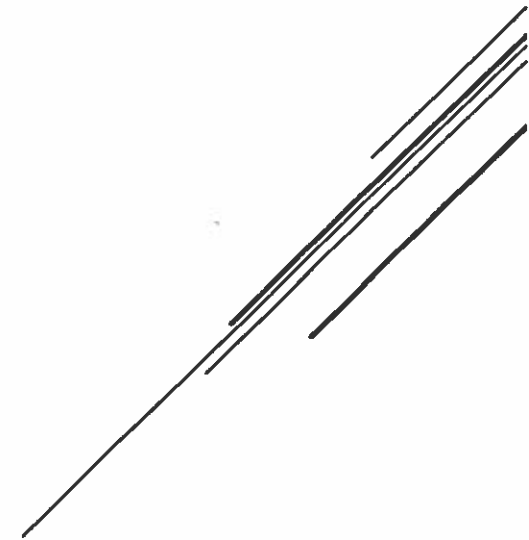
HICKLIN: A FUTURE ALASKA HIRE MAY NOT VIOLATE P&I CLAUSE, BUT FIRST ONE DOES



- ▶ "Alaska Hire was enacted to remedy, namely, Alaska's uniquely high unemployment. What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed."

- ▶ *Hicklin v. Orbeck*, 98 S.Ct. 2482, 2488 (U.S.Alaska,1978) (Internal references, quotes, and footnotes omitted).

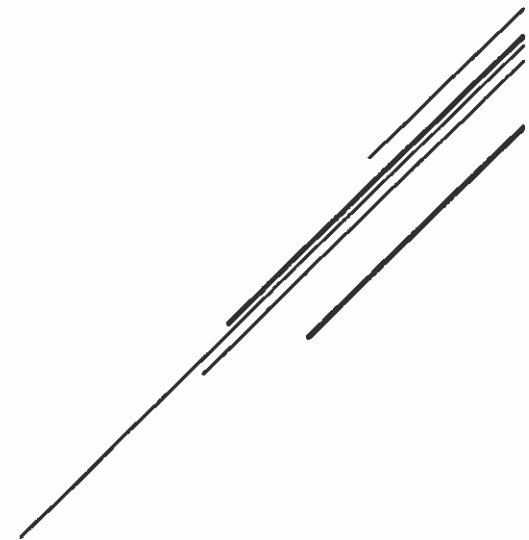
HICKLIN: NONRESIDENT HIRE NOT THE CAUSE OF ALASKA HIGH UNEMPLOYMENT



- ▶ "even if the State's showing is accepted as sufficient to indicate that nonresidents were a peculiar source of evil, Alaska Hire nevertheless fails to pass constitutional muster. For the discrimination the Act works against nonresidents does not bear a substantial relationship to the particular evil they are said to present. Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program."

- ▶ Hicklin, page 2488 (U.S.1978)

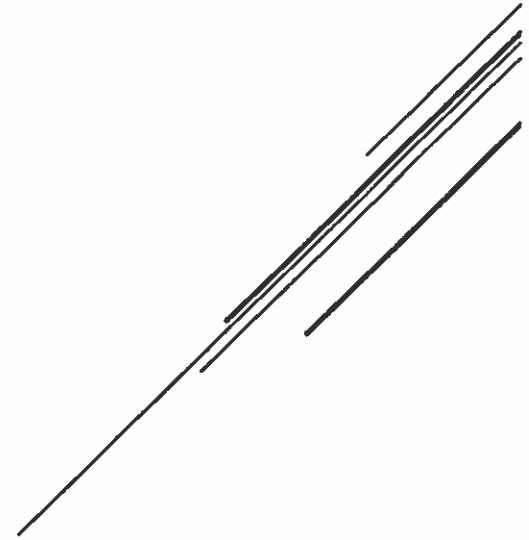
HICKLIN: SUBSTANTIAL RELATIONSHIP
BETWEEN THE DISCRIMINATION AND THE
PROBLEM IS REQUIRED



- ▶ "If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not."

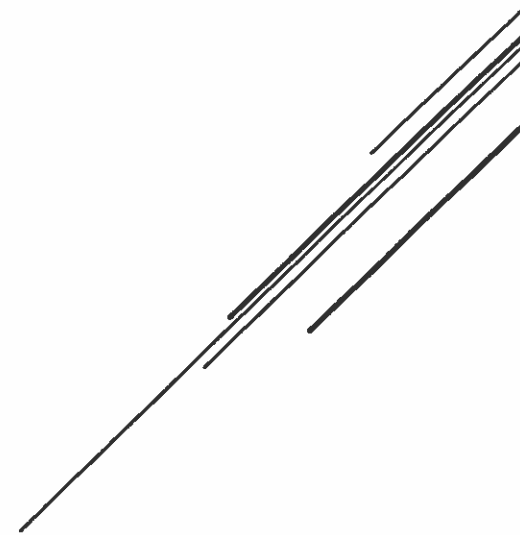
- ▶ *Hicklin*, page 2488 (U.S.1978)

HICKLIN: PREFERENCE MUST BE
CLOSELY TAILORED TO FIX PROBLEM



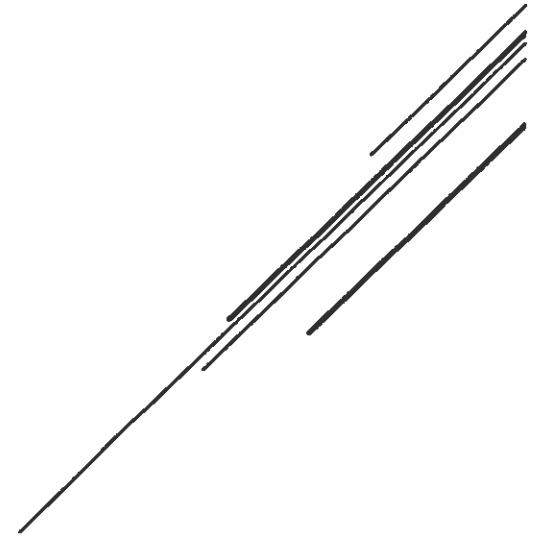
- ▶ The Camden Court found employment on public works projects is protected by P&I clause, but said "Every inquiry under the Privileges and Immunities Clause must be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls."

CAMDEN (U.S. 1985): STATES HAVE
CONSIDERABLE LEEWAY



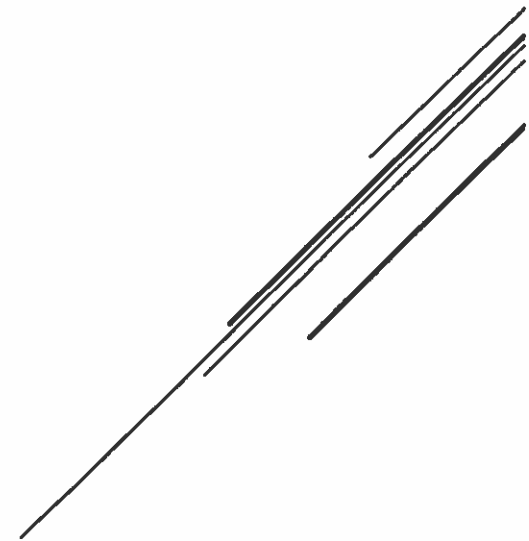
"The Alaska Hire statute at issue in Hicklin v. Orbeck (U.S. 1978) swept within its strictures not only contractors and subcontractors dealing directly with the State's oil and gas; it also covered suppliers who provided goods and services to those contractors and subcontractors. We invalidated the Act as an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. No similar "ripple effect" appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects."

CAMDEN: A HIRING PREFERENCE LIMITED
TO PUBLIC WORKS PROJECTS MIGHT NOT
VIOLATE P&I CLAUSE



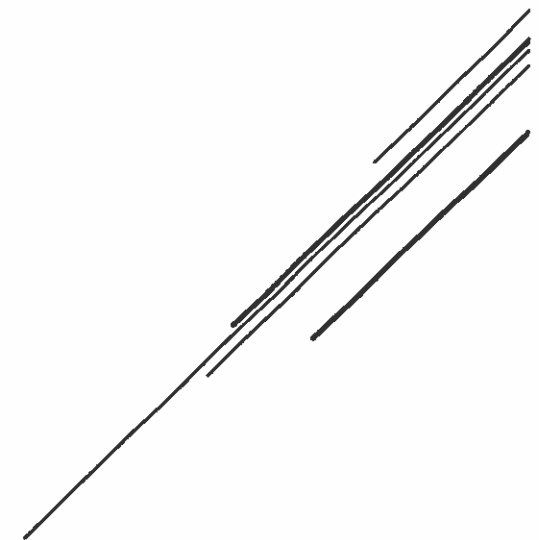
- ▶ Employment in construction industry is a fundamental right protected by P&I clause
- ▶ Purpose of P&I clause is "to prevent states from enacting measures which discriminate against non-residents for reasons of economic protectionism"
- ▶ Without substantial justification for it, a law discriminating against hire of nonresident workers violates P&I clause.

ROBISON (ALASKA 1986): DEFENSE OF
1983 VERSION OF ALASKA HIRE FAILS



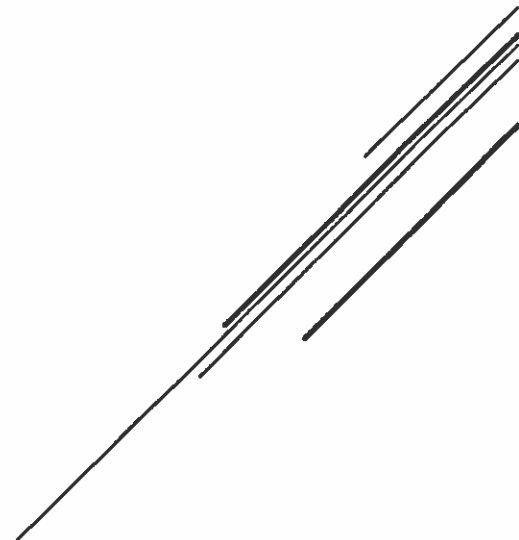
- ▶ There is no doubt that Alaska has an unemployment rate which is higher than the national average and that this constitutes a serious problem. What is lacking is a showing that non-residents are a "peculiar source of the evil" of unemployment. (p. 266).
- ▶ The purpose of the local hire law is to exclude non-residents from public construction jobs so that more jobs will be available to Alaskans. In our view this is not a permissible justification for discrimination under the privileges and immunities clause. To state the same conclusion in conventional privileges and immunities terms, the justification is not "substantial." (p. 266).

ROBISON: ALASKA HIRE (1983
VERSION) VIOLATES P&I CLAUSE



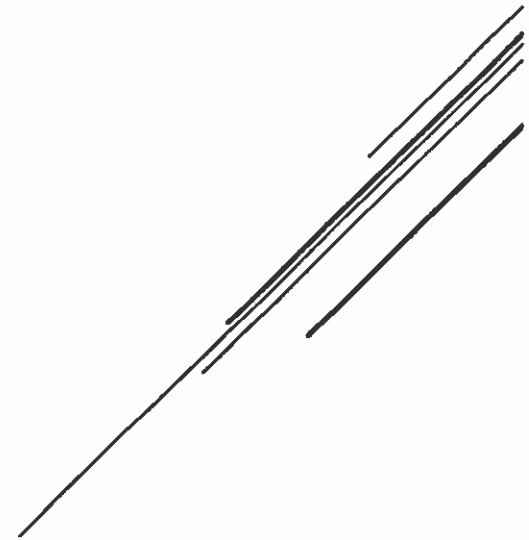
- ▶ "The preferential hire statute involved in Hicklin was struck down because, among other reasons, the statute was too broad. It applied not only to unemployed residents or residents enrolled in job training programs, but to all residents whether employed or unemployed, well trained or poorly trained. By giving preferential treatment to residents who do not need it, the present statute (adopted in 1983) suffers from the same vice as that struck down by the United States Supreme Court in Hicklin." (p. 268)

ROBISON: ALASKA HIRE 1983 VERSION
WAS TOO BROAD



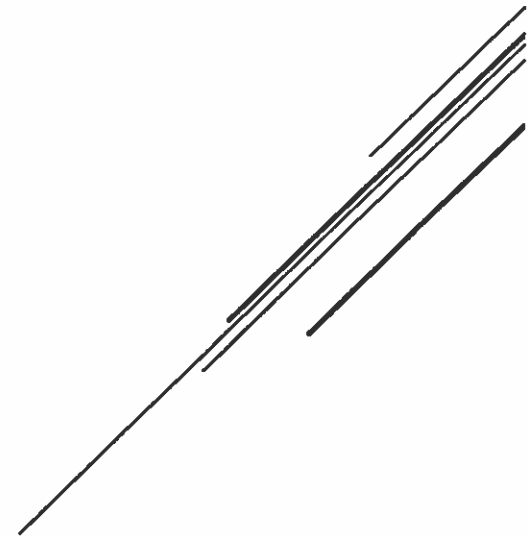
- ▶ A new version of Alaska Hire became law in 1986. The legislative record shows that
 - ▶ the goal was to narrow the scope of the preference, and more closely tailor it to address social problems like crime, poverty, and addiction, instead of simply unemployment
 - ▶ through testimony by experts, the legislature gathered much evidence thought to support a substantial need for the new law
 - ▶ the state's then attorney general helped craft the law, and predicted it had a good chance of surviving court challenges

AFTER ROBISON THE LEGISLATURE
WENT BACK TO DRAWING BOARD



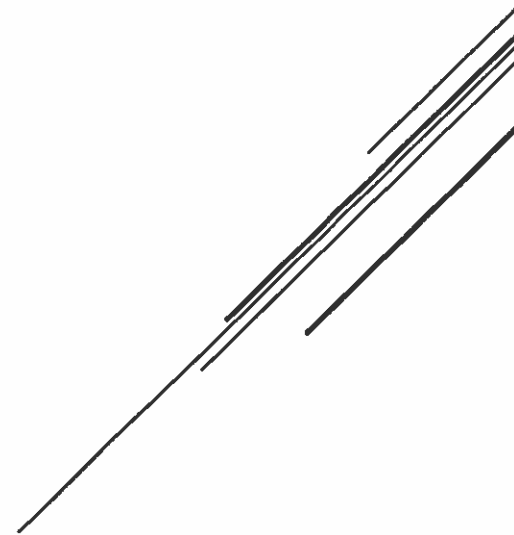
- ▶ If commissioner determines two year zone of underemployment, residents of the zone who qualify receive hiring preference for certain work on
 - ▶ (1) public construction projects in zone; and
 - ▶ (2) a "craft by craft or occupational basis";

ALASKA HIRE 2020 (ADOPTED 1986):
RESIDENTS HAVE TO QUALIFY, AND TYPE OF
WORK IS LIMITED



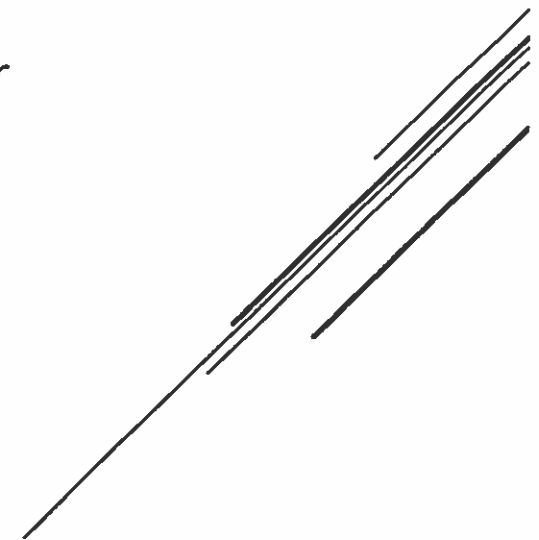
- ▶ Commissioner determines amount of hiring preference work based on
 - ▶ (1) nature of the work
 - ▶ (2) classification of workers
 - ▶ (3) number of qualified residents available

ALASKA HIRE 2020 (ADOPTED 1986):
STANDARDS APPLY TO DETERMINATION



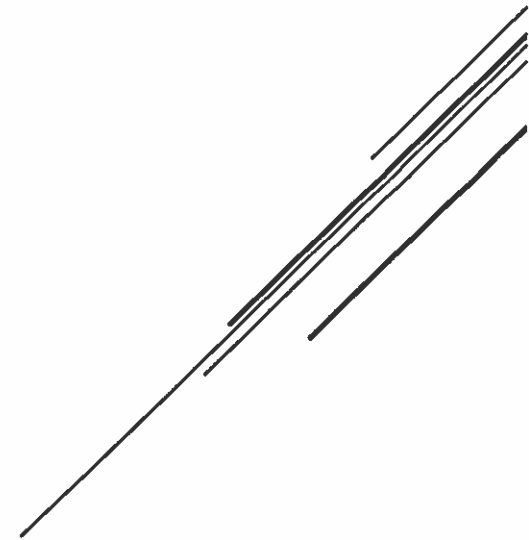
- ▶ residents must qualify (under AS 36.10.140) by
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ALASKA HIRE 2020 (ADOPTED 1986)
TARGETS CERTAIN RESIDENTS, BASED ON
NEED



- ▶ Enserch (Alaska, 1989) invalidated AS 36.10.160, but left 150 intact
- ▶ "Between 1989. . . and the present, no past administration was confronted with the constitutional infirmities of the current Alaska Hire law or was presented with the question of whether to defend it in court." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.

EXCEPT FOR ENSERCH, ALASKA HIRE NOT
CHALLENGED IN COURT UNTIL 2019



- ▶ Answer unknown until the law is challenged in court and the state defends it.
- ▶ Answer depends on whether the state persuades a court, with evidence, that
 - ▶ the law is substantially justified by facts;
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 - ▶ the court is persuaded that nonresidents constitute a peculiar source of the problem(s) at which Alaska Hire is aimed; and
 - ▶ the court is persuaded there is a reasonable relationship between the danger represented by nonresidents, as a class, and the discrimination against them by Alaska Hire.

IS ALASKA HIRE UNCONSTITUTIONAL?
MAYBE YES, OR MAYBE NO.

