

# UNLOCKING THE BALLOT: THE PAST, PRESENT, AND FUTURE OF ALASKA NATIVE VOTING RIGHTS

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## ABSTRACT

*Racial oppression in American democracy is older than America itself. While most existing scholarship focuses on the historical disenfranchisement of Black and Latinx voters, this Note tells the story of the voting rights of a smaller, but still noteworthy marginalized American community: Alaska Natives. By contextualizing the history of Alaska Native disenfranchisement within the broader national landscape, this Note seeks to illuminate the ways in which the Alaska Native experience is similar to, and unique from, the experiences of other marginalized American communities. Although this history and present are rife with troubling discrimination, inequity, and non-compliance, this Note is ultimately a hopeful one, concluding that Alaska can – and must – take the burdensome but necessary steps required to fully establish and protect the voting rights of its Native people.*

*“My dear friends: your vote is precious, almost sacred. It is the most powerful nonviolent tool we have to create a more perfect union.”*

Representative John Lewis<sup>1</sup>

## I. INTRODUCTION

In democracy, voting reigns supreme. When deployed faithfully, it promises individual participation in governance, equal amplification of equal voices, and the uplifting of communal wisdom. When implemented equitably, it ensures that positions of power and influence, from Prom

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1. Representative John Lewis, Address at the 2012 Democratic National Convention (Sept. 6, 2012), <https://www.pbs.org/video/pbs-newshour-rep-john-lewis-your-vote-is-precious-almost-sacred/>.

Queen to President, are occupied by those collectively considered most deserving. When protected diligently, it assures that the self-evident truths of equality, liberty, and justice escape their ink-and-parchment confines to spill freely into their only true realm – practice.

If only. In reality, racial oppression in American democracy is older than America itself; for as long as white men have cast ballots on this continent, they have also worked towards – and historically, largely succeeded in – keeping others from doing the same.<sup>2</sup> This denial has been vigorous, persistent, and insidious, slipping into new forms the moment that old ones are quashed.<sup>3</sup> And although notable progress has been made in voting rights and access, neither 1865, 1965, nor 2008 can mark the achievement of true racial equality in American democracy; that milestone lies still beyond our national horizon.

This observation is far from revelatory. For generations, scholars, journalists, and activists – predominantly those of color – have sought to illuminate the shadowed racial oppression within our systems of democracy.<sup>4</sup> Although existing scholarship has primarily focused on the disenfranchisement of African Americans,<sup>5</sup> notable research has also shed light on the obstacles faced by other marginalized communities of color, such as Latinx, Asian-American, and Native American communities.<sup>6</sup>

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2. See, e.g., *Colonial Virginia*, LIBR. OF VA., <https://www.lva.virginia.gov/exhibits/political/colonial.htm> (last visited Sept. 26, 2020) (“Only adult white men who owned property and a few who rented substantial farms were permitted to vote for representatives in the lower house of the General Assembly.”); Stanley L. Engerman and Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World* 6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 8512, Oct. 2001) (“The British colonies on the mainland, like those elsewhere in the hemisphere, reserved the privilege of voting to white adult men with significant holdings of real estate . . .”).

3. See, e.g., ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* (2015) (extensively reviewing the history of explicit and implicit racial oppression in American voting before, up to, and after the Voting Rights Act of 1965).

4. See, e.g., IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892) (documenting the realities of white supremacist violence in the post-Civil War South); Martin Luther King, Jr., *Civil Right No. 1 – The Right to Vote*, N.Y. TIMES, Mar. 14, 1965, Sunday Magazine, at 26 (“Few people in America realize the seriousness of the burden imposed upon our democracy by the disenfranchisement of Negroes in the Deep South.”).

5. See, e.g., Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859 (1995) (noting challenges to African American voting access before and since the Voting Rights Act).

6. See, e.g., Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201 (2004) (describing how Puerto Ricans and other Latinos have been impacted by the Voting Rights Act).

This Note seeks to contribute to this existing scholarship by focusing on a specific and less-studied community: Alaska Natives.<sup>7</sup> Despite notable geographic and cultural particularities, Alaska Natives share a history and current reality of discrimination and disenfranchisement that is strikingly similar to those of communities of color in the “Lower Forty-Eight.”<sup>8</sup> In noting both this broader historical context and these particularities, this Note seeks to calibrate proven voting rights solutions toward uniquely Alaskan problems.

This Note continues in Part II by briefly reviewing the deep and troubling history of racial oppression in American voting. Part III narrows the lens, focusing specifically on the voting access and experiences of Alaska Natives, and placing the Alaska Native story within the broader landscape of American democracy. Considering both the similarities and differences between the national landscape and the Alaska Native experience, Part IV explores potential policy solutions aimed at increasing voting access among Alaska Native communities. Ultimately, this Note is a hopeful one: squarely addressing a problematic past and present in order to forge a more just and democratic future.

## II. HISTORICAL CONTEXT: RACIAL OPPRESSION IN AMERICAN DEMOCRACY

Racial oppression in American democracy predates America itself. From colonial times through the Civil Rights Movement, the ballot box largely remained locked for African Americans, Native Americans, and other communities of color. Although the 1965 Voting Rights Act and 1975 expansion drastically reduced this disenfranchisement, systemic barriers remain, particularly for Alaska Native communities. Because comprehensive understanding of the voting rights and access of Alaska Natives must first be grounded in this broader national narrative, this Part outlines this historical context of racial inequity in American democracy before Part III more specifically explores the Alaska Native experience.

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7. This Note uses the terms “Native Americans,” “Native people,” and “indigenous people” interchangeably in general reference to North America’s original inhabitants. Indigenous people from Alaska are specifically referred to as “Alaska Natives.” Further, this Note builds upon the invaluable work of several notable scholars, many Alaskan themselves, who research Alaska Native voting rights, and whose scholarship is cited to throughout.

8. See JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 235–38 (Routledge 2016) (2009) (describing the parallels between the discrimination faced by African Americans in the Jim Crow South and by Alaska Natives).

## A. Antebellum Enslavement and Racial Oppression

From the earliest days of British colonies on North American soil, white colonists and the burgeoning legal and political systems they created explicitly excluded non-whites such as Native Americans and enslaved Africans from fundamental forms of self-determination and personal liberty, including democratic participation.<sup>9</sup> Following in the tradition of Europeans who had encountered Native Americans before them,<sup>10</sup> colonists in the Americas largely considered indigenous people to be sub-human, uncivilized, and otherwise wholly excluded from the American experiment.<sup>11</sup>

Shortly after independence and the establishment of the federal Constitution, states began to slowly eliminate property-based restrictions on suffrage.<sup>12</sup> But even as states moved towards universal white male suffrage in the early nineteenth century, most ardently adhered to the continued disenfranchisement of women, Native Americans, and both enslaved and free African Americans.<sup>13</sup> The rapid expansion of slavery and racialized violence further oppressed African Americans, while Native Americans were subjected to continued exclusion from citizenship, broken treaties, mass killings, and forced removals.<sup>14</sup> While the outcome and reverberations of the Civil War brought perhaps the most significant expansion of voting rights in American history, racial oppression in American democracy would prove too insidious to be buried with the Confederacy.

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9. See Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J. F. 343, 344–46 (2019) (noting that white supremacy and male dominance were hardwired into the original Constitution); see also Engerman & Sokoloff, *supra* note 2, at 6 (documenting the exclusion of people of color from colonial and early American systems of democracy).

10. See, e.g., HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES 1–7* (1980) (describing Christopher Columbus's violence and oppression towards indigenous people).

11. See TUCKER, *supra* note 8, at 235–38.

12. See Engerman & Sokoloff, *supra* note 2, at 8–9 (“Although some states . . . merely carried over the voting qualifications in place during the colonial era, eight of the thirteen made substantial changes through the constitutions they adopted during the Revolutionary era. Most moved in the direction of expanding the franchise somewhat . . . . Not a single state that entered the Union after the original thirteen had a property requirement for the franchise . . . .”).

13. *Id.* at 13–14.

14. See TUCKER, *supra* note 8, at 235 (noting the discrimination and violence faced by Native Americans and Alaska Natives); JAMES THOMAS TUCKER ET AL., *THE NATIVE AMERICAN RIGHTS FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 9* (2020) (“By the beginning of the American Civil War, most eastern tribes had been decimated, subdued by force, or removed.”) [hereinafter NARF REPORT].

## B. From Civil War to Civil Rights

The Civil War, and the groundbreaking constitutional amendments secured in its wake, proved monumental for the expansion of equal rights towards communities of color. In the realm of voting, the Fifteenth Amendment created the constitutional foundation upon which all future voting rights struggles would be based.

Ratified in 1870, the Fifteenth Amendment established that “[t]he 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.”<sup>15</sup> Building directly upon the Thirteenth Amendment’s abolition of slavery<sup>16</sup> and the Fourteenth Amendment’s conferral of citizenship to “[a]ll persons born or naturalized in the United States,”<sup>17</sup> the Fifteenth Amendment promised that where a right to vote has been established, it cannot be restricted based on race.<sup>18</sup>

This promise, however, was broken from the start. Although the Civil War Amendments ushered in a period of dramatic improvement in the rights, resources, and representation of formerly enslaved African Americans, Reconstruction proved brief.<sup>19</sup> After the removal of federal troops from the South in 1877,<sup>20</sup> white “Redeemers” regained control of local and state governments across the South, often through explicit racial violence.<sup>21</sup> Although the Fifteenth Amendment prohibited racial barriers to voting, Southern states and localities insidiously adapted to find new methods of racial oppression and disenfranchisement, such as literacy tests, poll taxes, and white supremacy terrorism.<sup>22</sup> Likewise, many state constitutions continued to explicitly exclude Native people from citizenship, and therefore, from political participation.<sup>23</sup> Well into the twentieth century, the Fifteenth Amendment rang hollow.

Slowly, though, persistent efforts by marginalized communities began to dent the armor of racial oppression. By the 1940s, federal legislation recognized Native American citizenship, and some courts

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15. U.S. CONST. amend. XV, § 1.

16. *Id.* amend. XIII, § 1.

17. *Id.* amend. XIV, § 1.

18. *Id.* amend. XV, § 1.

19. See BERMAN, *supra* note 3, at 14–15 (describing the rapid end of Reconstruction (1865–1877) and rise of Redeemers after the election of President Hayes).

20. *Id.* at 14.

21. See, e.g., WILMINGTON ON FIRE (Blackhouse Publishing 2015) (documenting the Wilmington Massacre of 1898).

22. BERMAN, *supra* note 3, at 14.

23. NARF REPORT, *supra* note 14, at 11; see also TUCKER, *supra* note 8, at 248–50 (describing early denial of citizenship to Alaska Natives).

began enforcing Native voting rights.<sup>24</sup> Likewise, by the 1960s, civil rights organizations, which had already been hard at work for decades,<sup>25</sup> began coalescing around the issue of voting rights, demanding that the federal government actually protect and enforce the Fifteenth Amendment for African Americans in the South. Change, it seemed, could wait no longer.

### C. The Voting Rights Act of 1965: Implementation and Impact

Signed into law by President Johnson on August 6, 1965, the Voting Rights Act of 1965 (VRA)<sup>26</sup> fundamentally altered the landscape of American democracy.<sup>27</sup> Where previous reforms attempts were piecemeal, the VRA was comprehensive.<sup>28</sup> Where previous attempts were reactive, the VRA was proactive.<sup>29</sup> Where previous attempts were inherently skeptical towards individuals alleging discrimination, the VRA shifted that skepticism onto the state and local governments with documented histories of that discrimination.<sup>30</sup>

First, the VRA unilaterally “eliminated literacy tests and other disenfranchising devices in states where less than 50 percent of eligible voters had registered or cast ballots in the 1964 presidential election . . . .”<sup>31</sup> This formula covered Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia in their entirety, and a number of individual counties in Arizona, North Carolina, Idaho, and Maine.<sup>32</sup> Next, the law created a proactive safeguard against future discriminatory changes in voting laws by requiring states and counties with qualifying histories of voting discrimination to obtain preclearance from the U.S. District Court for the District of Columbia or the Attorney General before enacting a new voting-related law.<sup>33</sup> Finally, the VRA authorized the

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24. NARF REPORT, *supra* note 14, at 11–12.

25. See generally, Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (Mar. 2005) (combatting the common narrative of a simplified, isolated Civil Rights Movement beginning with *Brown v. Board of Education* in 1954 and ending with the passage of the Voting Rights Act of 1965 with a more comprehensive “long” narrative beginning in the 1930s and continuing through the late twentieth century).

26. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101-10702 (2018)).

27. See BERMAN, *supra* note 3, at 36–38 (noting the gravity of the passage of the VRA and describing it as “The Second Emancipation”).

28. *Id.* at 32–33.

29. See *id.* at 31–32 (noting the failure of previous laws and the comprehensiveness of the VRA).

30. See *id.* at 32–33 (describing the application of the VRA’s coverage formula to various Southern states).

31. *Id.* at 30; see Voting Rights Act of 1965, §§ 3(b), 4(b).

32. BERMAN, *supra* note 3, at 30.

33. Voting Rights Act of 1965 § 5.

deployment of federal examiners to covered jurisdictions in order to ensure local compliance with the Fifteenth Amendment and the VRA.<sup>34</sup>

For African Americans, the VRA's impact was immediate and seismic. For the first time since Reconstruction, African Americans were able to register to vote with the force of the federal government behind them.<sup>35</sup> In the coming years, African Americans voted in record numbers, including for a burgeoning slate of African American candidates for positions ranging from the local school board to the United States Senate.<sup>36</sup> Although white politicians continued to "change[] the rules of the game to protect their own power" by altering election laws and redrawing voting districts, federal courts up to and including the Supreme Court largely enforced the VRA with fidelity.<sup>37</sup>

For other communities of color, though, the VRA proved far less impactful. Latinx and Native American voters, for example, were still largely excluded from the political process. This exclusion persisted largely as a result of disparities in literacy – election materials printed exclusively in English served as a *de facto* literacy test, excluding people of Latinx, Asian, Native American, or Alaskan Native backgrounds with limited English proficiency.<sup>38</sup> In Frio County, Texas, for instance, "fewer than half of Chicanos were registered to vote . . . compared with two-thirds of Anglos."<sup>39</sup> Native American registration and participation likewise lagged.<sup>40</sup> Accordingly, with the temporary provisions of the VRA set to expire in August 1975, several congressional representatives of color led an initiative to persuade Congress of the importance of including voting protections for language minorities in the law's newest edition.<sup>41</sup>

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34. *Id.* § 8.

35. See BERMAN, *supra* note 3, at 39–42 (documenting the impact of the VRA on the rapid enfranchisement of African Americans in the South).

36. *Id.* at 53, 63, 104 (Between 1965 and 1969, "a million [B]lacks had registered to vote in the South, and the number of Black elected officials had increased more than fivefold.").

37. *Id.* at 55; see, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 568 (1969) (declaring that Congress intended for "all [electoral] changes, no matter how small, be subjected to § 5 scrutiny" within covered jurisdictions).

38. See BERMAN, *supra* note 3, at 105.

39. *Id.*

40. See, e.g., TUCKER, *supra* note 8, at 256–57 (noting little improvement in Alaska Native voting due to persistent education and literacy disparities).

41. See *id.* at 108–13 (outlining the process and impact of the VRA's 1975 extension); SHAUNA REILLY, LANGUAGE ASSISTANCE UNDER THE VOTING RIGHTS ACT 18 (2015) (documenting the purpose and debates behind the 1975 VRA extension).

#### D. 1975 VRA Expansion

After extensive research, hearings, and hotly contested debate, Congress in 1975 agreed with these community advocates and key congressional representatives: longstanding segregation and discrimination had fundamentally impacted the economic, political, and educational opportunities of language minorities.<sup>42</sup> Congress recognized that these disparities, in turn, directly limited the ability of non-English speaking American citizens to equally participate in their local, state, and national politics.<sup>43</sup> It declared that in addition to these barriers, the political exclusion of language minorities was often further “aggravated by acts of physical, economic, and political intimidation.”<sup>44</sup>

Using this information, the 1975 VRA sought to pick up where the original Act had fallen short. With language and purpose closely resembling its 1965 predecessor, the language minority provisions of the 1975 VRA focused on states and counties in which a test or device had been used in the electoral process, functionally preventing language minorities from voting.<sup>45</sup> Any jurisdiction that had previously used such tests or devices now became subject to new language minority provisions, preclearance, and other federal observer provisions.<sup>46</sup> Likewise, Section 203 of the Act created a coverage formula based on minority population percentage, independent from the jurisdiction’s previous use of tests and devices.<sup>47</sup> Functionally, these language minority provisions “prohibit[ed] covered jurisdictions from ‘providing voting materials only in the English language’ and mandate[d] that voting materials be provided ‘in the language of the applicable minority group.’”<sup>48</sup>

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42. See Voting Rights Act, Pub. L. No. 94-73, sec. 203, § 4, 89 Stat. 400 (1975) (codified at 52 U.S.C. § 10303 (2018)) (finding that language minorities “have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language”), *invalidated by* Shelby Cty. of Ala. v. Holder, 570 U.S. 529 (2013); REILLY, *supra* note 41, at 18 (describing congressional debates regarding the 1975 VRA extension).

43. Voting Rights Act of 1975 § 4, *invalidated by* Shelby Cty. of Ala. v. Holder, 570 U.S. 529 (2013).

44. *Id.*

45. See *id.* (noting that states have denied equal educational opportunities).

46. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 95-98 (2007).

47. Voting Rights Act of 1975 § 4, *invalidated by* Shelby Cty. of Ala. v. Holder, 570 U.S. 529 (2013); see REILLY, *supra* note 41, at 18 (summarizing the 1975 VRA extension).

48. Landreth & Smith, *supra* note 46, at 99 (quoting Voting Rights Act of 1975, 52 U.S.C. § 10503 (1975)).

Nationally, the 1975 VRA extension largely worked.<sup>49</sup> Just as the original 1965 Act immediately advanced African American voting access, the 1975 extension catalyzed the enfranchisement of language minorities who had not previously participated in the political process.<sup>50</sup> But due to deficiencies in drafting, application, and enforcement, the 1975 VRA extension proved far less effective for Native Americans, and specifically for Alaska Natives.<sup>51</sup>

### **E. Dismantle and Decline: *Shelby County* and Present Disenfranchisement**

In the final decades of the twentieth century, debates regarding the VRA's appropriate scope and purpose brought frequent and often turbulent political storms.<sup>52</sup> While Congress consistently renewed the VRA, presidential administrations employed the steady, quiet power of federal judicial appointments to further their own values and legal interpretations.<sup>53</sup> While liberal-leaning judges understood improvements in the political participation of marginalized communities as showing the success and expansive potential of robust VRA protections, conservative jurists tended to view those same improvements as evidence that the VRA's extraordinary use of federal power was growing increasingly unnecessary.<sup>54</sup> This quiet federal judicial power amplified to a deafening roar by 2013, when the United States Supreme Court ruled on *Shelby County v. Holder*.<sup>55</sup>

*Shelby County* shattered the previous landscape of the Voting Rights Act. In a ruling as contentious as it was impactful, five justices of the Supreme Court agreed with the central Alabama county that the VRA's § 4(b) preclearance coverage formula was unconstitutional based on

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49. See BERMAN, *supra* note 3, at 113 (explaining the immediate impact of the VRA's 1975 extension on language minorities); REILLY, *supra* note 41, at 27 ("The language minority provisions of the Voting Rights Act eliminate[d] language barriers for millions of voters with limited English proficiency who have a higher illiteracy rate than the national average.").

50. See REILLY, *supra* note 41, at 27.

51. See *infra* section III.B.

52. See generally BERMAN, *supra* note 3, at 188–207 (describing political conflicts, often involving Department of Justice officials, regarding the shape and direction of voting rights in the 1990s).

53. For instance, President Carter "named more blacks, Hispanics, and women to the federal judiciary than all previous administrations combined" while President Regan appointed four Supreme Court Justices and over 350 district and appellate court judges during his presidency, of whom "94 percent were white, 95 percent were male, and 95 percent were Republican." *Id.* at 144.

54. See *id.*

55. *Shelby Cty. of Ala. v. Holder*, 570 U.S. 529 (2013).

modern voting rights progress, and thus could “no longer be used as a basis for subjecting jurisdictions to preclearance.”<sup>56</sup> Although the Court left the VRA’s substantive requirements (such as the minority language provision) and preclearance *process* untouched, eliminating the existing preclearance *coverage formula* rendered it hollow.<sup>57</sup> Despite Justice Ginsburg’s vigorous dissent that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet,”<sup>58</sup> the deed had been done: The Court rendered unenforceable the VRA’s cornerstone protection against discriminatory voting laws.<sup>59</sup>

And so came the rain. In the aftermath of *Shelby*, many jurisdictions that had previously been covered by preclearance quickly enacted restrictive voting changes such as heightening voter-identification requirements, closing polling places, purging voter lists, and limiting early voting.<sup>60</sup> Because of the elimination of preclearance, any individuals or communities challenging these new voting laws are now back to the pre-VRA days of time-intensive, costly, and often fruitless litigation.<sup>61</sup>

The negative impacts of these voting law changes have been far from “colorblind.” Ample scholarship documents that these changes disproportionately impact communities of color, including Native Americans.<sup>62</sup> Numerous previously covered jurisdictions have sought to enact laws that dilute minority voting strength, such as calculated redistricting or moving from district-based to at-large elections.<sup>63</sup>

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56. *Id.* at 557.

57. *See id.* (declining to issue a holding on § 5 itself).

58. *Id.* at 590 (Ginsburg, J., dissenting).

59. *See* Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

60. *See id.* (noting restrictive voting law changes enacted post-*Shelby*); *see also* Brad Bennett, *55 Years After ‘Bloody Sunday,’ Voting Rights are Still Under Attack*, S. POVERTY L. CTR. (Feb.29,2020), <https://www.splcenter.org/news/2020/02/29/weekend-read-55-years-after-bloody-sunday-voting-rights-are-still-under-attack>.

61. Newkirk II, *supra* note 59.

62. *See, e.g.,* Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, THE ABA (Feb. 10, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/); *Democracy Diverted: Polling Place Closure and the Right to Vote*, LEADERSHIP CONF. ON CIV. & HUM. RTS., <https://civilrights.org/democracy-diverted/> (last visited on Apr. 29, 2020).

63. Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 277 (2015).

Moreover, the barriers to voting that these changes place in front of people living in poverty further disenfranchise communities of color due to the entanglement of race and class.<sup>64</sup> In short, while the nation has made significant strides since the days of poll taxes and literacy tests, *Shelby County* and subsequent restrictive voting law changes make abundantly clear that the era of true racial equity in American voting lies still beyond our national horizon.

### III. ALASKA NATIVE VOTING RIGHTS AND ACCESS, PAST AND PRESENT

It is into this extensive and troublesome national historical context that the story of Alaska Native voting access, if it is to be holistically understood, must be placed. In many ways, Alaska's treatment of its Native people is a reflective fractal of this national history of racial oppression. Like other marginalized communities of color in the United States, Alaska Natives have faced generations of dehumanization, Jim Crow-like discrimination, separate and unequal education, and inadequate enforcement of rights, all of which have created broad and disparate disenfranchisement.<sup>65</sup>

In other ways, though, Alaska's cultural, geographic, and historical particularities have rendered the experiences of Alaska Natives unique.<sup>66</sup> For instance, Alaska has the highest percentage of Native residents and Native voters (over seventeen percent),<sup>67</sup> has the largest land area and lowest population density of any state,<sup>68</sup> has some of the most geographically isolated communities in the nation,<sup>69</sup> and is home to more

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64. See, e.g., Ferguson-Bohnee, *supra* note 62 (describing how high poverty rates among Native Americans directly heightens challenges to voting).

65. See generally TUCKER, *supra* note 8, at 235–57 (documenting historical discrimination against Alaska Natives, noting its similarity with the Jim Crow South).

66. See generally James Thomas Tucker, Natalie A. Landreth, & Erin Dougherty Lynch, "Why Should I Go Vote Without Understanding What I Am Going to Vote For?" *The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & L. 327, 334–35 (2017) [hereinafter Tucker et al.] (describing the geographic, cultural, and economic particularities of Alaska and Alaska Native communities); see also Landreth & Smith, *supra* note 46, at 82.

67. ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, ALASKA NATIVE VOTING RIGHTS 15 (2019) [hereinafter COMMITTEE REPORT]; Tucker et al., *supra* note 66, at 334; see also *Indian Country Demographics*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/about-tribes/demographics> (last accessed Sept. 13, 2020).

68. Landreth & Smith, *supra* note 46, at 82.

69. Tucker et al., *supra* note 66, at 334–35; see also Landreth & Smith, *supra* note 46, at 82–83.

than twenty indigenous languages.<sup>70</sup> Unfortunately, in the realm of voting, each of these particularities collide with the broader historical context of racial oppression to make it even *harder* for Alaska Natives to access the ballot box. These compounded difficulties have led to the persistent disenfranchisement of Alaska Native communities that continues through today.

### A. Early Disenfranchisement

Like America and nationhood, Alaska's history of discrimination against its Native peoples predates its statehood.<sup>71</sup> This history largely mirrors that of white America's oppression of Native American communities more broadly within the "Lower Forty-Eight," including widespread epidemics upon initial contact, resource exploitation, forced relocation, social segregation, and political exclusion.<sup>72</sup> Much of this early violence against Alaska Native communities was indirectly initiated by Congress's 1884 Act Providing a Civil Government for Alaska, which formally established jurisdiction over Alaska and allowed for American settlers to claim land in the territory.<sup>73</sup> The subsequent migration of white settlers to the Alaskan territory "resulted in not only a loss of lands, but in Alaska Natives being subjected to segregation and discrimination in nearly every aspect of cultural, political, and social life."<sup>74</sup> This explicit racial oppression persisted well into the twentieth century in nearly identical forms as those used against African Americans in the Jim Crow South, including racially restrictive property covenants, segregation in public accommodations like restaurants and movie theaters, and discriminatory state and federal government practices.<sup>75</sup>

In the realm of voting, "[d]isenfranchisement was the rule for Natives for most of Alaska's history."<sup>76</sup> Early efforts to deny Alaska

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70. Tucker et al., *supra* note 66, at 334–35.

71. See generally ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA 3 (2002) ("[Before statehood,] [m]ost white settlers had little regard for Native traditions, including hunting and fishing for a living and governing themselves through ancient tribal systems, and took from Native Alaskans, proving little or nothing in return.") [hereinafter RACISM'S FRONTIER REPORT].

72. See, e.g., Landreth & Smith, *supra* note 46, at 88–89 (documenting the notable similarities in the mistreatment of Native Americans in the continental United States to that of Alaska Natives).

73. Tucker et al., *supra* note 66, at 329; see An Act Providing a Civil Government for Alaska, ch. 53, 23 Stat. 24 (1884).

74. Tucker et al., *supra* note 66, at 329; see also RACISM'S FRONTIER REPORT, *supra* note 71, at 3–4.

75. TUCKER, *supra* note 8, at 236.

76. *Id.* at 248.

Natives the right to vote were founded in restrictive citizenship laws.<sup>77</sup> Alaska's 1915 Territorial Act "[denied] Alaska Natives citizenship unless they could prove through individual examination that they had abandoned 'any tribal customs or relationship' and adopted 'the habits of a civilized life' - forcing Alaska Natives to choose between their culture and identity, and the right to vote."<sup>78</sup> Here again, these discriminatory requirements were eerily similar to those used to disenfranchise African Americans in the Jim Crow South, including subjective examinations by white local officials, requisite personal endorsements from a minimum number of white people, and convoluted procedural hoops.<sup>79</sup>

When the federal Indian Citizenship Act granted all Native Americans citizenship in 1924, the state found new ways to keep Alaska Natives from the ballot.<sup>80</sup> On the very first day of the 1925 legislative session, Alaska territorial legislators introduced a literacy test bill which the legislature quickly and overwhelmingly voted into law.<sup>81</sup> The discriminatory purpose of this literacy test was far from secretive: its supporters went as far as declaring in local newspapers that the law's "purpose was to 'prevent the mass voting of illiterate Indians' and that the test was an 'opportunity to keep the Indian in his place.'"<sup>82</sup>

By enacting an English literacy test in voter registration, the state legislature purposefully exploited the inherent connection between education and political participation.<sup>83</sup> From the start of its history as a U.S. territory, Alaska's education of its indigenous people was explicitly unequal.<sup>84</sup> Initially, the territorial government only took responsibility for educating white children, leaving the federal government, from a great distance, to establish school systems for Alaska Native children.<sup>85</sup> This

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77. *Id.* at 248-50.

78. Tucker et al., *supra* note 66, at 330.

79. See Landreth & Smith, *supra* note 46, at 90 (describing the numerous requirements for Alaska Natives seeking citizenship under the 1915 Territorial Act).

80. Indian Citizenship Act of June 2, 1925, Pub. L. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)); see TUCKER, *supra* note 8 **Error! Bookmark not defined.**, at 250 ("At long last, all of the first Americans in Alaska were recognized as U.S. citizens. However, the territorial and later the state government would erect other obstacles to the voting rights of Alaska Natives.").

81. TUCKER, *supra* note 8, at 251-53; Tucker et al., *supra* note 66, at 330.

82. Tucker et al., *supra* note 66, at 330 (citing Stephen W. Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 17, 21 (1986)).

83. See *id.*

84. Landreth & Smith, *supra* note 46, at 91; see generally TUCKER, *supra* note 8, at 238-48 (documenting historical disparities in Alaska Native education).

85. Landreth & Smith, *supra* note 46, at 91; TUCKER, *supra* note **Error! Bookmark not defined.**, at 238 ("The dual system was born under federal laws governing the territorial government, which Alaska subsequently used as an excuse to repudiate public schooling for Alaska Natives."); see Nelson Act of 1905,

segregation led to a dearth of rural schools near Alaska Native villages and the establishment of boarding schools for Alaska Native children, often forcing Alaska Native students to travel far from their communities – sometimes hundreds of miles away – to receive a secondary education.<sup>86</sup> Though different in geographic setting, Alaska Native schools shared a key similarity with African American schools in the Jim Crow South: They were separate and inherently unequal.<sup>87</sup>

Although Alaska's 1945 Anti-Discrimination Act facilitated *some* progress towards abating the discrimination of Alaska Natives, it far from remedied widespread disenfranchisement.<sup>88</sup> In fact, Alaska's longstanding literacy test in voter registration was enshrined within the state's original constitution in 1959 and not formally repealed until 1970, five years *after* the original Voting Rights Act.<sup>89</sup> Even then, it was removed due to mounting federal pressure rather than democratic sentiment at home.<sup>90</sup>

Even after the formal literacy requirement was removed, informal barriers remained. Abolishing literacy tests did nothing, for instance, to increase the *physical* access of Alaska Natives to registration and polling sites.<sup>91</sup> This logistical issue, common among many rural, isolated Native communities in the United States, is particularly salient in Alaska, where many indigenous communities are accessible exclusively by air or by boat, and are often unreachable for extended time periods due to unpredictable inclement weather conditions.<sup>92</sup> Even when Alaska Natives *could* make the arduous trek to a polling site, though, they were met with an equally formidable barrier: language.<sup>93</sup>

Without any access to written or oral translation into Native

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ch. 277, 33 Stat. 616 (1905) (formally establishing Alaska's segregated school system).

86. Landreth & Smith, *supra* note 46, at 92.

87. These severe educational disparities would continue well into the late twentieth century when the impactful Molly Hooch case secured remedial funding for secondary education in Alaska Native villages, and in many ways, still linger today. TUCKER, *supra* note 8, at 247–48.

88. See Anti-Discrimination Act, 1945, Alaska Sess. Laws ch. 1, 35; Landreth & Smith, *supra* note 46, at 93.

89. Landreth & Smith, *supra* note 46, at 91; TUCKER, *supra* note 8, at 254–56.

90. Landreth & Smith, *supra* note 46, at 91.

91. See Wolfley, *supra* note 63, at 281 (describing how geographic isolation often creates a barrier for Alaska Native voting).

92. *Id.*

93. See, e.g., Tucker et al., *supra* note 66, at 334–35 (“Physical separation of villages is compounded by language barriers among non-English speaking voters of the more than twenty indigenous languages spoken in Alaska. Native voters in six Alaska regions have limited-English proficiency (LEP) rates of at least nine percent among voting-age citizens, with as many as one-third of those eligible voters illiterate.”).

languages, ballot materials printed exclusively in English presented yet another voting barrier for Alaska Natives with limited English proficiency.<sup>94</sup> Finally, the deep intersection of race and class meant that “Alaska Natives still lagged far behind non-Natives in almost all aspects, including education, earnings, healthcare, and quality of life.”<sup>95</sup>

Approaching the final quarter of the twentieth century, these combined barriers perpetuated Alaska’s longstanding political exclusion of Alaska Natives. While the Voting Rights Act promised to remedy this wrong, this promise remains unfulfilled.<sup>96</sup>

## B. 1975 VRA Extension: Alaskan Non-Compliance

The 1975 extension of the VRA promised to expand the reach of the Act’s most fundamental principle: access. In response to the outcry of language minority Americans from San Antonio to Sitka, the 1975 VRA sought to eliminate the language barriers that kept citizens with limited English proficiency from participating in their local, state, and national government.<sup>97</sup> English-only election materials, Congress realized, was as “effective as a literacy test in keeping [language minorities] from registering to vote or casting an effective ballot.”<sup>98</sup>

Although Spanish-speakers played the most prominent role in the VRA’s 1975 expansion, the law also sought to fundamentally increase political access among indigenous communities. Alaska, South Dakota, and Arizona, for instance, are covered jurisdictions under the VRA because of, in part, their large Native populations.<sup>99</sup> In these jurisdictions, the VRA’s minority language provisions require the state to provide all electoral information, including “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, in the language of the applicable minority group as well as in the English language.”<sup>100</sup>

Despite the appearance of progress, for Alaska Natives there was a catch. Although the thrust of the language minority provisions mandate *written* translations for qualifying language minorities, the statute notes

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94. *Id.*

95. Landreth & Smith, *supra* note 46, at 93.

96. *See id.* at 94–95 (summarizing the purpose of the 1975 extension of the Voting Rights Act).

97. *Id.* at 94; *see* REILLY, *supra* note 41, at 18 (describing the process of the 1975 VRA extension).

98. Barry H. Weinberg & Lyn Utrecht, *Problems in America’s Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & C.R. L. REV. 401, 410 (2002).

99. Wolfley, *supra* note 63, at 268–69.

100. Voting Rights Act of 1965, amendments, Pub. L. No. 94-73, § 203(c), 89 Stat. 400, 403 (1975) (current version at 52 U.S.C. § 10303(f)(4) (2018)).

that “where the language of the applicable minority group is oral or unwritten or in the case of Alaska Natives, if the predominant language is *historically unwritten*, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”<sup>101</sup> In other words, if the minority language in question is deemed “historically unwritten,” the jurisdiction is exempt from providing written translations.<sup>102</sup>

The fact that Alaska Natives are explicitly named within this exemption is far from coincidence – Alaska’s congressional representatives played a direct role in its enactment.<sup>103</sup> Initially, several Alaskan representatives resisted efforts to include the state within the new language assistance requirements at all. These representatives claimed that no voting discrimination took place in Alaska, and therefore that the protection of Alaska Natives under the VRA would be burdensome and unnecessary.<sup>104</sup> When these efforts toward total exemption failed, Alaska Senator Ted Stevens tried another route: asserting “that written translations were unnecessary for what he called ‘historically unwritten’ languages.”<sup>105</sup> The resulting exemption, named the “Stevens Proviso,” made it into the statute without objection.<sup>106</sup>

This legislative history tends to suggest that Senator Stevens and other members of Alaska’s congressional delegation wanted Alaska to avoid language minority VRA coverage altogether, and enacted the “historically unwritten” exception in order to avoid the burden of mandatory written translations.<sup>107</sup> Regardless of intent, the “historically unwritten” exception has proven to be confoundingly vague because the phrase has never been precisely defined.<sup>108</sup> Adding to this ambiguity is the fact that “[a]lmost all . . . Alaska Native languages were at one time historically unwritten and, therefore, the exception would essentially swallow the rule.”<sup>109</sup>

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101. *Id.* (current version at 52 U.S.C. § 10503(c) (2018)) (emphasis added).

102. Landreth & Smith, *supra* note 46, at 99.

103. See Tucker et al., *supra* note 66, at 338–39 (documenting the pushback of Alaskan officials towards VRA inclusion); see also Landreth & Smith, *supra* note 46, at 99–100.

104. Landreth & Smith, *supra* note 46, at 99–100; see also TUCKER, *supra* note 8, at 256 (noting the congressional testimony of Alaska Senator Mike Gravel during the 1975 VRA expansion debates).

105. Tucker et al., *supra* note 66, at 338–39 (quoting 121 CONG. REC. 24,761 (1975)).

106. *Id.* at 339.

107. See Landreth & Smith, *supra* note 46, at 99–100.

108. See Tucker et al., *supra* note 66, at 338 (describing the vagueness of the “historically unwritten” statutory definition).

109. Landreth & Smith, *supra* note 46, at 117; see REILLY, *supra* note 41, at 41–42 (“Native Alaskan languages are traditionally oral in nature, but written forms

Through the Stevens Proviso's loophole and a general lack of state-level action or federal enforcement, Alaska has historically never fully complied with the language minority mandates of the Voting Rights Act.<sup>110</sup> Throughout its tenure, the Alaska Division of Elections (DOE) has done "little to provide complete, clear, and accurate translations of all voting materials and information to Native voters."<sup>111</sup> Up to and through the turn of the twentieth century, Alaska Natives did not have consistent access to written or orally translated election materials, and often lacked physical access to voter registration and polling sites due to the continued absence of state election officials in rural villages.<sup>112</sup> Hallmark characteristics of Alaska's VRA non-compliance include not accepting or investigating voter complaints, ignoring the law or treating it as a low priority, and attempting to shift legal responsibility onto others.<sup>113</sup> Accordingly, little changed in Alaska Native voting access and participation.<sup>114</sup> "In the 2008 Presidential Election," for instance, "turnout among Natives was just 47 percent, nearly 20 percent lower than the statewide turnout rate of 66 percent."<sup>115</sup> As decades passed with little progress, frustration begot litigation.<sup>116</sup> For Alaska Natives in the early 2000s, just as for African Americans in the mid-1960s, change could wait no longer.

### C. *Nick v. Bethel and Toyukak v. Mallott*

With over a quarter-century passed since the 1975 Voting Rights Act and little improvement to speak of, Alaska Natives took action: Alaska Native voters and tribes from Bethel, with the help of the Native American Rights Fund and the ACLU of Alaska, sued the state.<sup>117</sup> The

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were developed by missionaries in the late 1800s and early 1900s and revised in a university setting in the 1960s.").

110. See, e.g., Landreth & Smith, *supra* note 46, at 101, 110; Tucker et al., *supra* note 66, at 340; TUCKER, *supra* note 8, at 257; COMMITTEE REPORT, *supra* note 67 (all noting Alaska's historic non-compliance with the 1975 VRA).

111. Tucker et al., *supra* note 66, at 350.

112. See *id.* at 340-43, 351 (describing existing language and physical barriers to Alaska Native political participation due to 1975 VRA non-compliance); see also TUCKER, *supra* note 8, at 257 ("Natives continue to encounter English-only election practices that impose the very sort of English literacy tests or devices that the VRA was intended to eradicate.").

113. TUCKER, *supra* note 8, at 261-76.

114. Wolfley, *supra* note 63, at 270, 283; see also Landreth & Smith, *supra* note 46, at 17.

115. TUCKER, *supra* note 8, at 257.

116. See *infra* Part III-C.

117. See Tucker et al., *supra* note 66, at 352-53 (summarizing the *Bethel* litigation); *Nick v. Bethel*, No. 3:007-cv-00098, 2010 WL 4225563 (D. Alaska Jan. 13, 2010).

*Bethel* plaintiffs alleged that Alaska had violated numerous VRA provisions, including Section 203, by continuously failing to provide the Native community political access through the translation of voting information.<sup>118</sup> In response, the state attempted to shift blame to the Alaska Native community, pointed to its recent and meager efforts to develop a language assistance program, and invoked the Stevens Proviso's "historically unwritten" exception to deny any wrongdoing.<sup>119</sup>

The court agreed with the *Bethel* plaintiffs – Alaska was violating the VRA.<sup>120</sup> Accordingly, it ordered the state to enact several remedies for the upcoming 2008 elections, including deploying poll workers fluent in English and Yup'ik, hiring a Yup'ik language coordinator, and translating all pre-election publicity and information into Yup'ik.<sup>121</sup> A subsequent court order mandated that these and other remedies – such as a confirmation procedure for translators, the creation of a Yup'ik-English election glossary, and advance publication of translator services – remain in place for at least four years.<sup>122</sup> Although the *Bethel* order itself, by nature of party-specific litigation, technically applied only to the Bethel Census Area, most commentators believed that since Alaska's VRA violations were statewide, the remedies should also be applied expansively.<sup>123</sup>

The state, apparently, thought differently. Instead of applying the mandated *Bethel* remedies across other VRA jurisdictions in the state, Alaska implemented the changes exclusively within the Bethel Census Area.<sup>124</sup> This evasive maneuver quickly drew the attention and ire of the many Alaska Native communities located outside of the Bethel Census Area, who accordingly sued the state in 2013.<sup>125</sup> In *Toyukak v. Mallot*,<sup>126</sup> the plaintiffs pointed specifically to the state's Official Election Pamphlet, which was provided to every household with a registered voter weeks before an election exclusively in English, as illustrative evidence of the state's VRA non-compliance.<sup>127</sup> In response, Alaska again sought to duck and diminish the VRA's statutory requirements, asserting that it had

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118. COMMITTEE REPORT, *supra* note 67, at 18; *see Bethel*, 2010 WL 4225563.

119. Tucker et al., *supra* note 66, at 352–53.

120. *Id.* at 355–56.

121. *Id.* at 356.

122. Consent Decree And Settlement Agreement As To Plaintiffs And Bethel Defendants at 5–7, *Bethel*, 2010 WL 4225563, [https://www.acluak.org/sites/default/files/nick\\_v.\\_bethel\\_settlement.pdf](https://www.acluak.org/sites/default/files/nick_v._bethel_settlement.pdf).

123. *See* COMMITTEE REPORT, *supra* note 67, at 19 (“The remedies outlined in the settlement were meant to address the needs of all Yup'ik speaking populations, and all Native language speakers in general.”).

124. Tucker et al., *supra* note 66, at 358.

125. *Id.* at 359.

126. *Toyukak v. Mallot*, No. 3:13-cv-00137-SLG (D. Alaska July 22, 2013).

127. *See* Tucker et al., *supra* note 66, at 358–59 (describing the evidentiary importance of the Official Election Pamphlet in the *Toyukak* litigation).

already taken the few “reasonable steps” necessary for compliance.<sup>128</sup>

The court again agreed with the Alaska Native plaintiffs, holding that the state continued to violate the language minority provisions of the VRA.<sup>129</sup> This time, the court’s order left no doubt – it mandated extensive remedies such as increased pre-election resources, trained bilingual outreach workers in each village, and diligent record-keeping procedures in *all* Alaska census areas covered by the VRA.<sup>130</sup> Forty years after the VRA’s 1975 extension to language minorities, Alaska Native voters finally received the federal enforcement they needed to actualize their right to democratic participation.<sup>131</sup> The *Toyukak* Order, if faithfully implemented, could have transformed Alaska from widespread VRA noncompliance to “a model of best practices for language assistance.”<sup>132</sup> But although some notable improvements have been made since the Order, pervasive non-compliance and lingering disparities remain.<sup>133</sup>

#### D. Lingering Disparities

To be sure, Alaska has made progress; recent actions by the DOE and State government have inched Alaska closer to VRA compliance.<sup>134</sup> In 2014, for instance, Alaska Native voters gained access for the first time to early voting and translated ballot information.<sup>135</sup> By the 2016 elections, federal observers found bilingual poll workers available in sixteen out of the nineteen Native villages observed.<sup>136</sup> And today, the DOE’s website includes voting information in eleven different Alaska Native languages.<sup>137</sup>

But continuing disparities abound. First, unaddressed or inadequately addressed physical barriers to voting access resulting from the extreme remoteness of many Alaska Native communities functionally

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128. *Id.* at 360.

129. *Id.* at 372–74; COMMITTEE REPORT, *supra* note 67, at 20 (“On September 3, 2014, the federal court for the District of Alaska found that the State had again violated Section 203 of the VRA by failing to provide election materials in Yup’ik and Gwich’in . . .”).

130. Stipulated Judgement and Order, *Toyukak v. Mallott*, No. 3:13-cv-00137-SLG, 2015 WL 11120474 (D. Alaska Sept. 30, 2015); *see* COMMITTEE REPORT, *supra* note 67, at 21–22 (summarizing the *Toyukak* order remedies).

131. COMMITTEE REPORT, *supra* note 67, at 22.

132. Tucker et al., *supra* note 66, at 377.

133. *Id.* at 377–78.

134. *Id.* at 375.

135. *Id.*

136. *Id.* at 378.

137. *See, e.g., Yuut Qalarcaraitgun Ikayullrit (Yukon Yup’ik)*, ALASKA DIVISION OF ELECTIONS, <https://elections.alaska.gov/Core/yukonyupiklanding.php> (last visited Dec. 13, 2020).

disenfranchise Alaska Native voters.<sup>138</sup> To be fair, the State is faced with no easy task here. To fully contextualize these continued disparities, a comprehensive understanding of the true situation on the ground is needed. One example of 2004 election day procedures in the Yup'ik village of Kasigluk, located fifteen minutes from Bethel by air, usefully illustrates the scope of this challenge:

The local election officer makes an announcement through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. because that is when the officer is taking the single polling machine to the other side of the river. At 11:30, the local election official collects the materials, packs up the ballot machine and drives it by four-wheeler down to the river. The old village site, where some tribe members still reside, is on the other side of the river but there is no bridge, so the election officer loads the ballot machine and materials onto a boat and crosses over. When the weather is bad, this is no mean feat. The ballot machine is set up again at the school on the other side where the children recite the pledge of allegiance in Yup'ik. The principal makes an announcement on the radio that the ballot machine has arrived and the poll in Kasigluk is open. The DOE says there are about 150 communities like this one.<sup>139</sup>

While geographic remoteness is far from anomalous among rural Native American communities, the extent of the isolation seen here is uniquely Alaskan.<sup>140</sup>

Further, physical isolation begets technological isolation.<sup>141</sup> "Given the remote rural conditions on . . . Alaska Native villages, many tribes do not have the infrastructure for telecommunication services[,]” leading to a lack of “wireless connectivity, wireless providers, or basic wireline providers.”<sup>142</sup> Due to this digital divide, many Alaska Natives cannot complete basic tasks required for registration and voting in remote areas, such as downloading and printing online registration forms or accessing online election information.<sup>143</sup>

Finally, the remoteness of many Alaska Native communities, and subsequent lack of local registration and voting opportunities, often

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138. Tucker et al., *supra* note 66, at 334, 341–42.

139. Landreth & Smith, *supra* note 46, at 82–83.

140. *See id.* at 82 (“Thus, ‘rural’ in Alaska carries a unique meaning that provides important context for the voting issues detailed here.”).

141. *See* Wolfley, *supra* note 63, at 281–82 (describing how geographical remoteness contributes to technological isolation of Alaska Native villages).

142. *Id.* at 282.

143. *Id.*

forces residents to either travel far distances to register and vote or rely on mail-in registration and voting.<sup>144</sup> Considering that many Alaska Native villages are only accessible by boat or by air<sup>145</sup> and lack public transportation, traveling to a non-local registration or polling site is often logistically and financially untenable.<sup>146</sup> Where mail-in registration and voting is available, Native voters in remote communities often lack a traditional street address.<sup>147</sup> Accordingly, many have to rely on unreliable mail delivery (often due to long periods of unpredictable inclement weather)<sup>148</sup> to sometimes distant P.O. boxes in order to receive voting materials.<sup>149</sup> Each of these physical barriers – obstacles to in-person and mail-in voting, lack of internet access, and the difficulty of travel – individually present distinct disadvantages for rural Alaska Native voters. Cumulatively, they can render voting utterly impractical, if not nearly impossible, without further support.

Physical barriers aside, the government’s language discrimination persists. To date, Alaska remains plainly in violation of the Voting Rights Act through its inconsistent provision of translation services.<sup>150</sup> In the five years since the *Toyukak* Order, Alaska has not been able to provide fully equitable information access to Alaska Natives with limited English proficiency.<sup>151</sup> This lack of access spans from electoral start to finish: from pre-election logistical and substantive information to poll worker trainings and fully and accurately translated ballots, Alaska continues to fall short of full VRA compliance.<sup>152</sup>

A July 2019 report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights usefully documents these language-based shortcomings.<sup>153</sup> Among other findings, the Report revealed that Alaskan

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144. *Id.* at 281.

145. Tucker et al., *supra* note 66, at 334.

146. Wolfley, *supra* note 63, at 281; *see also* Ferguson-Bohnee, *supra* note 62 (“Registering to vote online or . . . voting itself, can be logistically challenging if not economically infeasible.”).

147. *See* Ferguson-Bohnee, *supra* note 62 (“While 84 percent of the U.S. population lives in urban areas, many Native Americans and Alaska Natives live in rural communities that lack residential addresses.”).

148. Tucker et al., *supra* note 66, at 334.

149. *See* Ferguson-Bohnee, *supra* note 62 (“Due to these poor conditions, the U.S. Postal Service does not deliver mail to the majority of reservation residents at their homes . . . . Some reservation residents have to travel up to 70 miles in one direction to receive mail.”).

150. Wolfley, *supra* note 63, at 283–84.

151. COMMITTEE REPORT, *supra* note 67, at 2–3 (summarizing the report’s findings regarding the implementation of the *Toyukak* Order).

152. *See* Tucker et al., *supra* note 66, at 378–79 (recounting documented examples of non-compliance).

153. *See* COMMITTEE REPORT, *supra* note 67, at 42–52 (outlining the Committee’s findings and recommendations applicable to federal agencies and state actors).

VRA shortcomings in the 2016 election included nearly forty percent of poll workers not receiving training, inadequate DOE reporting, inadequate staffing of bilingual poll workers, lack of available translated written materials in numerous polling locations, inadequate quality and usefulness of translated materials, and an inequitable distribution of election equipment among urban and rural polling stations.<sup>154</sup>

Further, the social inequalities faced by Alaska Natives continue to compound. Alaska Natives continue to “share many of the same disparities in education, income, employment, and general wellbeing as other racial minority voters as compared to [w]hite voters.”<sup>155</sup> In education, the insufficient number and quality of rural schools remains “closely connected to limited English proficiency.”<sup>156</sup> This opportunity gap perpetuates longstanding disparities in Alaska Native standardized test scores, reading comprehension, and graduation rates.<sup>157</sup> Relatedly, Alaska Natives continue to face disparate outcomes in unemployment, poverty rates, housing stability, health outcomes, and incarceration as compared to white Alaskans.<sup>158</sup> These compounding inequities, which each make voting increasingly difficult, are inseparably intertwined with continued Alaska Native disenfranchisement.<sup>159</sup> In order to make substantial progress in Alaska Native enfranchisement, then, these physical, language, educational, and economic disparities must each be comprehensively addressed.

#### IV. INCREASING ACCESS: POTENTIAL POLICY SOLUTIONS

Complex problems demand comprehensive solutions. Accordingly, the following are presented as potential remedies to Alaska’s historical disenfranchisement of its Native voters and longstanding violations of the Voting Rights Act. Although scholarship remains inherently untethered from the financial and logistical constraints of real and difficult change, these solutions can at least provide a target. As the saying goes,

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154. *Id.* at 42–45.

155. Wolfley, *supra* note 63, at 280.

156. Tucker et al., *supra* note 66, at 332.

157. *Id.* at 332–33; Landreth & Smith, *supra* note 46, at 108; RACISM’S FRONTIER REPORT, *supra* note 71, at 18–20.

158. See Landreth & Smith, *supra* note 46, at 87 (describing recent studies revealing disparities in Alaska Native outcomes across categories of employment, health, and housing).

159. See *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986) (“Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”).

“campaign in poetry, govern in prose.”<sup>160</sup>

### A. Addressing Attitudes: Hostility-Based vs. Cooperation-Based Approaches

Addressing attitudes is a foundational, if intangible, place to start. As partially documented above, the long tale of white American attitudes and actions towards Native Americans is one of near-constant discrimination and hostility.<sup>161</sup> Unfortunately, Alaska is no exception.<sup>162</sup> If the State government had abandoned its hostile posture towards Alaska Natives and sought to make amends after the 1924 Indian Citizenship Act, the 1945 Alaska Equal Rights Act, the 1975 Voting Rights Act, or even the 2010 *Bethel* litigation, perhaps disparities would have faded and active accommodation measures would no longer be necessary.

Instead, the hostility persists.<sup>163</sup> Even in modern times, “State election officials are reluctant to provide access to the franchise for Indian voters, and Indian voters cautiously participate in state and local elections.”<sup>164</sup> Alaska’s recent attempts to either wholly skirt or only imply comply with the VRA’s minority language requirements reveal the state’s continued resistance to doing the tough but vital work necessary to fully enfranchise Alaska Native voters.<sup>165</sup> Yes, doing so will bring significant financial and logistical burdens. But that burden, costly as it may be, is also the exact price of Alaska’s long-avoided compliance with the VRA

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160. Often attributed to former New York Governor Mario Cuomo. See Elizabeth Kolbert, *Postscript: Mario Cuomo (1932 – 2015)*, THE NEW YORKER (Jan. 2, 2015), <http://www.newyorker.com/news/news-desk/postscript-mario-cuomo>.

161. See *supra* Part II-A.

162. See *supra* Part III-A.

163. See, e.g., TUCKER, *supra* note 8, at 257 (“Alaska has proven to be a recalcitrant jurisdiction . . .”).

164. Wolfley, *supra* note 63, at 269–70.

165. This continued hostility is perhaps best expressed within the poignant expert testimony of Dan McCool during the *Toyukak* hearings:

“This enduring, multi-faceted conflict has generated bitter feelings and resentment; it is impossible to analyze this conflict and not conclude that purposeful discrimination is at work here. I do not believe any fair-minded, objective observer could examine the history of Alaska Natives and their relationship to the state government, and reach any other conclusion. Whether it is the delivery of educational resources or other services, or assistance in voting, each act of beneficence by the state toward Native people has been presaged by a federal law or court case that mandated such behavior. This could only be interpreted as purposeful behavior intended to reduce or minimize Native Alaskan voting.”

Expert Witness Report of Daniel McCool, *Toyukak v. Mallot et al.*, No. 3:13-cv-00137-SLG (D. Alaska dismissed Sept. 30, 2015), 2014 WL 10010111.

and much-needed realization of the statutory and constitutional rights of Alaska Natives. Only by approaching the issue with an attitude of acceptance, earnestness, and cooperation can Alaska begin to comprehensively remedy this historic wrong and, in doing so, perhaps earn the reciprocated trust of Alaska Native voters. To this end, Alaska-specific anti-racism training, official recognition of the breadth and depth of past injustices, and increased incorporation of input from Native communities and leaders through town hall or informal meetings could serve as valuable initial steps towards reconciliation. While these are just a few of many potential steps, the overarching goal remains steady: reconciling the severely damaged relationship between the state government and its Native communities so that true and lasting progress can follow.

### B. Limited Efficacy of “Universal” Solutions

Next, universal solutions cannot fully solve localized problems. Since the 1990s, the federal government has made several broad, generalized efforts to increase political participation by trying to remove barriers that may keep *all* voters from registering and casting a ballot.<sup>166</sup> For example, the National Voter Registration Act of 1993 sought to expand opportunities for easy registration,<sup>167</sup> and the Help America Vote Act of 2002 sought to improve voting procedures and administration.<sup>168</sup> At first glance, the universal nature of these initiatives can add to their theoretical appeal: “if we make voting easier for *everyone*,” the thought goes, “then *all* communities will benefit.”

In practice, though, the generality of these laws, like that of the race-neutral theories that guide them, is their downfall. While commendable in their aims and occasionally successful,<sup>169</sup> generalized neutral efforts fail to systemically address the historically race-specific problem of American disenfranchisement.<sup>170</sup> For communities of color generally, universal laws do not account for the structural racism that creates disparities in educational, economic, social, and political opportunities.<sup>171</sup> For Native Americans and Alaska Natives specifically, “universal laws fail to address the unique issues facing rural and isolated [tribal]

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166. See, e.g., National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 39 U.S.C. § 3629, 52 U.S.C. §§ 20501-20511 (2018)).

167. National Voter Registration Act of 1993 § 2, 52 U.S.C. § 20501 (2018).

168. Pub. L. No. 107-252, 116 Stat. 166 (2002).

169. The Help America Vote Act of 2002, for example, “has made funding available to many [VRA] covered jurisdictions to assist with providing material to voters with limited English proficiency.” REILLY, *supra* note 41, at 43.

170. Wolfley, *supra* note 63, at 284-86.

171. *Id.* at 284.

communities.”<sup>172</sup> Because only these communities of color have been historically and systematically denied their voting rights on account of racial disparities, generalized solutions that ignore this history inherently do not fully recognize – and therefore cannot fully address – the problem.<sup>173</sup>

Further, even generalized solutions that *do* attempt to address discrimination can lack the nuance necessary for ground-level progress.<sup>174</sup> For instance, efforts that might increase voting access for African American voters in North Carolina, such as expanded early voting, may not provide much aid to Alaska Natives in the Kasigluk community described previously, who face barriers to language access and physical access.<sup>175</sup> Because the nature of the challenges is often particular to the community, the solution must be just as specific. Accordingly, comprehensively improving Alaska Native voting access requires policies that are specifically targeted to address the particular racialized disparities of Alaska’s past. Some examples of these potential policies follow.

### C. Increasing Language Access

From second grade to space travel, meaningful participation requires adequate understanding. When it comes to enfranchising Alaska Native voters with limited English proficiency, this understanding is grounded in language access. The foundation of this access requirement plainly emerges from the text of the VRA’s 1975 Amendment itself: “Whenever any [covered jurisdiction] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”<sup>176</sup>

If this requirement is plain in meaning, it is messy in practice. In Alaska, the state with the largest percentage of Native voters in the nation<sup>177</sup> and where numerous unique Native tribes speak vastly different languages,<sup>178</sup> this requires full translation services from registration to

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172. *Id.* at 285.

173. *Id.* at 284–86.

174. *See id.* at 286 (noting that universal remedies do not “address the differences in race discrimination among various groups and places”).

175. *See supra* Part III-D.

176. Act to Amend Voting Rights Act of 1965 of 1975 § 301, 52 U.S.C. § 10503(c) (2018).

177. COMMITTEE REPORT, *supra* note 67, at 15.

178. *See Tucker et. al., supra* note 66, at 334–35 (noting the “more than twenty indigenous languages spoken in Alaska”).

ballot-casting. In order to achieve full VRA compliance, these services must include: pre-election substantive information (like Official Election Pamphlets) and logistical announcements; adequately trained polling translators at each polling site; and translated sample ballots and actual ballots, among others.<sup>179</sup> Further, since almost all Alaska Native languages today are written, full enfranchisement would also require written translations for languages that previously were predominantly oral.<sup>180</sup> Finally, scholars have suggested that trained state and federal observers, working in collaboration with “an advisory committee[] comprised of a diverse tribal membership,” should monitor and assess current practices, and recommend adjustments accordingly.<sup>181</sup>

Outside of the statutory requirements of the VRA, Alaskan education reform is also inherently connected to progress here. Lingering disparities in educational access and funding, and the longstanding inequitable outcomes they reproduce, serve as functional restrictions on Alaska Native voting access.<sup>182</sup> If Alaska is to meaningfully increase the political participation of its indigenous people, it must increase the number and quality of rural schools and fund these schools more equitably.<sup>183</sup> Although the *Molly Hooch* settlement and subsequent Alaskan education cases have brought needed attention and additional funding to Alaska Native education, severe disparities in literacy, academic achievement, and graduation rates remain.<sup>184</sup> So long as they do, they will continue to impair Alaska Natives from fully accessing and exercising their right to vote.<sup>185</sup>

#### D. Increasing Physical Access

In order to cast any ballots, translated or not, Alaska Natives need to be able to first get to the polls. Accordingly, increasing physical access must go hand in hand with language access in order to improve Alaska Native enfranchisement. Physical access must begin with reliable registration and polling opportunities in every Native community,

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179. See, e.g., Wolfley, *supra* note 63, at 301-02 (describing necessary voter education services to reach VRA compliance); Landreth & Smith, *supra* note 46, at 119 (noting where Alaska Natives want and need translation assistance).

180. Landreth & Smith, *supra* note 46, at 118.

181. Wolfley, *supra* note 63, at 298; see also COMMITTEE REPORT, *supra* note 67, at 51 (recommending that federal observers continue to monitor state elections even after the *Toyukak* Order expires).

182. Landreth & Smith, *supra* note 46, at 107-08.

183. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 69 (1986) (noting the inherent link between inferior education and meaningful political participation).

184. Tucker, *supra* note 8, at 248; Landreth & Smith, *supra* note 46, at 92-93.

185. See Tucker et al., *supra* note 66, at 332-33 (noting the inherent connection between education, literacy, and voting).

especially remote, rural ones.<sup>186</sup> Because many Alaska Natives lack the financial and logistical means of travelling to far-away polling places, the polling places must come to them.<sup>187</sup> Importantly, the policies and procedures of these remote, rural registration and polling stations must mirror those of urban communities as much as practicable. For example, the amount and quality of physical election equipment (polling site signage, ballot boxes, etc.) should be distributed equitably between rural and urban communities, and the actual procedures used for ballot-casting should remain consistent across the state.<sup>188</sup> To provide formal, private voting practices in certain communities and slipshod, junior-varsity ones in others, after all, would only perpetuate existing disparities.<sup>189</sup>

Next, early voting opportunities should be expanded in Native communities as part of a broader hybrid voting system.<sup>190</sup> Such a system would include a robust menu of voting options including early voting, absentee voting, election day voting, and voting by mail, in order to allow Alaska Native communities and voters to best calibrate their own voting rights toward their specific and unique language and logistical needs.<sup>191</sup> To bridge the existing digital divide, internet access must be brought more broadly and reliably to Native villages to allow voters to access online election information and participate in potential online voting systems.<sup>192</sup> Finally, if vote-by-mail systems are employed, they must diligently account for Alaska Native voters who lack traditional street addresses and for whom postal service is frequently delayed – especially if mail-in voting is more heavily relied upon to ensure voter safety in the wake of the COVID-19 pandemic.<sup>193</sup>

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186. See COMMITTEE REPORT, *supra* note 67, at 45 (noting “an unequal distribution of election equipment among urban and rural polling stations”).

187. See Wolfley, *supra* note 63, at 281 (describing the financial and logistical barrier to Native travel to distant polling places).

188. See COMMITTEE REPORT, *supra* note 67, at 45 (documenting “concern that equipment lacked privacy and was inadequate to serve rural voters”).

189. See *id.* (describing existing inequities between rural and urban voting).

190. *Id.* at 51.

191. See *id.* (noting that the goal of the hybrid system would be “to avoid voter disenfranchisement”).

192. See Wolfley, *supra* note 63, at 281–82 (noting existing disparities in internet access in Alaska Native communities).

193. See Ferguson-Bohnee, *supra* note 62 (describing the difficulties of accessing vote-by-mail systems for Native Americans who lack traditional street addresses, particularly those on reservations); see, e.g., Vianney Gomez & Bradley Jones, *As COVID-19 Cases Increase, Most Americans Support ‘No Excuse’ Absentee Voting*, PEW RES. CTR. (July 20, 2020), <https://www.pewresearch.org/fact-tank/2020/07/20/as-covid-19-cases-increase-most-americans-support-no-excuse-absentee-voting/> (noting many states are reexamining policies for access to absentee and early voting in light of pandemic); James Brooks, *Alaskans’ interest in voting by mail has never been higher*, ANCHORAGE DAILY NEWS (Sept. 7, 2020),

### E. Addressing Legal and Socioeconomic Factors

Finally, the intersectionality of the solution must match that of the problem. Success in remedying existing disparities will therefore require several diverse solutions moving in strategic, collaborative synchronicity. Legally speaking, additional state and federal legislation can supplement the VRA by specifically targeting Native enfranchisement.<sup>194</sup> Ideally, such legislation would be heavily guided by the impacted Native communities themselves and facilitate their increased participation and leadership within the statutory process. For instance, federal legislation could include a “preclearance provision requiring . . . states to submit election law revisions or new laws directly to Indian tribes and Alaska Native governments for review and comment.”<sup>195</sup>

Congress need not look far for potential legislative solutions: as of the publication of this Note, the Native American Voting Rights Act of 2019, introduced by Representative Ben Ray Luján of New Mexico, currently sits in subcommittee.<sup>196</sup> Enacting this bill could work wonders for Native enfranchisement. It expressly recognizes and seeks to remedy the unique geographic and language barriers that impede Native political participation, as well as “second-generation” barriers like vote dilution that historically and presently impact other communities of color.<sup>197</sup> Federal legislation and enforcement could be especially effective here, since it is federal departments and agencies that are historically responsible for protecting Native American and tribal interests.<sup>198</sup>

Following in these federal footsteps, Alaska should take state-level action to recognize and address these specific disparities. For instance, the state could increase appropriations to the Division of Elections with the specific intent of ensuring state compliance with the VRA and the *Toyukak* Order, and enact state statutes guided by Title VI of the Civil Rights Act in order to facilitate greater language translation services for voters with limited English proficiency.<sup>199</sup>

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<https://www.adn.com/politics/2020/09/07/alaskans-interest-in-voting-by-mail-has-never-been-higher-heres-a-guide-to-voting-in-the-november-election/>.

194. See Wolfley, *supra* note 63, at 288–91 (suggesting “measures or laws that are specifically directed at the problems of race discrimination in voting”).

195. *Id.* at 289.

196. H.R. 1694, 116th Cong. (2019).

197. *Id.*

198. Wolfley, *supra* note 63, at 290.

199. COMMITTEE REPORT, *supra* note 67, at 51–52.

But this problem is not just legal.<sup>200</sup> To effect broader progress, systemic causes must be addressed. Meaningfully and permanently improving Alaska Native political participation requires addressing the numerous and vast socioeconomic disparities that Alaska Natives face.<sup>201</sup> With improved access to adequate education, employment, housing, and healthcare, Alaska Natives will correspondingly enjoy clearer and more pragmatic paths to the ballot.<sup>202</sup>

These solutions will be individually arduous, and collectively unprecedented. While free and easy to write about, they are costly and burdensome to implement. There is no doubt—improving voting access for Alaska Native communities has required, and will continue to require, monumental efforts from state and local officials and community leaders. Moreover, these financial and logistical burdens will not be lessened or lifted once equal voting access is achieved; new systems of access will require constant maintenance, oversight, and improvement. Importantly, though, the alternative—continued non-compliance with the VRA and disproportionate disenfranchisement of Alaska Native voters—is legally and morally unacceptable. The burdens will be many, but they are wholly necessary for the establishment and maintenance of a true and equitable Alaskan democracy. Profound injustices demand profound remedies.

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200. See generally RACISM'S FRONTIER REPORT, *supra* note 71 (summarizing historical and present educational, economic, and legal racial disparities in Alaska).

201. Wolfley, *supra* note 63, at 280–81 (describing modern socioeconomic disparities faced by Alaska Natives).

202. See Ferguson-Bohnee, *supra* note 62 (“Isolating conditions such as . . . socioeconomic disparities . . . limit Native American political participation.”).

## V. CONCLUSION

The history of Alaska Native voting access is an important feature within the broader landscape of American democracy. Like a fractal within a kaleidoscope, it is both a piece and a reflection of the whole. It tells a yet-unfinished story of oppression and discrimination, resistance and struggle, and, recently, important progress.

And it matters deeply. In democracy, voting is “Civil Right No. 1.”<sup>203</sup> As the U.S. Supreme Court has acknowledged, it is “preservative of all rights,” and represents not just individual expression, but participation, and thus belief, in a greater whole.<sup>204</sup> To unduly deny this right to *anyone* is unjust; to systematically deny it to our land’s original citizens is a uniquely American irony.

But progress beckons. Just like African Americans before them, Alaska Natives will continue to advocate for change. Just like Latinx and Native Americans before them, Alaska Natives will continue to dismantle barriers to access. And just like marginalized communities before and beside them, Alaska Natives shall overcome.

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203. Martin Luther King, Jr., *supra* note 4.

204. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).