LOCAL CONTRIBUTIONS

TO

PUBLIC EDUCATION

IN ALASKA:

A REPORT TO THE

KETCHIKAN GATEWAY BOROUGH ASSEMBLY

VOLUME II:

ANALYSES OF THE LEGAL ISSUES

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June 2013

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INTRODUCTION

I am writing this Volume II for two very different audiences: elected officials and administrators who must decide how to use this information (if at all), and lawyers of two stripes: Those who will participate in that decision-making, and those who might be the litigators of some or all of the issues.

There are some discussions of common-law jurisprudence in this Volume – some statements of legal methods and some elaborations of legal concepts – that professional attorneys will find simple and pedantic. I write these sections as a primer for non-lawyer officials and administrators, to improve their understanding and aid their decision-making.

There are also some tedious exegeses of hair-splitting details in this Volume that non-lawyer administrators and elected officials might find dry and soporific.[1] In these instances, I am writing for the benefit of the lawyers.

From each group of readers, therefore, I ask that you read this Volume with indulgence and understanding of the vast differences in my audiences.

The main problem addressed in this Volume arises from a single past circumstance. The Alaska Supreme Court has already decided some of the legal issues discussed and analyzed here: The taxpayers' equal protection claim; the deprivation of educational opportunities; the question of whether municipal governments enjoy equal protection; and the hands-off ("non-justiciable") nature of the local-contribution statute as a "political question" reserved by judges for decision by elected lawmakers.

Hence, as a prelude to deciding whether or not to litigate the local contribution statute again, non-lawyers must understand the significance of "precedents" in the common law. Lawyers must evaluate how successfully new facts and new argument in a new case might distinguish these precedents, and the litigating attorneys must strategize approaches to facts, choices of parties, and framing of issues that might succeed in persuading the presently sitting justices to overturn or distinguish precedents.

In the MatSu case, which is a major focus of this Volume, four justices split along two vastly distinguishable lines of arguments and reasoning in their analyses of the issues. A fifth justice did not participate in the decision. In the opinion of the two justices who reached the merits of the case, four of the six issues on appeal were dismissed summarily for lack of any factual evidence. The other two issues were decided upon paltry facts, and in partial reliance

[1] Upon learning that his son was considering going to law school, the poet Oliver Wendell Holmes counseled the young Civil War veteran, "Studying law is like eating sawdust without butter."

on what are totally incorrect statements of fact. These two justices who engaged in the substantive analyses of the issues failed to clearly delineate their issue-statements, and relied partially upon implied reasoning, *non sequiturs*, *obiter dictum*, and citations to wholly irrelevant cases. For all of these reasons, plus the passage of time, the MatSu case is a weak and vulnerable "precedent" in the common law.

In the Kenai Peninsula Borough case, holding that political subdivisions of the state do not enjoy constitutional equal protection, the five justices missed important Alaska constitutional history that probably warranted following an entirely different line of earlier decisions by entirely different state courts than those courts they cited as authority for their determination.

In Volume I of this Report, I presented an entirely new approach to factual development of the issues, and (hopefully) a far more reliable, detailed set of facts than what the justices reviewed in the 1986-97 MatSu case. Volume II now peals the layers off that MatSu decision itself in technical fashion, inspecting how truly few and inchoate the facts were in that case, how few the number of issues actually decided on the merits in that case, how divided the justices were in their thought-processes and opinions, how unreliable some of the bases for reasoning were, and how little authority really supported either the decision on justiciability or the taxpayers' equal protection arguments.

Lawyers and officials charged with making the decision to litigate or not litigate will find in this Volume II different arguments and approaches to the old MatSu issues, and new arguments applied to both old and new legal issues that the MatSu justices never heard. This Volume II questions the legal "capacity" and the legal "standing" of some of the earlier parties, and this Volume II also raises the question of whether some new type of party or some coalition of new parties might be more successful in litigation than "taxpayers" from a school district in circumstances of a cash economy.

The Ketchikan Gateway Borough advocates total elimination of the required local contribution, and full funding of Basic Need by the State.[2] The material in this Volume II addresses that plea to the courts as one possible goal.

Readers will find a high level of advocacy in the chapters below. *That tone should not, however, be read as this author trying to prompt or promote litigation of the issues*. I write in

[2] David Getches argued this in 1977, noting, correctly, that development of new borough governments will stagnate without full funding of basic need. For a period in the 1980s, the State did eliminate the required local effort and fully funded Basic Need for all school districts. See, Getches, David H., *Law and Alaska Native Education - The Influence of Federal and State Legislation upon Education of Rural Alaska Natives* by David H. Getches[2] (September 1977) online at: http://www.alaskool.org/native_ed/law/law_ane.html.

tones of persuasion solely to demonstrate my "best arguments" to the reader, and to present for evaluation here what a litigating attorney might choose to say to the court if one or more parties decided to raise some or all of my arguments in a new lawsuit. I personally have retired from litigation. I no longer have either the stamina or the "fire in the belly" required to be an aggressive litigator. If litigation is the chosen route to a solution to the problem, the plaintiffs must retain some attorney other than me. (I would however be willing to consult part-time, or write/edit draft briefs as a distant "second chair" well behind the primary litigator, if s/he so desired. Clients should leave that decision entirely to the primary litigator, however, and not try to impose me on him or her.)

One will not find in this Volume II any attempt to cite *every* supporting case or to distinguish *every* prior court decision seemingly going a different direction. This Volume II instead focuses on abstracting and analyzing the authorities cited in the primary cases, and focuses on developing the new issues and new arguments. Volume II is a result-oriented outgrowth of Volume I, containing what I consider to be the best reasoning and best arguments for why the local-contribution statute might still be declared unconstitutional by the Alaska Supreme Court. Rather than being a lawyer's brief to a court, Volume II should be read as being more in the nature of an embarrassingly long opinion letter to a client.

CHAPTER 1. Framing the Legal Issues

a. Statutory and Regulatory Formulae for Calculating State Funding of Public Schools.

Volume I of this Report described in detail the statewide statutory and administrative methods for calculating public school funding in Alaska. That description of the formulae is still correct, with one significant exception: Since the publication of Volume I, the legislature has repealed and replaced "the 50% Rule" applying to the local contribution required from municipal school districts, and the governor has signed the new law.[i]

That "50% Rule" had required from municipal school districts the equivalent of a 4-mills local contribution to local public education, based on the 1999 full and true value of all taxable real and personal property, plus or minus 50% of the change in value as of January 1 of the second year preceding the fiscal year in which the contribution must be made (e.g., the value as of January 1, 2012 for FY 2014 calculations), not to exceed 45% of Basic Need for the preceding year.

Now, under the revised 2012 formula, the local contribution required from all *municipal* school districts is the equivalent of 2.65 mills on 100% of the full value[3] of all taxable real and personal property in the municipal school district (as described above) – but still without regard for local cultures, local ability to pay taxes, or distressed local economies. State aid to all municipal school districts is equal to Basic Need minus the local contribution of 2.65 mills, minus 90% of eligible federal impact aid.

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[3] Another policy (and subtler legal) concern exists with respect to equity of full value determinations by the State. Those determinations govern the required local contributions for the 34 municipal school districts. However, only about two-thirds of those municipalities (23 of 34 or 67.6%) levy property taxes (14 of the 18 organized boroughs and 9 of the 16 home-rule and first-class cities in the unorganized borough).

The State Assessor relies heavily on property assessment data in those 23 local governments that levy taxes in making full value determinations for those governments. According to *Alaska Taxable – 2011*, p. 61-62, those 23 local governments spent $17,151,365 for assessment work in 2011 alone. That was simply to update municipal assessment data bases that have been developed over many decades in most cases. Thus, the State Assessor has many millions of dollars' worth of data at his disposal to make full value determinations for those 23 municipalities. Local assessments in those 23 municipalities are subject to due process.

In contrast, the State Assessor has no municipal assessment data upon which to make full value determinations in the remaining 11 of the 34 municipal governments that operate school districts. Those 11 districts encompass more than 94,000 square miles – an area larger than any of 39 states in our nation.

For all 19 REAAs, there has been no change in the law since Volume I was published. Still today, no local contribution is required from any of them. Basic Need in every REAA is funded totally by state aid and federal aid, regardless of local economic affluence, diversity in the local economy, quantity or value of taxable real and personal property in the school district, or any other measure of local financial ability to contribute to the costs of local public education.

Appendix A contains an analysis developed by Dan Bockhorst, Ketchikan Gateway Borough Manager, of the impact on the Ketchikan Gateway Borough of the 2012 legislated change from the 50% Rule to a flat 2.65 mills on present, full taxable value. While the new law may appear to unwary voters and taxpayers of Ketchikan as partial relief granted by state legislators, in fact this change in the law is an intergenerational betrayal. It imposes on the children in Ketchikan an increase in the unfunded mandate when they become the municipal voters and taxpayers.

Under the 2012 formula revision, the required local contribution by the Ketchikan Gateway Borough for FY 2013 and FY 2014 is reduced by about $1.1 million (roughly one-fifth) from what it would have been under the 50% Rule. But the financial effect of the difference between the now-repealed 50% Rule and the new 2.65-mill measure diminishes at a rate of tens of thousands of dollars each year. (See **Appendix A**.) In 23 years (Fiscal Year 2037), when present kindergarteners are 28 years old, this 2.65-mills mandatory local contribution will actually costs these children – as taxpayers – more than would have been the case under the 50% Rule. By Year 41, every dime of the ever-shrinking "relief" that occurs during the next 22 years will have been totally consumed by the higher amounts required by the state as a local contribution from children of Ketchikan during Years 23 through 41.[4] During that 41-year period, it is projected that the taxpayers of the Ketchikan Gateway Borough will pay more than $375 million (specifically, $378,925,603) in required local contributions for schools.

In effect, the new formula grants relief to Ketchikan taxpayers during the next score of years, but only by imposing a post-graduation debt on today's elementary students, due and payable when they become taxpayers. Many American college students today carry tuition debt into their years of post-graduation gainful employment. Under the revised form of the unfunded mandate of a local contribution, Ketchikan children will also carry elementary-school debt into adulthood!

[4] **Appendix A** does not discount future gains and losses to present value, and hence should be viewed as illustrative rather than absolute.

In the meantime, the State of Alaska remains the wealthiest state government in America,[5] per capita, and many affluent parents in prosperous REAAs still contribute absolutely nothing to the education of their children under the present state statute, AS 14.17.410(b)(2).

Appendix A also compares the required local contributions for six school districts (Ketchikan, Anchorage, Fairbanks, Matanuska-Susitna, Kenai, and Kodiak) for the "Class of 2013" years versus the "Class of 2025" years. These comparisons show that some districts will suffer the impacts of the repeal of the 50% Rule much more quickly and harshly than others. For example, relief for the taxpayers in the Matanuska-Susitna Borough is the most de minimus and short-lived. Matanuska-Susitna Borough taxpayers received a one-year reduction amounting to a mere $68,175 (less than three-tenths of one percent).

b. The Nature of the Legal Questions.

The legal analyses in this Volume II focus on the statutory classifications created in AS 14.17.410(b)(2), which require only *municipal* school districts to fund a local contribution to public education, and which exempt *all* REAAs from the same requirement without regard for any relevant or rational criteria such as the rural or urban nature of the REAA, the transportation patterns, the existence or nature or diversity of the local economy, the quantity or value of taxable real and personal property in the school district, or the relative affluence of the local people. As discussed in Volume I of this Report, AS 14.17.410(b)(2) is founded in an appealingly simple but erroneous stereotype that ignores major cultural and economic differences among REAAs, ignores major income and economic differences within the penalized municipal group, and ignores significant similarities between one-third of the REAAs and some of the more prosperous municipal school districts.

The first legal question raised by the demographic and statistical evidence in Volume I is whether the disparities between these simplistic statutory classifications (*all* REAAs vs. *all* municipal school districts), and/or the disparities among entities within both classifications, rise to a level of discrimination that violates the equal protection clause of the Alaska Constitution. Virtually all laws "discriminate" among the citizenry in one manner or another. A discriminatory enactment violates "equal protection" only when the government cannot meet a prescribed level of persuasion requiring a reasoned nexus between the statutory "means" chosen by the legislature and a legitimate governmental "purpose" or objective. This standard is described in far greater detail in the next chapter of this Volume.

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[5] The Governor's proposed FY 2014 budget left "more than $500 million in surplus revenue." http://omb.alaska.gov/ombfiles/14_budget/PDFs/FY2014_Press_Release_12.14.12.pdf That is more than twice what is needed to fully fund Basic Need for all 53 school districts, not just the 19 REAAs.

In 1997, the Alaska Supreme Court held that this local-contribution requirement, as it existed in law then, did not deprive taxpayers of their constitutional right to equal protection.[ii] However, the justices were analyzing the two categories largely abstractly, with only a modicum of stereotypically incorrect "expert" opinions regarding the relative characteristics of municipal school districts and REAAs. The likelihood that a new lawsuit would result in a finding of a violation of equal protection depends on whether specific geographic, demographic and financial/economic data and statistics – similar to those comparisons and contrasts found in Volume I – constitute sufficient new evidence to convince the Supreme Court to modify or distinguish its earlier decision.[6]

One can ask the equal-protection question at various levels: Are the more precise and compelling facts in Volume I sufficient to persuade the Court to render a different conclusion

> (i) in the context of applying the same "lowest-level" evaluation adopted in the 1997 MatSu case, or
>
> (ii) in the a context of applying an "intermediate level" of evaluation because of the new proof of stereotyping in the law, or
>
> (iii) in the context of applying the "highest level" of scrutiny because the new, more precisely detailed statistical exposé establishes a deprivation of educational opportunities?

A related question is whether the choice of a broad and sweeping classification in AS 14.17.410(b)(2), amalgamating all REAAs as a single entity for exemption, is so similar to administering a "single unorganized borough"[iii] that *ipso facto* this operative category is fatally unconstitutional? Stated another way, does the treatment of all REAAs in singular fashion constitute a failure to implement the requirement in the Alaska Constitution for the creation of a plural number of unorganized boroughs according to specifically enumerated constitutional criteria?[iv] The combined REAAs are not precisely, exactly the "single unorganized borough." They are the "single unorganized borough" minus the first class cities outside organized boroughs.[7] But these 19 subdivisions are not the operative units in AS 14.17.410(b)(2). All of those service areas have effectively been merged into one entity, into a single classification

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[6] This type of legal advocacy, relying on credible statistical evidence rather than facts pertaining to a specific event, is known among lawyers as a "Brandeis Brief."

[7] In the first footnote of the MatSu case, the Supreme Court ignored that subtle difference, stating, "Areas of the state that lie outside the boundaries of organized boroughs constitute a single, unorganized borough. The unorganized borough is divided into regional education attendance areas, or REAAs." [Citations omitted.]

(devoid of constitutionally required standards for this unorganized borough), for purposes of qualifying for the statutory exemption from making a local contribution to public education.

In addition to this singular unorganized borough issue, this Volume II of the Report also includes analyses of other provisions of the Alaska Constitution,

> (i) requiring maximum local responsibility within unorganized boroughs,[v]
>
> (ii) requiring a minimum number of local government units throughout the state,[vi] and
>
> (iii) requiring that "all persons have corresponding obligations to the people and to the State"[vii] in exchange for their enjoyment of constitutional rights and protections.

But the legal analyses in this Volume II do not stop with the substantive issues above. For example, the legislature has never enacted any law granting to municipal school districts the authority to sue and to be sued in their own name. REAAs, on the other hand, were specifically granted that legal status.[viii] The difference in treatment suggests that the legislature recognized that municipal school districts, like municipal utility boards or municipal parks-and-recreation boards, are mere subdivisions of that one larger legal entity known as the municipal corporation – which as a corporation did receive from the legislature power to sue and be sued.

That being said, the archives and the active case files of the Alaska Court System are replete with lawsuits brought by and filed against municipal school districts in their own name. No Alaskan court has ever ruled on the issue of the legal capacity of municipal school districts to sue and be sued in their own name,[8] and hence there is no precedent on that issue.

The Alaska Supreme Court has held that municipal corporations are not "persons" enjoying constitutional equal protection against enactments by the legislature because they are themselves creatures of the legislature.[ix] However that decision is seriously flawed. It fails to recognize (indeed, never even discusses) the relevant intent by the framers of the Alaska Constitution. The outcome is not only that a significant feature of constitutional intent was omitted from the reasoning of the court, but also that the case-law authorities cited for the

[8] The issue was raised by the author of this Report twice in the past. However, there was never any final ruling by the trial court in either case. Plaintiffs in a personal injury case quickly amended their pleadings to change the named defendant from the Nome City School District to the City of Nome in one instance, and in the second case the Municipality of Anchorage settled the case brought by their illegally terminated school superintendent before the court issued a ruling on the party-capacity of the Anchorage School District (raised as an affirmative defense in pleadings by the defendant-municipality).

outcome are from states with distinguishable constitutional foundations. The delegates to the Alaska Constitutional Convention adopted for the 49th State what is known as the "Texas Plan" of local autonomy and local authority in governance, and even named these regional governments "boroughs" with the very specifically stated intent of flagging their expansive "legislative authority" and of distinguishing them from the "old pattern" of how "counties" are treated in most states. In the Kenai case, the Alaska Supreme Court should have discussed this constitutional history and should have cited to *Texas* case law if any outside authority was needed as a precedent.

Municipal corporations in Alaska may indeed enjoy constitutional equal protection, if the documented intent of the framers of the Alaska Constitution is sufficient to prompt the Alaska Supreme Court to reverse its earlier decision and to instead follow a different line of Lower 48 authorities including Texas. In that event, a municipal government could be a party to litigation challenging the equal protection status of the local contribution requirement. (Note that even if the court followed the precedent in the Kenai case, another municipal government would only lose standing to raise the equal protection issue, and could still sue on all of the other issues.)

The party-plaintiffs in the 1997 MatSu case included the MatSu Borough, the MatSu Borough School District, MatSu-resident taxpayers and MatSu-resident students. Although there are many "rural" homesteaders and Sourdoughs living in largely off-road circumstances in that borough, most residents hail from a relatively suburban cash economy – North Slope oil workers, farmers of cash crops and commuters to Anchorage employment. It is possible that, by virtue of their cross-classification similarities in economic, geographic and cultural characteristics, a *combination* of plaintiffs including distressed REAAs, distressed boroughs and distressed cities-outside-boroughs could subtly reinforce to the Supreme Court the point that the present division in classifications – all REAAs vs. all municipal school districts – is irrational, arbitrary, and capricious.

c. The Nature of the Decisional Process.

The substantive and party-related issues summarized in section b. above are analyzed and discussed in far greater detail in the Chapters below. But, because decision-makers must think partially in terms of "overturning" or "distinguishing" prior Supreme Court cases, these later chapters must be read and evaluated in a frame of mind that includes a general understanding of that wonderfully refined Anglo-American system of jurisprudence known as "the common law." Hence I end this chapter with a short primer on our judicial decisional process, for the benefit of non-lawyer elected and appointed officials who will participate in the decision of whether to attempt to litigate these local-contribution issues.

Over time, printed statutes, ordinances and regulations promulgated by legislative bodies – what we call "black-letter laws" – inevitably become ambiguous in one or another of

infinitely possible factual settings and circumstances. The habits, attitudes, behavior and social morays[9] of citizens also change over time, while black-letter printed law remains rigidly the same. It is impossible to write a codified law for all of time and for all circumstances.

And yet, in order to gain and preserve public respect, credibility and public support for enforcement of the law, these rigidly written laws must have continuing practical and universal, everyday application. Most importantly, in a society ruled by laws rather than by men and women, these black-letter laws must have *predictable* application. This is where the "common law" courts enter the process.

Predictability in law comes from the underlying principle of American jurisprudence that prior decisions interpreting the law are "precedents" for understanding how that law will apply to present circumstances. However, in practice "case law" is an evolving series of interpretations of a statute or an ordinance, not only applying that black-letter law to specific circumstances but also sometimes either tweaking the interpretation of that black-letter law to ensure its continuing practical application in a changing society, or focusing on a distinguishing perspective of "the facts" in order to accommodate subtle-but-necessary changes in the written law.

Given the importance of "precedents" in preserving credibility and providing predictability in law, judges are (or should always be) extremely reluctant to overturn prior decisions, because decisional flip-flops not only destroy that important element of predictability for the public but also make judicial decisions appear frivolous and hence "unjust" – the politicized decisions of mere men and women rather than the objectified rule of majoritarian black-letter law. What one generally finds in "the common law" is only long-term, gradual and nearly imperceptible evolutionary changes – very slight variations over many years that become apparent only when comparing a present-day decision to similar facts, say, one hundred years ago.

In short, when judges construe black-letter law in our system of the common law, they are indeed tempering and molding otherwise rigid printed laws, but only slowly and usually

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[9] "I was so drunk driving home last night that I could hardly follow the center line of the road." That declaration resonates with shock and outrage in the social morays of 2013, but it would have brought amusement and chuckles from many American revelers in the 1950s. Smoking cigarettes in close quarters with non-smokers is another example of changed social morays. Four-letter words like the F-word that stunned our parents have far less impact today, while other words in common use in the 1940s and 50s like the N-word have become shuttering obscenities today. Seventy years ago, a White/Black inter-racial marriage was a disgusting scandal and a felony. Today many states and a majority of Americans accept same-sex marriages. Marijuana, that horrid weed that allegedly caused people to jump from windows in the conventional wisdom of the 1920s, and that "most certainly" led to addictive drugs as recently as a decade ago, is now legal to possess and use for both medical and personal purposes in many states.

only slightly, to meet the changing habits, attitudes, behavior and social morays of the contemporary citizenry. Generally, the process is extremely conservative. For the most part, predictability in law remains a constant, while aging black-letter enactments subtly retain life and purpose in a new world of new circumstances.

There are however some few instances where changes in common-law precedents occur as dramatic swings rather than gradually and imperceptibly. FDR's "court-packing" threat to increase the size of the U.S. Supreme Court to 15 justices in 1937-38 prompted a remarkable and immediate pendulum-swing in that court's decisions, away from a 70-year history of espousing laissez-faire economics to a sudden new series of opinions upholding the constitutionality of sweeping new social legislation, primarily through an expanded reading of the Interstate Commerce Clause.[10] Again, judicial "activists" in the Warren Court of the 1960s precipitously overturned many longstanding criminal-law precedents that had largely whitewashed abusive practices by overzealous law enforcement agencies in searches and seizures, use of tainted evidence, denial of the right to counsel, physically and mentally severe interrogations, coerced confessions, biased lineup identifications, limitations on jury pools, etc. Most recently, judicial "activists" of a differing philosophical persuasion have overturned precedents pertaining to the First Amendment rights of corporations and unions, pertaining to gun control under the Second Amendment, and pertaining to the application of the Interstate Commerce Clause to justify federal legal authority.[11]

However, the uniqueness of the above few instances of radical departures from precedent, and the prominence they bring to history, actually prove the rule that judges seldom overturn judicial precedents. It is far more likely that, if a court senses the need to tweak a

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[10] art. I, sec 8, U.S. Constitution. In the recent U.S. Supreme Court decision upholding the constitutionality of the Affordable Care Act, it appears that today, in 2012, the outer limits may have been reached for the 1938 rationale upholding nationwide social legislation through the constitutional authority of Congress "to regulate commerce … among the several state," and that U.S. Supreme Court reasoning now may be shifting toward citing the power of Congress "to lay and collect taxes" as the basis for defeating claims of states' rights and federalism. Whether rationalized through the Commerce Clause or through the power to tax, federalism is severely weakened as a political philosophy today. And, ironically, that democratic federalism and states'-rights of the historical "liberal," Thomas Jefferson, is advocated by "conservatives" today, and that highly centralized, national government of the historical "conservative," Alexander Hamilton, is advocated by "liberals" today.

[11] Judicial "activism" and judicial "restraint" are not the exclusive domains of either "liberals" or "conservatives." Both activism and restraint have a proper and salutary place in the decisional mindset of every judge, provided s/he is consciously careful not to use one or the other approach to further his or her personal political agenda. Good judges must possess the intellectual flexibility to swing between activism and restraint as necessary to make the common law credible, respected, predictable and enforceable. But good judges also must strive to avoid being "political" in their professional mindset. They accomplish this goal best by constant self-examination, by recognizing and acknowledging their personal political biases and thereby trying hard to counter these biases in the decisional process.

precedential interpretation of black letter law, it will instead find "distinguishing" facts and circumstances in the present case that can lead to a conclusion or to a "holding" different from the precedential case. The shift may indeed require some measure of dissembling, some casuistry and seemingly Jesuitical reasoning in the court's published opinion. But the changes in interpretation usually are only slight shifts and not major swerves. The legal fictions of consistency and predictability in law are preserved, and hence respect for compliance with law is also preserved.

Trial judges virtually always follow appellate-court precedents. Unlike the highest appellate courts, trial courts lack judicial authority to change the common law. But, like appellate courts, trial judges do sometimes "distinguish" present facts in their courtroom from prior circumstances in earlier cases. Hence, one must recognize that, at the trial-court level, there is far less likelihood that future plaintiffs can win the previously decided issues[12] that I address in this Report. In any future litigation, the superior court judge will almost certainly uphold the Supreme Court's earlier Kenai Peninsula Borough decision, and will probably uphold the Supreme Court's earlier MatSu decision unless s/he is presented with radically different facts – a very real possibility here. If the State prevails in the trial court, the plaintiffs will be assessed costs and attorney fees against them – an exposure that should be a significant part of the decisional discussions with litigating counsel.

Also, a new case brought to the Alaska Supreme Court might raise wholly new legal issues. The MatSu court was never presented with the question of whether a "single unorganized borough" is constitutional, whether the present exemption violates the constitutional requirement of maximum local participation and responsibility within unorganized boroughs, whether the present scheme allows for the constitutionally required maximization of local self-government with a minimum number of local government units throughout the state, or whether the classifications chosen for division between the local contribution and the exemption meets the constitutional muster requiring that "all persons have corresponding obligations to the people and to the State" in exchange for their enjoyment of constitutional rights and protections.

In short, this Report, Volumes I & II, contains many new facts and many newly presented legal issues that may distinguish the MatSu decision from a newly filed challenge to the local

[12] Aside from the broadly applicable precedent of two 1997 justices that the local contribution statute raises non-justiciable issues, only two legal issues discussed in this Report are burdened with substantively negative precedents: The *taxpayer equal-protection* issue regarding the local contribution, and the question of a *municipal government's enjoyment of equal protection*. There are no Alaska precedents on any of the other legal issues discussed below: deprivation of educational opportunities, constitutionality of administering (i.e., exempting) what is virtually a single unorganized borough, maximizing local responsibility in unorganized boroughs, maximizing local government with the fewest local units, and constitutional responsibilities associated with constitutional rights.

contribution statute, such that the Supreme Court can conveniently avoid overturning an earlier precedent by merely distinguishing it.

The Kenai Peninsula Borough case poses a different and more difficult problem, however. Facts and circumstances have not changed with regard to the legal powers and authorities of municipal governments in Alaska. The earlier court simply erred. It failed to consider essential Alaskan constitutional history before making its decision. Convincing the Alaska Supreme Court to acknowledge an earlier error may be difficult. On the other hand, the earlier opinion may represent such a glaring error that the newly constituted court will be amenable to reset the direction of precedence in this regard, granting equal protection to cities and boroughs. It is a far more risky loss in itself, but a less severe or significant loss if appended to a case with better possibilities of success on the merits.

Having thusly discussed the nature of the decisional process applying to any new litigation, and having placed in proper context the rather unique nature of the legal issues for consideration here, Chapter 2 now focuses on the legal complexities behind that seemingly simple phrase: "Equal Protection."

CHAPTER 2. The Equal Protection Clause Applied to the Local Contribution Requirement

a. The Method Used for Analyzing Constitutional Equal Protection in Alaska

State courts in Alaska evaluate the equal protection clause of Art. I, §1 of the Alaska Constitution[13] different from the method applied by the federal courts for assessing equal protection under the Fourteenth Amendment of the U. S. Constitution.[14] Alaska's courts apply what the justices claim to be

> a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective.[x]

An Alaska judge begins his or her analysis by assigning a "weight" or a level of importance to the constitutional interest allegedly impaired by the law in question. The Supreme Court refers to this weighting or measuring of importance as occurring on a "single sliding scale of review ranging from relaxed scrutiny to strict scrutiny."[xi]

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[13] Art. I, §1 of the Alaska Constitution states, "**Inherent Rights**. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

[14] Amendment XIV, sec 1 of the U.S. Constitution says, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." The analytical process for federal equal protection was summarized in State v. Ostrosky, 667 P. 2d 1184, 1192 (Alaska 1983):

> "Three standards of review are commonly utilized in cases involving the equal protection clause of the fourteenth amendment to the United States Constitution. First, where suspect classifications (i.e., those based on race, national origin, or alienage) or fundamental rights (e.g., voting, litigating, or the exercise of intimate personal choices) are involved, differential treatment will be upheld only when the purpose of the enactment furthers a 'compelling state interest' and the enactment itself is 'necessary' to the achievement of that interest. This is often called the strict scrutiny standard. Second, where classifications are based on gender or illegitimacy, the purpose of the enactment must be 'important,' and the means used to accomplish that purpose must be 'fairly and substantially' related to its accomplishment. [Citations omitted.] This is regarded as an intermediate level of review. Third, in cases not involving suspect classifications, the infringement of fundamental rights, or classifications based on gender or illegitimacy, differential treatment must be based on a governmental interest which is 'legitimate,' and the enactment must be 'rationally' related to its achievement. In our discussion of federal equal protection we have called this the rational basis test." [Citations and footnotes omitted.]

> The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification.[15]

By adjusting to looser or tighter "scrutiny" along a continuum or sliding scale, the court purports to avoid the federal method of "outright categorization of fundamental and nonfundamental rights,"[xii] in favor of what the Alaska justices claim is "a more flexible, less result-oriented analysis."[xiii]

Almost[16] all economic claims of unfair differential treatment, including taxpayer claims, fall at the "low end" of constitutional interests that the court is willing to scrutinize for equal protection. At the other extreme, both fundamental individual rights (like travel, speech and public educational opportunities) and suspect classifications (usually focusing on race and ethnic minorities) rise to the highest end of interests deserving constitutional equal protection.[xiv]

This "low end" and "high end" language in turn describes the level or extent of burden that the defending government must carry in order to preserve the constitutionality of its enactment (ordinance, regulation, statute, etc.) that allegedly is impairing someone's constitutional interests. The enacting government first must address the goal or "purpose" or "objective" served by the statute in question. If the court places the grievance at the "low end" of interests deserving equal protection (e.g., taxing disparities), then the government only needs to persuade the reviewing judge that the purpose or objective is "legitimate." But for protected interests deserving equal protection at the "high end," the government must persuade the court that the purpose or objective rises to the level of a "compelling state interest."

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[15] State v. Ostrosky, 667 P. 2d 1184, 1192 (Alaska 1983). Note that the court articulates two inquiries when deciding upon the standard of review. The justices will not only ponder (1) the "importance of the individual rights asserted" but also (2) "the degree of suspicion with which [they] view the resulting classification." Generally, these latter "suspect categories" involve racial or ethnic references or effects in the challenged classification. However, while the Alaska Supreme Court has stated repeatedly that differential treatment among taxpayers deserves only the lowest level of scrutiny, the statistical and demographic data in Volume I of this Report may raise "the degree of suspicion with which [the court will] view the classification," – all REAAs vs. all municipal school districts – such that, in a new case on appeal, the statute receives a higher level of scrutiny.

[16] "As a general matter, economic interests are not considered interests of a high order in equal protection analysis, State, Dept of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993); Coghill v. Coghill, 836 P.2d 921, 929 (Alaska 1992); Anthony, 810 P.2d at 158; Sonneman, 790 P.2d at 705; Hilbers v. Municipality of Anchorage, 611 P.2d 31, 40 (Alaska 1980). But see Enserch, 787 P.2d at 632 ('right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes')." MatSu at n. 12.

Then, in the next step of proof, the defending State or local government that enacted the challenged law must address the actual "means" (i.e. the classification itself) employed by the enactment to further the above purpose or objective desired. If the court had determined earlier that the allegedly impaired constitutional interest falls at the "low end" of the above-mentioned continuum, then the government only needs to show a "fair and substantial relationship between means and ends."[17] But, if the impaired constitutional interest falls at the "high end" in that initial weighting or primacy test, then the government must show that the chosen means – the statute or regulation or ordinance in question – is the "least restrictive alternative" for achieving the compelling state interest.

In summary, whether one is applying the allegedly "more flexible, less result-oriented"[18] analytical method of the Alaska Supreme Court, or the analyses of equal protection by another state's courts, or by federal courts in their three-step process, one can say (1) that courts generally show very little tolerance for statutory disparities in the treatment of race, ethnicity, creed, electoral enfranchisement, public educational opportunities, etc.; (2) that courts allow somewhat more tolerance for statutory disparities in gender, sexual and other preferences founded in stereotypes; and (3) that courts tolerate rather extensive over- or under-inclusiveness in economic classifications like taxpayer claims, enterprise licensing, and other economic controls.

Escaping for a moment from the cerebral jargon of judges and lawyers to a more frivolous but apt analogy, one can say in cocktail conversation that a statutory classification affecting fundamental rights or creating "suspect classifications" must fit a compelling governing need like a leotard. A legislated classification effecting preferences likely to be founded in stereotypes must be tailored to the governing purpose about like an off-the-rack business suit. A legal classification affecting most economic interests need only fit a legitimate governing purpose like a Hawaiian muumuu.

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[17] Sometimes the court states the standard as a "fair and substantial relationship." Other times the court refers to the standard as being only a "substantial relationship." In analyses below, I will focus on the need for not only a "substantial" relationship but also a "fair" relationship, suggesting that in future decisions the court should be required to be more precise in applying the fairness element of the standard.

[18] State v. Ostrosky, 667 P. 2d 1184, 1193 (Alaska 1983). The Alaska test does indeed allow for more flexibility. But that flexibility can also be construed as enabling more subjectivity in the decisional process. For all grievances challenging classifications that do *not* fall at one or another extreme of the "sliding scale" or "continuum," different justices can, in their own minds, place them at different locations left or right. And, to make matters even more subjective, the tailoring of the "fit" of the classification to the legislative purpose is then wholly subjective in the mind of every different judge and justice. In this writer's opinion, no analytical process could ever be more subconsciously "result-oriented" than a process allowing every judge broad discretion to begin his or her analysis by placing mid-range grievances where s/he feels it should sit along the nebulous length of a figurative, metaphorical "sliding scale" or "continuum."

b. MatSu Borough et al. v. State of Alaska et al.[xv]

This MatSu case represents the present state of court-made law or "precedent" pertaining to AS 14.17.410(b)(2). In substance, it addresses only the justiciability questions and the equal protection issues raised by the statute, and not the other possible weaknesses discussed in Chapter 5 of this Report. But no justiciability or equal protection challenge to that Alaska statute in a court of law today can prevail without convincing the judge(s) either to (i) overturn the MatSu split decision both on justiciability and on equal protection, or (ii) accept justiciability (as two justices in MatSu did) and raise the judicial scrutiny of the equal protection issue to a higher level of state-required persuasion than the earlier case, or (iii) distinguish this 1986-through-1997 case as representing a different set of facts and circumstances than what justifies review and a different conclusion today.

i. Abstracting Judicial Opinions.

Lawyers engage in "abstracting" the elements of a written court decision in order to identify various levels of similarities and differences between that earlier written decision and a potential new case, and in order to distill the foundations and reasoning in that previously written decision. The process of abstracting unfolds in the minds and thoughts of lawyers by asking the following questions:

- What exactly were the earlier **trial court proceedings** that constitute "the record" reviewed by the appellate court?
- What are the proven **facts** brought up to the appellate court for review?
- What are the precise and narrow **legal issues** raised by the parties in the appeal?
- For each legal issue, what is the (usually narrow) **"holding" or law of the case** (the "nut" of the decision) announced by the justices?
- What was the stream of **reasoning** by the appellate judges that led from each "issue" to each "holding"?

Throughout this precise dissection of a case, lawyers are making these fine distinctions in an effort to determine the extent to which the earlier case is truly a precedent applying to the client's facts and law under review, and if so, whether it is a powerful precedent "on all fours"[19] or a weak precedent potentially distinguishable or vulnerable to being overturned. Lawyers look for similarities and distinctions between the facts in the earlier case and the

[19] In legal jargon, a precedent is "on all fours" with a present set of facts when, by analogy, it manifests the stability and sturdiness of a table solidly settled on four "legs": (1) the "facts" are extremely similar, (2) the "issues" are virtually the same, (3) the "reasoning" in the earlier case is valid, and therefore (4) the "holding" (law of the case) will predictably be the same if a new lawsuit is filed.

present facts in a potential new case. They precipitate out of the earlier case superfluous commentary known as *obiter dicta.*[20] They identify precisely the legal issues on appeal in the earlier case to learn how similar or different those earlier issues are from the present issues confronting their client. They study the final declaration of the justices, the "holding" or the nut of the narrow, "law" contained in this prior case, in order to determine whether each holding truly comports with the precise issue brought by the parties to that court. They trace the logic of the reasoning of the judges, in search of fallacies and *non sequiturs* that might weaken the precedential authority of the earlier case, and in order to determine whether some alternative line of reasoning might lead to a new and different result in the next case. These various analyses in the abstracting process occur in the context of trying either to distinguish the earlier precedent from the present case, or to determine whether some new strategy might render a different result, e.g. new and different parties presenting similar but distinguishable issues with a different twist.

The seemingly tedious "abstracting" of the MatSu case here will reveal inchoate and erroneous facts, obfuscation of issues, weak links in some of the logic, a decision by far less than a full court, and vastly divided approaches and opinions among the four participating justices.

ii. Proceedings in the Trial Court.

At the trial court level, the party-plaintiffs in the MatSu case included not only the Borough itself, but also the borough school district, some taxpayers and some affected students in the borough schools.[21] The superior court judge ruled on partial summary judgment[22] that

- The Borough and the school district were not "persons" entitled to equal protection under art. 1, section 1 of the Alaska Constitution; and

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[20] "*Obiter dicta*" are diversionary side comments in the written opinion that are not directly relevant to the issues on appeal and hence do not "make" new law.

[21] Chapter 4 presents the legal analyses of these and other possible parties to any future litigation.

[22] "Summary judgment" occurs when a judge determines that no material facts are disputed between the parties, and the decision is wholly a matter of interpreting law. There is no need for a jury to make findings of "fact," because the parties do not disagree at this level. The disagreement exists only at the level of how the law should be interpreted and applied, and this level of decision-making is the exclusive province of the judge, not the jury. "Partial" summary judgment occurs when the judge disposes of only a portion of the dispute with a direct ruling from the bench. Because the testimony of the State's experts, Messrs. Cole and Worley, made its way into the record on appeal, one can assume that the plaintiffs never disputed these "factual" claims at the trial level. Albeit partially irrelevant (Cole) and significantly erroneous (Worley), these "facts" came to the MatSu Supreme Court as "given" and established, i.e., no longer disputable.

- Neither the school construction statutes[xvi] nor the local-contribution statute[23] deprived the individual plaintiffs of equal protection as either taxpayers or students.[xvii]

Following this ruling by the trial judge, the parties stipulated to dismiss the rest of the claims in the lawsuit. The individual plaintiffs then appealed the denial of their equal protection claims, and the award of costs against them. The borough and the borough school district did not appeal to the Alaska Supreme Court the judgment of the trial court denying their equal protection status as a "person." [24] The two local government units only appealed the award of attorney's fees against them.[xviii]

iii. The Facts

The factual development of this MatSu case at the trial level was extremely limited. The case came to the Supreme Court and was decided by these justices with only the following set of undisputed[25] facts, some of which are not really "facts" but rather statements of existing law and extended reasoning from that law. To make that distinction clearer, I have italicized the few genuine "facts" in the case on appeal:

- For capital construction of schools, the State reimburses a borough for 70% of the annual debt-service costs incurred by the borough during the fiscal year of reimbursement. REAAs do not participate in this program. REAAs fund capital construction through construction grants from the State. This construction grant program is also available to municipal governments. However, while REAAs must contribute to these grants only 2 percent of the project costs, boroughs and cities must contribute from 5 to 30 percent.[xix]

- In the computation of state aid to operating costs, boroughs receive "basic need" less a required local contribution, and less ninety percent of federal impact aid. The required local contribution is the lesser of either the equivalent of four mills on real and personal property values, or 35% of the prior year's "basic need." REAAs are not required to make any local contribution. They

[23] The Supreme Court refers to AS 14.17.025(a) & (d) in the opinion. The "local contribution" language presently found in AS 14.17.410(b)(2) was in AS 14.17.025(a) at that time, and AS 14.17.025(d) was a redundant statement of exemption for REAAs that was deleted in a later revision.

[24] Despite the fact that the local governmental units did not appeal the issue, the MatSu supreme court gratuitously added as *obiter dictum* in Footnote 2 comments and citations to precedents supporting the lower court ruling that "boroughs are not entitled to equal protection under the Alaska Constitution."

[25] See, n. 20 above.

receive State aid equal to "basic need" less ninety percent of federal impact aid.[xx]

- In municipalities with high property values, 4 mills can exceed 35% of last year's "basic need," and therefore the state-aid formula would result in more State funding going to this municipality with higher property values than to a similarly situated municipality with lower property values that trigger instead a local contribution equal to a 4 mill tax rate.[xxi]

- On the other hand, if every borough and city government was required to contribute 4 mills without an alternative, some local governments (e.g. North Slope Borough and City of Valdez) would be forced to contribute an amount actually exceeding their total "basic need."[xxii] *By paying 65% of basic need in these wealthiest school districts, the State allegedly*[26] *achieves leverage over those districts, which in turn allows the State to have a greater say in setting local educational standards*.[xxiii]

- Municipalities are free to provide limited additional local support for public education. *The MatSu Borough's local contribution to borough education was the equivalent of a 5.69 mill tax levy*.[xxiv]

- "*Nathaniel H. Cole, a consultant [for the defendant State of Alaska] in education finance and management, affied that, in his professional opinion, spending per student among districts in Alaska 'is as equitable as [in] any state's program I have examined' except Hawaii's, and that is because Hawaii 'has but one state-operated school district, and therefore has no disparities between districts.'*"[xxv]

- "*[F]rom 1981 to 1990, the State paid the [MatSu] Borough more in school construction costs per student than it paid the average REAA. During the same time period, all but three of the REAAs received less in legislative grants for school construction than the Borough did*."[xxvi]

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[26] The Court recites this alleged "fact" as originating in the State's appellate brief, not from the official record coming up from the trial court. But Justice Compton then says, "In briefing this asserted purpose, the State does not refer us to any legislative history or other authority that might indicate that one of the goals of capping the required local contribution at thirty-five percent was to maintain state leverage. Furthermore this goal does not appear anywhere in the legislature's statement of purpose." Footnote 15. Why was "this goal" even mentioned in the final MatSu opinion, if it was not proven fact? Given the fact that it was acknowledged by Justice Compton in his opinion, at least in passing, it warrants further discussion in the analyses sections below.

- "*Michael W. Worley, State Assessor for the State, affied that the available tax base in REAAs is limited by a number of factors: the tax-exempt status of certain Native-owned lands, the widespread lack of ownership records, and the fact that property ownership is often poorly defined in these areas. He also stated that '[b]orough organization generally occurs when a tax base develops or is discovered in the area which is adequate to support local government and to yield, in addition, greater services than are otherwise provided by the state*.'"[xxvii]

The total absence of other relevant and important facts in the MatSu case is as significant for present purposes as the factual errors and diversions[27] created by the above italicized "facts": The Supreme Court noted that

- there were no facts in the record of this MatSu case showing that statutory requirements creating funding disparities[28] in local contributions actually resulted in loss of educational opportunities for students in municipalities;

- there were no facts in the record showing that the individual plaintiffs paid higher taxes as a result of the required local-contribution requirement; and

- there were no facts in the record showing that invalidating the local contribution requirement would result in savings to the taxpayers.

For purposes of later analyses, I note here that in the MatSu case there were no demographic or economic facts before the Supreme Court, like those found in Volume I of this Report; that the Twenty-first Century information in Volume I of this Report directly contradicts the 1987 statement of State Assessor Michael W. Worley in the MatSu case; and that the statement of Nathaniel H. Cole has limited application to *total* funding for each school district from every source, not the relevant issue of disparities in *sources* of funding. (See, ch. 3.b. below.)

iv. The Legal Issues, Reasoning and Holdings on Appeal

What then were the legal questions brought to the Alaska Supreme Court in the MatSu appeal, and what logic did the justices use to answer these questions in their decisional "holdings"?

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[27] See Chapter 3 below for the detailed evaluation.

[28] The Court is acknowledging funding disparities, but later concluding that these disparities do not translate into disparities in *educational opportunities* among similarly situated students.

First, it is noteworthy that only four of the five justices participated in the case. It is also noteworthy that these four justices wrote two sets of reasoning and holdings that were universes apart from one another. Justice Compton wrote one opinion for himself and Justice Eastaugh, addressing some but not all of the substantive merits of the case. Justice Matthews wrote another opinion on behalf of himself and Justice Rabinowitz, summarily dismissing the entire case without reaching substantive questions. I present the two opinions here in the reverse order of their appearance in the published decision, because no new appeal could ever reach the Compton-addressed substantive issues without first overcoming the threshold questions in the Matthews-addressed justiciability issues.

A. The Matthews-Rabinowitz Opinion

Justices Matthews and Rabinowitz stepped back from the precise questions raised by the parties before the trial court and on appeal. Instead they decided, *sua sponte,*[29] to view the case as raising only two broader grievances: (1) inequality in State spending and (2) inter-jurisdictional taxing inequalities. In an opinion written by Justice Matthews, these two justices rather summarily concluded that

> no claim of unequal State spending for public facilities or activities is justiciable…. This is to say, claims of this character pose a political question. … Political questions raise issues which are more properly dealt with by a coordinate branch of the State's government. … They cannot be answered by judges.[xxviii]

In reaching that conclusion, Justice Matthews reasoned that the State can build public facilities such as roads, courthouses and job-training centers in one city and not in another, without being answerable in a court for constitutional inequalities in spending. "The solution to unequal spending claims regarding public facilities and activities is exclusively political and legislative."[xxix]

With nearly the same abruptness, Justices Matthews and Rabinowitz concluded,

> There is no inter-jurisdictional right to tax equality. … [T]he legislature can decide whether and how much to tax property in REAAs free from legally maintainable claims brought by taxpayers in other taxing jurisdictions that its decision is wrong. Here, as with State spending decisions, any available remedy must be pursued through majoritarian processes rather than through the courts.[xxx]

[29] *Sua sponte* is legal jargon for a judge spontaneously raising a new issue that was not briefed or presented by the opposing parties to the appeal.

According to the reasoning of Justice Matthews, it is inevitable that some taxing jurisdictions are blessed with more taxable assets than others. Also, taxing jurisdictions choose to spend their money differently according to local priorities and values.

> "It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live."[xxxi]

But these two justices who dismissed the MatSu case so quickly and easily did leave open a door for future claims of disparities in educational opportunities (as opposed to educational funding), if adequate facts could be developed:

> No serious claim is made in this case that substantially different levels of per pupil expenditures (adjusted for cost of living differences) exist among the various school districts of Alaska. Similarly, there is here no claim that funds available to any Alaska school district are insufficient to pay for a level of education which meets standards of minimal adequacy. … Nothing in today's opinion, or in this concurrence, should be read as suggesting that such claims might not be maintainable, if supported factually, based on the equal rights [footnote omitted] and public schools [footnote omitted] clauses of the Alaska Constitution.[xxxii]

In this quoted statement, Justice Matthews actually contradicts his earlier reasoning with regard to funding of public facilities and activities such as roads, bridges and job training centers, and suggests instead that funding of facilities and activities pertaining directly to constitutionally required statewide public education should sometimes be treated differently.

In contrast to the opinion of Justices Matthews and Rabinowitz, Justice Compton – writing for himself and Justice Eastaugh – implicitly assumed that there *could* be justiciable equal protection issues underlying the claims of the individual plaintiffs. Justice Compton chose to explore in great detail the contention of Justices Matthews and Rabinowitz that "[n]o serious claim is made in this case that substantially different levels of per pupil expenditures (adjusted for cost of living differences) exist among the various school districts of Alaska." But Justices Compton and Eastaugh also elaborate on the failure of the MatSu plaintiffs to bring to the court factual evidence of any "claim that funds available to any Alaska school district are insufficient to pay for a level of education which meets standards of minimal adequacy."[xxxiii]

B. The Compton-Eastaugh Opinion

The Compton-Eastaugh opinion is not easy to "abstract" into its component parts: issues related to reasoning related to holdings. These two justices addressed the legal issues under

the rubrics of three conclusions or "holding." But when one studies the opinion carefully, it becomes apparent that there actually are six separate and distinct legal issues that they merged into their three sets of conclusions.

To find all six issues, one must first observe that the court identified two sets of parties, two sets of arguments made by each party, and two statutes that each party challenged. This count emerges from the following three statements by Justice Compton:

> (i) "The individual plaintiffs claim that [1] their interests as taxpayers and [2] their children's interests in education are impaired by the state school funding laws…."[xxxiv]
>
> (ii) Each of these two groups of plaintiffs in turn challenges two types of disparities, being [1] "the difference in treatment between regional educational attendance area (REAA) school districts and city and borough school districts, and [2] among the non-REAA districts…."[xxxv]
>
> (iii) "The individual plaintiffs challenge two school funding laws: … [1] state aid for costs of school construction debt, and … [2] the local contribution required when districts receive state aid for operating costs."[xxxvi]

Two groups of individual plaintiffs (students and taxpayers) are each challenging two levels of alleged disparities (educational opportunities and citizen-funding) pertaining to two different sets of statutes (capital construction and operating costs). Hence, under the rubrics of three holdings or conclusions, the Compton-Eastaugh opinion is actually addressing and disposing of the following six legal questions or "issues":

1. Are MatSu Borough students deprived of equal-protection educational opportunities because of the disparities in treatment between municipal school districts and REAAs in state construction spending statutes?

2. Are MatSu Borough students deprived of equal-protection educational opportunities because of the requirement of a local contribution from municipal school districts while REAAs are exempted?

3. Are MatSu Borough students deprived of equal-protection educational opportunities because of the disparity in treatment between some municipal school districts being required to contribute the equivalent of 4 mills while other municipal school districts instead contribute 35% of the prior year's basic need?

4. Do MatSu Borough taxpayers suffer unconstitutional equal-protection impairments because of the disparities in treatment between municipal school districts and REAAs in state construction spending statutes?

5. Do MatSu Borough taxpayers suffer unconstitutional equal protection impairments because of the requirement of a local contribution from municipal school districts while REAAs are exempted?

6. Do MatSu Borough taxpayers suffer unconstitutional equal protection impairments because of the disparity in treatment between some municipal school districts being required to contribute the equivalent of 4 mills while other municipal school districts instead contribute 35% of the prior year's basic need?

There is a seventh issue in the MatSu case, pertaining to the award of costs and attorneys' fees to the State as the prevailing party to the litigation. I do not discuss that issue in this Report, because it is not a direct part of the substantive question of whether the requirement of a local contribution is legal.[30] However, *before any plaintiff decides to commence litigation anew, s/he/it should obtain a legal opinion from litigating counsel regarding exposure to costs and attorney fees in the event that new appeal failed*.

1. Issues No. 1 and 4: Financing School Construction

The two justices, Compton and Eastaugh, disposed of Issues No. 1 and 4 – alleged disparities in school construction spending statutes – with the single determination that "[t]he individual plaintiffs have failed to establish a foundation for an equal protection claim based on school construction aid."[xxxvii] Simply stated, no facts supported the claim.

The individual plaintiffs had argued that MatSu Borough students are deprived of educational opportunities, and MatSu taxpayers are deprived of equal protection because the state would reimburse the borough only 70% of annual debt service costs for school construction, while under an alternative school construction grant program REAAs were only required to contribute 2% of project costs in order to receive state construction grants.[xxxviii] The individual plaintiffs alleged that this disparity inherent in the statutory scheme itself ("*ipso jure*" in legal jargon) created two classes of students, those who receive 70% state funding and those

[30] The reader will also note that, in my Chapter 3 analyses, I do not discuss legal questions pertaining to school construction funding, or legal questions pertaining to differences in assessments among municipal school districts, namely the 4-mills vs. 35% (today, 2.65 mills vs. 45% of basic need) question. I do not feel that there is any chance for alleging disparities in school construction funding, particularly as the law has changed in recent years. I also agree with the reasoning of the Supreme Court regarding differences in the treatment of different municipal school districts, and as a matter of litigation strategy, I see nothing to gain by dividing municipal school districts in opposing groups against one another.

who receive 98% state funding; and two classes of taxpayers, those who paid locally 30% of school construction costs and those who paid locally 2% of such costs.[xxxix]

Justices Compton and Eastaugh held that these individual MatSu Borough plaintiffs "have failed to present any evidence suggesting that there actually is an overall disparity in state aid for school construction."[xl] In their reasoning, the justices said that, while REAAs do indeed pay only 2%, they do not enjoy any of the benefits of the debt-reimbursement statute under which only municipal school districts have the power to force school construction funding by the State simply by issuing bonds. Justices Compton and Eastaugh characterized debt-reimbursement to municipal school districts by the state as being mandatory under the statute once that municipal school district decides to incur the bonded indebtedness.[31] By contrast, according to the reasoning of the two justices, the sole source of construction funding for REAAs is the state's award of grants, for which REAAs must await the pleasure of the legislature.[32]

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[31] In that debt reimbursement is subject to annual appropriation by the State legislature, it is no more "mandatory" than the exemption reimbursement provisions of AS 29.45.030(g), which provide that, "The state *shall* reimburse a borough or city, as appropriate, for the real property tax revenues lost" from the State mandatory property tax exemption for seniors and disabled veterans under AS 29.45.030(e) (emphasis added). The State legislature has not appropriated funds for the senior/disable veteran exemption reimbursement provisions of AS 29.45.030(g) since FY 1997. In FY 2013, $103,105,400 in property within the Ketchikan Gateway Borough was exempt under the provisions of AS 29.45.030(e). Those exemptions reduced FY 2013 areawide property tax revenues for the Ketchikan Gateway Borough by $515,527. Nonareawide and service area property taxes were also affected.

[32] In 2010, the legislature enacted *HCS CSSB 237(FIN) am H,* which was signed into law by Governor Parnell as Chapter 93, SLA 2010. The law established the "**Regional educational attendance area school fund.**" The sponsor of SB 237 described its purpose as follows:

> . . . In 2001, Alaska courts ruled in Kasayulie vs. State of Alaska that the process by which REAA schools are funded in Alaska is significantly different than the process used for funding schools in municipal districts. The court further said that, as a result of this difference, funding for REAA schools has been arbitrary and inadequate.
>
> . . .
>
> This legislation proposes to remedy this situation by creating a stream of funding that can be used for REAA construction. . . .

(*Source:* http://www.legis.state.ak.us/basis/get_documents.asp?session=26&bill=SB237)

Municipal school districts also can pursue funding through awards of grants from the legislature. Hence, while this is the sole funding source available to REAAs, municipal school districts have two funding alternatives to choose from: one is precisely the same as the REAA method, and the other prompts mandatory reimbursements from the state.[xli]

The undisputed evidence presented by the State actually indicated that, from 1981 to 1990, the State paid the MatSu Borough more in school construction costs per student than the average paid to all REAAs, and more in construction grants than all but three REAAs.[xlii]

> The individual plaintiffs have failed to show that the various laws providing state assistance for school construction arguably interact in such a way that the students and taxpayers of the Borough have been disadvantaged somehow relative to those residing in REAAs. [Footnote omitted] In the absence of any evidence arguably showing an overall disparity in benefits and burdens, we are left with little more than a challenge to a debt reimbursement program that is available to the individual plaintiffs' district, but unavailable to the REAAs themselves. We cannot see how the individual plaintiffs' district is disadvantaged relative to REAAs by having the option of participating in this program.[xliii]

2. Issues No. 2 and 3: Impairment of Educational Opportunities

The reasoning and the conclusions pertaining to Issues No. 2 and 3 are also merged in the written opinion of Justice Compton. The individual plaintiffs had contended that requiring a 4-mill local contribution from the MatSu Borough while exempting REAAs impairs the educational opportunities of MatSu students. They also had claimed that the disparity between the 4-mill required local-contribution and the 35%-of-basic-need local-contribution impairs the educational opportunities of MatSu students.

The two justices dealt with these impairment-contentions of the individual plaintiffs slightly differently, noting that the individual plaintiffs "*assert* that invalidating the statute would result in more funding for their children's schools, leading to a better education. They also *assert* that educational interests require the highest scrutiny."[xliv] Justices Compton and Eastaugh then disposed of these assertions with the determination, again, that "[t]he individual plaintiffs have failed to establish a foundation for an equal protection claim based on educational opportunity."[xlv33] "The individual plaintiffs have failed to present any evidence arguably showing that the educational interests of their children have been disparately affected

[33] It is noteworthy that the reasoning here focuses on only the local contribution statute as it relates to the disparate treatment of 4-mills vs. 35% of basic need, and as it relates to the REAA exemption from any contribution. The reasoning does not focus at all on the statutes pertaining to school construction grants or debt-reimbursements.

by the local contribution to operating costs required of the Borough …."[xlvi] Once again, as with Issues No. 1 and 4 above, no facts supported the claims made by the plaintiffs in Issues No. 2 and 3.

These two justices then describe one clearly written line of reasoning, followed by a second ambiguous and largely implicit line of reasoning. First, Justice Compton states,

> "Basic need itself is determined by a statutory formula. No evidence indicates that altering the amount a district contributes to basic need will alter the overall amount of funding available. As noted by the State, 'the funding level remains constant regardless of the source of the revenue.'"[xlvii]

Here the justices inject the Nathaniel H. Cole expert opinion as undisputed factual evidence of the lack of any disparity in funding: "[S]pending per student among districts in Alaska 'is as equitable as [in] any state's program I have examined' except Hawaii's…."[xlviii]

The second line of penumbral, implicit reasoning by Justices Compton and Eastaugh is found in an earlier sentence where Justice Compton said, "In the absence of any evidence of disparate treatment, there is no basis for an equal protection claim, and we need not subject the challenged laws to sliding scale scrutiny."[xlix] He then added a lengthy footnote reciting a litany of cases requiring – quite differently from the above – that the disparate circumstances must exist among persons who are "similarly situated." Hence, implicitly, Justice Compton is suggesting not only that elimination of the local contribution would have no effect on "basic need" funding to MatSu Borough students, but also that the individual plaintiffs have failed to prove that the MatSu Borough parents and students are "similarly situated" to the REAA students and to the students in municipal school districts contributing 35% rather than 4 mills.[34]

3. Issue No. 5: Disparities in Local Contributions and Exemptions

The two justices then disposed of Issue No. 5 (the alleged disparity of requiring municipal local contributions to operating costs vs. granting exemptions to REAAs, as it affects municipal taxpayers) by actually finding a tenuous set of facts in the record, and by applying the low-end equal protection test to those scant facts. They concluded in their holding that "[t]he individual plaintiffs' taxation-based equal protection challenge to the required local contribution to operating costs fails because the State has established a substantial relationship between means and ends."[l]

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[34] Although this "similarly situated" reasoning arises specifically in the context of educational opportunities, it probably was intended by Justice Compton to apply to a distinction between taxpayers in the Matanuska-Susitna Borough and non-taxpayers in the REAAs.

While finding a paltry glimmer of facts to potentially open the door to the issue, the two justices also commented on missing facts in the borough's case: "The individual plaintiffs have not shown that they pay higher taxes as a result of the required local contribution"[li] Also, they have not shown "that invalidating [the local contribution requirement] would result in savings to them as taxpayers."[lii]

However, the taxpaying plaintiffs did establish, as a matter of "fact," that the borough's local contribution was higher than the required 4-mill equivalent, funded instead at the level of a 5.69 mill tax levy.[liii] Given this higher 5.69 mill level of local contribution, the justices conceded that "it is arguable that the individual plaintiffs' interests as taxpayers are being impaired by the contribution requirement. Because of this, we will proceed with an equal protection analysis of this claim."[liv]

Following the line of equal protection analyses described in Section a. of this chapter, Justices Compton and Eastaugh first concluded that "[t]he interest involved here, freedom from disparate taxation, lies at the low end of the continuum of interests protected by the equal protection clause."[lv]

Then Justice Compton moved to exploring the question of whether the local contribution requirement/exemption was in pursuit of a legitimate state government purpose. He noted that there exists in Alaska a constitutional mandate for "pervasive state authority," in the field of public education, not only to "establish" a statewide school system but also to "maintain" that system. "[T]he provision is unqualified; no other unit of government shares responsibility or authority." "By enacting a law to ensure equitable educational opportunities across the state, the legislature acted in furtherance of this constitutional mandate." Hence, the state's purpose in the enactment of the local-contribution funding provision was "legitimate."[lvi] It met the minimal nexus to purpose or goal or objective that is required at the low end of the continuum of interests.

Evaluating the "means" chosen, the reasoning of Justice Compton runs as follows: REAAs cannot levy taxes. Municipal governments can. But the legislature could levy a tax in the REAAs because the legislature is empowered to "exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough."[lvii] However, the fact that the legislature *could have* levied a tax in the REAAs does not mean that they *must* follow that route, under the minimal "means" test at the low end of the continuum of equal protection.[lviii]

> Even if the legislature overcompensated for the unique constitutional limitations on REAAs when it opted to exempt them entirely from the local contribution requirement, the fit between the means it chose and the goal of the legislation is close enough to withstand the relaxed scrutiny applicable to this case. … The

> means it chose may not have been those most protective of taxing equality, but they do bear a substantial relationship to the goals of the legislation. The classifications relied upon meet the minimal requirement that they 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'[lix]

Then, in the grossly erroneous (but unchallenged) statement of State Assessor Michael W. Worley, the justices find additional reasoning, or, "further support"[35] for the legislature's decision not to pursue the possible route of taxing REAAs:

> … [T]hat the available tax base in REAAs is limited by a number of factors: the tax-exempt status of certain Native-owned lands, the widespread lack of ownership records, and the fact that property ownership is often poorly defined in these areas. He also stated that '[b]orough organization generally occurs when a tax base develops or is discovered in the area which is adequate to support local government and to yield, in addition, greater services than are otherwise provided by the state.'[lx]

Hence, the rationales by these two justices appear at first blush to follow two lines of reasoning: (1) The mere argument that the legislature *could* have taxed REAAs for a local contribution does not mean that their failure to have done so violates the breadth of over- or under-inclusiveness permitted at the lowest level of scrutiny for equal protection, and (2) the undisputed Worley "facts" in the record of this case indicate that in REAAs there is a high level of tax-exempt property, widespread lack of ownership records, and ownership poorly defined. When a viable tax base develops, borough formation follows.

But then, in the final statement of the holding, Justice Compton expresses a third line of reasoning. He concludes, "*Given the differences in constitutional status between REAAs and borough and city districts*,[36] we hold that the legislative decision to exempt REAAs from the local contribution requirement, while requiring contributions from borough districts, was substantially related to the legislature's goal of ensuring an equitable level of educational

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[35] The word "further" indicates that the Worley testimony was not the *only* reason for the decision of the legislature not to pursue the possible route of taxing REAAs. Attorneys litigating a new case must be careful to understand that refuting the Worley testimony does not *fully* answer the Compton reasoning in this regard.

[36] The earlier reasoning indicates that it was not this summarily asserted difference in "constitutional status" between REAAs and municipal school districts that led to the holding, but rather (1) the legislature's freedom – within that broadly allowable level of over- or under-inclusiveness at the lowest level of scrutiny – to choose to not levy a tax in the REAAs, and (2) the Worley factual assertion of the impracticality of trying to levy a property tax in REAAs. As will be noted in Chapter 3, Justice Compton had eliminated the argument of a difference in taxability by noting that the legislature was empowered to levy a tax in the unorganized boroughs.

opportunity across the state. Therefore, the REAA exemption did not deprive the individual plaintiffs of equal protection under law."[lxi]

4. Issue No. 6: Disparities Between 4-Mills and 35%

In Issue No. 6, the taxpaying plaintiffs focused on disparities *among* municipal school districts, arguing that requiring a 4-mill local contribution from some municipal school districts while allowing other municipal school districts with high assessed property values to limit their contribution to 35% of basic need, deprives the taxpayers in the former districts of equal protection.[lxii] The plaintiffs noted that the problem arises from the fact that "the districts with 'the greatest ability to provide local support to education' are precisely those of which 'a lesser tax effort is required than of any other municipal school district.'"[lxiii37]

The State argued in response that requiring 4 mills from all municipal school districts would result in an even greater disparity and would defeat the goal of an equitable level of funding statewide, because, e.g., the North Slope and City of Valdez would be contributing an amount in excess of basic need.[lxiv] The individual plaintiff taxpayers responded that simply capping the alternative local contribution at 100% of basic need would avoid that opposite extreme of inequity, and would bring these districts closer to those municipal districts contributing the equivalent of 4-mills.

In addressing Issue No. 6, Justices Compton and Eastaugh adopted the same limited finding of fact described in Issue No. 5 above, and they made the same observations about what the plaintiffs had *not* established as proven facts.[lxv] Here, they also rejected the State's factual assertion that retaining a measure of state funding to these municipal school districts with high assessed property values gives the State leverage and a greater say in setting local standards, "because we did not find any explicit indication in the legislative history that the asserted purpose was one of the purposes behind the act at issue."[lxvi]

In their reasoning, the two justices first observed that no matter where the legislature had set the cap, "some taxpayers would have ended up residing in four mill districts while others resided in capped districts."[lxvii] In the context of allowing a greater degree of tolerance for over- or under-inclusiveness at this "low end" of evaluating a taxpayer's right to equal protection, these two justices concluded that the 35% cap "protects against increased funding inequities among districts and furthers the statutory purpose of equitable educational opportunity statewide."[lxviii]

The justices then developed a second line of reasoning to their conclusion or holding:

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[37] NOTE: boroughs with greater ability paying a lower local contributions rings in the same tone as affluent REAAs with greater ability paying less (nothing) vis a vis Kake, Klawok, Hoonah, and St. Mary's.

> … [U]nder the thirty-five percent cap the wealthiest districts still pay for a higher percentage of basic need than any of the four mill equivalent districts do. Therefore, the cap does not seem to undermine the broader equitable purposes of the statute, since the needier districts still have a greater percentage of their basic need paid for by the State than do the wealthier capped districts.[lxix]

In summary, the justices were saying that, because the 35% cap "provides the required fit," and "furthers the purpose of the statute" sufficiently to bear a "substantial relationship to the legislative goals that underlie the statute," "[w]e hold that the disparate impact on taxpayers in four mill districts that result from the thirty-five percent cap … does not rise to the level of an equal protection violation."[lxx]

v. Summary and General Observations

In a seemingly general and summary application to all six of the above issues, Justices Compton and Eastaugh conclude their opinion on the substantive merits by citing four cases from three other jurisdictions (California, Oregon and the U.S. Supreme Court), where highly discriminatory taxing policies were upheld by these other courts asserting that the discrimination did not rise to the level of violating the equal protection of taxpayers.[lxxi38] The two Alaska justices acknowledge that these four cases were decided under different standards of review than Alaska's test, and the two justices deny any implicit prediction of how these cited cases would have been decided in Alaska. But, simply by having cited these cases, they ambiguously imply that there must be, in these cases, some supportive reasoning or authority for their own decision.

> These cases from other jurisdictions are informative, however, insofar as they provide some indication of the latitude lawmakers are given in furthering public policy objectives even when the means chosen may happen to have severely disparate impacts on certain classes of taxpayers. … Furthermore, the plaintiffs [in the present, MatSu case] have not shown clearly that they have been disparately affected, as the plaintiffs in Nordlinger and Rodriguez did, or that any potentially disparate effect on them even remotely approaches the same degree of imbalance and severity of burden found constitutional in those cases.[lxxii]

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[38] *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L.Ed.2d 1 (1992); *Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization*, 22 Cal.3d 208, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct 1278, 36 L.Ed.2d 16 (1973); *Savage v. Munn*, 317 Or. 283, 856 P.2d. 298 (1993). The holdings of these cases are discussed in Ch. 3d below.

To summarize the holdings in the MatSu case, one can say that the Matthews-Rabinowitz opinion held that

- claims of unequal state spending and
- claims of inter-jurisdictional tax inequalities

raise only non-justiciable political questions that must be decided by elected officials, not courts.

The Compton-Eastaugh opinion held that

- there were no facts in the record developed at the trial court level supporting the plaintiffs' claims of deprived educational opportunities suffered by students in municipal school districts;
- there were no facts in the record developed at the trial court level supporting the plaintiffs' claims of inequality in school construction funding and indeed municipal governments actually enjoyed greater benefits and greater flexibility than REAAs; and
- although taxing disparities are created by the local-contribution statute, the "relaxed scrutiny" test applying to taxpayers renders the conclusion that there exists a "fair and substantial"[39] relationship between "the means" (the local-contribution statutory requirements toggling between 4-mills and 35% of basic need for municipal school districts and exempting all REAAs), and "the objective" (the explicit constitutional mandate for statewide funding of public education).

This Chapter 2 represents the state-of-the-law today regarding local contributions. In the next chapter, I will dissect this MatSu case to show what was missing in factual development, what was developed erroneously in trial-court proof, how the arguments of the various justices might be distinguished with new facts, how the MatSu case is weakened both by the split of the Court and by the errors in reasoning, and how a new case might avoid some of the pitfalls of the MatSu plaintiffs. I will also suggest some possible new approaches to equal protection arguments against the local contribution statute.

[39] Sometimes the test is stated by Justice Compton as requiring a "substantial relationship." I discuss in Chapter 3 the importance of not brushing over the "fair" element of the test, and I offer an objective measure of "fairness."

CHAPTER 3. Analyses of the MatSu Case and New Equal Protection Arguments

As noted above, the MatSu case describes the present state of constitutional equal-protection law as it applies to the local contribution requirement. No future equal protection claim by taxpayers or students can succeed without convincing the court either to overturn the MatSu case or to distinguish that case from present-day facts and circumstances.

This Chapter opens with a discussion of the summary dismissal of the MatSu case by Justices Matthews and Rabinowitz, based on non-justiciability. Then the discussion moves to analyses of the Compton-Eastaugh opinion, focusing primarily on Issues No. 2, 3 and 5, and including methods of developing facts to refute the Cole testimony, and new facts to refute the Worley testimony. New facts may actually raise the level of the Supreme Court evaluation either to an intermediate level or the highest level of scrutiny. Even if the court applies only the lowest level of scrutiny, the new facts in Volume I magnify the disparity considerably from the paltry facts in the MatSu case.

a. Analyses of the Matthews Opinion: Justiciability.

Justices Matthews and Rabinowitz summarily dismissed the equal protection claims of the taxpayers in the MatSu case without ever getting to the legal issues surrounding the few substantive facts in the case. These two justices held that inequities in state spending on public facilities, and disparities in inter-jurisdictional taxation, raise only "political questions" that are not justiciable in the courts but instead must be argued in democratic electoral processes and through the elected branches of government.

If, in some future case, a majority of the presently seated Alaska Supreme Court justices adopts the earlier Matthews-Rabinowitz positions, then the plaintiffs would be stopped abruptly at the courtroom door, never obtaining a hearing of the substantive merits of a new case with new facts supporting the equal protection arguments. Hence, the reasoning and decisions of these two justices in the MatSu case raise literal threshold questions for review and analysis here.

I join the vast majority of Alaskan attorneys in the opinion that Justices Matthews and Rabinowitz rank among the most intelligent, highly respected jurists ever to sit on the Alaska Supreme Court. Lawyers and Alaskan citizens may object to the impracticality of some of their decisions and the complicated public policy issues created for other branches of government by some of their decisions, but these two jurists (one now retired, the other deceased) possessed deeply learned insights and understandings of legal theory and constitutional law. They are generally recognized by their peers and nationally as eminent legal minds. Hence, I believe that

the panel of justices on today's Supreme Court will give more-than-ordinary credence to the legal opinions of these two justices in the MatSu case.[40]

However, respect does not always translate into agreement. Obviously, Justices Compton and Eastaugh did not agree with Justices Matthews and Rabinowitz. Supplied with even more detailed facts, persuasive reasoning and cogent argument, one can probably assume that the present panel of supreme court justices will be equally independent in their thinking.

Moreover, a break from the Matthews-Rabinowitz position by the presently seated court is easier to rationalize because only four of five justices participated in the MatSu decision, and those four justices were glaringly divided[41] in their opinions. Where only two-of-five justices found that the earlier case raised solely political questions warranting summary dismissal, and another two-of-five justices instead delved deeply into the merits of the case, the precedential value of both written opinions is seriously weakened and the entire outcome seriously compromised as a "precedent" binding on future courts. One must deal carefully with the holding that taxpayer-equal-protection issues surrounding the local contribution statute are non-justiciable political questions, but there is not yet a clearly established common-law precedent to that effect in Alaska.

Even if the presently seated court followed the opinions of Justices Matthews and Rabinowitz, that portion of the MatSu case applies only to plaintiffs coming to the court as

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[40] Following graduation from law school, my first job was to serve as an Alaska Supreme Court law clerk for 13 months during 1971-72. I clerked for Justice John Dimond, and then Justice Robert Boochever in Juneau. In 1973, I clerked again for a few months for Justice James Fitzgerald in Anchorage. As executive director of the Alaska Judicial Counsel, I then worked for three years under the direct supervision of Chief Justice Jay Rabinowitz.

From this "inside" perspective of the Supreme Court processes, I can say that while all of the justices were very respectful of the legal opinions and written draft-opinions of one another, Justice Rabinowitz clearly was the legal luminary among them, and was highly respected by them as such – the most incisively analytical among them, and the jurist drawing not only from extreme intelligence but also from a vast knowledge of law that he could call to the fore in an instant.

[41] In American jurisprudence, consensus is a very important factor in developing credence for appellate judicial decisions. A grossly divided appellate court generally makes only tenuous law. *In camera*, an important function of a good "chief justice" is mediating among the justices toward developing as tight a consensus as possible, and every good judge knows that striving for common ground among a panel of justices is important to the future strength and credibility of their common law pronouncements. Draft opinions are circulated among the justices, sometimes for many months, and throughout the process every justice joins the chief justice in searching for common grounds and bases for consolidation of written opinions toward the fewest possible number.

Generally speaking, a single opinion by a united five-justice court is a far more enduring statement of law than, say, a promulgated decision containing a two-justice opinion, a single-justice concurring opinion, and two dissenting opinions. The former is an embodiment of conviction and predictability in the common law, while the latter embarrassingly suggests too strong an element of the subjective rule by individual men and women rather than the fictionally objectified rule of law.

taxpayers making an equal protection argument. It does not apply to any of the arguments in Chapter 5 below.[42] The two justices held only that there can be no justiciable *equal-protection* claim for unequal State spending on public facilities or activities, and that *taxpayers* have no inter-jurisdictional right to tax equality.

Moreover, these two justices were very careful to narrowly confine and qualify their equal protection decision, noting that it does not apply to instances where students claim disparities in educational opportunities as a denial of equal protection.

> No serious claim is made in this case that substantially different levels of per pupil expenditures (adjusted for cost of living differences) exist among the various school districts of Alaska. Similarly, there is here no claim that funds available to any Alaska school district are insufficient to pay for a level of education which meets standards of minimal adequacy. … Nothing in today's opinion, or in this concurrence, should be read as suggesting that such claims might not be maintainable, if supported factually, based on the equal rights [footnote omitted] and public schools [footnote omitted] clauses of the Alaska Constitution.[lxxiii 43]

The above quote establishes that some equal protection claims in matters of financing education are justiciable, in the opinions of Justices Matthews and Rabinowitz. These jurists are only saying in essence that *these MatSu plaintiffs,* specifically, have failed to make out a case. And, to the extent they left open a seemingly broad category of claims "based on the equal rights and public schools clauses of the Alaska Constitution," "if supported factually," then a disparity in "educational opportunities" is only one of many possible sets of factual circumstances that could receive a full hearing by the court at some future time.

Viewed from another perspective, one can observe that Justices Matthews and Rabinowitz precisely and carefully delineated two "political questions" they found in the specific appeal by the MatSu plaintiffs. They explicitly reserved the possibility of some future

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[42] These two justices were not reviewing the legal questions raised by the constitutional provisions requiring (i) implementation of a plural number of unorganized boroughs according to specifically enumerated constitutional criteria, (ii) maximum local participation and responsibility within unorganized boroughs, (iii) maximum local self-government with a minimum number of local government units throughout the state, and (iv) "corresponding obligations" of every Alaska citizen enjoying constitutional rights and protections.

[43] In the next section of this Chapter, I explore the possibility of developing new facts establishing a disparity in "standards of minimal adequacy," such that the review of the equal protection issues surrounding the foundation funding formula rise to the highest level of scrutiny requiring that the statute be the "least restrictive alternative" for accomplishing a "compelling state interest."

equal protection claim succeeding as a justiciable issue, and they implicitly did not say that taxpayers *never* have an equal protection claim founded in taxation.

If newly proven facts can demonstrate circumstances strikingly more invidious than what one finds in the view that all four justices of the Supreme Court took from the few-facts-and-many-erroneous-assumptions[44] in the MatSu case, then a new equal protection claim by taxpayers might well cross the Matthews-Rabinowitz threshold into justiciability. Imagine, for example, an admittedly extreme hypothetical where the legislature imposed a local-contribution requirement only on first class cities outside boroughs (e.g. St. Mary's, Hoonah and Dillingham) while granting to municipalities and boroughs (e.g. Anchorage, Fairbanks and Juneau) the same exemption all REAAs presently enjoy. In the reviewing eyes of Justices Matthews and Rabinowitz, St. Mary's taxpayers suing as taxpayers probably would have a justiciable equal protection grievance. Such a hypothetical funding scheme does not bear a "fair and substantial relationship" to the legitimate purpose of funding public schools, and is far too extremely irrational and invidious for any insightful judge to dismiss summarily as a non-justiciable "political questions."

Hence, one can say that, even in the context of "taxpayers" and "equal protection," it is possible to overcome the non-justiciability opinions of Justices Matthews and Rabinowitz – if the presently seated Supreme Court justices agreed that the newly established demographic, economic and geographic facts demonstrate a level of invidiousness or irrationality far more extreme than what was evident from the negligible, erroneous and inadequate developed facts in the MatSu case. One would argue anew to the court that, in the context of the perspective of 1997, Justices Matthews and Rabinowitz were only saying that the MatSu Borough plaintiffs themselves failed to prove a sufficiently egregious inequity and sufficiently intolerable injustice warranting intervention by the courts.

Another approach to this argument lies in persuading the new justices that, assuming Justices Matthews and Rabinowitz would have accepted justiciability at some higher level of inequity, more egregious than the MatSu record of facts, then it is incumbent upon this new court to delve deeply, substantively, into the present facts in the new record of a new case in order to *assess* whether the level of unfairness and the degree to which the means miss the

[44] In MatSu, the court was left with the stereotypical impressions that REAAs, for the most part, can be defined as Alaska Natives living on rural tax-exempt Native lands off the road system in subsistence life styles and distressed economies that lack cash employment opportunities, and that municipal school districts, for the most part, can be defined as non-Natives living on urban, privately owned and taxable lands along major transportation corridors in non-distressed economies offering ample cash employment opportunities. Volume I of this Report challenges that image.

mark[45] are now so egregious and invidious as to warrant justiciability. The presently seated justices cannot determine whether the new case might pass into what Justices Matthews and Rabinowitz would consider justiciable without a full substantive review of the present-day facts and circumstances.

This argument for a full substantive review as a prerequisite to a determination of justiciability is strengthened by pointing out to the new court that the MatSu "record on appeal" was remarkably incomplete and contained many stereotypically incorrect statements of facts about REAAs and municipal school districts, and, that circumstances have changed considerably since those 1986 facts were brought to the appellate court.

The remainder of this section contains commentary on possible errors in the perceptions and reasoning of Justices Matthews and Rabinowitz.

i. Disparities in Inter-Jurisdictional Taxation

Justice Matthews characterized the MatSu case as being one in which plaintiff-taxpayers "claim that they pay more in property taxes [to a borough taxing authority] than … property owners in REAAs (who pay no property taxes)" at sufferance of a different taxing authority, the state legislature.[lxxiv] He then stated as an incontrovertible matter of constitutional law, "There is no inter-jurisdictional right to tax equality."[lxxv]

This word, "inter-jurisdictional," presumes two or more different taxing authorities. Justice Matthews describes his interpretation of the case as the MatSu Borough being one taxing authority and the state legislature being another taxing authority. Viewed from this perspective, he is correct. One governmental taxing authority might place greater value on snow plowing services while another taxing authority places greater value on public safety personnel and equipment. Courts cannot interfere with these separate and distinguishable democratic decisional processes. Injecting non-elected judges into the quagmire of cross-jurisdictional tax inequalities would flout the democratic processes. It is taxpayers who should decide with their votes how much to tax, and how to allocate spending of that tax revenue. Why, for example, should Ketchikan voters be limited in the amount they spend on public safety, to ensure that it is equalized with what Sitka voters choose to devote to public safety? How can any court measure, much less control, these types of "inter jurisdictional" revenue balances?

Justice Matthews characterized the case as "inter-jurisdictional" because the MatSu plaintiffs presented their case to the supreme court as taxpayers to the MatSu Borough

[45] At the lowest level of scrutiny, do the "means" bear a "fair and substantial relationship" to a legitimate governmental objective?

contesting the fact that they were required to pay a levy *to their borough taxing authority* while another set of potential taxpayers in REAAs were exempted from a levy *by their state-legislature taxing authority*. The MatSu plaintiffs set up an "inter-jurisdictional" scenario.

But, when we are analyzing the local contribution statute, AS 14.17.410(b)(2), we should be talking about only one taxing authority: the State legislature. Where the legislature possesses not only the power to tax some part or all of the unorganized borough, and where that same legislature also possesses the power to impose an unfunded mandates on local governments, that legislature is one-and-the-same taxing authority and the issue is "intra-jurisdictional," not "inter-jurisdictional." *An unfunded mandate is a tax imposed by the legislature.*

An example of an intra-jurisdictional situation at the local level would be where one-and-the-same taxing authority, e.g., a borough assembly, enacts a school-funding ordinance stating that one neighborhood in the school district must pay fees to fund the jurisdiction-wide music and sports programs while another neighborhood in the same school district can enjoy participation in the same programs while contributing nothing. Such a local classification might indeed be constitutional, if there exists "a fair and substantial relationship" between the differences in neighborhoods and a legitimate borough purpose. The point to be made here is that, in any future litigation, the local contribution statute must be characterized for evaluation as this kind of an "intra-jurisdictional" inequity, and then the applicable law will also change.

This new characterization – one taxing authority treating two potential taxpayers differently – raises its own issues. First, one might argue that an unfunded mandate is not a tax. True, it is not a direct tax by the legislature on taxpayers suing as aggrieved taxpayers. AS 14.17.410(b)(2) does not require an *ad valorem* levy of a mill rate on property. It only requires a local contribution that is "the equivalent of…." That local contribution can come from any source, and in fact is collected from various sources other than property taxation by different municipal school districts, e.g., sales taxes, raw fish taxes, mining payments in lieu of taxes, etc.

But, while the unfunded mandate may not be a tax levied on taxpayers per se, that unfunded mandate is, in all practical effects, a tax levied by the legislature on boroughs and first-class cities outside boroughs. It is a required annual payment for the benefit of the state that is levied according to an assessed value of property, and collected to fund what is constitutionally a state function, not a local function. States tax individuals and states tax corporations and other business associations. There is nothing in the Alaska Constitution preventing the state from also taxing municipal corporations, and that is what happens in

practical effect when the state legislature imposes an unfunded mandate on these political subdivisions.[46]

Viewed from this perspective, the plaintiff is not arguing as a local aggrieved taxpayer, but rather is arguing from the perspective of someone accepting the broader notion of a state-required local contribution, and simply trying to make it fairer with inclusions and exclusions. Indirectly, that plaintiff is still showing the court that the statute as presently enacted lacks the "fair and substantial" relationship required to meet minimal equal protection. But the way the argument is articulated will avoid confusion between an inter- and an intra-jurisdictional issue.

Of course, borough taxpayers *qua* taxpayers cannot present this perspective on the grievance without risking the MatSu trap of being viewed as raising inter-jurisdictional taxing issues. And the ability of a borough or first-class/home rule city outside a borough to make this equal protection argument is problematic because of present limitations on the interpretation of the Alaska equal protection clause. The "party" issues surrounding this new perspective will be discussed in Chapter 4 below.

ii. Inequities in State Spending on Public Facilities

In the same manner that Justice Matthews re-characterized the claims of the MatSu plaintiffs as disparities in inter-jurisdictional taxation, he also re-characterized their claims as founded in alleged inequities in state spending on public facilities, thereby raising only purely "political questions." The simple response here is that the Alaska Constitution does not allow the legislature to treat spending on public education as cavalierly and politically unequal as it treats spending on docks, bridges and public facilities in general. The distinction between legislative funding of bridges, docks and job training centers on the one hand, and legislative funding of educational facilities and activities on the other hand was missed, despite the fact that, the decision was narrowly limited to ensure leaving open the possibility of a future claim founded in discriminatory levels of per pupil expenditures or insufficient funding for minimal standards of education.

This portion of the opinion can be refuted a number of ways. First, a new appeal should focus on the funding formula for the operating costs of public schools, not the funding of capital construction of school facilities. The equal protection issue then becomes one of educational funding and opportunity, cleanly distinguished from educational buildings, edifices and public facilities.

[46] One might carry the characterization and argument further to find that this unfunded mandate is a "dedicated tax."

Secondly, new parties to new litigation should bring to the fore art. VII, sec. 1 of the Alaska Constitution. In matters of public education, there is an overriding constitutional mandate that the legislature must "establish and maintain a system of public schools open to all children of the State" in a fair and equal manner.[lxxvi] It is an integrated, statewide school system. The equities required by the Constitution for the funding of public education are far different from wide-ranging possible and permissible inequities in more generic state capital-budget spending on one or another public facility, such as what results when, e.g., funding a bridge in Southcentral Alaska is favored over funding a causeway in Western Alaska.

State spending on public facilities, viewed generally, is always unevenly applied in a political process, and allocated unevenly according to greater or lesser clout on the finance committees of the legislature. But State funding and spending on public education is a far more sacred and exacting preserve. This has been recognized by the Alaska Supreme Court on many occasions, in many contexts.[lxxvii] By invoking state spending on public facilities, the Matthews opinion has ranged far too broadly. It fails to deal with the differences between permissible spotty state spending on public facilities, generally speaking, and impermissible inequities in spending on constitutionally required statewide, integrated public school education.

In summarizing the above comments about the Matthew-Rabinowitz non-justiciability opinion, one can first note that only two of the five justices found non-justiciability in the earlier MatSu case, and hence it is not a compelling precedent. But those two justices number among the most esteemed jurists in Alaska Supreme Court history, and hence it is particularly important to refute their positions.

b. The MatSu Facts and the Development of New Facts.

i. Introduction

I have observed repeatedly in Volume I and in this Volume II that the "facts" brought by the MatSu parties to the Alaska Supreme Court were few, poorly developed, partially incorrect, and not adequately refuted by the plaintiffs' attorneys.

The narrow relevance of testimony by a state consultant in education finance and management finding no disparities in total, all-source financing among Alaskan districts was not only unchallenged by the plaintiffs' attorneys but was used by Justice Compton to conclude that educational opportunities are equal throughout the state.

The testimony of a state assessor slipped into the Supreme Court record unchallenged by the plaintiffs' attorneys despite his incorrect assertion of poorly defined and largely exempt ownership of property in REAAs, and despite his erroneous claim that borough formation occurs when a tax base matures.

In the MatSu case, no facts were developed to support the claims of deprived "educational opportunities." No facts in the record established that the individual plaintiffs paid higher taxes as a result of the required local-contribution requirements. No facts in the record alleged or proved that invalidating the local contribution requirement would result in savings to the taxpayers. Scant facts only marginally managed to trigger a review by two justices of possible taxing disparities created by the local-contribution statute.

Just as Volume I of this Report challenged the 1987 stereotype of all REAAs being off-road Native cultures with subsistence lifestyles and distressed economies, the discussions in this subsection explain other ways that an attorney in future litigation might successfully distinguish the facts in the MatSu precedent from facts in a new case challenging the local contribution statute.

Whatever the reason for the deficiencies in factual development in the MatSu case, that earlier shortfall may prove to be a hidden blessing at this point in time, 27 years after that inadequate "proof" entered the record, and 16 years after the Supreme Court decision. If a new case came to the Supreme Court as a Brandeis-brief containing an elaborate set of statistical and demographic facts to overcome the rural/Native/subsistence/distressed-economy stereotype of all REAAs (which was apparent in the earlier case), and if a new case came with credible expert-testimony discrediting the positions of Messrs. Cole and Worley, the justices today would be far more likely to "distinguish" MatSu as an outdated and inapposite precedent, and substantively review the local-contribution statute anew.

ii. All-Source Financing and Equal Educational Opportunities

Nathaniel Cole, a consultant in "education finance and management" (and pointedly not an expert in substantive educational methods and practices) testified for the State in the MatSu case that the amount of spending per student among districts in Alaska "is as equitable as any state's program I have examined except Hawaii's… ."[lxxviii] He found no disparities in total, all-source financing among Alaskan school districts. His statement is relevant only to the narrow fact that district-by-district basic need[47] is constant in local spending power no matter what the

[47] Justice Compton cited Mr. Cole's testimony in conjunction with the assertion by the State that "the funding level remains constant regardless of the source of the revenue," as one of three lines of reasoning this justice used to support the proposition that the MatSu plaintiffs "failed to establish a foundation for an equal protection claim based on educational opportunity." The second line of reasoning was simply the absence of evidence. The third line of reasoning appears in the "similarly situated" discussion in subsection 3.b.v below.

source of funding, whether it comes partially from a local contribution or entirely from the State.

Justice Compton then reasoned from this unchallenged observation by Mr. Cole that, if all school districts derive equal spending power from all sources, then all students in all districts receive equal educational opportunities, and therefore the requirement of a local contribution must not be depriving any students in any particular municipal school districts of equal educational opportunities.

The logical fallacy of this reasoning is found in the leap from funding to educational needs: If funding is equal, then educational opportunities are equal. Because students do not suffer disparate treatment in funding across the entire state, no local subset of students suffers a qualitative educational loss in comparison with another subset of students.[48] Implicitly, an assumption is made that funding is the only element in the quality of education, and that every student of equal, innate competence starts public school with the same support structures and abilities to benefit from a constant spending level, whether that student is residing in a remote village or the center of Anchorage.

From the point of view of the testimony itself, one can find two problems with what Mr. Cole said. First, he did not address any one particular *source* of funding for statewide public education and hence his testimony did not address one of the central issues in the MatSu lawsuit – the taxing equity of requiring a local contribution from only some school districts. (He only addressed equality of educational opportunity.)

Secondly, Mr. Cole said nothing about whether equal spending power among districts correlates in any significant manner with statewide equality in the provision of substantive educational opportunities. Mr. Cole only addressed the subject of *total* financing of public schools from all sources, in support of the State's argument that basic need remains constant without regard for source, and Mr. Cole was silent on both 'where' the money comes from (the local contribution requirement) and the relative 'effectiveness' of equal spending on the constitutional right to equal educational opportunity.

When we speak of equality of educational opportunities, we are not referring to barren technocratic equality in dollar-spending power in each school district. We are talking about bringing every student of equal intelligence to the same core-goal of educational accomplishment, such that every such student leaves school with equal opportunities in the market place, without regard for their resident school district. If some students start on a

[48] In fairness to Justice Compton, he also noted that the plaintiffs brought no evidence to the court supporting their claim of deprived educational opportunities. It was in the context of that vacuum that he pulled the testimony of Mr. Cole from the record, and applied it illogically as *further* support for his decision.

figurative "second base," and other students start at "home plate," equal running time does not bring both of them back around to home base. The student running all bases needs extra speed and/or time. Similarly, in a state with so many extremely diverse cultures and such differences in remote vs. urban-central living conditions, some students starting further back need more state financial assistance in order to arrive, on a statewide basis, as an equal in educational opportunity. These students do not get that equal *opportunity* if they need more assistance developing study skills, or need to learn more but have no extra money to "get there." Simply stated, equal dollar-spending power in each district statewide is not synonymous with equal educational opportunities in each district statewide.

In order to provide equal statewide educational opportunities, a government must give more attention to those districts with fewer community- and family-resources, and less favorable circumstances for achieving the academic standards of substantive education desired statewide. As an illustration, if the legislature chose to fight Hepatitis C equally throughout the state, it would not allocate equal spending power per capita in each district. Legislators would allocate proportionately more in districts where Hepatitis C was per capita more prevalent. Similarly, if the state chose to bring all human habitations equally to the same minimum building code standards, it would not allocate monies as equal spending power per capita among districts, but rather would allocate proportionately more spending power in the regions with the most dilapidated housing.[49]

A line of facts that would make a justiciable issue of inequality in educational opportunities, according to Justice Matthews, would be proof that "funds available to any Alaska school district are insufficient to pay for a level of education which meets standards of minimal adequacy."[lxxix] There probably are many school districts throughout Alaska that do not meet "minimal adequacy" in standardized testing. Some are much farther from "minimal adequacy" than others. If six or seven affluent REAAs contributed to the statewide "pool" of all-source funding of public education then the base student allocation number could be increased statewide without any larger dollar-appropriation from the legislature, thereby increasing the funds available for meeting "minimal adequacy."

Hence, in any new litigation challenging the local contribution statute, plaintiffs should retain substantive *education* experts (not educational finance experts) to describe to the Supreme Court the inequities that occur when, e.g., the Lower Yukon REAA receives only equal

[49] These analogies fail to represent constitutional issues in themselves because in most circumstances the equal protection clause does not require the legislature to allocate funds to achieve equal effect statewide. (See, Justice Matthews' discussion of legislative discretion in allotting funding for public works and public services.) But these examples do illustrate analogues for how one achieves equal effects in educational opportunities, which is a statewide public service, different from other public works and public services. The Alaska Constitution requires equal educational opportunities statewide, which can be measurable by effects.

spending power per student purportedly to achieve "minimal adequacy" and/or the same academic common-core results as the Anchorage School District, given the access of the latter students to local advantages in academic culture, bookish parenting, surrounding library- and museum-programs, richer English-language lifestyles, and other more literary resources.

I certainly am not that education expert, but I suspect that, somewhere amid the plethora of testing required in public-education today,[50] there is ample proof that equal funding does not provide equal educational opportunities for achieving common core educational standards, or the "minimal adequacy" identified by Justice Matthews. I suspect that statewide testing processes will demonstrate these disparities in the relative profiles of performance and in the "minimal adequacy" of students in, e.g., Alakanuk or Koyukuk as contrasted with students in, e.g., Delta Junction or Glennallen.

Showing that such a disparity exists is not, however, the end of the argument for present purposes. The putative new plaintiffs must also relate that disparity to the requirement of a local contribution. If *arguendo* one assumes that the test scores for the academic achievement of Delta Junction or Glennallen students represent a "minimal adequacy," and if *arguendo* the test scores of students in the remote villages of, e.g., Alakanuk or Koyukuk are substantially lower than the scores of students in these road-system REAAs, then the present funding formula which grants a local-contribution exemption for these towns in affluent REAAs, thereby effectively reduces the statewide pool of money in a manner depriving those remote-village students the additional money that would otherwise be available from the state – money needed for them to come closer to that performance level of "minimal adequacy" in educational opportunity. The basic need number would increase for everyone statewide if more affluent REAAs subsidized a portion of their local educational expenses, such that the legislature could increase the base student allocation number, even assuming the legislature added no more state funding than the year before. In that sense, the statutory exemption creates a disparity in funding that prevents parity in "minimal adequacy" of educational opportunities between distressed REAAs and affluent REAAs.[51]

In the last analysis, Mr. Cole's testimony says nothing about the central issue, the equity of the local contribution as a source of partial funding of public school education in some districts; and Mr. Cole's testimony does not prove that students in each district are, in effect, receiving an equal educational opportunity. The broad and sweeping factual evidence offered by Mr. Cole offers no basis for conclusions about equal educational opportunities.

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[50] E.g., SBA, TerraNova, GLE, A&E, DIBELS, AIMS, and HSGQE, to name a few.

[51] An educational expert witness might be able to develop test-score evidence for use along the same line of argument to prove disparities in "minimal adequacy" educational opportunities between distressed municipal school districts and affluent REAAs.

iii. Value of Privately Owned and Taxable Property in REAAs

The second unchallenged "expert" testifying for the State in the MatSu case was the then-state assessor, Michael W. Worley, who incorrectly reported to the Supreme Court

> "that the available tax base in REAAs is limited by a number of factors: the tax-exempt status of certain Native-owned lands, the widespread lack of ownership records, and the fact that property ownership is often poorly defined in these areas."[lxxx]

The first error of note in this statement is that Federal Impact Aid payments compensate both REAAs and city and borough school districts alike for tax exempt properties. There is no distinction between the two in this regard. Seven REAAs and three municipal school districts are projected to generate FY 2013 Federal Impact Aid amounting to $4,930 to $7,733 per student. Five REAAs and five municipalities are projected to generate between $4,134 and $1,580 per student.

School District	Federal Impact Aid Per Student	School District	Federal Impact Aid Per Student	School District	Federal Impact Aid Per Student
Pribilof	7,733	Kake	1,826	Cordova	50
Annette Island	7,093	Aleutian Region	1,580	Unalaska	47
Yupiit	6,434	Yakutat	1,400	Galena	31
Bering Strait	6,144	Chatham	1,298	Southeast Island	16
Lower Yukon	6,085	Dillingham	1,277	Sitka	13
Southwest Region	6,050	Bristol Bay	1,155	Denali	13
Kashunamiut	5,897	Hoonah	1,022	Valdez	11
Lake & Peninsula	5,491	Fairbanks	936	Wrangell	3
Klawock	5,181	Iditarod Area	840	Haines	0
Hydaburg	4,930	Craig	806	Juneau	0
Lower Kuskokwim	4,134	Yukon/Koyukuk	796	Kenai Peninsula	0
Kuspuk	3,949	Alaska Gateway	776	Ketchikan Gateway	0
Aleutians East	3,626	Kodiak Island	764	Mat-Su	0
Yukon Flats	3,112	Copper River	581	Nenana	0
North Slope	2,883	Anchorage	420	Pelican	0
Mt. Edgecumbe	2,519	Delta/Greely	389	Petersburg	0
Northwest Arctic	2,509	Chugach	229	Saint Mary's	0
Tanana	2,155	Nome	61	Skagway	0

Moreover, for purposes of AS 14.17.410(b)(2), the State Assessor already makes full value determinations in 11 remote cities outside boroughs where no local assessment records

exist. The alleged lack of ownership records and poor definition of ownership would be no different in these small, remote cities already serviced by the State Assessor than in the 6-7 affluent and far more sophisticated REAAs. (See, footnote 3 above.)

Finally, contrary to what Mr. Worley testified, as early as 2003 the Alaska Local Boundary Commission determined, to the contrary, that six REAAs[52] had sufficient local financial resources for operating a local borough government, including payment of the local contribution to public education. That LBC Report was replete with property valuations and taxing information, showing a valuation of $454 million excluding oil and gas properties.[lxxxi] Interestingly, all of this *ad valorem* private property tax information for the year 2001 was obtained from the Alaska Office of the State Assessor. Hence, in at least these six REAAs, the State Assessor subsequently was able to find clearly discernible privately owned lands, and sufficient ownership records to provide very detailed assessment information when it was requested from LBC staff.

iv. The Myth of Spontaneous Borough Formation

State Assessor Worley was cited by the Supreme Court for an incorrect –declaration under oath that

> [b]orough organization generally occurs when a tax base develops or is discovered in the area which is adequate to support local government and to yield, in addition, greater services than are otherwise provided by the state.[lxxxii]

The history of Alaska indicates that there is absolutely nothing spontaneous or circumstantial that triggers incorporation of boroughs. As noted in Volume I of this Report, more than 96% of residents of organized boroughs live in boroughs that did not voluntarily initiate incorporation.[lxxxiii] The effort to incorporate a Deltana Borough by local action was unsuccessful on repeated occasions. Only one of the eight unorganized areas of the State recognized by the LBC in 2003 as meeting borough-incorporation financial standards has incorporated. The Wrangell/Petersburg model borough boundary area was incorporated as two separate borough governments. The City and Borough of Wrangell incorporated on May 30, 2008, and the Petersburg Borough incorporated on January 3, 2013.

The Alaska Local Boundary Commission formally declared in 2001 that it "considers the lack of a strong State policy promoting the extension of borough government to be the most pressing 'local government boundary problem' facing Alaska."[lxxxiv] Two years later, in response to a request from the legislature, the LBC formally declared that six and perhaps seven regions

[52] Aleutians REAA, Delta-Greely REAA, Alaska Gateway REAA, Copper River REAA, Chugach REAA and Chatham REAA.

of the State qualified in all respects for borough formation. Senator Gary Wilken then sponsored Senate Concurrent Resolution 12, which would have required the LBC to consider borough incorporation for four of the REAAs previously determined to meet borough formation standards. SCR 12 passed the Senate, but died in the House Committee on Community and Regional Affairs.[lxxxv] History demonstrates not only that Mr. Worley was wrong in his statement that borough-creation occurs spontaneously when circumstances are ripe, but also that even the majoritarian political process is unable to implement the provisions in the Alaska Constitution requiring maximized local government with a minimum of local governmental units.

As noted in the Local Boundary Commission reports cited and quoted in Volume I of this Report, it is highly unlikely that the citizens in unincorporated regions will ever vote to form boroughs, because that change of status would block their presently successful end-run around the requirement of a tax levy for contributions to their local public education expenses. Governor Jay Hammond said it well: "Attractive enough on paper, in practice, the organized borough concept had little appeal to most communities. After all, why should they tax themselves to pay for services received from the state, gratis?"[lxxxvi] The people in these regions have no incentive to incorporate when they can otherwise retain 100% state-and-federal government aid to their local public education.

In any future litigation, the plaintiffs must retain an expert in the history of borough formation in Alaska.[53] The Alaska Supreme Court must be accurately informed about these facts, indicating clearly the present inequities of levying a local contribution from economically distressed municipal school districts while allowing affluent REAAs to enjoy a free ride as virtual malingerers in a *de facto* educational welfare program. The Alaska Supreme Court must be convinced that nothing short of mandatory borough formation or, major changes in the education-funding formulae by the courts, will ever correct the present inequities resulting from treating the entire unorganized borough as a singular unit for exemption from AS 14.17.410(b)(2).

v. "Similarly Situated" Persons

In his holding on educational opportunities, Justice Compton said, "[I]n the absence of any evidence of disparate treatment, there is no basis for an equal protection claim, and we

[53] The present manager of the Ketchikan Gateway Borough, Mr. Dan Bockhorst, is without question the pre-eminent Alaskan expert on all matters pertaining to borough formation and to all of the reports and manuals published by the LBC during his 27 years as the leader of that commission's staff. He researched, analyzed and wrote every one of the LBC reports and manuals. During his LBC career, he developed a vast library of source materials pertaining to constitutional, legal and historical municipal affairs in Alaska, and he mastered his material. He organized and developed many seminars and workshops of experts to discuss issues of municipal affairs, and he edited and published transcripts and summaries of these convocations.

need not subject the challenged laws to sliding scale scrutiny." One might conclude that this holding is founded only in the two reasons published in the main text of his opinion, namely, (1) that the plaintiffs failed to present factual evidence of disparate treatment, and (2) that basic-need funding remains constant regardless of source, supported by the above testimony of Mr. Cole regarding equality in all-source financing.

But Justice Compton added a footnote to the above-quoted sentence, and that footnote cited a number of cases addressing an entirely different line of reasoning, namely, whether the allegedly disparate circumstances existed among truly "similarly situated" persons. Justice Compton implicitly slipped into his opinion, in a footnote, a third reason for denying the plaintiffs' requested relief, founded in a stereotype that is factually incorrect, namely, that the MatSu plaintiffs were not persons "similarly situated" to residents of REAAs.

It is true that Matanuska-Susitna Borough residents are not "similarly situated" to residents in remote ethnic villages in Western Alaska REAAs. But these Borough residents are remarkably similar to residents in the 6-7 REAAs that the LBC found sufficiently affluent and economically mature to become organized boroughs. Indeed, it is exactly that difference between Western Alaska REAAs and affluent REAAs recognized by the LBC that manifests the arbitrariness and the unreasonableness of the legislature grouping all of them together for the same and equally beneficial exemption from the local contribution statute. The affluent REAAs are not "similarly situated" to the western Alaska REAAs. The affluent REAAs are not "similarly situated" to distressed municipal school districts. But the affluent REAAs are "similarly situated" to other non-distressed municipal governments like the Matanuska-Susitna Borough, such that classifying each differently for purposes of requiring a local contribution is arbitrary and irrational.

In any future litigation, the new plaintiffs should be sure to introduce evidence showing the demographic, economic and cultural similarities between the residents in many non-distressed municipal school districts and the residents in these affluent REAAs. The new plaintiffs should also introduce evidence showing the demographic, economic and cultural disparities between residents of economically distressed municipal school districts with predominantly Native cultures, and affluent REAAs with predominantly White cultures. These similarities and these differences not only totally destroy the stereotype, and challenge any semblance of a "fair and substantial" difference between all REAAs on the one hand, and all municipal school districts on the other; these similarities show classifications "similarly situated" for purposes of asserting that one is treated with invidious discrimination vis-à-vis the other.

vi. Higher Taxes and Savings to Taxpayers

Justice Compton noted that no evidence in the record showed that the plaintiff-taxpayers paid higher taxes as a result of the local-contribution requirement, and no evidence

in the record showed that invalidating the local-contribution requirement would result in tax savings for local property owners. Both of these deficiencies in proof must be avoided in any future litigation, through evidence introduced at the trial court level.

vii. Higher Than Minimal Local Contributions

The plaintiffs in the MatSu case did prove the fact that taxpayers in the MatSu Borough were contributing more than the minimally required equivalent of (at that time) 4 mills. Their tax assessment and levy for public school education was 5.69 mills. Because the taxpayer-plaintiffs were contributing more than the minimum statutory requirement, Justice Compton concluded, "It is arguable that the individual plaintiffs' interests as taxpayers are being impaired by the contribution requirement. Because of this, we will proceed with an equal protection analysis of this claim."[lxxxvii]

If the interests of taxpayers are impaired when paying 5.69 mills, why are they not impaired when paying the required 4 mills? What feature of the optional and voluntary portion of that 5.69 mills triggers judicial review of a challenge to the lower 4 mills statutory requirement, in a manner suggesting that no review would have been warranted if the taxpayers were paying only the minimum 4 mills? Why wouldn't a taxpayer paying 4 mills be "impaired by the contribution requirement," such that the Court should also "proceed with an equal protection analysis" in that instance?

Perhaps Justice Compton means that taxpayers' interests are impaired where 4-of-5.69 mills must, by statute, apply to fulfilling "basic need," rather than having the entire 5.69 mills augmenting "basic need." This point of view can only be founded in the observation that the goal of the MatSu litigation was to eliminate totally the local contribution requirement, to declare that statute fully null, void and extinguished.

Howsoever one interprets the reasoning of Justice Compton in accepting judicial review at 5.69 mills (and implicitly suggesting he would not have done so at 4 mills), a potential new case in litigation should include (as the MatSu Borough did) evidence that the taxpaying plaintiffs are in fact paying more than the statutory minimum local contribution, which today is 2.65 mills on taxable value as of January 1 of the second preceding fiscal year.

c. Analyses of the Compton Reasoning

In this subsection, I focus on the reasoning pertaining only to Issues No. 2, 3 and 5 of the Compton opinion, which address alleged impairments in educational opportunities and alleged

disparities in the local contribution/exemption classification.[54] Justice Compton's reasoning on these issues has already been discussed in the factual analyses immediately above: (1) The perception that equal funding is synonymous with equal educational opportunity; (2) the perception that REAAs lack a sufficient tax base for a local contribution; the (3) view that mature REAAs spontaneously become incorporated boroughs; and (4) the stereotype that students in some municipal school districts are not similarly situated with students in some REAAs.

Here, I question (1) the state's equal-protection "purpose" for the statute (in light of my suggestion to reframe the issues in a new lawsuit); (2) the equal-protection "means" chosen by the legislature; (3) the notion that funding remains constant whether or not there is a local contribution (when considered in the context of the reframed issues in this Report); and (4) the requirement of fairness in the means-standard which requires both a "fair" and a "substantial" relationship.

i. The Legitimacy of Purpose of the Statute

Recall that, at the lowest end of the continuum of analysis for equal protection, the state bears the burden of proving that the statute fulfills a "legitimate" governmental purpose. Justice Compton addresses that legitimacy criterion as follows:

> The stated purpose of the public school foundation program that provides for operating cost aid is "to assure an equitable level of educational opportunities for those in attendance in the public schools of the state." AS 14.17.220. This purpose easily meets the required standard of legitimacy. Op. at 399.

But the question before the court was not whether the statutory section containing a self-serving "stated purpose" of the entire chapter of laws, AS 14.17, was enough to make that entire chapter and everything in it "legitimate." The question before the court was whether one small subsection, AS 14.17.410(b)(2) was "legitimate."

Justice Compton then recites the constitutional primacy of the state legislature in both establishing and maintaining a statewide public education system, and concludes, "By enacting a law to ensure equitable educational opportunities across the state, the legislature acted in furtherance of this constitutional mandate." Op. at 399.

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[54] Issues No. 1 & 4 pertain to school construction financing, which is not a subject of this Report on local contribution requirements to operating costs. Issue No. 6 pertains to alleged disparities between municipal school districts, which is also is not a subject of this Report.

The reasoning of Justice Compton runs as follows: AS 14.17.200 says that the purpose of the foundation program it to provide "an equitable level of educational opportunities" throughout the state. The constitution assigns to the legislature alone full power and authority to establish and maintain the public education system. By enacting a law to ensure the above stated purpose of "equitable level of educational opportunities," the legislature was pursuing a "legitimate" governmental objective for purposes of evaluating whether AS 14.17.410(b)(2) was a denial of equal protection.

It does not follow in logic that, if a section in a chapter of statutes says that the broad, general purpose of the entire public school foundation program – all of AS 14.17 – is "equitable," then a narrowly challenged subsection at issue in the case, AS 14. 17.410(b)(2), automatically and immediately fulfills a "legitimate" governmental purpose. The plaintiffs did not complain about the foundation program in general. The plaintiffs did not challenge the noble statement of purpose in AS 14.17.200. The plaintiffs challenged one small subsection, AS 14.17.410(b)(2), arguing that it – ignobly – was unconstitutional. That subsection was never analyzed to determine whether it, specifically, fulfills a "legitimate" governmental purpose. In essence, it was concluded that, if one section of a chapter of laws says that the purpose of this chapter of laws is to provide "equitable" education, then every subsection in that chapter of laws automatically is "legitimate." Those two words – equitable and legitimate – are not synonyms.

If some future litigation raises again the question of whether the local contribution statute is a denial of equal protection, one might argue that, aside from equitability, no statute can ever be "legitimate" for equal protection purposes if it is constitutionally illegitimate for reasons such as those stated in Chapter 5 of this volume of the Report.

ii. "Means" Reasoning

Justice Compton addresses the next stage of the equal-protection analysis, whether the "means" chosen (namely the local contribution requirement itself) bears a "fair and substantial relationship" to this "legitimate" governmental purpose. Clearly, Mr. Worley's factual assertion of the impracticability of trying to levy a property tax in REAAs was one reason for Justice Compton to find that the means were substantially related to the objective. However, new plaintiffs in future litigation could now prove that statement incorrect.

Justice Compton also notes that REAAs cannot levy taxes and municipal governments can. But he then discards (or at least discounts) that distinction by recognizing that, instead, the legislature could levy a tax in the REAAs because the legislature is empowered to "exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough."[lxxxviii] He concludes that simply because the legislature *could have* levied a tax in the REAAs does not mean that these lawmakers *must* follow that route, under the

minimal "means" test at the low end of the continuum of equal protection.[lxxxix] The "means" fall within broadly acceptable over-/under-inclusiveness for the desired classification.

But, after discarding the tax-levying distinction and adjudging the "means" into broad over-inclusiveness, Justice Compton seems to add a third implicit line of reasoning in the final statement of his holding. He concludes, "Given the *differences in constitutional status* between REAAs and borough and city districts, we hold that the legislative decision to exempt REAAs from the local contribution requirement, while requiring contributions from borough districts, was substantially related to the legislature's goal of ensuring an equitable level of educational opportunity across the state."[xc]

The line of discussion condoning the legislature's freedom to choose, within broad boundaries of over/under inclusiveness, not to levy a tax in the REAAs seemed to be developing as a second reason for Justice Compton's holding. But in that final sentence quoted above, the reasoning seems to shift to "differences in constitutional status" which had never been discussed previously by Justice Compton except with regard to the differences in taxing powers, which he discounted or discarded as irrelevant given the legislative power to tax REAAs.[55]

iii. Funding Does Not Remain Constant

Another element in the reasoning of Justice Compton changes if one reframes the issue from seeking elimination of local contributions to seeking inclusion of some affluent REAAs in the required local contribution. Justice Compton adopted the argument of the State that 'the funding level remains constant regardless of the source of the revenue.'"[xci] The local contribution is a component of basic need. If the local contribution is eliminated, the MatSu Borough has no more and no less money for public education than it had before. The only change is that it all flows from the State and the federal governments, and none from local sources.

But if affluent REAAs were required to make a local contribution, the State would be relieved from spending that same amount in those affluent REAAs, and that new surplus could be available for distribution statewide. If the statutory base student allocation is "A" in Year 1 when affluent REAAs are being subsidized with state funding from pool "X" of total state monies, then in Year 2 when affluent REAAs are making a local contribution, the base student allocation can be increased by the legislature to "B" with the total pool of state monies, "X,"

[55] If one truly does focus on all aspects of the differences in constitutional status between REAAs and borough/city school districts, then art. X of the Alaska Constitution enters the picture, and the court should have considered the Ch. 4.c. arguments and all of the Ch. 5 arguments below.

remaining constant from the prior year. The base student allocation can *increase* in Year 2 for the benefit of all students statewide without the state *spending* any more money in Year 2.

Hence, all municipal school districts and all economically distressed REAAs are, today, receiving less money for local public school education than they could receive if affluent REAAs were required to make local contributions and the legislature applied that new-found surplus to raise the base student allocation. Contrary to the statement of Justice Compton as advocated by the State, funding would not remain constant. The base student allocation would increase and Basic Need would increase.[56]

One might anticipate the responsive argument that such an assumption of an increased base student allocation is speculation, not fact. "[N]o evidence indicates that altering the amount a district contributes to basic need will alter the overall amount of funding available."[xcii] But there is no need to alter the overall amount of funding available. Total amount of state *spending* on affluent REAAs decreases and a surplus in the overall amount of state monies exists once affluent REAAs begin contributing, if the base student allocation remained the same. Either the state spends less on public education in the subsequent year, and absorbs that new surplus somewhere else, or the legislature increases the base student allocation without the overall amount of state funding increasing.

True, the legislature could decide to keep the base student allocation the same in the subsequent year, such that the total appropriation is less than in the previous year of subsidizing affluent REAAs and the surplus is appropriated somewhere else in the general fund. My rebuttal to that scenario is that, while there exists the possibility that the legislature would be so parsimonious in the subsequent year, that assumption is even more speculative than presuming the status quo of the base student allocation would remain unchanged in the subsequent year. The perennial statewide clamor for additional educational funding, and the history of increases in base student allocations every year, suggest that there will be no stingy or begrudging reduction of funding by the legislature. All present evidence as well as conservative avoidance of speculation suggests that one should work only with present numbers in the appropriation – the status quo. One should place the "fact" of the present numbers in its proper political context, and in that most conservative fashion avoid as much speculation as possible in every direction. If the "fact" of the present appropriation remains

[56] An additional "benefit" statewide is the elimination of the present strong negative incentive to form boroughs. Once affluent REAAs are required to pay the equivalent of 2.4 mills for their local public school education program, there may be a stronger incentive for local government in other regards. This disincentive has been recognized repeatedly in Local Boundary Commission studies, and as early as 1977 in *Law and Alaska Native Education - The Influence of Federal and State Legislation upon Education of Rural Alaska Natives* by David H. Getches (September 1977) online at: http://www.alaskool.org/native_ed/law/law_ane.html.

unchanged, and if affluent REAAs add to that pot of money, then there is more money available for every student in Alaska.

iv. Absence of a Finding of Fairness

Finally, Justice Compton repeatedly cites the Isakson-Ostrosky line of prior equal-protection cases requiring, at the lowest end of the continuum, that the State must establish a relationship of means-to-purpose that is "fair and substantial."[57] In both of these seminal cases cited by Justice Compton, every time the word "substantial" appears, it is in the conjunctive form requiring both a testing for a "fair" and a testing for a "substantial" relationship.[xciii] [58]

But, throughout the MatSu case, the standard is applied to require only a "substantial" relationship. Nothing is said about the required *fairness* in the relationship. In the opening discussion, a description is provided of the 3-step process in analyzing an equal protection claim. It is stated, "At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate."[xciv]

Where this part of the case addresses specifically to the local contribution requirement, it opens his discussion with the statement, "The individual plaintiffs' taxation-based equal protection challenge to the required local contribution to operating costs fails because the State has established a substantial relationship between means and ends."[xcv] During the analysis of this conclusion, it states, "At the low end of the sliding scale 'a substantial relationship between means and ends is constitutionally adequate.'" [xcvi] Again, two paragraphs later, it states, "The means [the state] chose may not have been those most protective of taxing equality, but they do bear a substantial relationship to the goals of the legislation."[xcvii] Then, in the very next sentence, without ever acknowledging much less evaluating for a required element of fairness in the conjunctive standard, it states conclusorily, "The classifications relied upon meet the minimal requirement that they 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[xcviii]

In the concluding paragraph of the full analysis of these local contribution issues, it states in this part of the case, "[W]e hold that the legislative decision to exempt REAAs from the local contribution requirement, while requiring contributions from borough districts, was substantially related to the legislature's goal of ensuring an equitable level of educational opportunity across the state."[xcix]

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[57] E.g., at pp. 399-400, Justice Compton writes, "The classifications relied upon meet the minimal requirement that they 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' " *quoting* Ostrosky, 667 P.2d at 1193 (*quoting* Isakson v. Richey, 550 P.2d 359, 362 (Alaska 1976).

[58] In section 3.e. below I will discuss some corrosion of the conjunctive standard in dissenting opinions and in some later cases.

Moving then from the local contribution issue to the 35% cap issue, Justice Compton begins with a correct statement of the argument of the plaintiffs: "The individual plaintiffs argue that the thirty-five percent ceiling is "so overinclusive [that it] cannot bear a 'fair and substantial relation' to the state interest that it serves."[c] Again without considering the fairness element the conclusion is reached that the statute "provides the required fit and bears a substantial relationship to the legislative goals that underlie the statute."[ci]

At the end of the written opinion in this part of the case, after citing a number of irrelevant cases from other jurisdictions (discussed below in Section 3.d.), it is concluded that, "The minimal equal protection standard under the Alaska Constitution, the substantial relationship standard we have applied in this case, is stricter in its protection of individual rights than its federal counterpart."[cii]

In summary, this part of the case acknowledges that the means test requires both a "fair" and a "substantial" relationship, but never once does it address the fairness element of that compound equal protection test. That limited analysis might be reasonable in a case where a justice found in the negative, that there was no "substantial" relationship. If one of the compounded elements is absent, the statute immediately becomes unconstitutional. There is no need to inquire further into whether it is also "fair."[59]

But, when a judge finds that a "substantial" relationship does exist, then that judge must also determine whether a "fair" relationship exists before s/he can conclude that the constitutional analysis is complete. The flaws in the reasoning here is that the local contribution statute was declared constitutional, prematurely, without first analyzing and determining the element of fairness.

In Section 3.e. below, I will develop the existing case law surrounding this standard in greater detail, and I will suggest how "fairness" might be addressed in any new litigation applying the means test at the level of minimal scrutiny.

d. Gratuitous Dictum

[59] E.g., in Turner Construction Co, Inc. v. Scales et al. 752 P.2d 467, 471-72 (Alaska 1988) Justice Burke says he is going to analyze the suspect classification "under the fair and substantial relationship test of the state constitution," but then he says that the "final step is to examine the means to determine whether they substantially further the statutory purpose." He concludes, "there is no substantial relationship," and "[t]hus, we believe that the statutory means are not substantially or rationally related to the ends." In this instance, where he found no "substantial" relationship between the statute and its purpose, he was right to stop the analysis as determinative. It is only when a justice finds that a "substantial" relationship does indeed exist that s/he must continue to determine whether there is also a "fair" relationship.

Recall that the trial judge held that the MatSu Borough lacked standing as a "person" entitled to equal protection in Alaskan courts. The MatSu Borough only appealed the award of attorney's fees against it, and did not appeal that equal-protection portion of the trial court's decision. It simply accepted that statement of existing law (which I challenge below in Chapter 4).

Despite the fact that the local governmental units (borough and school district) did not appeal the issue, *obiter dictum* was gratuitously added in comments and citations to precedents supporting the lower court ruling that "boroughs are not entitled to equal protection under the Alaska Constitution."[ciii]

Suffice it to say here that this *obiter dictum* in the MatSu case carries no precedential value whatsoever in law. It was not an issue brought to the Supreme Court by the parties. At best, it was two justices gratuitously expressing their opinion that an earlier and presently irrelevant Supreme Court decision was correct, that political subdivisions created by the State legislature could not assert personhood for constitutional equal protection from additional legislation by that creator/legislature. I will explore this specific proposition in great detail in Chapter 4, noting in particular that cities and boroughs in Alaska are something more than simply creatures of the legislature. They are created by that same Alaska Constitution that created the legislature, and they enjoy specific powers and authorities embedded in art. X of that Constitution, above and beyond what their sibling legislature might enact "by law."

Another example of *obiter dictum* in the MatSu case is found in concluding paragraphs citing a string of four cases from other jurisdictions, in which outrageously discriminatory taxing policies were upheld by these other appellate courts, all of which concluded that the alleged discrimination did not rise to the level of violations of the equal protection of taxpayers.[civ60]

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[60] In Nordlinger v. Hahn, where taxation remained at 1975-76 levels until a change of ownership, and this "acquisition value" system resulted in one property being assessed at five times another similarly situated property, the U. S. Supreme Court found in the classification a "rational basis" from the state's legitimate interest in neighborhood preservation, continuity and stability, and from the difference in "reliance interests" between the two taxpayers. 505 U.S. 1, 112 S. Ct. 2326, 120 L.Ed.2d 1 (1992).

In Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization, where taxation was founded in that same disparate "acquisition value" in Nordlinger, above, the California Supreme Court found a "rational basis" for the classification in the theory that annual taxes should bear some rational relationship to the original cost of the property. 22 Cal.3d 208, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978)

In San Antonio Independent School District v. Rodriguez, where higher local tax rates in the poorest school district could generate only a fraction of the local support of education in the most affluent school district,

It was readily and quickly acknowledged that these four cases were decided under different standards of review than the Alaska test.[61] It was readily acknowledged too that the Alaska standard is "stricter in its protection of individual rights."[cv] It abjures any implicit prediction as to how these cited cases would have been decided under Alaska's unique analysis of an equal protection continuum. It clearly does not mean to imply that these cases contain any measure of supportive reasoning or supportive legal authority for the MatSu decision. It merely finds them informative of the "latitude" other courts allow for "severely disparate impacts on certain classes of taxpayers."[62] [cvi]

So what? Why even cite these cases? They aren't relevant. They admittedly don't apply the same legal standard used in Alaska. The Alaska standard is indeed "stricter in its protection of individual rights." These cases are not relevant to the present decision in any regard whatsoever. Just because a more lenient standard of review – more forgiving of disparities created by a legislature – allows more onerous factual disparities to exist within equal-protection parameters in some other states, one cannot conclude that a stricter standard of review – less forgiving of disparities created by a legislature – results in judicial approval of an equally onerous factual disparity, or, even results in judicial approval of a less onerous factual disparity. If state "A" applies relaxed standard "M" to taxing circumstance "Y," how is that related or relevant in any way to state "B" applying stricter standard "R" to circumstance "Z"?

By citing these cases, it only recites the truism that, if Alaska applied a more relaxed standard to totally different taxing cases than our present case, the outcome would be

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and where no state equalization occurred, the U.S. Supreme Court found in the disparate classification the "rational basis" or furthering the legitimate state purpose of local control of school districts. 411 U.S. 1, 93 S. Ct 1278, 36 L.Ed.2d 16 (1973).

In Savage v. Munn, where an initiative amended the Oregon Constitution such that different county taxes on identical properties would be different, depending on whether the property was inside or outside a city, the Oregon Supreme Court relied on Nordlinger, above, to conclude that limiting total taxes was legitimate and that there was a "rational basis" for the tax-limiting system chosen. 317 Or. 283, 856 P.2d. 298 (1993).

[61] "[E]ach of these cases was decided under the minimal federal equal protection standard of rational basis review." MatSu at 402

[62] "These cases from other jurisdictions are informative, however, insofar as they provide some indication of the latitude lawmakers are given in furthering public policy objectives even when the means chosen may happen to have severely disparate impacts on certain classes of taxpayers … . Furthermore, the plaintiffs [in the present, MatSu case] have not shown clearly that they have been disparately affected, as the plaintiffs in Nordlinger and Rodriguez did, or that any potentially disparate effect on them even remotely approaches the same degree of imbalance and severity of burden found constitutional in those cases." MatSu at 402.

different. It is nothing more than the dismissive observation, "Hey, things could be worse … if you lived somewhere else." The cited cases say absolutely nothing about the outcome of an equal protection case in Alaska when taxpayers challenge a local-contribution requirement.

e. Possibilities for New Levels of Equal Protection Review

All of the above sections of this Chapter 3 suggest that, given the new facts available in Volume I of this Report, and given the weaknesses in rationales and the time-worn obsolescence of the MatSu decision as precedence, there is an encouraging possibility that a new case might succeed in defeating the present classifications for the local contribution statute even at the lowest level of scrutiny. In this subsection, I go a step further: I offer three additional, new equal protection arguments challenging the local contribution requirement.

First, I will build the case for moving the analysis of the problem further up the continuum from the lowest level of scrutiny to at least something in what the federal courts would call an intermediate level of scrutiny, given the facts of gross disparities in the new demographic/economic information that make the local contribution classifications a "suspect category." Secondly, I develop below my earlier observation that the Alaska Supreme Court repeatedly declares that the means test is whether the statute bears a "fair and substantial" relationship to the purpose, while in many cases and emphatically in the MatSu case the justices inquire only for a "substantial" relationship and not for a "fair" relationship. Thirdly, I will suggest in this section that, in light of the constitutional arguments laid out in Chapter 5 below, one can argue the impossibility of an unconstitutional local contribution classification ever being "fair and substantial" or ever fulfilling a "legitimate" governmental purpose under the rubric of equal protection.

But first, conciseness must yield to redundancy – a summary of the primer in Ch. 2.a., to ensure that my readers retain in the foreground of thought throughout this subsection some of the details of that highly legalistic test for equal protection:

When analyzing equal protection claims, federal courts assign the claim to one of three compartments of means-to-purpose testing.

- At the lowest level of scrutiny, the challenged classifications in the law must be "rationally related" to a "legitimate" purpose.
- At the intermediate level, the classification must be "fairly and substantially related" to an "important" purpose.
- At the highest level, the challenged classification must be "the least restrictive alternative" for fulfilling "a compelling governmental interest."

Alaska abandoned this three-compartment approach in favor of a purportedly more flexible "sliding scale" or "continuum" of lowest-to-highest scrutinizing, adjusting the claim along this

continuum according to the interest allegedly affected by the challenged classification in law. Alaska also adopted at the far left of its continuum (i.e., the lowest level of scrutiny) the intermediate-scrutiny means-portion of the federal test requiring a "fair and substantial" relationship. With this shift of a higher means standard, "fair and substantial," at the lowest level of scrutiny, the Alaska courts claim that our state analysis of equal protection under the Alaska Constitution is more protective of civil rights than the federal test under the Fourteenth Amendment.

At the low end of the continuum, where the Alaska court engages only in relaxed scrutiny, the state or local government is required to prove that the classification chosen in the enactment was "reasonable, not arbitrary, and … rest[s] upon some ground of differences having a fair and substantial relation to the object of the legislation."[cvii] "[I]f relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness [sic] in the means-to-ends fit will be tolerated."[cviii] This low end generally applies to most claims of economic discrimination.

At the high end of the continuum, where the court engages in strict scrutiny, the government is required to prove that the classification chosen in the enactment was the "least restrictive alternative" available to fulfill "a compelling state interest" with very little or no over- or under-inclusiveness permitted. This high end generally applies to very important individual rights (travel, speech, public educational opportunities, etc.) and to statutory classifications that appear to be more "suspect" (racial, ethnic, etc.).

i. That Elusive Intermediate Range of the Continuum

There are two reasons why the Alaska Supreme Court should not relegate the local contribution statute to the lowest level of equal protection scrutiny, characterized as a mere economic matter.

First, the classification separating all REAAs from all municipal school districts is not a mere economic matter of aggrieved taxpayers. It is indeed a taxpaying issue, but one that pertains solely and directly to the exalted purpose of public education embodied in art. VII of the Alaska Constitution. It is not, as was erroneously suggested in the MatSu case, analogous to financing bridges and buildings. It is the financing of a fundamental civil right in Alaska constitutional law, namely public education. Even if new plaintiffs cannot prove inequities in educational opportunities, they can prove inequities in educational funding that leads to less total money available for the purpose of public education. For reasons stated in this re-characterization of the economic issue, the court should at least move the analysis further along that sliding scale from mundane dollars-and-cents issues at the lowest level of scrutiny to some intermediate placement on the "continuum" or "sliding scale."

Secondly, the data set forth in Volume I of this Report should raise the issue into a higher realm of consideration as a patently apparent "suspect category." That is to say, the demographic and economic disparities in Volume I should raise the eyebrows of the justices sufficiently to motivate them to question more closely than their lowest level of scrutinizing the over- and under-inclusiveness of the classification for purposes of the local contribution. Volume I is not simply a prima facie case. It is a compelling case.

I recognize here that I am taking some liberty with my use of the constitutional term "suspect category." It has in the past applied to statutory divisions occurring along lines of race, ethnicity or religious beliefs. If a classification is "suspect" in this manner, the court's analysis rises immediately to the highest level of scrutiny. To the best of my knowledge, it has never been used to raise the level of scrutiny in matters of economic discrimination.

But there are at least four reasons why the local contribution statute should be viewed as a "suspect category" warranting tighter scrutiny from the Alaska Supreme Court. First, I am not suggesting here[63] that the local contribution statute be subjected to that highest level of scrutiny of racial, ethnic and religious classifications that are usually triggered by a "suspect category." I am only suggesting that this challenged statute warrants *tighter* scrutiny and less allowance for over- and under-inclusiveness than it received by two justices in the MatSu case, i.e., movement away from that lowest level of scrutiny and into an intermediate position on the "sliding scale."

Secondly, it warrants movement into that intermediate place on the "continuum" of scrutiny because it is public *education* funding that is "suspect" here, a constitutional mandate far more sacrosanct than mere public works funding.

Thirdly, if indeed the Alaska courts do apply a "sliding scale" along a "continuum" in their analyses, then issues pertaining to funding of public education deserve tighter scrutiny than simple economic issues pertaining to questions of who pays for bridges and buildings.

And fourthly, while the term "suspect category" generally applies to statutory language drawn along lines of race or ethnicity, one can say that the statutory lines of AS 14.17.410(b)(2) are drawn without regard for differences in culture, race and ethnicity. In a state of such diverse cultures as Alaska, lack of consideration for such factors in public education can be as discriminatory as overemphasizing them in other contexts.

Curiously, although the Alaskan analysis allegedly functions along a continuum, the Alaska Supreme Court has never articulated language for testing in one or another intermediate

[63] There is however the separate argument that, if new plaintiffs can establish inequities in educational opportunities founded in the local contribution statute, then the highest and tightest level of scrutiny is warranted.

range of this supposed sliding scale. Alaska equal protection scrutiny today appears to be diametrically bipolar, falling into either a lowest-level pigeonhole or a highest-level podium. All claims of a sliding scale to the contrary, the Alaska Supreme Court compartmentalizes its equal protection analyses. There is no case law evidence of a sliding scale, except to whatever extent the justices might subjectively place the issue presented to them at one polar extreme or the other, or, to whatever extent the justices subjectively might widen or narrow permissible over- and under-inclusiveness for different cases within one or the other articulated polar extremes. These intuitive placements by men and women do not meet the standards or principles of objectified law.

Assuming that the presently sitting justices are willing to give the case intermediate scrutiny, what would be the language or methodology of the test? At the federal level, the intermediate test is that the classification must be fairly and substantially related to an important government purpose. Here in Alaska, the "important" purpose criterion is still available to employ, but the "fair and substantial" language of the federal intermediate means test has already been pre-empted for use at the lowest level of scrutiny. If a case moves up the sliding scale into some intermediate level on the continuum, the justices need stronger words than "fair and substantial" but words not as strong as "least restrictive alternative." Or, the justices need a new methodology.

For alternative wording of an intermediate means test, the possibilities are endless. They range from requiring the means to bear some "heightened" measure of a fair and substantial relationship to an "important" governmental purpose when the analysis shades out of the lowest level of scrutiny along the continuum, to requiring the means to fall "among tolerably narrow alternatives" to fulfilling that same "important" governmental purpose when the analysis shades closer along the continuum to the highest level of scrutiny. One could also combine that language to require at the level of intermediate scrutiny "a heightened fair and substantial relationship within a range of tolerably narrow alternatives" to fulfill an "important" governmental interest.

An alternative method for devising a test in the intermediate range of the continuum would be to say simply that tolerable levels of over- and under-inclusiveness of the classification will become narrower and tighter as the claim is placed higher and higher up the continuum in the initial analysis by the court. Thus, "fair and substantial" would require increasingly clearer delineated boundaries and limits – less allowance for spillover – as the selected point of analysis moves up the continuum.

Still another approach would be to require, at an intermediate level, closer scrutiny of that element of "fairness" that presently receives only lip service at the lowest level of scrutiny. I develop language for measuring "fairness" in Section 3.e.ii. below.

Suffice it to say for present purposes that there exists tremendous undeveloped latitude for growth in implementing the alleged "flexibility" that the Alaska Supreme Court proclaims as a characteristic of its distinguishable and more protective test for equal protection. There is no better reason to move an economic matter out of the lowest polarity of scrutiny than the fact that it pertains to public education, and that it fails to make economic accommodations among cultures and racial districts in Alaska. Even if loss of education opportunities cannot be proven satisfactorily to warrant the highest level of scrutiny, the compelling evidence of disparities in the present classification lumping all REAAs together and all municipal school districts together should warrant at least tighter, mid-continuum scrutiny more focused than the polar-low scrutiny given by the court to a mundane taxpayer's grievance about bridges and buildings.

ii. Fairness in "Fair and Substantial" Testing

As noted in subsection 3.c.iv. above, Justice Compton declared repeatedly that a "substantial relationship" between means and ends is constitutionally adequate at the lowest level of scrutiny. But in the seminal 1976 Isakson case which he cites for this proposition, the supreme court actually said that the classifications must "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[cix] Justice Compton acknowledges that the test is compound, but he doesn't implement it as such.

In the majority[64] opinion of that original Isakson case, the word "substantial" always appears in conjunction with the word "fair."[65] Although this standard is restated in the same bifurcated form in every subsequent equal protection case, only one Alaska court has ever directly addressed the element of fairness in the test.[66] On the other hand, many Alaska court

[64] The erosion of the two-tined phrase began early, in the dissenting opinion of Justice Connor in the Isakson case. He cited certain statistics as "strong evidence that [the legislative measures] bear a *close and substantial* relationship to their purpose. Isakson v. Richey, 550 P.2d 359, 368 (Alaska 1976) (Footnote omitted) (Emphasis mine.). The majority had not adopted a "close and substantial" relationship standard. It adopted a "fair and substantial" standard.

[65] Justice Fabe in Premera Blue Cross v. State, 171 P. 3d 1110 (Alaska 2007) is one of the few justices to uses the conjunctive form of the Ostrosky/Isakson test consistently throughout her opinion to conclude that the state's retaliatory tax statute was not a violation of equal protection. However, she never offers any reasoning specific to either "fair" or "substantial." She simply lumps them together in every reference. One can say that she didn't conclude prematurely without focusing on "fair," but one cannot say how or whether she distinguished "fair" from "substantial."

[66] In Eldridge v. State, 988 P. 2d 101 (Alaska 1999), Justice Carpeneti reviewed the question of whether the denial of a PFD to the Eldridge family was a denial of equal protection where they were out of state for 328 days during 1994 for employment, but remained Alaska residents by all other indices. Justice Carpeneti consistently refers to the test as requiring "a fair and substantial relationship." He expresses sympathy for the Eldridges' circumstances.

decisions have focused solely on the "substantial" aspect of the test, even after articulating the test in its conjunctive form.[67]

What is "fair"? If new plaintiffs in a subsequent lawsuit are going to argue for bifurcated analyses of the "fair and substantial" test, they must provide some guidance to a court that has never articulated any such standard. Many would say that fairness is elusive, found only subjectively in the eyes of the beholder. In the one Supreme Court case where the concept was mentioned, Justice Carpeneti concludes that merely feeling sympathy for the injured party is not sufficient, and that there need only be a loose connection between fairness and the purpose of the statute. Justice Carpeneti essentially says that where the statute is speculatively more subject to mischief when applied to private employees absent out of state than when applied to public employees absent out of state, the connection between the means and the purpose of the statute that distinguishes these two classifications is "fair."

Most jurispruds, political scientists and philosophers would agree that John Rawls' 1971 publication of "A Theory of Justice" was the single-most significant addition to jurisprudence, political theory and distributive justice in the entire 20th Century. The theory melds the tensions between "liberty" and "equality, restates justice as fairness, and has generated a flurry

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"However, under a minimum scrutiny analysis, we do not determine if a regulation is perfectly fair to every individual to whom it is applied…." 103-04.

> There is not a perfect fit between means and ends, as this case probably demonstrates, but there need not be a perfect fit for the regulation to pass the relatively low constitutional test applied when the individual's interest is economic. 104

Why then is it "fair" for State employees to have allowable absences longer than 180 days and not private employees? Justice Carpeneti's rationale is that "[t]here is substantial uncertainty and potential for abuse inherent in cases where employees are transferred by private employers to positions outside Alaska. These problems do not exist, at least on the same scale, with regard to state employees." [n. 8]

[67] In the 1983 Ostrosky case, both the majority opinion and the dissent by Justice Rabinowtiz consistently apply the compounded form of the test as "fair and substantial" throughout the main texts of their opinions. But, each opinion then contains one footnote using the corrupting shorthand reference in the singular form: The final footnote 39 of the majority opinion contains dictum referring to "legislative purposes having a *substantial* basis in reality…."; and footnote 3 of Justice Rabinowitz's dissent says, "I would hold that the state bears a high burden of showing the *substantiality* of its interests throughout our equal protection examination." Ostrosky, 667 P.2d at n. 39 and dissenting n. 3.

Dictum in Alaska Pacific Assurance Co. v. Brown et al., 687 P.2d 264, 269-70 and 278 (Alaska 1984) similarly refers to only "a substantial relationship" and the dissent in that case refers to the law as "substantially furthers the legitimate goal…." (The mistaken references to the test in this case are mere *obiter dictum* because the court actually applied the strictest scrutiny test.)

of responsive and interpretive texts during the 40-plus years since its publication. I provide a primer on Rawls' theory of "justice as fairness" in **Appendix B**. I lay out the theory in a practical and realistic context of how Alaskans and Alaska judges might review the fairness of the local contribution statute.

Suffice it to say here that, under the Rawlsian test, the fairness tine of the "fair and substantial" fork in equal protection analyses requires no more nor less than evaluating whether the challenged statute represents that particularly conservative allocation of benefits and burdens which every Alaskan would inevitably choose if s/he was enshrouded in a veil of ignorance regarding his or her race, age, class, resident location, intelligence, talents, economic and political status, and aesthetic conceptions of what is enjoyably "good", and in that context was then forced to devise a system for school funding – fully aware of the worst that can possibly happen to oneself under whatever system of school funding s/he designs. Stated another way, this fairness test asks whether the challenged statute is what every Alaskan would choose under such a veil of ignorance where probabilistic analyses of one's own status and position are impossible and where there exists no other safe recourse but to follow the Maximin Rule of game theory.

Thus, a judge would ask,

> If one does not know his or her race, age, class, resident location, intelligence, talents, economic or political status, or aesthetic conception of what is good, would s/he choose the present method of funding public education partially through a local contribution that exempts all REAAs without regard for affluence, and levies upon all municipal school districts without regard for distressed economies?

The answer to that question tells the judge whether the local contribution statute is "fair" in the Rawlsian sense of what should be required by the means-test for equal protection.

iii. Unconstitutionality Extinguishes Rationality

The low-scrutiny test of requiring a fair and substantial relationship to a legitimate government purpose is sometimes called the rational-basis test. If a statute was unconstitutional for some reason other than equal protection, then it could not possibly have a rational basis for purposes of equal protection. It cannot be "fair." It cannot be substantially related to a *legitimate* governmental purpose because an unlawful means can never lawfully facilitate a "legitimate" purpose.

The substantive arguments for these other bases for unconstitutionality are found in Chapter 5 below. If the court finds that amalgamating all REAAs into a unitary whole is a violation of art. X, §6 of the Alaska Constitution requiring unorganized boroughs in the plural

form, then such an unconstitutional local contribution exemption is also a denial of equal protection. If the court finds that exempting affluent REAAs is a constitutional failure to delegate maximum responsibility to some portions of the unorganized borough functioning as REAAs, then again such an unconstitutional local contribution exemption is simultaneously a denial of equal protection. The same decisional result occurs if the court finds that the failure to delegate a requirement of partial funding is not maximizing local government as required by the constitution, or, if a court ventured so far as to interpret art. I §1 Inherent Rights to include the constitutional duty to contribute to funding public education when financially capable of doing so (and where others similarly situated are thusly required).

f. Summary of the Chapter

Chapter 3 is essentially an evaluation of whether, in the 1997 MatSu case, the Alaska Supreme Court struck the death knell to a constitutional challenge of the local contribution statute on grounds of equal protection. After researching, analyzing and writing Volumes I and II of this Report, I conclude that the MatSu case is not formidable *stare decisis*.

Only four justices participated in the MatSu decision. Their opinions split evenly along two radically different lines of reasoning. Justice Matthews characterized the litigated issues as mere inequities in state spending on public facilities, as though funding public education was no different from funding bridges and buildings. He ignored the constitutional primacy of school funding in contrast to other state-funded capital improvements. He also treated the issues as being disparities in inter-jurisdictional taxation, when in fact the issue pertains to only one jurisdictional taxing authority, the state legislature. That legislature chose *not* to impose an equitable tax or mandatory borough incorporation on affluent REAAs but chose instead to impose a tax in the form of an unfunded mandate on all municipal governments with school districts.

One justice disagreed with another justice regarding whether the issues were justiciable, but the plaintiffs gave him very few significant facts to work with, and many erroneous facts came into the appellate record undisputed by the plaintiffs earlier in the trial court. Justice Compton saw nothing like the material found in Volume I of this Report. The state's expert in educational financing (notably not an expert in the substantive provision of equal educational opportunities) said only that all-source financing among Alaskan school districts was "equal," and Justice Compton never delved deeper (i) to realize that equal funding is not necessarily synonymous with equal educational opportunity, or (ii) to recognize that equal all-source funding says absolutely nothing pertinent to the issue of disparities in *local* contributions.

The plaintiffs in the MatSu case never disputed the erroneous, broad-stroke testimony of the State Assessor that the available tax base in REAAs is limited by numerous factors. A decade later, the Office of the State Assessor provided the Local Boundary Commission with sufficient localized taxing information to allow a unanimous conclusion by the Commission that

6-7 of these REAAs demonstrated sufficient revenue-generation capability for incorporation as boroughs.

The plaintiffs in the MatSu case also failed to dispute the patently erroneous testimony of the state assessor that boroughs form spontaneously when they are sufficiently matured in their ability to administer regional government. Chapters 5 & 6 of Volume I of this Report show the historical absurdity of that statement. As Governor Hammond observed, "[T]he organized borough concept had little appeal to most communities. After all, why should they tax themselves to pay for services received from the state, gratis?"

One justice found that taxpayers in the MatSu Borough were not "similarly situated" to residents of REAAs, because the plaintiffs in that case failed to introduce any evidence showing the differences between economically distressed REAAs and affluent REAAs. He adopted the stereotypical, conventional wisdom that all REAAs are remote Native communities in largely subsistence economies and all municipal school districts are cash economies in Occidental cultures located along main transportation patterns of Alaska.

The opinion includes *obiter dictum*. And, while the justice paid lip service to the compound nature of the "fair and substantial" means-test, he applied only the "substantial" tine of that forking standard.

CHAPTER 4. Parties

a. Introduction

In the MatSu case, the party-plaintiffs included the borough, the borough school district, and four individual taxpayers, two of whom also sued on behalf of their children as four minor public school students.[68] In this chapter, I will address three aspects of the appropriateness of this lineup of plaintiffs: legal "capacity" to sue, and legal "standing" to raise the issues.

Parties to litigation must cross two judicial thresholds before obtaining substantive review of a grievance. They must show capacity to sue and then show standing to make the particular claim they assert. Capacity raises the question of whether the courts will recognize this person or this entity as a litigator in his/her/its own name. As recently as the late Nineteenth Century, a married woman lacked capacity to sue – even in probate as the guardian of her children or as the administratrix of her deceased husband's estate (which would have included even the property *she* brought to the marriage). Instead, a local banker or male family member would guide the probate as an administrator and guardian *ad litem*. Today, minor children and mentally incompetent persons usually lack capacity to sue independently, in their own name. They gain access to the courts for adjudication of their grievances through others acting as, for example, trustees, guardians, conservators or *in parens patriae* (like the MatSu parents suing on behalf of their minor school students).

Corporations obtain capacity to sue and be sued through state laws expressly granting that power to them. But unincorporated subdivisions of corporations, like "the research and development division" or "the public works department" cannot sue directly in those names of their subordinate and internal labels.[69] No statute recognizes them as legally cognizable entities separate from their corporation.

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[68] The full caption of the case reads, "Matanuska-Susitna Borough School District, Matanuska-Susitna Borough, a Municipal Corporation, June Tull, Kenneth P. Fallon, Donald L. Moore, and Roy S. Carlson, Jr., individually as taxpayers of the Matanuska-Susitna Borough, Donald L. Moore, as parent and next friend for Tyler J. Moore and Isaac D. Moore, minor school students, and Roy S. Carlson, Jr., as parent and next friend of Reave C. Carlson and Amber L. Carlson, minor school students,

vs.

State of Alaska, Steve Cowper, Governor of the State of Alaska, William G. Demmert, Commissioner, Alaska Department of Education, and the State of Alaska Department of Education, 931 P. 2d 391 (Alaska 1997)"

[69] Subsidiary corporations are different from divisions of a corporation. Municipal school districts are not subsidiary corporations.

Similarly, a registered but unincorporated trade name like "the Alaska SeaLife Center" cannot sue or be sued in its own name but must come to court in the name of the certified nonprofit corporation that has registered that trade name (which in this instance is the "Seward Association for the Advancement of Marine Science").

General partnerships and joint ventures are recognized in statutes and in courtrooms as shorthand names for the specific human individuals or corporations comprising that particular legal combination. Limited liability companies acquire their power to sue and be sued from the legislature, in the same manner as corporations. But an unincorporated association like a parent-teacher association or an unincorporated travel club or book club has no capacity to sue or be sued in its own name. It must sue or be sued in the names of the corporate and/or human members that comprise that association.

In this chapter, legal capacity arises as a question of whether a municipal school district is a lawful party to a lawsuit in its own right, i.e., whether it has independent authority in law to sue in its own name, separate and distinct from the municipal corporation under which it exists. Where the parties in the MatSu case included both the borough corporation and the borough school district, was anything really added to the litigation by naming the school district? Could creative lawyering by the state have resulted in the dismissal of the school district as a party lacking capacity to sue?

Once a plaintiff passes over the threshold question of legal capacity to sue or be sued, that plaintiff must meet the additional preliminary criterion of legal standing to make the particular claim asserted. Here the analysis focuses on empowerment of a different sort: Does this human person or this entity with fictional personhood bring to the courtroom a real injury or direct grievance to themselves or to their legally recognized beneficiary, pertaining to a law that was designed for his/her/its benefit or protection? Stated another way, does the interest alleged by the plaintiff fall within the zone of interests that the statute or constitutional guarantee was designed to regulate or protect? For example, in most instances, simply being a federal taxpayer in Alaska does not create a sufficiently proximal nexus and level of personal grievance to gain judicial standing to litigate, e.g., alleged misuse of federal highway funds in Ohio.[70]

[70] Sometimes whistleblower statutes provided for exceptional "standing" to sue. For example, the federal False Claims Act, 31 U.S.C. §3729 et seq. (dating back to the Civil War) and state counterpart statutes empower and frequently reward whistleblowers who file lawsuits initially under seal against persons or entities defrauding the government, even though it is the government and not that whistleblower who is the injured party.

Looking at another facet of its application, the law of standing requires that the aggrieved person or entity was an intended beneficiary of the protection asserted in the complaint. For example, an able-bodied employee cannot sue an employer alleging unlawful discrimination by that employer against some *other* employee with a disability (unless, of course, Congress provides in a statute for legal standing by such a remotely affected person[71]). There must be a sufficient connection to an immediate and substantial injury suffered or soon to be suffered by the litigant himself/herself/itself.

The question of legal standing arises in this Report in the context of whether a municipal corporation – a borough or a city – can assert that it is one of those "persons" authorized to invoke equal protection under art. I, §1 of the Alaska Constitution.

b. Capacity of Municipal School Districts to Sue and Be Sued

The archives of the Alaska courts are replete with captioned cases where municipal school districts sued in their own name and where municipal school districts were sued as school districts rather than as divisions of a municipal corporation. Cases with such captions have come to the Alaska Supreme Court repeatedly, and the MatSu case is one of them. But, no one has ever raised the appellate[72] issue of whether a municipal school district possesses the legal authority to sue and be sued in its own name.

The legislature has specifically authorized municipal corporations to sue and be sued.[cx] The legislature has specifically authorized REAAs to sue and be sued.[cxi] *The legislature has never authorized a municipal school district to sue or be sued*. The fact that the legislature did enact a statute specifically granting legal capacity to one type of school district is highly suggestive (if not decisive) that the absence of a similar statutory grant of legal capacity to municipal school districts was intentional, particularly where the parent municipal corporation itself was authorized to sue and be sued.

In Alaska, a municipal school district is not a separate and distinct corporation. It is a subordinate department or instrumentality of the municipal corporation, similar in many regards to a planning commission or a municipal utility board. By statute, a municipal school

[71] See, n. 75 above.

[72] I know of only two instances where the issue was presented in the trial court, and both of those cases were settled before the issue was adjudicated. In a Nome personal injury case, the plaintiffs named the school district as well as the City of Nome. When defense counsel raised the affirmative defense of a school district lacking capacity to sue and be sued, the plaintiffs immediately dropped that party and the City eventually settled the case. In an Anchorage case, a wrongfully discharged school superintendent sued only the Municipality of Anchorage and not the Anchorage School District. The MOA raised the affirmative defense that the school district should be the party defendant, but the case soon settled without the court ruling on that issue.

district does possess some primary power and responsibility when acting in conjunction with the borough or city government,[73] but no statute extends that autonomy to filing lawsuits or defending lawsuits that expose assets of the entire corporation to risks without first obtaining approval from the proper corporate fiduciaries, the elected council or assembly. Similarly, no law authorizes any plaintiff to sue any division of the municipal corporation in its accessory role rather than in the name of the municipal corporation. No law authorizes a municipal school board to dictate litigation strategies and tactics independent of the fiduciary responsibility and authority of the elected council or assembly – the body ultimately responsible for protecting the full faith and credit of the municipal corporation. (All of the assets of the municipal corporation are exposed in any lawsuit by or against the school district.)

As with municipal school districts, state statutes assign specific administrative roles to municipal planning commissions, platting boards, utility boards, boards of equalization, etc. But none of these other subordinate divisions of the municipal corporation has ever been granted (or ever claimed) legal power to sue and to be sued independently in its own name. None of them can initiate a lawsuit without council or assembly approval beforehand. None of them can hire their own attorneys to strategize in litigation separate and apart from the municipal attorney, unless approved by the council or assembly. None of them is authorized to expose the broader assets of the municipal corporation without approval from the council or assembly.

If it is legally correct that the municipal school district is simply one of many subordinate accessories and components of municipal administration that together comprise the municipal corporation, and if the municipal corporation is the only corpus empowered to sue and be sued, how did we get to this point where, 54 years after statehood, municipal school districts and school boards still sue in their own name, and direct litigation by their own attorneys according to policies of their own boards rather than at the direction of the elected fiduciaries of the full corporation? There are many possible reasons: A court generally decides only the issues before it, and seldom raises issues *sua sponte* i.e., of its own accord without formal prompting by the parties.[74] The issue has never been raised at the appellate level.

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[73] AS 14.14.060 gives a school board primary authority (i) for selecting professionals to design school buildings, (ii) for the design of a school building, (iii) for routine maintenance of school buildings, (iv) for appointing and compensating school employees, and (v) for policies governing purchases of supplies and equipment. The borough or city corporation, on the other hand, possesses primary authority (i) to deposit all school money in a centralized treasury with other municipal funds, (ii) for determining the amount of money appropriated from local sources for school purposes, (iii) for determining the location of school buildings, and (iv) for construction and major repair of school buildings.

[74] Ironically, the gratuitous dictum of the *MatSu* court regarding the standing of municipal governments to assert equal protection contravenes this hallowed principle of common-law adjudicating.

In territorial days, school districts could be separate entities with capacity. It may well be that this earlier practice inadvertently slipped into statehood law and legal practice.

Also, because municipal school boards frequently retain their own attorneys separate from the law firm hired by the city council or borough assembly, competitive tensions influence legal assignments and legal opinions, not always in the best interests of the full faith and credit of the larger corporation exposed to risk whenever a school district sues or is sued.

Moreover, there exists among school boards and school administrators in Alaska a strong culture of asserted independence from elected and appointed administrators of the city and borough governments. [75] Perhaps most importantly, city councils and borough assemblies frequently defer to this level of autonomy asserted by a school board, delegating a legally questionable level of fiduciary responsibility for the corporate assets.

What, then, are the best arguments in defense of continuing to allow municipal school districts to be parties to litigation, i.e., to having legal powers to sue and be sued? The observation that "we've always done it that way" is barely an opening gambit for making new law. It is never a sufficient argument.

If the legal capacity of a municipal school district to sue as a named plaintiff is challenged by a defendant in that lawsuit, a municipal school district must persuade the court that its presence as an independent party distinctly separate from the municipal corporation is somehow cognizable in law. That lawyer must guide the judges to the desired conclusion with legal reasoning based in sound public policy,[76] and with at least some modicum of supporting law.

Insulating and preserving the integrity of the local educational process from extreme local political influences might be a lofty and attractive public policy argument for distinguishing

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[75] In the late 1980s, during a panel discussion at an annual meeting of the Alaska Association of School Boards, I stated that municipal school districts lack legal capacity to sue or be sued in their own name. I was immediately confronted with a virtually unanimous and adamant opposition coming from not only the other panelists (consisting of school administrators, school attorneys and local school board members) but also from an audience of administrators and school board members. The subject of capacity dominated the rest of the one-hour panel discussion. Significantly, none of those protesting my opinion could cite any statute or case law authorizing a municipal school district to sue or be sued independently of its municipal corporation. The best arguments against my opinion were public policy claims of educational integrity insulated from local politics (proffered by *locally elected* school board members), and the existence of a long-standing practice in Alaska – "we've always done it that way."

[76] "Reasoning" is a necessary but not a sufficient condition for persuasion in the judicial process. "Public policy" is the other essential ingredient. "Public policy" is the content that fleshes out a skeletal syllogism or "reasoning" with attractive social morays that make the argument persuasive.

a municipal school board and the school district from other functions performed by other divisions of the municipal corporation. Alaska's integrated statewide public education system may provide one such pathway leading a Supreme Court to granting autonomous legal capacity to municipal school districts.

The delegates to the Constitutional Convention clearly created in art. VII, §1 of the Alaska Constitution a statewide public education system, and clearly delegated to the state legislature authority to enact laws for the administration of that system.[77] The Constitution gives no authority in public education to local government except to the extent the legislature chooses to delegate it. Hence, one will not find any *constitutional* role for local political input in public education policies in Alaska (except at the ballot box).

The state legislature has however enacted laws that recognize a distinction in functions between local school boards and local city councils/borough assemblies, delegating directly to school boards autonomy in, e.g., choices of school-designers and school designs, selection of school employees and purchasing of equipment and supplies – all without interference from the local council or assembly.[78] Arguably, the purpose of those legislated separations of power at the local level is to insulate public schools from some of the harsher aspects of local politics and thereby preserve a level of integrity in education. This line of reasoning might imply a corresponding need for a level of separation and independence in the power to sue and be sued.

But one can question whether the above separation in statutory powers is sufficient to impute legal standing. After all is said, that legislature which granted a modicum of autonomy to municipal school boards clearly did not specifically grant the power to sue and be sued in the same specific manner that it granted this legal capacity to REAAs and to the parent municipal corporations. Also, if an autonomous power to sue and be sued can be implied from the constitutional insulation of public education from local politics except as legislated differently, why does the empowering legislation not limit the extent to which the broader municipal assets are exposed when a school district sues independently of the municipal corporation?

There is no case law on point. But there is this "longstanding" silent reception of municipal school districts as parties in litigation, which could be recited as a string of tacit precedence – if silence is ever precedence. When combined with cases in other jurisdictions

[77] Art. VII, § 1 states, "The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

[78] The authority for the legislature to restrict borough and city governments in this fashion is not found in art. X of the Alaska Constitution but in art. VII, which vests all matters of public education in the legislature.

recognizing capacity in municipal school districts, these factors together will comprise what I consider the best argument for a school district possessing independent standing to sue and be sued.

I believe, however, that the rebuttal to that argument is devastating. The legislature certainly knows how to grant powers to sue and be sued, both to municipal corporations and to REAAs. The corresponding silence of the legislature with regard to municipal school districts is deafening. The legislature clearly knows how to grant autonomy and independence to municipal school districts. Legal standing to sue is not found among those grants of independence.

Moreover, public policy militates against allowing a mere division of the municipal corporation to place the full faith and credit of the *entire* municipal corporation at risk in litigation. The city council or borough assembly is the only fiduciary authority expressly authorized by law to decide in every instance how and when to sue and how and when to defend against lawsuits. No law authorizes or recognizes such a high level of fiduciary power and authority in elected school boards. The Alaska Constitution recognizes no local control of public education except to the extent that the legislature chooses to delegate it; and while the legislature has built into its delegations some insulating features that prevent local politics from interfering with some aspects of delegated public education functions, the legislature has never authorized a municipal school district to sue or to be sued.

In summary, as a potential "party" in litigation, a city or borough school district stumbles at the threshold of the courtroom door, unable to cite any legislative delegation of independent capacity to sue or to be sued in its own name.[79] Matters worsen when one observes that the legislature did specifically grant these powers to regional educational attendance areas and to municipal corporations, and that municipal school districts are mere divisions or departments of these municipal corporations. But the longstanding practice of an unchallenged status, and a silent judicial tolerance of municipal school districts as parties in litigation, might serve today to imply an independent party-capacity to sue that is consistent with the public policy of insulating public education functions from the local politics of city councils and borough assemblies. That conclusion is possible, but in my opinion not plausible without the legislature or the courts also placing some limit on the particular municipal assets exposed in such litigation.

c. Standing of Municipal Governments to Assert Equal Protection

[79] The status of a municipal school district as a subordinate division of the municipal corporation may raise other legal questions beyond the scope of this Report: For example, if a municipal school district purchases a liability insurance policy in its own divisional name, and if the district *qua* district is dismissed from the lawsuit for lack of capacity, can the insurer then argue that it need not defend or indemnify the borough corporation if the broader corporation was not listed as an additional insured party in the insurance policy?

i. The Present Law in Alaska

In the 1986 MatSu complaint to the trial court, the Borough and its school district alleged that the public school funding laws violated their rights to equal protection. While the MatSu case was pending in the trial court, the Alaska Supreme Court published its 1988 decision in Kenai Peninsula Borough v. State, Dep't of Community and Regional Affairs.[cxii] Citing that authority, the trial judge held that the MatSu Borough and the school district were not "persons" entitled to equal protection under art. I, §1 of the Alaska Constitution. [80]

The borough and the school district abandoned that issue on appeal. They only appealed the assessment of attorney's fees against them. Despite the absence of an issue ripe for review, Justice Compton gratuitously added the following *dicta* to his appellate opinion:

> Boroughs are not entitled to equal protection under the Alaska Constitution. Fairbanks N. Star Borough v. State, 753 P.2d 1158, 1160 (Alaska 1988); Kenai Peninsula Borough v. State, Dep't of Community and Regional Affairs, 751 P.2d 14, 18-19 (Alaska 1988). As we observed in Kenai Peninsula Borough, "[t]he purpose of the Alaska due process and equal protection clauses is to protect people from abuses of government, not to protect political subdivisions of the state from the actions of other units of state government." 751 P.2d at 18-19. Under this rationale, the District also lacks any equal protection rights, since it, like the Borough, is not a "person" entitled to equal protection. *See* State ex rel. Brentwood School Dist. v. State Tax Comm'n, 589 S.W.2d 613, 615 (Mo.1979) (en banc) (school districts are not "persons" and may not charge the state with due process violations).[cxiii]

That unwarranted footnote adds nothing to the law of the MatSu case, and adds nothing to the law of the earlier Kenai case. The citation to the Missouri appellate case adds nothing to precedential law in Alaska, not only because it was a mere *dictum* but also because it was superfluous, for three reasons. First, the same case was already cited in the Kenai decision. Secondly, the reasoning of the Kenai case was founded in (i) the U.S. Supreme Court Williams case,[cxiv] which denied federal constitutional protections to *all* local governing entities "created by a state for the better ordering of government" and, (ii) in a line of state cases adopting the doctrine of legislative supremacy that applies to *all* political creatures of the state. Municipal

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[80] The full text of Art. I, §1 of the Alaska Constitution says, "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

school districts are these kinds of creatures, as indicated by the Kenai case citing the Missouri case, and hence the Kenai decision already covered them – rightly or wrongly – notwithstanding the later citation by Justice Compton.[81]

Thirdly, as noted above, a municipal school district does not have legal capacity to sue, which is a prerequisite for legal standing to assert a claim. Hence, independent of what the Kenai case and a Missouri court say, Alaska municipal school districts are banned from the courtroom before they can ever claim standing to assert equal protection or to assert any other legal right or privilege in their own name.

Thus, the controlling Alaska law proclaiming that boroughs do not enjoy standing to claim equal protection under the Alaska Constitution is not found in the MatSu case. It is found in the earlier Kenai case[cxv] where Justice Moore denied constitutional equal protection to cities and boroughs. This, then, is the Supreme Court case we must analyze to determine the strength of the arguments and reasoning favoring that proposition.

In the Kenai case, the Kenai Peninsula Borough had enacted and levied a differential property tax of 1.75 mills on assessed value of real property and 2.5 mills on assessed value of personal property. After statutory notice requirements, but without convening a requested hearing, the former Alaska Department of Community and Regional Affairs ("DCRA") concluded that the differential tax levy violated state law and that the borough must adopt a uniform millage as soon as possible.

The Kenai Peninsula Borough appealed administratively and the DCRA commissioner affirmed the determination of his department. The borough appealed again to the superior court, and the judge affirmed the decision of the commissioner. In the final appeal by the borough, Justice Moore, writing for a unanimous Alaska Supreme Court, held

> (1) that the differential mill rates violated the relevant statutes requiring a uniform rate of levy on real and personal property taxation within the borough,
>
> (2) that the setting of tax rates by the borough is a "procedure" within the statutory enforcement authority of DCRA, and

[81] One might argue that, even though the Kenai court cited a Missouri case denying equal protection to a Missouri school district, the Kenai case itself did not involve a school district and the MatSu case did involve a school district. However, the school district *did not appeal* the issue to the MatSu court. Justice Compton's treatment of the issue was *sua sponte*.

> (3) that the borough is not a person within the meaning of the Alaska constitutional provisions of due process and equal protection affording protections from abuses by state government.

While close scrutiny raises serious questions as to the accuracy of all three holdings,[82] it is only the third statement of law that carries relevance to the inquiries in this Report.

Before exploring the reasoning of Justice Moore for that third holding above, one must question whether he was correct in stating that this third issue of whether the borough was a "person" entitled to due process and equal protection was "an issue of first impression" before the court.[cxvi] In a footnote he states, "In City of Homer v. State, Dept. of Natural Resources, 566 P.2d 1314, 1317 (Alaska 1977), we expressly refused to decide whether a local government is a 'person' entitled to due process."[cxvii] The fact of the matter is that the court in City of Homer did avoid the precise and narrow question of personhood, but then continued affirmatively to evaluate, on grounds of legislative "fair treatment," whether Homer had been afforded constitutional due process. Hence, in the following paragraphs I describe an existing crack of daylight in Supreme Court case law through which a municipal corporation still might obtain "fair treatment" regarding due process, if not equal protection.

In the City of Homer case, the State of Alaska had granted private upland owners a tideland patent covering submerged lands directly offshore from the Homer Spit ("Land's End"). The City of Homer appealed the administrative decision to the superior court and then the Alaska Supreme Court. The private owners argued that Homer was not a "person" enjoying due process.[83] (Equal protection was not at issue in this case.)

The Supreme Court began its analysis of the issue with the statement, "Although the parties' constitutional arguments address significant issues affecting state-municipal relationships, we think it unnecessary to decide such far-reaching issues given the factual context of the instant case."[cxviii] Justice Dimond then continues, in the very next sentence, to discuss "legislative mechanisms" that show intent to provide to cities "fair treatment," which in turn serves as the entrée for adjudging the substantive questions of whether the City of Homer was deprived of due process.

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[82] The ambiguous statute could have been interpreted reasonably and soundly either way; and semantically stretching the meaning of the word "procedure" to include the substantive act of setting a mill rate requires Lewis Carroll-like verbal legerdemain. Moreover, as will be shown below, procedural due process is one area where federal courts have allowed municipal corporations created by a state to invoke constitutional protection in opposition to that state. The grievance of the Kenai Peninsula Borough case included an issue of procedural due process, namely that DCRA and its commissioner had denied the borough a due process hearing.

[83] Full and fair disclosure: I was the attorney who made that argument in 1977.

How exactly did the court achieve this result? First, Justice Dimond observed, on behalf of a unanimous court, that the state statute for obtaining tidelands provided to cities and individual occupants alike "a unitary scheme" of adjudicating disputes between claimants, and thereby "the legislature has shown its intention that the claims of municipalities be determined along with those of other occupants."[cxix]

> Private parties are entitled to due process of law before property rights may be removed; therefore, the minimal protection provided by Departmental adjudicatory procedures must meet that standard. Municipalities are thus likewise entitled to due process in the adjudication of claims to these tide and submerged lands.[cxx]

In short, if a law provides due process to private parties (as every law must!) and if the legislature intended "fair treatment" for municipal governments under the same law (and such an assumption of "fair treatment" is always imputed into legislation until there is evidence otherwise), then municipal governments enjoy due process with regard to virtually all laws that apply to both them and private parties.[84]

Next, Justice Dimond observed that the language in the submerged lands act passed by Congress also shows intent "that fair treatment be provided to both municipalities and private parties in disposition of tide and submerged lands…."[cxxi]

> The Senate Report makes no distinction between preferences for private or municipal occupants and simply restates the preference protection for occupants where lands are transferred to towns or school districts and are subsequently disposed of.
>
> Consequently, we conclude that with respect to the disposition of tidelands, municipal corporations are to be afforded the same rights of due process as are private parties.[cxxii]

Hence, when Justice Moore in Kenai stated that "[i]n City of Homer … we expressly refused to decide whether a local government is a 'person' entitled to due process"[cxxiii] he was correct only in the fact that City of Homer avoided the precise question of personhood. City of Homer continued then to grant a due process evaluation for the benefit of the municipal corporation, based on statutory intent that Congress and the state legislature intended "fair treatment" of both upland occupants and municipalities. One always assumes that Congress and a state legislature intend "fair treatment" to those affected by legislation, and so, a

[84] This logic from Justice Dimond's reasoning does not fall exactly "on all fours" with the local contribution statute, however. City of Homer was considering statutes that addressed both private parties and municipal corporations, but AS 14.17.410(b)(2) does not address or apply to private parties.

municipal corporation has standing to assert due process in every legislative enactment that also addresses private parties.

Before the Kenai case, there was a precedent in Alaska stating, in its narrowest interpretation, that municipal corporations enjoy due process whenever Congress or the state legislature enacts legislation intending "fair treatment" to municipal corporations. What should one now read from the more sweeping decision in the Kenai case? Under the "doctrine of legislative supremacy" adopted in the Kenai case (and discussed below), a municipal corporation today may not still enjoy "fair treatment" from the state legislature. To that extent, Kenai probably overturned the prior precedent in City of Homer. But, in a future case, if the Alaska Supreme Court considered the history of intent behind art. X of the Alaska Constitution (discussed below), there exists some likelihood that such a severe interpretation of Kenai will be tempered if not distinguished or overturned.

After this summary disposal of City of Homer, Justice Moore in Kenai offered the following reasoning for the court's denial of constitutional personhood for municipal corporations:

> The purpose of the Alaska due process and equal protection clauses is to protect people from abuses of government, not to protect political subdivisions of the state from the actions of other units of state government. …[85] Thus, the only procedural rights to which the Borough is entitled are those bestowed by the statute …. DCRA complied with the notice and appeal procedures in former AS 29.53.105.

Where did Justice Moore find this statement of "purpose"? He did not explore any of the history of the creation of the Alaska Constitution. He did not analyze any language in the Alaska Constitution itself. Alaska business corporations, non-profit corporations, corporations sole (churches) and limited liability companies are all "people" in law that enjoy Alaskan due process and equal protection. Why would the Supreme Court exclude from fundamental constitutional protections the one and only type of Alaskan corporation that uniquely enjoys protected status and authority in the Alaska Constitution?

Instead of looking locally within the state for support for his reasoning, Justice Moore cited cases from other jurisdictions. First, he cited the U.S. Supreme Court case of Williams v. Mayor of Baltimore[cxxiv] and ensuing federal circuit court cases. He then shifted from citing this federal precedent applying *federal* constitutional protections and immunities in the *federal* context of the 10th Amendment, to citing as authority the decisions of an alleged majority of

[85] Footnote 19 in the original states, "The Borough has not argued that it may assert the rights of its residents as *parens patriae*, nor do we decide this issue."

other state courts explicating the law found in each of their *unique constitutions* – none of which reads anything like art. I, § 1 or art. X of the Alaska Constitution, and none of which contains anything akin to Alaska's art X empowerment to municipal corporations:

> "Most state courts exclude local government entities from state due process and equal protection guarantees. *E.g.,* Village of Riverwood v. Department of Transp.[cxxv],… (under the Illinois Constitution, municipal corporation may not assert due process claim against state); State ex rel. Brentwood School Dist. v. State Tax Comm'n,[cxxvi] … (school districts are not "persons" and may not charge the state with due process violations); State ex rel. New Mexico State Highway Comm'n v. Taira,[cxxvii] … (State Highway Commission not protected by due process clause); Carl v. Board of Regents,[cxxviii] … (state medical school admissions committee not entitled to due process or equal protection); City of Seattle v. State,[cxxix] … (city itself not entitled to equal protection, but has standing to assert claims of potential residents); City of Mountlake Terrace v. Wilson,[cxxx] … (city may not assert due process claim against state)."[cxxxi]

In the following subsections, I will first examine the appropriateness of the federal case law as reasoned authority for the Kenai conclusion that cities and boroughs in Alaska do not enjoy due process and equal protection under our state constitution. Then I will parse the six cases from other states cited by Justice Moore, for the same purpose of determining how authentically they might buttress the argument for denying due process and equal protection to municipal governments in Alaska. Finally, I will explore Alaska's own constitutional history as it relates to the "Texas Plan" which the delegates to our Constitutional Convention intended to create in this state – a significant matter of legal intent and public policy that the Kenai court never mentioned.

ii. Federal Authority Cited in the Kenai Case

It is instructional to note that Justice Moore seemed to imply a bit of reticence in his citation of the 1933 U.S. Supreme Court case of Williams v. Mayor of Baltimore,[cxxxii] when he added the qualifier that "[w]hile the Supreme Court has not revisited this issue in over 50 years, Williams is often cited by the circuit courts today."[cxxxiii] In addition to the implied hesitancy in the tone of that sentence, Justice Moore was not entirely correct in stating that the U.S. Supreme Court "has not revisited this issue" since deciding Williams in 1933. The underlying issue and the foundational cases that led to the Williams decision were analyzed in great detail in 1960 in the Gomillion case discussed below.

While these weaknesses may suggest a lack of thoroughness in the research and analyses of equal protection applying to Alaska municipal corporations, and while these same weaknesses may add a measure of persuasiveness to ease five new justices into the extraordinary judicial act of reconsidering and distinguishing the Kenai precedent, the

fundamental defect in citing Williams as authority is that the reasoning and holding of the Williams case is largely irrelevant to the issue that was before the Alaskan Kenai court. The federal privileges and immunities clauses and the state-federal relationship found in the 10th Amendment of the U.S. Constitution represent a body of law vastly distinguishable from the Alaska state equal protection clause and the state-local relationship and treatment of Alaskan municipal governments in the Alaska Constitution.

In Williams, the Maryland state legislature had exempted a bankrupt railroad from all taxation for a period of two years. Recitals in the statute spoke of the dire financial distress of the railroad and of the public welfare served by its continuing operation. Justice Benjamin Cardozo wrote the opinion for a unanimous court addressing, *inter alia*, whether the state law constituted a denial of federal equal protection to the cities of Baltimore and Annapolis. Citing six[cxxxiv] earlier Supreme Court decisions, Justice Cardozo succinctly held

> A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.

Justice Cardozo is one of the most brilliant and revered jurists in the history of American jurisprudence, famous too for the eloquent conciseness of his writing style.[86] Because he offers no detailed reasoning in the above terse statement of the law of prior cases, one must conclude that he felt strongly that his cited cases clinched that proposition squarely. In order to determine whether he was correct, one must analyze each of those cited cases. That tedious exegesis is found in **Appendix C**. Suffice it to say here that **Appendix C** confirms that Justice Cardozo's cogent summary of the law, as quoted above, is totally supported by the earlier cases he cites.

However, in the Kenai case Justice Moore never addresses four significant details about this Williams case. First, as noted earlier, the Williams holding was addressing and interpreting only the broad array of "privileges and immunities of the Federal Constitution." It was not addressing Art. I, §1 of the Alaska Constitution. The citation in Kenai to Williams is a classic example of "apples and oranges." The equal protection clause of the Alaska Constitution reads differently from the federal Fourteenth Amendment; it was drafted with different statements of intent; and it has been interpreted by our Supreme Court using a different scheme of analyses from what the U.S. Supreme Court uses for examining the application of the federal equal protection clause under the 14th Amendment.

[86] His lucid and insightful 1921 Yale lectures were compiled into a very readable legal classic, "The Nature of the Judicial Process."

Secondly, the reasoning that leads to the legal conclusion that the *federal* constitution cannot be invoked by an aggrieved instrumentality of a state against that state in a *federal* court does not necessarily mean that a *state* constitution cannot be invoked by an aggrieved instrumentality of a state against that state in a *state* court. The relationship embodied in the U.S. Constitution between the federal government and the 50 states (including all of their creations: their agencies, instrumentalities and political subdivisions) must be – and is – evaluated in the context of the Tenth Amendment to the U.S. Constitution.[87] This unique federal-state relationship represents a body of law and political theory which is, at once, [88] vastly distinguishable from but remarkably analogous to the body of law and political theory that describes and defines the relationship between the State of Alaska and its political subdivisions. The latter relationship must be evaluated in the context of art. X of the Alaska Constitution, not the 10th Amendment of the U.S. Constitution.

Thirdly, Justice Moore in the Kenai case either ignored or overlooked the fact that Justice Cardozo actually recognized in Williams the differences of application between the federal constitution and state constitutions. He pointedly noted in Williams that the City of Baltimore probably enjoyed standing to assert its equal protection claim under the Maryland Constitution.

> We have assumed, without deciding, that the respondents though without standing to invoke the protection of the Federal Constitution, will be heard to complain of a violation of the constitution of the state. Their standing for that purpose, at least in the state courts, is a question of state practice [citations omitted], as to which the federal courts do not exercise an independent judgment. … The Maryland decisions proceed on the assumption that municipal corporations assailing a statute of exemption or other special legislation have an interest in the controversy which entitles them to be heard [citations omitted], though the reports do not show that their interest was questioned.[cxxxv]

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[87] The Tenth Amendment of the U. S. Constitution grants to the 50 states all powers that are not expressly reserved to the federal government, with the statement, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[88] While concepts of federalism in the 10th Amendment are vastly distinguishable from the legal concepts of home-rule powers in the Texas Plan adopted in Alaska, one still can argue plausibly that art. X of the Alaska Constitution grants to Alaska local governments a breadth of power and authority similar in magnitude to what the 10th Amendment of the U. S. Constitution reserves to the 50 states. By the terms of the 10th Amendment, federal courts defer to the states in all matters not specifically enumerated in the federal constitution. By the terms of art. X of the Alaska Constitution, the state legislature should defer to home-rule municipal corporations in all matters of "legislative authority" not specifically reserved for state authority in the Alaska Constitution.

Here, Justice Cardozo is both making the federal-state distinction, and noting that prior cases in the Maryland *state* appellate courts have allowed cities legal standing to assert *state-level* constitutional challenges when those cities have an interest in the issue – all being quite a different proposition from what Justice Moore concludes in the Kenai case.[89]

Fourthly, as will be discussed in greater detail below, the 1960 Gomillion case reinterpreted the seminal 1907 Hunter v. Pittsburgh[cxxxvi] case, and its associated cases, significantly eroding the underpinnings of Williams with regard to at least federal procedural due process being available to political subdivisions of states. One can see in **Appendix C** the significance of the Hunter case as a fundament to the earlier cases cited by Cardozo for his holding in Williams.

Hence, the Williams decision does not resolve the legal question of state equal protection for Alaska municipal corporations (i) because it addresses a different constitutional law interpreted differently by the respective courts, (ii) because the 10th Amendment places constraints in the legal relationship between the federal government and the states vastly different from the legal relationship between the State of Alaska and the empowerment of its political subdivisions in art. X of the Alaska Constitution, (iii) because the Williams decision actually recognizes the availability of state equal protection under the particular state constitution applying to the City of Baltimore, and (iv) because the 1960 Gomillion case qualified the 1907 Hunter case which was the seminal authority behind the Williams case, and hence qualified the Williams case in a manner and to an extent Justice Moore did not acknowledge in the Kenai opinion.

One might argue in response, however, that the Alaska Supreme Court cited Williams only for its reasoning – for the adoption of the doctrine of legislative supremacy – and not for exact identification with the particular constitutional law being interpreted. The reasoning implicitly adopted by Justice Cardozo from his predecessor justices is that, in the creation of instrumentalities for the better ordering of government, the "will" of the state is not simply hierarchical in rank and in superiority but, indeed, in all manner of speaking, is sovereign and independent of the will of the "creature" that it created. I will address that doctrine in itself, setting aside for the moment how Gomillion modified that statement of law in 1960.

One fallacy in the argument lies in the presumption that the Alaska state government was the androgynous "creator" of those subordinate instrumentalities we know as cities and boroughs. In truth of fact, article X of the Alaska Constitution is the conceiving parent of cities

[89] I will show below that another case cited by Justice Moore in the Kenai decision grants similar standing to cities, noting that the basic test for standing to assert a constitutional protection is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." City of Seattle v. State, 694 P.2d 641, 645 (Wa. 1985).

and boroughs, playing the most significant, initial and preeminent role in the genetic makeup of these Alaskan municipal corporations. That constitutional parent not only contributed the dominant genes to the final appearance, character and status of Alaska municipal corporations, but also granted to the legislature only a subsequent but limited role of incubation and birth "by law." As will be shown below, rather than enumerating constitutional powers for municipal corporations, the framers of the Alaska Constitution reserved to them all legislative authority not specifically granted to the legislature. That is hardly a creator-creation relationship between the legislature and municipal corporations in Alaska.

The opening section of art. X of the Alaska Constitution states,

> 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. A *liberal construction* shall be given to the powers of local government units. (Italics mine.)

When creating cities and boroughs, the Alaska state legislature has *no choice* but to allow for "maximum local self-government," and all three branches of state government have *no choice* but to grant "liberal construction…to the powers of local government units." Cities and boroughs minimally enjoy these concrete constitutional protections quite apart from any ethereal, metaphysical "will" of the legislatures in other states as a "creator" of cities and boroughs. To paraphrase Justice Cardozo, but in the converse of his holding (and unfortunately without his talent for conciseness), one can say that *a municipal corporation in Alaska, created by laws enacted by the state legislature for the better ordering of government, possesses pre-existing constitutional powers and authorities which it may invoke in opposition to the will of the legislature, even while the legislature is identified, in a subordinate role but together with the state Constitution, as the joint "creators" of that municipal corporation*.

Contrary to the assumption in the federal and "most states" reasoning of Justice Cardozo and the federal courts before him, municipal corporations in Alaska were conceived and empowered by the state constitution before the state legislature existed or played its secondary role as their "creator." Municipal corporations are not mere creatures of any of the three branches of Alaska state government.

The Alaska Constitution delegated to the future state legislature the power to create cities and boroughs "by law." But the Alaska Constitution did not give to the future state government unconditional supremacy and untrammeled authority over every detail of these sub-divisional creatures of governance. The authority of the legislature to make "law" creating boroughs and cities must occur within the parameters of the local government character and status of the pre-existing art. X of the Alaska Constitution as adopted by the Alaska Constitutional Convention.

One finds an instructional analogue at the federal level: Congress "creates" states, but that act of creation does not make Congress sovereign and supreme in all respects over those states. In the Tenth Amendment, the U.S. Constitution defined the relationships between that parent and those children before the birth of any but the first thirteen of them. And those first 13 entered the pact as sovereign nations subject only to the loose ties of the Articles of Confederation.

Likewise, in Alaska, art. X of the Alaska Constitution defines the relationship between the Alaska legislature and Alaska municipal corporations, and that defined relationship is far from the absolute legislative supremacy that Justice Cardozo and the appellate courts of some states find in their respective and different constitutional contexts. As will be shown below, the framers of our Alaska Constitution sought to learn from the mistakes and uncertainties of these other states, not adopt their systems.

Pursuing further the creator-creature line of reasoning by many courts, one can note that non-governmental corporations – business corporations, non-profits, religious corporations, etc. – are far better examples of hermaphroditic creations existing largely at the sufferance of the state legislature. Yet, curiously, the doctrine of legislative supremacy has never been invoked against these fictional "persons" to prevent them from enjoying federal or state constitutional privileges and immunities vis a vis their creator-states.[90]

Cities and boroughs in Alaska are the only Alaska corporations that enjoy a constitutional assurance that "[a] liberal construction shall be given to the powers of local government units" by all branches of state government, and yet cities and boroughs in Alaska are the only Alaska corporations that the Alaska Supreme Court has deprived of the fundamental power of legal standing to assert due process and equal protection. As with all other corporations, the legislature granted to cities and boroughs the power to sue and be sued (as the Constitution would require them to do), without including in that statute any exceptions to or qualifications of legal standing when it comes to invoking fundamental constitutional protections.

By way of reaffirming the continuing legal authority of Williams, Justice Moore said in Kenai that this case "is often cited by the circuit courts today."[cxxxvii] He cited as examples a 1981 case in the 7th Circuit and a 1973 case in the 2nd Circuit.[cxxxviii] Given the "apples and oranges" arguments above, and the fact that Alaska municipal corporations are not mere

[90] *See*, Hartmann, Thom, Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights, Berrett-Koehler Publishers, Inc. San Francisco 2002. While this book argues that business corporations should not enjoy equal protection, it nonetheless shows how deeply embedded that privilege is etched in American constitutional law. Other cases have extended other protections of the Bill of Rights to business corporations as well.

creatures of either the Alaska legislature or the executive branch, there is no need to describe here the analyses of these two federal cases interpreting federal constitutional law at the federal circuit-court level. These and other federal circuit cases stand or fall on Williams, and Williams is partially inapposite to the law in Alaska, partially in acknowledgement of municipal governments potentially having equal protection and due process under the constitutions and laws of their respective states, and partially modified by Gomillion (below).

In citing the Williams case, Justice Moore asserted that "the [U.S.] Supreme Court has not revisited this issue in over 50 years." It would be more correct to say that, in the 1960 U.S. Supreme Court case of Gomillion v. Lightfoot,[cxxxix] Justice Frankfurter tempered considerably the terse but cogent earlier conclusion of Justice Cardozo that a municipal corporation cannot invoke federal privileges and immunities in opposition to the will of its creator-state.

While Gomillion was not a case of an aggrieved political subdivision attempting to invoke federal privileges and immunities as protection against "the will of its creator," Gomillion is sound authority for the proposition that the earlier case of Hunter v. Pittsburgh,[cxl] and its progeny (including the later Williams case), must be read in their narrow contexts and do *not* constitute a broad, sweeping prohibition against municipal governments claiming federal constitutional protections against the state that created them.

In Gomillion the court held that a boundary change of Tuskegee, Alabama eliminating from the city all but 4 or 5 of 400 Black voters without eliminating any white voters would, if proven in a trial on the merits, deprive Blacks of their right to vote on account of their race, contrary to the 15th Amendment of the U.S. Constitution.

Gomillion is not a 14th Amendment equal protection or due process case, except in the mind of one justice who wrote a concurring opinion. But the reasoning of the Gomillion court is relevant generally to the question of whether municipal governments enjoy the broader category of federal constitutional privileges and immunities. Writing for the majority, Justice Frankfurter said that the Tenth Amendment[91] leaves to states the administration of internal affairs *only so long as the exercise does not offend another provision of the U.S. Constitution*.

> We freely recognize the breadth and importance of this aspect of the State's political power [to establish, destroy or reorganize local units of government]. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of Hunter v. Pittsburgh….
>
> ….

[91] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

> Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is…that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

The Gomillion court also noted that "Hunter and kindred cases" were those in which "state power is used as an instrument for circumventing a federally protected right…." As noted by one commentator, "[M]unicipal corporations *do* in fact have standing to assert procedural due process claims against their creating states in cases not involving substantive matters of the state's internal political organization." [92] (Recall that one grievance of the Kenai Peninsula Borough was that DCRA had deprived the borough of a procedural due process hearing.)

In summary, federal case law pertaining to a city invoking federal constitutional protections against the parent-state is, today, far more complicated than the succinct holding in Williams, cited by the Alaska Supreme Court in the Kenai case. The Kenai court failed to trace qualifiers found in the Hunter line of cases that culminate in Gomillion. The Kenai court failed to appreciate the vast distinction between the 10th Amendment federal-state relationship and the art. X state-city/borough relationship in the Alaska Constitution. The Kenai court failed to recognize the difference between analyses and applications of the federal equal protection clause, on the one hand, and the state equal protection clause on the other hand. Indeed, the Kenai court does not even mention the Alaska Constitution. Instead of reviewing our own state constitutional history and our own specific provisions dealing with the powers and liberal construction given to municipal corporations, the Kenai court focused on a representative sampling of interpretations by "most" states applying their various and different constitutions.

As will be shown below, not all of those state cases agree that standing is an insurmountable barrier to a municipal corporation asserting constitutional protections; one State of Washington case supersedes another cited Washington case with a far more liberal and flexible interpretation; and the Illinois line of cases leads to such an astonishingly extreme application of the doctrine of legislative supremacy that their importation to Alaska would

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[92] Michael Anthony Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 Vill. L. Rev. 93, 116 (2002) [Italics in original; underlining mine.] This commentator argues that the U.S. Constitution affords to municipal governments the rights of procedural due process (opportunity to be heard "at a meaningful time in a meaningful manner") against the creating state, but only "in cases not involving substantive matters of the state's internal political organization." Id. He traces federal cases (Hunter, Gomillion, Rogers) qualifying the limits of the denial of standing to municipalities, while he recognizes that federal courts are extremely reticent to interfere with the internal substantive political matters of any state. He relies heavily upon "principles of fundamental fairness and doctrinal consistency in state-local relations," and cites only one state case reciting *dicta* squarely in support of his proposition that [i]n contrast [to a ban on asserting substantive due process claims], municipal corporations are not barred from asserting procedural due process claims." Id. At 110, quoting City of Colorado Springs v. Bd. Of Comm'rs of the County of Eagle, 895 P.2d 1105, 1119 (Colo. Ct. App. 1994)

amount to a *de facto* extinguishment by the courts of most safeguards in art. X of the Alaska Constitution.

iii. Authorities from Other States Cited in the Kenai Case

Justice Moore cited six cases from other states in support of his statement that "most" states invoke the doctrine of legislative supremacy over not only municipal corporations but also other political subdivisions. Only three of these cited cases pertain to city and village governments. Two of those three cases were Washington State cases, and one of those two (published by the Washington Supreme Court) virtually supplants the other (published earlier by an intermediate court). Hence, there really were only two-of-six cases cited by Justice Moore that speak of municipal corporations and apply directly to Alaskan cities and boroughs.

Of the other three state cases cited in Kenai for the doctrine of legislative supremacy, one each pertained to a school district, to an executive-branch highway department, and to a medical school admissions committee. Out of compassion for my readers, I have placed the dryly detailed abstracts of all of these cases in **Appendix D**. The analyses of their applications to Alaska appear below.

The Illinois Case. The Alaska Supreme Court in Kenai cited Village of Riverwood v. Department of Transportation[cxli] for the compressed[93] proposition that "under the Illinois Constitution, municipal corporations may not assert due process claim against state."[cxlii] Note first that, as with all of the following cases, this Illinois decision was reviewing its own state constitution, not the Alaska Constitution with its unique provisions in art. X pertaining to boroughs and cities.

The Riverwood case itself summarily held that a municipal corporation is not entitled to due process against the state. The court offered no reasoning, but cited two earlier Illinois cases as authority. In the first of these earlier cases, Meador v. City of Salem,[cxliii] the court again merely stated conclusorily "that under the doctrine of legislative supremacy over municipal corporations, a municipal corporation may not assert the protection of the due-process clause against action of the State government." One finds in that opinion no reasoning why.

[93] When Justice Moore cites cases with compressed parenthetical statements of the holding of each, he is employing a commonly acceptable legal writing style in which the holdings of a series of cases are compressed to about 6-7 words each. The problem with this style appears when the "nut" of the law of the case loses accuracy when compressed. Some of the inaccuracies of Justice Moore may be attributed to the shortfall in choosing to use this style.

The meat of the reasoning supporting the summary and conclusory Riverwood and Meador rulings is found in the earlier case of Supervisors v. Village of Rainbow Gardens,[cxliv] where the Illinois court said,

> The character of the functions of such municipal corporations, the extent and duration of their powers and the territory in which they shall be exercised rest *entirely in the legislative discretion*. The governmental powers which they may exercise and the property which they may hold and use for governmental purposes are *equally within the power of the Legislature*. … The state may, with or without the consent of the inhabitants or against their protest, and with or without notice or hearing, take their property without compensation and vest it in other agencies, or hold it itself, expand or contract the territorial area, divide it, unite the whole or part of it with another municipality, apportion the common property and the common burdens *in accordance with the legislative will*, and it may abolish the municipality altogether. The property of such corporations is public property in the hands of state agents for certain purposes and is *subject to the will of the Legislature*. It has been held so in many cases.[cxlv]

That ruthlessly extreme statement of legislative supremacy and dominance is totally anathema to the various provisions of art. X of the Alaska Constitution empowering Alaska cities and boroughs, and placing most of the above types of decisions in a local boundary commission rather than in the legislature. One can only presume that, if Justice Moore's law clerks had brought the above-quoted underlying statement of Illinois law to the attention of their Justice, either the Illinois case of Riverwood would not have been cited in the Kenai case, or, the outcome of the Kenai case would have been different.

No person knowledgeable about the Alaska Constitutional Convention or the Alaska Constitution could ever endorse for application in Alaska the unqualified proposition of Illinois constitutional law that, "[t]he character of the functions of such municipal corporations, the extent and duration of their powers and the territory in which they shall be exercised rest entirely in the legislative discretion." These factors in Alaska are divided among art. X, §1 municipal empowerment provisions, the Alaska Local Boundary Commission, and – only in that context – legislative fine tuning.

No person knowledgeable about the Alaska Constitutional Convention or the Alaska Constitution could ever endorse for application in Alaska the total emasculation of municipal corporations in Illinois constitutional law, providing that "[t]he governmental powers which [municipal governments] may exercise and the property which they may hold and use for governmental purposes are equally within the power of the Legislature." As noted in an earlier section of this chapter, the Alaska Constitution declares – ahead of the existence of any state legislature – that, when creating cities and boroughs, the state legislature has *no choice* but to

allow for "maximum local self-government," and that all three branches of state government have *no choice* but to grant "liberal construction…to the powers of local government units."

No person knowledgeable about the Alaska Constitutional Convention or the Alaska Constitution could ever endorse for application in Alaska the whimsical, arbitrary and capricious power of the legislature in Illinois constitutional law, providing that "[t]he state may, with or without the consent of the inhabitants or against their protest, and with or without notice or hearing, take their property without compensation and vest it in other agencies, or hold it itself, expand or contract the territorial area, divide it, unite the whole or part of it with another municipality, apportion the common property and the common burdens in accordance with the legislative will, and it may abolish the municipality altogether." Many of those functions are vested by the Alaska Constitution in the Local Boundary Commission, not the legislature, and our Alaska Supreme Court has never granted either that commission or to any state agency the power to act so arbitrarily regarding municipal corporations, their public property or their "inhabitants."[94]

Simply put, the Illinois proclamation of the doctrine of legislative supremacy, while apparently consistent with the Illinois Constitution, is vastly distinguishable from the protected powers, the liberal authority, and the political distancing reserved to cities and boroughs by the Alaska Constitution, where the constitutionally created Local Boundary Commission further trumps the state legislature in ways that insulate Alaska municipal corporations from the extreme political ruthlessness and arbitrariness apparently vested in the Illinois legislature, even toward municipal "inhabitants." The summary holding in the Riverwood case lends no authority for constitutional law in Alaska, when one explores its cited authority deeper to find in Village of Rainbow Gardens the Illinois reasoning behind that Riverwood holding.

The Washington State Cases. In his Kenai decision, Justice Moore also cited the 1985 Washington Supreme Court case of City of Seattle v. State[cxlvi] for the legal proposition that the "city itself [is] not entitled to equal protection, but has standing to assert claims of potential residents."[cxlvii] He then cited an earlier 1976 Washington intermediate court of appeals case, City of Mountlake Terrace v. Wilson,[cxlviii] for the proposition that a "city may not assert due process claim against state."[cxlix]

These are puzzling citations, for a number of reasons. First, the bald-faced, highly generalized holding by the intermediate court in City of Mountlake Terrace was narrowed,

[94] See, eg., U.S. Smelting, Refining & Mining Company v. Local Boundary Commission, 489 P.2d 140 (Alaska 1971) where the Supreme Court required the Local Boundary Commission to change boundaries only according to due process, duly promulgated regulations available beforehand to such landowning "inhabitants." Indeed, today the 1960 Gomillion line of reasoning would also afford procedural due process even to Illinois cities affected in the manner described in the above doctrine of legislative supremacy.

clarified and supplanted by the later Washington Supreme Court in City of Seattle. In 1976, the intermediate Washington court stated,

> The City of Mountlake Terrace has no standing to attack this order of the Snohomish County Disability Board as violative of either the 14th amendment of the United States Constitution or article 1, section 3 of the Washington Constitution. The due process clause protects people from government; it does not protect the state from itself. Municipal corporations are political subdivisions of the state, created for exercising such governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause against action of the state government.[cl 95]

Now contrast this statement by the 1976 intermediate court (cited by Justice Moore) with the 1985 statement of the Washington Supreme Court (also cited by Justice Moore):

> Standing is not an insurmountable barrier to municipal corporations challenging the constitutionality of a legislative act. Where a controversy is of serious public importance the requirements for standing are applied more liberally. The basic test for standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question".
>
> The City does not itself have rights under the equal protection clauses of the state and federal constitutions. The primary purpose of the equal protection clause is the protection of individuals' rights, including the right to vote. However, in cases involving the right to vote, the courts have also expressed a concern as to the effects of the denial of the right to vote on the integrity of the democratic process. Protection for the integrity of the political process, as well as individuals' rights, is within the zone of interests protected by the equal protection clause. The City does have a direct interest in the fairness and constitutionality of the process by which it annexes territory.
>
> In the past we have found standing to challenge a state statute for a public agency which was required to act under a statute which was arguably unconstitutional. We have also found standing for the Seattle School District to challenge unconstitutional action by the Legislature which placed financial constraints on the District's ability to meet the State's constitutional obligation to fund public education.[cli]

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[95] That recitation is followed by a long string of case authority including Williams, Hunter, Gomillion and Meador – without distinguishing among them or recognizing how one and another were modified by still another, or, how different one state's constitution can be interpreted vis a vis another state's constitution.

This quote raises my second reason for puzzlement that Justice Moore would cite this Washington decision in support of the Alaska Supreme Court holding in Kenai. The court in City of Seattle actually held to the contrary of the holding of the Kenai court, not only concluding that Seattle did enjoy standing to assert a constitutional equal protection claim, but also proclaiming that in matters of serious public importance the requirements for standing will be applied more liberally.

Arguably, the question of whether the Kenai Peninsula Borough should enjoy due process and equal protection in hearings before DCRA on matters of disparities in mill rates may not raise either the level of "protection for the integrity of the political process" or matters of "individuals' rights" or "financial constraints" that would give the Kenai Peninsula Borough standing to raise the constitutional protections, according to the standards of the Washington Supreme Court. But that argument raises two responsive observations. First, in Alaska the powers of the borough are to be "liberally construed," and the borough enjoys "maximum local government." Secondly, assuming *arguendo* that the borough's right to a hearing before DCRA is not a terribly significant concern, the matter of disparate classifications for the statewide statutory requirement of a local contribution to public school education certainly does raise a much higher level of concerns pertaining to "the integrity of the political process," pertaining to the "individuals' rights" asserted by a borough on behalf of its property owning citizens, and pertaining to "financial constraints" in matters of public education. Ironically, City of Seattle might serve as an entrée for amenable justices on the presently seated Alaska Supreme Court to use the liberal policies stated in this Washington case (that was endorsed earlier in the Kenai case), to now "distinguish" the Kenai *issues* from the local contribution issues in new litigation.[96]

My third reason for puzzlement with Justice Moore's citations to the Washington cases lies in the fact that a careful reading of City of Seattle indicates that its holding was not as cryptic and narrow as Justice Moore's pithy statement of the law of that case. Instead, it was broad, embracing and liberal in its treatment of legal standing of a city to assert constitutional protections. It does not say what Justice Moore restates, that the "city itself [is] not entitled to equal protection, but has standing to assert claims of potential residents."[cliii] It does pay platitudinal lip service to the statement that the city itself does not have rights under the equal protection clause of the Washington Constitution, but the opinion then continues with broad

[96] As noted earlier in this Report, it is easier to persuade a court to *distinguish* a precedent than to *overturn* a precedent. But the other decision of the Alaska Supreme Court promulgated in 1988 may not be quite so easily distinguishable. In that case, where the legislature enacted a statute authorizing the governor to withhold payment of certain appropriations to the Fairbanks North Star Borough, the Borough's claim of violations of due process and equal protection "fail for a number of reasons," one of which is the decision in Kenai. Fairbanks North Star Borough et al. v. State of Alaska et al., 753 P.2d 1158, 1160 (Alaska 1988). One could argue that this case involved not only legislative supremacy issues, but political questions of not placing the courts in a position of appropriating state money.

qualifiers, saying that "standing is not an insurmountable barrier to municipal corporations, " that "the requirements for standing are applied more liberally" in matters pertaining to "the integrity of the political process" or "individuals' rights," and that public agencies and school districts have in the past been allowed standing to challenge legislation placing "financial constraints" on funding of public education. This bread of liberal standing is neither the same severe doctrine of legislative supremacy that applies in the State of Illinois, nor the narrow limits of *in parens patriae* that Justice Moore read into the case.

The Washington decision does not limit standing to asserting only the "claims of potential residents," as Justice Moore states. Cities in Washington have liberal authority to also assert matters of constitutional integrity in politics and the constitutionality of statutes imposing at least some types of financial constraints. The Alaska Supreme Court should be as liberal and accommodating in hearing the grievances of cities and boroughs created by art. X of the Alaska Constitution.

The Missouri School Case. In the Kenai decision, Justice Moore correctly cited State ex rel. Brentwood School Dist. v. State Tax Commission[cliii] as holding that "school districts are not 'persons' and may not charge the state with due process violations." [cliv] In Alaska, no statute or constitutional provision gives municipal school districts the prerequisite legal capacity to sue and be sued. Hence they cannot enjoy standing to assert state privileges and immunities as school districts per se.

One can ask, however, whether this Missouri case might serve as the basis for restricting the ability of an REAA to invoke due process or equal protection against a state statute. Unlike municipal corporations, REAAs are mere service areas, and REAAs are not granted powers and liberal construction by art. X of the Alaska Constitution. In contrast to municipal corporations, REAAs are wholly creatures of a creating legislature. For this reason, Brentwood warrants abstracting in **Appendix D**.

The one new element in the Brentwood case is a citation to a Colorado decision which held that an incorporated school district did indeed have standing to assert due process and equal protection in circumstances where it risked losing its property and assets. However, the reasoning of that Colorado court represented unique circumstances whereby the "creator" state legislature – with the presumable power to abolish its creation summarily – actually enacted a process for possible reorganization of the incorporated school districts, and it was that process that was at issue. See, **Appendix D**.

This Missouri case offers nothing new or different from the law and analyses that have already been discussed in this section. If it continues as authority in Alaska, it would restrict the ability of an REAA to invoke due process and equal protection. Even if a new court distinguishes Kenai and its cited cases to instead look at empowerment and liberal construction in art. X of the Alaska Constitution, REAAs still would not benefit from that constitutional

existence before legislative creation – unless the REAAs were construed as unorganized boroughs protected under art. X.[97] In the last analysis, REAAs construed as "service areas" may have a higher hurdles to surmount than municipal corporations in overcoming the doctrine of legislative supremacy.

The New Mexico Highway Department Case. The Alaska Supreme Court in Kenai cited State ex rel. New Mexico State Highway Comm'n v. Taira[clv] for the legal proposition that a state highway commission is "not protected by [the] due process clause."[clvi] That is correct, but the statement must be put in context.

This is not a case focusing on the doctrine of legislative supremacy. Almost as an aside, at the very end of its 5-page opinion, the New Mexico Supreme Court added a final sentence pertinent to the Kenai case: "We would also note that the due process clause … protects only the rights of 'persons' and does not embrace the state."[clvii] The court clearly was saying that the *state* commission in the executive branch of *state-level* government is not a "person" under the due process clause of the New Mexico Constitution, but the court did not define who was a "person" for purposes of due process. One can note that the court certainly did not mean to exclude business and religious corporations from constitutionally protected personhood. Are municipal corporations within or without? In the last analysis, apropos the issues in the Kenai case, this New Mexico case says only that the unincorporated state-level executive departments themselves are not protected from the state, and says absolutely nothing about the status of municipal corporations as "persons."

The Oklahoma Admissions Committee Case. The Alaska Supreme Court recognized that, in Carl v. Board of Regents[98], it was a "state medical school admissions committee" that was "not entitled to due process or equal protection" by the Oklahoma Supreme Court.[clviii] The question before that Oklahoma court was whether requiring compliance with the open meetings act denied equal protection to the unincorporated Admissions Board, a subordinate entity to the constitutional board of regents functioning at the state level in the executive

[97] That is very implausible, not only because the legislature recognizes them as mere service areas but also because they do not possess general municipal governing powers. They are not unorganized boroughs. They are limited in law to administering public education. In Chapter 5.a, I argue that, while REAA service areas might be construed as separate unorganized boroughs for purposes of administering public education, the statute granting a blanket REAA-wide exemption from a local contribution is in essence treating "all REAAs" as the single, statutory "unorganized borough," in violation of the Constitution. It would be inconsistent to argue that, for purposes of standing to claim equal protection regarding the local contribution, the REAAs are separate unorganized boroughs with empowerment and liberal construction afforded by art. X , §1; but, for purposes of finding that the local contribution statute is unconstitutional per Ch. 5.a below, the REAAs are one amalgam which in itself is unconstitutional.

[98] 577 P.2d 912, 915 (Okla.1978).

branch of government. The court held that the commission "has no rights, privileges and immunities protectable under the Federal or State Constitutions." These guarantees "run to 'persons,' not the state. Their purpose is to protect persons from the abuses of the state's power." 915 The court cited, without comment or analyses, only the 1933 Williams case as authority. (See, **Appendix D** for greater details.)

In short, the Oklahoma Carl case also addresses only a state-level, executive branch, unincorporated commission, and ignores wholesale the underlying limited application and true meaning of the federal Williams case. The Carl case also fails to answer the question, who is a "person" for purposes of constitutional guarantees? While an unincorporated, appointed board subordinate to a constitutional board operating at state-level is not a "person," and while business corporations in Oklahoma are "persons," where do Oklahoma municipal corporations fall in that scheme? The Carl case lies a far distance from the question of whether an Alaska municipal corporation, enjoying a constitutional origin and a constitutional mandate of powers liberally construed, should be included among all other Alaskan corporations that are, in contrast, wholly begotten to legislative supremacy but nonetheless imbued with recognized personhood to assert equal protection.

iv. The Alaska Constitutional History of the Texas Plan

The liberal policies regarding standing in City of Seattle endorsed by the Kenai court (perhaps inadvertently), considered together with the inappropriateness in Alaska of the Illinois Riverwood rationale that one finds buried deep in Rainbow Garden, and the acknowledgement in Williams of legal standing for the City of Baltimore to assert state constitutional protections, and the Gomillion modification of Williams – all taken together – just might be enough to convince a new Supreme Court to distinguish the Kenai circumstances and look for law and public policy closer to home, specifically in art. X of the Alaska Constitution and in the Texas Plan that the framers of our unique constitution intended for municipal corporations in Alaska.

Art. X, §1 of the Alaska Constitution states: "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. A liberal construction shall be given to the powers of local government units." Those powers include not only "maximum" local government, but maximum "self" government. And all branches of state government, courts included, are required to give "a liberal construction" to this maximization of powers for self-governance.

The court in Kenai did not totally ignore this liberal grant of power, but it stated the powers incorrectly and conditionally. In footnote 10, addressing the borough's contention that a differential tax rate is legal because it is not specifically prohibited by law, the court said,

> "Local government powers are liberally construed. Alaska Const. art. X, § 1; former AS 29.48.310. Unless otherwise limited by law, a borough may exercise

> all powers fairly implied in a specific grant of power. Former AS 29.48.320. The enumeration of certain powers does not imply the exclusion of others. Former AS 29.48.330."

The Constitution says municipal corporations enjoy a "liberal construction" of "maximum local self-government." It doesn't say that the "liberal construction" is limited to "*a specific grant of power*." There is a vast distinction between the statements,

> Where power is specifically granted to municipal corporations by the legislature, it includes all fairly implied powers liberally construed.

and

> Municipal corporations enjoy maximum local self-government liberally construed.

The former statement depicts a traditional role in "most states" where constitutions recite certain enumerated powers granted to municipalities, and all else is subject to grant from the state legislature. The latter statement depicts what the Framers of our Alaska Constitution intended, for the specifically stated purpose of avoiding the uncertainty and litigiousness that comes from the former method of enumerating powers. This footnote in the Kenai case erroneously juxtaposes statutory provisions in the manner of the former statement, not only mischaracterizing the letter and spirit of the Alaska constitutional provision, but also reflecting the underlying tone and attitude which led the Court to the erroneous adoption of the doctrine of legislative supremacy found in "most" states of the Union.

One can wish that, before the Kenai case had been decided, some attorney or law clerk would have brought to the attention of the Court the Minutes of the Alaska Constitutional Convention for Day 58, January 19, 1956,[clix] and the 1971 book co-authored by Vic Fischer, a delegate to the Alaska Constitutional Convention who served on the Local Government Committee, and a preeminent authority recognized by the Alaska Supreme Court as an expert in municipal government.[clx]

Art. X of the Alaska Constitution uses the word "borough" rather than "county" specifically to distinguish the enhanced legislating power intended for home rule in Alaska, in contrast to other states.[99] Reporting to the full Constitutional Convention, Delegate Vic Rivers of the Local Government Committee noted,

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[99] "We decided we did not want anything like conventional counties, as they were too rigid, suited neither to urban regions nor vast rural expanses. …. We had invented something new in these regional units of government and we agreed early in the process that it would be confusing to call them 'counties.'' Fischer, Victor, *To Russia with Love*, University of Alaska Press, Fairbanks 2012 at 154-55.

> that the counties as such were established as more or less an agency of the state in administrative matters. …. The old approach to county government was that they existed and had their authorities only in those specifically delegated to them and specifically spelled out to them by the legislature or by the constitutions. …. That has been the matter of the choice – whether we wanted to follow the old pattern in which the constitution and the legislature would delegate certain specific powers to the intermediate form of government, which often is called the county and which we have designated as the borough, or whether we would follow the plan of reserving powers to the state and letting the local government exercise broad general authority within the limits of those reservations.[clxi]

By avoiding the word "county," the Committee specifically sought to avoid the fact hidden in the stereotype that "other state constitutions had encountered major difficulties due to legislative limitations and narrow judicial interpretations" of "local" and "statewide" powers.[clxii] Using the word "county" would mislead a future court into thinking that one can look to "most states" to see the relationship between the municipal corporation and the state legislature.

A staff paper prepared by the Public Administration Service had recommended that the Local Government Committee adopt the provisions of the National Municipal League's Model State Constitution "which provided for a general grant of authority, a list of major powers, and a statement … that the enumeration should not be deemed to restrict the general grant."[clxiii] The Local Government Committee felt, however, that this language did not adequately address the "vexed attempts to establish home rule in other states." [clxiv] The Minutes of the 24th Meeting of the Local Government Committee state,

> The grant of powers is to be based upon "legislative powers" rather than a specific enumeration. Enumerations have frequently been restrictively interpreted by the courts. Nor was it felt desirable that the grant be on the basis of powers covering "local affairs" or "local government." Such terms have also given rise to continuous judicial interpretation, causing great uncertainty in what the actual powers of local government are.[clxv]

"Believing that local governments should have maximum freedom to perform desired functions and to adopt any appropriate administrative organization, the committee chose to devise a clause based on a home rule grant of 'legislative powers.'"[clxvi]

By adopting the term "legislative powers" for municipal corporations, the Committee intended to grant to home rule local governments in Alaska "the same powers available to the state legislature" unless there were "overriding state interests or [need] to resolve conflicts of authority between home rule cities and home rule boroughs."[clxvii] That sibling-like "same powers available to the state legislature" is a far cry from the creator-creature relationship

embodied in the doctrine of legislative supremacy found in the constitutions of "most states" and intentionally spurned by the Local Government Committee of the Constitutional Convention.

When the Alaska Supreme Court in Kenai adopted that doctrine of legislative supremacy, it essentially reintroduced the uncertainties inherent in the notion of specifically enumerated powers, uncertainties that the enlightened delegates to our Constitutional Convention specifically sought to avoid. Unfortunately, much of what these wise framers of our Constitution learned from the history of other states was lost "at one fell swoop" in the poorly researched Kenai decision.

Instead of adopting a system of enumerated powers burdened with the uncertainties and difficulties of interpretation experienced by other states in the past, the Committee chose "the plan of reserving powers to the state and letting the local government exercise broad general authority within the limits of those reservations."[clxviii] This plan was known as the "Texas Plan" whereby

> [t]he State of Texas chose to delegate to their intermediate tier of government those powers which were – not those specifically enumerated but those powers which were not specifically withdrawn or reserved or withheld to the state, and it has proven to be an effective form of government at the intermediate tier level.[clxix]

The Framers of the Alaska Constitution were adopting the lessons learned in the State of Texas where, after many years of judicial wrangling with interpretations of "local government powers," that state abandoned the entire doctrine and adopted instead a home rule amendment to their constitution.

The Local Government Committee of the Alaska Constitutional Convention actually used a 1951 study from the Institute of Public Affairs at the University of Texas in drafting the provisions of municipal law in art. X of the Alaska Constitution.[clxx] Eventually, this "Texas Plan" was even adopted by the National Municipal League (which previously had simply enumerated powers) "and several states have moved in this direction"[clxxi]

In short, the delegates to the Alaska Constitutional Convention specifically rejected the "old approach" of what the Kenai decision referred to and cited as the law of "most states," i.e., specifically enumerating municipal power. It is that "old pattern" – the legislative-creator/municipal-creature concept – that forms the basis for the doctrine of legislative supremacy. This notion of absolute supremacy has no place in the broad and liberal constitutional concept found in the Texas Plan, as adopted by the delegates to the Alaska Constitutional Convention.

Viewed from another perspective, one can say that art. X of the Alaska Constitution should instead be read in a vein and tone similar to the 10th Amendment of the U.S. Constitution, providing in paraphrase that the powers "not specifically withdrawn or reserved or withheld to the state" [clxxii] are delegated to Alaska municipal corporations.

Hence, after all is said, if the Alaska Supreme Court still felt need to look beyond our own Constitutional Convention for guidance in how to treat municipal corporations for purposes of constitutional privileges and immunities, they should have joined the framers of our Alaska Constitution in spurning the municipal case law of Illinois, Washington, Oklahoma, New Mexico and Missouri – states still following the "old pattern" of enumerating municipal powers by state legislation, and then grappling with troublesome terms like "local affairs," "local government," and similar supremacy language. If the issue arises again in a future case, legal counsel should argue to the court that, if there is need to go beyond the clearly stated history and intent found in the Minutes of our own Alaska Constitutional Convention, the court should not look at the doctrine of legislative supremacy found in "most states" but rather at the law of Texas and the "several states [that] have moved in this direction."

I provide here one such case as an illustration: In Wilson et al. v. Andrews et al., 10 S.W. 3d 663 (Tex. 1999), the City of Lubbock challenged whether a revised state civil service act requiring arbitration at the behest of terminated employees could supersede a prior existing city ordinance (which had adopted state law at the time) containing disciplinary procedures that did not allow for requesting independent arbitration. The City of Lubbock argued, *inter alia*, that the state statute violated due process because it was unconstitutionally vague, and that it violated equal protection because it unconstitutionally biases hearing examiners.[clxxiii] The intermediate court of appeal had held that Lubbock had no standing to challenge the state statute on due process or equal protection grounds.[clxxiv]

The Texas Supreme Court reversed the court of appeals on the issue of the standing of the municipal corporation to assert due process and equal protection.

> Under our standing jurisprudence, Lubbock and its city officials acting in their official capacities do have standing to assert these [constitutional] claims because they have alleged concrete injuries and have asked for a remedy that, if granted, would end the controversy. In Texas Association of Business v. Texas Air Control Board, we explained that the constitutional demands of standing are that there is (a) a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought. [Footnote omitted] Under this standard, Lubbock indeed has standing. …. Because Lubbock has standing to bring its claims, we assume without deciding that government entities can raise due process and equal protection challenges and confront the merits of its constitutional challenges.[clxxv]

The court continued to rule against the city in the last analysis, but not based on standing. "While Lubbock, and its officials acting in their official capacity, have standing to argue that the statute violates its due process and equal protection rights, its constitutional challenges to the statute fail."[clxxvi]

To summarize this section, in a significant retreat from the earlier City of Homer case, the Kenai supreme court denied standing to municipal corporations to assert due process and equal protection. The Kenai court adopted the doctrine of legislative supremacy, which governs the issue in "most states." The Kenai opinion did not mention that the delegates to the Alaska Constitutional Convention had specifically rejected the traditional relationship between legislatures and municipal corporations in "most states," and the Kenai court did not consider how art. X of the Alaska Constitution might affect the question. In fact, the framers of our Alaska Constitution had adopted "the Texas Plan" granting broad, liberal home-rule "legislative powers" to municipal corporations rather than the conventional enumeration of powers found in "most states." These enlightened drafters of the Alaska Constitution granted to municipal corporations powers more akin to a sibling relationship with the state legislature than to the historically troublesome, uncertain and litigious creator-creature relationship adopted by the court in Kenai.

Municipal power and authority in Alaska are not like the old approach in "most states," or like any of the states cited by the Alaska Supreme Court in Kenai. Municipal powers and authority in Alaska are patterned after the State of Texas, where the courts recognize the standing of municipal corporations to assert due process and equal protection.

CHAPTER 5. Constitutional Arguments Not Raised In the MatSu Case

a. Introduction

In Chapter 4, I presented arguments for why the broad and liberal "legislative authority" intended for municipal corporations by art. X of the Alaska Constitution belays the creator-creation relationship found in the doctrine of legislative supremacy, which the Alaska Supreme Court erroneously adopted in the Kenai case.

In this Chapter 5, I will focus specifically on why – aside from all of the Chapter 2-4 analyses and arguments pertaining to "equal protection" – some of these sections in art. X render the local contribution statute unconstitutional in a very direct manner of application having nothing to do with equal protection. To whatever extent municipal corporations might continue to lack standing to assert equal protection in a new case, and to whatever extent taxpayers might be relegated to the lowest level of scrutiny in evaluating equal protection in a new case, all of the following arguments stand alone with no such impediments applying to them. This chapter contains all new material of first impression in any court of law.

- Art. X §§ 3 & 6 of the Alaska Constitution requires that there "shall" be multiple unorganized boroughs in undeveloped areas of the state, not the present single, unconstitutional unorganized borough authorized in AS 29.03.10.

- Art. X §3 also requires that these multiple unorganized boroughs "shall" be divided by socio-economic, transportation and geographic boundaries embracing common interests.

- Art. X § 6 also requires that the legislature "shall" provided for the maximum possible local participation and the maximum possible local responsibility according to the respective undeveloped, developing or developed circumstances in these unorganized areas.

- Art. X § 1 requires that these unorganized boroughs must be treated like all other "local government units," in the sense that they enjoy "maximum" local "self" government, and that a "liberal construction" "shall" be given to these powers.

Art. X §§ 1, 3 & 6 give the state legislature substantial discretion in how these provisions are implemented, but the Alaska Constitution does not authorize the legislature to totally ignore implementation of these provisions. The legislature *must* create multiple unorganized boroughs of one sort or another; the legislature *must* establish boundaries among them

embracing common interests; the legislature *must* provide for maximum local responsibility; and the legislature *must* construe the maximized local self-government liberally in these unorganized boroughs. Fifty-four years after statehood, the legislature has done none of the above.

Given vast socio-economic and geographic differences among the REAAs, it is unconstitutional for all of them to be amalgamated into one statutory unorganized borough for purposes of enjoying an exemption from the local contribution statute. Where all REAAs have been granted the constitutionally required maximum local "participation" in their public education affairs, the legislature has failed to impose upon the affluent, predominantly White REAAs the corresponding constitutional requirement that they assume maximum local "responsibility" for the public education affairs. Unlike economically distressed boroughs and cities, affluent REAAs are unconstitutionally exempted from the local contribution requirements of AS 14.17.410(b)(2).

b. Single Unorganized Borough[100]

Art. X §6 of the Alaska Constitution requires the Alaska state legislature to "provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility."

Two words in this constitutional provision are noteworthy for present purposes. Unorganized boroughs are referenced in the plural form, not as the one amorphous remnant of the State embodied in AS 29.03.010 which states, "Areas of the state that are not within the boundaries of an organized borough constitute a single unorganized borough." (Emphasis mine.)

Also, the provision requires maximization of local "responsibility" in the unorganized borough(s). Applied as simple English usage, those constitutionally pluralized "unorganized boroughs" that are not distressed economically should carry the same "local … responsibility" for a local contribution to public education that municipal school districts are now required to endure.[101] A blanket exemption from that local-contribution requirement, applying sweepingly across a single unconstitutional unorganized borough, without regard for vast, regional socio-economic differences within that unorganized borough, violates both of these requirements of art. X §6 of the Alaska Constitution.

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[100] Some of this material is reprinted from Volume I, Ch. 7.

[101] Not only does Art. X §6 require "maximum…responsibility" at a local level, but also Art. 1, §1 recites the fundamental tenet that "all persons have corresponding obligations to the people and to the State."

Art. X §3 of the Alaska Constitution is another relevant section, deserving a quote in full:

> The entire State shall be divided into boroughs, organized and unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.[102]

The word "they" refers to all "boroughs, organized and unorganized." As noted by the LBC,[clxxvii] the language in Art. X §3 requires the state legislature to

1. Enact standards for establishing both organized and unorganized boroughs
2. Enact procedures for establishing both organized and unorganized boroughs
3. Classify organized and unorganized boroughs
4. Prescribe the powers and functions of organized and unorganized boroughs, and
5. Enact methods for boroughs to be "organized, incorporated, merged, consolidated, reclassified, or dissolved."

These 54 years after Statehood, the Alaska State Legislature still has not enacted

- standards and procedures for establishing unorganized boroughs,
- classifications for unorganized boroughs,
- powers and functions in unorganized boroughs, or
- methods for unorganized boroughs to be incorporated, reclassified or dissolved.

Instead of following its constitutional duty to form unorganized boroughs in the plural form, the Alaska Legislature in 1961 enacted a law making all areas outside organized boroughs one motley remnant known as "the single unorganized borough"[clxxviii] – without the constitutionally required regard for vast internal differences in "population, geography, economy, transportation, and other factors" and without regard for the constitutional

[102] "As used in this constitution, the terms 'by law' and 'by the legislature,' or variations of these terms, are used interchangeably when related to law-making powers." Art. XII. §11, Alaska Constitution.

requirement that each unorganized borough "shall embrace an area and population with common interests to the maximum degree possible." As noted by the LBC,

> From its inception, the single unorganized borough has embraced an area and population with highly diverse interests rather than the maximum common interests required by the constitution. The diversity of the social, cultural, economic, transportation, and geographic characteristics of the unorganized borough is remarkable. As currently configured, the existing unorganized borough contains an estimated 374,843 square miles – 57% of the total area of Alaska. It ranges in a non-contiguous manner from the southernmost tip of Alaska to approximately 150 miles above the Arctic Circle. This borough extends in a non-contiguous manner from the easternmost point in Alaska (at Hyder) to the westernmost point in Alaska at the tip of the Aleutian Islands.[clxxix]

Vic Fischer, a delegate to the Alaska Constitutional Convention, and one of seven members of the Local Government Committee, identifies the continuing constitutional problem in his recent book:

> [I]mportant elements of the local government article [art. X] still have not been implemented by the legislature. The constitution requires that the state government would divide the entire state into boroughs, organized and unorganized. Over time, the local population of each area would make its own decision whether its borough would organize. We visualized all unorganized boroughs with some self-government, through regional planning and guiding state services in the regions.
>
> Instead, the legislature lumped all parts of Alaska not included in an organized borough into a single "unorganized borough," contrary to the regional concept of the constitution. As created by the legislature, a single unorganized borough now covers more than half of the state, an immense area totally unsuited for local government. It is larger than the entire state of Texas. It extends from one end of Alaska to the other, equivalent to the distance across the United States.[clxxx]

Viewed from still another perspective, in 2003 the unorganized borough included portions of each of Alaska's four judicial districts, a total of 11 entire census districts, portions of 10 State House election districts, all or portions of 6 State Senate election districts, 19 entire REAAs, all or portions of 10 of Alaska's 12 ANCSA regional Native corporations, 18 entire model boroughs and model-borough territory for five existing organized boroughs. "Clearly, the unorganized borough remains a vast area with extremely diverse interests rather than common interests as required by the constitution."[clxxxi]

The descriptions above clearly are not what the Alaska Constitution means when it refers to "boroughs, organized and unorganized" being established and classified by "population, geography, economy, transportation, and other factors" such that each of them "shall embrace an area and population with common interests to the maximum degree possible."

Nowhere is this unconstitutional inequity more flagrantly apparent than in AS 14.17.410(b)(2), the statutory provision requiring the unfunded mandate of a local contribution to public education from only municipal school districts while exempting approximately two-thirds of all state citizens[103] residing in that singular, amorphous and diverse 374,843-square-mile remnant that has never been properly subdivided by the legislature in compliance with the Alaska Constitution.

To whatever extent one tries to argue that the REAAs are "classifications" with "powers and functions" in compliance with the constitutional requirement for plural unorganized boroughs, the response is that REAAs per se are not the operative unit for the AS 14.17.410 exemption from the local-contribution requirement.[104] Because ***all*** REAAs obtain the exemption without regard for ability to pay, the operative unit is the entire unorganized borough outside city school districts.

If all REAAs are treated as an integrated singularity, without regard for whether they fall in an economically prosperous Group A or a distressed Group B, then the REAAs are treated as an unconstitutional, single unorganized borough. For purposes of applying the local contribution statute, they most certainly have not been divided into the economic units required by the Alaska Constitution.

Essentially, what AS 14.17.410(b)(2) says is that everyone in the unconstitutionally singular unorganized borough outside city school districts is exempt, while everyone outside that singular unit must pay, without regard for socio-economic and cultural distinctions among the exempted entities and without regard for the socio-economic and cultural similarities between many of the exempted entities and many of the assessed municipal school districts.

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[103] Approximately one-third of the population of the unorganized borough resides in first-class/home-rule city school districts outside organized boroughs. *Unorganized Areas of Alaska That Meet Borough Incorporation Standards, supra* at 20.

[104] Also, REAAs do not "embrace an area and population with common interests to the maximum degree possible," because REAAs exclude from their boundaries enclaves of home-rule/first-class cities outside boroughs. Consider, e.g., the Southwest Region REAA with schools in Aleknagik, Koliganek, Manokota, Togiak, Twin Hills, New Stuyahok, and Ekwok, ***but not Dillingham***. Home rule and first class cities in the unorganized borough are typically hubs for communities in their respective regions.

It is not enough to create pro forma classifications called REAAs, and then ignore their respective subdivisional distinctions in the administration of a local contribution statute, granting exemptions to all of them without regard for the economic distinctions that should play a role in their boundaries.

REAAs are indeed subdivided service areas. But REAAs have not been subdivided according to "population, geography, economy, transportation, and other factors" such that each of them "shall embrace an area and population with common interests to the maximum degree possible." (See, n. 114 above.) Moreover, in the language of the blanket exemption in AS 14.17.410, REAAs are not distinguished from one another along these mandatory constitutional boundaries for purposes of accepting local responsibility. Instead, they are all treated as that one-and-the-same "unorganized borough" unconstitutionally enacted by the state legislature in 1961 and still actively administered in law today.

c. Delegation of Maximum Responsibility to Unorganized Boroughs

Art. X §3 of the Alaska Constitution says, "The legislature shall classify boroughs and prescribe their powers and functions." This duty to classify and prescribe applies to unorganized boroughs as well as organized boroughs. As noted above, there has never been any classification or prescription of powers and functions among unorganized boroughs in Alaska. The inequities that result from this neglect of a constitutional responsibility are nowhere more apparent than in the sloppy assignments of exemptions across the entire unorganized borough, as found in the local contribution statute, AS 14.17.410.

Art. X §6 of the Alaska Constitution requires the Alaska state legislature to "provide for the performance of services it deems necessary or advisable in unorganized boroughs, *allowing for maximum local participation and responsibility*." (Emphasis mine.) Note here that the Constitution does not grant the legislature full discretion in how it provides for services in the unorganized boroughs. It must, by constitutional mandate, do so in a manner that allows for not only "maximum local participation" but also "maximum local … responsibility."

A statute that exempts affluent REAAs from the local contribution requirement that is then imposed on economically distressed municipal corporations violates art. X §6 which requires that, when assigning the performance of services, the legislature must impose "maximum local … responsibility" on these affluent REAAs. In short, they not only deserve the "local participation" they achieve through the REAA legislation, but they also must – by constitutional mandate – assume the "local responsibility" that comes with that participation –

at least the same "local responsibility" for local funding of public education that the legislature has imposed on economically distressed cities and boroughs.[105]

Art. X, §1 of the Alaska Constitution states: "The purpose of this article is to provide for maximum local self-government …. A liberal construction shall be given to the powers of local government units." As noted in Chapter 4.c. above, the Constitution required a "liberal construction" of "maximum local self-government." It doesn't say that the "liberal construction" is limited to *a specific grant of power*, as Justice Moore suggested in the Kenai case. Local governments include both incorporated and unincorporated boroughs. They both enjoy, and must assume local responsibility for, maximum local self-government liberally construed.

d. Minimal Units of Local Government

Art. X §1 of the Alaska Constitution calls for not only "maximum local self-government" but also for "a minimum of local government units." Addressing the greater economies of scale achieved by the formation of boroughs, the LBC stated,

> [E]ach organized borough comprises a single school district. Yet the lone unorganized borough encompasses thirty-seven different school districts – more than twice the number in all organized boroughs combined. The unorganized borough has just thirteen percent of Alaska's population, yet it contains seventy percent of the school districts in the state. If the state were organized along the model borough boundaries defined by 3 AAC 110.990(9), the number of school districts servicing the area now within the unorganized borough would be reduced by more than 50%.[clxxxii]

The LBC noted that, based on 2001-02 enrollments, 35% of the school districts in the unorganized borough have fewer than 250 students, the threshold established in law for a new school district.[clxxxiii] One-third of these school districts in the unorganized borough obtained waivers for FY 2000 of the requirement that at least 65% of operating funds be budgeted for instruction.[clxxxiv]

In 1975, the legislature created 21 REAAs as "educational service areas." At that time, there were 21 city school districts and 11 boroughs in the state. Of the resulting 53 school districts, 79.2% were in the unorganized borough. In 1985, the legislature created two more

[105] As will be shown below in section e., this requirement of delegating "maximum local…responsibility" in the various unorganized boroughs, along with "participation" and according to local ability to pay, is a specific application of the more general, statewide constitutional policy in art. I § 1 of the Alaska Constitution "that all persons have corresponding obligations to the people and to the State."

"regional" educational attendance areas including the one-square mile "regional" service area of Kashunamiut, and the slightly larger Yupiit REAA service area.[106] Thus, in 1985, there were 55 school districts, 44 or 80% of which were in the unorganized borough. Since 1985, eight boroughs have formed, including a number of boroughs that encompass few if any students that were outside former city school districts (Yakutat, Skagway, Wrangell and Petersburg). Today, there are 53 school districts, of which 34 or 64.2% are in the unorganized borough.

In summary, the classifications in AS 14.17.410 constitute legislative administration of the exemption from the local contribution requirement across a unitary unorganized borough, ignoring the constitutional requirement for a plural set of unorganized boroughs divided by demographic, socio-economic and geographical characteristics. The REAAs enjoy "maximum local participation" in public education, but the state legislature has failed to implement the corollary constitutional requirement of "maximum local … responsibility" in those REAAs more affluent than the economically distressed city and borough school districts that are required to make a local contribution to the local cost of public education. Of the 53 school districts statewide today, 34 or 64.2% are in the singular unorganized borough, and within that one unorganized borough communities that form the rural hub of the region have school districts separate and distinct from the single-purpose "educational service areas" contrary to the constitutional requirement of plural unorganized boroughs created according to pre-existing legislative standards united regions according to demographic, socio-economic and geographical features. Two of these REAA, tiny "service areas" the size of a single community, probably also violate the priorities in art. X § 5 for incorporated cities. These numbers hardly represent "the minimum number of governmental units" of local government contemplated in art. X §1 of the Alaska Constitution.

All organized city and borough school districts bear the burden of making a local contribution to public education, while the legislature exempts all citizens in an unconstitutionally single unorganized borough, without regard for constitutionally required definition of distinctions among regional economic and cultural differences in a plural number of unorganized boroughs, and without regard for the requirement of delegating not only "participation" but also "responsibility" in those affluent regions that are very capable of contributing.

e. "For Every Right There Is A Duty"

[106] Art. X § 5 of the Alaska Constitution says in relevant part, "A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by … incorporation as a city, or by annexation to a city. The assembly [the legislature in an unorganized borough] may authorize the levying of taxes, charges, or assessments within a service area to finance the special services."

In earlier chapters, this Report focused on the specific inherent right of equal protection in art. I §1 of the Alaska Constitution. But the full context of that section contains not only broader inherent rights that were considered above, but also inherent duties that bear consideration here. The full text says,

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

That last clause assigns to all "persons" in Alaska the same corresponding duties that one finds in art. X § 6 applying to all local government units in Alaska, including unorganized boroughs. When assigning the performance of services to an affluent REAA, the legislature is constitutionally required to not only grant maximum local participation but also is constitutionally required to impose on the citizens in those affluent REAAs the "corresponding obligations to the people and to the State," described in art. X § 6 for the local governmental unit as "maximum local … responsibility" to contribute to local education expenses to the best of its ability.

As long as the Alaska Supreme Court continues to hold that municipal corporations and school districts are not "persons" within the meaning of art. I § 1, the above requirement for "corresponding obligations" will not apply directly to them. But the art. I § 1 requirement for "corresponding obligations" adds reinforcing argumentation to buttress a strong and broad, twice-stated constitutional intent that the legislature should enact laws from the constitutional perspective that both individual citizens in affluent REAAs and these local governmental units themselves are charged separately with "responsibilities" that accompany "participation," and with "obligations" that accompany inherent rights.

Individual taxpaying plaintiffs and student plaintiffs are, however, "persons" within the meaning of art I § 1, and they can assert directly this reiteration of the constitutional requirement of duties corresponding with rights. They number among "the people" to whom "all persons" in affluent REAAs owe "obligations" corresponding to their inherent rights. There will undoubtedly be issues of capacity and standing to consider if the charges are made directly by these individual plaintiffs. One also cannot predict whether the pattern for evaluation of such a plea will follow the "sliding scale" of equal protection, or some other mode of measure. However, the arguments are compelling as support if not as a direct charge of failure by the legislature in enacting the local contribution statute, AS 14.17.410(b)(2).

CHAPTER 6. Concluding Summary

AS 14.17.410(b)(2) levies on municipal school districts a local contribution to local public education in an amount equal to the equivalent of 2.65 mills on 100% of the full value of all taxable real and personal property in the municipal school district. This unfunded mandate pays no regard to local socio-economic, cultural, or geographical circumstances. And, in the same disregard for local socio-economic, cultural or geographical circumstances, all REAAs are exempted from this local levy.

Volume I of this Report shows that there are huge disparities among REAAs in Alaska, with regard to their ethnic, geographic and economic circumstances. Some are severely economically distressed. Others are comfortably affluent. The same can be said for municipal school districts. Some occur in subsistence economies while others are prosperous cash economies. In the last analysis, the classifications in AS 14.17.410(b)(2) totally ignore all regional differences of race, ethnicity, culture, economies, geographic characteristics and transportation patterns.

In the 1997 MatSu case, two justices summarily dismissed claims of taxpayers and students arguing that the local contribution requirement violated their equal protection rights. Two other justices agreed to review the merits of the case, but ultimately held that there was no evidence of any denied educational opportunity to the student-plaintiffs, and that the local contribution statute does not violate the level of equal protection afforded to taxpayers under the Alaska Constitution. A fifth justice did not participate in the case.

The plaintiffs in that case brought forth no evidence of a denial of educational opportunities, and only paltry evidence of alleged harm to taxpayers. They offered no factual evidence of disparities among school districts, such as one finds in Volume I of this Report. They failed to challenge highly incorrect statements of "fact" by experts for the defending State of Alaska.

The two justices who considered the substantive merits of the MatSu case applied the unique Alaskan analyses to the question of equal protection. Where the claim of a violation is merely economic in nature, such as with taxpayers, the state need only show that the challenged statute bears a "fair and substantial" relationship to a "legitimate" government purpose. At this "lowest level of scrutiny," great latitude of over- and under-inclusiveness is permissible in the classification employed in the challenged statute.

Equal protection in Alaska is analyzed along a "slide scale" or "continuum" from the above-described lowest level of scrutiny to the highest level of scrutiny. At that highest level, where e.g. the court agrees with a plaintiff that the statutory classification carries racial, ethnic or religious implications, or pertains to a "suspect category," the state must prove that the statute in question is the "least restrictive alternative" serving "a compelling state interest."

There are many ways to challenge the application of the above analyses in the MatSu case. First, while the justices purported to be applying a standard requiring a "fair and substantial" relationship, they addressed only whether the relationship was "substantial" and concluded that it was. The fairness aspect went totally by the wayside.

These same two justices never addressed the possibility that in matters of public education – far more sacred and deserving of constitutional consideration than most other economic considerations – the "sliding scale" should perhaps shift away from the "lowest level of scrutiny" afforded to other taxpayer-issues and advance further along the "continuum" to where some tighter relationship is required between means and end. Indeed, despite the fact that the Alaska Supreme Court espouses a "liberal" sliding scale, all of its decisions in equal protection are bipolar – either lowest scrutiny or highest scrutiny.

Also, the party-plaintiffs never raised any of the alternative constitutional challenges to AS 14.17.410(b)(2) found in Chapter 5 of this Volume II of the Report. The statute cannot be "legitimate" for equal protection purposes if it manifests wholesale unconstitutional administration of a single, disparate unorganized borough contrary to the requirements of art. X, §§ 3 and 6 of the Alaska Constitution that the legislature must establish standards, procedures, classifications, powers and functions for a plural number of unorganized boroughs subdivided according to areas and populations with common interests including population, geography, economy, transportation and other factors.

The exemption of all affluent REAAs from the local contribution statute cannot be "legitimate" for equal protection purposes if it manifests a wholesale unconstitutional failure of the legislature to allow "for maximum local … responsibility" along with the "local participation," in compliance with art. X, § 6 of the Alaska Constitution. Art. X, §1 similarly requires "maximum local self-government" with local powers "liberally construed." Art. I, §1 of the Alaska Constitution tracks this same requirement "that all persons have corresponding obligations to the people and to the State." All of these constitutional principles belay the windfall educational welfare that exists where state and federal governments subsidize 100% of local public education for residents of affluent REAAs who are perfectly capable of paying local taxes but who have no incentive – indeed, a disincentive – to incorporate into boroughs of "maximum local…responsibility" and "maximum local self-government," thereby joining Alaskans in incorporated cities and boroughs who must tax themselves for a local contribution to the public education of their children.

AS 14.17.410(b)(2) cannot be "legitimate" for equal protection purposes if it represents unconstitutional administration of a plethora of school districts in the face of a requirement in art. X, §1 of the Alaska Constitution calling for "a minimum of local government units," where 19 exempted "educational service areas" of separate school district administrations throughout

that single unorganized borough surround but do not embrace in the statutory exemption any of the pre-existing first-class/home-rule city school districts in the same regions.

As noted above, two other justices on the deeply divided MatSu court refused to even consider the taxpayer arguments, concluding *sua sponte* that the taxpayers raised only non-justiciable inter-jurisdictional taxation questions, and non-justiciable complaints of inequities in state spending on public facilities.

Moreover, funding public education does not equate with funding bridges and public works. Public education is seated on high in art. VII of the Alaska Constitution. It deserves to be treated in a far superior realm from inevitably inequitable capital-improvement appropriations by the legislature across different regions of the state. Indeed, even that justice who summarily declared the local contribution requirement nothing more than a majoritarian inequity, acknowledged aside that issues pertaining to "different levels of per pupil expenditures" and funding at a level of education that fails to meet "standards of minimal adequacy" would raise justiciable issues for a court of law. He recognized the sacred domain of public education, but, in seemingly contradictory fashion, he placed the AS 14.17.410(b)(2) public education funding scheme down among bridges and sewer lagoons.

The MatSu case was decided in a near vacuum of proven facts, amid an array of inaccurate facts and exploited stereotypes. One state expert spoke to the equality of funding statewide from all sources, ignoring the precise issue which pertained specifically to one of those sources. His claims of equal funding are correct only in the most contrived and sterile measures of official cost-equalization – measures that should be challenged and exposed by an expert in any future litigation. Another state expert claimed that REAAs lack defined private property and non-exempt property capable of being taxed for a local contribution. But four years after the MatSu case was decided, that same Office of the State Assessor provided highly detailed values of property to the Local Boundary Commission, resulting in a study for the legislature that concluded 6-7 regions of the unorganized borough was sufficiently mature financially to become incorporated boroughs. See, Vol. 1, Ch. 6.

That State Assessor also testified in the MatSu case that, when regions of the unorganized borough "mature," they spontaneously become incorporated boroughs. Chapters 5 & 6 of Volume I of this Report pop the bubble of that myth. In order to avoid making a local contribution to local public education, REAAs fight against incorporation and they lobby the state legislature to prevent incorporation being imposed upon them (as it was imposed by the legislature in the past on eight of the present organized boroughs).

The tone of the experts, and the tone of the justices in the MatSu case resound in the still-popular stereotype, that all city and borough school districts are in urban areas with matured cash economies, and all REAAs are in rural areas of subsistence life styles among ethnically and culturally distinguishable Native Alaskans. Again, Volume 1 of this Report lays

out demographic, geographic, economic and racial factors proving that REAAs are a hodgepodge mix of remote, distressed regions and affluent, land-owning regions; and that borough and city school districts represent the same jumbled miscellany. There simply is no sensible reason for creating classifications that include "all" REAAs and "all" borough and city school districts.

The MatSu Borough and its school district were parties to the original MatSu case in the trial court. After the trial judge ruled that a municipal corporation and municipal school district are not "persons" enjoying the inherent right to equal protection, pursuant to the 1988 Kenai case, the borough and its school district dropped all issues on appeal except the award of costs and attorney fees against them. (The substantive issues on appeal were carried only by the taxpayers and the student-plaintiffs.)

Aside from anything written in the Kenai and MatSu decisions, city and borough school districts have never been granted legal capacity to sue and be sued. That power is reserved to the municipal corporation itself. The school district is a mere division or department of that municipal corporation. In contrast, the legislature has granted REAAs legal capacity to sue and be sued in their own name, thereby indicating that the absence of similar power for municipal school districts was not merely an oversight.

The Alaska Supreme Court in the Kenai case adopted two distinctive lines of case law when it concluded that municipal corporations lack legal standing to assert equal protection under art. I, § 1 of the Alaska Constitution. First, it cited a federal line of U.S. Supreme Court and circuit court cases, without regard for the different treatment given to states by the federal government as a result of the Tenth Amendment of the U.S. Constitution, and without regard for the fact that the principal case written by Justice Cardozo actually acknowledged that the appellant enjoyed equal protection under its state (Maryland) constitution. The Kenai court also failed to realize that this cited line of federal cases had been modified by a later U. S. Supreme Court case.

Secondly, the Kenai court cited the law of "most states," following what is known as the doctrine of legislative supremacy whereby municipal corporations stand in a creature-creator relationship with their state legislature. That legislature assigns enumerated powers and authority to political subdivisions, and it can revoke those powers and authority at its whim (so to speak). Only three of the six state cases cited in Kenai pertain to municipal governments in other states. One of those three was significantly modified by another of those three, in the State of Washington. Today, Washington does not really follow the doctrine of legislative supremacy. Instead, it recognizes that "standing is not an insurmountable barrier to municipal corporations challenging the constitutionality of a legislative act." The third state (Illinois) case cited in Kenai and pertaining to a municipal corporation, possesses underlying reasoning so absurdly far-fetched from anything constitutional in Alaska that one must conclude that law

clerks never brought that underlying reasoning to the attention of Justice Moore, the author of the Kenai decision.

The Kenai case makes no reference whatsoever to art. X of the Alaska Constitution, to the explanations of intent by the delegate who drafted that article in the Minutes of the Alaska Constitutional Convention, or to the "Texas Plan" adopted by those enlightened framers for Alaska, with pointedly articulated language diametrically opposing any intent to follow that doctrine of legislative supremacy found in "most states." Indeed, the delegates serving on the Local Government Committee at the Constitutional Convention even spurned the word "county" and adopted the unique word "borough" with intent to distinguish local home-rule powers and local "legislative authority" in Alaska from the pitfalls of uncertainty and litigiousness found in "the old approach" and "the old pattern" of enumerated powers in the treatment of "counties" in other states. If the justices in the Kenai decision had been informed of this constitutional history, they would not have followed "most states" of the Union, but rather would have followed the minority line of case law originating in the State of Texas, where the underlying studies originated and gave birth to art. X of our Alaska Constitution.

MatSu was based on emaciated and inaccurate facts. For what it says, it is obsolete today, and it says nothing about either a factual basis for deprivations of educational opportunity or the legal soundness of the new challenges found in Chapter 5 of this Volume II of the Report. Volume I of this Report sets forth a methodology for an expert in any future litigation to develop a Brandeis Brief of facts like nothing ever seen by the justice in the MatSu case.

The Kenai decision quite simply is dead wrong. Everything in the constitutional history of the State of Alaska militates against the lines of cases defining the reasoning of the court in that decision.

ENDNOTES

[i] Chapter 19, SLA 2012 (HCS CSSB 182 [FIN])

[ii] Matanuska-Susitna Borough School District et al. v. State of Alaska et al., 931 P.2d 391 (Alaska 1997). (Hereinafter, "MatSu")

[iii] AS 29.03.010.

[iv] Art X, §§3 and 6, Alaska Constitution.

[v] Art. X, §6, Alaska Constitution.

[vi] Art. X, §1, Alaska Constitution.

[vii] Id.

[viii] AS 14.08.101(1).

[ix] Kenai Peninsula Borough v. State, Dep't of Community and Regional Affairs, 751 P.2d 14 (Alaska 1988). (Hereinafter "Kenai")

[x] State v. Ostrosky, 667 P. 2d 1184, 1193 (Alaska 1983)

[xi] Id. at 1192.

[xii] Id.

[xiii] Id.

[xiv] Id. at 1193

[xv] 931 P. 2d 391 (Alaska 1997)

[xvi] AS 14.11.100

[xvii] MatSu at 394.

[xviii] Id. at 395.

[xix] Id. at 395-96.

[xx] Id. at 396.

[xxi] Id..

[xxii] Id. at 400, n. 14.

[xxiii] Id. at 400, n. 15.

[xxiv] Id. at 398.

[xxv] Id. at 397, n. 8.

[xxvi] Id. at 398, n. 10.

[xxvii] Id. at 400, n. 13.

[xxviii] Id. at 406.

[xxix] Id.

[xxx] Id.

[xxxi] Id.

[xxxii] Id. at 405.

[xxxiii] Id.

[xxxiv] Id. at 395.

[xxxv] Id. at 394 (Citations omitted.)

[xxxvi] Id. at 395 (Citations omitted.)

[xxxvii] Id. at 397.

[xxxviii] Id. at 395.

[xxxix] Id. at 396.

[xl] Id. at 397.

[xli] Id. at 398.

[xlii] Id. at 398 n. 10.

[xliii] Id. at 398.

[xliv] Id. at 397. (Emphasis mine.)

[xlv] Id.

[xlvi] Id.

[xlvii] Id. (Citations and footnote omitted.)

[xlviii] Id. at n. 8

[xlix] Id. at 397.

[l] Id. at 398

[li] Id.

[lii] Id.

[liii] Id.

[liv] Id.

[lv] Id. *quoting* Atlantic Richfield Co. v. State, 705 P.2d 418, 437 (Alaska 1985), *appeal dismissed*, 474 U.S. 1043, 106 S. Ct. 774, 88 L.Ed.2d 754 (1986).

[lvi] Id. at 399.

[lvii] Art. X §6 Alaska Constitution.

[lviii] MatSu at 399.

[lix] Id. at 399-400, *quoting* Ostrosky, 667 P.2d at 1193 *quoting* Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976).

[lx] Id. at 400, n. 13.

[lxi] Id. at 400.

[lxii] Id. at 394 and 396.

[lxiii] Id. at 396.

[lxiv] Id at 400 and n. 14.

[lxv] Id at 398.

[lxvi] Id. at n. 15. (Citations omitted.)

[lxvii] Id. at 400.

[lxviii] Id. at 400-01.

[lxix] Id at n.16.

[lxx] Id.at 401.

[lxxi] Id. at 401-02.

[lxxii] Id. at 402.

[lxxiii] Id. at 405.

[lxxiv] Id. at 406.

[lxxv] Id.

[lxxvi] Art. VII, sec. 1, Alaska Constitution.

[lxxvii] E.g., Macauley v. Hildebrand, 491 P. 2d 120 (Alaska 1971).

[lxxviii] MatSu at 397 n. 8.

[lxxix] Id.

[lxxx] Id. at 399 n. 13.

[lxxxi] *Unorganized Areas of Alaska that Meet Borough Incorporation Standards,* Alaska Local Boundary Commission, 2003 at 130-31 and Table 3-21.

[lxxxii] MatSu at 400 n. 13.

[lxxxiii] *Unorganized Areas of Alaska That Meet Borough Incorporation Standards, supra* at 28.

[lxxxiv] *The Need to Reform State Laws Concerning Borough Incorporation and Annexation*, Local Boundary Commission, Jan. 2001 at p. 3.

[lxxxv] *Preliminary Report to the LBC on the Deltana Borough Incorporation, supra* at 26.

[lxxxvi] Hammond, Jay, *Tales of a Bush Rat Governor* at 149.

[lxxxvii] MatSu at 398.

[lxxxviii] Art. X, §6, Alaska Constitution.

[lxxxix] MatSu at 399.

[xc] Id. at 400.

[xci] Id. at 397. (Citations and footnote omitted.)

[xcii] Id.

[xciii] Isakson v. Rickey, 550 P.2d 359, 362, 363 and 365 (Alaska 1976); State v. Ostrosky, 667 P. 2d 1184, 1192, 1193 and 1195 (Alaska 1983)

[xciv] MatSu at 396.

[xcv] Id. at 398

[xcvi] Id. at 399 *citing* Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-79.

[xcvii] Id. at 399

[xcviii] Id. *quoting* Ostrosky, 667 P.2d at 1193 (*quoting* Isakson v. Richey, 550 P.2d 359, 362 (Alaska 1976).

[xcix] Id. at 400.

[c] Id.

[ci] Id. at 401.

[cii] Id. at 402 *citing* Kenai, 743 P.2d at 1371; Erickson, 574 P.2d at 11-12; Isakson, 550 P.2d at 362.

[ciii] Id. at 395.

[civ] Id. at 401-02.

[cv] Id. at 402.

[cvi] Id.

[cvii] State v. Ostrosky, 667 P. 2d 1184, 1193 (Alaska 1983), *quoting* Isakson v. Rickey, 550 P. 2d 359, 362 (Alaska 1976) *quoting* State v. Wylie, 516 P. 2d 142, 145 (Alaska 1975).

[cviii] Id.

[cix] Isakson v. Richey, 550 P.2d 359, 362 (Alaska 1976).

[cx] AS 29.35.010(14).

[cxi] AS 14.08.101(1).

[cxii] 751 P.2d 14, 18-19 (Alaska 1988).

[cxiii] MatSu at 394 n. 2.

[cxiv] Williams v. City of Baltimore, 289 U.S. 36, 40, 53 S. Ct. 431, 432, 77 L. Ed. 1015, 1020 (1933).

[cxv] Kenai, 751 P.2d 14 (Alaska 1988).

[cxvi] Id. at 18.

[cxvii] Id. at 18 n. 15.

[cxviii] City of Homer v. State, Dept. of Natural Resources, 566 P.2d 1314, 1317 (Alaska 1977).

[cxix] Id.

[cxx] Id.

[cxxi] Id. at 1318.

[cxxii] Id.

[cxxiii] Kenai at 18 n 15.

[cxxiv] Williams, 289 U.S. 36, 40, 53 S. Ct. 431, 432, 77 L. Ed. 1015, 1020 (1933).

[cxxv] 77 Ill.2d 130, 32 Ill.Dec. 325, 328, 395 N.E.2d 555, 558 (1979).

[cxxvi] 589 S.W.2d 613, 615 (Mo.1979) (en banc).

[cxxvii] 78 N.M. 276, 430 P.2d 773, 778 (1967).

[cxxviii] 577 P.2d 912, 915 (Okla.1978).

[cxxix] 103 Wash.2d 663, 694 P.2d 641, 645 (1985) (en banc).

[cxxx] 15 Wash.App. 392, 549 P.2d 497, 498 (1976).

[cxxxi] Kenai at 18.

[cxxxii] Williams, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015, 1020 (1933).

[cxxxiii] Kenai at 8 n. 17.

[cxxxiv] Trenton v. New Jersey, 262 U.S. 182, 67 L. Ed. 937 (1923); Newark v. New Jersey, 262 U.S. 192, 67 L. Ed. 943 (1923); Worcester v. Worcester Consolidated Street Ry. Co., 196 U.S. 539; Pawhuska v. Pawhuska Oil Co., 250 U.S. 394, 63 L. Ed. 1054 (1919); Risty v. Chicago, R.I. & Pac. Ry. Co., 270 U.S. 390; Railroad Commission v. Los Angeles Ry. Corp., 280 U.S. 145; 74 L. Ed. 234 (1929).

[cxxxv] Williams, 289 U.S. at 47-48.

[cxxxvi] Hunter v. Pittsburgh, 207 U.S. 179 (1907).

[cxxxvii] Kenai at 8 n. 17.

[cxxxviii] Village of Arlington Heights v. Regional Transportation Authority 653 F.2d 1149, 1151-52 (7th Cir.1981); City of New York v. Richardson 473 F.2d 923, 929 (2d Cir.1973).

[cxxxix] Gomillion v. Lightfoot, 364 U. S. 339 (1960).

[cxl] Hunter, 207 U.S. 161.

[cxli] 77 Ill.2d 130, 32 Ill.Dec. 325, 328, 395 N.E.2d 555, 558 (1979).

[cxlii] Kenai at18.

[cxliii] 284 N.E. 2d 266, 270 (Ill. 1972).

[cxliv] 153 N.E. 2d 16 (Ill. 1958).

[cxlv] Id. (Italics mine.)

[cxlvi] 103 Wash.2d 663, 694 P.2d 641, 645 (1985) (en banc).

[cxlvii] Kenai at 18.

[cxlviii] 15 Wash.App. 392, 549 P.2d 497, 498 (1976).

[cxlix] Kenai at 18.

[cl] 549 P.2d 497, 498-99 (Wash. App. 1976)

[cli] 694 P.2d 641, 645 (Wash. 1985) (en banc) (Citations omitted.).

[clii] Kenai at 18.

[cliii] State ex rel. Brentwood School Dist. v. State Tax Commission, 589 S.W.2d 613, 615 (Mo.1979) (en banc).

[cliv] Kenai at 18.

[clv] State ex rel. New Mexico State Highway Comm'n v. Taira, 430 P.2d 773 (N.M. 1967).

[clvi] Kenai at 18.

[clvii] Taira *supra* at 778.

[clviii] Kenai at18.

[clix] http:/www.law.alaska.gov/doclibrary/conconv/58.html at pp. 8-11.

[clx] Morehouse, Thomas A. and Fischer, Victor, *Borough Government in Alaska: A Study of State-Local Relations*, Institute of Social, Economic and Government Research, University of Alaska, College 1971.

[clxi] http:/www.law.alaska.gov/doclibrary/conconv/58.html at p. 9.

[clxii] Morehouse, Thomas A. and Fischer, Victor, *Borough Government in Alaska: A Study of State-Local Relations*, Institute of Social, Economic and Government Research, University of Alaska, College 1971 at 57.

[clxiii] Id.

[clxiv] Id. at 57-58.

[clxv] Id. at 58.

[clxvi] Id. at 57-58.

[clxvii] Id. at 58.

[clxviii] http:/www.law.alaska.gov/doclibrary/conconv/58.html at p. 9.

[clxix] http:/www.law.alaska.gov/doclibrary/conconv/58.html at p. 10.

[clxx] Keith, John P., *City and County Home Rule in Texas*, Institute of Public Affairs, University of Texas, 1951.

[clxxi] Morehouse, Thomas A. and Fischer, Victor, *Borough Government in Alaska: A Study of State-Local Relations*, Institute of Social, Economic and Government Research, University of Alaska, College 1971 at 58 n. 76.

[clxxii] http:/www.law.alaska.gov/doclibrary/conconv/58.html at p. 10.

[clxxiii] Wilson et al. v. Andrews et al., 10 S.W. 3d 663, 668-69 (Tex. 1999).

[clxxiv] Id.

[clxxv] Id.

[clxxvi] Id. at 671.

[clxxvii] *Unorganized Areas of Alaska that Meet Borough Incorporation Standards,* Alaska Local Boundary Commission, 2003 at 4.

[clxxviii] AS 29.03.010.

[clxxix] *Unorganized Areas of Alaska That Meet Borough Incorporation Standards, supra* at 19.

[clxxx] Fischer, Victor with Wohlforth, Charles, *To Russia With Love: An Alaskan's Journey*, University of Alaska Press, Fairbanks 2012, p. 156-57.

[clxxxi] *Unorganized Areas of Alaska That Meet Borough Incorporation Standards, supra* at 64.

[clxxxii] Id. at 22.

[clxxxiii] *Id*. See, AS 14.12.410.

[clxxxiv] *Id*.