

TOWARDS BETTER LOCAL GOVERNANCE IN ALASKA'S UNORGANIZED BOROUGH

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ABSTRACT

Alaska's unorganized borough is the only unincorporated county-equivalent area in the entire United States, but the Alaska Constitution never envisioned that would be the case. The framers of the Alaska Constitution drafted a revolutionary article on local government that prioritized localism – participation in local government – to further democratic engagement in the state. Recognizing that much of rural Alaska lacked the population and infrastructure to support incorporated and localized self-governance in the 1950s, the framers opted not to automatically incorporate the entire state under various borough governments. Even so, the framers made clear that the state was to play an active role in encouraging (and even compelling) the incorporation of rural sections of the state as time progressed.

Today, many sections of the Alaska's unorganized borough eligible for incorporation remain unincorporated, resulting in a number of adverse governance outcomes for rural and urban communities alike. This Note argues that Alaska maintains a positive obligation to incorporate eligible sections of the unorganized borough and that its failure to do so is unconstitutional under the state Constitution. Acknowledging the potential dangers of imposing local government on non-consenting citizens, this Note also articulates why borough governance may further the Alaska Constitution's localism mandate by developing the regional political communities envisioned by the framers.

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I. INTRODUCTION

When Alaska joined the Union in 1959, its constitutional framers believed that they had developed a revolutionary local government framework.¹ They realized that American counties, cities, and towns had become vestiges of a bygone era, incapable of responding to the expanding service needs of the country's growing metropolitan population.² The framers instead placed the keys of local government in the hands of the localities they served, wresting local control away from the state and federal governments.³ Rather than allow state authorities to make local decisions from the top-down, the framers decided that creating locally accountable, general purpose local governments would foster more robust democracy in Alaska.⁴

The Alaska Constitution demonstrates the framers' unwavering commitment to localism—greater local control over governance⁵--as a means of encouraging democratic participation. The Alaska Constitution codified the framers' novel view of local governance by ensuring "maximum local self-government with a minimum of local government units . . ."⁶ This clause demonstrated localism's centrality to Alaska democratic spirit as much as it responded to a countervailing revolution in American local governance: the spread of myriad overlapping special

1. THOMAS A. MOREHOUSE & VICTOR FISCHER, *BOROUGH GOVERNMENT IN ALASKA* 3 (1971). This Note sometimes uses the works of Alaska government scholars Thomas Morehouse and Victor Fischer as proxies for primary sources regarding the framers' intent and the historical context surrounding the Alaska Constitution. Alaska courts often refer to the scholars' research when construing the state constitution, especially that of Fischer, a former delegate to the Alaska Constitutional Convention. *See, e.g.,* *Keane v. Local Boundary Comm'n*, 893 P.3d 1239, 1242 n.3, 1243 n.6, 1244 n.7 (Alaska 1995) (citing Morehouse and Fischer as authority while discussing the purpose and intent of Article X, Sections 1 and 5); *Forrer v. State*, 471 P.3d 569, 574 n.20 (Alaska 2020) (citing Fischer's work on the Alaska Constitutional Convention).

2. MOREHOUSE & FISCHER, *supra* note 1, at 4.

3. *Id.* at 3; *see also* Kevin C. Ritchie, *Alaska's Local Government System, Public Policies, and State-Local Power Dynamics*, in *ALASKA POLITICS AND PUBLIC POLICY: THE DYNAMICS OF BELIEFS, INSTITUTIONS, PERSONALITIES, AND POWER* 629, 631 (Clive S. Thomas et al. eds., 2016) ("[R]eliance on [local self-government] reflected and continues to reflect the general antipathy toward 'distant governments,' particularly the federal government, but also territorial, and the later state, government.").

4. *See* Ritchie, *supra* note 3, at 636 ("[T]he founders were very concerned . . . with involving the public in decisions about their local government, its powers, and its development.").

5. *See generally* Richard Briffault, *Our Localism: Part I - The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (discussing localism and its place within federal and state law).

6. ALASKA CONST. art. X, § 1.

purpose districts with limited functions.⁷ The framers aimed to provide maximum local control to tightly knit regional polities,⁸ but the limited local accountability of special purpose districts⁹ threatened that revolutionary view.

To maintain resilient local control, the Alaska framers developed a new form of general purpose local government: the borough.¹⁰ A borough would operate in the space between the state and its various cities, much like the traditional American county.¹¹ Counties, though, were generally viewed as districts for state and federal service provision,¹² so the framers fashioned Alaska's county alternative to strengthen local control.¹³ To further the flexibility of boroughs, they are designated as either organized or unorganized.¹⁴ Organized boroughs, run by a borough assembly of locally elected government officials,¹⁵ operate as fully-fledged incorporated municipal corporations—colloquially known as local

7. MOREHOUSE & FISCHER, *supra* note 1, at 4; *see also* Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 310–12 (2005) (situating the creation of Article X within the larger national debate over the proper division of state and local authority). Special service districts had the potential to bear little-to-no accountability to the general local voter base because special purpose districts are not required to abide by the federal constitution's one-person, one-vote rule. *See generally* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (holding the one-person, one-vote rule inapplicable to specialized local government institutions with limited jurisdiction); *see also* *Avery v. Midland Cnty.*, 390 U.S. 1114 (1968) (extending the Fourteenth Amendment's one-person, one-vote requirement to elections for general purpose local government institutions). In fact, because *Salyer* and *Avery* would not be decided until around a decade following Alaska statehood, the framers' revolutionary view of local accountability arose in an era when commentators still debated the merits of applying federal constitutional principles, such as one-person, one-vote, to local governments. Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 339 (1993); *see also* Schwaiger, *supra* note 7, at 311 (noting that debates over the proper division of state and local authority reached the national level in the 1950s in light of the U.S. Supreme Court's ruling in *Brown v. Board of Education*).

8. *See infra* Sections II.B.ii and II.C.ii for discussion of the framers' intent.

9. *See* Briffault, *supra* note 7, at 368 (explaining that special districts are not required to abide by the constitutional rules of universal adult suffrage and equal representation).

10. MOREHOUSE & FISCHER, *supra* note 1, at 5, 6.

11. *Id.*

12. *See* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1140–41 (2008) (detailing unique features of county governments that distinguish them from other traditional forms of local government); *see also* Briffault, *supra* note 5, at 73 n.309 (distinguishing counties from other municipal governments because of their historical role as administrative arms of the state).

13. MOREHOUSE & FISCHER, *supra* note 1, at 5.

14. ALASKA CONST. art. X, § 3.

15. *Id.* at 2.

governments.¹⁶ They provide generalized basic government services, such as schooling, policing, land use management, and health services.¹⁷

By contrast, the unorganized borough is unincorporated, meaning that it is not a government at all.¹⁸ It does not provide any services whatsoever; instead, it merely operates as an arm of the state designated for state-level government service provision.¹⁹ Yet, around ten percent of Alaskans live in the unorganized borough, and it covers fifty percent of the state geographically.²⁰ In fact, the unorganized borough is the only unincorporated county-equivalent area in the entire United States.²¹

The unorganized borough's unincorporated status was never intended to be permanent. The framers hoped that unorganized boroughs would incorporate and transition towards full-fledged governments to meet the demands of developing populations, economies, and institutions.²²

Unfortunately, the local government system envisioned by the Alaska Constitution is simply not the one that has developed.²³ In practice, Alaska has fostered two systems of local government--one urban and one rural.²⁴ In the absence of borough government, hundreds of local government institutions have proliferated throughout the unorganized borough.²⁵ As early as 1981, a government study concluded that the unorganized borough system not only failed to provide rural

16. See MOREHOUSE & FISCHER, *supra* note 1, at 40 ("Unlike the organized borough, legally a municipal corporation, unorganized boroughs were regarded as instrumentalities of the state."); see also Briffault, *supra* note 5, at 73 ("Municipal corporations--variously known as cities, boroughs, towns or villages--are general purpose governments . . .").

17. See NAT'L ASS'N OF COUNTIES, COUNTY GOVERNMENT OVERVIEW: ALASKA 3-5 (2022) (providing a breakdown of the services offered by boroughs).

18. LOCAL BOUNDARY COMM'N, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., LOCAL GOVERNMENT IN ALASKA 11 (2015) [hereinafter LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA].

19. See Ritchie, *supra* note 3, at 635 ("[The unorganized borough] was intended to be the first level of local government evolution, during which the borough would be a state operated and funded public service district.").

20. *Id.* at 2.

21. Ken Jennings, *13 Percent of Alaskans Live in No-Man's Land*, CONDE NAST TRAVELER (Feb. 1, 2016), <https://www.cntraveler.com/stories/2016-02-01/13-percent-of-alaskans-live-in-no-mans-land>.

22. MOREHOUSE & FISCHER, *supra* note 1, at 39.

23. Gordon S. Harrison & Clive S. Thomas, *Alaska's Constitution: Shaping the Foundations and Development of Politics, Government, and Public Policy*, in ALASKA POLITICS AND PUBLIC POLICY: THE DYNAMICS OF BELIEFS, INSTITUTIONS, PERSONALITIES, AND POWER 113, 129 (Clive S. Thomas et al. eds., 2016).

24. See GERALD A. MCBEATH & THOMAS A. MOREHOUSE, ALASKA POLITICS AND GOVERNMENT 255-56 (1994) (outlining the development of Alaska's dual local government system and the consequences for rural residents).

25. *Id.* at 256.

residents with effective services, but that it also *increased* rural reliance on state government.²⁶ In recent years, the state has considered rolling back service spending to resolve Alaska's fiscal downturn, exacerbating this strained dynamic and threatening to compound Alaska's rural governance challenges.²⁷ Residents of the unorganized borough already face inadequate local government service offerings.²⁸ For many small villages, city government institutions lack sufficient resources and funding to meet the demands of community members.²⁹ Unless Alaskans begin to rethink local governance in the unorganized borough, they could risk furthering the widespread political disaffection in rural communities,³⁰ which some scholars have attributed to lack of meaningful

26. Ritchie, *supra* note 3, at 644 (citing DEP'T OF CMTY. AND REG'L AFFS., PROBLEMS AND POSSIBILITIES FOR SERVICE DELIVERY AND GOVERNMENT IN THE ALASKA UNORGANIZED BOROUGH 26–41 (1981)).

27. See James Brooks, *Anchorage Senator Proposes New Spending Cap, Key Piece of Alaska Fiscal Plan*, ALASKA BEACON (Jan. 31, 2023, 6:00 A.M.), <https://alaskabeacon.com/2023/01/31/anchorage-senator-proposes-new-spending-cap-key-piece-of-alaska-fiscal-plan/> (reporting on bipartisan support for a new government spending cap that would restrict spending on government services, despite calls for increased need for spending on services, such as public education).

28. See, e.g., Kyle Hopkins, *Lawless: One in Three Alaska Villages Have No Local Police*, ANCHORAGE DAILY NEWS (May 17, 2019), <https://www.adn.com/alaska-news/lawless/2019/05/16/lawless-one-in-three-alaska-villages-have-no-local-police/> (reporting on Alaska's systemic lack of local law enforcement officers in rural villages, many of which are located within the unorganized borough); Hayden Godfrey & Audrey Hill, *Infrastructure Law Gives Hope for Villages Without Running Water*, NOME NUGGET (Jan. 5, 2023, 7:09 P.M.), <http://www.nomenugget.com/news/infrastructure-law-gives-hope-villages-without-running-water> (detailing a 2021 federal infrastructure bill which could finally provide running water to thirty rural Alaska villages, including Stebbins, a city located within the unorganized borough).

29. See MCBEATH & MOREHOUSE, *supra* note 24, at 256 (“Most rural organizations [exercising governmental or quasi-governmental powers] are weak, poorly managed, and underfinanced.”). Inadequate local government resources is only one of the many causal factors for poor governance outcomes. Rural Alaskans rely substantially on state and federal funding and services to support their local economies. Lee Huskey, *Alaska's Village Economies*, 24 J. LAND RES. & ENV'T L. 435, 448 (2004). Further, service provision can be more difficult given the relative isolation of rural cities and the absence of navigable connecting thoroughways. See *Alaska*, RURAL.GOV, <https://www.rural.gov/community-networks/ak> (last visited Nov. 1, 2023) (explaining that due to isolation of rural Alaska cities, access to goods and services is extremely limited).

30. See, e.g., Yareth Rosen, *Alaska's Majority-Native Districts Had Uneven Voter Turnout in 2020, Analysis Finds*, KTOO (June 20, 2022), <https://www.ktoo.org/2022/06/20/2020-voter-turnout-alaskas-majority-native-districts/> (reporting that some tribal leaders postulate that low voter turnout in some rural communities reflects questions over whether their vote really matters); Emily Cochrane & Mark Walker, *Indigenous Voters, Gaining Influence, Look to Mobilize*, N.Y. TIMES (Nov. 6, 2022), <https://www.nytimes.com/2022/11/06/us/politics/indigenous-voters->

avenues for rural participation in local government institutions.³¹

The Alaska agency in charge of city and borough incorporation, the Local Boundary Commission (LBC), has repeatedly stressed the need for further incorporation to solve the problems of local governance in rural Alaska.³² However, its recommendations have fallen on the deaf ears of legislators, and the Commission has begun to transition away from actively pursuing incorporation.³³ Without the state's encouragement, further incorporation is unlikely, as unorganized borough residents' unique tax status disincentivizes incorporation.³⁴ Many unorganized borough residents receive certain services—mainly public schooling—for free, paid for by taxes collected from Alaskans living in organized boroughs.³⁵

This Note clarifies that the Alaska Constitution obligates the state, rather than local residents, to incorporate sections of the unorganized borough and argues that the present unorganized borough system is unconstitutional. Further, this Note contends that, in addition to ensuring fidelity to the framers' intent, incorporation would strengthen the voice

influence.html (“[Ryen Aavurauq Richards, who is Inupiaq.] once felt disconnected from the political process because to her the outcome of races in Alaska appeared predetermined.”).

31. See, e.g., Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 838, 842 (2021) (attributing the political disaffection in rural American communities to lack of meaningful local government participation).

32. See, e.g., LOCAL BOUNDARY COMM'N, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., UNORGANIZED AREAS OF ALASKA THAT MEET BOROUGH INCORPORATION STANDARDS 32 (2003) (advocating for incorporation of eligible model boroughs) [hereinafter, LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS].

33. Virtual Video Interview with Jedediah Smith, Local Gov't Specialist, Local Boundary Comm'n, Alaska Dep't of Com., Cmty., & Econ. Dev. (Feb. 24, 2023) [hereinafter Interview with Jedediah Smith, Local Gov't Specialist, Local Boundary Comm'n].

34. See *infra* Section III for a more fulsome discussion of Alaskan citizens' views on further incorporation of the unorganized borough.

35. See *infra* Section I.B for discussion of the unorganized borough contribution exemption to local schooling. Although still a lively political issue, the Alaska Supreme Court has upheld the constitutionality of this taxing scheme on two occasions. See generally *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391 (Alaska 1997) (upholding the constitutionality of the REAA local contribution exemption from equal protection challenge); *State v. Ketchikan Gateway Borough*, 366 P.3d 86 (Alaska 2016) (upholding organized boroughs' local contribution requirement from a dedicated funds clause challenge). *But see id.* at 103–05 (Winfrey, J., concurring) (suggesting that the local contribution requirement may violate the Alaska Constitution's taxation provisions). Although *Ketchikan* concerned organized boroughs' local contribution requirement—as opposed to REAAs' exemption from that requirement—the litigation was spurred by perceived taxation inequities between organized borough school districts and REAAs. Kate Wheelock, Note, *The Future of Challenges to the Alaska Public School Funding Scheme After State v. Ketchikan*, 34 ALASKA L. REV. 111, 112–13 (2017).

of rural Alaskans and better allocate rural government services by promoting localism in the state and creating regional political communities.

Part II of this Note outlines Alaska's current constitutional and statutory framework for local governance and details the incorporation process. Part III makes the case that the current unified unorganized borough is unconstitutional under the Alaska Constitution and that the only appropriate remedy is further incorporation mandated by the state. Finally, Part IV asserts that further incorporation could lead to better local governance in the unorganized borough. It discusses borough government's impact on the political voice of rural residents and details why boroughs may be better suited to provide services to rural communities.

II. ALASKA'S LOCAL GOVERNMENT SYSTEM AND THE INCORPORATION PROCESS

A. General Purpose Local Government Institutions in Alaska

Concerned with democratic accountability, the framers of the Alaska Constitution opted to consolidate all government functions under general purpose governments,³⁶ as opposed to the special purpose districts employed by other states.³⁷ The Alaska Constitution accordingly has a strong preference for general purpose local governments like cities and organized boroughs.³⁸ "Cities" in Alaska may range dramatically in population, but they operate much like the city, town, or village

36. See *infra* Sections III.B.ii and II.C.ii for discussion of the framers' intent.

37. For various reasons, most states employ at least some special districts, which provide one or two discrete services to a specified geographic area. Briffault, *supra* note 5, at 73 n.308. Despite their litany of service offerings, all special districts operate under the same "proprietary" model. See Briffault, *supra* note 7, at 359-60 (arguing the U.S. Supreme Court has tried to delineate between general purpose governments and special districts based upon whether the local government provides "proprietary" services). Although special districts may be best suited to provide certain services efficiently, some commentators have criticized them for their lack of democratic accountability. See, e.g., Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth About Special Districts*, 75 *FORDHAM L. REV.* 3041, 3053, 3056-57 (2007) (arguing that special districts lack public accountability because citizens often fail to vote in special district elections and even where they do, special districts can limit the eligible franchise); Briffault, *supra* note 7, 419-24 (concluding that the courts should stop attempting to delineate between local governments based on functions because of the intermixing and overlapping of services between special and general purpose local governments).

38. See ALASKA CONST. art. X, § 2 ("All local government powers shall be vested in boroughs and cities.").

governments elsewhere in the United States by providing a wide range of services to a relatively compact geographic area.³⁹ By contrast, boroughs—similar to traditional counties—provide area-wide services to the entire borough or area-based services to areas that fall outside of city authority.⁴⁰

To the limited extent that Alaska law permits special purpose local government units, they may not be used in place of organized city or borough government.⁴¹ Any existing independent specialized local governments are brought within the purview of a borough upon borough incorporation.⁴² Similarly, a borough may not create a special service area if the service could be provided by incorporating a city.⁴³

1. *Cities*

The state legislature has provided for three “classes” of cities.⁴⁴ Each class—ranging from home-rule jurisdictions to second-class general law jurisdictions—differ with respect to their authority to pass local legislation.⁴⁵ Home-rule cities possess the most robust lawmaking authority. Unlike general law jurisdictions, which derive their lawmaking authority from legislative delegation,⁴⁶ home-rule jurisdictions may, without delegation, pass any law not otherwise prohibited by state law.⁴⁷

Because home-rule jurisdictions possess more robust lawmaking powers, the types of services offered by cities in Alaska differ depending on their class. Additionally, Alaska law only imposes a service obligation on home-rule and first-class cities located in the unorganized borough.⁴⁸

39. ALASKA MUN. LEAGUE, ALASKA’S LOCAL GOVERNMENT: STATE COMMITMENTS, LOCAL ROLES AND RESPONSIBILITIES 7 (2021) [hereinafter ALASKA MUN. LEAGUE, ALASKA’S LOCAL GOVERNMENT].

40. *Id.* at 4.

41. ALASKA CONST. art. X, § 5 (“Service areas to provide special services within an organized borough may be established A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city.”); *see also id.* § 15 (“Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law.”).

42. *Id.*

43. *Id.* § 5.

44. LOCAL BOUNDARY COMM’N, LOCAL GOVERNMENT IN ALASKA, *supra* note 17, at 3.

45. *See id.* at 6–10 (describing the legislative authority of general law and home-rule jurisdictions).

46. ALASKA MUN. LEAGUE, ALASKA’S LOCAL GOVERNMENT, *supra* note 39, at 2.

47. *See* ALASKA STAT. § 29.04.010 (2022) (“A home rule municipality has all legislative powers not prohibited by law or charter.”).

48. Unless state law says otherwise, no American municipal government is obligated to provide any particular service, and municipal governments maintain broad discretion to selectively offer or deny certain services. RICHARD BRIFFAULT, ET. AL, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 984 (9th ed.

They are obligated to operate school districts and regulate land use within their territories.⁴⁹ By contrast, second-class cities in the unorganized borough (or cities of any class in an organized borough) are under no legal obligation to provide any particular local service.⁵⁰

Most cities in the unorganized borough lack the funding and resources to provide critical local services.⁵¹ Due to their extremely small populations,⁵² most rural cities lack the money and skilled government employees needed to provide for their communities.⁵³ They may also often lack the tax bases necessary to support meaningful economic development.⁵⁴ In fact, only nine cities in the unorganized borough even collect property taxes.⁵⁵ Lack of funding is especially notable in second-class cities, which account for eighty of the total ninety-five cities in the unorganized borough.⁵⁶ Given the general lack of rural funding for required government services, it is unsurprising that a number of communities in the unorganized borough large enough for city governance have refused to incorporate.⁵⁷

2. Boroughs

The Alaska constitutional framers designed boroughs to be a unique form of government that could provide differing services depending on the needs of each locality.⁵⁸ In urban localities, where service needs could be primarily met by a general purpose city government, boroughs could operate as an intermediate service provider that served the urban fringe and allocated services better suited for the regional level.⁵⁹ By contrast,

2022).

49. LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 10.

50. *Id.*

51. See MCBEATH & MOREHOUSE, *supra* note 24, at 267 (“Except for a few first-class cities, such as Nome and some well-established towns in the Southeast [of the state], most of the Native village and city governments of rural Alaska have extremely limited resources and functions.”).

52. Based on data provided by the LBC, the average population of a second-class city in the unorganized borough sat around 444 people in 2015. See *id.* (listing a total population of 35,520 residents in Alaska’s eighty second-class cities located within the unorganized borough).

53. MCBEATH & MOREHOUSE, *supra* note 24, at 267.

54. *Id.*

55. ALASKA MUN. LEAGUE, ALASKA’S LOCAL GOVERNMENT, *supra* note 39, at 3.

56. LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 3.

57. MCBEATH & MOREHOUSE, *supra* note 24, at 267.

58. See MOREHOUSE & FISCHER, *supra* note 1, at 6 (“[The borough] was to encompass ‘natural’ social, economic, and political community, and serve both urban and rural needs . . .”).

59. *Id.*

for rural localities, boroughs would take on the primary service role.⁶⁰ The region's cities would then become secondary, albeit independent, local government institutions.⁶¹ Nonetheless, the theoretical flexibility of boroughs has not become the reality.⁶²

Like cities, boroughs are divided into differing classes that may exercise varying degrees of lawmaking authority.⁶³ Home-rule jurisdictions may exercise any legislative powers not otherwise prohibited by state law,⁶⁴ while the remaining three classes of general law jurisdictions instead derive their authority from the state and may only act subject to a state grant of authority.⁶⁵ All organized boroughs must provide schooling and regulate land use,⁶⁶ but a number of boroughs provide additional services such as transportation, health and safety assistance, and environmental regulation.⁶⁷ Of course, urban borough governments generally offer more robust service suites,⁶⁸ but, recently, rural boroughs have developed transportation and infrastructure development authorities,⁶⁹ expanded education and community programs,⁷⁰ and even created mechanisms to oversee key industries.⁷¹

The unorganized borough, however, differs dramatically from organized boroughs. It is not a local government and may not exercise

60. *Id.*

61. *Id.* at 6–7.

62. *See id.* at 7 (“Instead of being the focus of a unified and adaptable local governmental system, however, the borough has occasioned persistent political conflict, and its governmental role has for the most part been minor.”); *see also* Ritchie, *supra* note 3, at 638 (noting that the theoretical borough framework differs from the system that has developed in reality).

63. LOCAL BOUNDARY COMM’N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 4. Although third-class boroughs are permissible under the Alaska Constitution, there are none in the state. In fact, Alaska law expressly *prohibits* the formation of third-class boroughs. *See* ALASKA STAT. § 29.05.031 (2022).

64. *Id.* at 4.

65. *Id.*

66. *Id.* at 10.

67. *See* ALASKA MUN. LEAGUE, ALASKA’S LOCAL GOVERNMENT, *supra* note 39, at 4–5 (providing some of the services boroughs typically provide).

68. *See* MCBEATH & MOREHOUSE, *supra* note 24, at 262 (“Boroughs [in urban areas] have attracted constituencies and justified their existence primarily because they have consistently expanded their menu of urban services.”).

69. DOTF & Northwest Arctic Borough Partner in Regional Planning Organization, KINY (Mar. 2, 2023, 1:54 P.M.), <https://www.kinyradio.com/news/news-of-the-north/dotandpf-and-northwest-arctic-borough-partner-in-regional-planning-organization/>.

70. Molly Drischner, *Southwest Alaska Education Program Grows Courses, Students*, 41 ALASKA J. OF COM. 13 (2017).

71. *See* Borough Consultants, LAKE & PENINSULA BOROUGH, <https://lakeandpen.com/consultants> (last visited Apr. 14, 2023) (providing information on the borough’s fisheries consultants who help community members oversee fishing practices in the borough).

any government authority.⁷² In lieu of the borough government, the Alaska Constitution appointed the state legislature to act as the borough's governing body and service provider.⁷³ The legislature may provide the services it deems "necessary or advisable" within the region and exercise the authority that a borough government could exercise within an organized borough.⁷⁴ Despite its broad grant of power, however, the legislature chooses to provide only the services it is legally required to offer: schooling and land use regulation.⁷⁵ All other services are left to the discretion of cities or other quasi-governmental institutions in the unorganized borough.⁷⁶ Accordingly, the unorganized borough functions more like the traditional counties that Alaska's framers hoped to avoid.⁷⁷ Unlike organized boroughs (and many American counties), though, the unorganized borough is not directly accountable to local interests at all. As it is not a government, there is no local body to hold responsible.

3. *Other Local Governance Institutions in the Unorganized Borough*

In place of the borough government that typically offers regional services in Alaska, alternative local governance structures have attempted to fill the void, resulting in a complex system of overlapping governments and competing jurisdiction. The chaotic rural governance system further attenuates local political communities from the governments the Alaska Constitution intended for them to direct.

In particular, Regional Education Attendance Areas (REAs) and tribal governments both provide integral governmental services in the unorganized borough.⁷⁸ REAs are special districts that serve as the

72. LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 11.

73. MOREHOUSE & FISCHER, *supra* note 1, at 41.

74. ALASKA CONST. art. X, § 6.

75. See LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 32 ("The State continues to shoulder the burden for education and platting services in [much of the unorganized borough]"); see also ALASKA MUN. LEAGUE, ALASKA'S LOCAL GOVERNMENT, *supra* note 39, at 5 (explaining that all boroughs are required to provide schooling and regulate land use).

76. See ALASKA STAT. § 29.35.260 (2022) (requiring that certain cities in the unorganized borough provide schooling and land-use management services but permitting them to "exercise a power not otherwise prohibited by law").

77. MOREHOUSE & FISCHER, *supra* note 1, at 37-39 (recounting the framers' deliberations regarding the inadequacies of traditional counties and the eventual adoption of the borough model instead). Because the unorganized borough is not a local government, it is merely an area for the provision of state-level services, similar to the traditional American county. See Briffault, *supra* note 5, at 73 n.309 (counties maintained a historical role as administrative arms of the state, rather than local service providers).

78. See LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 13-17 (describing the role of REAs and tribal governments in the

vehicle through which the Alaska state government provides K-12 education to unorganized borough localities other than home-rule and first-class cities.⁷⁹ The state employs nineteen REAAs in the unorganized borough to supplement the education services offered by fifteen city school districts.⁸⁰ The REAAs are entirely funded by the state and cannot tax the locality they serve.⁸¹ Unlike city or borough school districts, which are partially funded through local taxation, REAAs are exempt from the local contribution requirement.⁸² Because unorganized borough residents also do not pay state tax,⁸³ localities served by REAAs are not obligated to contribute anything towards local education. The Alaska Supreme Court has upheld this system redistributing organized borough taxation towards REAA education to create equitable education opportunities across the state.⁸⁴

As most of Alaska's native communities are located within the region, tribal government has also grown within the unorganized borough.⁸⁵ All native communities operate some form of tribal government council, and some have even incorporated as cities under Alaska state law.⁸⁶ Alaska native villages, whether incorporated or not, are recognized as possessing some degree of inherent tribal authority under federal law,⁸⁷ but they possess only a fraction of the regulatory authority enjoyed by tribal governments elsewhere in the United States.⁸⁸

unorganized borough).

79. *Id.* at 13. Home-rule and first-class cities in the unorganized borough are statutorily obligated to provide their own city schools. *See supra* Section I.A.

80. Sarah Laws, Note, *The Alaskan Variable: A Call for Education Clause Analysis in School Funding Cases*, 37 ALASKA L. REV. 87, 94 (2020).

81. *Id.*

82. *See* ALASKA STAT. § 14.17.410 (2022) (providing the calculation for determining the amount of state aid, federal aid, and local contribution that must be allocated to each school district).

83. Ritchie, *supra* note 3, at 645.

84. *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 400–01 (Alaska 1997).

85. Mara Kimmel, *Fate Control and Human Rights: The Policies and Practices of Local Government in America's Arctic*, 31 ALASKA L. REV. 179, 204 (2014).

86. *Id.*

87. *See generally* *John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).

88. *See* *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 524 (1998) (explaining that the Alaska Native Claims Settlement Act "completely extinguished" all native territorial claims to Alaskan land). Tribal governments elsewhere in the United States typically exercise significant power over land and persons within their geographic territory on the basis of territorial jurisdiction. Geoffrey D. Strommer & Stephen D. Osborne, "Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 8 (2005). A tribal government's territorial jurisdiction is defined in terms of the tribe's "Indian country," a legal term of art representing the scope of a native tribe's territorial jurisdiction as an independent sovereign. *See* 18 U.S.C. § 1151.

Their limited authority has left native governments unable to effectively exercise traditional government powers such as land use and natural resource regulation, taxation, and policing,⁸⁹ or protect tribal members from the wrongdoing of non-members.⁹⁰ What is more, tribal leadership in rural Alaska sometimes clash with city governments, owing to the fact that many of the unorganized borough's second-class cities are also native villages.⁹¹ Conflict can be especially tense given the small size of the communities and the competing policy interests of the native councils and municipal governments.⁹²

B. The Incorporation Process

Although there is no federal constitutional right to local government,⁹³ states have generally given local residents agency over the incorporation process.⁹⁴ As such, a desire for local governance is the most important criterion for municipal incorporation in most states.⁹⁵ Generally, so long as the incorporation petition concerns previously unincorporated land, states permit incorporation where a sufficient number of people in an area have consented to form a municipality containing a statutorily sufficient population and contiguous boundaries.⁹⁶

Alaska's laws regarding borough incorporation are not outliers from the national trend, with the notable exception that Alaska does not require local consent to incorporate a local government. The Alaska Constitution instructs the Alaska state legislature to "include population, geography, economy, transportation, and other factors" within the statutorily defined laws of incorporation.⁹⁷ It also imposes an additional commonality requirement on the process, declaring that "[e]ach borough shall embrace an area and population with common interests to the maximum degree possible."⁹⁸ Beyond these minimum requirements, the framers delegated

89. See Kimmel, *supra* note 85, at 188-199 (describing the impact lack of territorial jurisdiction has had on land use and natural resource regulation, local taxation, and public safety in Alaska native villages).

90. See *id.* at 197 ("The lack of territoriality has very specific legal consequences for the ability of Alaskan tribes to protect their communities and thus ensure their wellbeing.").

91. MCBEATH & MOREHOUSE, *supra* note 24, at 267.

92. *Id.*

93. See generally *Hunter v. City of Pittsburgh*, 270 U.S. 161 (1907) (rejecting a federal right to local governance).

94. Briffault, *supra* note 5, at 74.

95. *Id.*

96. *Id.* at 74-75.

97. ALASKA CONST. art. X, § 3.

98. *Id.*

to the legislature control over the means of incorporation.⁹⁹ The Alaska legislature has refined the constitutional requirements with more specificity,¹⁰⁰ but has not imposed a statutory local consent requirement.

The borough incorporation process begins with submission of an incorporation petition to the LBC, the executive agency in charge of municipal incorporation and boundaries.¹⁰¹ A voter-initiated petition must be signed by fifteen percent of residents living inside and outside of home-rule and first-class cities located within the proposed borough boundaries.¹⁰² Normally, an incorporation petition is brought by the residents of a given locality—representing local consent—but Alaska law recognizes other eligible petitioners that may submit an incorporation petition without a local vote, including the state legislature, the commissioner of the LBC, and an REAA.¹⁰³

After the proposal stage, the LBC reviews the locality's petition.¹⁰⁴ The LBC may, subject to public notice, independently amend the incorporation petition or even condition incorporation on certain requirements.¹⁰⁵ If the LBC finds that an incorporation petition does not meet all necessary requirements or that it would be against the interest of the state, the LBC must reject the request.¹⁰⁶ LBC determinations may be appealed under the Alaska Administrative Procedure Act.¹⁰⁷

Alaska law recognizes two methods for ratifying an incorporation petition following approval by the LBC, one constitutionally defined and one derived from statute.¹⁰⁸ The "legislative review method," described in Article X, Section 12 of the Alaska Constitution, permits an approval without vote of local residents.¹⁰⁹ So long as the legislature does not veto the LBC's incorporation determination within forty-five days of the

99. *See id.* ("Methods by which boroughs may be . . . incorporated . . . shall be prescribed by law.")

100. ALASKA STAT. § 29.05.031 (2022).

101. *Id.* § 29.05.060 (2022) ("Municipal incorporation is proposed by filing a petition with the [LBC].").

102. LOCAL BOUNDARY COMM'N, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., BOROUGH INCORPORATION IN ALASKA 11 (2017) [hereinafter LOCAL BOUNDARY COMM'N, BOROUGH INCORPORATION IN ALASKA].

103. *Id.* at 10. The legislature invoked its status as an eligible petitioner once previously to forcibly incorporate eight boroughs under the 1963 Mandatory Borough Act. *See* MOREHOUSE & FISCHER, *supra* note 1, at 74–76 (describing the enactment of the Mandatory Borough Act of 1963).

104. *See* ALASKA CONST. art. X, § 12 ("The commission or board may consider any proposed local government boundary change.")

105. ALASKA STAT. § 29.05.100 (2022).

106. *Id.*

107. *Id.*

108. LOCAL BOUNDARY COMM'N, BOROUGH INCORPORATION IN ALASKA, *supra* note 102, at 12.

109. *Id.*

Commission's report, the locality becomes incorporated.¹¹⁰ Alternatively, the "local option," derived from statute, mandates for incorporation by vote of a popular majority of local residents.¹¹¹ The LBC may ultimately choose the method of approval, even if it differs from the one chosen by the petitioners.¹¹² Since the state can petition, approve, and ratify incorporation unilaterally, in theory at least, incorporation can be imposed on an Alaska locality even without the consent of a majority of its residents.

III. THE CONSTITUTIONAL CASE FOR FURTHER BOROUGH INCORPORATION

As detailed above, most local governments in the unorganized borough are weak and inefficient, plagued by conflict and collective action problems deriving from lack of funding and competing interests. The system stands in stark contrast to the relatively streamlined local government system employed by Alaska's more urban localities,¹¹³ furthering the rural-urban divide in the state and adversely affecting all residents.¹¹⁴ The result is a status quo that neither satisfies the needs of rural residents nor the requirements set forth by the Alaska Constitution.

At least one scholar, Kevin Ritchie, has argued that the unorganized borough is unconstitutional.¹¹⁵ He posits that the constitutional harm arises from the lack of separate, individual unorganized boroughs.¹¹⁶ While Ritchie is correct in his assessment of the constitutionality of the unorganized borough, his solution fails to remedy the constitutional harm. Functionally, a number of separate but unorganized boroughs would not improve local governance and would continue to run afoul of

110. *Id.*

111. *Id.*; see also ALASKA STAT. § 29.05.110 (2022) (providing the procedure for an incorporation election).

112. LOCAL BOUNDARY COMM'N, BOROUGH INCORPORATION IN ALASKA, *supra* note 102, at 12.

113. See MCBEATH & MOREHOUSE, *supra* note 24, at 254 ("An integrated set of government institutions has developed in urban Alaska. Fewer than twenty-five local and regional governments serve the needs of the majority of the state's population.").

114. See Ritchie, *supra* note 3, at 647 (detailing how disagreements over the taxpaying obligations of unorganized borough residents have "triggered yet another instance of urban versus rural-bush conflict in the state").

115. See *id.* at 641 ("One huge, statewide unorganized borough certainly violates the constitutional provisions for determining regional unorganized boroughs . . .").

116. See *id.* at 638 (noting that the unified unorganized borough is a "far cry" from the multiple unorganized boroughs envisioned by the Alaska constitutional framers).

the Alaska Constitution's localism mandate.¹¹⁷ The harm is not merely that the unorganized borough fails to "embrace an area and population with common interests to the maximum degree possible,"¹¹⁸ as Ritchie suggests,¹¹⁹ but rather that it fails to "provide for maximum local self-government with a minimum of local government units . . ." ¹²⁰

It is time to wield the power established by the state constitution to remedy the unorganized borough through incorporation. This section presents a proper reading of the Alaska Constitution's article on local government: requiring incorporation of sections of the organized borough if a regional locality meets the applicable standards for incorporation. First, it contends that Article X's policy of "provid[ing] for maximum local self-government with a minimum of local government units"¹²¹ must be read in conjunction with the related mandate that "[t]he entire State shall be divided into boroughs, organized or unorganized"¹²² to preference creation of an incorporated borough over an unorganized borough where sustainable. Second, it argues that the ultimate obligation for incorporating boroughs rests with the state, and its failure to incorporate eligible sections of the unorganized borough is unconstitutional.

A. Constitutional Interpretation in Alaska

When interpreting the Alaska Constitution, Alaska courts "look to the plain meaning and purpose of the provision and the intent of the framers."¹²³ A three-step interpretive analysis can be derived from the Alaska Supreme Court's prior opinions. First, courts are to begin with the constitutional text, absent binding precedent to guide them.¹²⁴ Words are to be given their ordinary meaning at the time of adoption.¹²⁵ Next, the

117. Since the organized borough was merely designed as a residual area lacking any borough-level government, division into a number of smaller units similarly lacking any borough-level government would result in functionally no change to local governance in rural Alaska.

118. ALASKA CONST. art. X, § 3.

119. See Ritchie, *supra* note 3, at 641 (arguing that the unorganized borough is unconstitutional because it fails to meet the standards provided by Article X, Section 3 of the Alaska Constitution).

120. ALASKA CONST. art. X, § 1.

121. *Id.*

122. *Id.* § 3.

123. Forrer v. State, 471 P.3d 569, 583 (Alaska 2020) (quoting Wielechowski v. State, 403 P.3d 1141, 1146 (Alaska 2017)).

124. See *id.* at 585 ("Our first step when presented with a question of constitutional law not squarely addressed by precedent is to consult the plain text of the Alaska Constitution as clarified through its drafting history.").

125. *Id.*

text of the constitution is not to be read in a vacuum; it is to be harmonized with the whole of the document.¹²⁶ Finally, the same words are presumed to have the same meaning throughout the constitution.¹²⁷ While Alaska courts may look to the other states when interpreting the text of the Alaska Constitution, they are to be cautious that “each state constitution’s . . . provisions are different and must be interpreted in light [of] their purpose and relevant history.”¹²⁸

The drafting history, historical context, and events preceding ratification can also help to guide the court’s analysis.¹²⁹ In a case construing the local government article of the state constitution, the Alaska Supreme Court looked to relevant laws passed prior to Alaska statehood and the record of the state Constitutional Convention.¹³⁰ Courts may also look to legislation passed soon after Alaska joined the Union because “[s]tatutes passed immediately after statehood give insight into what the founders intended.”¹³¹ Finally, if after considering the text and historical context, a court is still unsure of its interpretation, it may turn to policy and other considerations to inform its analysis.¹³²

B. The Constitutional Preference for Organized Boroughs

1. Text

Construction of the relevant articles should begin with the section regarding creation of boroughs, in this case Article X, Section 3. The relevant text reads: “The entire State shall be divided into boroughs, organized or unorganized.”¹³³ Black’s Law Dictionary defined “shall” as “generally imperative or mandatory,” noting that it was a word of command and obligation.¹³⁴ Ballentine’s Law Dictionary similarly defined the word as “[p]roviding generally, but not always, a mandate, where appearing in a constitutional provision.”¹³⁵ Both dictionaries permitted a permissive reading of “shall” only where absolutely necessary to further the intent of the drafter.¹³⁶ Based on the ordinary

126. *Id.*

127. *Id.*

128. *Id.*

129. *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

130. *Id.* at 91–95.

131. *Id.* at 90.

132. *Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020).

133. ALASKA CONST. art. X, § 3.

134. *Shall*, BLACK’S LAW DICTIONARY 1541–42 (Rev. 4th ed. 1968).

135. *Shall*, BALLENTINE’S LAW DICTIONARY 1171 (3d. ed. 1969).

136. *See id.* (“The word ‘shall’ may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed”); *see also Shall*, BLACK’S LAW DICTIONARY 1541–42 (Rev. 4th ed. 1968) (“But [‘shall’] may be construed as merely permissive or directory . . . to carry out the legislative

meaning of “shall,” it is clear that the word was used by the framers to impose an obligation on the state to create “boroughs, organized or unorganized.”¹³⁷

To fully understand Article X, Section 3’s requirement that the state be divided into organized or unorganized boroughs, it is next necessary to construe Section 1, which states the purpose and construction of the local government article.¹³⁸ The relevant text provides: “The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions.”¹³⁹ The Alaska Supreme Court has explicitly recognized that Section 1 indicates a preference for organized boroughs, citing to it for the proposition that “[o]ur constitution encourages their creation.”¹⁴⁰

Because Section 1 outlines the policy of Article X, it must be read as modifying the general command to create boroughs. To effectuate maximization of local governance, the constitution must preference organized boroughs over unorganized boroughs. The term “maximum”¹⁴¹ denotes that the state should create incorporated boroughs where sustainable to provide for local governance to the greatest degree *possible*. The word further encourages the state to avoid imposing municipal governance where it cannot be sustained. By incorporating boroughs where sustainable, the state also fulfils its duty to minimize the number of local government units through dissolution of REAs and possibly some of the unorganized borough’s smallest cities.¹⁴²

intention and in cases where no right or benefit to [anyone] depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.”).

137. ALASKA CONST. art. X, § 3; *see also* *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978) (“Unless context otherwise indicates, the use of the word ‘shall’ denotes mandatory intent.”). A permissive reading of “shall” would be nonsensical because it would render the directory “may” superfluous elsewhere in Article X, such as in Section 2, where the constitution permits—but does not require—that the state delegate taxing authority to cities and boroughs. *See* ALASKA CONST. art. X, § 2 (“The State may delegate taxing powers to organized boroughs and cities only.”); *see also* *Hickel v. Cowper*, 874 P.2d 922, 928 (Alaska 1994) (rejecting petitioner’s construction of the relevant constitutional provision where it would render the wording of a related section superfluous).

138. *See* ALASKA CONST. art. X, § 1 (entitled “Purpose and Construction”).

139. *Id.*

140. *Mobil Oil Corp. v. Local Boundary Comm’n*, 518 P.2d 92, 101 (Alaska 1974) (citing ALASKA CONST. art. X, § 1).

141. “Maximum” was defined by Black’s Law Dictionary as “highest or greatest amount, quality, value, or degree.” *Maximum*, BLACK’S LAW DICTIONARY 1131 (Rev. 4th ed. 1968).

142. *City of Douglas v. City & Borough of Juneau*, 484 P.2d 1040, 1044 (Alaska 1971). *But see* *Keane v. Local Boundary Comm’n*, 893 P.2d 1239, 1244 n.9 (Alaska 1995) (questioning whether Section 1 requires minimization of *all* local

Educational services provided by REAAs and many of the services offered by smaller cities could be covered at the borough level, reducing the number of local government institutions.

However, it is not possible to discard the final clause of Section 1's first sentence: "[A]nd to prevent duplication of tax-levying jurisdictions."¹⁴³ The final clause seems to disrupt an interpretation of Article X that prefers borough incorporation because it would impose an additional level of borough taxation on top of the cities' taxation authority. This would be in contrast to existing special service areas, like REAAs, which do not hold inherent authority to tax the areas they serve.¹⁴⁴ The Alaska Supreme Court has faced the same quandary in the reverse context--whether a city may be formed within an organized borough where city services could be provided by the borough's creation of a special service area.¹⁴⁵ There, notwithstanding the threat of double taxation, the court clarified "that there is a statutory and constitutional preference for incorporation of cities over the establishment of new service areas,"¹⁴⁶ noting that the favoring of cities could reduce the overall number of local governments and hence tax-levying districts.¹⁴⁷ The court's reading tracks closely with a constitutional preference for organized boroughs because boroughs, like cities, are general purpose governments that could provide a wide range of services.

As a practical matter, Section 1's avoidance of overlapping taxation districts cannot be read as expansively as precluding the creation of a borough where cities currently exist. Such a reading would render all non-unified municipalities in the state unconstitutional because it would prohibit overlap of city and borough taxation authority. Similarly, if the constitution prefers incorporation of a city over creation of a limited-purpose service area, why would it prefer limited purpose service areas, such as REAAs, in lieu of a borough? Textually, it would be nonsensical to conclude that the framers intended cities and boroughs to be mutually exclusive if they also mandated for cities to "be a part of the borough in which they are located."¹⁴⁸

2. Historical Context

The historical context further solidifies the textual interpretation

government units or merely minimization of special service districts).

143. ALASKA CONST. art. X, § 1.

144. See *supra* discussion in section I.B; see also ALASKA CONST. art. X, § 5 ("The [borough] assembly *may* authorize the levying of taxes, charges, or assessments within a service area to finance special services." (emphasis added)).

145. *Keane*, 893 P.2d at 1242.

146. *Id.* at 1244.

147. *Id.* at 1243-44.

148. ALASKA CONST. art. X, § 7.

above. The framers' statements at the Alaska Constitutional Convention evince an intent to further local control by developing organized regional government and minimizing independent special districts. Subsequent legislation passed by the Alaska legislature further clarified the framers' preference for organized borough governance in favor of independent districts, ultimately imposing borough government on localities that refused to abolish special districts.

Alaska had no counties or boroughs before it became a state because counties could not be formed in the territory without Congress's express approval.¹⁴⁹ Because of the lack of a similar local government in territorial Alaska, the convention's local government committee reviewed the structures of local governments in other states and across the globe.¹⁵⁰

Delegate John Rosswog, chairman of the local government committee, outlined the committee's vision for providing local control over governance and explained the role of the unorganized borough in furthering that control. In introducing the committee's proposal, he explained, "[w]e felt that [the people of Alaska] were able to govern themselves locally and that we should give them as much self-government as possible."¹⁵¹ He also explained that the unorganized borough existed to "allow for the boroughs [to remain] unorganized until they [were] able to take on their local government functions."¹⁵² As his comments demonstrate, the unorganized borough system was not a permanent but rather a temporary solution addressing the practical reality that not all of Alaska could sustain local governance at the time of the Alaska Constitutional Convention.¹⁵³

Delegate Victor Rivers echoed Rosswog's general points regarding the unorganized borough and the borough model. He explained that "[o]ur policy in this Committee . . . has been that we try and institute . . . under this constitution an intermediate form of government which the people could largely exercise a broad degree of power, except those especially reserved to the state."¹⁵⁴ He argued that, without a flexible government unit like the borough, mid-level government in Alaska would become nothing more than an agent of the state.¹⁵⁵ As the framers envisioned the borough to be a form of local government meant to further

149. MOREHOUSE & FISCHER, *supra* note 1, at 11, 19.

150. *Id.* at 36.

151. Proceedings of the Alaska Constitutional Convention 2611 (Jan. 19, 1956) [hereinafter PACC (Jan. 19, 1956)].

152. *Id.* at 2612.

153. See MOREHOUSE & FISCHER, *supra* note 1, at 39 ("It was visualized that boroughs could proceed from unorganized or limited-function status to self-government under home rule charters.").

154. PACC (Jan. 19, 1956) at 2613 (statements of Del. V. Rivers).

155. *Id.* at 2613-14.

maximum local government participation, it would be unreasonable to assume that they intended unorganized boroughs to exist where local government could be sustained. Certainly, the local government committee made clear to all delegates that the unorganized borough was not a local government at all.¹⁵⁶

After the committee members provided a general introduction of the article, the Convention opened up to questions. Early comments speak to the framers' goal of minimizing special districts.¹⁵⁷ Delegate Maurice Johnson began by questioning why the committee had removed a provision regarding independent school districts.¹⁵⁸ Rosswog responded that the committee felt that school districts should be worked into borough governments.¹⁵⁹ While they could become independent bodies, the committee envisioned such special purpose governments would be under the control of the borough general assembly.¹⁶⁰ Delegate Victor Fischer also clarified that the term "integrated" in Article X, Section 15 was meant to "most directly express the intent that [an existing] school district becomes a part of the over-all functions of the borough" upon formation.¹⁶¹

The Convention record further provides support for a reading of "maximum" that considers whether incorporation will maximize local governance in a given locality. Throughout the convention, the framers understood the word to further local government policy to the maximum possible degree. For instance, the framers clarified that "maximum" in Article X, Section 3¹⁶² provided discretion to consider "the area and population and common interest to the maximum extent possible."¹⁶³ Delegate Maynard Londborg also explained that "maximum" as used in Article X, Section 6¹⁶⁴ instructed the legislature to place as much local

156. See Proceedings of the Alaska Constitutional Convention 2730 (Jan. 20, 1956) ("The unorganized borough does not function period. All the functioning is at the state level . . .") (statements of Del. V. Rivers).

157. In his introductory comments regarding Article X, Delegate Victor Rivers specifically addressed perceived dangers with an overabundance of local government units. See PACC (Jan. 19, 1956) at 2617 ("That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective to carry out not only the local but also state functions as may be necessary.").

158. PACC (Jan. 19, 1956) at 2619 (statements of Del. M. Johnson).

159. *Id.* at 2620 (statements of Del. J. Rosswog).

160. *Id.*

161. *Id.* at 2631 (statements of Del. V. Fischer).

162. ALASKA CONST. art. X, § 3 ("Each borough shall embrace an area and population with common interests to the maximum degree possible.").

163. PACC (Jan. 19, 1956) at 2638 (statements of Del. J. Rosswog).

164. ALASKA CONST. art. X, § 6 ("The legislature shall provide for the performance of services . . . in unorganized boroughs, allowing for maximum local participation and responsibility.").

control over unorganized borough governance as could be sustained.¹⁶⁵ Understanding a word carries the same meaning throughout the Alaska Constitution,¹⁶⁶ the policy set forth in Article X, Section 1 places a gloss on the rest of the section to maximize the local self-government *when possible* while minimizing local government units.

Legislation passed following Alaska statehood further supports a constitutional preference for organized boroughs. Soon after joining the Union, the state legislature passed the 1961 Borough Act,¹⁶⁷ establishing the standards for incorporation and requiring that all special service districts integrate within organized boroughs by July 1, 1963.¹⁶⁸ Unfortunately, only a single locality, the community of Bristol Bay, took up the reins to successfully obtain borough incorporation prior to the 1963 cutoff.¹⁶⁹ With its deadline quickly approaching, the Alaska legislature reconvened to pass the 1963 Mandatory Borough Act,¹⁷⁰ which would forcibly incorporate eight localities into boroughs unless they voluntarily proposed boundaries by 1964.¹⁷¹ Six of the eight communities proposed their own boundaries, but the Anchorage and Fairbanks petitions were denied, leading to the forced incorporation of four communities.¹⁷²

The 1961 and 1963 Acts represent the legislature's early recognition that the constitution favored borough incorporation to reduce overall local government units and maximize local participation in governance. The 1961 Act enforced Article X's goal of minimizing special districts and local government units¹⁷³ by setting a deadline for borough incorporation, leading to consolidation of existing school and utility districts into newly created boroughs. The 1963 Act represents the same policy as the 1961 Act, taken to the extreme. It demonstrates that the state's constitutional commitment to borough incorporation as a tool for maximizing local self-governance is strong enough to impose local governance even if resisted

165. See PACC (Jan. 19, 1956) at 2649 (statements of Del. M. Londborg) (answering that the Committee's intent was for "maximum" to maximize local participation in local governance rather than instruct the legislature to set a "maximum" for local participation); see also *id.* at 2679 (statements of Del. M. Londborg) (clarifying that "maximum" in Article X, Section 6 meant "the maximum of local participation responsibility possible in each borough").

166. See *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020) (explaining that the words of the Alaska Constitution are presumed to carry a consistent meaning throughout the document).

167. Alaska Sess. Laws Ch. 146 (1961).

168. MOREHOUSE & FISCHER, *supra* note 1, at 72.

169. *Id.* at 73.

170. Alaska Sess. Laws Ch. 52 (1963) (repealed 2003).

171. MOREHOUSE & FISCHER, *supra* note 1, at 74-75.

172. *Id.* at 75.

173. See ALASKA CONST. art. X, § 15 ("Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law.").

by the locality itself.¹⁷⁴

Both the text and historical context of Article X, Sections 1 and 3 support the assertion that the Alaska Constitution preferences incorporated boroughs over unorganized boroughs. Textually, Article X must be read as furthering the overall purpose set forth in Section 1: providing for maximum self-governance with a minimum of local government units. Bearing that in mind, Section 3's command that the state be divided into organized or unorganized boroughs preferences organized borough incorporation because it would maximize local participation and minimize local government units. The framers' comments support such a reading because they reflect dual policy preferences: (1) minimizing local government institutions--particularly special districts--and (2) protecting local control over governance. Finally, the 1961 and 1963 Acts are early instances of the state enforcing the constitutional preference for borough incorporation to eliminate special districts and further locally controlled general purpose governments.

C. The State's Obligation to Incorporate Boroughs

1. Text

Article X makes clear that the state bears the ultimate obligation to make proper local boundary decisions, such as incorporation. As explained above, "shall" in Article X, Section 3 must be read as a word of command, imposing a constitutional obligation on the state to create boroughs in Alaska.¹⁷⁵ Additionally, Section 12 places the only constitutionally mandated method for approving municipal incorporation in the hands of the state legislature.¹⁷⁶ It also provides that the LBC may "consider" any proposed boundary changes,¹⁷⁷ again placing agency with the state over decisions such as incorporation. Finally, Section 5 permits the legislature to abolish special service districts

174. See MOREHOUSE & FISCHER, *supra* note 1, at 73 ("[T]he 1961 Borough Act was predicated on the assumption that local desire to establish borough government would supply the force toward incorporation, despite the findings of previous Boundary Commission hearings that there was little enthusiasm in the state for the unknown and untried form of local government."). In fact, the 1963 Mandatory Borough Act likely represents the legislature's belief that the state is *obligated* to incorporate boroughs to remedy unconstitutional local government arrangements. See *infra* Section II.C.ii.

175. See *supra* Section II.B.i.

176. See ALASKA CONST. art. X, § 12 (mandating approval of an incorporation petition submitted by the LBC to the state legislature unless the legislature rejects the LBC's grant of incorporation within forty-five days or before the end of the current legislative session, whichever is earlier).

177. *Id.*

and limits boroughs in their authority to create them.¹⁷⁸

While the relevant provisions could be construed narrowly to require that the state merely exercise its authority to create either organized *or* unorganized boroughs, such a reading ignores the policy set forth in Sections 1 and 3. The Alaska Supreme Court held in *Petitioners for Incorporation of City & Borough of Yakutat v. Local Boundary Commission* that that the commonality requirement of Section 3¹⁷⁹ constrains the LBC's obligation to ensure proper boundaries under Section 12 by requiring that it only approve an incorporation petition if it concerns an area and population with common interest to the maximum degree possible.¹⁸⁰ As the court explained, Section 3 commands the LBC to determine "whether an area is cohesive and prosperous enough for local government."¹⁸¹ But to ensure that the state "provide[s] for maximum local self-government with a minimum of local government units"¹⁸² under Section 1—which encourages the creation of boroughs¹⁸³—Section 3 must *require* incorporation of an organized borough if a locality "is cohesive and prosperous enough for local government."¹⁸⁴ As such, when read with Section 1, Section 3 hinges the state's obligation to create organized or unorganized boroughs on whether an incorporated borough would provide for maximum local governance possible and minimize local government institutions. By failing to incorporate a borough where a locality is "cohesive and prosperous" enough to support local government, the state violates its affirmative obligation to create boroughs under Section 3.

2. Historical Context

The framers intended to leave substantial control over the nature of local government with the state. Rosswog explained, "The boundaries, we think, are a quite important question and should be under some agency

178. *Id.* § 5.

179. *See id.* § 3 ("Each borough shall embrace an area and population to the maximum degree possible.").

180. *See* *Petitioners for Incorporation of City & Borough of Yakutat v. Local Boundary Comm'n*, 900 P.2d 721, 725–26 (Alaska 1995) (explaining that the commonality requirement of Section 3 vests the LBC with the power to reject boundaries that do not maximize common interests); *see also* *City & Borough of Juneau v. Local Boundary Comm'n*, 361 P.3d 926, 934–35 (Alaska 2015) (clarifying that the holding in *Yakutat* does not require that the LBC consider an existing borough's petition for annexation of a given locality when considering that locality's petition for borough incorporation).

181. *Yakutat*, 900 P.2d at 726 (quoting *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 98 (Alaska 1974)).

182. ALASKA CONST. art. X, § 1.

183. *Mobil Oil Corp.*, 518 P.2d at 101 (citing ALASKA CONST. art. X, § 1).

184. *Yakutat*, 900 P.2d at 726 (quoting *Mobil Oil Corp.*, 518 P.2d at 98).

[the LBC] which can establish them along the proper lines. They should not be left to the local community”¹⁸⁵ To address their concern, the framers opted to reserve final boundary change determinations (including incorporation) with the state.¹⁸⁶ To that end, the 1961 Borough Act specifically designated the LBC as the gatekeeper of incorporation, granting it broad authority to accept or reject local incorporation petitions.¹⁸⁷ Modern Alaska courts also understand the wide latitude that the state has over incorporation, as they have been hesitant to read Article X as “essentially allow[ing] the electorate to establish a boundary without regard to LBC action on reconsideration.”¹⁸⁸

The local government committee also intended to reserve to the state substantial latitude in determining the scope of local government. As Rosswog explained:

We believe that we should just draw the outline of this local government structure; we should leave a great deal of it and will need a great deal of help from the state in setting up the exact boundaries and the exact laws and rules under which they shall operate. The establishing of the two categories of local government as boroughs and cities we felt that we would keep it simplified as much as possible.¹⁸⁹

In support, Fischer argued that the committee had written the article to provide flexibility for the state to use its “powers over the incorporation, annexation, elimination, and consolidation of [local government] units to promote both efficiency in citizen participation [and] local affairs.”¹⁹⁰ To him, it was imperative for Alaska to provide a moldable local government system “with the maximum amount of state interest and local participation.”¹⁹¹

Londborg also contended that the legislature should fulfill its role as

185. PACC (Jan. 19, 1956) at 2612 (statements of Del. J. Rosswog).

186. *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962); *see also* LOCAL BOUNDARY COMM’N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 13 (arguing that incorporation is included within the definition of boundary change); *see also*

187. David H. Getches, *North Slope Borough, Oil, and the Future of Local Government in Alaska*, 3 UCLA-ALASKA L. REV. 55, 58 (1973).

188. *Lake & Peninsula Borough v. Local Boundary Comm’n*, 885 P.2d 1059, 1066 (Alaska 1994); *see also* *Oesau v. City of Dillingham*, 439 P.2d 180, 183 (Alaska 1968) (“The basic purpose for creating the boundary commission and conferring upon it the powers that it possesses was to obviate the type of situation that existed here where there was a controversy over municipal boundaries which apparently could not be settled at the local level.”).

189. PACC (Jan. 19, 1956) at 2611–12 (statements of Del. J. Rosswog).

190. *Id.* at 2617 (statements of Del. V. Fischer).

191. *Id.*

service provider in the unorganized borough with an eye to encouraging future incorporation.¹⁹² He noted that it was “very necessary” that the legislature do its best to integrate local participation into unorganized borough service-providing to prevent the residents from “fall[ing] asleep” and failing to incorporate when they were ready.¹⁹³ He also believed that the state should “try[] to create responsibility” and encourage localities to seek incorporation.¹⁹⁴ Londborg’s assertions evince the unique role that the framers envisioned for the state within the incorporation process. It was not only to determine the scope and nature of local governance, but it was to actively ensure the development and creation of organized borough governance.

Perhaps most importantly, Londborg revealed that the state could be the ultimate arbiter of incorporation to prevent localities from relying on state services in perpetuity instead of developing necessary local control. During deliberations, Delegate Barrie White asked the local government committee a particularly astute question: if the legislature would provide services in the unorganized boroughs, what would make their residents ever want to incorporate?¹⁹⁵ Taking the first stab at an answer, Rivers responded that it would be the state’s policy to provide certain incentives to incorporation, such as tax refunds, that would offset the cost of governance.¹⁹⁶ Londborg went further, however, adding that the committee had conceived of two possible avenues for resolving lack of initiative to incorporate, one which would impose incorporation and one which would encourage it.¹⁹⁷ Although he believed the latter to be more appealing, Londborg never stated that the Alaska Constitution expressly favored one view over the other.¹⁹⁸

In fact, the 1963 Borough Act is an instance of when the state *did* invoke its role as arbiter of incorporation to prevent the continued existence of the state’s numerous independent special districts. The Act indicates the extent of the constitution’s preference for organized, general

192. See *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 92 n.43 (Alaska 2016) (citing Londborg’s statements for the proposition that “state-local cooperative programs would encourage local communities to organize into boroughs”).

193. PACC (Jan. 19, 1956) at 2649 (statements of Del. M. Londborg).

194. *Id.*

195. *Id.* at 2650 (statements of Del. B. White).

196. *Id.* (statements of Del. V. Rivers).

197. *Id.* at 2651 (statements of Del. M. Londborg).

198. Londborg simply floated imposition and encouragement as two methods the committee had envisioned for the state to ensure localities took up the reins on incorporation. See *id.* (“We felt that [incorporation] could be handled possibly different ways, but I will mention two: one is to have some state agency that would . . . say now is the time you have to incorporate; there is no way you can get out of it . . .”).

purpose local government and represents the state's obligation to "say now is the time you have to incorporate; there is no way you can get out of it . . ."199 According to an LBC report, the legislators who passed the 1963 Act collectively understood that it was the first in a line of legislation that would compel incorporation if necessary.²⁰⁰

Both text and historical context make clear that the ultimate obligation to ensure borough incorporation rests with the state. Therefore, it is the state, not the people, that is constitutionally required to remedy violations of Article X. To further the Alaska Constitution's localism mandate, Article X, Section 3 requires that the state incorporate parts of the unorganized borough if it will provide for maximum local self-government and minimize local government units. The framers granted the state substantial control over boundary changes and incorporation, and they believed that the state had a duty to oversee the unorganized boroughs and guide them towards their path to incorporated government. Further, as Delegate Londborg and the 1963 Mandatory Borough Act ultimately made clear, the state's obligations over incorporation could entail imposing government if necessary to overcome lack of local initiative.

IV. THE PRACTICAL APPEAL OF FURTHER BOROUGH INCORPORATION

Certainly, the state should not invoke lightly its obligation to order the creation of local government. As Delegate Londborg recognized, wielding the power haphazardly could lead to local resentment and would likely result in dysfunctional, unmotivated government.²⁰¹ Today, rural residents have largely failed to take up the opportunity to further incorporate sections of the unorganized borough, and, to a degree, have actively impeded top-down efforts to do so.²⁰² As a statewide political matter, there are a number of proponents for further borough incorporation, primarily as a vehicle to reduce the tax burden urban Alaskans shoulder for unorganized borough services.²⁰³ Others recognize

199. *See id.*

200. LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 19.

201. PACC (Jan. 19, 1956) at 2651 (statements of Del. M. Londborg).

202. *See Ritchie, supra* note 3, at 645 (noting that state legislators from rural localities have successfully forestalled legislative attempts to impose further incorporation on sections of the unorganized borough).

203. *Id.* at 645; *see also* John Havelock, *Alaska Needs to Finish the Job of Creating Boroughs*, ANCHORAGE DAILY NEWS (June 29, 2016), <https://www.adn.com/commentary/article/alaska-needs-finish-job-creating-boroughs/2014/11/25/> (explaining that, historically, top-down attempts to

that borough incorporation will lead to better governance in the region.²⁰⁴

Rural Alaskans have mixed views. A number of residents oppose the idea of more government in general,²⁰⁵ while some communities in the unorganized borough believe borough incorporation could lead to better governance outcomes.²⁰⁶ Nonetheless, Alaska law presently contains many disincentives to incorporation,²⁰⁷ particularly, the unorganized borough state tax exemption and the free schooling offered by REAAs. Further, even those groups that have sought incorporation are often held up by the red tape associated with the LBC approval process.²⁰⁸

Despite local opposition, though, borough incorporation should be achieved not only out of constitutional fidelity, but for the sake of good governance. As a constitutional matter, the ability to incorporate a locality in Alaska without significant voter approval²⁰⁹ suggests that the obligation to further the Alaska Constitution's commitment to local governance may outweigh local enthusiasm.²¹⁰ Yet, there is simply no reason to force creation of a municipality if it will not result in better

incorporate sections of the unorganized borough were driven by beliefs that unorganized borough residents received too many services without paying taxes).

204. Havelock, *supra* note 203.

205. See Michael Paschall, *Local Resident Speaks Out Against City's Membership in Alaska Municipal League*, DELTA WIND (Feb. 18, 2023), https://www.deltawindonline.com/news/local/local-resident-speaks-out-against-city-s-membership-in-alaska-municipal-league/article_d0e216c8-af79-11ed-bd4c-bb9410b445e9.html (quoting a resident who opposed the Alaska Municipal League because of its efforts to encourage further incorporation in the unorganized borough); Jacob Resneck, *Funter Bay Landowners Object as Juneau Eyes Expansion*, KTOO (Feb. 10, 2017), <https://www.ktoo.org/2017/02/10/funter-bay-landowners-object-juneau-eyes-expansion/> (reporting on opposition to Juneau's annexation of nearby sections of the unorganized borough).

206. See Adelyn Baxter, *Hoonah Sets New Borders in Bid to Form Borough. But, It Overlaps With Juneau's Annexation Plan*, KTOO (Oct. 23, 2019), <https://www.ktoo.org/2019/10/23/hoonah-sets-new-borders-in-bid-to-form-borough-but-it-overlaps-with-juneaus-annexation-plan/> (reporting on a petition to form the Xunaa Borough, which proponents hoped would lead to an expanded tax base and greater control over local schooling).

207. LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 30.

208. *Id.*; see also Virtual Video Interview with Jeff Good, Wrangell Borough Manager, and Carol Rushmore, Econ. Dev. Dir. for the Wrangell Borough (Feb. 17, 2023) [hereinafter Interview with Wrangell Borough] (detailing difficulties reaching agreement over boundaries with the LBC during the incorporation hearing process).

209. See generally *Lake & Peninsula Borough v. Local Boundary Comm'n*, 885 P.2d 1059 (Alaska 1994) (concerning a borough incorporation petition brought by an REAA); see also ALASKA CONST. art. X, § 12 (permitting incorporation petitions to be approved by the state legislature after review by the LBC).

210. See LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 30 (claiming that borough incorporation is compulsory under the Alaska Constitution).

governance outcomes for the locality. Accordingly, this section argues that incorporation in the rural unorganized borough would create better governance by strengthening the political voice of residents and ensuring better service provision.

Recognition of “voice,” or participation in government,²¹¹ as a virtue of local governance can be traced back to the writings of Alexis de Tocqueville as he surveyed the developing townships of New England.²¹² Scholars who advocate for a vision of participatory local government posit that placing decision-making authority in the hands of local residents can both strengthen governance and actualize political “self-determination.”²¹³ Generally speaking, voice within a given polity can be furthered by giving local actors control over local decisions,²¹⁴ expanding those actors’ political accountability,²¹⁵ and developing local voting opportunities.²¹⁶ While proponents of an alternative view of local government participation, “exit,”²¹⁷ are critical of voice-maximization as the primary objective of local government law,²¹⁸ the extreme rurality of

211. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 883 (1983) (“Participation or voice is a particularly venerable legitimator of local government.”).

212. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61–63 (G. Lawrence trans., 12th ed., 1966) (detailing his observations about New England townships and their place in American democratic life, giving particular attention to their role as independent government bodies supportive of local political interaction).

213. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1068–70 (1980); Su, *supra* note 31, at 880–81 (suggesting that smaller democratic subdivisions can lead to more participation from the public); Rose, *supra* note 211, at 883–86 (discussing the persistence of the Antifederalist’s commitment to local control because of its ability to increase government participation and responsiveness).

214. See Frug, *supra* note 213, at 1069 (“One step towards meeting [the] objective [of local self-determination] is the reduction of the scale of decisionmaking . . .”).

215. See Su, *supra* note 31, at 867 (suggesting that consolidation of local government under state authority has led to reduced local government accountability to local residents); see also Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 416 (1990) (“[P]articipation theory[’s] . . . basic premise is that local governments are political institutions that decide on public issues in a manner influenced by and accountable to an involved constituency of local residents.”).

216. See Anderson, *supra* note 12, at 1138 (explaining that development of political voice for minorities was the policy underlying expansion of voting rights).

217. “Exit” refers to the act of voicing local policy preferences through physically moving to another locality with a service bundle more in tune with one’s priorities. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (developing the theory of “exit” as a means of local political engagement).

218. See Briffault, *supra* note 215, at 434 (“The greater opportunities for exit and voice at the local level may make local governments more responsive to their

the unorganized borough and limited mobility of its residents restrict exit's application to the unorganized borough in practice.

Additionally, the virtues of political voice track closely with the policy objectives of Alaska's constitutional framers.²¹⁹ The framers committed themselves to localism as a value of democratic participation, prioritizing general purpose local government institutions to ensure wide local control over service provision.²²⁰ While special districts may have allowed for more streamlined services, they risked the framers' view of participatory democracy. The constitutional preference for incorporated, general purpose government reflects the framers' belief that participatory local government, with broad authority and local accountability, could result in better governance across the state and strengthen its commitment to democracy.

At its simplest, borough incorporation would increase local voice by creating a locally accountable municipality where one presently does not exist. However, the mere creation of a new democratic institution fails to convey the full impact of organized boroughs. They are especially valuable for two reasons. First, organized borough government could help overcome rural vote dilution in statewide elections. Second, they place local decision-making in a body with the funding sufficient to further local self-determination.

A. Overcoming Rural Vote Dilution

Because the state legislature oversees service provision within the unorganized borough, unorganized borough residents rely on their state representatives to advocate for local interests.²²¹ Legislators representing sections of the unorganized borough, however, make up only a fraction of Alaska's forty house representatives and twenty senators.²²² The lack

inhabitants and may promote efficiency and public participation within local units. But most local governments today are not self-contained communities, set apart from each other.”).

219. See *supra* discussion in Section II.

220. *Id.*

221. Recently, Alaska's state house flipped to Republican control thanks to a change of allegiance by the Bush Caucus--representing many of the residents of the unorganized borough--who feared “split[ting] the Bush Caucus . . . could have diluted the political power of rural Alaska in the House.” James Brooks, *For Rural Alaska Lawmakers, Local Issues Trumped Party Interests and Swung the State House*, ALASKA PUB. MEDIA (Jan. 24, 2023), <https://alaskapublic.org/2023/01/24/for-rural-alaska-lawmakers-local-issues-trumped-party-interests-and-swung-the-state-house/>.

222. Compare Alaska Districts and Legislative Information Office Locations, GOOGLE MAPS, <https://www.google.com/maps/d/u/0/viewer?hl=en&mid=1m7xS712hRugLi>

of local unorganized borough legislators makes coalition-building essential to meet rural needs, which can be difficult given Alaska's recent history of legislative deadlock.²²³

Unfortunately, Alaska's legislative voting districts do not map onto borough boundaries, leading to districts with mixed populations of unorganized and organized borough residents.²²⁴ In fact, only two state representatives and *zero* state senators represent an area entirely comprising the unorganized borough.²²⁵ Because organized borough voters may express local preferences at the city, borough, and state level, they have more local voting opportunities than do their unorganized counterparts, who only vote at the state--and possibly city--level. The mixed voting districts, as a result, weaken local voice over matters of significance to the unorganized borough. For issues like REAA funding, the preferences of organized borough residents may even be materially adverse to those of rural residents.

Rural vote dilution is even stronger in districts that merely tack-on sections of the unorganized borough. For instance, in House District 37, a piece of the unorganized borough is simply attached to the boundaries of the Lake & Peninsula and Aleutians East Boroughs.²²⁶ In these voting districts, unorganized borough residents are simply outvoted in district-wide elections. One scholar has detailed a similar phenomenon in the city-county context in her analysis of unincorporated fringe communities in larger incorporated urban counties.²²⁷

Beyond creating more local voting opportunities, borough governments can also overcome vote dilution in statewide elections by

jMU0jC9q5n-jCgsp1c&ll=66.03698696390806%2C-149.29334008612742&z=5 (last visited Mar. 31, 2023) (providing Alaska's House and Senate districts), *with* LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 2 (providing a map of the unorganized borough).

223. See Brooks, *supra* note 221 (explaining that the rural Bush Caucus flipped to avoid the deadlock that had plagued the Alaska House in 2019 and 2021).

224. See generally *Alaska Districts and Legislative Information Office Locations*, *supra* note 222.

225. *Id.* Only House Districts 36 and 39 comprise areas completely within the unorganized borough. The senators that represent those districts also represent areas within the Northwest and North Slope Boroughs (for Senate District encompassing HD 39) and the Fairbanks North Star Borough (for the SD encompassing HD 36).

226. Compare *Alaska Districts and Legislative Information Office Locations*, *supra* note 222, *with* *Alaska Borough and Census Area Boundaries*, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., <https://gis.data.alaska.gov/datasets/DCCED::alaska-borough-and-census-area-boundaries/explore?location=54.945127%2C-148.096981%2C4.93> (last visited Mar. 31, 2023).

227. See Anderson, *supra* note 12, at 1155-59 (detailing a similar voting power dilution effect felt by residents of unincorporated urban municipalities within larger incorporated urban counties).

advocating for regional interests with the state. In his article considering how the law can better support the needs of rural communities, Professor Rick Su suggests giving local communities a greater role in the creation and provision of state and federal policies.²²⁸ He argues that expanding mid-level local government structures unites regions and permits rural localities to “negotiate, represent, and give voice to the varied political interests of their communities” before state policymakers.²²⁹ Because local funding in part derives from the state, providing a structure that coordinates regional interests could be instrumental to ensuring self-determination of local communities. By providing regional decision-making bodies in the form of boroughs, regional polities can also overcome collective-action problems to lobby for their top-down policy interests.

B. Supplying Funding for Local Self-Determination

Borough government will also transfer regional decision-making to a locality with a sufficient tax base to provide services. Presently, many of the city governments and native villages are too small or underfunded to achieve the sort of self-determination necessary to support robust local control over governance.²³⁰ The limited power of these local governments to channel the needs and preferences of their residents can lead to community decline and political disaffection.²³¹ While it is best to “reduc[e] the scale of decisionmaking” by reinvigorating “popular involvement in the decisionmaking process . . . at the [borough] level,”²³² self-determination can only be achieved if the locality has a sufficient tax base to fund public programs,²³³ such as policing, health services, and community development.

Borough government represents the balancing necessary to achieve true local self-determination. With their greater geographic scope, boroughs could reinvigorate popular involvement by pooling taxing resources currently divided among the unorganized borough’s various cities. While a number of small cities currently provide services using

228. Su, *supra* note 31, at 879.

229. *Id.* at 880.

230. See *supra* Sections I.A and I.B for a discussion of the present local government arrangements in the unorganized borough.

231. See Su, *supra* note 31, at 878 (“Both [the decline of rural communities and the disaffection of rural residents], [are] tied to democratic deficit of rural local governments and their limited ability to channel the interests of their residents.”).

232. Frug, *supra* note 213, at 1069.

233. See Briffault, *supra* note 215, at 374 (explaining that expanding authority to incorporate may not lead to greater incorporation if the locality’s tax base is unable to support municipal services).

relatively small municipal budgets, boroughs could potentially funnel regional taxation towards more robust borough-level services. Instead of distributing a small amount of funds to a wide range of services at the city level, boroughs could distribute more funding to a few core functions, supplementing the services offered by its various cities.

For example, in the policing context, lack of local infrastructure in some of Alaska's remote rural cities²³⁴ could be mitigated by creating borough-level police forces. Many small, rural cities and native villages simply cannot afford to support a full-time police force independent of the state,²³⁵ despite violent crime rates well above national averages.²³⁶ The cities' lack of funding is compounded by low wages for village police officers and rural housing shortages, making it difficult, if not impossible, for communities to recruit qualified officers.²³⁷ By contrast, the North Slope Borough—Alaska's northernmost borough²³⁸—provides borough-wide policing services,²³⁹ which it supports through around seventy-five

234. In its 2019 investigation, the Anchorage Daily News discovered that one in three Alaskan communities, particularly rural native villages, lack any kind of local law enforcement. Hopkins, *supra* note 28. Many of those communities reside within the unorganized borough. *Compare id.* (providing a map demarcating Alaskan communities with no local law enforcement), *with* LOCAL BOUNDARY COMM'N, LOCAL GOVERNMENT IN ALASKA, *supra* note 18, at 2 (providing a map of the unorganized borough).

235. Hopkins, *supra* note 28.

236. See Taylor Burke, *Report on Domestic Violence in Alaska Shows Rates of Abuse Remain 'Alarmingly High,'* ALASKA'S NEWS SOURCE (May 4, 2022, 12:31 A.M.), <https://www.alaskasnewsresource.com/2022/05/04/report-domestic-violence-alaska-shows-rates-abuse-remain-alarmingly-high/> (reporting that in 2020, forty-eight percent of Alaska women interviewed by the state criminal justice commission reported intimate partner violence, a number up from the 2010 and 2015 surveys); see also JULIA CLEMAN, STATEWIDE SERV. DIV., CRIM. RECS. & IDENTIFICATION BUREAU, CRIME IN ALASKA 2021, 10 (2021) (showing Alaska violent crime rates well above national averages). *But see* Suzanne Downing, *Crime in Alaska Reaches Lowest Level Since 1975*, MUST READ ALASKA (Oct. 3, 2022), <https://mustreadalaska.com/crime-in-alaska-reaches-lowest-level-since-1975/> (detailing that crime rates in Alaska have steadily declined since Governor Dunleavy's election to state office); Mike Dunleavy, *Opinion, Alaska Re-Funded the Police*, WALL ST. J. (Nov. 27, 2022, 3:34 P.M.), <https://www.wsj.com/articles/alaska-re-funded-the-police-public-safety-crime-murder-arson-violent-officer-fbi-criminals-victims-reform-11669566356> (arguing his policy of increasing funding for state-level policing has led to declining crime in Alaska, but recognizing crime rates remain above national averages).

237. Hopkins, *supra* note 28.

238. *Your Government*, NORTH SLOPE BOROUGH, <https://www.north-slope.org/your-government/> (last visited Mar. 29, 2023). The North Slope Borough is also predominantly populated by Native Alaskans. *Id.*

239. Kyle Hopkins, *Alaska's Law Enforcement Crisis is a Public Emergency. Here's How Experts Want to Fix It.*, PROPUBLICA (Dec. 21, 2019, 11:00 A.M.), <https://www.propublica.org/article/alaskas-law-enforcement-crisis-is-a-public-emergency-heres-how-experts-want-to-fix-it>.

full time employees, ranging from officers to support staff.²⁴⁰ In 2021, the borough's violent crime and theft rates were below or comparable to some—but not all—of the largest cities in the unorganized borough,²⁴¹ suggesting that borough policing could resolve some of the challenges to policing relatively isolated rural communities if properly implemented. Even where borough-wide policing would be too expensive, boroughs could create policing service areas that cover smaller borough communities.²⁴² Under such a scheme, larger, more urban localities with better infrastructure would rely on borough police services,²⁴³ and the borough would redirect the state's village policing funds to outlying communities to supplement state policing efforts.²⁴⁴

Boroughs may also help regional localities achieve service economies of scale, further aiding in self-determination.²⁴⁵ The boroughs could potentially tax to fund services, such as schooling, public safety, and infrastructure, best suited for provision on an area-wide basis.²⁴⁶ The shift to regional service provision would also help to coordinate interests among smaller communities by developing a new regional approach to policymaking.²⁴⁷ As such, economies of scale would not only aid in service provision, but they could provide an avenue to channel rural interests collectively, thereby strengthening local control and encouraging development of regional rural polities. To the extent that the remoteness of these boroughs or their small populations could prevent economies of scale from taking hold, the Local Boundary Commission noted as early as 1998 that seven of the then-eleven census areas in the unorganized borough had higher per capita incomes than two existing organized boroughs.²⁴⁸ Employment and earning statistics for the same period supported the proposition that unorganized borough economies were no weaker than those of many organized boroughs.²⁴⁹ Further,

240. CLEMAN, *supra* note 236, at 3.

241. Compare *id.* at 325 (North Slope Borough; 320 total) with *id.* at 193 (City of Bethel; 497 total); *id.* at 308 (City of Nome; 329 total). Two of the unorganized borough's largest cities, Unalaska and Valdez, had markedly lower violent crime and theft rates than the other large cities. See *id.* at 384, 409 (72 total for Unalaska; 74 total for Valdez).

242. See Hopkins, *supra* note 239 (suggesting a similar program in the Matanuska-Susitna Borough).

243. *Id.*

244. *Id.*

245. LOCAL BOUNDARY COMM'N, AREAS THAT MEET BOROUGH INCORPORATION STANDARDS, *supra* note 32, at 22.

246. *Id.*

247. *Id.* at 23.

248. LOCAL BOUNDARY COMM'N, ALASKA DEP'T OF COM., CMTY., & ECON. DEV., THE NEED TO REFORM STATE LAWS CONCERNING BOROUGH INCORPORATION AND ANNEXATION 10 (2001).

249. *Id.*

localities in the unorganized borough do not necessarily have lower populations than some of the state's rural organized boroughs.²⁵⁰

Taxation concerns could also be mitigated by the expanded geographic scope of boroughs. While, certainly, creating taxable districts would be unpopular, the new organized boroughs would also be able to tax revenues derived from industry and tourism within the sparsely populated regions which presently sit outside the scope of cities' taxation authority.²⁵¹ As such, the tax burden necessary to fund government services could be spread between industries and residents, reducing the cost of new local taxation.²⁵² Additionally, borough governments would still receive state and federal funding,²⁵³ offsetting the general lack of a tax base in the rural areas of Alaska²⁵⁴ while maintaining the benefit of local control.

V. CONCLUSION

Alaska's present inaction towards the unorganized borough amounts to a constitutional violation of its affirmative obligation to ensure creation of organized boroughs where they can be sustained. While taxation and consent concerns certainly dictate that incorporation determinations should be made with sensitivity to the needs of a given locality, they cannot be used to thwart the significant state authority to

250. See ALASKA DEP'T OF LAB. & WORKPLACE DEV., ALASKA POPULATION OVERVIEW: 2019 ESTIMATES 63 (2019) (providing the 2019 population statistics for the state's organized boroughs and census areas within the unorganized borough).

251. See Ritchie, *supra* note 3, at 642 (noting that capturing of regional revenues from oil, mining, tourism, and fishing can be an incentive to incorporation).

252. In fact, rural boroughs have already successfully taxed the extensive oil, natural gas, or precious metal mining operations that sit within their jurisdiction. See Tim Bradner, *Red Dog Mine Owner Teck Reaches Tax Deal With Borough*, ALASKA J. OF COM. (Apr. 19, 2017, 1:08 P.M.), <https://www.alaskajournal.com/2017-04-19/red-dog-mine-owner-teck-reaches-tax-deal-borough> (reporting on implementation of a new industry taxation plan which would net the Northwest Arctic Borough between eighteen and twenty-six million dollars each year over the next ten years). The North Slope Borough funds its municipal services overwhelmingly through taxing oil revenues. See Harry Brower Jr. & Amaulik Edwardsen, *Opinion, My Native Alaskan Community Needs the Willow Oil Project*, WALL ST. J. (Sept. 26, 2022, 6:39 P.M.), <https://www.wsj.com/articles/my-native-alaskan-community-needs-the-willow-oil-project-inupiat-gas-subsistence-municipal-government-economy-11664220998> (Ninety-five percent of the borough's taxation derives from oil revenues).

253. See Interview with Wrangell Borough, *supra* note 208 (providing a rough break-down of borough funding derived from local taxation, state funding, and federal grants).

254. See Ritchie, *supra* note 3, at 644 (noting the lack of a tax base in the rural Alaska bush).

create local government institutions granted by Article X. The ultimate obligation to ensure maximum local self-government rests with the state, and the suggestion that the constitution envisioned a permanent unorganized borough simply cannot be sustained by text or history. Even to the extent that state-level top-down incorporation efforts should be limited to remedy constitutional harm, incorporation is necessary in the unorganized borough to correct the present lack of robust rural self-government. Weak and poorly funded city governments simply cannot achieve the sort of self-determination that the framers envisioned.

Contrary to concerns that borough governance would be detrimental to the rural Alaska spirit,²⁵⁵ it would actually provide *more* local control over regional affairs and provide a vehicle to actualize local policy preferences. Creation of borough government only creates governance opportunity; it still leaves substantial control in the hands of rural communities to determine the scope of borough authority. Borough governance simply provides a vehicle for local residents to *choose* how much government suits their needs. It would also help overcome reliance on state government by aiding in the development of the self-sufficient regional polities envisioned by the Alaska Constitution. At the very least, incorporation must be achieved to bridge Alaska's ever-widening rural-urban divide and bring the state's local government framework more in line with the views of the constitutional framers.

255. See Paschall, *supra* note 205 (quoting a resident who believed Alaska Municipal League advocacy in favor of further borough incorporation was contrary to the rural way of life).