A "Herculean" Task: The Voting Rights Act and Redistricting in Alaska

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ACKNOWLEDGMENTS

In the course of researching redistricting in Alaska, the work of many other scholars has been extremely useful to me. Redistricting, despite its importance, is a fairly obscure topic to many, and redistricting in Alaska even more so. Nonetheless, several authors have written on the subject and their research has been very helpful. For information on the current redistricting process, I have relied heavily on the reporting of local newspapers, particularly the Anchorage Daily News and the Fairbanks Daily News-Miner. The website of the Alaska Redistricting Board has also been extremely useful.

On a personal note, I would like to thank my reader, Professor Ward Elliott, for his insights and his help throughout the process of writing this thesis. Additionally, I am thankful to my family and my friends for their support and encouragement. In particular, I owe many, many thanks to my parents. Their love and support, not only during the process of writing this thesis, but also throughout my entire life, has been without comparison, and I could not have done any of this without them.
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CHAPTER ONE: INTRODUCTION

The decennial redistricting process, the redrawing of the lines which divide up electoral districts, is a complicated one no matter the location. Every ten years, following the completion of the census, states, counties, supervisorial districts and more engage in this process, using a variety of different methods and approaches. Some jurisdictions allow the state legislature to draw the new maps, while others rely on an independent commission. Whatever the method, however, redistricting is almost always fraught with political tension, as the shape and nature of a district has a great deal of influence over what sort of candidate it will elect as its representative.

Redistricting in Alaska presents a unique set of challenges, given the state’s immense geography and relatively tiny population. Both federal and state requirements must be followed, although they sometimes lead in different directions. And the Alaska Native minority population’s voting power must be protected, even as Natives migrate away from rural villages and towards the state’s urban centers, making this task ever more difficult. Redistricting Alaska is so difficult, in fact, that in every redistricting cycle so far, the state courts have found the first set of maps unconstitutional, under either the state or federal constitution.\(^1\)

With just over 570,640 square miles in land area, Alaska is by far the largest state in the nation, more than twice the size of Texas, the second largest state. Despite this vast land area, Alaska is also one of the least populous states in the Union, with barely more

than 710,000 residents. This results in an extremely low population density of only 1.2 people per square mile, in contrast to the 87.4 people per square mile average for the whole United States. If Manhattan had the same population density, it would have less than thirty residents. Further complicating Alaska’s demographic composition is its lop-sided concentration of residents. More than half the population lives in the City of Anchorage and the fast-growing Matanuska-Susitna Borough, home to Wasilla and Palmer. In the other, generally rural, parts of the state, population density is thus even lower. The following map shows the population concentrations across the state.

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Although the above map is fifteen years old, similar discrepancies exist today as well.

It is also important to note that “rural” has an entirely different meaning in Alaska than it does in the rest of the United States. The state has around two hundred communities which are not accessible by road. More than one hundred communities have less than one hundred residents, and more than another hundred and fifty have less than one thousand residents. The off-road villages receive groceries and mail through visits from small propeller planes. They generally don’t have more than a single general store. And many of the residents of such villages still practice a heavily subsistence lifestyle, living off the land through fishing, hunting and gathering.⁶

The Alaska Supreme Court has acknowledged the difficulty of redistricting in Alaska in a number of cases, writing in one:

> When Alaska’s geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task [of redistricting] assumes Herculean proportions commensurate with Alaska’s enormous land area. The problems are multiplied by Alaska’s sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.⁷

A significant part of this difficulty has been caused by the sometimes conflicting requirements imposed by the Alaska State Constitution and federal law, especially the Voting Rights Act of 1965 (VRA).

The Alaska State Constitution, which was ratified in 1956 and officially became operative with Alaska’s Proclamation of Statehood in 1959, establishes several

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requirements for redistricting.\(^8\) Currently, the constitution sets the state Senate at twenty members and the state House of Representatives at forty members, with two contiguous house districts nested inside of each senate district. Given the state’s small population, Alaska has only a single congressional district, and so it only has to conduct state legislative redistricting, in contrast with most other states which must redraw their congressional districts as well. The Alaska State Constitution requires that any variation in population between house districts be “as small as practicable,” and that districts must be both contiguous and compact. It also requires that house districts be composed of “relatively socio-economically integrated areas,” with consideration given to local political boundaries when practical. State statutes also forbid discrimination in line drawing based upon “race, religion, color, national origin, sex, age, occupation, military or civilian status, or length of residency.”\(^9\)

Superseding these state requirements are a set of federal requirements. First, the United States Supreme Court established a standard of “one person, one vote” in its 1964 decision of *Reynolds v. Sims*.\(^10\) This standard requires that state legislative districts be apportioned solely based on population and that the populations of each district be as close as practicable. Other federal constitutional requirements include a prohibition of purposeful discrimination against any group which has historically been excluded from the political process and a prohibition against political and racial gerrymandering.\(^11\)

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\(^8\) Alaska Const. art. VI, § 6.


Federal statutory law also establishes several restrictions on redistricting through the VRA. The VRA was aimed at preventing discriminatory practices against minorities in voting and elections. Two parts of the VRA are particularly applicable to redistricting in Alaska: Section 2 and Section 5. Section 2 prohibits the denial or abridgment of voting rights based on race, color, or language minority status. It is applicable to the entire country and is permanent. Section 5, on the other hand, is temporary and only applies to certain areas, the qualifying tests for which are set out in Section 4 of the VRA. Under Section 5, these covered jurisdictions are required to submit any change in election law, including new redistricting maps, to the federal government for approval, in a process known as preclearance. In the case of redistricting, the federal government ensures that the new maps do not contain any avoidable retrogression, meaning drawing districts in a way that weakens minority voting strength relative to the previous maps. Alaska is one of nine states currently covered by Section 5 of the VRA in their entirety. Portions of other states are also covered.\(^\text{12}\) The following map shows the jurisdictions covered by Section 5, as of January 2008.\(^\text{13}\)


Alaska’s experience under the Voting Rights Act has been a fairly unique one compared with that of the other covered states. Most of the other states fully covered under Section 5 are in the South, and have a long history of discrimination against African-Americans, including slavery and decades of Jim Crow laws. Alaska’s most sizeable minority population is the Alaska Native population, which makes up just under one fifth of the state’s total population. The Federal Bureau of Indian Affairs recognizes 229 different tribes in Alaska with a total of nearly 80,000 members. These villages have their own cultures and traditions. Although some of the indigenous peoples have historically been enemies, that tension has played a large role in the Alaska redistricting process. The villages also speak a number of different languages. The following map

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shows the general distributions of the indigenous language regions of Alaska, Western Canada and Eastern Russia.\textsuperscript{15}

More than twenty different Alaska Native languages are still spoken in the state, and in some villages, these indigenous languages are the primary language used.\textsuperscript{16}

Importantly, under the VRA, minority voting strength is not measured by the number of Alaska Natives in office, in the case of Alaska, or the rate of success of Alaska Native candidates for office, but rather by the ability of Alaska Natives to elect their preferred candidates. These preferred candidates are usually Alaska Natives, but not


always. For example, in the 2002 governor’s race, approximately seventy percent of Alaska Natives voted for Democrat Fran Ulmer, who is white, although an Alaska Native was running as well. Similarly, in the 2006 U.S. House race, a majority of Alaska Natives supported white Republican Don Young over Alaska Native Democrat Diane Benson. In the 2008 primary race for State House District 38, Alaska Natives supported Bob Herron, who is white, over Tony Vaska, an Alaska Native. Both men are Democrats.\(^\text{17}\) These examples are exceptions to the general trend, however.

As a general rule, Alaska Natives also tend to vote Democratic. Of the seven Alaska Native members of the current Alaska State Legislature, all but one is a Democrat.\(^\text{18}\) In 2008, Democratic Senate challenger Mark Begich won the majority of rural election precincts and the urban Native vote as well, helping him to victory over incumbent Republican Senator Ted Stevens.\(^\text{19}\) Again, however, this trend is nowhere near absolute. In the much contested 2010 Senate race, conservative Republican Joe Miller defeated the more moderate incumbent Lisa Murkowski in the Republican primary. Murkowski successfully ran a write-in campaign in the general election, beating out both Miller and Democratic nominee Scott McAdams to become the first write-in candidate nationwide to win a Senate race since 1954.\(^\text{20}\) Much of Murkowski’s win can be credited to the Alaska Native vote. The Alaska Federation of Natives endorsed Murkowski, and as much as sixty percent of her margin of victory was thanks to the heavily Alaska Native


rural parts of the state.\textsuperscript{21} Murkowski acknowledged the importance of the Alaska Native vote to her re-election success, saying “my success in running this history making write in campaign would not have been possible […] if Alaska’s Native people did not turn out at the poles, did not energize, did not come together as they did.”\textsuperscript{22} The late former Senator Ted Stevens, also a Republican, was a stronger support of Alaska Natives and received their support and votes for many years.\textsuperscript{23}

Further complicating redistricting in Alaska are the locations and concentrations of the Alaska Native minority. The Anchorage Municipality, for example, is one of the most urban areas of the state, and has an Alaska Native population of about 7.4%. In contrast, many of the rural villages dotting the remote parts of the state have Alaska Native populations of eighty to ninety percent.\textsuperscript{24} However, about half the state’s Alaska Native population currently lives in one of the five largest urban centers, and the general trend has been a migration towards the cities and away from rural villages.\textsuperscript{25} In fact, many Alaskans refer to Anchorage as the “Alaska’s biggest Native village,” as the city has the highest number of Alaska Natives of any community in the state, with 23,130 as

\begin{footnotesize}
\begin{enumerate}
\item National Congress of American Indians, \textit{Native Vote: Every Vote Counts}, http://api.ning.com/files/LHIwwM6*0cff*Gnq2JyYkaePNoWVfp1mBQP7KGK6Q-3mUDeiElgF6OpoiAbxt9rPJo5jU18N*mb1lMYuYvFiHBhrS8l-c9/2012NativeVoteToolkit.pdf (last visited Apr. 15, 2012).
\item U.S. Census Bureau, \textit{American FactFinder}, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B02001&prodType=table (last visited Apr. 1, 2012).
\end{enumerate}
\end{footnotesize}
of the 2010 Census. Under the VRA, these rural, minority populations must be protected from any discrimination in the redistricting process, and their voting power cannot be weakened by decreasing the number of districts in which they are likely to elect a candidate of their choice, if it is possible to maintain the current level of representation.

Together, all of these requirements lead to some very extreme districts. For example, after the 2000 redistricting process the state Supreme Court approved Senate District C, depicted in the map below. District C is the largest state senate district in the history of the country. Its area is more 240,000 square miles, almost the size of Texas, and it measures more than 1,000 miles from one end to the other.

![Map of Alaska showing Senate District C](image)

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The VRA, while it has constituted a growing influence on Alaska redistricting in every cycle since the 1980’s, has been particularly prominent during the Alaska redistricting process following the 2010 census. In this most recent cycle, the conflicts between the requirements of the state constitution and the VRA have been tested more than ever.29

In the following paper, I will examine the role that the VRA has played in the history of state legislative redistricting in Alaska, particularly in the context of its relationship to the requirements of the state constitution. I will focus especially on the conflict between the VRA and the state constitution in the most recent redistricting process and the implications this redistricting cycle holds for the future. I will not examine the constitutionality of the VRA at length or the role of the VRA in other aspects of Alaskan election law. Such questions are beyond the scope of this analysis.

Having introduced the reader to my topic in this first chapter, I will outline the requirements imposed on redistricting by the Alaska State Constitution in the next section. In Chapter Two, I will explore the process established by the framers of the state constitution in the 1950’s and how that process was altered following the U.S. Supreme Court’s establishment of the “one person, one vote” doctrine. I will also look at the 1998 state constitutional amendment which changed the Alaska redistricting process to its current form, in which redistricting is conducted by an independent commission, called the Alaska Redistricting Board. In Chapter Three, I will look at the specific requirements the framers imposed on the nature of districts and how the state supreme court has

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interpreted those requirements over the years. In both chapters, I will focus on what sets Alaska apart from other states in regards to its approach to redistricting.

In the next section, I will turn to the Voting Rights Act itself. In Chapter Four, I will look at the history of the VRA, beginning with its passage almost fifty years ago. In Chapter Five, I will look at the specific provisions of the VRA, particularly Section 5, and their effects on the redistricting process. I will also briefly explore the impact that recent decisions made by the U.S. Supreme Court have had on the VRA. I will chart the different jurisdictions that have been covered, especially Alaska’s history of coverage under Section 5. Finally, I will conclude look at the process for receiving an exemption, known as a bailout, from Section 5 coverage, with an eye to the chances that Alaska would be able to meet these requirements.

Next, I will turn to the history of redistricting in Alaska. In Chapter Six, I will look at Alaska’s redistricting cycles in the 1970’s and 1980’s, and in Chapter Seven, I will move on to the 1990’s and 2000’s. In each cycle, I will explore the process used to create maps and the court cases that arose regarding those maps. I will look at the interplay between the VRA’s requirements and the state constitution’s requirements in each cycle.

In the next chapters, I will turn to the most recent redistricting process, that following the 2010 Census. In Chapter Eight, I will examine the process itself, beginning with the receipt of census results and then focusing on the work done by the Alaska Redistricting Board. I will look at the extent to which both the Board’s process was influenced by the requirements of the VRA. I will conclude the chapter with a look at the preclearance process as it applies to the 2011 redistricting and the findings of the Federal
Department of Justice. In Chapter Nine, I will look at the maps created by the Board and how they were shaped by the requirements of the VRA. In Chapter Ten, I will look at the next step in the 2011 redistricting process: the court cases appealing the Board’s maps. The primary complaint by the plaintiffs was that the Board had satisfied VRA requirements at the expense of the requirements of the state constitution and that it ought instead to have satisfied the demands of both. The Board responded that it was not possible to meet both VRA requirements and state constitutional requirements and that federal law must take priority. I will discuss the decisions issued in the cases, both at the superior court level and by the Alaska Supreme Court. In Chapter Eleven, I will look at the aftermath of the court’s ruling and the Board’s reaction to it, particularly the Board’s difficulty in adhering to both state constitutional requirements and those of the VRA.

Finally, in Chapter Twelve, I will conclude my analysis by looking back over the history of the interactions between the state constitution and the VRA, and summarizing this enduring conflict. I will suggest possible solutions to the difficulties faced in redistricting Alaska and explore what redistricting in Alaska would look like if the state was no longer required to abide by the preclearance requirements of Section 5.
CHAPTER TWO: THE ALASKA REDISTRICTING PROCESS

The Alaska State Constitution devotes Article VI to outlining the legislative redistricting process. The system originally created at the Constitutional Convention, wherein the governor was largely responsible for redistricting, was changed shortly thereafter, as a result of the U.S. Supreme Court’s establishment of the “one person, one vote” doctrine. However, the constitution was not actually amended to reflect this change until 1998, when Alaskans voted to create an independent board to redraw its state legislative lines every ten years. The following chapter will look at the evolution of the different systems used by the state and compare them to the processes other states have elected to follow.

The Constitutional Convention

The Territory of Alaska held its state constitutional convention over the winter of 1955-56. Although the federal government had not yet granted Alaska statehood, the Territorial Legislature decided to hold a convention in hopes of expediting that process. Beginning on November 8, 1955, fifty-five delegates met in Fairbanks to begin drafting a constitution for the as-yet non-existent State of Alaska. Of the fifty-five delegates, only one, Frank Peratrovich, was an Alaska Native. The constitution was ratified by the voters in 1956, and it took effect in January 1959, when President Dwight D. Eisenhower signed the Alaska Statehood Act into law, making Alaska the forty-ninth state to join the Union.¹

The framers dedicated the entirety of Article VI to legislative apportionment. They outlined both the structure of the redistricting process and the guidelines and requirements for redistricting. One of the framers’ primary goals in creating this redistricting process was to prevent gerrymandering. In a statement that has often been quoted in Alaska court decisions regarding redistricting, the framers explained the state’s approach to redistricting as follows:

Now the goal of all apportionment plans is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation. And in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.2

The delegates also recognized the difficulty in creating a redistricting process, however. As one said, “I don’t think if you were given the problem of apportioning the heavens that you could please all the occupants, but you just have to try.”3

In light of these goals, the framers created a redistricting process which attempted to minimize the influence of partisan gerrymandering by taking the power to redistrict out of the hands of the legislature and giving it to the governor. The redistricting process originally outlined in the constitution gave the governor the responsibility for drawing district lines and created a Redistricting Board, which was to serve an essentially advisory role to the governor. The framers envisioned that this Board would “counter the universal influence of politicians to gerrymander.”4 The five members of the

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Redistricting Board were to be appointed by the governor and had to be chosen from geographically diverse areas of the state. They were not allowed to be public officials, and the governor was not allowed to take political affiliation into consideration in his selection process. As Delegate John Hellenthal said, “the whole purpose of this article is to de-emphasize politics.”

The Board was empowered to draw a plan which was then to be submitted to the governor for final approval. The governor was permitted to make changes only if he provided an explanation to the public of why those changes were needed. Additionally, citizens were allowed to sue the governor in state court to correct any errors in the plans, adding another level of review. This review provided the basis for the court challenges which have greeted each proposed map over the decades.

In creating this process, the framers also took into account the earlier problems from territorial times of underrepresentation of rural areas. When Alaska’s territorial legislature was founded in 1912, each of the territory’s four judicial districts had two senators and four representatives. This resulted in a total of eight senators and sixteen representatives. The map below shows the districts as they were at the time.

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5 Id. at 56.
7 Id.
In 1912, the four districts had somewhat comparable populations. According to the 1910 census, the Third District had the highest population, with 20,078 residents, while the Second District had the smallest population, with only 12,351. Thus, residents of the Third had one senator for every 10,000 people, while those in the Second had one senator for every 6,000 or so. As the state’s population began to concentrate even more heavily in a few urban areas the populations of the districts became even more varied. This resulted in the residents of the more under-populated areas having far more representation per capita than the residents of the more heavily populated areas. By 1940, the First District had 25,241 residents to the Second’s 11,877, but still had the same number of representatives and senators.\footnote{Alaska Dep’t of Labor and Workforce Development, Research and Analysis Section, \textit{Alaska Population Counts 1990-1900}, http://labor.alaska.gov/research/census/histpdfs/akpopcnts1990-1900.pdf (last visited Apr. 17, 2012).} Congress noted this discrepancy, and, in 1942, reapportioned the house seats based on population. Thus, districts with higher population received a proportionally higher number of representatives in the territorial house, as
compared with less populated ones like the Second. This act did not affect the apportionment of territorial senate districts. The act also increased the size of the territorial legislature, upping the senate from eight to sixteen and the house from sixteen to twenty-four.\textsuperscript{10}

One result of having only four legislative districts in such a geographically immense area was that legislators were generally elected from the more populous towns in each district, as opposed to the rural areas. Residents of small, remote villages were rarely elected to office at the territorial level. This lack of rural representation was taken into account when planning the state constitutional convention. Several of the delegates for the convention were chosen from seventeen single-member districts from across the state, ensuring representation for the rural as well as the urban parts of the state.\textsuperscript{11}

The framers of the Alaska State Constitution attempted to address rural underrepresentation by dividing the state into twenty-four house districts, seventeen of which were single-member districts and seven of which were multi-member. This higher number of districts allowed for geographically smaller districts, giving the rural parts of the state a better chance of avoiding inclusion with urban centers and therefore of electing representatives of their choice. There were thus a total of forty members of the state House, or one representative for about every 5,600 people.\textsuperscript{12} The constitution provided

\begin{flushright}
\textsuperscript{11} Id.
\end{flushright}
for the house districts to be redrawn every ten years following the decennial census to account for changes in population.\(^\text{13}\)

In the state Senate, the framers opted for a different approach. They allocated the twenty senate seats based on a combination of geographic area and population. Each of the four judicial districts was accorded a minimum of two senators, with the twelve additional senators distributed based on the population of the districts. As a result, under the original state constitution, rural areas of the state had a higher level of representation in the Senate than they did in the House, relative to the urban areas of the state. Voters making up less than a third of the population could elect a majority of the Senate due to the composition of the districts and the allotment of seats. This system was similar to those used in many other states across the nation at the time.\(^\text{14}\)

The framers purposefully required that the apportionment of the state Senate would take into account factors beyond population. As Convention Chairman William Egan, who later served as the state’s first governor, noted, “geography, socio-economical needs, the relationships of contiguous areas, and the future possibilities of growth” were all taken into consideration.\(^\text{15}\) Importantly, the state constitution did not originally provide for a method of redistricting the senate, as the lines were frozen and were based on the judicial districts carried over from the territorial era.\(^\text{16}\)

In creating this redistricting system for the state of Alaska, the framers looked to the redistricting processes used across the United States. Most states gave the


\(^{14}\) Id.


redistricting power to the state legislature, but the framers noted the common reluctance of state legislators to redistrict their seats as often as might be appropriate. At the time of the framing of the Alaska constitution, many states had not conducted legislative redistricting in several decades. As Delegate John Hellenthal noted at the Constitutional Convention:

…reapportionment …has been neglected where it has been left to the legislators…the experience of the nation shows that the thing is delayed – procrastination; that in the State of Washington they waited for years and years and years, and finally, only by resorting to the courts and the initiative were they able to reapportion Washington. It was costly, the people suffered…it is the inaction of the legislature, as testified to by the universal history of the 48 states, that we’re trying to overcome.17

Instead, the framers turned to the Hawaii system for inspiration, which gave redistricting power to the executive and set a time frame for its regular occurrence: “following the official reporting of each decennial census of the United States”.18

The framers also disliked the idea of allowing state legislators to draw their own districts, as was common, because they thought prohibiting this would reduce the likelihood of gerrymandering. Convention Chair Egan wrote, “Members of the legislature will have nothing to do with reapportionment. Because of this provision so-called ‘gerrymandering’ will be impossible.”19 While this claim did not prove to be entirely correct, as will be discussed later, the Alaska system was definitely an improvement in many ways over allowing the state legislature to redistrict itself.

The Alaska system’s use of the Redistricting Board was well-received nationally. The National Municipal League adopted the process in the sixth edition of its *Model State Constitution*, and argued that it would help restrain the governor from engaging in partisan gerrymandering.\(^{20}\)

**The “One Person, One Vote” Doctrine**

In the early 1960’s, the U.S. Supreme Court issued two decisions, *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), establishing the “one person, one vote” doctrine. In *Baker*, the Court held that legislative redistricting was not a solely political question and that the judiciary could rule on conflicts arising out of redistricting.\(^{21}\) And in *Reynolds*, the Court held that state legislative districts had to be of roughly equal population.\(^{22}\) This new doctrine, grounded in the Equal Protection Clause of the Fourteenth Amendment, substantially affected the redistricting and apportionment processes in Alaska and many other states. Seats in state legislatures were now required to be apportioned based solely on population, with geography not taken into consideration, and each district was required to have roughly the same number of people as the other districts.

The “one person, one vote” doctrine effectively nullified parts of the Alaska constitution’s language on state legislative apportionment, as eight of the twenty senate seats were apportioned based on geography instead of population. The constitution, however, had not provided for a system of redistricting these seats.

\(^{20}\) *Id.*


In light of this lack of guidance, Governor William Egan, the Democrat who had chaired the state’s constitutional convention, began redistricting the state Senate. Egan himself was not personally in support of the Court’s ruling in *Reynolds* and the new doctrine it established. In a proclamation announcing his proposed redistricting plan in 1965, Egan wrote that when drafting the constitution:

> It was my view, as well as a majority of the other delegates, that it was in the public interest to have one house of the Legislature apportioned by more by area than by population, to serve as a check and balance on the other. This is still my view. However, this is a land ruled by law, not men… Our Nation’s highest court has ruled that each citizen’s vote must count as much as another’s, and we must abide as closely as possible by that decision.\(^\text{23}\)

Egan initiated the redistricting process, using the procedure outlined in the constitution for house districts to draw new senate districts.

The resulting plan redistributed several seats from rural areas towards urban ones in order to provide for districts with close to equal populations. In his redistricting proclamation, Egan noted that under the new maps, 53.1% of the state’s population would be able to elect a majority of the senate, a vast improvement over the prior situation where a mere third of the population was necessary to do so. Egan’s plan, issued in September 1965, also called for all Senate seats to go up for election in the upcoming 1966 primary and general elections, cutting short the terms of half of the incumbent Senators.\(^\text{24}\) Egan’s map is shown below.\(^\text{25}\)

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\(^{24}\) Id.

OFFICIAL MAP
ALASKA ELECTION DISTRICTS
As determined in accordance with provisions of the
CONSTITUTION
OF THE
STATE OF ALASKA
Following the official 1965 reapportionment by
Governor William A. Egan

[Map image]

- DEEP LINES INDICATE SENATORIAL DISTRICTS (LETTERS)
- BROKEN LINES INDICATE HOUSE DISTRICTS (NUMBERS)
- THIN LINE INDICATES URBAN DISTRICTS

SENATE SEATS
DISTRICT E: 7 SEATS
DISTRICT F: 4 SEATS
ALL OTHER DISTRICTS: 10 SEATS EACH

HOUSE SEATS
DISTRICT B: 2 SEATS EACH
DISTRICT C: 14 SEATS
DISTRICT D: 15 SEATS
ALL OTHER DISTRICTS: 8 SEATS EACH

[Map image]
Although Egan’s redistricting plan was released one month after the Voting Rights Act was signed by President Johnson, he made no mention of it in his proclamation.

At the time, the legislature was heavily Democratic. The Senate had seventeen Democrats and three Republicans, and the House had thirty Democrats and ten Republicans.\(^{26}\) Fifteen senators, all Democrats, challenged the governor’s right to redistrict the Senate. They were particularly perturbed by the governor’s plan to cut short their terms in order to implement the new redistricting plans. The senators alleged that the governor did not have the authority to redistrict the Senate and that any redistricting of the Senate would need to be conducted through the amendment process. The state superior court agreed with the senators and held that Egan’s plan was unconstitutional. Egan appealed to the Alaska Supreme Court. At the time, the Court consisted of three Justices, Buell Nesbett, John Dimond, and Jay Rabinowitz, all of whom had been appointed by Egan.\(^ {27}\)

In *Wade v. Nolan*, the state supreme court overturned the superior court’s decision and upheld the governor’s right to redistrict the state Senate in the absence of a constitutional amendment outlining a new process. The court understood the question at issue to be “whether the Governor of Alaska was authorized by the Alaska Constitution to reapportion the Alaska Senate on an interim basis after United States Supreme Court decisions had declared invalid “frozen” area apportionment plans such as that provided”

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\(^{26}\) *Alaska State Legislature Roster of Members* (Oct. 1, 2010), http://w3.legis.state.ak.us/docs/pdf/ROSTERALL.pdf.

for in the Alaska Constitution. In its decision, the state court noted that “no specific provision is made for reapportioning the Senate” in the state constitution, and that the governor was clearly given power over redistricting the state House. The court also concluded that it is “abundantly clear that it was the specific intent of the Convention to grant no authority to and to place no responsibility in the legislature with respect to reapportionment.” Given the changes in federal law since the Convention and the lack of a legislative attempt to pass a constitutional amendment regarding redistricting in the wake of *Reynolds*, the court decided that Egan’s redistricting plan was constitutional and should be used for the 1966 elections. The system used by Egan was held to be constitutional until such time as the state constitution was amended to provide for “a valid, permanent reapportionment plan for the Senate.” The constitution was not amended to account for this system until 1998, although the process established was used until that time.

In the 1966 elections, with the composition of the state’s senate districts newly altered, Republicans fared extremely well. Republicans went from having only three of twenty senate seats to having fourteen, and from ten of forty house seats to twenty-six. This change in partisan alignment was not necessarily attributable to the redistricting process, however. Republicans did similarly well in state-wide races, with the state electing a Republican governor and a Republican congressman for the first time since statehood. Much of this was due to dissatisfaction with the economy and a weak effort

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29 Id. at 692.
30 Id. at 695.
31 Id. at 701.
from the Democrats. As Governor Egan said, “They [the Republicans] did not win the election- we lost it.” The shift was also assisted by the retirement of nearly half the state’s legislators prior to the election.33

The 1998 Constitutional Amendment

In 1998, the Alaska State Constitution was amended to restructure the state’s redistricting process. The new system took the responsibility for redistricting from the governor and awarded it to a five-member, independent body: the Alaska Redistricting Board. 34 The state legislature proposed and approved the amendment, which was then passed by the voters in a narrow vote.35

The constitutional amendment outlines the composition of the new Redistricting Board. Its members are to be appointed every census year by September 1. The governor is given the power to appoint two members, the presiding officer of the Senate and the presiding officer of the House are each to appoint one member, and the Chief Justice of the Alaska Supreme Court appoints a fifth and final member. The members are to be appointed in that order, and must represent each of the four judicial districts of the state. Appointments are supposed to be “made without regard to political affiliation.” Once complete, the Board elects one of its members as the chair, and hires staff and legal counsel as necessary. All decisions must be passed by the three-person majority.

The amendment requires the Board to produce a draft plan within thirty days of receiving data from the census and a final plan within ninety days. It allows for lawsuits against the Board’s final plan and orders the courts to deal with such cases on an accelerated timeline. The amendment requires that there be forty house districts and twenty senate districts, with two of the former composing each of the latter. It also requires single-member districts.  

Alaska provides its voters with information on all ballot measures, including a statement in support and a statement in opposition. Both of these statements are instructive regarding the contemporary arguments surrounding the passage of the amendment.  

House Representatives Brian S. Porter and Eldon Mulder, both Republicans, wrote in support of the amendment. They argued that the redistricting process then in use had resulted in partisan gerrymandering and extensive litigation following every redistricting cycle. Porter and Mulder noted that the latest process was “exceptionally contentious and required the supreme court to cause the reapportionment plan to be drawn, without any input from the board, rather than risk delaying or missing the next election.” They also pointed out that Alaska was the only state which gave control over redistricting solely to the governor, and that every other state incorporated some form of legislative control or oversight into the process. According to Porter and Mulder, the new system would result in “balanced, professionally-drawn districting plans” and lessen the influence of gerrymandering. Porter and Mulder also noted that the amendment would

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36 Id.
eliminate the now-outdated language regarding the initial make-up of the senate districts from the original framing.\textsuperscript{38}

The Chair of the Alaska Democratic Party, Deborah Bonito, wrote in opposition to the amendment. Bonito argued that the framers had purposefully given redistricting power to the executive, as the governor is “Alaska’s only elected official without a direct interest in the shape of individual election districts.” She argued that although the process was by no means perfect and could definitely stand to benefit from some fine-tuning, it had “weathered the tests of time and court challenge.” Bonito pointed to five major substantive flaws and two procedural flaws. Substantively, the amendment allowed legislators to play a role in drawing the lines for their own districts, mingles decision-making between all three branches resulting in a lack of checks and balances, hurts the independence of the judiciary, increases the partisanship of the process, and offers no proof that it will result in a better system of representation. Procedurally, Bonito argued that the amendment passed the legislature without public scrutiny or debate and represents a political compromise, as opposed to “a well-considered change to our carefully crafted constitution.”\textsuperscript{39}

Ultimately, voters passed the ballot measure, amending the constitution to change the redistricting process, by a margin of 110,768 to 101,686.\textsuperscript{40}

After the passage of the amendment, the 2001 redistricting cycle was the first to use the new procedure. Despite the new system and its goals of independence, the maps

\textsuperscript{38} Id.
\textsuperscript{39} Id.
produced by the Board were still highly contested and the Alaska redistricting process remained controversial.

The Alaskan Redistricting Process in Context

Alaska’s current redistricting process is fairly unique compared to those used by other states. It is one of six states which use an independent redistricting commission. Each of these states has its own take on appointing members to these commissions. The other five states are Arizona, California, Idaho, Montana and Washington.\textsuperscript{41}

Most other states entrust the redistricting process to their state legislatures, sometimes with an advisory commission or a back-up commission serving as well. An additional five states (Arkansas, Colorado, Missouri, New Jersey, Ohio, and Pennsylvania) give the redistricting power to a commission made up of politicians and/or elected officials.\textsuperscript{42}

Redistricting in Alaska is also unique as a result of the guidelines imposed by the state constitution on the Redistricting Board. Chapter Three will discuss these guidelines in more detail.


\textsuperscript{42} \textit{Id.}
CHAPTER THREE: REQUIREMENTS OF THE STATE CONSTITUTION

In this chapter, I will explore the specific requirements the Alaska State Constitution places on redistricting. In addition to looking at the actual text of the constitution, I will look at what the framers said about those provisions and how the Alaska Supreme Court has interpreted them over the decades. This analysis will provide an understanding of the requirements imposed upon the Alaska Redistricting Board by the state constitution today.

Many states have little to no state constitutional redistricting jurisprudence; that is, state court decisions interpreting the state’s constitutional provisions regarding legislative redistricting. Only six states have a substantial amount of this sort of jurisprudence: Alaska, Colorado, Illinois, Maryland, New Jersey and Vermont. In most other states, court challenges to redistricting plans go through the federal court system. Alaska’s legislative redistricting jurisprudence is, in fact, “by far the most sophisticated and best-developed,” according to at least one analysis. That scholar credits this to “Alaska’s unusual ethnic diversity and oddly clumped population centers, spread across an immense expanse of territory,” which heighten the difficulties inherent in any legislative redistricting process.¹

Also contributing to this high amount of jurisprudence are the strict guidelines which the state constitution sets out regarding redrawing district lines. As discussed in the introduction, there are nine states covered under Section 5 of the Voting Rights Act,

meaning that they must submit their redistricting plans to the federal Department of Justice for preclearance. Of these nine, Alaska is the only one in which redistricting plans have been repeatedly challenged in state courts as opposed to federal courts. In every other covered state, plaintiffs generally contest the plans in federal courts. This distinction is indicative of the unique nature of the Alaska State Constitution’s restrictions on the line drawing process.²

The Text of the Alaska Constitution on Redistricting

Article VI, Section 6 of the Alaska State Constitution is devoted to the rules governing the drawing of district boundaries. It reads:

The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries whenever possible.³

Section 6 is the only section of Article VI that was unchanged by the 1998 constitutional amendment. In the rest of this chapter, I will look at each specific provision in Section 6, and discuss its meaning in the context of comments made at the constitutional convention and in subsequent Alaska Supreme Court cases.

Several of the state constitution’s requirements are fairly self-explanatory and have not been particularly controversial as to their meaning. Generally the requirements

² Alaska Supreme Court Oral Arguments (Mar. 13, 2012), http://gavelalaska.org/media/?media_id=AKSC120313A.
³ Alaska Const. art. VI, § 6.
of Section 6 are aimed at preventing gerrymandering and, as the court has written, at ensuring “that the election boundaries fall along natural or logical lines rather than political or other lines.” The Board must consider local government boundaries when practical. Forty-two states require that their legislative districts be based at least to some extent on established political boundaries. Additionally, senate districts must be composed of two contiguous house districts. Thirteen other states also require that the lower chamber’s districts be nested in those of the upper chamber. Finally, the Board must also abide by state statutory requirements. Alaska Statute 15.10.200 forbids the Redistricting Board from adjusting census numbers “by using estimate, population surveys, or sampling for the purpose of excluding or discriminating among person counted based on race, religion, color, national origin, sex, age, occupation, military or civilian status, or length of residency.”

Contiguity

House districts must be formed of contiguous territory, meaning that the territory must be bordering or touching. In regards to redistricting, one scholar has defined this as follows: “a district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)”.

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5 Justin Levitt, Where are the lines drawn?, All About Redistricting (2012), http://redistricting.lls.edu/where-state.php.
6 Id.
Given Alaska’s many islands and archipelagos, absolute contiguity is impossible. The court has thus allowed districts which contain open sea, although this allowance is not without limits. As the court pointed out in Hickel v. Southeast Conference, if “the potential to include open sea in an election district is not without limits [… ] then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim.”

Almost every state requires contiguous districts in at least one chamber of its state legislature.

**Compactness**

House districts must also be compact. This generally means that the area in each district must be as closely clustered as possible. Interpretations of compactness vary considerably; however, there are three general approaches. First, a district with more contorted boundaries will be considered less compact than one with smoother boundaries. Second, a district in which the territory is close to the center point is more compact than a district with many pieces sticking out far away from the middle. And third, districts with long tendrils are less offensive to compactness when they are in less populated areas.

The Alaska Supreme Court has accepted these general principles. In Hickel, they cite an earlier concurrence from Carpenter v. Hammond in which Justice Walter Matthews defined compact as “having a small perimeter in relation to the area

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10 Justin Levitt, Where are the lines drawn?, All About Redistricting (2012), http://redistricting.lls.edu/where-state.php.
11 Id.
encompassed.” They have also accepted the rule that districts should not have “bizarre designs.”\textsuperscript{12}

The court has adopted the interpretation that the Alaska State Constitution “calls only for relative compactness.”\textsuperscript{13} In \textit{Hickel}, the court wrote that “oddly-shaped districts may well be the natural result of Alaska’s irregular geometry. However, ‘corridors’ of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.”\textsuperscript{14}

When judging compactness and contiguity, the state supreme court will often compare the Proclamation Plan from the Redistricting Board to other draft plans the Board considered or plans submitted by outside groups. If other plans were able to draw the district in question in a more compact and contiguous way, then that is cause for concern for the version of the district in the Proclamation Plan.\textsuperscript{15}

Thirty-seven states, including Alaska, require state legislative districts to be reasonably compact.\textsuperscript{16}

\textbf{Relative Socio-Economic Integration}

At the time of the passage of Alaska’s constitution, many other states had anti-gerrymandering provisions in their constitutions, requiring districts to be “compact” and “contiguous” among other things. Alaska’s was the first, however, to lead in a new

\textsuperscript{15} See for example, \textit{In Re 2001 Redistricting Cases v. Redistricting Bd.}, 44 P.3d 141 (Alaska 2002).
\textsuperscript{16} Justin Levitt, \textit{Where are the lines drawn?}, All About Redistricting (2012), http://redistricting.lls.edu/where-state.php.
generation of “more precise and sophisticated” rules.\textsuperscript{17} The Alaska State Constitution also requires that each district be “a relatively integrated socio-economic area,” and it was followed by the imposition of similar requirements in other states, such as preserving “communities of interest” and “economic and political interests.”\textsuperscript{18} This requirement was elaborated on at the Constitutional Convention:

Where people live together and work together and earn their living together, where people do that, they should be logically grouped in that way...It cannot be defined with mathematical precision, but it is a definite term, and is susceptible of a definite interpretation. What it means is an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following, if possible, similar economic pursuits. It has, as I say, no mathematically precise definition, but it has a definite meaning.\textsuperscript{19}

This particular requirement has been at issue in several of the cases contested over the decades surrounding redistricting proposals.

The court elaborated on this requirement in \textit{Kenai Peninsula Borough v. State}, writing that the governor, or the Board as the case may be, must provide “sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction and interconnectedness rather than mere homogeneity.”\textsuperscript{20} In the same case, the court held that proof of transportation between two areas, such as daily flights or state ferry service, could also be evidence of socio-economic integration.

As with contiguity and compactness, socio-economic integration is only required to be relative. The court “compare[s] proposed districts to other previously existing and


\textsuperscript{18} \textit{Id.} at 926-7.


proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient.”

While Alaska’s requirement is fairly unique, twenty-four states do require consideration of “communities of interest” when creating state legislative districts. Most of these states only have such a rule in the context of general advice, however, as opposed to an actual requirement, as is found in Alaska’s constitution.  

**Equally Sized Districts**

Every state must abide by the equal representation requirements of the U.S. Constitution as proscribed by the Supreme Court in *Reynolds*. Alaska’s constitution, however, imposes additional requirements. It requires that districts have populations which are as equal as practicable. This has been interpreted to mean that the overall deviation must be no greater than ten percent, meaning that each district may have no more than five percent deviation, plus or minus, from the ideal district population size.

In the guidelines it established for itself prior to the 2011 redistricting process, the Redistricting Board elaborated on this. First, “10% deviation standard is not a safe harbor, good faith efforts must be made to reduce deviations to as small as practicable.” And second, “deviations in urban areas must be made as small as practicable because new technology makes it practicable to achieve those deviations.”

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Supreme over all of these state constitutional requirements are those of the federal government and the VRA in particular. The following chapters will explore the requirements of the VRA, before turning to the specifics of its conflicts with the requirements of the Alaska State Constitution over Alaska’s history.
CHAPTER FOUR: HISTORY OF THE VOTING RIGHTS ACT

In the 1960’s, nearly a century after the Fifteenth Amendment gave African-Americans the right to vote, racially based voter discrimination still ran rampant, particularly in the Southern states. In an effort to remedy these problems, Congress passed the Voting Rights Act of 1965. Today’s Justice Department calls the legislation “the most effective civil rights statute enacted by Congress.”\(^1\) In this chapter, I will review the history and intent of the VRA, and in Chapter Five, I will look at the specific requirements of the VRA and their application to Alaska over the last several decades.

In the wake of the Civil War, three Constitutional Amendments were adopted, known collectively as the Civil War or Reconstruction Amendments. The Thirteenth Amendment was ratified in December 1865, and formally ended slavery in the United States, declaring, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”\(^2\) The Fourteenth Amendment was ratified in June 1868 and reads in part, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”\(^3\) This provision was aimed at extending citizenship to African-Americans and overturning the Supreme Court’s 1857 ruling in *Dred Scott v. Sanford*. The amendment also prohibits the States from denying to any person due process of law or the equal protection of the laws. Finally, the Fifteenth Amendment was

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\(^2\) U.S. Const. amend. XIII, §1.
\(^3\) U.S. Const. amend. XIV, §1.
ratified in February 1870, and awarded African-American men the right to vote, declaring, the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

In the decade following the Civil War, African-Americans gained political power in the South, helped by the three Amendments and the tough Reconstruction policies imposed by the North. In 1870, Hiram Revels became the first African-American elected to the U.S. Senate, while Joseph Hayne Rainey became the first African-American elected to the U.S. House of Representatives. In South Carolina, voters elected an African-American, Jasper J. Wright, to the state supreme court. The 42nd Congress, which first met in 1871, included five African-American members.

The full promise of the far-reaching Civil War Amendments was not fulfilled for many decades, however. As the Reconstruction Era came to an end in 1877, white Democrats in the Southern states began rebelling against the racial equality which the North had attempted to impose. Over the next several decades, the Southern states disenfranchised African-Americans through both legal and informal means. In 1896, the U.S. Supreme Court approved racial segregation laws under the “separate but equal” doctrine in Plessy v. Ferguson. Many states passed laws effectively disenfranchising African-Americans through poll taxes, literacy tests, grandfather clauses, and the like. When Louisiana adopted a literacy test with a grandfather clause in 1896, black voter registration fell from 44.8% to 4.0% in 1900. In 1888, Florida adopted several

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4 U.S. Const. amend. XV, §1.
6 Plessy v. Ferguson, 163 U.S. 537 (1896).
disenfranchising laws, causing voter turnout among African-American men to fall from 62% to 11% by 1892. As late as 1940, only 3% of eligible African-Americans living in the South were registered to vote.

These disenfranchising laws also affected some poorer whites, although not at nearly the same levels as African-Americans. For example, from the 1888 presidential election to the 1892 presidential election, white turnout in Mississippi fell 34% percent. Over the same period, black turnout in the state fell 69%. Overall, the levels of support for opposition parties also fell as a result of this disenfranchising. In Mississippi, between 1888 and 1892, the percent of adult males voting for the opposition party fell by 60%. Democrats, the major proponents of these disenfranchisement laws, became in many cases the sole political party in the Southern states.

African-Americans were not the only minority targeted by racially discriminatory voting laws in this era. In 1882, Congress passed the Chinese Exclusion Act, denying Chinese-Americans both citizenship and the right to vote. In 1887, Congress passed the Dawes General Allotment Act which allowed only those Native Americans who gave up their tribal affiliation to receive U.S. citizenship. The U.S. Supreme Court ruled that Takao Ozawa, a Japanese immigrant, could not be naturalized under the Naturalization Act of 1906, which limited naturalization to “free white persons and to aliens of African

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8 Id.
nativity and to persons of African descent,” purposefully excluding Asian-Americans. Filipinos were not allowed to vote until 1946.  

The disenfranchisement of African-Americans was also done by more informal means, namely the white-only primary. Some have argued that this factor was even more influential than the legal approaches. The Democratic Party was legally allowed to exclude African-Americans from joining the party, and thereby from voting in the party primary, solely on the basis of their being African-American. Given that the South was essentially operating under a one-party system at this point, African-Americans were effectively excluded from the voting process. The Supreme Court found the white primary unconstitutional in 1944, after which African-American voter turnout in the South rose, although not to nearly the level of white voter turnout.

While the Supreme Court forbade segregation in public schools in 1954 in Brown v. Board of Education, segregation remained a reality, as did voter discrimination. Five years later, in 1959, the Supreme Court upheld the constitutionality of literacy tests in Lassiter v. Northampton County Board of Elections. The effect of all this was that in the early 1960’s, almost a century after the passage of the Fifteenth Amendment, many African-Americans were still unable to vote. In 1964, just one year before the passage of the VRA, only 44% of adult African-Americans in Georgia were registered to vote.

The Civil Rights Movement is generally dated to have begun in the 1950’s, with the Brown ruling and Rosa Parks’ famous refusal to move to a seat in the back of the bus,

\[^{11}\text{V. O. Key, Southern Politics in State and Nation (Univ. Tennessee Press 1984).}\]
as required by a city ordinance in Montgomery, Alabama. Over the next decade, the
demonstrations increased, and rioting and violence intensified. In 1964, after more than
fifty days of filibuster in the Senate, Congress passed the Civil Rights Act, prohibiting
racial segregation in public places and racial discrimination in hiring.\textsuperscript{13}

In January 1965, Dr. Martin Luther King Jr. began a campaign in Selma, Alabama
to call attention to race-based voter discrimination. Selma was chosen as a particularly
egregious example of this discrimination; at the time, only 1\% of eligible African-
Americans were registered to vote.\textsuperscript{14} On March 7, around 600 protestors began a march
from Selma to Montgomery in support of this cause. A mere six blocks into the march,
state and local law enforcement officials attacked and brutally beat the group, resulting in
the death of one demonstrator. The event drew national outrage and became known as
Bloody Sunday.\textsuperscript{15}

One week after Bloody Sunday, on March 15, 1965, President Lyndon B. Johnson
spoke before a joint session of Congress and introduced the bill that eventually became
the Voting Rights of Act of 1965. In a speech titled, “We Shall Overcome,” Johnson
called on legislators to pass legislation ending racially-based discrimination in voting,
“this most basic right of all.” Johnson said:

\begin{quote}
We ought not, and we cannot, and we must not wait another eight months
before we get a bill. We have already waited 100 years and more and the
time for waiting is gone…But even if we pass this bill the battle will not
be over. What happened in Selma is part of a far larger movement which
reaches into every section and state of America. It is the effort of
American Negroes to secure for themselves the full blessings of American
\end{quote}

\textsuperscript{13} Abigail Thernstrom, Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections 5 (AEI
Press 2009).
\textsuperscript{14} Id.
\textsuperscript{15} American Civil Liberties Union, Timeline: Voting Rights Act, https://www.aclu.org/timelines/timeline-
life. Their cause must be our cause too. Because it’s not just Negroes, but really it’s all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome.\textsuperscript{16}

Johnson sent the Act to Congress on March 17, 1965.

Congress passed the bill in under five months. The Senate began floor debate on the VRA on April 22 and eventually passed it on May 26 by a vote of 77-19, after successfully invoking cloture to end debate. The House followed suit on July 9, with 333 votes for to 85 against. The two bills were reconciled in conference, and on August 6, President Johnson signed the Voting Rights Act of 1965 into law. At the signing, Johnson praised the bill, saying, “Today is a triumph for freedom as huge as any victory that has ever been won on any battlefield.” Addressing the purpose of the act, Johnson noted, “This act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote.” \textsuperscript{17} Once the VRA was passed, it was generally only Southerners who attacked the Act, and these critiques were largely dismissed given that, as Abigail Thernstrom puts it, they “came to the matter with dirty hands.”\textsuperscript{18}

The VRA had an immediate effect after its passage. In March 1965, around 19.3% of blacks in Alabama were registered to vote; by September 1967, 51.6% were. Similar increases were seen in other Southern states, including Georgia, Louisiana, South Carolina and Virginia. Perhaps most impressively, Mississippi’s black voter registration

\textsuperscript{18} Abigail Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Georgetown Journal of Law & Public Policy 41, 41 (2007).
skyrocketed from 6.7% to 59.8%. North Carolina had previously had a fairly high black registration percentage of 46.8% and saw a smaller gain as a result.\textsuperscript{19}

There was an initial court challenge to the VRA in 1966, in the case of \textit{South Carolina v. Katzenbach}, in which South Carolina sued Attorney General Nicholas Katzenbach on the grounds that parts of the Act exceeded Congress’s powers and violated the state’s rights to control elections. In an 8-1 decision, the Supreme Court upheld the VRA under the Fifteenth Amendment’s enforcement clause, which gives Congress “full remedial powers” to end race-based discrimination in voting.\textsuperscript{20}

In his majority opinion for the Court, Chief Justice Earl Warren argued that “the constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”\textsuperscript{21} He wrote, “Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution...[and] Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”\textsuperscript{22} The sole dissenter was Justice Hugo Black, an Alabama Democrat. Black argued that the Act upset the balance of federalism, writing that one section in contention “so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between State and Federal power almost

\begin{footnotes}
\footnote{Id.}
\footnote{South Carolina v. Katzenbach, 383, U.S. 301, 326 (1966).}
\footnote{Id. at 308.}
\footnote{Id. at 309.}
\end{footnotes}
meaningless.”23 With this constitutional approval from the Supreme Court, the federal government continued to implement the provisions of the VRA.

Having established the history and purpose of the VRA, I will now turn to the specific provisions of the Act, with a focus on their relation to redistricting in Alaska.

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23 Id. at 358.
CHAPTER FIVE: REQUIREMENTS OF THE VOTING RIGHTS ACT

The different provisions of the Voting Rights Act cover a wide territory and include several permanent parts, as well as several temporary parts which have been reauthorized numerous times over the last half-century. While some had initially feared that making some key provisions temporary would weaken the efficacy of the Act, in actuality many strengthening amendments have been added every time the provisions have been extended. As two scholars write, “The fact that the major provisions of the Act were temporary has turned out to be an advantage to proponents of minority voting rights, rather than a hindrance, for each time the Act has been scheduled to expire it has been not only renewed, but strengthening or broadening amendments have been added.”¹ Additionally, some parts of the VRA apply to the entire country, whereas others are targeted specifically at those parts of the country deemed to have a history of racial discrimination in voting practices, including Alaska. In this chapter, I will look at some of the provisions of the VRA.

Section 2

Section 2 of the VRA prohibits voting practices and procedures which discriminate based on race, color, or language minority status. It applies to the entire country and is permanent, meaning it has no expiration date and needs no reauthorization. Redistricting is one of the procedures included under Section 2. Section 2 prohibits not only redistricting plans which have discriminatory intent but also those with a racially

discriminatory effect. If the United States, or a private party, feels that a redistricting plan violates Section 2, it can file suit.²

In 1980, the Supreme Court held in Mobile v. Bolden that Section 2 is a restatement of the rights protected under the Fifteenth Amendment. They interpreted this to mean that anyone arguing that their Section 2 rights have been violated must show that the procedure that did so was enacted or maintained, at least to some degree, with an “invidious purpose.”³

Congress amended Section 2 in 1982, to allow that if a plaintiff could prove that if, in the context of the “totality of the circumstance of the local electoral process,” the challenged procedure resulted in race based discrimination in voting, then the procedure could be declared unconstitutional under Section 2. To elaborate on this, the Senate Judiciary Committee issued a list of factors which could be considered in “the totality of the circumstance of the local electoral process.” They are:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.\textsuperscript{4}

This list is neither comprehensive nor exclusive. The Supreme Court interpreted the meaning of the 1982 amendment in \textit{Thornburg v. Gingles} (1986). Justice William Brennan wrote for a unanimous court that the “essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”\textsuperscript{5}

\textit{Gingles} established three conditions which must be met before a district can be ruled to have unconstitutionally violated Section 2. First, the minority group must have a sufficiently large population and be geographically distributed in such a way that it is possible it could control a reasonable district. Second, the minority population must generally vote as a bloc, for the same sort of candidate. This test goes beyond a tendency to all vote for a Democratic candidate or all vote for a Republican candidate, and requires that the group vote for the same type of Democratic candidate or the same type of Republican candidate. Third, the rest of the population in the area must generally vote in bloc for a different sort of candidate than that preferred by the minority group, meaning that the minority party’s preferred group would almost always lose so long as the minority group’s voting power is unprotected. If both the second and third conditions are in effect, this is known as racially-polarized voting. If all three of the \textit{Gingles} conditions


\textsuperscript{5} Thornburg v. Gingles, 478 U.S. 30, 47 (1986).
are met, the Court then looks at the “totality of the circumstances” to decide whether the district is unconstitutional.  

Sections 3 and 8

Sections 3 and 8 give the federal government the power to appoint examiners to polling places when deemed necessary to ensure that the Fourteenth and Fifteenth Amendments are enforced. If there are concerns about racial discrimination in a particular area, the federal courts, empowered by Section 3, or the U.S. Attorney General, empowered by Section 8, can send examiners to oversee Election Day. These Sections are permanent.

A political subdivision in Alaska has only once been certified by the Attorney General for oversight by an examiner; on October 6, 2009, the Bethel Census Area was certified. No part of Alaska is currently eligible for a federal examiner as a result of a federal court ruling.  

Sections 203 and 4(f)(4)

Section 203 and 4(f)(4) constitute the language minority provisions of the VRA. They are temporary provisions and were first passed by Congress in 1975. Congress extended them in 1982, 1992, and 2006. Section 203 is currently set to expire in 2032 and Section 4(f)(4) in 2031. The provisions require that covered jurisdictions provide all election information available in English additionally in the minority language. Ballots,

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6 Id. at 36.
voting instructions and registration notices are some of the documents that fall into this category. The provisions note that:

[T]hrough the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.  

The language minority provisions are only applicable to certain covered jurisdictions. Every decade, following the decennial census, the Census Bureau determines what jurisdictions are covered based on a formula outlined in the VRA. The language minority group in question must number at least 10,000, or constitute more than five percent of all voting age citizens, or, on an Indian reservation, more than five percent of all reservation residents, and have an illiteracy rate higher than the national illiteracy rate. Only language minorities considered by Congress to have historically faced obstacles in the political process are included under these provisions: American Indians, Alaska Natives, Asian Americans and Hispanics.

While the language minority provisions do not directly interact with the redistricting process, they are an important part of Alaska’s relationship with the VRA, as has been elaborated on by other scholars.\(^{11}\)

As of the most recent Census Bureau determinations, issued on October 13, 2011, several political subdivisions were covered under the language minority provisions. In other states, areas of covered by county. In Alaska, where boroughs serve as the equivalent of counties, the borough is the political subdivision used. Aleutians East Borough must provide materials for Filipino and Hispanic minority groups. Aleutians West Census Area must provide materials for Filipinos. Bethel Census Area must provide materials for Inupiat and Yup’ik minority groups. Dillingham Census Area must provide materials for Yup’ik voters. Nome Census Area must provide materials for Inupiat and Yup’ik minority groups. North Slope Borough must provide materials for Inupiats and an unspecified Alaska Native tribe. Northwest Arctic Borough must provide materials for Inupiat voters. Wade Hampton Census Area must provide materials for Yup’ik and Inupiat voters. And Yukon-Koyukuk Census Area must provide materials for Athabascan voters.\(^{12}\)

**Section 5**

Section 5 of the Voting Rights Act is the section that has drawn the most complaints, according to records kept by the Civil Rights Division of the Department of

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Justice. Section 5 requires preclearance from the federal government before any procedural change to voting or election law can be implemented in certain covered areas. This approval can be granted by either the United States Department of Justice or by a Federal District Court in Washington, D.C. Jurisdictions have almost always gone with the first option, as it is a speedier and less costly procedure than navigating the court system.\(^{13}\)

In order to implement such a change, the jurisdiction must prove that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [minority language status]”. Until approval is granted, such a voting change is unenforceable and the jurisdiction may not implement it. If the change is not approved, its implementation is blocked. Such changes include any election policies, practices or administrative functions, including changes to redistricting maps.\(^{14}\)

In the case of redistricting, a map will generally receive approval if it is not intended to dilute minority votes and does not lead to retrogression in minority political opportunity, whether intended or not. Retrogression is caused when a map causes fewer opportunities for the minority group to elect a candidate of its choice, relative to the preexisting map.\(^{15}\)

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\(^{14}\) *Id.*

\(^{15}\) *Id.*
In 2008, the U.S. Attorney General’s Office stated that only about 1% of submissions are overturned by the Department of Justice.\textsuperscript{16} The Attorney General has reviewed over half a million election law changes since the VRA’s passage.\textsuperscript{17} Since the 2000 Census was released, more than 3,000 redistricting related changes have been reviewed. The Attorney General is also empowered to file suit when election changes are put into effect without prior authorization, as are private individuals or groups who can show standing.\textsuperscript{18}

Section 5 is a temporary provision of the VRA and must be reauthorized by Congress. When the Voting Rights Act was initially passed in 1965, Section 5 included a five-year sunset provision. Since then, it has been extended multiple times; most recently a 25 year extension passed in 2006 as the centerpiece of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA), meaning that the section is on the books until 2031.\textsuperscript{19}

Only certain areas of the country fall under Section 5, the entire state of Alaska being one of them. The definition of a covered jurisdiction is explained in Section 4, and it has been changed several times since the VRA’s initial passage in 1965.


\textsuperscript{17} U.S. Dep’t of Justice, \textit{Section 5 Changes by Type and Year}, http://www.justice.gov/crt/about/vot/sec_5/changes.php (last visited Apr. 1, 2012).

\textsuperscript{18} Id.

Section 4

Section 4 outlines the criteria for determining whether a particular jurisdiction is covered under certain provisions of the Act, including Section 5’s preclearance requirement. This is premised on the idea that certain areas of the country, particularly at the time of the VRA’s passage, were more inclined to discriminate than others and therefore necessitated greater oversight from the federal government.

When the VRA was initially passed, there were two “qualifiers” which would result in a jurisdiction being placed under Section 5 coverage. First, any state or political subdivision of a state which had a “test or device” which restricted the opportunity to register to vote as of November 1, 1964 was included. Second, it included any area in which less than fifty percent of people of voting age were registered to vote as of November 1, 1964 and any area in which less than fifty percent of voting age actually voted in the presidential election held in November of 1964. Seven entire states were immediately included (Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia) as were political subdivisions in four other states (Arizona, Hawaii, Idaho and North Carolina). 20

Alaska was included in this group of covered jurisdictions due to a provision in the state constitution which required voters to be able to speak or read English unless prevented from doing so by a disability. Many of the southern states, in comparison, required voters to either read or write English, a far more difficult literacy test. Nonetheless, this provision was repealed by the voters in 1970.

20Id.
Following the passage of the VRA, Alaska applied for and received a bailout from coverage under Section 5 in 1966. The state successfully proved that it had not used a test or device with either race-based discrimination as intent or in effect over the last five years. Several counties in other parts of the country also received exemptions during this time period, although Alaska remains the only entire state to receive an exemption from Section 5 coverage.

In 1970, Congress extended the temporary provisions of the VRA, including Section 5, for another five years. At this time, they also changed the coverage formula slightly, adding any jurisdiction with a test or device in place as of November 1968 to the list of covered areas. This change led to parts of ten states being covered additionally under Section 5, including Alaska. The extension was passed based on Congress’s assessment that despite the increase in black voter registration rates over the previous five years, there continued to be racial discrimination aimed at limiting minority participation in elections through such techniques as gerrymandering in the redistricting process and harassing minority voters at the polls.

With the addition of the 1968 election, Alaska was again included under the coverage formula. In the early 1970’s, Alaska received another exemption from Section 5 coverage.

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25 Id.
In 1975, Congress again extended the temporary provisions of the VRA, this time for seven years, as minority voter registration rates continued to be lower than those of white voters. Any jurisdiction with a test or device in place as a requirement to vote as of November 1972 was covered. At this time, the provisions were also expanded to prevent discrimination against “language minority groups” in voting. Finally, Congress expanded the 1965 “test or device” definition to include the practice of proving English-only election information, such as ballots, in jurisdictions where a single language minority makes up more than five percent of voting age citizens in the area. This last change led to coverage of Alaska, Arizona, and Texas entirely as well as parts of California, Florida, Michigan, New York, North Carolina and South Dakota.

Alaska again applied for an exemption, but abandoned this request when it appeared that the Department of Justice would not approve it.

In 1982, Congress extended Section 5 for another 25 years but did not make any changes to the coverage formula. Most recently, in 2006, Congress passed a 25 year extension of the temporary sections of the VRA in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA), meaning that the section is on the books until 2031.

In addition to the coverage formula discussed above, Section 4 also includes the procedure a covered jurisdiction can follow to become exempted from the preclearance requirement, a process known as the bailout. This procedure was originally available in

26 Id.
1965 to correct any inappropriate inclusion of jurisdictions and required the jurisdiction to prove that they had not used a test or device to establish eligibility to vote which was racially discriminatory, either in effect or intent, over the last five years. In 1970, when the VRA’s temporary sections were reauthorized, the length of time was extended to ten years, and in 1975, it was again extended to seventeen years.

In the 1982 reauthorization, the current bailout process was established. The current system allows even those jurisdictions with a fairly recent history of racial discrimination in voting practices to receive an exemption from Section 5’s preclearance requirement if they can prove that they have not engaged in such practices for the last ten years and have made an effort to increase minority voter participation. The new process allows for political subunits of a covered jurisdiction to apply for a bailout. For example, a city within a covered state could receive a bailout if it met the conditions necessary.

A jurisdiction can receive a bailout if a three-judge panel in the U.S. District Court for the District of Columbia issues a declaratory judgment that the jurisdiction has met the following set of conditions. As outlined by the Department of Justice:

The successful bailout applicant must demonstrate that during the past ten years:

- No test or device has been used within the jurisdiction for the purpose or with the effect of voting discrimination;
- All changes affecting voting have been reviewed under Section 5 prior to their implementation;
- No change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District of Columbia district court;
- There have been no adverse judgments in lawsuits alleging voting discrimination;
- There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;

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29 Id.
There are no pending lawsuits that allege voting discrimination; and
Federal examiners have not been assigned;
There have been no violations of the Constitution or federal, state or local laws with respect to voting discrimination unless the jurisdiction establishes that any such violations were trivial, were promptly corrected, and were not repeated.\(^{30}\)

Essentially, the jurisdiction must show that over the last decade it has not violated the VRA and its voting and election procedures have not discriminated against minority voters. The jurisdiction must also show that it has worked to eliminate discriminatory voting practices not prohibited by the VRA, such as intimidation, and that the minority group’s access to the electoral process has increased.

A number of jurisdictions have been awarded bailouts from Section 5 coverage over the history of the VRA. The Justice Department has compiled a list of these areas.\(^{31}\)

Alaska as a whole is not eligible to receive a bailout under the current process. In 2009, the Federal Attorney General certified a federal observer to oversee the Bethel Census Area, meaning that the state will not be eligible to receive a bailout until 2019. The state does not supply all ballots and election materials in the minority languages which the federal government has decided it should, although Alaska has contended that for various reasons it should not be required to do so. Regardless, it is highly unlikely that Alaska will be able to receive a bailout from Section 5 as it stands today.\(^{32}\)

The bailout provision’s role was illustrated recently in the 2009 Supreme Court case of *Northwest Austin Municipal Utility District Number One v. Holder, et al*, a case


\(^{31}\) *Id.*

which also called into question the future of Section 5.\footnote{Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193 (2009).} In this case, a small utility district located near Austin, Texas, included as a covered jurisdiction under Section 5 along with the rest of Texas, requested a bailout. The district served about three thousand people and had no evident history of discrimination on the basis of race or language in its board elections. In addition to requesting a bailout, the district also alleged that the Voting Rights Act, and the 2006 amendment in particular, was unconstitutional.

The Federal District Court in the District of Columbia rejected the district’s request on the grounds that only political subdivisions which registered their own voters, including counties and parishes, were eligible for bailouts. The municipal utility district did not register its own voters and so could not receive a bailout. The District Court also upheld the constitutionality of the Voting Rights Act and the 2006 extension.

The district then appealed to the Supreme Court. In an 8-1 decision, the Court ignored the district’s attacks on the Voting Rights Act itself and determined that there were other grounds available to decide the case on. It found that the district was clearly a political subdivision in “the ordinary sense” and was therefore entitled to receive a bailout if it met the other requirements, regardless of whether it registered its own voters or not. Therefore, the Court reversed the decision of the district court and remanded the case back to the lower court.\footnote{Adam Liptak, \textit{Justices Retain Oversight by U.S. on Voting}, New York Times (Jun. 22, 2009), http://www.nytimes.com/2009/06/23/us/23scotus.html?_r=2&hp.}

The Court’s decision was highly anticipated at the time, with many observers expecting the Court to rule on Section 5’s constitutionality outright, and many expecting
that Section 5 might be overturned. Chief Justice John Roberts, who authored the majority opinion, was fairly skeptical of Section 5’s current necessity at oral arguments.

In his closing remarks to the opinion, Roberts writes:

> More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of this country justified extraordinary legislation otherwise unfamiliar to our federal system…In part due to the success of that legislation, we are now a very different nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits, all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

Roberts also devoted time in the opinion to discussing the successes of the VRA, again possibly implying that the time for Section 5’s termination may be approaching. Roberts did allow that the coverage formula “is based on data that is now more than 35 years old…and there is considerable evidence that it fails to account for current political conditions.”

Justice Clarence Thomas was the sole dissenter to the opinion. In his dissent, Thomas called for the Court to take up the constitutionality of Section 5 and overturn it, given the successes that Roberts discussed.

The VRA Today

In addition to *Northwest Austin Municipal Utility District Number One v. Holder, et al.*, the Supreme Court has ruled on several other cases related to the Voting Rights Act in recent years which carry significance for the future of the Act.

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In 1997, the Court overturned the Religious Freedom Restoration Act of 1993 (RFRA), which Congress had passed under the Fourteenth Amendment’s Enforcement Clause, in *City of Boerne v. Flores*.\(^{37}\) In his opinion for the 6-2 Court, Justice Anthony Kennedy wrote that while the Enforcement Clause gave Congress the right to enforce the Fourteenth Amendment, it did not allow Congress to decide what constituted the substantive rights protected by the Amendment, as he concluded the RFRA did. Congress’s enforcement power was purely remedial. Kennedy writes, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” This standard is sometimes considered to be at least illustrative of the Court’s possible approach to Section 5 of the VRA.

Kennedy’s decision contrasts the RFRA with the VRA, articulating that:

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.\(^{38}\)

Just as the RFRA was based in the Fourteenth Amendment’s Enforcement Clause, the VRA is based in the Fifteenth Amendment’s Enforcement Clause. Some observers have argued that given the lessening in racial discrimination over the last several decades, this same analysis could now be applied to Section 5 in today’s world.

In January 2012, the Court dealt again with the VRA, specifically in the context of Texas’s redistricting process, in the case of *Perry v. Perez*.\(^{39}\) The Court was asked to consider a federal court in Texas’s ability to impose its own interim legislative district

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\(^{38}\) *Id.* at 530.

\(^{39}\) *Perry v. Perez*, et al., 565 U.S. No. 11-713 (Jan. 20, 2012).
maps given that the plans drawn by the state had not yet received preclearance from the federal government.

In an anonymous decision, the Court unanimously overturned the interim maps drawn by the district court. Instead, the Court ordered the lower court to take up the issue again and this time to use the maps produced by the state legislature as a “starting point.” The district court was to make any changes necessary under the requirements of the VRA but no more. The majority opinion again declined to address the issue of the VRA’s constitutionality, just as it did in Northwest Austin Municipal Utility District Number One v. Holder, et al. The opinion does note, however, that the “intrusion of state sovereignty” presented by the preclearance requirement does bring up “serious constitutional questions.” Justice Thomas filed his own opinion, arguing that given his belief that Section 5 is unconstitutional, Texas should have been able to draw its maps without preclearance from the federal government.

It currently seems likely that by the end of 2012 the Supreme Court will again have a chance to rule directly on the constitutionality of Section 5. As a covered jurisdiction, Texas was required to submit its plan to require voter IDs to the Department of Justice for approval. The Department of Justice rejected the Texas law, saying that it is both unnecessary and will disproportionately affect Hispanic voters. Texas has filed suit, and is currently alleging that preclearance under Section 5 is unconstitutional.\(^\text{40}\) Given the Court’s hints in recent cases that Section 5 is on shaky ground, it is not inconceivable that

they could overturn the law. Of course, the Court has so far managed to avoid ruling on Section 5’s constitutionality and may continue this avoidance in future cases as well.

Those in favor of the VRA argue that it, including Section 5, is still an important and necessary piece of legislation. When the VRARA was passed in 2006, it was with considerable bipartisan support from Congress- unanimous support from the Senate in fact-, and Republican President George W. Bush signed the bill into law in July of that year.41

Civil rights groups are among some of the most prominent advocates of the continuing necessity and constitutionality of the VRA today. For example, the American Civil Liberties Union calls the Act “critical for helping ensure election laws do not discriminate against minority voters,” and has involved itself in several recent lawsuits against the VRA to fight for its preservation.42 The Leadership Conference argues, “The number of objections (626) interposed between August 5, 1982, when Section 5 was last reauthorized, and December 30, 2004, was greater than the number of objections before 1982, constituting 56 percent of the total objections under the VRA.” 43 They interpret this to mean that the VRA is still as necessary as ever, given that the number of objections has not fallen. This line of argument is generally grounded in the idea that the VRA has accomplished a lot since its passage and that its work is not yet done; there is still racial discrimination in election and voting practices that is being minimized thanks to the VRA and Section 5’s preclearance requirements.

Two scholars have even focused their work specifically on the continuing importance of the VRA in Alaska. In their paper titled “Voting Rights in Alaska: 1982-2006,” Natalie Landreth and Moira Smith argue that “the Alaska Native population still faces barriers to voting the VRA was meant to eradicate thirty years ago”. Landreth and Smith focus on the language provisions of the VRA, but also spend some time on Section 5 and redistricting in particular.

Others think that the Section 5 is no longer necessary. They argue that a country that can elect a black man to the presidency no longer has a need for federal oversight of state election law based on racism and discrimination. Supreme Court Justice Clarence Thomas is among those who advocate this point of view, writing in one case that “punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose.”

This viewpoint was also articulated by Abigail Thernstrom in her paper titled “Section 5 of the Voting Rights Act: By Now, A Murky Mess” and in her book, Voting Rights and Wrongs. Thernstrom argues that although the Act as originally passed was “flawless”, its current incarnation bears little similarity to that legislation and has become a “jumbled mess”. According to her, the reauthorization in the VRARA in 2006 was “a careless, politically expedient promise unlikely to be kept and it carries a high cost”. Whereas the Act was originally aimed at preventing voter discrimination against blacks, its main role in today’s world is to “ensure the creation or maintenance of reserved seats

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for black and Hispanic candidates, on the assumption that the number of blacks and Hispanics holding legislative seats is an accurate gauge of minority representation”.  

Artur Davis, an African-American and former Democratic Congressman from Alabama, argues that the requirements of the VRA, or at least the way they are applied today, lead to “hyper-gerrymandering” and racially polarized districts. In an interview with National Public Radio, Davis claims that people’s votes are not longer guided exclusively by race and that maps with super-majorities of African-Americans, such as his former district, Alabama’s 7th, lead to “politics that’s more racially polarized than ever.”

Others argue that Alaska in particular should not be subject to the VRA. In the editorial from the Fairbanks Daily News-Miner, published on March 12, 2012, the paper argued that Alaska should be exempted from the Voting Rights Act, writing that it is “absolutely mind-boggling…that this federal law applies to Alaska in the first place.”

Still others argue that Section 5, and the bailout provisions in particular, ought to undergo significant revisions to ensure their constitutionality. Christopher Seaman offers some solutions to what he sees as the current failings of the bailout process. Seaman suggests that two changes should be implemented. First, he argues that Congress automatically bailout all covered jurisdictions which “have not violated the major provisions of the Voting Rights Act since the 1982 renewal.” And second, Seaman calls for a change in the current requirements for a bailout to make it easier for jurisdictions to

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determine their eligibility before embarking on the lengthy and sometimes costly process. These are only Seaman’s suggestions; many others have also offered their own input into possible ways to correct what they see as the wrongs in the VRA today.\footnote{Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 Saint Louis University Public Law Review 9 (2010).}

Given the passion by advocates on both sides of the issue, and a possible decision by the U.S. Supreme Court in the coming year, the debate over the constitutionality of Section 5 of the Voting Rights Act is unlikely to disappear soon. In the next chapter, I will begin to explore the history of the redistricting process in Alaska, and the history of the conflict between the requirements of the VRA and the Alaska State Constitution.
CHAPTER SIX: ALASKA REDISTRICTING HISTORY, PART ONE

Having presented the requirements of both the state constitution and the VRA regarding redistricting, I will now explore the history of redistricting in Alaska. I will progress through the decades, concluding with a look at the redistricting following the 2000 census. This chapter will examine the redistricting process during in the 1970’s and 1980’s. During the first part of this era, Alaska was often not covered by the VRA due to its bailouts in 1966 and 1971, and the VRA did not play a significant role in redistricting for the most part in the state. In the following chapter, I will look at the redistricting process in the 1990’s and the 2000’s, when the requirements of the VRA began to play a greater role in Alaska redistricting and the litigation surrounding the maps produced.

One scholar has argued that the Alaska Supreme Court’s jurisprudence, while admittedly extensive, has been highly unpredictable, in that “the Court never applies the same rules twice.”¹ Tuckerman Babcock, director of the Alaska Redistricting Board for the redistricting cycle following the 1990 census, argues that this “predictable unpredictability” means that in redistricting, one ought to assume that the first plan will never be approved, although for different reasons every cycle, and that the second plan, however it has been amended, will be allowed to stand. Babcock writes, “The perverse effect of this judicial strategy eliminates whatever meager incentive exists for a governor to practice restraint, work to compromise, or to any real degree rein in political manipulation during reapportionment, round one.”²

¹ Tuckerman Babcock, Predictably Unpredictable: The Alaskan State Supreme Court and Reapportionment, in Race and Redistricting in the 1990’s 121 (Bernard Grofman ed., 2008).
² Id. at 133.
Redistricting in the 1970’s

I have already discussed the redistricting process following the U.S. Supreme Court’s ruling in *Reynolds v. Sims* in 1965, establishing the “one person, one vote” doctrine. After *Wade v. Nolan*, Republican Wally Hickel defeated Democratic Governor Egan in the November 1966 election. Hickel served for just over two years, until January 1969 when he was appointed by President Richard Nixon to be Secretary of the Interior. Lieutenant Governor Keith Miller assumed the governorship, and was defeated in the 1970 general election by Egan.³

After the 1970 census, Governor Egan appointed a Redistricting Board and then, on December 30, 1971, announced his redistricting plan. Republican Senate President Jay Hammond and fourteen other legislators sued, alleging that the plan was unconstitutional due to excessive variation in population from district to district.⁴ At the time, Democrats had the advantage in the state legislature, with a 31-9 majority in the House and the Senate evenly split.⁵

The state supreme court unanimously agreed with the legislators, concluding that the plan was unconstitutional under the U.S. Constitution’s equal protection and supremacy clauses due to excessive variation in the population of districts, and returned the plan to Egan. Since the 1966 case of *Wade v. Nolan*, the court had been expanded to include five justices. Egan appointee Jay Rabinowitz was still on the court, as was the more recent Egan appointee Robert Boochever. Hickel appointee Roger Connor and

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Miller appointee Robert Erwin rounded out the court, for a total of two justices appointed by Democrats and two by Republicans. A fifth justice, Justice George, had died in a boating accident a month earlier, leaving the court short one justice. As the deadline to file to run in the 1972 elections was fast approaching, the Court appointed two masters to create an interim plan to serve for the 1972 elections alone. Egan was to draw a plan to be used in subsequent elections.

The interim plan created by the Masters included members of the military population residing within in the state but who were not registered Alaskan voters in its population counts. In Adak, for example, a city at the Western end of the Aleutian Chain, only 165 of the 4,995 resident service-members were able to register to vote. The civilian population of the community was 450 at the time. Detractors argued that this resulted in unequal representation and ought to be unconstitutional under the Equal Protection Clause. In June 1972, the state supreme court heard objections to the plan on these grounds, and held that this inclusion was constitutional, therefore upholding the interim plans for use in the 1972 election. Egan appointee Boochever was the sole dissenter, on the grounds that the Alaska State Constitution forbade the inclusion of non-resident members of the military in the redistricting process.

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9 *Id.*
Republicans fared well in the 1972 elections. They won an 11-9 majority in the Senate and closed the gap in the House to one representative, with Democrats holding a 20-19 majority. Representative Frank Ferguson did not have any party affiliation.\(^{10}\)

On December 11, 1973, Governor Egan announced his second plan, created with the help of a new Redistricting Board. State legislators again sued, led this time by Republican State Senator Cliff Groh. The only change on the Court between 1972 and 1974 was Egan’s replacement of the deceased Justice Boney with James Fitzgerald.\(^{11}\)

There were thus three Democratic appointees and two Republican appointees on the bench. In *Groh v. Egan*, the supreme court again ruled that the plan had too large of discrepancies between the population of districts and required Egan to try again, although it upheld the plan against a number of other challenges, including the plan’s exclusion of non-resident members of the military. The two Republican-appointed Justices, Erwin and Connor, dissented from the decision, on the grounds that the exclusion of the non-resident military population was unconstitutional.\(^{12}\)

Egan submitted a third redistricting plan days later, in June 1974, attempting to correct for the problems identified by the court in the prior maps.\(^{13}\) The same court approved this third and final plan, with the exception of requiring the movement of the southern end of the Kenai Peninsula into a more socio-economically integrated district, and the plan was put into effect for the 1974 elections. Republican-appointee Erwin

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\(^{10}\) *Alaska State Legislature Roster of Members* (Oct. 1, 2010), [http://w3.legis.state.ak.us/docs/pdf/ROSTERALL.pdf](http://w3.legis.state.ak.us/docs/pdf/ROSTERALL.pdf).


dissented from the decision on the grounds that although the plan fulfilled the requirements of the federal constitution, it failed to meet those of the state constitution. Democratic-appointee Fitzgeral concurred in part and dissented in part, disagreeing only with the court’s moving of the Kenai Peninsula communities.\textsuperscript{14} In November, using the maps created by Democratic Governor Egan, Democrats did extremely well. They won a 13-7 majority in the Senate and a 30-9 majority in the House, with one independent.\textsuperscript{15} Statewide, the governor’s election was extremely close, with Republican Jay Hammond beating out Egan by less than three hundred votes. Democratic incumbent, Senator Mike Gravel and Republican incumbent Representative Don Young both won re-election.\textsuperscript{16}

The Voting Rights Act did not figure into any of these court decisions for this redistricting cycle, as Alaska was not a covered jurisdiction from its bailout in 1971 until its re-inclusion under Section 5 with the 1975 reauthorization of the VRA.

As is clear, the VRA did not play a significant role in redistricting through the 1970’s. With Alaska’s re-inclusion as a covered district under Section 5 of the Voting Rights Act in 1975, the VRA’s requirements began to take greater precedence in the state’s redistricting processes and litigation. The VRA was first brought up in redistricting litigation during the 1980 cycle and has continued to grow in prominence since then.

\textsuperscript{14} Groh v. Egan, 526 P.2d 863 (Alaska 1974).
\textsuperscript{15} Alaska State Legislature Roster of Members (Oct. 1, 2010), http://w3.legis.state.ak.us/docs/pdf/ROSTERALL.pdf.
Redistricting in the 1980’s

Republican Governor Jay Hammond was re-elected in 1978, and so was governor when the redistricting process began again following the 1980 census. He announced his redistricting plan on July 24, 1981, after making some slight modifications to the maps created by his Advisory Board. In determining the population data to use for the maps, the Board elected not to include members of the military and their dependants who were considered non-residents. This led to a subtraction of just over 30,000 from the census’s total population. The Voting Rights Act does not appear to have played a major role in the decision-making of the Board or the governor in creating these maps, as it is not discussed in either the Board’s report or the governor’s proclamation. The U.S. Constitution’s Equal Protection Clause and the Alaska Constitution’s language on socio-economically integrated communities, in contrast, are discussed at length as justifications for the maps.17

At the time, the legislature was fairly evenly split. The Senate had ten Democrats and ten Republicans. The House had twenty-two Democrats, sixteen Republicans and two Libertarians.18

The vice-chair of the Alaska Democratic Party, Marilyn Carpenter, challenged the plan, on a number of different grounds. Carpenter argued that the exclusion of non-resident military members and their dependants violated equal protection and that the inclusion of Cordova in District 2 with coastal communities in the Southeast violated the

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requirement for compact and relatively socio-economically integrated districts. Although a map of the proposed district was not available, I have included a map below showing Cordova in relation to the Southeast communities to illustrate their physical distance.¹⁹

The state superior court upheld Hammond’s maps for the most part and Carpenter appealed the case to state supreme court. The court, at the time, had two Democratic appointees, Justices Rabinowitz and Moore, and three Republican appointees, Justices Burke, Matthews, and Compton. Hammond himself had appointed all the three of the Republican appointees.²⁰

In the case of Carpenter v. Hammond, issued in 1983, the Alaska Supreme Court held that the governor’s maps were unconstitutional due to their inclusion of Cordova in

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District 2, a district largely made up of coastal communities in Southeast Alaska. 21 This inclusion violated the state constitution’s requirement that districts must compose a relatively integrated socio-economic area. The court wrote, “The record is simply devoid of evidence of significant social and economic interaction between Cordova and the remaining communities comprising House Election District 2.” 22 The court did accept the governor’s exclusion of non-resident members of the military and their dependants from the population counts, concluding that this exclusion was motivated by “a legitimate interest in limiting its apportionment base to bona fide residents.” Compton and Burke, both appointed by Hammond, dissented from the decision in part, with Compton writing that “the court fails to recognize the flexibility” of the Alaska constitutional requirements and should have allowed Cordova to remain in District 2. 23 The governor was ordered to create new maps in which Cordova was included in a new district.

In the 1982 governor’s election, Democrat William Sheffield won, succeeding Hammond to the governor’s seat and inheriting the task of redistricting. He issued a new redistricting plan in February of 1984, having attempted to correct for Cordova’s location by including it in District 6, composed of Southcentral communities around the Prince William Sound and parts of Kenai. The map below shows the new District 6 highlighted in purple against the Governor’s map from his proclamation. 24

22 Id. at 1215.
23 Id. at 1222.
Moving Cordova, however, necessarily resulted in moving other communities as well. Nikiski, a community north of the City of Kenai was included with parts of South Anchorage in District 7, just to the left of District 6 on the map above. The Board acknowledged that the “inclusion of Nikiski in District 7 was the Board’s most difficult decision, and was adopted only after extensive consideration and elimination of the available alternatives.”

The Kenai Peninsula Borough and several residents of Nikiski filed suit, challenging the constitutionality of District 7 and the two-member Senate District E. District E included District 7 and House Districts 16 and 6, composed of the Matanuska-Susitna Borough and Prince William Sound respectively, and was known as the

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“doughnut district” due to its strange shape, which circled around Anchorage to the south, east and north. The suit also challenged the realignment of districts in Southeast Alaska, arguing that District 2’s 14.8% deviation from the ideal population size for a district was too large and thus violated equal protection.26

The state supreme court heard the suit in the 1987 case of *Kenai Peninsula Borough v. State*. The court had the same composition as it had in 1983, with three Republican appointees and two Democratic appointees.27 The court unanimously upheld the constitutionality of the Southeast districts and House District 7, but decided that District E violated the equal protection clause of the Alaska constitution, which is more stringent than its federal counterpart. The court noted that under the state clause, “a showing of a consistent degradation of voting power in more than one election will not be required” and that any amount of disproportionateness, no matter how small, cannot be disregarded “when determining the legitimacy of the Board’s purpose.”28 The court decided that District E was clearly “intended to discriminate against the voters of Anchorage,” as the Board arbitrarily selected 2.6% underrepresentation as opposed to 2.4% overrepresentation for Anchorage voters’ representation in the Senate.29 The Board’s purpose was thus illegitimate and the District was unconstitutional.

*Kenai Peninsula Borough v. State* was the first case in Alaska redistricting history to significantly feature the Voting Rights Act. The State argued that the large 14.8% deviation in District 2 was “justified because the creation of District 2 advances the

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29 *Id.* at 1373.
policy of facilitating review under the Voting Rights Act by increasing the Native population in the district from 27.5% to 41.9%.”

30 Essentially, the State argued that in order to avoid retrogression in the representation of Alaska Natives, and thus receive VRA approval under Section 5, District 2 needed to have a higher percentage of Alaska Native voters and thus a higher total population. The court noted that the U.S. Supreme Court has held that a state is allowed to draw districts which enhance minority voting strength under the VRA, but had not ruled on whether that allowed for deviations of more than ten percent from the ideal. In this case, however, the state court concluded that it was unnecessary to answer that question, since the state had not shown that the higher percentage of Alaska Natives was necessary in order to comply with the VRA. The state did not prove that retrogression would have occurred with the smaller percentage and so the VRA was not at issue. The court nonetheless held that the governor’s redistricting of the Southeast, including District 2, was justified in that if “effectuated other rational and consistent state policies” and so was constitutional.

31 Despite ruling that District E was unconstitutional, the court held that a new map was not required. Instead, the court ruled that a declaration of the unconstitutionality of the district was an “adequate remedy” and allowed the maps to be used in the 1988 election cycle. Justice Compton dissented from the court’s ruling that the map could be used, even though it was unconstitutional. He wrote, “The court reaches the incredible conclusion that a mere ‘declaration’ of illegitimate purpose is an adequate remedy. Such

30 Id. at 1361.
a declaration is no remedy at all.” Justice Moore did not participate in the case. One scholar has argued convincingly that the fact that it was 1987 and only one general election remained before the next redistricting process probably played into the Court’s decision to allow the continued use of the map.

The 1988 elections resulted in a fairly evenly split legislature. Democrats held a 24-16 advantage in the House, and Republicans held a 12-8 advantage in the Senate. This was the same split as from after the 1986 elections. Statewide, Republicans fared better, with George Bush winning the presidential vote by more than twenty points and incumbent U.S. House Representative Don Young winning re-election by a margin of almost thirty points.

In the 1990 and 2000 redistricting cycles, the clash between the VRA and the state constitution became more pronounced, as those responsible for redistricting tried, sometimes in vain, to balance the requirements of each.

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CHAPTER SEVEN: ALASKA REDISTRICTING HISTORY, PART TWO

Beginning with the 1980 redistricting cycle, the Voting Rights Act’s influence on Alaska redistricting began to grow, intensifying over the following two decades. In this chapter, I will explore the redistricting cycles of the 1990’s and 2000’s.

Redistricting in the 1990’s

The redistricting process following the 1990 Census featured the first, and so far only, objection by the Federal Department of Justice to an Alaskan redistricting proposal. The process also resulted in the case *Hickel v. Southeast Conference*, which set a precedent for dealing with the VRA which figures prominently in Alaskan redistricting today.

The redistricting cycle in the 1990’s faced even more problems than normal. Over the previous decade, Alaska’s population had grown by about one third, the largest percentage growth by any state over that time period. And this growth was very unevenly distributed. The overall deviation from the ideal house district population was 82.5% in 1990, up from just 14.9% in 1984. In every geographic area of the state, district deviations exceeded 75%.¹

Following the 1990 Census, various interest groups and communities immediately began lobbying for their preferred districts and maps, having noted the enormous potential for change and upheaval in this redistricting process. The Yup’ik community of western and southwestern Alaska, who constituted the largest single indigenous group in

the state at around 26,000 people living in around 75 villages, was one such group. Arguing that they had been “gerrymandered into political oblivion” after the 1970 Census, the Yup’ik people claimed that the VRA entitled them to their own senate district.2

After the 1990 elections, the Senate was evenly split, and Democrats had a 23-17 majority in the House.3 Republican Walter Hickel was governor at the time, and he released his proposed maps on September 5, 1991. The director of the Advisory Board was Tuckerman Babcock, who has since written about the Board’s approach to the redistricting process. According to Babcock, “attorneys advised that every effort must be made to protect individuals covered by the Voting Rights Act from avoidable retrogression in their ability to elect candidates of their choice,” including avoiding partnering minority incumbents in the same district as one another and creating “influence districts” in which Alaska Natives made up at least 25% of the population. Babcock writes that, “despite honest misgivings about the prevalence or even existence of significantly racially polarized voting patterns in Alaska, the Board followed that advice with gusto to help ensure approval by Justice and to preserve as many rural districts as possible.”4

Hickel’s proposal gave the Yup’ik community its own senate district, but the map was attacked for diluting the voting power of other Native groups. Southeast Alaska lost a seat, Fairbanks gained a seat, and the Matanuska-Susitna Borough was split into five

pieces. The governor was accused of being “anti-Native,” and the plan was criticized for ignoring the differences between Alaska Native groups. The Board was also attacked for having allegedly worked in private, although they had held twelve public hearings. The plan had a statewide population deviation of less than ten percent and an average district population deviation of less than two percent, the lowest in the state’s history. The plan was also the first to create uniform single-member districts, in which each district elects a single representative. When the plan was submitted to the Federal Department of Justice for preclearance under Section 5, a group of Alaska Native interests called on the DOJ to reject the plan, pointing out what they saw as its biggest failings.5

The DOJ, under the Republican Bush administration, responded by sending a letter to the State asking for more information and listing several specific worries. First, the maps reduced the number of Alaska Native majority districts from four to three, constituting retrogression of the voting power of a minority group. Second, Interior Athabaskan Indians had been lumped in with the North Slope Inupiat Eskimos, weakening the voting power of both groups. Third, one district combined an urban area with a rural Native area, again weakening the Natives’ voting power. Fourth, the plan took great care to protect incumbents, except for Alaska Native incumbents whose districts were combined. And fifth, the Board had failed to properly publicize its

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meetings. The Department of Justice did approve the plans eventually, however, announcing this decision on April 10, 1992.

At this same time, seven lawsuits were filed against the plans, of which two were dismissed. The remaining five were consolidated and went before Superior Court Judge Larry Weeks for trial. Weeks ruled that the plan was unconstitutional because two of the districts were not “compact” and eight of the districts were not “as nearly as practicable a relatively socio-economically integrated area,” as required under the Alaska constitution. Hickel and the Board argued in response that in order to satisfy the requirements of the VRA, this lack of compliance with the state constitution was necessary. Hickel appealed to the state supreme court, which affirmed the majority of Weeks’ opinion on May 28, 1992. The court was the same one which had ruled on the 1980’s redistricting cases, and was made up of three Republican appointees and two Democratic ones. Justice Burke, a Republican-appointee, dissented in part, arguing that two of the districts in question, Districts 28 and 35, were constitutional.

In Hickel v. Southeast Conference, the Alaska Supreme Court acknowledged the difficulty of satisfying both state and federal requirements, and also recognized that compliance with Section 5’s requirements “is a legitimate goal of the Reapportionment Board.” Nonetheless, it still required that a plan “not derogate the Alaska Constitution in order to obtain preclearance” from the Department of Justice. The court set a standard

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6 Id. at 123.
which has become important in more recent redistricting cases as well, requiring that the
Board:

…the must first design a reapportionment plan based on the requirements of
the Alaska Constitution. That plan then must be tested against the Voting
Rights Act. A reapportionment plan may minimize [the Alaska
Constitution’s] requirements when minimization is the only means
available to satisfy Voting Rights Acts requirements.\textsuperscript{10}

This procedure has since become known as the \textit{Hickel} process.

The court then proceeded to elaborate on the specifics of each district which it
found unconstitutional. For instance, District 3 mixed “small, rural, Native communities
with the urban areas of Ketchikan and Sitka. These rural and urban communities have
different social concerns and political needs. Logical and natural boundaries cannot be
ignored without raising the specter of gerrymandering.” The court wrote:

The Board cited the Voting Rights Act as its justification in creating
District 3. District 3 was meant to be a Native influence district. The
proposed configuration of District 3 raised the Native percentage of the
district two percentage points compared to the old "Islands District."
However, such an awkward reapportionment of the Southeast Native
population was not necessary for compliance with the Voting Rights Act.
An "Island" District can be configured which satisfies the requirements of
the Voting Rights Act and which is more compact and better integrated
socially.\textsuperscript{11}

Given the map’s unconstitutionality, the court directed Hickel to draw a new plan.
The November elections were quickly approaching, however, and so the court appointed
masters to draw an interim plan. Justices Burke and Moore both dissented from this
decision, writing, “If an interim plan is needed, which is clearly the case, the governor
should be directed to prepare it,” as opposed to court-appointed masters, which they

\textsuperscript{11} \textit{Id.} at 52.
called “an abuse of our judicial power.” The masters’ interim plan left about 75% of Alaskans in the districts which Hickel’s plan had put them in, and it was affirmed with some slight modifications on June 25 and approved by the DOJ on July 8.

The masters’ interim plan was used in the 1992 election. Republicans won a slim 10-9 majority in the Senate and Democrats held on to their House majority, with twenty seats to the eighteen held by the Republicans. The statewide races were also close. In the presidential vote, Republican George Bush won 39.4% of the vote, Democratic Clinton won 30.2%, and Independent Ross Perot won 28.4%. In the U.S. Senate race, incumbent Republican Frank Murkowski received 53.0% of the vote, and in the U.S. House race, incumbent Republican Don Young won re-election by less than a four point margin, one of the smallest victory margins in his almost four decades in office.

Hickel submitted a second redistricting plan on May 27, 1993, based on the masters’ interim plan but with slight changes to Interior rural districts. When this plan was submitted to the DOJ, at this time under the Democratic Clinton administration, it was found to unconstitutionally violate Section 5 of the VRA. Specifically, the reduction of the Native voting age population from 55.5% to 50.6% in House District 36 was found to reduce the voting power of Alaska Natives to too great of an extent. Hickel was thus required to redraw the map again.

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On March 25, 1994, Hickel unveiled his latest redistricting plan, making minor changes to his earlier maps in order to satisfy the complaints from the Department DOJ. There were no suits against it this time. This was likely as a result of exhaustion brought on by the extensive court battles of the last few years, as one scholar argues, and not as much a result of general happiness with the plan.\footnote{Id. at 60.}

Republicans fared well under Hickel’s plan in the 1994 election. They won a 12-7 majority in the Senate, with one Independent Democrat, and a 22-17 majority in the House, with one Independent.\footnote{Alaska State Legislature Roster of Members (Oct. 1, 2010), http://w3.legis.state.ak.us/docs/pdf/ROSTERALL.pdf.} Statewide, Republican incumbent Don Young won re-election to the U.S. House, with 56.9% of the vote. In the race for the governorship, Democrat Tony Knowles beat Republican Jim Campbell and Lieutenant Governor Jack Coghill of the Alaska Independence Party, in the closest governor’s race in state history. Knowles won 87,693 votes to Campbell’s 87,157. Alaska was the only state in country that year in which the governor’s seat shifted from the Republicans to the Democrats.\footnote{Alaska Division of Elections, Official Returns: November 8, 1994 General Election (1994), http://www.elections.alaska.gov/results/94GENR/result94.htm.}

**Redistricting in the 2000’s**

The post-2000 Census redistricting was the first to use the new process established by the 1998 constitutional amendment. The new Alaska Redistricting Board was assembled in August 2000. Democratic Governor Tony Knowles appointed Vikki Otte and Julian Mason, both of Anchorage. The Republican Senate President, Drue Pearce, appointed Bert Sharp of Fairbanks. The Republican Speaker of the House, Brian
Porter, appointed Michael Lessmeier of Juneau. And the Chief Justice of the Alaska Supreme Court, Dana Fabe, appointed Leona Okakok of Barrow. Fabe had been appointed to the Court by Democratic Governor Tony Knowles. On many issues that came before the Board, including the final plan, Okakok sided with Otte and Mason against the Republican Pearce and Lessmeier, creating a majority coalition for the Democrats.19

The Board hired an executive director and four other staffers, and the U.S. Census data arrived on March 19, 2001. According to the new constitutional amendment, a draft plan was now due on April 18 and a final plan on June 18.20

In 1999, prior to the arrival of the Census data, the State considered changing its redistricting instructions to require that only official census data be used in drawing maps. The Clinton Department of Justice observed, however, that since census data is often criticized for undercounting minorities, this proposal would tend to reduce the voting power of minorities.21

In 2001, as the redistricting process began, Republicans held a majority in both the Senate (14-6) and the House (26-14).22

For the week between March 30 and April 6, 2001, the Board held hearings across the state to receive public testimony on redistricting. Individuals and groups were able to present their thoughts on the current boundaries, give advice and ideas on the upcoming

20 Id. at 64.
plans, and propose plans of their own. On April 10, the Board began deliberating over draft plans, a process which lasted one week. The Board adopted four draft plans on April 18, along with an alternative plan for Anchorage. The first two plans were prepared by the Board in conjunction with its staff, the third by Alaskans for Fair Redistricting (AFFR), and the fourth by Calista Corporation, an Alaska Native regional corporation. The AFFR was a coalition of Native corporations, individuals, unions, and environmental organizations. Although not formally affiliated with the group, the Alaska Democratic Party was connected to some extent and staff of Democratic Governor Knowles provided assistance as well. The Calista plan focused on southwest Alaska and created two rural districts of majority Alaska Native communities. From May 4 to 19, the Board held public hearings across the state on the draft plans and invited written public comments. Other groups continued to submit draft plans to the Board as well, including AFFR which submitted a revised plan. 23

On May 21, 2001, the Board met to choose a final plan. After about three weeks, on June 9, the Board adopted the revised AFFR plan with some slight changes as its final plan, in a 3-2 vote. 24 The Democrats, Okakok, Otte, and Mason, all voted in favor of the plan, whereas as the two Republicans, Pearce and Lessmeier, voted against it. Pearce and Lessmeier accused the majority of political gerrymandering. In a report accompanying the Proclamation Plan, they called the Proclamation Plan “a plan prepared by a tightly

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24 Id.
controlled special interest group which has refused to fully disclose the identity of its members or its funding.”

The Board submitted its plan to the Bush DOJ, noting that the “proposed redistricting plan will have no retrogressive effect with respect to minority voting strength.” The maps maintained four house districts and two senate districts with a majority of Alaska Native residents. Additionally, it maintained two house districts and one senate district with at least thirty-five percent Alaska Native populations. The report noted that since 1994 all districts that were at least thirty-five percent Alaska Native had elected an Alaska Native to office. The DOJ approved the maps, and in June 2001, the Board issued a report with its final plans. The report noted that, “In order to avoid retrogression prohibited by the [VRA], the board needed to maintain effective representation by Alaska Natives in a certain number of house and senate districts. This factor limited the number of options available to the board in the pairing of some house districts to form senate districts.”

Nine lawsuits were filed around the state against the map, all of which were consolidated in to a single case, In Re 2001 Redistricting Cases v. Redistricting Board. After a three week trial in January of 2002, State Superior Court Judge Mark Rindner found House Districts 12 and 16 unconstitutional under the Alaska State Constitution.

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The parties appealed to the state supreme court which at the time included three Democratic appointees, Justices Dana Fabe, Walter Carpeneti, and Alexander Bryner, and two Republican appointees, Justices Warren Matthews and Robert Eastaugh.28

In the court’s opinion, issued on March 21, 2002, they ruled that a number of districts were unconstitutional on various grounds, and ordered the Board to redraw the plans. 29 In addition to ruling some districts unconstitutional outright, the court also ordered the Board to take a “hard look” at whether there were any possible alternatives to some of the districts they had created. For instance, it held that District 5, in Southeast Alaska, was not compact and that the Board needed to prove that this was necessary under the VRA. District 16 was held unconstitutional due to its lack of compactness. The Anchorage house districts were held unconstitutional because the Board had not offered sufficient justification for the deviation in their populations, which could have been remedied fairly easily given the urban and densely populated nature of the area. The court also held that the Board had misinterpreted its earlier jurisprudence in creating House Districts 12 and 32, and that while the districts were not necessarily unconstitutional, the Board ought to take a “hard look” at any possible alternatives when creating a new redistricting plan.

Two justices dissented from the decision in part. Justice Bryner dissented from the court’s holding that District 5 was non-compact. Justice Carpenetti dissented from most of the opinion, writing that “the court today strikes down- directly or indirectly- over two-thirds of the election districts fashioned by the board [and] fails to truly

consider the statewide responsibilities of the board and the need for the board, at the end of the day, to prepare a plan that works across the entire state.”

Several aspects of the court’s ruling related specifically to the requirements of the Voting Rights Act. First, the court acknowledged that the Board was justified in dividing some boroughs between multiple districts in order to ensure the creation of an effective Alaska Native district in Senate District C. They also upheld the constitutionality of District C, even though it was “unquestionably the largest, least compact, and most diverse state legislative election district in the history of the United States.” District C is shown below.

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Second, the court held that District 5, which together with District 6 made up Senate District C, was unconstitutionally non-compact. District 5 is shown on the map below.\(^{33}\)

The Board argued that this was necessary under the VRA, but the court held that the Board had not made any findings supporting this claim and that the district was unconstitutional unless the Board made such a finding on remand. Third, the court ruled that District 40 was unconstitutional because its population deviation from the ideal was negative 6.9\%, resulting in a statewide maximum population deviation of 12\%.\(^{34}\) The court accepted that this high deviation was indirectly caused by the Board’s attempts to satisfy the requirements of the VRA, but noted that the VRA “does not require a state to


\(^{34}\) Thomas Lloyd Brunell, *Redistricting and Representation: Why Competitive Elections are Bad for America* (Psychology Press 2008).
avoid retrogression of minority voting strength if doing so would create a maximum population deviation exceeding ten percent.”

The court remanded the case to the superior court, while also commending the Board’s work and noting that “this court’s invalidation of some aspects of the board’s plan should not be read as a general criticism of the board’s work.”

Following the court’s decision, the Board reconvened and again accepted plans from individuals and groups until April 9. At an April 12 meeting, the Board considered nineteen plans, ten of which were prepared by the Board and its staff. The Board focused on a plan submitted by Board Member Mason which had been developed in negotiation with some of the plaintiffs to the earlier lawsuit and some state legislators. On April 13, the Board unanimously adapted the plan and proclaimed this to the public on April 25.

Judge Rindner upheld the amended plan two weeks later, in a ruling that was later upheld by the Alaska Supreme Court. They agreed that the Board had satisfactorily justified the non-compact shape of House District 5 under the VRA. The U.S. Department of Justice approved the plan on June 10, and it was put into effect and used for the November 2002 general elections. Republicans held on to their majorities in both the Senate (12-8) and the House (27-13) under the maps. Republicans also swept the three statewide races, for Governor, U.S. Senate, and U.S. House.

Although its supporters had argued that the 1998 constitutional amendment would diminish the influence of partisanship and gerrymandering in redistricting, the 2000 redistricting cycle was still marked by partisan debate. The first round of maps was

passed by a 3-2 vote, with the three Democrats voting for the plan and the two Republicans voting against it. One of the many tools available to those looking to gerrymander is controlling population deviations. For example, in order to elect more Democrats, one draws under-populated Democratic-leaning districts and over-populated Republican-leaning ones. This results in Democrats being able to win more seats per vote received than Republicans. In this particular cycle, thirteen of the forty house seats leaned to the left. Of these thirteen, ten were under-populated in that their populations were below the ideal district size. Of the twenty-five seats which leaned to the Republicans, sixteen had total populations above the ideal district size. Overall, the Democratic-leaning districts’ populations were an average of more than 2% less than the ideal size. The Republican leaning districts, on average, had populations about 1.5% higher than the ideal. The final maps, passed unanimously and upheld by the court, did not have these political biases.  

This concludes the history of Alaska redistricting leading up to the latest redistricting process. The following chapters will look in more detail at the post-2010 Census redistricting process and the court case contesting its constitutionality.

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CHAPTER EIGHT: THE 2010 REDISTRICTING PROCESS

We can now begin to examine the 2011 redistricting process and the maps that resulted from it. Chapter Eight will focus on the challenges faced by the Board and the process that they went through to create the first maps, particularly the Board’s focus on the VRA. The chapter will also explore the Department of Justice’s reaction to these maps and the reactions the maps were met with from Alaskans. Chapter Nine will follow up on this chapter and look at the maps themselves, and Chapter Ten will look at the court challenges to the maps and the ruling of the court.

Demographic Shifts in Alaska from 2000-2010

Between the 2000 Census and the 2010 Census, Alaska’s population grew by more than 13%, or almost 84,000 people, to hit 710,231. Given the forty state house districts, this set the ideal population for each house district at 17,755.1 In addition to this overall growth, the population also shifted, concentrating even more heavily in the urban areas and away from rural Alaska. More than one-third of the state’s growth over the last year was in the Mat-Su Borough, whose population increased from 59,322 to 88,995.2 The percentage of Alaskans identifying themselves as Alaska Native rose slightly over the decade as well, from 19% to 19.3%.3 This growth, too, was concentrated in the

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urban parts of the state, as Alaska Natives migrated towards Anchorage, Fairbanks, and other cities. The following map illustrates this shift to urban areas.\(^4\)

\[\text{Change in American Indian and Alaska Native population, from 2000 to 2010}\]

The Alaska Native rural population can be defined as the number of Alaska Natives who live outside of the five major boroughs: Anchorage, Fairbanks North Star, Juneau, Kenai Peninsula and Matanuska-Susitna. Between 2000 and 2010, the urban Alaska Native population grew by almost 18,000, whereas the rural Alaska Native population grew by only 1,364. The following chart details these population shifts.\(^5\)

<table>
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<tr>
<th>Alaska Native Population</th>
<th>2000</th>
<th>2010</th>
<th>Difference</th>
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<tbody>
<tr>
<td>Urban Population</td>
<td>50,426</td>
<td>68,133</td>
<td>17,707</td>
</tr>
<tr>
<td>Rural Population</td>
<td>68,815</td>
<td>70,179</td>
<td>1,364</td>
</tr>
<tr>
<td>Alaska Native Population</td>
<td>119,241</td>
<td>138,312</td>
<td>19,701</td>
</tr>
<tr>
<td>Percent Urban</td>
<td>42.30%</td>
<td>49.30%</td>
<td>7.00%</td>
</tr>
<tr>
<td>Percent Rural</td>
<td>57.70%</td>
<td>50.70%</td>
<td>-7.00%</td>
</tr>
</tbody>
</table>


The percentage of Alaska Natives living in rural areas as opposed to urban areas fell by seven percent. As of the 2010 Census, almost half of the state’s Alaska Native population resided in one of the five major boroughs.

The movement away from rural districts and towards urban ones resulted in large population deviations from the ideal district population of 17,755. The following chart, created by the Alaska Redistricting Board, lists the population deviations of each district, as well as the percent of each district that was Alaska Native.\(^6\)

<table>
<thead>
<tr>
<th></th>
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<td>1</td>
<td>15,031</td>
<td>17.62%</td>
<td>14,333</td>
<td>-3,422</td>
<td>-19.27%</td>
<td>19.53%</td>
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<tr>
<td>2</td>
<td>14,991</td>
<td>20.14%</td>
<td>14,651</td>
<td>-3,104</td>
<td>-17.48%</td>
<td>20.84%</td>
</tr>
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<td>3</td>
<td>15,203</td>
<td>17.99%</td>
<td>15,433</td>
<td>-2,322</td>
<td>-13.08%</td>
<td>19.15%</td>
</tr>
<tr>
<td>4</td>
<td>15,508</td>
<td>12.10%</td>
<td>15,842</td>
<td>-1,913</td>
<td>-10.77%</td>
<td>14.65%</td>
</tr>
<tr>
<td>5</td>
<td>15,048</td>
<td>37.90%</td>
<td>13,846</td>
<td>-3,909</td>
<td>-22.02%</td>
<td>36.63%</td>
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<td>6</td>
<td>14,905</td>
<td>54.53%</td>
<td>14,235</td>
<td>-3,520</td>
<td>-19.83%</td>
<td>53.23%</td>
</tr>
<tr>
<td>7</td>
<td>15,494</td>
<td>7.57%</td>
<td>20,982</td>
<td>3,227</td>
<td>18.18%</td>
<td>9.18%</td>
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<tr>
<td>8</td>
<td>15,552</td>
<td>9.89%</td>
<td>19,960</td>
<td>2,205</td>
<td>12.42%</td>
<td>10.91%</td>
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<td>9</td>
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<td>21,692</td>
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<td>16,303</td>
<td>6.62%</td>
<td>14,811</td>
<td>-2,944</td>
<td>-16.58%</td>
<td>9.03%</td>
</tr>
<tr>
<td>13</td>
<td>16,231</td>
<td>7.93%</td>
<td>23,507</td>
<td>5,752</td>
<td>32.40%</td>
<td>9.32%</td>
</tr>
<tr>
<td>14</td>
<td>16,119</td>
<td>7.54%</td>
<td>23,682</td>
<td>5,927</td>
<td>33.38%</td>
<td>9.03%</td>
</tr>
<tr>
<td>15</td>
<td>16,137</td>
<td>8.98%</td>
<td>25,974</td>
<td>8,219</td>
<td>46.29%</td>
<td>10.16%</td>
</tr>
<tr>
<td>16</td>
<td>16,104</td>
<td>7.18%</td>
<td>21,559</td>
<td>3,804</td>
<td>21.42%</td>
<td>8.40%</td>
</tr>
<tr>
<td>17</td>
<td>15,819</td>
<td>4.89%</td>
<td>16,349</td>
<td>-1,406</td>
<td>-7.92%</td>
<td>6.65%</td>
</tr>
<tr>
<td>18</td>
<td>15,639</td>
<td>3.52%</td>
<td>19,255</td>
<td>1,500</td>
<td>8.45%</td>
<td>4.37%</td>
</tr>
<tr>
<td>19</td>
<td>15,841</td>
<td>13.36%</td>
<td>17,804</td>
<td>49</td>
<td>0.28%</td>
<td>14.08%</td>
</tr>
<tr>
<td>20</td>
<td>15,837</td>
<td>16.51%</td>
<td>18,540</td>
<td>785</td>
<td>4.42%</td>
<td>15.74%</td>
</tr>
<tr>
<td>21</td>
<td>15,850</td>
<td>8.59%</td>
<td>16,303</td>
<td>-1,452</td>
<td>-8.18%</td>
<td>10.21%</td>
</tr>
<tr>
<td>22</td>
<td>15,831</td>
<td>15.49%</td>
<td>16,126</td>
<td>-1,629</td>
<td>-9.17%</td>
<td>16.76%</td>
</tr>
<tr>
<td>23</td>
<td>15,847</td>
<td>16.48%</td>
<td>16,958</td>
<td>-797</td>
<td>-4.49%</td>
<td>16.27%</td>
</tr>
<tr>
<td>24</td>
<td>15,812</td>
<td>10.30%</td>
<td>19,355</td>
<td>1,600</td>
<td>8.01%</td>
<td>13.41%</td>
</tr>
</tbody>
</table>

<p>| | | | | | |</p>
<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>12.79%</td>
<td>16,201</td>
<td>-1,554</td>
<td>-8.75%</td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>8.60%</td>
<td>15,814</td>
<td>-1,941</td>
<td>-10.93%</td>
</tr>
<tr>
<td>26</td>
<td></td>
<td>7.92%</td>
<td>18,047</td>
<td>292</td>
<td>1.64%</td>
</tr>
<tr>
<td>27</td>
<td></td>
<td>6.44%</td>
<td>18,473</td>
<td>718</td>
<td>4.04%</td>
</tr>
<tr>
<td>28</td>
<td></td>
<td>11.18%</td>
<td>17,639</td>
<td>-116</td>
<td>-0.65%</td>
</tr>
<tr>
<td>29</td>
<td></td>
<td>7.92%</td>
<td>18,664</td>
<td>909</td>
<td>5.12%</td>
</tr>
<tr>
<td>30</td>
<td></td>
<td>5.27%</td>
<td>17,744</td>
<td>-11</td>
<td>-0.06%</td>
</tr>
<tr>
<td>31</td>
<td></td>
<td>4.87%</td>
<td>19,952</td>
<td>2,197</td>
<td>12.37%</td>
</tr>
<tr>
<td>32</td>
<td></td>
<td>9.14%</td>
<td>18,493</td>
<td>738</td>
<td>4.16%</td>
</tr>
<tr>
<td>33</td>
<td></td>
<td>7.93%</td>
<td>18,909</td>
<td>1,154</td>
<td>6.50%</td>
</tr>
<tr>
<td>34</td>
<td></td>
<td>11.44%</td>
<td>17,419</td>
<td>-336</td>
<td>-1.89%</td>
</tr>
<tr>
<td>35</td>
<td></td>
<td>21.26%</td>
<td>14,570</td>
<td>-3,185</td>
<td>-17.94%</td>
</tr>
<tr>
<td>36</td>
<td></td>
<td>47.28%</td>
<td>15,199</td>
<td>-2,556</td>
<td>-14.40%</td>
</tr>
<tr>
<td>37</td>
<td></td>
<td>85.36%</td>
<td>16,055</td>
<td>-1,700</td>
<td>-9.57%</td>
</tr>
<tr>
<td>38</td>
<td></td>
<td>84.82%</td>
<td>15,642</td>
<td>-2,113</td>
<td>-11.90%</td>
</tr>
<tr>
<td>39</td>
<td></td>
<td>79.39%</td>
<td>17,516</td>
<td>-239</td>
<td>-1.35%</td>
</tr>
<tr>
<td>40</td>
<td></td>
<td>70.78%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

District 5, which included Cordova and some islands in the Southeast, was the most under-populated district, with almost 4,000 residents less than the ideal district size. In fact, every district in the Southeast, Kodiak, the Aleutians, rural Alaska and the Interior (except for Fairbanks) was under-populated. Conversely, the Palmer, Wasilla and rural Mat-Su areas were considerably over-populated. Prior to the redistricting process, it looked as though the Panhandle in the Southeast would likely lose a seat, whereas the Matanuska-Susitna Borough appeared likely to gain one.  

Under the 2000 maps, Alaska Natives were able to elect candidates of their choice in six house districts and in three senate districts. The Redistricting Board needed to preserve this level of influence in order to avoid retrogression, a potentially tough job given the migration of many Alaska Natives from rural areas to urban centers, where

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their voting power is diluted. The Department of Justice and the Redistricting Board used the current legislative maps, finalized in 2002, as the benchmark plans against which to measure any possible retrogression.

House Districts 6 (Interior villages), 38 (Bethel), 39 (Bering Strait), and 40 (North Slope) all had a majority of Alaska Native residents as of 2010. The latter three had consistently elected the preferred candidate of Alaska Natives, while District 6 was at that time represented by a white Republican, Alan Dick, who had defeated the Alaska Native preferred candidate, Democratic incumbent Woodie Salmon, in the 2010 election. District 37 in the Aleutian Islands, although only about 45% Alaska Native, had also consistently elected the Alaska Native preferred candidate over the prior decade. Finally, District 5 in the Southeast, though it only had an Alaska Native population of about 36%, had elected an Alaska Native to the legislature consistently over the decade, although not always the Alaska Native preferred candidate. Thus, there were a total of six House districts with significant Alaska Native populations.

The benchmark plan contained two senate districts in which Alaska Natives made up a majority of the population: Districts S, composed of House Districts 37 and 38, and District T, composed of House Districts 39 and 40. Each had consistently elected the Alaska Native preferred candidate over the decade. Senate District C, made up of House Districts 5 and 6, despite only having an Alaska Native population of about 46%, also

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consistently elected the Alaska Native preferred candidate. There were thus a total of three senate districts with a significant Alaska Native population in the benchmark plan.

Following the 2010 elections, there were seven Alaska Natives serving in the state legislature. In the House, Bill Thomas represented District 5, Bryce Edgmon represented District 37, Neal Foster represented District 39, and Reggie Joule represented District 40. In the Senate, Albert Kookesh represented District C, Lymann Hoffman represented District S, and Donald Olson represented District T. All but Thomas are Democrats.

There were three significant challenges facing the Redistricting Board in trying to avoid retrogression by meeting the level of representation in the benchmark plan. First, most of the minority districts were considerably under-populated and so needed to have their populations increased in order to meet the equal population requirements. Five of the six house districts were well below the necessary population, as were all three of the senate districts. The following charts show the population deviations for the house and senate Alaska Native influence districts respectively.

<table>
<thead>
<tr>
<th>House District</th>
<th>Total Population</th>
<th>Population Deviation</th>
<th>Percent Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>13,846</td>
<td>-3,910</td>
<td>-22.0%</td>
</tr>
<tr>
<td>6</td>
<td>14,235</td>
<td>-3,521</td>
<td>-19.8%</td>
</tr>
<tr>
<td>37</td>
<td>15,199</td>
<td>-2,557</td>
<td>-14.4%</td>
</tr>
<tr>
<td>38</td>
<td>16,055</td>
<td>-1,701</td>
<td>-9.6%</td>
</tr>
<tr>
<td>39</td>
<td>15,642</td>
<td>-2,114</td>
<td>-11.9%</td>
</tr>
<tr>
<td>40</td>
<td>17,516</td>
<td>-240</td>
<td>-1.4%</td>
</tr>
</tbody>
</table>

10 Id.
In order to preserve these districts, the Redistricting Board would need to add substantial numbers of residents, and specifically Alaska Native residents, to their jurisdictions. Second, there were little to no nearby minority populations which could be added to the minority districts to increase their total population to the necessary levels. And third, the Alaska Natives in the urban centers were not concentrated enough to merit their own districts in those areas. Despite the migration of Alaska Natives from rural to urban areas over the decade, the concentrations of Natives in the cities was still low. The following map shows the concentrations of Alaska Natives across the state as of the 2010 Census.14

<table>
<thead>
<tr>
<th>Senate District</th>
<th>Total Population</th>
<th>Population Deviation</th>
<th>Percent Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>28,081</td>
<td>-7,429</td>
<td>-20.9%</td>
</tr>
<tr>
<td>S</td>
<td>31,254</td>
<td>-4,256</td>
<td>-12.0%</td>
</tr>
<tr>
<td>T</td>
<td>33,158</td>
<td>-2,352</td>
<td>-6.6%</td>
</tr>
</tbody>
</table>

All of these factors ensured that avoiding retrogression in Alaska Native voting power would be a difficult task.

There were also political considerations related to the current partisan make-up of the Alaska State Legislature which further complicated the conversation about redistricting. Heading into the redistricting process, the Alaska State Senate had a delicate balance of ten Republicans and ten Democrats. Given this, a bipartisan two-party coalition controlled the majority. Many onlookers feared that a redistricting plan which leaned to either party would break this power-sharing agreement.\(^\text{15}\) The state House had

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twenty-four Republicans and sixteen Democrats and was led by a majority coalition of twenty-two Republicans and four Democrats.\(^\text{16}\)

Concerns were so high about the ever-increasing size of the rural districts that Alaskans considered a ballot measure in November 2010 which would have increased the state House to forty-four seats and the state Senate to twenty-two seats.\(^\text{17}\) Ballot Measure 1 would have amended the constitution to this end and had already been approved by a two-thirds majority of the state legislature as required by the constitution. Supporters of the measure, which included many Alaska Native groups, argued that it would make rural districts less unwieldy and prevent the loss of representation for rural Alaska. Opponents argued that the extra seats would likely end up going to urban parts of the state and decrease rural voting power by increasing the number of legislators. The proposal was rejected by the voters by almost a twenty point margin.\(^\text{18}\) Nonetheless, its consideration alone shows the trepidation that many Alaskans felt about the upcoming redistricting process, as well as the difficulties that the Redistricting Board was to face in protecting Alaska Native voting power.

The Board’s Redistricting Process

In June 2010, the new Alaska Redistricting Board was formed. Republican Governor Sean Parnell appointed his two choices: Albert Clough of Douglas and John


Torgerson of Soldotna. Republican Senate President Gary Stevens appointed Robert B. Brodie and Republican House Speaker Mike Chenault appointed Jim Holm of Fairbanks. Finally, Supreme Court Chief Justice Walter Carpeneti, himself appointed to the court in 1998 by Democratic Governor Tony Knowles, appointed Marie N. Greene of Kotzebue, a Democrat and an Alaska Native, to the Board. In October 2010, the Board selected as executive director Ron Miller, the former head of Alaska’s development bank, and in January 2011, the Board launched its website at www.akredistricting.org. In February 2011, Board member Albert Clough resigned. Parnell replaced Clough with PeggyAnn McConnachie of Juneau.

The Board was struck by tragedy in May, 2011, when executive director Ron Miller passed away suddenly as a result of a heart attack. The Board named assistant director Taylor Bickford as the new executive director a few days later.

Onlookers worried that the Board’s lopsided political composition would result in a highly partisan plan. Board members dismissed these fears in May 2011. Torgerson said the issue was not even worth discussion and that the Board was “a good board. Deep

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thinkers. Passionate. Know the state. Take their job very seriously.”26 Even the Board’s sole Democrat, Greene, said that at least as yet she had not felt excluded. She said, “From the beginning, we’re not looking at each other as Republicans or Democrats. We come together with the end in mind, and that’s to meet all that’s required of us.”27

This presents a marked difference from the partisanship which divided the Board in the prior redistricting process. Nonetheless, as new executive director Bickford noted, “This is definitely not a process where you can make everybody happy.”28 The Board did appear non-partisan in at least one aspect: on all of its major decisions regarding plans, the Board voted unanimously. However, when the plans were released, it was Democrats who had the most objections to them, as will be discussed in more detail later.

On March 15, 2011, the Board received the 2010 redistricting data from the U.S. Census Bureau. They then had thirty days to adopt a draft plan and sixty additional days to adopt a final plan.29 The Board quickly scheduled public hearings to be held across the state over the next few weeks to allow members of the public to present plans and comment on the redistricting process. A number of private groups submitted map proposals. Alaskans for Fair Redistricting (made up of union and Native groups), Alaskans for Fair and Equitable Redistricting (headed by Alaska Republican Party chairman Randy Ruedrich), and the Rights Coalition (led by the Alaska Democratic Party) all submitted statewide plans. The Alaska State Legislature’s Bush Caucus and the City and Borough of Juneau each submitted regional plans. And the City of Valdez and

27 Id.
28 Id.
the Bristol Bay Borough each submitted single-district plans. The Board analyzed each
plan and concluded that all of them were retrogressive and would not be able to receive
preclearance, and so the Board did not use any of them in creating its draft plans. The
outside groups would later argue that this was due to the Board’s failure to provide them
with sufficient information about the Benchmark Plan and the number of effective Alaska
Native groups that were required to avoid retrogression.  

On April 13, the Board announced its adoption of several draft plans. In a
statement announcing these draft plans, the Board noted that in creating these, they had
begun by focusing on rural Alaska. Along these lines, they had stated that they would
draw a plan with nine Alaska Native influence districts in order to comply with the
VRA’s prohibition of retrogression. The Board succeeded in maintaining these nine
districts and managed to keep the highest population deviation to just under eight
percent.

The draft plans paired several incumbents in the same districts. Of the sixteen
Democrats currently in the House, eight were paired with another incumbent under the
draft plan, and of the twenty-four Republicans in the House, six were paired with other
incumbents. There were three pairs of Democrats put into the same districts as each other,
two pairs of Republicans, and two pairs composed of one Democrat and one Republican.
Some argued that this discrepancy demonstrated partisan gerrymandering on the part of
the Republican-dominated Board. Following announcement of its draft plans, the Board

30 Alaska Redistricting Board, Report to Accompany Redistricting Proclamation of June 13, 2011 (Jun. 13,
31 Steven Aufrecht, For Republicans, redistricting is all good, Anchorage Daily News (May 5, 2011),
http://www.adn.com/2011/05/05/1847947/for-republicans-redistricting.html#storylink=misearch.
32 Id.
initiated additional public hearings to receive comments on both its draft plans and the plans submitted by private groups.

On June 7, the Alaska Redistricting Board announced its adoption of a draft final plan, one week prior to the June 14 deadline for the adoption of a final plan. On June 13, the Board officially released its final maps, passed unanimously by a 5-0 vote. The maps were not without their problems, however, nor without their detractors. In the next chapter, I will discuss the composition of the Board’s maps, before moving on to the challenges brought against them.

When the Board released its final maps in June 2011, it issued a Redistricting Proclamation, explaining its process and accounting for the strange shape of some districts. The Board argued that the shapes of several house districts, and their seeming violation of the requirements of the state constitution, were necessary in order to comply with the requirements of the VRA and avoid retrogression. The Board also stated that it had not attempted to protect incumbents, except for Alaska Natives when necessary to avoid retrogression. Finally, the proclamation required all but one state senator to run for re-election in 2012, even those who were not scheduled to run for re-election until 2014. This was as a result of significant changes to their districts. State Senate elections are staggered, with half the Senate running every two years. The sole senator not required to run in 2012 was Dennis Egan, a Democrat from Juneau, whose district contained about 87% of its original population. Four house districts and two senate districts did not have an incumbent as drawn. In this chapter, I will explain several of the districts in greater detail and outline the reasoning provided by the Board for its work. Below is a statewide map of the redistricting plan created by the Board.

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The Voting Rights Act

The Board maintained the nine Alaska Native influence districts of the benchmark plan, according to VRA expert Lisa Handley. House Districts 36, 37, 38, 39, and 40 all had at least 50% Alaska Native populations, and District 34 had an Alaska Native population of just under 37%. The Board also created three effective Alaska Native senate districts. Districts T and S both had majority Alaska Native populations, and District R had just barely less than 50% of its residents as Alaska Native. The following charts show the populations of Alaska Natives in the nine districts.

<table>
<thead>
<tr>
<th>House District</th>
<th>Total Population</th>
<th>Percent Deviation from Ideal</th>
<th>Percent Alaska Native Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
<td>17,875</td>
<td>0.68%</td>
<td>32.85%</td>
</tr>
<tr>
<td>36</td>
<td>17,095</td>
<td>-3.72%</td>
<td>71.45%</td>
</tr>
<tr>
<td>37</td>
<td>16,899</td>
<td>-4.82%</td>
<td>46.63%</td>
</tr>
<tr>
<td>38</td>
<td>17,027</td>
<td>-4.10%</td>
<td>46.36%</td>
</tr>
<tr>
<td>39</td>
<td>16,892</td>
<td>-4.86%</td>
<td>67.09%</td>
</tr>
<tr>
<td>40</td>
<td>16,953</td>
<td>-4.52%</td>
<td>62.22%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Senate District</th>
<th>Total Population</th>
<th>Percent Deviation from Ideal</th>
<th>Percent Alaska Native Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>R</td>
<td>34,581</td>
<td>-2.62%</td>
<td>48.63%</td>
</tr>
<tr>
<td>S</td>
<td>33,926</td>
<td>-4.46%</td>
<td>54.78%</td>
</tr>
<tr>
<td>T</td>
<td>33,845</td>
<td>-4.69%</td>
<td>71.82%</td>
</tr>
</tbody>
</table>


6 *Id.*
Handley compared District R to District C from the benchmark plan, noting that although Alaska Natives did not have an outright majority in either, they would still likely be able to elect a candidate of their choosing. Handley therefore concluded that the proposed plan was not retrogressive.

The Anchorage Area

The proposed map for the Anchorage area was fairly uncontroversial. The following map shows the Anchorage area plan.\(^7\)

![Anchorage Area Map](http://www.akredistricting.org/GIS%20STORAGE/June21/Anchorage.pdf)

The Alaska Native population of Anchorage was not concentrated enough, or geographically segregated enough, to allow the Board to create any Alaska Native

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majority districts in the city. None of the city’s house or senate districts had more than 22% Alaska Native residents.  

The Anchorage area drew criticism from Democrats for what they claimed was targeting of Democratic incumbents. Democratic Senator Bettye Davis, the state’s sole black legislator, had her East Anchorage district, District M, shifted north, to take in parts of Eagle River, a far more conservative community. Republican House Representative Anna Fairclough has filed to run against Davis in 2012. Anchorage Democratic Senator Bill Wielechowski also was given a more conservative district. The new Senate District G includes parts of Wielechowski’s old East Anchorage district and adds Elmendorf Air Force Base, a generally conservative area. Republican Bob Roses will be running against him in 2012. Republican party leaders have listed both District G and M as possible wins for Republican candidates in November.  

In the House, two Democratic representatives, Chris Tuck and Mike Doogan, were paired in the new District 22, in central Anchorage. Democrat Pete Petersen and Republican Lance Pruitt were also matched up in a new East Anchorage seat, District 25.

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11 Id.
The Matanuska-Susitna Area

Like Anchorage, the Mat-Su area did not have a high enough concentration of Alaska Natives to merit an Alaska Native majority district. The following map shows the proposed plan for the Mat-Su area.\textsuperscript{14}

The proposal for the area was critiqued by some who argued that the Mat-Su Borough had gained enough population to have five house districts but only received four. After the 2002 redistricting cycle, there were four districts completely within the boundaries of the Borough. The 2011 plan kept this number, along with two seats partially within the Borough. The Board’s executive director responded that one of these districts, District 11, had a majority of its population in the Mat-Su Borough, and that “there’s no question

that’s a Mat-Su district.”

House District 6 was also controversial. The district, which stretches from the Mat-Su north to just south of Fairbanks, is shown in the map below.

The Mat-Su Borough Assembly arguing that the district’s composition resulted in a weakening of the voting power of Mat-Su residents and was not socio-economically integrated. District 6 was then combined with the Fairbanks-area District 5 to create Senate District C. The entire Mat-Su area is fairly conservative, with each district having a Republican representative or senator.


The Fairbanks Area

The Fairbanks area was particularly controversial. The following map shows the Board’s proposal.  

House Districts 1 and 2 were both accused of violating the Alaska State Constitution’s requirement of compactness.

Fairbanks residents were also angry that the city had not been given a sole senate district, given that its population accounted for eighty-nine percent of an ideal Senate seat. Instead, the map split central Fairbanks into two separate senate seats. The map also paired up incumbent Democratic Senators Joe Paskvan and Joe Thomas in Senate District

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B, prompting accusations of gerrymandering from some Democrats. In the past, the west and east house districts in Fairbanks, the equivalents of Districts 1 and 4, had been combined to form a senate seat, which had been filled by Senator Paskvan, a resident of west Fairbanks. The new map’s combination of west Fairbanks with Farmers Loop, Fox and Two Rivers, home to Senator Thomas, required the two to run against one another. The two house districts share a border of only a few hundred feet, as opposed to most other combined districts which generally have a longer border with one another.

**The Southeast Area**

The Southeast area of the state was difficult to redistrict given that its population required the Board to take away one of the area’s five house districts from the 2002 redistricting cycle. The map below shows the distribution of districts in the Southeast.19

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The City of Petersburg was angry about its inclusion in District 32 with downtown Juneau and Skagway, despite its requests during the public hearing process to be put in a district with Sitka and other small, coastal Southeast communities, which were eventually grouped together in District 34. Petersburg is located in the southern end of District 32. District 34 had 36.96% Alaska Native residents, the sixth highest in the state, and the Board argued that it had to draw District 34 in the way it did to ensure this representation of Alaska Natives. District 34 is based on the previous District 5, and is represented by an Alaska Native, Republican William Thomas.

Incumbent Republican Representatives Peggy Wilson and Kyle Johansen were matched up with one another in District 33, as were Senators Al Kookesh, a Democrat,
and Bert Stedman, a Republican, in Senate District Q. Kookesh is an Alaska Native, and both he and Stedman have filed to run for the seat in 2012.

**Rural Areas**

The state’s rural districts were the sources of the most controversy, as they were the ones which were drawn to create Alaska Native majority districts under the VRA. House Districts 36, 37, 38, 39, and 40 and Senate Districts R, S, and T are at least close to having a majority of Alaska Native residents. Of these, House Districts 36, 37, and 38 and Senate District S have received the most criticism. Senate District T is the largest in the history of the United States, with an area about equal to that of the entire state of Texas.

The Aleutian Islands were split into two separate House districts, 36 and 37, shown on the maps below.

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The Alaska Supreme Court has previously ruled, in *Hickel v. Southeast Conference*, that splitting the Aleutians in two was unconstitutional. The Aleutians East Borough protested the maps, arguing that the division violated the Alaska State Constitution. The Board responded that the division was necessary to avoid retrogression. District 37, in particular, paired communities from the Eastern end of the Aleutian Chain with the City of Bethel, over 800 miles away. In District 36, Incumbents Republican Alan Dick and Democrat Bryce Edgmon were matched up.

The other highly controversial district was House District 38. The district reaches from West Fairbanks, through the Denali Borough and Athabascan villages along the upper Kuskokwim River and out to Yup’ik communities along the Bering Sea coast. The district reaches over 600 miles from east to west. District S had an Alaska Native population of just over fifty percent. The map below shows District 38.24

District 38 was combined with District 37, which is centered on Bethel but also includes the eastern part of the Aleutian Islands, to create Senate District S. Residents of West Fairbanks argued that District 38 failed to satisfy the Alaska Constitution’s requirement of relative socio-economic integration. As VRA expert Theodore Arrington later said, “With District 38, you can see there’s nothing on the old plan that resembles it…Starting up here in Fairbanks and going all the way to the coast, there’s nothing like that. It’s very different geographically, so there isn’t any old district that we could look at and say this new District 38 is going to behave like the old plan.”

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After the Release of the Proclamation Plans

Upon the release of the Board’s final maps, Democrats across Alaska immediately began to attack the plans. They argued that the maps disproportionately hurt Democratic incumbents and failed to follow the requirement of the state constitution that district lines match borough and city lines when possible. Alaska Democratic Party Chairwoman Patti Higgins stated, “It just kind of strikes at the heart of, will Alaskans be represented well under this structure, and I don’t think so.” As discussed above, at least two Democratic Senators had their seats considerably weakened and two others had their combined. In the House, one pair of Democrats was paired, one pair of Republicans was paired and two pairs of one Democrat and one Republican were paired. The Alaska Democratic Party also critiqued the Board’s adding of population from the Fairbanks area to a large new district which stretches to the west to the Bering Sea.

In an editorial published on January 15, 2012, the Fairbanks Daily News-Miner argued that it is time that Alaska is exempted from submitting its redistricting proposals to the federal government for preclearance. The piece was titled “Right the wrong: Federal law is an obstacle to rational election districts,” and calls the redistricting directives in the Alaska Constitution “not just common sense… [but] fundamental to the functioning of a representative government.” In contrast, it refers to the requirements imposed by the VRA as “clumsy,” and says they have “little justification” and “dubious

28 Id.
benefits,” at least as applied to Alaska. As a result, according to the editorial, “as Alaska’s population grows and becomes more integrated and urban, the contortions grow worse with each decade.”

The editorial argues, “Alaskans, in modern time, have never endorsed the sort of overt racism once found in laws of the southern states.” It references the Territorial Legislature’s passage of a civil rights law in 1945, two decades prior to the VRA and the Civil Rights Act of 1964. Alaska is ineligible for a bailout as, among other reasons, in many rural Alaskan villages, more than five percent of the residents speak a Native language, but the state does not provide ballots written in those languages. The editorial notes, however, that “very few speakers also use the written language [and] that the state employs translators at most villages during elections.” The editorial concludes with the following: “It’s time to remove…federal oversight from Alaska. This state has no history to justify it, and it’s undermining our efforts to create election districts that honor our Constitution’s rightful call for compact districts with similar social and economic characteristics.”

While the Daily-Miner editorial makes some strong points in its arguments against the VRA, it also glosses over many of the advantages of the VRA in Alaska. The state’s history of discrimination against minorities is not as spotless as the editorial argues, and the VRA has exerted a positive influence against this trend at times. It also remains to be seen whether observance of both the VRA and state constitutional requirement for redistricting is impossible, as put forth in the piece. Nonetheless, the article is reflective of the unique conflict that Alaskan redistricting incurs between the state constitution and federal guidelines, particularly during this most recent cycle.
Challengers were given thirty days to file suit against the plans, and several Alaskans took advantage of this opportunity. The Board’s attorney, Michael White, responded to the critics, “There are hard choices that have to be made, and so of those choices, people will look at this map and go ‘we don’t like those choices, therefore we are going to sue you’…I think this plan has as good a chance as any to pass constitutional muster.” White had served as the head attorney for the court challenges to the 2000 redistricting plans.  

Despite the threat of legal challenges and possible future changes to the redistricting maps, legislators began to survey their new districts and prepare for re-election races. Anchorage Democrat Hollis French’s district became slightly more conservative. In June 2011, he said, “I’m going to start introducing myself to the people in my new district as soon as I can...There are going to be some tweaks to this at some point down the line but it would be foolish of me to wait for that to happen...It’s a big district and there are a lot of new people.”

Although the filing deadline to run in 2012 primary elections was not until June 1, 2012, several candidates began to file. One legislator even filed to run in two different districts. Representative Bill Thomas of Haines filed to run in his current seat and for a new house seat which includes Sitka. Thomas’s original seat stretched from Metlakatla to Cordova and included about thirty Southeastern communities. The new district, as drawn,

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adds Sitka to the current area. In House District 33, incumbent Republicans Kyle Johansen and Peggy Wilson have both filed to run against one another in the primary. Other legislators announced that they would not be running for re-election in 2012. Mike Doogan, a Democratic Representative who was placed into the same district as Democrat Chris Tuck, announced that he would not run for re-election.

After the release of the maps, both parties began speculating about their possible effects on the 2012 legislative races and the likelihood that the even split in the Senate would come to an end. Alaska Republican Party Chairman Randy Ruedrich speculated in November 2011 that the GOP had a “very good” chance at gaining an outright majority in the Senate. He said “I believe there is a chance of us picking up, under very, very ideal circumstances, six” additional Senate seats. Democrats called this prediction nonsense, but expressed some worries about losing one or more of their current ten seats. Before the maps could be finalized for the elections, however, they still had to receive preclearance from the federal government under Section 5 of the VRA, and survive any court challenges.

On August 11, the Redistricting Board submitted its plans to the Federal Department of Justice for preclearance as required under Section 5. Alaskans were

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allowed to view the submission and send the DOJ their comments on the plans.\textsuperscript{37} The Board submitted Handley’s analysis with its proposal, which showed no retrogression. Two months after the submission, on October 11, the DOJ approved the plan.

The maps still needed to survive court challenges, however, before they could be put into place.\textsuperscript{38} Chapters Ten and Eleven will explore the court challenges to the maps, the court’s decisions and the Board’s reaction to those decisions. All of this will serve to emphasize the difficulties of adhering to both the requirements of the state constitution and the Voting Rights Act.

CHAPTER TEN: COURT CHALLENGES TO THE BOARD’S PLAN

This chapter will explore the court cases filed against the plans and the court’s ruling on the plans. The conflicts between the requirements of the Alaska State Constitution and the requirements of the VRA will continue to manifest themselves in this analysis. The following chapter will look at the reaction of the Board to court’s ruling.

Court Challenges Begin to Emerge

After the Board’s redistricting plans were announced, Alaskan residents and communities from across the state began to consider filing suit. Several Boroughs voiced their opposition to the Proclamation Plan, but did not challenge it in the end. The Aleutians East Borough Assembly passed a resolution opposing the plan for splitting the Aleutian Chain into two separate house districts which were then put into separate senate districts, but the Borough did not decide to sue.\(^1\) The Matanuska-Susitna Borough also considered a suit, and the Borough Assembly even voted to file a lawsuit. The Borough mayor vetoed that decision, claiming that the Borough had done well overall in the plan and that a lawsuit would be costly and could result in a less favorable plan. The Assembly failed to override the veto, missing it by one vote.\(^2\)

Despite initially considering a lawsuit, the Alaska Democratic Party also decided against one. Party Chairwoman Patti Higgins said, “It was matter of picking your battles.


\(^2\) Id.
In the end, the group made a strategic choice to focus on supporting candidates and winning elections.” Higgins added that the party would support others filing suit, with a focus on Fairbanks, which she referred to as “the most egregious parts of this map.”

Alaskans for Fair Redistricting (AFFR), the coalition of labor and Native groups which submitted the plan the Board’s 2000 cycle map was based on, also considering filing a lawsuit but eventually decided against it. Vikki Otte, chair of the 2000 Board, was now a part of AFFR. She said, “We think we can live with it…We think our resources would be best utilized by investing in races in the districts. And that, if we were to file a suit, we could end up with something worse than we’ve got.”

Three parties did decide to sue. On July 12, Fairbanks-area residents George Riley and Ron Dearborn sued the Alaska Redistricting Board on the grounds that the maps were unconstitutional. They argued that the Board had failed to follow the Alaska constitution’s requirement that house districts be composed of a compact and relatively socio-economically integrated area, particularly in its treatment of Fairbanks. Both Riley and Dearborn are residents of the proposed District 38, the sprawling district reaching from the outskirts of Fairbanks to the Bering Sea.

Also on the 12th, the City of Petersburg, in Southeast Alaska, sued the Board over its treatment of the Petersburg area. Petersburg was included in House district 32 with downtown Juneau and Skagway, despite its requests during the public hearing process to

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4 Id.
6 Id.
be put in a district with Sitka and other small, coastal Southeast communities, which were eventually grouped together in District 34.

The Fairbanks-North Star Borough Assembly voted to sue over the composition of House District 38, which the Board claimed was necessitated in order to avoid retrogression. Assemblyman Tim Beck noted, “We’ve got about 8,000 residents on the west side of Fairbanks that are linked in the plan with Hooper Bay, which is right on the Bering Sea. That’s a 500-mile distance.”7 West Fairbanks would likely be represented in the state Senate by Bethel Democrat Lyman Hoffman. Beck argues that, “It would be easier for somebody who lived in Ester, say, or Goldstream Valley [two small communities just outside of the city of Fairbanks] to fly to Juneau for a face-to-face with their senator than to go to Bethel.” The Borough filed its suit on July 13. 8

On July 26, the three cases, brought by Riley and Dearborn, Fairbanks and Petersburg, were consolidated into one, called Riley v. Alaska Redistricting Board.9 The Ketchikan Gateway Borough also filed to join the lawsuits, on the side of the Alaska Redistricting Board.10 The Board argued in response to these charges of having violated the Alaska state constitution that the Voting Rights Act required the boundaries that were drawn and that as federal law it trumped any state restrictions.11

In October 2011, the Fairbanks North Star Borough dropped its lawsuit against the Redistricting Board amid financial concerns. The Borough’s attorney argued that it

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8 Id.
should not “be seen as a reflection on the strength of the case.” Petersburg also dropped all of its charges against the Board except for those alleging that the city’s new house district was not compact. The city decided that it could not commit sufficient funds to the suit to justify continuing all of its complaints.\(^\text{12}\)

**Before the Alaska Superior Court**

The case came to trial before Alaska Superior Court Judge Michael McConahy in January 2012. Prior to the trial, in December 2011, four of the House districts were held to violate the Alaska Constitution in a series of summary judgments by McConahy and agreements between the parties. These were Districts 1, 2, 37, and 38.\(^\text{13}\) Districts 1 and 2, both in Fairbanks, were not compact, as required under the state constitution. District 37 failed to meet the Alaska constitution’s requirement that districts be formed of contiguous territory, and District 38 was found to violate the Alaska Constitution’s requirement that districts be contiguous and have similar social and economic characteristics. The plaintiffs also argued that it was unconstitutional to split Fairbanks into two separate Senate districts.\(^\text{14}\)

McConahy ruled that House District 2, which includes Eielson Air Force Base, Fort Wainwright and North Pole, could not be justified by the Voting Rights Act. In the case of the other districts, McConahy agreed that it was possible that the VRA justified

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\(^{14}\) *Id.*
the districts, even if they violated the Alaska State Constitution, and said it was the state’s responsibility to prove that this was the case and there were no other options.\(^{15}\)

Also prior to the trial, Judge McConahy held that the plaintiffs Riley and Dearborn could save much of their case for the rebuttal. In effect, this put much of the burden of proof on the Board. The plaintiffs’ attorney, Michael Walleri noted at the time, “We have prevailed on every challenge of specific districts…The burden has now shifted; they have to come forward and show that they have to do it…that’s a lot different than where we thought we would be.”\(^{16}\)

It was clear from the outset that the case would eventually head to the Alaska Supreme Court. Prior to the trial, McConahy said, “This is an interlude…No matter how intense this is, it’s just an interlude between the redistricting board and the Supreme Court.”\(^{17}\)

In December 2011, the plaintiffs filed a motion for summary judgment based on invalid process from the court on the grounds that by focusing on satisfying the VRA prior to the state constitution, the Board had violated the redistricting process outlined by the Alaska Supreme Court in *Hickel v. Southeast*. On December 23, the court agreed with the Board, holding that *Hickel* had not “created a mandate or a claim for invalid process” and that “the Plaintiffs request to remand the entire plan back to the Board to start over is impractical and unnecessary.” The plaintiffs also filed additional motions for summary judgment on other grounds, all of which the court rejected.\(^{18}\)

\(^{15}\) *Id.*

\(^{16}\) *Id.*

\(^{17}\) *Id.*

At trial, the issue of political gerrymandering was floated as well. On the first day of the trial, two Democratic Alaska State Senators, Joe Paskvan and Joe Thomas, testified for the plaintiffs that they believed that the Redistricting Board had purposefully gerrymandered the map to put them into the same district, thereby making room for a new Republican senator.\(^{19}\) Alaska’s redistricting rules require two neighboring house districts to be combined to make a senate district. In this case, however, the plaintiff’s attorney, Mike Wallieri, argued that the pairings were inappropriate: “What we’re going to be talking about is the irrational Senate pairings...You’ve got cities mish-mashed together, you’ve got boroughs mish-mashed together.” On the stand, Paskvan said, “When I looked at it and for the very first time became aware of the proposed pairing not with the east side and the west side, but the west side and this massive area north of Fairbanks, the word that came to mind is gerrymandering.” The attorney for the redistricting board, Michael White, countered that neither state senator had any sort of constitutional right to have his seat maintained. He also noted that both of the proposed senate seats would maintain representation for the Borough.

The trial concluded on January 17 and Judge McConahy issued his ruling on February 3. McConahy held that districts 1, 2, 37, and 38 were all unconstitutional and not justified by the VRA. In his ruling, he also questioned the constitutionality of District 32, which contained Petersburg and Juneau, and asked the state supreme court to take a close look at it. McConahy rejected the plaintiff’s argument that Fairbanks deserved its own senate district.

Both parties appealed to the Alaska Supreme Court. The Board argued that McConahy erred in holding Districts 37 and 38 unconstitutional, but accepted his ruling on Districts 1 and 2, which required only a small change. The plaintiffs argued, among other things, that McConahy ought to have found the entire plan unconstitutional, not just a few districts.  

Before the Alaska Supreme Court

The Alaska Supreme Court held just under two hours of oral arguments for the case on March 13, 2012. The Court only had four members instead of the normal five at the time of this case. Justice Morgan Christen had just been appointed to the Ninth Circuit Court of Appeals and the governor had not yet selected her replacement. Therefore, Senior Justice Warren Matthews, a retired Hammond appointee, joined the Court for the redistricting cases. Chief Justice Walter Carpeneti and Justice Dana Fabe were both appointed by Knowles, a Democrat, while Justices Daniel Winfree and Craig Stowers were appointed by Governors Sarah Palin and Sean Parnell respectively, both Republicans.

The arguments centered on whether it was possible to meet the requirements of both the state constitution and the Voting Rights Act. Michael White, the Board’s attorney, reiterated his claim that the lack of compliance with the state constitution in some districts was necessitated by the VRA. He argued that if the Board had done things

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differently, “You’d still be here. You’d just have a different set of plaintiffs.”\textsuperscript{23} The plaintiff’s attorney, Michael Walleri, argued that the Board ought to have begun by satisfying the Alaska constitution and then moved on to the VRA, instead of using the reverse order as it did. This was the process set forth by the court twenty years prior in \textit{Hickel v. Southeast Conference}, but dismissed by Judge McConahy at the superior court level. White responded that the process was contained in a single footnote to the decision, and should not be taken to represent a “mandate.”\textsuperscript{24}

Another issue hotly debated during the arguments was whether the Department of Justice would have rejected a map which met the state’s constitutional requirements, but matched Alaska Native Senator Lyman Hoffman of Bethel with Senate President Gary Stevens, who is white. Walleri contended that if the senate district the two were put in was truly an Alaska Native effective district, then Stevens would have been in danger as opposed to Hoffman, and so the map would have avoided retrogression. White responded that the DOJ would not have been likely to approve any district which paired an Alaska Native incumbent with another incumbent. The justices seemed skeptical in their questioning, however, that such analysis had been satisfactorily performed.\textsuperscript{25}

\textbf{The Supreme Court’s Decision}

On March 14, just one day after hearing oral arguments, the Alaska Supreme Court handed down its decision, remanding the case to the superior court with the order

\textsuperscript{24} \textit{Alaska Supreme Court Oral Arguments} (Mar. 13, 2012), http://gavelalaska.org/media/?media_id=AKSC120313A.
\textsuperscript{25} \textit{Id.}
to require the Board to draw new plans. The court held that the Board’s plans were unconstitutional for giving priority to the VRA, as opposed to the Alaska State Constitution, in violation of the process outlined by the court in *Hickel*.  

The court compared the Board’s plans to Hickel’s plans in 1992, noting that both “accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution.” It quoted the *Hickel* decision, which said that “[t]he Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.” The court then quoted from *Hickel* again, outlining the process which the court set forth for redistricting:

> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.

Given that it was undisputed that the Board had focused first on complying with the VRA and therefore ignored the *Hickel* process, the court held that “the Board cannot meaningfully demonstrate that the Proclamation Plan’s Alaska constitutional deficiencies were necessitated by Voting Rights Act compliance, nor can we reliably decide the question.”

The court also noted that decisions issued by the U.S. Supreme Court since the *Hickel* decision had further substantiated that case’s holding. The Supreme Court has

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27 Id. at 2.
29 Id. at 52.
ruled that a jurisdiction may not unnecessarily depart from traditional redistricting principles\textsuperscript{31} in order to create districts in which race is “the predominant, overriding factor.”\textsuperscript{32} The Alaska Supreme Court argued that following the \textit{Hickel} process would ensure the prioritization of these traditional redistricting principles.

The court declined to consider several of the districts at issue in the case, given that “the new plan eventually formulated by the Board may moot the claims raised in this case.”\textsuperscript{33} It addressed only two issues: one raised by Riley and one raised by the Board.

The court agreed with Riley’s claim that the superior court had erred in ruling that the City of Fairbanks did not merit its own senate district because it did not have a population equal to or greater than the ideal senate district size. Fairbanks had a population which was equal to 89\% of the ideal state senate district. The court held that eighty-nine percent was enough to consider Riley’s voter dilution claim. It noted that in \textit{Kenai Peninsula Borough v. State}, the court had held that a group of Anchorage voters who made up fifty-one percent of an ideal senate district could bring up such a voter dilution claim. The court wrote that “[d]epending on how the districts are redrawn on remand, this issue may or may not reoccur. But if it does, and a similar challenge is raised, the superior court will need to make findings on the elements of a voter dilution claim, including whether a politically salient class of voters existed and whether the Board intentionally discriminated against that class.”\textsuperscript{34}

The court also addressed the Board’s claim that the superior court had erred in ruling that House Districts 37 and 38 were unconstitutional, because the five Alaska

\begin{itemize}
\item \textsuperscript{31} Bush v. Vera, 517 U.S. 952 (1996).
\item \textsuperscript{32} Miller v. Johnson, 515 U.S. 900, 902 (1995).
\item \textsuperscript{33} In Re 2011 Redistricting Cases, No. S-14441, 6 (Alaska 2012).
\item \textsuperscript{34} \textit{Id.} at 7.
\end{itemize}
Native effective districts had a higher population of voting age Alaska Natives than was necessary. The Court held that McConahy’s rationale here was unsatisfactory, because although there may have been excess Native Alaskan population, it was not clear how this excess population could be accessed.

The court ordered the Board to redraw its plans, this time following the *Hickel* process. It allowed for the Board to petition for the Proclamation Plan, with slight variations to correct for the uncontested unconstitutionality of House Districts 1 and 2, to be used as an interim plan for the 2012 elections alone, if the Board was unable to draft a new plan in time.
CHAPTER ELEVEN: AFTERMATH OF THE COURT’S RULING

On March 15, the day after the Supreme Court issued its ruling, Judge McConahy directed the Board to draw a new plan. The Board immediately made plans to meet several times over the next few weeks and create new plans, this time following the Hickel process. In this chapter, I will look at the final plan created by the Board and the process they used.

Even as the Board began creating a new plan, the Board’s attorney, Michael White, strongly objected to the court’s ruling and voiced his surprise at the decision. White argued that the court’s ruling essentially required the Board to begin by ignoring the “supreme law of the land.” He dismissed the claim that the Hickel process would result in a better map and questioned whether the Alaska Supreme Court even had the authority to mandate such a process, given the separation of powers between the branches.¹ Nonetheless, the Board obeyed the court’s ruling and began to draw a new map.

The Hickel Process

The Board met from March 26 to March 31 to create a new redistricting plan for the state. Prior to this, the Board had its staff create several “Hickel Plans” as starting points. These plans did not alter the parts of the original Proclamation Plan which were neither made with the goal of fulfilling the VRA nor were found unconstitutional by the court. There were thus four districts in rural Alaska which needed to be drawn anew. The

population available for these districts was 62,240, but the ideal size of four districts was 71,020. Even to draw the districts at a deviation of -5.0% would have required 67,468 people. As a result, it was necessary to add some urban population to these rural districts in order to satisfy equal population requirements.²

The Board’s staff created four such plans, known as Hickel 001, Hickel 002, Hickel 003, and Hickel 004. The plans took population from Fairbanks, Mat-Su, Anchorage and Kenai respectively. When the Board met on March 27, they adopted Hickel 001 as the “Hickel Plan,” on the grounds that it was the only one of the four which met the requirements of Section 6 of the state constitution, according to an analysis by Michael White, the Board’s attorney.³

According to the Board’s analysis, the Hickel Plan met the requirements of the Alaska State Constitution. Every house district was contiguous, relatively compact, and relatively socio-economically integrated. The plan had an overall population deviation of 8.9%, within the equal population requirements, and each senate district was composed of two contiguous house districts.⁴ The following map shows the statewide plan.⁵

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³ Id.
⁴ Id.
Clearly, the rural districts in the *Hickel* Plan were considerably different from those in the original Proclamation Plan. Generally, the map is more similar to the map from the 2002 redistricting cycle than the Proclamation Plan was. Of the effective Alaska Native house districts, District 40, on the North Slope, alone remained relatively unchanged. It was combined with the new District 39, centered on Norton Sound and Nome, to create Senate District T.

Under the new plan, Ester and Goldstream, the Fairbanks communities previously included in the expansive and rural House District 38, were still in a largely rural district. House District 37 stretched around the Fairbanks North Star Borough, looking fairly similar to District 6 from the 2002 redistricting cycle. Although the district was still incredibly large and not extremely socio-economically integrated, the Board felt that this was the closest they could come to meeting those requirements, given the difficulties of redistricting caused by the demographics of Alaska. District 37 was combined with District 38, located on the Kuskokwim Bay and containing Bethel and the surrounding villages, to create Senate District S.

The *Hickel* Plan did not separate the Aleutian Chain, as the Proclamation Plan had. Instead, it put it in a district with the Bristol Bay area, District 36. District 36 was combined with District 35, which looked the same as it had under the Proclamation Plan, to create Senate District R.

Despite its compliance with the Alaska State Constitution, the *Hickel* Plan would have been unlikely to receive preclearance from the U.S. Department of Justice, as it did not meet the requirements of the VRA and would have resulted in retrogression. VRA expert Lisa Handley presented the Board with her analysis of the *Hickel* Plan and its lack
of compliance with the VRA on March 28. She concluded that the plan would not receive preclearance because it was regressive.

Handley began by using the Proclamation Plan as the Benchmark Plan to gauge any new plan by. She notes that once a legislative plan receives preclearance from the Department of Justice it becomes the new Benchmark Plan unless it is found unconstitutional by a federal court. As the Proclamation Plan had only been challenged in state court, Handley used it as the benchmark.6

This Benchmark Plan had five effective Alaska Native house districts and three effective Alaska Native senate districts. The following chart shows the percent of each district’s population that is Alaska Native, as taken from Handley’s report.7

<table>
<thead>
<tr>
<th>House District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
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</thead>
<tbody>
<tr>
<td>36</td>
<td>78.26</td>
<td>71.45</td>
</tr>
<tr>
<td>37</td>
<td>56.18</td>
<td>46.63</td>
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<td>38</td>
<td>53.38</td>
<td>46.36</td>
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<td>39</td>
<td>72.50</td>
<td>67.09</td>
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<tr>
<td>40</td>
<td>71.15</td>
<td>62.22</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Senate District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
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</thead>
<tbody>
<tr>
<td>R</td>
<td>48.63</td>
<td>43.75</td>
</tr>
<tr>
<td>S</td>
<td>54.78</td>
<td>46.85</td>
</tr>
<tr>
<td>T</td>
<td>71.82</td>
<td>65.05</td>
</tr>
</tbody>
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7 Id.
According to Handley’s analysis, a district generally needed 41.8% of its Voting Age Population to be Alaska Native in order to elect an Alaska Native-preferred candidate. This number varied slightly in different parts of the state.  

Under the Hickel Plan, only four house districts and two senate districts would likely be considered effective Alaska Native districts by the DOJ. The following charts show the percent Alaska Native population of districts with high percentages.  

<table>
<thead>
<tr>
<th>House District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
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<tbody>
<tr>
<td>36</td>
<td>47.47</td>
<td>40.21</td>
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<tr>
<td>37</td>
<td>36.23</td>
<td>33.26</td>
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<td>38</td>
<td>86.92</td>
<td>82.65</td>
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<td>39</td>
<td>88.37</td>
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<table>
<thead>
<tr>
<th>Senate District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
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</thead>
<tbody>
<tr>
<td>R</td>
<td>34.02</td>
<td>29.74</td>
</tr>
<tr>
<td>S</td>
<td>61.64</td>
<td>55.83</td>
</tr>
<tr>
<td>T</td>
<td>79.74</td>
<td>72.80</td>
</tr>
</tbody>
</table>

Clearly, this plan constituted retrogression. Neither House District 37 nor Senate District R could be considered an effective Alaska Native district. Handley therefore concluded that the Hickel Plan was retrogressive and would not receive preclearance.

The Board concluded that “it is impossible for the Board to construct a redistricting plan that strictly complies with both the Alaska Constitution and the

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8 Id.
9 Id.
10 Id.
Given the supremacy of federal to state law, the Board began to create a new plan. They did this, however, while deviating from the state constitution’s requirements “to the least degree reasonably necessary to ensure compliance with the VRA,” as required by the state supreme court.

Amending the Hickel Plan

The Board faced a tough challenge in amending the Hickel Plan. In order to avoid retrogression, the Board needed to create one additional effective Alaska Native district in both the Senate and the House, for a total of three and five respectively. To create an effective house district, the Board had to rework Districts 38 and 39, both of which had Alaska Native voting age populations of more than 80%. To create an additional effective senate district, the Board needed to combine one effective Alaska Native house district with another district which had a fairly high Alaska Native population, although not enough to be considered an effective Alaska Native seat. This required that at least one effective house district have a very high Alaska Native concentration in order to balance out one with a lower concentration.\(^\text{12}\)

The Board decided to focus on plans which did not separate the Aleutian Chain, given the superior court’s holding that dividing the chain could not be justified by the VRA. However, “after considerable effort,” the Board could not find a way to create a


\(^{12}\) Id.
third effective Senate district, keep the Aleutian Chain together, and avoid pairing Alaska Native incumbents together.\textsuperscript{13}

During the amendment process, the Board did not hold public hearings. It did accept new plans from third-party groups. Five statewide plans were submitted: one from Alaskans for Fair Redistricting, one from the RIGHTS Coalition, and three from the Calista Corporation. The Board analyzed each, concluded that only the Calista plans had followed the \textit{Hickel} process, and discarded the other two plans. The Board also concluded that none of the Calista plans satisfied the requirements of both the VRA and the state constitution, despite having used the Board’s \textit{Hickel} Plan as a starting point.

The Board also considered several adjustments to the original Proclamation Plan. One involved reconfiguring House Districts 36 and 37 to create a district including the Aleutian Chain and stretching north around Bristol Bay to Bethel. Ultimately, the Board accepted this proposal on the advice of Handley, incorporating it into their final map.

\textbf{The Amended and VRA-Compliant \textit{Hickel} Plan}

On March 31, the Board announced its new map, passed by a 5-0 vote. They admitted that the map did not strictly comply with the requirements of Alaska State Constitution, like the \textit{Hickel} Plan had, but argued that having followed the \textit{Hickel} process, they could now account for this based on the necessity of adhering to the VRA. The following map shows the new statewide map under the Amended Proclamation Plan.\textsuperscript{14}

\textsuperscript{13} Id.
The Amended Plan was fairly similar to the Original Proclamation Plan in many ways. It also was far more likely to receive approval from the Department of Justice than was the *Hickel* Plan. The plan had an overall statewide population deviation of 9.05% for house districts and 8.46% for senate districts, both within the limits of the constitution. The deviations in the urban parts of the state were considerably smaller, as required. While the Board’s VRA expert, Handley, has not yet published her analysis of the plan, the map has three senate districts with populations of majority Alaska Natives and five house districts with population of majority Alaska Natives. The data released by the Board is shown in the tables below.\(^{15}\)

<table>
<thead>
<tr>
<th>House District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>85.70</td>
<td>81.13</td>
</tr>
<tr>
<td>37</td>
<td>51.02</td>
<td>42.97</td>
</tr>
<tr>
<td>38</td>
<td>52.38</td>
<td>45.72</td>
</tr>
<tr>
<td>39</td>
<td>70.84</td>
<td>65.63</td>
</tr>
<tr>
<td>40</td>
<td>71.15</td>
<td>62.77</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Senate District</th>
<th>Percent Alaska Native Population</th>
<th>Percent Alaska Native Voting Age Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>R</td>
<td>52.47</td>
<td>47.37</td>
</tr>
<tr>
<td>S</td>
<td>51.68</td>
<td>44.24</td>
</tr>
<tr>
<td>T</td>
<td>71.00</td>
<td>64.17</td>
</tr>
</tbody>
</table>

In order to create these districts, however, the Board necessarily had to deviate from the requirements of the state constitution. The Board argued that only three districts violated

the requirements of the Alaska State Constitution: House Districts 38 and 39 and Senate District S.

House District 38 looked very similar to District 38 of the original Proclamation Plan. It stretched from the western parts of the Fairbanks North Star Borough to the villages of the Bering Sea coast. House District 38 is shown below.16

The Board admitted that in order to meet the VRA requirements and create a fifth effective Alaska Native house district, it had to let District 38 be not very socio-economically integrated. The district still includes parts of the Fairbanks North Star Borough, including the communities of Ester and Goldstream, in a large, rural district.

The Board argued that by following the *Hickel* process, however, they had justified this lack of compliance with the Alaska State Constitution and shown that it was necessary.

The other house district which the Board admitted violated the requirements of the state constitution was District 39. The district is similar to District 39 from the original Proclamation Plan and stretches from Nome and neighboring small villages along the Bering Sea coast and Norton Sound, east through the Interior of the state north of Fairbanks to reach the Canadian border, and then south to the Wrangell-St. Elias National Park and almost to the Gulf of Alaska. House District 39 is shown below.  

As with District 38, the Board acknowledged that District 39 was neither relatively socio-economically integrated nor compact. The district is almost identical to District 39 from the original Proclamation Plan, however, which was not contested in court. Given Alaska’s vast geographic area and low populations in the rural parts of the state,

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expansive districts are necessary in some cases. District 39 seems unlikely to be challenged as a result.

Finally, the Board acknowledged that Senate District S, composed of House Districts 37 and 38, could be considered unconstitutional under the Alaska State Constitution. The district stretched from Ester and Goldstream in the Fairbanks North Star Borough to Bethel and through the Aleutian Chain. It was not strictly contiguous, as several parts of the district were joined only by open sea. Senate District S is shown below, with House District 38 in purple and House District 37 in lime green.\(^\text{18}\)

The Board thought that the district met the requirement that districts be “as nearly as practicable” contiguous. They also argued, however, that if the court disagreed with that conclusion, then the district could still be justified in that the lack of contiguity was necessary to satisfy the requirements of the Voting Rights Act.

The only urban area changed under the new plan was Fairbanks. The Board made the small changes to Districts 1 and 2 which the superior court had found were necessary and possible to meet the compactness of the Alaska constitution. This change had a ripple effect throughout the Fairbanks North Star Borough, resulting in a reconfiguration of the House district in the area.

The majority of the City of Fairbanks itself was placed in a single senate district, District B, of which Fairbanks residents made up 85.88% of the total population. The plaintiffs had requested this, although the superior court had not held that it was constitutionally required. The state supreme court did not rule directly on the issue, but held that the superior court had ruled “based on [an] incorrect premise.” In order to avoid further litigation, the Board decided to create the single senate district for the city.

The excess population of the Fairbanks North Star Borough was split only once. 5,756 residents were placed in House District 38, which extended from the suburbs of Fairbanks to the Bering Sea and was very similar to District 38 under the original Proclamation Plan. The additional excess population, placed in House District 6 under the original plan, was put into several districts contained entirely within the Fairbanks North Star Borough. The following map shows the Fairbanks area under the new plan.

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Along with the Amended Proclamation Plan, the Board released an Interim Plan, as authorized by the court. The plan was identical to the original Proclamation Plan except for a few small changes to Districts 1 and 2 to ensure their compactness. The deadline for candidates to file for primaries for the November 2012 elections is June 1, 2012. Thus, a map must be completed prior to this deadline. If the amended plan does receive preclearance from the Department of Justice and approval from the state courts prior to this date, then the interim plan can be used for the 2012 elections alone. The Board was also planning to submit its latest redistricting plan to the Department of Justice towards the end of April.  

On April 16, 2012, seven parties filed objections against the Amended Proclamation Plan in the superior court, on a number of different grounds. The parties

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were the Fairbanks North Star Borough, the Aleutians East Borough, the City of Petersburg, Calista Corporation, Bristol Bay Native Corporation, the RIGHTS Coalition, and the original Riley plaintiffs.23

All but one of the suits alleged that the Board had failed to follow the Hickel process as prescribed by the court, although for a variety of different reasons. In particular, the parties argued that the Board’s failure to start from scratch and consider redrawing every district was unconstitutional. Other complaints included that the Board had failed to conduct a sufficiently open public hearing process when creating the amended plans, that the plan was retrogressive under Section 5 of the VRA, and that the plan’s districts violated the requirements of the Alaska State Constitution.24

On April 18, the Board issued its response to the suits, denying that any of them had merit and reiterating its claim that the Amended Proclamation Plan complied fully with the Alaska Supreme Court’s order.25

On April 20, Superior Court Judge McConahy rejected the Board’s Amended Proclamation Plan, accepting the plaintiffs’ arguments that the Board had failed to follow the Hickel process as outlined by the Alaska Supreme Court. He wrote, “The Board’s method did not comply with either the spirit or the letter of the Alaska Supreme Court’s order and the Hickel process.” 26 McConahy stayed his order for five days, however, to

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24 Id.
allow for appeal to the state supreme court. The Board announced that it would meet on April 24 to discuss a possible appeal.\textsuperscript{27}

Whether or not the plan is eventually approved by the court and the Department of Justice this time around, the process nonetheless illustrates the immense and growing conflicts between the requirements of the Alaska State Constitution and Section 5 of the Voting Rights Act. As my conclusion will discuss, this conflict will persist as long as Alaska’s demographic changes continue in the same direction they have been, with the Alaska Native population gravitating towards the urban centers, making it ever more difficult to avoid retrogression.

CHAPTER TWELVE: CONCLUSION

The requirements of the Alaska State Constitution have repeatedly come into sharp conflict with the requirements of Section 5 of the Voting Rights Act over the history of Alaskan legislative redistricting. As Alaska’s demographics have changed, this conflict has grown stronger, coming to a head in the most recent redistricting process. In 2011, the Alaska Redistricting Board stated that it has become outright impossible to satisfy the demands of both the state constitution and the VRA.¹

As Alaska Natives continue to migrate from rural villages to urban centers, this conflict will only continue to intensify unless either the state constitution or Section 5 gives way. In the case of the VRA, this could occur in one of two ways: if Alaska receives a bailout from Section 5 coverage or if Section 5 as a whole is ended, by either the U.S. Supreme Court or Congress. As discussed already, Alaska is not currently eligible for a bailout, as the U.S. Attorney General authorized a federal examiner for the Bethel Census Area in October 2009. Alaska will thus not be eligible for a bailout until at least October 2019.

The possibility that Section 5 could be ended on a national level is far higher. As discussed above, the U.S. Supreme Court will be hearing at least one case in its next Term on the alleged unconstitutionality of Section 5. Additionally, Section 5 could be repealed by Congress. The consequences of the elimination of Section 5 would be significant, and in considering the continuing necessity of Section 5, its many different

effects must be examined. Section 5 has had many impacts on election law all across the
country; even in Alaska, it affects far more than simply redistricting. The preclearance
requirement of Section 5 affects a number of different areas of Alaska election and voting
law. These effects have been documented by other scholars in great detail and have been
largely positive in many cases.²

In assessing the continuing necessity of Section 5, it is critical that all of these
impacts are considered, including the analysis of the VRA’s effects on Alaska
redistricting. The effects of Section 5 are different in Alaska than they are in other states
because Alaska’s sheer size and population diversity create very different redistricting
challenges than the other covered states.

Looking back over the history of the VRA in Alaska redistricting, Section 5 has
been a positive influence in many ways. Although Alaska’s racial discrimination never
reached the levels seen in the southern states against African-Americans, there is
nonetheless a demonstrated history of discrimination against Alaska Natives.

The discrimination against Alaska Natives has many similarities to the
discrimination against American Indians in the Lower 48. At the turn of the twentieth
century, the territory of Alaska passed laws depriving Alaska Natives of citizenship,
voting rights and the right to enter some public buildings. Even as late as the 1940’s,
many stores and restaurants in Alaska displayed signs saying “No Dogs or Indians.” The
existence of this historical discrimination shows the importance of the VRA in Alaska,
even though the state never had slavery as occurred in the South.³

² See, for instance, Natalie Landreth and Moira Smith, Voting Rights in Alaska: 1982-2006, 17 Review of
³ Id.
Having such a large amount of restrictions on the redistricting process, through both state and federal requirements, has also helped limit the amount of partisan gerrymandering in Alaska redistricting historically. Of course, some amount of partisanship is evident in nearly every map produced. In many cases, however, the first map proposed by either the governor or the Redistricting Board was more aggressively partisan. When the Alaska Supreme Court rejected these maps for having not followed the requirements of the VRA and the state constitution, the maps were redrawn. These second incarnations were generally less partisan, as the governor and the Board were forced to put aside partisanship in order to simply meet the strenuous set of requirements.

In addition to these positive influences of Section 5, however, there have also been several negative impacts. Particularly in the most recent redistricting cycle these negative influences have begun to outweigh the positive ones, as Alaska’s demographics have become even more extreme. This trend will likely continue during the post-2020 Census redistricting cycle.

In the absence of change at the federal level, and given the supremacy of the U.S. Constitution, the Section 6 requirements of the state constitution will necessarily be left even more to the wayside. The districts created by the Redistricting Board will likely be even more bizarrely shaped than they presently are, and connect communities of even more varied interests. The redistricting requirements of the Alaska State Constitution, as discussed, are some of the most stringent of any state. The fact that they cannot be fully effectuated is therefore problematic.

The worry is, of course, that without the protection of Section 5, Alaska Natives will see their voting power diminished through the redistricting process. However, I do
not believe that this decrease would be substantial, as Alaska would still be governed by both the state constitution and Section 2 of the VRA.

Many of the Alaska Native communities form groups with relatively well-integrated socio-economic interests and so they would be kept together in the same districts in many cases under Section 6. The Aleutian Chain, for instance, would be protected under the contiguity and compactness requirements of the state constitution.

Section 2 of the VRA also imposes restrictions on the abridgment of minority voting power. The section is permanent and applies to the entire country, meaning that even if Alaska received a bailout or Section 5 was struck down, Section 2 would still apply. This section prohibits dilution of minority votes, in this case Alaska Native votes, through either packing the minorities tightly into too few districts or spreading them so thinly that they cannot exercise influence in any one district. The U.S. Supreme Court has held that districts must accurately reflect the voting strength of minorities and that the fulfillment of traditional redistricting principles, such as those found in the Alaska State Constitution, cannot be used as an excuse for violating Section 2. The section also prohibits any redistricting plan which has purposeful discrimination, as well as those with any discriminatory effect. Section 2 also allows for individuals, or the Federal Department of Justice, to sue in federal court if they feel that a redistricting plan violates the requirements of the VRA. Section 2, however, is not quite as strict as Section 5 in its requirements. The Court has held that the section mandates protection of districts where minorities make up a majority of the voting age population.

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The question remains as to what Alaska can and should do in future redistricting cycles. Alaska could consider applying for a bailout from Section 5 of the VRA. As discussed above, the state is not currently eligible for a bailout due to its lack of compliance with parts of the Act over the last decade. The state could, however, try to qualify for a bailout over the next several years, thereby eliminating the need for compliance with the preclearance requirements of Section 5 of the VRA in the 2021 redistricting process.

Another possible change, which is a more short-term solution, is increasing the size of the state legislature, thereby allowing for geographically smaller districts. As discussed earlier, Alaskans considered and rejected a ballot measure in November 2010 which would have added four seats to the House and two seats to the Senate.\(^7\) Currently, each of the forty members of the Alaska State House represents about 17,500 people, a number which will continue to rise as the state’s population grows. Increasing the size of the house to forty-four members would lower each representative’s district to approximately 16,000 constituents, which would reduce the size of some of the enormous rural districts which have been contested. Alaska has the smallest bicameral state legislature in the country and its size has not been expanded since statehood.\(^8\)

Increasing the size of the state legislature would likely make it easier to satisfy the requirements of the Alaska State Constitution and initially allow for more compact and contiguous districts. At the same time, however, this change would require the creation of more Alaska Native effective districts meaning that it would still be difficult for the

\(^7\) Legislative district size still a problem, Anchorage Daily News (Nov. 6, 2010), http://www.adn.com/2010/11/05/1539331/legislative-district-size-still.html.

Board to receive preclearance under Section 5. The Board would need to preserve the same proportion of representation for Alaska Natives, not just the same number of districts, so the proposal might not substantially ease the difficulties the Board has had in satisfying the VRA requirements. In order to create these effective Alaska Native districts, it is likely that the Board would continue to need to pull in some urban populations to meet equal population requirements.

Regardless of the requirements for legislative redistricting in Alaska, the process will almost certainly remain difficult and fraught with controversy, given the unique nature of Alaska’s demographics and geography. Historically, the requirements of Section 5, while complicating the process, have provided a generally positive influence by protecting the voting power of Alaska Natives and minimizing the ability of partisans to engage in gerrymandering. Today, however, it has become impossible to satisfy the requirements of Section 5 while also creating contiguous, compact, and socio-economically integrated districts as required under the Alaska State Constitution. If Alaska was no longer covered under Section 5, the state’s legislative districts could be more accurately tailored to fit the diverse social and economic communities across the state, and Section 2 of the VRA would still serve to protect Alaska Native voters from minority vote dilution.
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