

# THE NEED FOR FEDERAL LEGISLATION TO ADDRESS NATIVE VOTER SUPPRESSION

BY KAITLYN SCHAEFFER<sup>∞</sup>

## ABSTRACT

*Native Americans, like other minority groups, continue to face racially-motivated disenfranchisement efforts. Watershed victories for equal access to the ballot—such as the passage of the Fifteenth and Nineteenth Amendments—did not affect Native Americans because, by and large, they were not considered American citizens until the Indian Citizenship Act was passed in 1924. The Act only nominally enfranchised Native Americans, however, given states’ use of a variety of disenfranchisement tactics. Early disenfranchisement tactics included literacy tests and facially-neutral laws that prohibited Native Americans from voting (e.g., denying the franchise to “Indians not taxed”). Modern disenfranchisement techniques include gerrymandering, vote dilution, and voter identification laws. These disenfranchisement techniques compound other barriers Native Americans face in voting, including geographical constraints, cultural differences, and longstanding Native exclusion from state economic and political life.*

*Tribes and tribal advocates have primarily used the Voting Rights Act to combat voter suppression. However, the Court’s decision in Shelby County significantly weakened statutory protections against voter disenfranchisement. Using litigation to ensure equal access to the ballot also has drawbacks: it is costly, time-consuming, and its results do not always provide lasting solutions. A legislative fix is needed to address the extensive barriers that Native Americans face in voting. However, given the states’ history of animosity toward tribes, this Article argues that the legislative solution must come from the federal government. Under the federal trust responsibility, the Elections Clause, and other constitutional provisions, Congress arguably has both the power and the obligation to enact voting legislation aimed at remedying Native voter suppression.*

I. INTRODUCTION.....	708
II. A HISTORY OF DISENFRANCHISEMENT.....	709
A. The Path to Citizenship .....	709
B. Early Disenfranchisement Tactics.....	711

---

<sup>∞</sup> Kaitlyn Schaeffer, J.D. New York University School of Law. Kaitlyn currently works at Arnold & Porter, LLP, in New York City. I would like to thank Bob Bauer for his insightful feedback during the drafting process of this Article, as well as the incredible editorial team at *The Review of Law and Social Change*. Many thanks to the staff at the Senate Committee on Indian Affairs, without whom I would not have begun this research.

III. MODERN DISENFRANCHISEMENT TACTICS .....	712
A. Barriers to Voting Faced by Native Communities and Native Individuals	714
1. Geographical Barriers to Voting .....	714
2. State Failure to Accommodate Native Cultural Differences .....	714
3. History of Exclusion.....	715
B. Gerrymandering and Other Forms of Vote Dilution.....	718
C. Scarcity of Polling Places.....	720
D. Voter Identification Laws .....	722
E. Language Barriers .....	724
F. Intimidation, Harassment, and Misinformation .....	724
IV. COMBATTING NATIVE VOTER SUPPRESSION .....	725
A. The Voting Rights Act of 1965 .....	726
B. VRA Litigation to Combat Native Voter Suppression .....	727
V. THE NEED FOR FEDERAL LEGISLATION TO ADDRESS NATIVE DISENFRANCHISEMENT .....	728
A. Shelby County and its Aftermath.....	729
B. Limits of Litigation .....	729
C. States Are Not Reliable Protectors of Native Rights .....	731
D. A Federal Legislative Solution.....	732
1. Congress's Authority to Pass Native Voting Rights Legislation .....	732
2. Obstacles to Enacting Native Voting Rights Legislation .....	735
3. Substance of a Federal Legislative Solution .....	738
VI. CONCLUSION.....	740

## I.

### INTRODUCTION

Although they were the country's first inhabitants, Native Americans were not granted U.S. citizenship until 1924. Once Native Americans were formally recognized as citizens, the Fourteenth and Fifteenth Amendments provided them with nominal enfranchisement. However, the states—the primary regulators of elections—pushed back, adopting tactics that made it difficult or impossible for Native Americans to vote. While early tactics, such as literacy tests and statutes preventing Native Americans from voting, have largely been abrogated, Native Americans continue to face considerable challenges in exercising the right to vote. States disenfranchise Native Americans and other minority communities through gerrymandering, vote dilution, voter identification laws, failure to provide language assistance, and voter misinformation or intimidation. These tactics are compounded by barriers unique to Native voters, including cultural differences in Native communities, the generally isolated locations of reservations, and

longstanding Native exclusion from state economic and political life.

Native individuals and communities have primarily used litigation under the Voting Rights Act (“VRA”) to combat disenfranchisement. However, not every voting-related problem can be litigated, and litigation is expensive, time consuming, and may not provide lasting solutions. Native communities need a legislative fix, and this fix must come from Congress. States, which are charged with administering elections at the local, state, and federal level, have long histories of suppressing the Native vote and cannot be trusted to enact and enforce legislation protecting Native Americans’ access to the ballot. Federal legislation can address the manifold issues that inhibit Native Americans’ full participation in the political process by ensuring fair placement of polling locations, accepting Native forms of identification in voting, and implementing a limited preclearance regime for state election laws that would affect Native communities.

## II.

### A HISTORY OF DISENFRANCHISEMENT

#### A. *The Path to Citizenship*

Watershed victories for equal access to the ballot, such as the Reconstruction Amendments and the Nineteenth Amendment, did not impact Native Americans because they were, by and large, not considered citizens until the passage of the Indian Citizenship Act in 1924. In 1880, John Elk, a Native American resident of Omaha, Nebraska, tried to register to vote but was denied.<sup>1</sup> He sued, arguing that the Fourteenth and Fifteenth Amendments prohibited the state from disenfranchising him. The Fourteenth Amendment states that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,”<sup>2</sup> and the Fifteenth Amendment prohibits states from denying citizens the vote on the basis of their race or color.<sup>3</sup> The Court, however, determined that the Citizenship Clause of the Fourteenth Amendment did not apply to Native Americans, reasoning that Native Americans are members of “distinct political communities” owing “immediate allegiance to their several tribes,” and thus are “not part of the people of the United States.”<sup>4</sup> Native Americans could be naturalized, but only with the consent of the federal government—by treaty, for example.<sup>5</sup> Native Americans could not be naturalized via general naturalization statutes,<sup>6</sup> nor by individual unilateral actions. Thus, the facts that Elk had moved off tribal land, cut ties with his tribe, and was living and working among non-Native

---

1. *Elk v. Wilkins*, 112 U.S. 94 (1884).

2. U.S. CONST. amend. XIV, § 1.

3. *Id.* amend. XV.

4. *Elk*, 112 U.S. at 99.

5. *Id.* at 103–05 (discussing treaties that conferred citizenship on various tribes).

6. *See Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746, 749–50 (1856).

Americans in Nebraska were irrelevant to the Court's analysis.<sup>7</sup> *Elk* reflected widely-shared imperialist understandings of Native sovereignty. As Attorney General Caleb Cushing explained in an 1856 opinion, “[t]he simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible.”<sup>8</sup>

In the decades following the Court's decision in *Elk*, thousands of Native Americans became citizens in an ad hoc manner. Some Native Americans became citizens via treaty, but most obtained citizenship through various federal statutes. In 1919, Congress declared that all Native Americans who had served in World War I and received honorable discharges would be granted citizenship.<sup>9</sup> Another statute granted citizenship to Native women who married white men.<sup>10</sup> But by far the greatest naturalizing statutes were the allotment acts.<sup>11</sup> The Dawes Act<sup>12</sup> and the Burke Act<sup>13</sup> granted citizenship to Native Americans who complied with the division of tribal land into allotments, and who agreed either to leave the reservation or cut ties with their tribes.<sup>14</sup> By the time Congress enacted the Indian Citizenship Act in 1924,<sup>15</sup> two-thirds of Native Americans had already acquired citizenship.<sup>16</sup> The Indian Citizenship Act made the remaining Native American population citizens of the United States and of the states in which they resided. Thus, the Fourteenth and Fifteenth Amendments were, as a formal matter, extended to all Native Americans forty-four years after their ratification. Even so, Native Americans' right to vote in U.S. elections remained contested well into the

---

7. *Elk*, 112 U.S. at 95.

8. Relation of Indians to Citizenship, *supra* note 6, at 749.

9. Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

10. Act of Aug. 9, 1888, ch. 818, 25 Stat. 392.

11. Between 1890 and 1900, the number of Native Americans who were U.S. citizens jumped from 5,307 to 53,168. President Theodore Roosevelt described the Dawes Act as “a mighty pulverizing engine to break up the mass.” See Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 178 (1991).

12. Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, tit. I, § 206(a)(1), 114 Stat. 1991.

13. Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. ch. 9 § 349 (2010)).

14. See LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 15 (2010). The dual purpose of these statutes was to open up tribal land to white settlers and assimilate Native Americans. Thus, Native Americans could achieve citizenship under these laws only to the extent that they “appeared to nonnative eyes to have abandoned their identity.” Pamela S. Karlan, *American Indians and the Fight for Equal Voting Rights*, 120 YALE L.J. 1420, 1427 n.30 (2011). While Native Americans agreed to these deals—by, for example, moving off reservations and cutting ties to their tribes in exchange for citizenship—many continued to observe tribal traditions in private. *Id.*

15. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

16. Daniel McCool, Susan M. Olson, & Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* 8 (2007).

twentieth century.<sup>17</sup>

### B. Early Disenfranchisement Tactics

States with large Native populations have historically resisted the enfranchisement of Native Americans, and they have often wielded their power to restrict Native Americans' access to the ballot. State disenfranchisement of Native Americans mirrored the disenfranchisement of Black Americans in the South after Reconstruction. This pushback involved many of the same tactics,<sup>18</sup> so-called "first-generation barriers,"<sup>19</sup> which directly disenfranchised minority voters. For example, several states adopted literacy tests.<sup>20</sup> Literacy tests proved a potent tool for disenfranchising Native Americans because schools on reservations were under-resourced and because many tribal members spoke only tribal languages.<sup>21</sup> For instance, in 1948, the English illiteracy rate for Native Americans living in Arizona was estimated to be between 80% and 90%.<sup>22</sup> Other states made registration difficult by canceling registrations, requiring Native Americans to re-register, or denying registration altogether.<sup>23</sup> Additionally, Native Americans were subject to harassment and intimidation at the polls by election officials.<sup>24</sup>

Other disenfranchisement tactics targeted Native Americans explicitly. Several states enacted laws banning "Indians not taxed" from voting, taking advantage of the fact that Native Americans who live on federal lands such as reservations

---

17. See, e.g., *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948) (finding that an Arizona county recorder's refusal to register Mojave-Apache tribe members violated Native Americans' rights under the Arizona Constitution); *Montoya v. Bolack*, 372 P.2d 387, 387–88 (N.M. 1962) (surveying Native voting rights litigation in New Mexico and holding that Native Americans living on a reservation only partially within New Mexico were eligible to vote).

18. See, e.g., Wolfley, *supra* note 11, at 167; David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515 (2005); *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1734 (2016).

19. First-generation disenfranchisement tactics are actions that explicitly prevented certain minority groups from voting. These direct tactics include literacy tests, poll taxes, and violence. Second-generation disenfranchisement tactics, by contrast, disenfranchise minority groups in a more indirect way, such as by enacting voter identification laws. See *Shelby County v. Holder*, 570 U.S. 529, 562–564 (2013) (Ginsburg, J., dissenting) (discussing the difference between "first-generation barriers" and "second-generation barriers" to voting). See also *infra* Section III for further discussion.

20. Karlan, *supra* note 14, at 1427–28.

21. Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1112 (2015).

22. *Id.*

23. See generally VOTING RIGHTS IN INDIAN COUNTRY, THE AMERICAN CIVIL LIBERTIES UNION (2009) (discussing various ways states made registration more difficult for Native Americans).

24. See Adam Cohen, *Editorial Observer; Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES (June 21, 2004), <http://www.nytimes.com/2004/06/21/opinion/editorial-observer-indians-face-obstacles-between-reservation-ballot-box.html> [<https://perma.cc/ZE4S-6CDC>].

do not pay property taxes.<sup>25</sup> In a similar vein, Montana amended its state constitution to require that an individual be both a citizen and a taxpayer to be able to vote.<sup>26</sup> Utah denied Native Americans who lived on reservations the right to vote on the grounds that, under state law, they were not state residents.<sup>27</sup> Other states conditioned the right to vote on assimilation, extending the franchise only to those Native Americans who could demonstrate that they were “civilized.”<sup>28</sup> In *Porter v. Hall*, the Arizona Supreme Court, exploiting language from a Supreme Court opinion,<sup>29</sup> declared all Native people wards of the state and therefore ineligible to vote under the state constitution.<sup>30</sup> Some states enacted outright bans preventing Native Americans from voting or holding office—such as South Dakota, whose law remained in effect until 1939.<sup>31</sup>

Though they may seem like relics of the past, many of these disenfranchisement tactics remained in effect well into the mid to late twentieth century. For instance, Utah and Maine continued to deny outright Native Americans’ right to vote through the 1960s,<sup>32</sup> Arizona did not repeal its literacy test until 1972,<sup>33</sup> and South Dakota prevented three majority-Native counties from voting in local and state elections until 1975.<sup>34</sup>

### III.

#### MODERN DISENFRANCHISEMENT TACTICS

Native Americans continue to face discrimination and unequal access to the ballot. Native voters have been refused registration cards, live in jurisdictions that habitually refuse to comply with the VRA, and face hostility when registering and voting.<sup>35</sup> Native disenfranchisement has not attracted the same amount of media

25. Maine, Mississippi, New Mexico, Idaho, and Wyoming enacted such laws. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 7.

26. *Id.* (citing MONT. CONST. art. IX, § 2 (1932)).

27. *Id.* at 7 (noting that Utah’s legislature repealed this statute in 1957).

28. *Opshal v. Johnson*, 163 N.W. 988 (Minn. 1917). *See also* *Swift v. Leach*, 178 N.W. 437, 443–44 (N.D. 1920) (granting individual Native Americans the right to vote upon a finding that “they do not lead a nomadic or wandering life; they have homes and fixed abodes; they are engaged in the pursuit of agricultural industry; they live intermingled with the whites, having adopted and following their customs.”); *MCCOOL, OLSON AND ROBINSON*, *supra* note 16, at 11–12.

29. In *Cherokee Nation v. Georgia*, Chief Justice Marshall described the relationship between tribes and the federal government as one “resembling a ward to its guardian.” 30 U.S. 1, 17 (1831).

30. 271 P. 411, 417 (Ariz. 1928) (reasoning that “[i]t is the undisputed law . . . that all Indians are wards of the federal government”), *overruled by* *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

31. Cohen, *supra* note 24.

32. *Securing Indian Voting Rights*, *supra* note 18, at 1735.

33. Aura Bogado, *Democracy in ‘Suspense’: Why Arizona’s Native Voters Are in Peril*, THE NATION (Oct. 18, 2012), <https://www.thenation.com/article/democracy-suspense-why-arizonas-native-voters-are-peril/> [<https://perma.cc/6MVA-MZHR>].

34. Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 273 (2004).

35. Native Americans in South Dakota report that white election officials regularly enact obstacles that make it more difficult for them to register and vote. Cohen, *supra* note 23.

attention or public interest as has the disenfranchisement of other groups facing restricted access to the ballot. Perhaps as a consequence, there has never been a large-scale voting rights campaign aimed at addressing the issues Native voters face.<sup>36</sup> For example, from 1974 to 1990, only one lawsuit was brought in Montana to challenge that state's at-large elections<sup>37</sup> despite their widespread use to dilute the voting strength of Native Americans; in that same time period, Black plaintiffs brought 97 lawsuits challenging Georgia's election procedures.<sup>38</sup> The Department of Justice ("DOJ") has done little to combat Native voter suppression. Following the passage of the VRA, some state officials essentially refused to comply with Section 5's preclearance requirement,<sup>39</sup> which required certain jurisdictions with a history of voter suppression to obtain preclearance from the federal government for any proposed changes to their voting laws before those changes could go into effect.<sup>40</sup> South Dakota submitted fewer than ten out of more than 600 enacted election regulations between 1976 and 2002—the first twenty-six years it was subject to the preclearance requirement.<sup>41</sup> DOJ sued to enforce the preclearance requirement in 1978 and in 1979, but was unable to force South Dakota to comply with the law; after 1979, the department "turned a blind eye"<sup>42</sup> and never brought suit again. Where there have been lawsuits, either filed by DOJ or by individual plaintiffs, courts have "invariably found patterns of widespread discrimination against Indians in the political process."<sup>43</sup>

Counties and states have taken advantage of lax VRA enforcement by DOJ and the limited legal resources of Native communities to implement a variety of disenfranchisement tactics.<sup>44</sup> While many of the more blatant disenfranchisement techniques have been struck down or repealed, voter misinformation, intimidation,

---

36. See Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 270 (2015). See also VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 16 ("The extensive voting rights litigation campaign being waged elsewhere largely bypassed Indian Country.").

37. In an at-large election, members of the governing body are elected by the entire membership of the relevant group (such as a state or a city), instead of a subset of that group. At-large elections present a direct contrast to voting by electoral districts.

38. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 16.

39. See Wolfley, *supra* note 36, at 279; Bogado, *supra* note 33.

40. The Voting Rights Act contained special provisions that applied only to certain jurisdictions. One such special provision was Section 5, which required certain jurisdictions to submit proposed changes that would affect voting rights to either the Attorney General or the U.S. District Court of D.C. Under this preclearance regime, such proposed changes could only be implemented after they had been examined by the federal government to ensure that they would not negatively impact minority voting rights. Voting Rights Act, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965).

41. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 28. South Dakota's Attorney General advised the Secretary of State not to comply with the preclearance requirements. *Id.* at 27.

42. *Id.* at 28.

43. *Id.* at 16. For example, courts have found that Native Americans who had registered to vote had their names removed from voting lists; some found themselves de-registered for general elections even after they voted in the preceding primary elections. *Id.* at 4.

44. See *infra* Section II(B).

and harassment have persisted. In addition, more subtle, “second-generation” barriers have emerged,<sup>45</sup> which make every step in the voting process more difficult.<sup>46</sup> Second-generation barriers include gerrymandering and vote dilution, distant polling places, voter identification laws, and inadequate language assistance. These tactics are aggravated by barriers that are specific to Native communities and individuals, such as geographic constraints, cultural differences, and this nation’s long history of Native economic, social, and political marginalization.

*A. Barriers to Voting Faced by Native Communities and Native Individuals*

*1. Geographical Barriers to Voting*

Early federal policies aimed at assimilation and removal resulted in forced migrations of many tribes and the creation of the reservation system.<sup>47</sup> As settler appetite for land grew, the federal government increasingly banished tribes to the least desirable lands in some of the most remote areas of the country. A significant portion of the nearly seven million Native people in the United States today continues to live in these often rural, inaccessible locations.<sup>48</sup> Many reservations are located far from city or county centers. Such remote areas are not always served by the United States Postal Service,<sup>49</sup> and many reservation communities are not organized by named streets.<sup>50</sup> These geographical facts aggravate challenges to voting absentee, registering to vote, voting in person, and securing acceptable forms of voter identification. For example, in 2012, Naomi White, a member of the Navajo Nation, was placed on an inactive voter list by the Apache County Recorder because it deemed the address in her registration application “too obscure.”<sup>51</sup> Ms. White was therefore not assigned a voting precinct and not allowed to vote.<sup>52</sup> The challenges Ms. White faced were not isolated occurrences: County election officials have been known to place registered Native voters on inactive lists when uncertainty about those voters’ addresses apparently prevented officials from assigning them to precincts.<sup>53</sup>

*2. State Failure to Accommodate Native Cultural Differences*

States disenfranchise Native voters by refusing to accommodate differences in community organization and Native traditions. Some Native communities are

---

45. *Securing Indian Voting Rights*, *supra* note 18, at 1737.

46. *Id.*

47. *See* Wolfley, *supra* note 36, at 170.

48. Julie Turkewitz, *For Native Americans, a ‘Historic Moment’ in the Path to Power at the Ballot Box*, N.Y. TIMES (Jan. 4, 2018), [https://www.nytimes.com/2018/01/04/us/native-american-voting-rights.html?\\_r=0](https://www.nytimes.com/2018/01/04/us/native-american-voting-rights.html?_r=0) [<https://perma.cc/QNP3-E6Y6>].

49. Bogado, *supra* note 33.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*



not organized by address numbering systems. For example, on most reservations in Arizona, a person's address is not indicated by a street number, but is typically denoted by reference to a well-known landmark, such as a mile post marker or a chapter house.<sup>54</sup> As a result, several distinct houses can have the same or a nearly identical address.<sup>55</sup> Additionally, many Native Americans do not have personal mailboxes, opting instead for P.O. boxes, which are often shared by multiple people.<sup>56</sup> County employees and poll workers sometimes find shared addresses suspicious; this in turn can create problems when Native Americans try to register and vote. In 2012, more than 500 registered and otherwise-qualified voters in Arizona's Apache and Pinal counties were reportedly turned away at the polls for address-related issues.<sup>57</sup> The failure of state election law to account for Native traditions can also make voting more difficult. For example, members of the Navajo Nation are sometimes born at home or in hogans, traditional Navajo dwellings.<sup>58</sup> As a result, many tribal members do not have birth certificates, which in turn makes it difficult to secure acceptable forms of voter identification.<sup>59</sup>

### 3. *History of Exclusion*

The effects of federal and state removal and exclusion policies on Native peoples' ability to participate in the political process cannot be understated. Statutes directing that Native Americans be sent to live in remote areas of the county,<sup>60</sup> along with tax policies that disincentivize economic investment in Indian Country,<sup>61</sup> have contributed to the underdevelopment of tribal economies. Federal assistance to tribes is consistently below levels of need.<sup>62</sup> All of this has contributed to unstable housing markets, high rates of transience and poverty, worse-than-average health and educational outcomes, and other socioeconomic problems.<sup>63</sup> The

---

54. Ferguson-Bohnee, *supra* note 21, at 1139.

55. *Id.* at 1139–40.

56. *Id.* at 1140.

57. *Id.*

58. *Id.* at 1099; Bogado, *supra* note 33.

59. *Id.*

60. *See, e.g.*, Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

61. *See generally* STAFF OF JOINT COMMITTEE ON TAXATION, 110TH CONG., OVERVIEW OF FEDERAL TAX PROVISIONS RELATING TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS (July 2008); Indian Country refers to tribal lands in the United States, including reservation land. *See* 18 U.S.C. § 1151 (2012).

62. *See* THE NAT'L TRIBAL BUDGET FORMULATION WORKGROUP, RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3–4 (May 2013) (comparing funding for the Indian Health Service (IHS) with levels of need. For example, in Fiscal Year 2003, IHS was appropriated \$2.85 billion, which amounted to about 15% of need).

63. *See, e.g.*, *Empowering Indian Country: Coal, Jobs, and Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 5, 9–10 (2015) (statement of Darrin Old Coyote, Chairman, Crow Nation) (discussing socioeconomic challenges arising from federal Indian land policies); *Unemployment on Indian Reservations at 50%: the Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 59 (2010) (statement of Harvey Spoonhunter, Chairman, Northern Arapaho Business Council Wind River Indian Reservation)

median family income for Native persons is \$33,144, as compared to \$54,698 for whites.<sup>64</sup> More than one quarter of Native people live below the poverty line, as compared to 10% of whites.<sup>65</sup> On many reservations in Arizona, poverty rates among residents hover around 50%, and Fort Yuma's is 94%.<sup>66</sup> This depressed socioeconomic status, as the Supreme Court has acknowledged,<sup>67</sup> makes it more difficult for members of tribal communities to vote and run for office. People living in communities with depressed economies have more difficulty engaging in voting-related activities that many others take for granted. For instance, the fee to obtain an original birth certificate—required for securing acceptable forms of voter identification—can render registration out of reach, and lower rates of car ownership among Native voters affect the ease with which individuals can travel to a county seat to register or vote. It is easy to see how these barriers overlap with and compound those posed by geography.

Depressed political participation has also resulted in the election of fewer Native-preferred candidates to federal and state office, as well as to local offices, including school boards and county commissioner seats. This underrepresentation perpetuates depressed economies, because Native-preferred candidates are not parties to decisions about how to allocate resources. Underrepresentation also perpetuates disenfranchisement insofar as Native communities have little say in decisions like whether to require identification to vote, what types of identification will be acceptable, how to draw districts, and where to locate polling stations. South Dakota, for example, amended its law such that state residents who pay property taxes are automatically registered to vote while non-taxpayers must register in person at the county auditor's office, which often requires Native Americans to travel great distances to register.<sup>68</sup>

Systemic discrimination inhibits the ability of Native people to vote in other

---

(discussing harmful socioeconomic effects of certain tax policies); *Unemployment on Indian Reservations at 50%: the Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 13–15 (2010) (statement of Jefferson Keel, President, National Congress of American Indians) (discussing negative impacts of certain federal policies on reservation employment rates); *The President's FY 2020 Budget Request for Indian Programs: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. (2019) (statement of Jefferson Keel, President, National Congress of American Indians) (discussing reports commissioned by the U.S. Commission on Civil Rights, which determined that programs serving Indian Country were persistently underfunded, and how this contributes to tribal nations' inability to provide sufficient social, medical, and educational services); *The President's FY 2020 Budget Request for Indian Programs: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. (2019) (statement of Andrew Joseph Jr., Rep., National Indian Health Board) (discussing Congress' continuing failure to fully fund the Indian Health Service, and the negative consequences thereof).

64. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 14.

65. *Id.*

66. Ferguson-Bohnee, *supra* note 21, at 1123.

67. *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986) (“[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”).

68. McDonald, *supra* note 14, at 123. This problem was aggravated by the fact that registration by mail “was not fully implemented in South Dakota until 1973.” *Id.*

ways. Native people are disproportionately prosecuted and convicted of felonies as compared to their white counterparts, and as a consequence are disproportionately harmed by felon disenfranchisement laws.<sup>69</sup> Native Americans, like other minority voters, are often the targets of voter fraud accusations. For example, following record turnout by Native voters in the 2002 South Dakota Senate election and Democratic Senator Tim Johnson's unexpected victory, Native Americans were accused of "stuffing ballot boxes."<sup>70</sup> *The Wall Street Journal* characterized Johnson's win as "highly suspicious, if not crooked."<sup>71</sup> These accusations are typically followed by "ballot security" measures, ostensibly aimed at ensuring election integrity but often in practice used to suppress minority voting.<sup>72</sup> In this case, the South Dakota legislature passed strict voter identification laws.<sup>73</sup>

Additionally, entrenched racism can prevent Native Americans living on reservations from voting in neighboring white cities and towns. Elsie Meeks, a member of the Pine Ridge reservation in South Dakota and the first Native person to serve on the United States Commission on Civil Rights, testified at trial in a VRA suit against South Dakota that Native Americans "experience [] racism in some form from non-Indians nearly every time they go into a border town community."<sup>74</sup> In 2000 and 2007, the U.S. Civil Rights Commission found that Native Americans are frequently subject to hate crimes, murders, and fatal police shootings in towns near reservations in Montana, New Mexico, and South Dakota.<sup>75</sup> The Navajo Nation Human Rights Commission was established in 2006 following decades of "Indian rolling" hate crimes<sup>76</sup> and police shootings.<sup>77</sup> Deep-seated racial prejudice manifests in voter intimidation and harassment and deters many Native Americans from traveling to white towns to register and vote in person, as they are often required to do.<sup>78</sup>

---

69. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 43. In 2000, Native Americans made up only 1.5% of the country's population, yet 4% were under correctional supervision as compared to 2% of whites. *Id.* Additionally, four of the ten states with the highest Native populations have adopted the harshest felon disenfranchisement laws, permanently disenfranchising citizens who are found guilty of committing a felony. *Id.*

70. *CNN Crossfire* (CNN television broadcast Jan. 6, 2004), available at <http://www.cnn.com/TRANSCRIPTS/0401/06/cf.00.html> [<https://perma.cc/ZP4L-ECNH>].

71. Jackson, *supra* note 34, at 285 (discussing the article, which has since been removed).

72. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 48–49 ("Defenders of ballot security measures say they are necessary to prevent voter fraud and ensure that only those who are legally registered cast a ballot. But such initiatives have regularly been designed to suppress minority voting and have been driven not by concern for purity of the ballot, but by partisanship.")

73. *Id.* at 48.

74. *Id.* at 30.

75. U.S. CIVIL RIGHTS COMM'N, DISCRIMINATION AGAINST NATIVE AMERICANS IN BORDER TOWNS: BRIEFING REPORT 19 (2011), available at [https://www.usccr.gov/pubs/docs/Border-Towns\\_03-22-11.pdf](https://www.usccr.gov/pubs/docs/Border-Towns_03-22-11.pdf) [<https://perma.cc/VAG3-DSWD>].

76. "Indian rolling" refers to a phenomenon where white teenagers beat and roll inebriated Navajo off cliffs, often without consequence, in border Navajo towns. Bogado, *supra* note 33.

77. *Id.*

78. See Kira Lerner, *9 Native American Tribes Seek to Shorten 200 Mile Trip to Early Vote*, THINK PROGRESS (Oct. 24, 2016), <https://thinkprogress.org/nine-nevada-tribes-vote-68bdc2eb73a7/>

Native Americans' gains in access to the ballot have galvanized opponents, such as "white rights" groups committed to Native disenfranchisement. For example, Montanans Opposed to Discrimination advocates for giving states exclusive control over Indian land, eliminating reservations, and ending state support for tribal communities.<sup>79</sup> These organizations also frequently spearhead accusations of voter fraud. For example, another white rights group, the Citizens Equal Rights Alliance, filed a complaint in federal court alleging that election fraud and voting rights abuses took place on the Crow Indian Reservation and led to vote dilution in the 2006 election.<sup>80</sup> The Alliance's stated goal in instigating the suit was to prevent polling places for federal, state, county, and local elections from being located on reservation land.<sup>81</sup> The case was ultimately dismissed for failure to state a claim.<sup>82</sup>

### B. Gerrymandering and Other Forms of Vote Dilution

Three common malapportionment methods used to dilute the strength of minority voting are cracking, stacking, and packing.<sup>83</sup> Cracking refers to a technique in which the minority population is divided into multiple districts, so the white population retains a majority in each district. Stacking involves combining a concentration of minority voters with a greater concentration of white voters such that white voters can maintain control of the district. Packing involves concentrating as many minority voters as possible into a single district in an effort to minimize the overall number of majority-minority districts in the broader area. States with large Native populations have employed all three—and while all have been harmful, packing has proven to be particularly pernicious.

Examples of packing abound. States pack Native voters together by gerrymandering, adopting at-large districts, and altering the size of representative bodies. Buffalo County, South Dakota, used a district-based system to elect its three-member county commission. While Native Americans constituted 83% of the population, the plan packed nearly all of them into a single district, so that two seats were always held by white people.<sup>84</sup> In *Bone Shirt*, the Eighth Circuit found that South Dakota's legislative redistricting plan violated Section 2 of the VRA because it packed Native people into two of thirty-five total districts.<sup>85</sup> In the 1980s, Arizona's state legislature attempted to create an all-Native American county, a

---

[<https://perma.cc/5SLR-CPT9>].

79. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 37.

80. *CERA v. Johnson*, Case No. 1-07-CV-00074-RFC, 2007 WL 9710087 (D. Mont. Nov. 5, 2007).

81. *Id.*, complaint at ¶ 1.

82. *Johnson*, 2007 WL 9710087 at \*4.

83. See VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 31.

84. *Id.* at 3. Fifteen-hundred of the county's 2,000 inhabitants were packed into the majority Native American district.

85. *Bone Shirt v. Hazletine*, 461 F.3d 1011 (8th Cir. 2006).

plan one state senator called the “Arizona Apartheid Act.”<sup>86</sup> In 2002, plaintiffs in Martin, South Dakota, sued the city, alleging that the new redistricting plan unlawfully fragmented the Native vote, creating white majorities in all three council wards.<sup>87</sup>

Even where Native votes are not malapportioned, Native Americans face myriad challenges in achieving equal representation. One failed challenge occurred shortly after Charles Mix County, South Dakota, was forced to adopt a new redistricting plan that adhered to the “one person, one vote” standard set forth by the Court in *Reynolds*.<sup>88</sup> In the first election under the new plan, a tribal member mounted a successful primary campaign against a non-Native American and went on to win in the general election.<sup>89</sup> In response, voters circulated a petition to increase the number of county commissioners from three to five in an effort to dilute the Native vote, which the county voters subsequently approved.<sup>90</sup> However, when the plan was submitted for pre-clearance, the Justice Department determined that the county had failed to demonstrate that the plan lacked a discriminatory purpose, and ultimately rejected it.<sup>91</sup> As a result, the commission remains a three-member body.

At-large election systems are one of the most common forms of vote dilution. In 1983, plaintiffs in Big Horn County, Montana, sued, alleging that the at-large election of the county commission and the school board prevented Native Americans from selecting candidates of their choice. Despite constituting 41% of the county’s voting age population, no Native person had ever been elected to either the commission or the school board.<sup>92</sup> The court agreed with the plaintiffs, finding that the county’s at-large voting system unlawfully diluted the Native vote in violation of the VRA, and ordered a district-based system enacted.<sup>93</sup> At-large systems were similarly struck down in Blaine County, Montana;<sup>94</sup> Montezuma County,

---

86. Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights*, 15 AM. INDIAN CULTURE AND RES. J. 73 (1991).

87. *Cottier v. City of Martin*, 466 F. Supp. 2d 1175 (D.S.D. 2006); *but see Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010) (vacating and remanding in an en banc rehearing).

88. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 32; *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

89. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 32.

90. *Id.*

91. *Id.*

92. *Windy Boy v. City of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).

93. *Id.* at 1023.

94. *United States v. Blaine Cty.*, 363 F.3d 897, 915–16 (9th Cir. 2004) (striking down an at-large system used to swamp out the Native vote, which constituted 45% of the county).

Colorado;<sup>95</sup> Fremont County, Wyoming;<sup>96</sup> Wagner Community School District, South Dakota;<sup>97</sup> and elsewhere.<sup>98</sup>

### C. Scarcity of Polling Places

Many Native Americans also lack access to polling places. Polling stations are generally located in county seats, far from reservations, such that it is not uncommon for Native Americans to have to travel 100 miles or more to be able to vote. For example, Ed Moore, a member of the Fort Belknap tribe, has to travel 126 miles to vote at his nearest polling station.<sup>99</sup> In 2016, members of the Pyramid Lake tribe and Walker River Paiutes successfully sued to have polling stations located in tribal areas after demonstrating that tribal citizens were required to travel 200 miles to vote.<sup>100</sup> Worse still, some polling stations are not accessible by road at all. In some Alaska Native communities, voters have had to travel to their nearest polling location by plane.<sup>101</sup> Native American communities have few early voting opportunities, which compounds the harm caused by inaccessible polling places.<sup>102</sup> Without the option of voting early, many Native Americans are

---

95. *Cuthair v. Montezuma-Cortez*, 7 F. Supp. 2d 1152, 1162 (D. Colo. 1998) (challenging the use of an at-large system for the county school board in a county where no Native American had ever been elected to public office). The court found in *Cuthair* that the surrounding white communities “treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome.” *Id.* at 1160.

96. *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010), *aff’d*, 670 F.3d 1133, 1148–49 (10th Cir. 2012) (challenging the county’s use of an at-large election system for the county commission, which had prevented Native Americans from being elected to the five-member commission despite constituting 20% of the population).

97. *Weddell v. Wagner Cmty. Sch. Dist.*, Civ. No. 02-4056 (D.S.D. 2003) (alleging unlawful use of an at-large system for the district’s education board). *Weddell* resulted in the parties agreeing to replace the at-large system with a system of cumulative voting. In the subsequent election, a tribal member was elected to the board.

98. *See generally* VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 19–26 (discussing vote dilution cases).

99. Stephanie Woodard, *The Missing Native Vote*, IN THESE TIMES (June 10, 2014), [http://inthesetimes.com/article/16773/the\\_missing\\_native\\_vote](http://inthesetimes.com/article/16773/the_missing_native_vote) [<https://perma.cc/TZK2-CGR7>].

100. Lerner, *supra* note 78.

101. Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, THE GUARDIAN (Jun. 10, 2015), <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights> [<https://perma.cc/VC97-BUM3>].

102. *Securing Indian Voting Rights*, *supra* note 18, at 1738–39. When early voting stations are located on reservations, they are not always as accessible as the early voting stations located in non-Native communities. For example, in 2016 in Arizona, the early voting sites on reservations were open for a total of eight hours, while the stations in nearby white towns allowed residents several days to cast their votes. Felicia Fonseca, *Groups Record Voting Rights Abuses Against Native Americans*, WASH. TIMES (Jan. 11, 2018), <https://www.washingtontimes.com/news/2018/jan/11/groups-document-voting-rights-abuses-in-indian-cou/> [<https://perma.cc/UT2R-WWHL>].

forced to take an entire day off of work in order to travel to a distant polling location, vote, and drive home.<sup>103</sup> Because many reservation communities are socio-economically depressed,<sup>104</sup> residents are less likely than others to own cars.<sup>105</sup> Only about 6% of tribes have access to public transit systems.<sup>106</sup> Thus, the lack of accessible polling locations makes it more costly for Native Americans to vote.<sup>107</sup>

Absentee voting cannot solve these problems. As mentioned above, the U.S. Postal Service does not always deliver to the remote areas where many Native communities are located.<sup>108</sup> Many members of tribal communities use P.O. boxes instead of personal mailboxes, and these post boxes are sometimes located far from home.<sup>109</sup> As a result, absentee voting can be very difficult, especially when such balloting involves tight turnaround dates. For example, it can take weeks for rural voters in Alaska to receive their ballots, at which point the deadline to return them has often already passed.<sup>110</sup> Additionally, many tribes lack broadband connectivity, printers, and other hardware necessary for downloading registration forms or ballots to fill them out and send them in.<sup>111</sup> Further, many Native Americans require—and are entitled to receive—language assistance in filling out their ballots, and there is no reliable mechanism for providing language assistance to absentee voters. Many Navajo, particularly the elderly, do not speak English; if they cannot find someone to help them translate mail-in voting materials, they must travel great distances to either have those materials translated or vote in person with the help of an interpreter.<sup>112</sup>

---

103. Landreth, *supra* note 101.

104. See, e.g., *The Poverty Cycle*, RUNNING STRONG FOR AM. INDIAN YOUTH, <http://indian-youth.org/american-indian-life/poverty-cycle> [https://perma.cc/47T4-L6NG] (last visited Apr. 14, 2019).

105. See Ferguson-Bohnee, *supra* note 21, at 1136.

106. *Id.* at 5.

107. The Department of Justice hired Gerald R. Webster, a professor at the University of Wyoming, to investigate Native Americans' access to the vote. His study found that Indians on reservations in three Montana tribes had to travel two to three times further than whites to get to a county courthouse to vote; that Native Americans were two to three times less likely to have a car for the trip; and that they were also less likely to have money needed for gas to make that trip. Gerald R. Webster, *An Evaluation of the Effects of Adding a Second Voter Registration/Polling Site in Three Montana Counties* (Oct. 23, 2012), <https://www.justice.gov/crt/case-document/file/925251/download> [https://perma.cc/Y42X-GK2D]. In South Dakota, Tom Poor Bear and other Oglala Sioux members filed suit against the county to have an early voting location placed on tribal land, arguing that Native residents had to travel about twice as far to register and vote early than the county's white residents. Mike Lakusiak, Erin Vogel-Fox, Courtney Columbus, & Marianna Hauglie, *Voting Restrictions Create Obstacles for Native Americans*, AZ CENTRAL (Aug. 23, 2016), <https://www.azcentral.com/story/news/politics/nation/2016/08/23/voting-restrictions-create-obstacles-native-americans/89217796/> [https://perma.cc/RJM7-7F75].

108. For example, only 25% of the residents on the Navajo reservation in San Juan County, Utah, have a numerical address that mail delivery providers serve. Lakusiak, *supra* note 107.

109. *Id.*; Landreth, *supra* note 101.

110. Landreth, *supra* note 101.

111. Wolfley, *supra* note 36, at 282.

112. Lakusiak, *supra* note 107.

#### D. Voter Identification Laws

Native Americans face several challenges in obtaining acceptable forms of voter identification. Many states that require voter identification do not accept tribal forms of identification,<sup>113</sup> or only accept them under certain conditions (e.g., if they list a physical address). Determining which voter identification law is applicable can sometimes cause added confusion. The Navajo Nation, for instance, overlaps with three states—Arizona, Utah, and New Mexico—so Navajo residents must navigate three different sets of rules governing voter identification, early voting, and voter registration.<sup>114</sup> For people living in Native communities without address numbering systems, it can be hard or impossible to obtain an acceptable, non-tribal form of identification because they cannot provide adequate proof of residence.<sup>115</sup> Native communities also have higher rates of transience, increasing the burden of fees for changing an address on a government-issued identification card.<sup>116</sup> Compounding these obstacles, state facilities that issue acceptable forms of identification are usually located far from reservations and are not always open during regular hours, or every day of the week.<sup>117</sup>

The hurdles to attaining photo identification are so high that one member of the Navajo Nation, Agnes Laughter, required the assistance of twelve people—who dedicated hours of work to providing legal, transportation, and language interpretation services—to obtain a state identification card.<sup>118</sup> Some tribes, including the Navajo Nation, do not require identification to vote in tribal elections; instead, identity is confirmed using traditional kinship systems.<sup>119</sup> At the time Arizona's voter identification law was passed, the Navajo Nation did not issue photo identification to its members. Prior to the law's enactment, Ms. Laughter had voted in nearly every local and federal election since the state abandoned its

---

113. *Securing Indian Voting Rights*, *supra* note 18, at 1741.

114. Bogado, *supra* note 33.

115. Sarah Childress, *North Dakota's Voter ID Law is Latest to Be Overturned*, FRONTLINE (Aug. 2, 2016), <http://www.pbs.org/wgbh/frontline/article/north-dakotas-voter-id-law-is-latest-to-be-overturned/> [<https://perma.cc/RW24-SSBV>] (noting that a North Dakota law requiring a permanent residential address disproportionately impacted Native Americans. Under the new law, nearly a quarter of Native voters lacked acceptable voter identification as compared to twelve percent of the non-Native population, and nearly half of Native Americans lacked the appropriate underlying documents to obtain an appropriate form of ID.).

116. Ferguson-Bohnee, *supra* note 21, at 1140.

117. See KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, *THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION* 4–6 (2012) (“The distances that many voters must travel to their nearest ID-issuing office will be particularly burdensome for voters who do not have vehicle access . . . [and many offices] are open less than five days per week [or] have irregular hours.”).

118. Bogado, *supra* note 33. Ms. Laughter was born at home and lived hours away from the nearest place where she could obtain a delayed certificate of birth. She was told by a government worker that she could not get a state ID using a delayed birth certificate, and her lawyer had to intervene.

119. *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 at \*58 (D. Ariz. Sept. 11, 2006) (testimony of Leonard Gorman), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitEx120.pdf> [<https://perma.cc/7WP9-DJMU>].



literacy test,<sup>120</sup> using her thumb print as her signature.<sup>121</sup> Yet when she reported to her usual polling location in 2006, Ms. Laughter was turned away for her failure to comply with poll workers' demand that she produce state-sanctioned identification—despite the fact that a Navajo poll worker recognized her and verified her identity in the traditional Navajo way.<sup>122</sup> Though the Navajo Nation has recently started issuing photo identification cards, only those who can afford the \$17 fee have access to them.<sup>123</sup>

Arizona has a “soft” voter identification law, meaning that voters may produce either an acceptable form of photo identification or two forms of alternative identification—but despite its relative lenience, the law still disproportionately burdens Native Americans. While Native voters might easily produce a tribal identification card as one acceptable alternative form of identification, they are harder pressed to produce a second form of alternative identification, such as a utility bill, property tax statement, proof of car insurance, bank statement, or a car registration card.<sup>124</sup> A number of factors make this so. Native people living on federal land do not pay property taxes. Members of tribal communities with depressed economies do not always have enough money to pay for utilities, and are thus less likely than others to have utility bills.<sup>125</sup> Navajo who live in hogans do not use electricity at all.<sup>126</sup> Additionally, it is more common in Native communities for multiple people to live in a single house than it is in non-Native communities, and utility bills only come addressed to one individual.<sup>127</sup> Native Americans are also less likely than non-Native Americans to have bank accounts, cars, and car insurance.<sup>128</sup> When attempting to vote in 2006, the only verification of her identity that Agnes Laughter had was her certificate of Native American blood and a census coin.<sup>129</sup>

---

120. Ferguson-Bohnee, *supra* note 21, at 1126.

121. Brief for Nat'l Cong. of Am. Indians et al. as Amici Curiae Supporting Petitioners at 9, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL3440943.

122. Mary Yazzie recognized Ms. Laughter and greeted her in the Navajo language, acknowledging her as a relative, her older sister, through their maternal clan, Red-Running-into-the-Water. Ferguson-Bohnee, *supra* note 21, at 1126 (citing Aff. of Agnes Laughter at 5, Agnes Laughter Election Grievance Form, ARIZ. SEC'Y OF STATE (2006)).

123. *Navajo Nation ID Cards Now on Sale*, ALBUQUERQUE J. (May 22, 2012), <https://www.abqjournal.com/108147/navajo-nation-id-cards-now-on-sale.html> [<https://perma.cc/GF4W-YHWT>].

124. ARIZ. REV. STAT. ANN. § 16-579 (2006).

125. For example, according to the 2000 Census, one-third of the houses on the Navajo Reservation lacked plumbing, 62% lacked phone service, and more than half of homes were heated by wood. Ferguson-Bohnee, *supra* note 21, at 1128 (citing Supplemental Brief of Petitioner at 4, *Gonzalez v. Arizona* (No. 06-1268) 2006 WL 3627297 (D. Ariz. Sept. 11, 2006)).

126. *Id.*

127. *Id.*

128. *Id.*

129. Complaint at 3, 12–13, *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. Jun. 6, 2006).

### E. Language Barriers

Members of tribal communities are not always proficient in English. According to the 2000 census, about one-fifth of Native people are limited English proficient.<sup>130</sup> Limited English proficiency hinders voters' ability to register, vote, and secure necessary forms of identification. Registering to vote and obtaining certain forms of government identification require extensive interaction with government bureaucracy.<sup>131</sup> While states are required by law to provide language services, poll workers do not always speak tribal languages.<sup>132</sup> The greatest challenges are faced by those whose native tongues are historically unwritten, such as the Navajo and Zuni languages, and are thus not easily amenable to a document-based voting process.<sup>133</sup> Some voters face challenges that result from difficulties in translation. For example, there are no equivalent words for important terms like "Republican" or "Democrat" in some Native languages.<sup>134</sup> Thus, the availability of glossaries, as well as other translation tools and services, becomes very important to enabling Native Americans to vote.

### F. Intimidation, Harassment, and Misinformation

Instances of intimidation and harassment against Native voters abound. Native voters often face direct or indirect discrimination when they travel to largely white county centers to register and vote.<sup>135</sup> In at least one case, South Dakota county auditors placed limits on the number of registration cards that could be distributed to Native voters.<sup>136</sup> A more recent study conducted by Arizona State University found that during the 2008 and 2010 elections, poll workers engaged in discriminatory behavior toward Native voters, and police sometimes blatantly intimidated them.<sup>137</sup> Native voting activists are sometimes falsely accused of committing voter fraud.<sup>138</sup>

---

130. *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

131. Judge Posner catalogued the volumes of paperwork voters must fill out to obtain identification compliant with the applicable voter identification law "for disillusionment." *Frank v. Walker*, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

132. Fonseca, *supra* note 102.

133. *Securing Indian Voting Rights*, *supra* note 18, at 1740.

134. *Id.*

135. Woodard, *supra* note 99; Dean Chavers, *A History of Indian Voting Rights and Why It's Important to Vote*, INDIAN COUNTRY TODAY (Oct. 29, 2012), <https://indiancountrymedianetwork.com/history/people/a-history-of-indian-voting-rights-and-why-its-important-to-vote/> [<https://perma.cc/HFZ2-P22U>].

136. *See, e.g., Fiddler v. Sisker*, No. 85-3050 (D.S.D. Oct. 24, 1986) (finding an auditor unlawfully limited the number of registration application forms to be given to Native Americans).

137. ARIZONA NATIVE VOTE ELECTION PROTECTION PROJECT 2012: FINAL REPORT, INDIAN LEGAL CLINIC AT THE SANDRA DAY O'CONNOR COLLEGE OF LAW 2 (2012).

138. Cohen, *supra* note 23. For example, prior to the 2002 election, federal and South Dakota state officials announced that they were going to investigate allegations of voter fraud in counties

Election officials also commonly share incomplete or incorrect information with Native voters. For instance, poll workers have turned away Native voters who showed up at the wrong polling places without checking to see if they were registered elsewhere and without providing them the opportunity to cast a provisional ballot, both of which are required under the Help America Vote Act (“HAVA”).<sup>139</sup> Agnes Laughter, for example, was not presented with a provisional ballot after she was barred from voting for failing to present appropriate identification.<sup>140</sup> Tribes have repeatedly requested federal observers at polling locations frequented by Native voters. When observers are not present, poll workers have been found to incorrectly translate ballots, rush voters, fail to provide lawfully required assistance to voters, and fail to post important notices.<sup>141</sup> Poll workers also fail to inform voters that they have the right to bring an escort with them to help interpret their ballots.<sup>142</sup>

In 2005, a staff attorney with the American Civil Liberties Union’s Voting Rights Project testified before Congress about state officials’ “complete disregard of Native American voting rights.”<sup>143</sup> The examples highlighted above illustrate this disregard and strengthen the case laid out in the next section for federal intervention.

#### IV.

#### COMBATING NATIVE VOTER SUPPRESSION

Native communities’ primary tool to combat voter suppression is the VRA. In the run-up to the act’s reauthorization in 1975, Congress heard testimony detailing Native voter suppression.<sup>144</sup> In response, subsequent reauthorizations included protections for minority-language citizens and added certain jurisdictions with large Native populations to Section 4’s preclearance formula, the provision that sets forth which jurisdictions are subject to Section 5’s preclearance requirement. Section 5’s preclearance regime has been called the “heart of the Voting

---

that had sizable Native populations following voter registration drives and get-out-the-vote campaigns on reservations that led to increases in the number of registered voters in those counties. No one was ever charged in this investigation. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 48.

139. *Id.* at 5–6.

140. Aff. of Agnes Laughter, *supra* note 122, at ¶¶ 5–6.

141. *Continuing Need for Section 203’s Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 500-01 (2009) (statement of Alfred Yazzie).

142. Dianna M. Nanez, *As Election Nears, Volunteers Work to Protect Native American Voting Rights*, AZ CENTRAL (Nov. 4, 2016), <https://www.azcentral.com/story/news/politics/elections/2016/11/04/arizona-native-american-voting-rights/93265480/> [<https://perma.cc/4L3K-E65A>].

143. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. On the Const. of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of Bryan Sells).

144. GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES*, C.R.S. REPORT 18 (Feb. 2007); S. REP. NO. 2995, 94th Cong., 1st Sess. 24, 38 (1975).

Rights Act,”<sup>145</sup> and it historically played a major role in preventing Native voter suppression.<sup>146</sup> After 1975, Arizona, Alaska, and two counties in South Dakota were required to submit for preclearance any election-related changes in their laws and regulations.<sup>147</sup> In addition, Congress enacted Section 203, which provides support for language minorities, including those who speak Native languages.<sup>148</sup> However, as discussed below, the Court in *Shelby County v. Holder* has since rendered Section 5’s preclearance regime inoperative, making the need for further government protections clear.<sup>149</sup>

### A. *The Voting Rights Act of 1965*

Congress passed the VRA in 1965 in response to widespread minority disenfranchisement. The most important provisions for Native voters are Section 2, Section 203, and, prior to *Shelby County*, Section 5.<sup>150</sup> Section 2 of the VRA outlaws any voting measure that “results in a denial or abridgement of the right . . . to vote on account of race or color.”<sup>151</sup> This section seeks to prevent vote dilution and vote denial. Under this section, measures that disenfranchise minority voters on the basis of their race or color, or diminish the potency of minority voting power, are unlawful.

Section 5’s preclearance regime required jurisdictions with a history of voting discrimination, as identified by a coverage formula provided in Section 4, to submit all election-related laws and regulations to either the Attorney General or the district court of the District of Columbia before enactment. In 1975, Congress added Alaska, Arizona, and South Dakota’s Oglala and Todd Counties to the preclearance formula.<sup>152</sup>

In 2006, Congress added Section 203, which provides protections for certain language minorities that have historically been excluded from the political process. The coverage formula in this section identifies jurisdictions with large language minority populations and requires that those jurisdictions provide their voters with bilingual registration and voting materials—and, where the minority population’s language is historically unwritten, with oral language services.<sup>153</sup>

---

145. Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, ACLU (July 2, 2013), <https://www.aclu.org/blog/voting-rights/promoting-access-ballot/supreme-court-put-dagger-heart-voting-rights-act> [<https://perma.cc/PK6E-9A9F>].

146. JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, U.S. DEP’T JUSTICE <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/Y9LX-FWSD>] (last updated Aug. 6, 2015).

147. *Id.*

148. An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (1965).

149. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

150. Native Americans have occasionally made use of Section 3, which provides that a jurisdiction can be “bailed in” to the preclearance regime upon a finding that the jurisdiction has violated the Fourteenth or Fifteenth Amendment. *Securing Indian Voting Rights*, *supra* note 18, at 1745.

151. 52 U.S.C. § 10301(a).

152. *See Jurisdictions Previously Covered by Section 5*, *supra* note 146.

153. 52 U.S.C. § 10503(c).

Native communities are included in the coverage formula if “more than five percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient.”<sup>154</sup> Eighty counties and seventeen states fall under Section 203’s coverage formula because of Native populations.<sup>155</sup>

### B. VRA Litigation to Combat Native Voter Suppression

For years, the VRA proved an effective tool for preventing Native voter suppression. Indeed, as a result of preclearance and litigation, Native political participation and the number of Native Americans in office increased significantly.<sup>156</sup> Section 5’s preclearance regime prevented a number of election-related changes that would have disproportionately harmed Native voters from going into effect. For example, the preclearance requirement prevented Alaska’s attempt to withdraw polling stations from several Native villages and consolidate precincts for permanent absentee voting.<sup>157</sup> Additionally, Native plaintiffs have filed lawsuits to enforce their rights under the VRA and the Constitution.<sup>158</sup> Sometimes third parties like the DOJ or public interest groups like the ACLU file these lawsuits on Native plaintiffs’ behalf.<sup>159</sup>

A Section 2 violation “is established if, based on the totality of the circumstances,” plaintiffs have demonstrated that members of a minority group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>160</sup> Native Americans, advocacy groups, and the DOJ have utilized Section 2 to prevent a number of changes that would have disproportionately burdened Native voters. For example, in 1978, DOJ sued Thurston County, Nebraska, after the county switched from district-based elections to an at-large election for its board of supervisors following the election of a Native American to the board.<sup>161</sup> The District Court for the District

---

154. *Id.* § 10503(b)(2)(A)(i)(III).

155. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871 (July 26, 2002).

156. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 2.

157. Letter from Christopher Coates, Chief, Voting Section, U.S. Dep’t of Justice, to Gail Fenumiai, Dir., State of Alaska Div. of Elections (July 14, 2008), *reprinted in* Brief of Amici Curiae Alaska Native Voters & Tribes in Support of Appellees, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322) 2009 WL 815235 at \*22–\*23. The state did not submit these changes as required; rather, the DOJ learned of Alaska’s plans to make these changes and the state subsequently withdrew them. *Id.*

158. *See, e.g.,* Cuthair v. Montezuma-Cortez, 7 F. Supp. 2d 1152, 1154 (D. Colo. 1998) (bringing causes of action under the Voting Rights Act as well as the First, Thirteenth, Fourteenth, and Fifteenth Amendments).

159. MCCOOL, OLSON & ROBINSON, *supra* note 16, at 44 (noting that “[a]dvocates for voting rights for Indians have made steady use” of the VRA and subsequent amendments).

160. 52 U.S.C. § 10301(b).

161. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 33 (citing *United States v. Thurston Cnty.*, Civ. No. 78-0-380 (D. Neb. May 9, 1979)).

of Nebraska found that this change diluted the voting strength of the Native population there, and ordered the county to return to a district-based system.<sup>162</sup> Similar suits have been filed in other states with large Native populations—and where litigation has occurred, courts have “invariably found patterns of widespread discrimination against Indians in the political process.”<sup>163</sup>

Litigation has also been used to enforce other VRA provisions. The DOJ has repeatedly sued to enforce Section 203 violations.<sup>164</sup> Common violations include states’ failure to provide adequate numbers of trained bilingual poll workers and translated election materials, and to develop translated materials for electronic voting.<sup>165</sup> Section 3 has been utilized by advocates in Indian Country to “bail in”<sup>166</sup> several jurisdictions to the preclearance requirements of Section 5. For example, Charles Mix County was bailed in using this section following litigation sparked by the county’s attempt to increase the number of county commissioners from three to five in an attempt to suppress the Native vote.<sup>167</sup>

## V.

### THE NEED FOR FEDERAL LEGISLATION TO ADDRESS NATIVE DISENFRANCHISEMENT

Successes achieved under the VRA have been limited by doctrinal developments and by the inherent practical limits of using litigation to achieve access to the ballot. With the evisceration of Section 5’s preclearance regime in *Shelby County*, tribes have mainly enforced their voting rights through litigation. However, litigation alone cannot fill the void left by the gutting of the preclearance regime. Native advocacy groups have called on Congress to pass Native voting rights legislation,<sup>168</sup> and federal officials have acknowledged the need for action. As Assistant Attorney General Peter Kadzik wrote in a letter to then-Vice President Joe Biden, “there is a pressing need for federal legislation to ensure equal access to voting for Native American voters.”<sup>169</sup>

---

162. *Stabler v. Cnty. of Thurston*, 129 F.3d 1015, 1018 (8th Cir. 1997).

163. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 16.

164. Wolfley, *supra* note 36, at 283.

165. *Id.*

166. A “bail in” under Section 3 allows a federal judge, upon a finding that a jurisdiction has violated the Fourteenth or Fifteenth Amendment, to require that jurisdiction to comply with Section 5’s preclearance regime. 52 U.S.C. § 10302(c).

167. Letter from Grace Chung Becker, Acting Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Sara Frankenstein (Feb. 11, 2008), <https://www.justice.gov/crt/voting-determination-letter-14> [<https://perma.cc/7ZZW-K5W3>].

168. TRIBAL EQUAL ACCESS TO VOTING, THE NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION #MSP-15-030, NATIONAL CONGRESS OF AMERICAN INDIANS (2015).

169. Letter from Peter J. Kadzik, Assistant Att’y Gen., to Vice President Joe Biden 1 (May 21, 2015), <http://www.carlyleconsult.com/images/Tribal-Equal-Access-to-Voting-Act.pdf> [<https://perma.cc/MB3G-2PDP>].

### A. *Shelby County and its Aftermath*

In *Shelby County v. Holder*, the Court invalidated Section 4(b) of the VRA, the provision that provided the preclearance coverage formula, rendering Section 5's preclearance regime inoperative.<sup>170</sup> The Court held the coverage formula was unjustified in light of the targeted jurisdictions' supposed advances in protecting voting rights.<sup>171</sup> Congress has the power to alter Section 4(b)'s formula, but in order for such legislative action to fall within its enforcement powers, it must tailor the formula to address current, documented problems.

As a result of this holding, Arizona, Alaska, and South Dakota's Dunn and Oglala Counties are no longer required to submit their election-related changes for preapproval. Lawsuits challenging election-related changes in Alaska and Arizona state law have spiked since 2013.<sup>172</sup> Arizona drastically reduced the number of polling places available in the state during the 2016 elections and created a new felony offense prohibiting individuals from collecting marked ballots and bringing those ballots to an election official<sup>173</sup>—a practice common in many Native communities located far from county centers. The Democratic National Committee and groups of minority voters, including Native Americans, have filed suit in Arizona, challenging the decision to reduce the number of polling places and seeking to enjoin the application of the felony.<sup>174</sup>

### B. *Limits of Litigation*

In addition to the *Shelby County* decision, other doctrinal developments have rendered the VRA a less potent tool for combatting voter suppression. Courts have, over time, grown more skeptical of Section 2 claims.<sup>175</sup> Plaintiffs are being asked to demonstrate more than in decades past to prove their claims,<sup>176</sup> and courts are increasingly amenable to accepting defendants' proffered grounds for explaining differences in voting patterns.<sup>177</sup> Recent Supreme Court opinions appear to

---

170. 570 U.S. 529, 557 (2013). Four years earlier, in *Northwest Austin*, the Court raised, but did not decide, questions as to Section 5's constitutionality. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204–05 (2009).

171. *Id.* at 555–57 (“Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years . . . And voter registration and turnout numbers in the covered States have risen dramatically in the years since . . . Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.”).

172. Lakusiak, *supra* note 107.

173. *Ariz. Rev. Stat. § 16-1005* (2016) (West).

174. *Id.*

175. Karlan, *supra* note 14, at 1437. Karlan believes this has more to do with “a distaste for discussions of racial justice” than with changing circumstances. *Id.*

176. *Id.* For example, several circuits now require plaintiffs alleging Section 2 violations to demonstrate that there exists a single-member district in which members of the minority group would make up a majority of the citizens of voting age. *Id.* at 1437 n.70 (collecting cases).

177. *Id.* at 1438 n.71 (collecting cases). Even though no Native person had ever been elected

suggest hostility towards continuing Section 2 claims.<sup>178</sup> Section 2 violations are also more difficult to establish when the minority community in question is less populous and more dispersed, as Native communities tend to be.<sup>179</sup> Even where Section 2 cases have been successful, the heavily fact-dependent nature of these cases sometimes results in incomplete protections going forward.<sup>180</sup> Litigants do not commonly pursue Section 3 claims to bail in certain jurisdictions to Section 5's preclearance requirement, probably because they are "substantially more difficult to establish than section 2" claims.<sup>181</sup> When Section 203 is enforced, it is generally effective. However, most of the lawsuits filed to enforce Section 203 are brought by DOJ, which has limited resources at its disposal.<sup>182</sup> The evidentiary burden in these cases is high, and many cases are dismissed for a lack of showing.<sup>183</sup>

In addition, there are inherent limits on what litigation can accomplish in terms of access to the ballot. Litigation is complex, time-consuming, expensive, and often turns on access to effective legal assistance. It requires plaintiffs to willingly expose themselves to scrutiny.<sup>184</sup> It can take several years for cases to be decided and, even if the court ultimately rules in plaintiffs' favor, enforcement costs are high.<sup>185</sup> Native Americans have limited access to financial resources even when compared to other minority groups, and thus cannot afford to litigate every law and regulation that makes it more difficult for Native Americans to vote.<sup>186</sup> Even where litigation is successful, the results do not always provide lasting solutions. In some cases, the issues have to be re-litigated for every election.<sup>187</sup> Given the persistent barriers to and shortcomings of litigation, the need for a prophylactic legislative solution to secure voting rights for Native Americans is

---

to the city council, the court held that plaintiffs had failed to demonstrate that the white majority sufficiently votes as a bloc enabling it to defeat the minority's preferred candidate in elections, a necessary precondition to establishing a vote dilution claim. *See Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010) (en banc).

178. The Court appears to think that protection against vote dilution is no longer needed. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 14 (2009) (holding that plaintiffs must prove that they constitute more than half of the voting age population in the relevant geographic area in order to bring a Section 2 claim).

179. *Securing Indian Voting Rights*, *supra* note 18, at 1745.

180. *Id.*

181. *Id.* at 1746.

182. Wolfley, *supra* note 36, at 293.

183. *See* Deborah F. Buckman, *Application of Voting Rights Act to Native Americans*, 40 A.L.R. FED. 2D 1 (2009).

184. Landreth, *supra* note 101.

185. MCCOOL, OLSON & ROBINSON, *supra* note 16, at 89.

186. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. On the Const. of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

187. Samantha Lachman, *Justice Department Voting Rights Proposal Could Make a Huge Difference for Native Americans*, HUFFINGTON POST (May 29, 2015), [https://www.huffingtonpost.com/2015/05/28/voting-rights-native-americans-\\_n\\_7463126.html](https://www.huffingtonpost.com/2015/05/28/voting-rights-native-americans-_n_7463126.html) [https://perma.cc/E2GN-4QUF].



clear.

### C. *States Are Not Reliable Protectors of Native Rights*

The legislative solution cannot come from the states; it must come from the federal government. A state-driven solution to equalizing access to the ballot would result in a patchwork of different laws providing varying degrees of protection. Such a scenario might be especially disruptive to tribal nations that span multiple states. A legislative solution to Native voter suppression should be uniform. Unlike the states, the federal government has both plenary power over Indian affairs and a trust responsibility to tribes. Congress has committees—namely, the Senate Committee on Indian Affairs and the House Natural Resources Subcommittee—staffed with people who are subject-matter experts and dedicated to enacting legislation that promotes the rights of tribes and Native people. Many states, by contrast, have a history of trying to suppress the rights of Native Americans.

The Supreme Court recognized the animosity between tribes and states early on: “[Indians] receive from [the states] no protection. Because of local ill feeling, the people of the states where they are found are often their deadliest enemies.”<sup>188</sup> That “ill feeling” is still present. For example, in 2002, a South Dakota state legislator, apparently prompted by a Native American’s bid to become Lieutenant Governor and the concomitant fear that her election would result in more Native Americans voting, stated on the floor that he would “lead [] the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty.”<sup>189</sup> During legislative redistricting in Montana in 1992, commissioners rejected tribal members’ proposed redistricting plans, saying, among other things, that locating white residents in a majority Native district would “emasculate” those white residents.<sup>190</sup>

States are the actors responsible for deploying many of the vote suppression tactics described in previous sections. States have also recently engaged in retaliatory tactics against Native Americans exercising the right to vote. In some states, Native Americans constitute a sufficiently large minority such that their votes can influence the outcome of elections, including national elections.<sup>191</sup> Former Arizona Governor Janet Napolitano, for example, credits the Native vote for her victory.<sup>192</sup> The Native vote was also crucial to Senator Heidi Heitkamp’s 2012 election as well as to Senator Jon Tester’s successful 2012 and 2018 re-election campaigns.<sup>193</sup> In reaction to Senator Tim Johnson’s slim re-election, also due in

---

188. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

189. *Shirt v. Hazletine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

190. *Old Person v. Cooney*, No. CV-96-004-GF (D. Mont. 1996); *see also* VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 35.

191. Wolfley, *supra* note 36, at 267.

192. Ferguson-Bohnee, *supra* note 21, at 1122.

193. Rob Capriccioso, *Tester, Heitkamp Score Victories with the Native Vote*, COUNCIL FIRE

no small part to large Native turnout, the South Dakota legislature passed a measure making its voter ID law more burdensome. During debate, one legislator who supported the bill remarked, “I’m not sure we want that sort of person in the polling place.”<sup>194</sup> South Dakota Representative Tom Van Norman stated that, in his opinion, “the legislature was retaliating because the Indian vote was a big factor in . . . a close senatorial race.”<sup>195</sup> Native Americans have also been accused of, and investigated by states for, voter fraud following large Native turnouts and the election of Native-preferred candidates.<sup>196</sup>

#### D. A Federal Legislative Solution

##### 1. Congress’s Authority to Pass Native Voting Rights Legislation

Congress is the appropriate body to pass Native voting rights legislation. While the federal government’s track record of supporting tribes and Native rights leaves much to be desired,<sup>197</sup> since the 1970s, its Native American policy has been one of promoting tribal self-determination and Native rights.<sup>198</sup> Opponents of Native voting rights legislation may question Congress’ authority to enact sweeping protections. Federal regulation that targets state election laws can raise federalism concerns because states, by tradition and Constitutional authority, have historically been the primary regulators of voting and elections.<sup>199</sup> This is particularly true when federal regulations target state and local elections, raising further state

(Nov. 7, 2012), <http://council-fire.org/?p=305> [<https://perma.cc/Z5A9-CSMQ>]; Acee Agoyo, *Native Vote Once Again Propels Jon Tester to Victory in Close Senate Race*, INDIANZ (Nov. 7, 2018), <https://www.indianz.com/News/2018/11/07/native-vote-once-again-propels-jon-teste.asp> [<https://perma.cc/2YAH-E8HA>].

194. *Shirt*, 336 F. Supp. 2d at 1026 (quoting Rep. Stanford Addelstein).

195. VOTING RIGHTS IN INDIAN COUNTRY, *supra* note 23, at 48.

196. *See id.* at 48–51.

197. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1615 (2016) (“Indian Country suffers from gross neglect, characterized by a long history of federal law that attempted to make Indians literally and conceptually invisible, through policies of failed assimilation and geographic confinement.”).

198. *See, e.g.*, President’s Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970), [http://www.ncai.org/attachments/Consultation\\_IJaOfGZqLYSuxpPUqoSS-WIaNTkEJEPXxKLzLcaOikifwWhGOLSA\\_12%20Nixon%20Self%20Determination%20Policy.pdf](http://www.ncai.org/attachments/Consultation_IJaOfGZqLYSuxpPUqoSS-WIaNTkEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf) [<https://perma.cc/GV8G-LJ3V>] (“Self-determination among the Indian people can and must be encouraged . . . The recommendations of this administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems.”); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. IND. L. REV. 21, 34 (2000) (noting that since at least the 1970s, “Congress has embarked on a path of promoting and encouraging economic development and self-sufficiency.”).

199. *See, e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 5 (2010); *see also* U.S. CONST. art. I, § 4, cl. 1. The Court has raised, but not addressed, questions about the constitutionality of other VRA provisions. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205–06 (2009) (suggesting that Section 5 is unconstitutional, but finding an alternative rationale for the holding).

sovereignty and Tenth Amendment issues.<sup>200</sup> However, Congress—under the Elections Clause and the Fifteenth Amendment, as well as by its plenary power over Indian Affairs—arguably has the authority to pass much-needed legislation addressing equal access to the ballot for Native Americans in federal, state, and local elections.

Congress clearly has authority to regulate federal elections under the Elections Clause of Article I, through which Congress may “at any time by Law make or alter” state regulations governing the “Times, Places, and Manner of holding Elections for Senators and Representatives.”<sup>201</sup> In practice, the Court has interpreted this to be a robust power. In *Smiley v. Holm*, the Court stated that the Elections Clause granted Congress the authority “to provide a complete code for congressional elections.”<sup>202</sup> In *Arizona v. Inter Tribal Council*, the Court affirmed Congress’ “broad” and “comprehensive” authority under the Elections Clause.<sup>203</sup> In that case, the Court held that the National Voter Registration Act preempted Arizona Proposition 200, which required individuals to provide documented evidence of citizenship in order to register to vote.<sup>204</sup> More specifically, the Act’s requirement that states accept a uniform, federal form for federal election voter registration preempted Proposition 200’s requirement that county officials reject would-be voters who used the federal form but failed to additionally provide proof of citizenship.<sup>205</sup> These cases illustrate the “unusually far-reaching authority to enact election law” that Congress derives from the Election Clause.<sup>206</sup>

Congress’ power to regulate state and local elections, however, would likely have to derive from some other source. Congress’ enforcement powers under the Fifteenth Amendment, in conjunction with its plenary power over Indian affairs, could provide such a source. The Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude.”<sup>207</sup> Under the Fifteenth Amendment’s Enforcement Clause, Congress has the power to enact “appropriate legislation” to enforce the Fifteenth Amendment, including legislation that regulates state and local elections.<sup>208</sup> The Court has described the text of the Fifteenth Amendment as “explicit and comprehensive.”<sup>209</sup> Moreover, the

---

200. See, e.g., Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1252–53 (2012).

201. U.S. CONST. art. I, § 4, cl. 1.

202. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

203. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

204. *Id.* at 19.

205. *Id.* at 8–10 (stating that Congress’ power under the Elections Clause “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)).

206. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 776 (2016).

207. U.S. CONST. amend. XV, § 1.

208. *Id.* § 2.

209. *Rice v. Cayetano*, 528 U.S. 495, 495 (2000).

Court has stated that “congressional remedial and prophylactic power [under the Fourteenth and Fifteenth Amendments] is at its strongest when Congress acts to remedy or prevent the kinds of practices that the court has subjected to heightened judicial scrutiny,”<sup>210</sup> such as the fundamental right to vote.<sup>211</sup> The VRA, for example, was enacted pursuant to Congress’ Fifteenth Amendment Enforcement power.<sup>212</sup> *Shelby County* provides insight into the limits of Congress’ authority under this power. As discussed above, the Court invalidated Section 4’s coverage formula on the grounds that it was outdated. The Court appears to have stopped short of applying *City of Boerne*’s “congruence and proportionality” requirement that Congress must abide by to exercise its remedial powers under the Fourteenth Amendment<sup>213</sup> in invalidating the coverage formula under the Fifteenth Amendment.<sup>214</sup> Nonetheless, the Court has been unequivocal that Congress must attempt to tailor the legislative solution to the identified problem.

In addition to its broad enforcement powers, Congress also has exclusive and plenary power over Indian affairs. The Supreme Court recently described the plenary power doctrine as follows: “[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”<sup>215</sup> While Congress is generally constrained in its ability to legislate by the enumerated categories of Article I, the plenary power doctrine removes this limitation, granting Congress sweeping powers to legislate over tribes. Indeed, under this doctrine, Congress has the authority to regulate nearly every aspect of tribes, including the nation’s relationship to them. Thus, this doctrine makes Congress a “sort of super-legislature” over tribes.<sup>216</sup> Congress’s plenary power is not only expansive, but also exclusive. The regulation of tribes and their members is not the proper object of state law.<sup>217</sup> So long as Native voting rights legislation is “‘tied rationally to the fulfillment of

---

210. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 13 (2007).

211. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing the right to vote as a “fundamental political right”); see also *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

212. *Securing Indian Voting Rights*, *supra* note 18, at 1751.

213. *City of Boerne v. Flores*, 521 U.S. 507, 516, 520, 530 (1997).

214. The Court does not mention congruence and proportionality. Instead, Chief Justice Roberts determined that Section 4’s formula violated the principle of “equal sovereignty,” a doctrine discussed in an earlier case in which the Court determined that the VRA’s “burdens must be justified by current needs.” *Shelby County*, 570 U.S. at 536 (citing *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203). However, the lack of clarity in *Shelby County*’s reasoning has left the door open for the Court to later assert that legislation enacted under the Fifteenth Amendment’s enforcement powers must meet *City of Boerne*’s congruence and proportionality requirement. See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 388 (2014).

215. *United States v. Lara*, 541 U.S. 193, 200 (2004).

216. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 671 (2013) (citing *Lara*, 541 U.S. at 203–04).

217. See, e.g., WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 2 (3d ed. 1998) (“[T]he independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes.”).

Congress' unique obligation toward [Native Americans],"<sup>218</sup> legislation seeking to equalize access to the ballot for Native Americans falls squarely within this grant of congressional power. In this sense, federal authority to protect Native voting rights may rest on an even stronger constitutional foundation than general voting rights legislation.

It is clear that Congress has a legal responsibility to combat Native voter suppression. The United States has a long-established trust responsibility with tribal nations. The trust responsibility, a cornerstone of federal Indian law, created a fiduciary relationship on behalf of the United States toward tribes and their members.<sup>219</sup> The core of this broad doctrine requires the United States to recognize the sovereign status of tribes, uphold treaty agreements, and protect the rights of tribal members.<sup>220</sup> The special obligations created by the trust responsibility include ensuring that states do not inhibit Native Americans' civil rights—an obligation “that is separate and distinct from, and heightened when compared to, the federal government's general obligations under the Constitution and its amendments.”<sup>221</sup> Thus, the trust responsibility, in addition to Congress's enforcement power obligations and authority under the Elections Clause, suggests that Congress has not only the power but also the responsibility to enact legislation to combat Native voter suppression.<sup>222</sup>

## 2. *Obstacles to Enacting Native Voting Rights Legislation*

Voting rights activists face legal challenges to enacting federal legislation. In addition to questions discussed in the previous section in respect to Congress' authority to regulate elections, federal voting rights legislation can also raise unfunded mandate concerns.<sup>223</sup> This issue can easily be alleviated by including appropriations provisions.

---

218. Wolfley, *supra* note 36, at 290 (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

219. FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 5.04[3][a] (2012).

220. Wilkins, *supra* note 18, at 524–25. *See also* AMERICAN INDIAN POLICY REVIEW COMMISSION: FINAL REPORT 130 (May 17, 1977), <https://archive.org/stream/finalreport01unit#page/130/mode/2up> [<https://perma.cc/P3TT-4EAU>] (“For [Native people] . . . the trust relationship has meant the guarantee of the U[nited] S[tates] that solemn promises of Federal protection for lands and people would be kept.”); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (finding that the trust responsibility imposes on the federal government the “moral obligations of the highest responsibility and trust”).

221. Ryan D. Dreveskracht, *Enfranchising Native Americans After Shelby County v. Holder: Congress's Duty to Act*, 70 NAT'L LAW. GUILD REV. 193, 212–13 (2013) (citing cases).

222. *See, e.g.*, Wolfley, *supra* note 36 at 290–91 (suggesting that the trust responsibility justifies federal legislative action to ensure Native citizens equal access to the ballot); Dreveskracht, *supra* note 221, at 214. At least one court has found that the federal government's trust responsibility obligates it to protect tribal members' right to vote and to take action when that right is infringed on by the states. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 372, 379 (1st Cir. 1975) (finding that the federal government's trust responsibility obligates it to “investigate and take such action as may be warranted” where certain rights of tribal members, including the right to vote, are infringed on by the states.).

223. *See, e.g.*, Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50

Native Americans also face political challenges to securing voting rights legislation. Voting rights legislation in general has a tendency to ignite partisan rivalry. Republicans are less likely than Democrats to believe that equal access to the ballot is an issue that needs to be addressed.<sup>224</sup> Additionally, voting rights legislation is typically viewed as having partisan effects.<sup>225</sup> In this case, that belief might be well-founded: Native Americans tend to vote Democrat.<sup>226</sup>

These challenges are compounded by the rapid pace with which certain issues garner attention and positions of power shift in national politics. In the wake of *Shelby County*, Congress was motivated to take up voting rights: it held hearings for the purpose of updating the preclearance formula and introduced the bipartisan Voting Rights Amendment Act of 2015, which garnered 41 co-sponsors. That same year, DOJ recommended enacting a Native-specific voting rights bill called the Tribal Equal Access to Voting Act (“TEAVA”), and provided model language that had been approved by the Office of Budget and Management.<sup>227</sup> Additionally, Senator Jon Tester introduced the Native American Voting Rights Act of 2015 (“NAVRA 2015”) which was, like DOJ’s proposal, Native-specific but provided more comprehensive relief.<sup>228</sup> However, despite Congress’ demonstrated interest in voting rights and the Executive’s support for Native-specific voting rights issues—and even though the House and Senate were presented with a bill that would adequately address these issues—Congress failed to pass Native voting rights legislation.

---

VAND. L. REV. 1137, 1139 (1997) (“[Unfunded mandates] refer[] to obligations imposed on states and localities by the federal government without federal funding.”).

224. Mike Lillis, *Republicans Slam Brakes on Voting Rights Bill*, THE HILL (Aug. 1, 2015), <https://thehill.com/homenews/house/249959-republicans-slam-brakes-on-voting-rights-bill> [<https://perma.cc/B4DY-34MY>] (noting that the Chair of the House Judiciary committee killed a voting rights bill that had bipartisan support because he did not believe it was necessary to prevent discriminatory laws and practices from preventing people from accessing the ballot). Speaker Ryan said that he disagreed, but still refused to call the bill to the floor for a vote. *Id.* See also William Douglas & Emma Dumain, *House Democrats Seek Voting Rights Fixes. Senate GOP Says It’s Already Dead*, MCCLATCHY (Dec. 6, 2018), <https://www.mcclatchydc.com/news/politics-government/congress/article222729680.html> [<https://perma.cc/XE6H-KYMG>].

225. See, e.g., Ed Kilgore, *House Democrats Pass Landmark Voting Rights Bill on a Party-Line Vote*, N.Y. MAG. (Mar. 8, 2019), <http://nymag.com/intelligencer/2019/03/voting-rights-bill-passes-house-on-pure-party-line-vote.html> [<https://perma.cc/6ZP3-PNE8>].

226. See, e.g., Jeonghun Min & Daniel Savage, *Why Do American Indians Vote Democratic?*, 51 SOC. SCI. J. 167, 175 (2014) (finding that Native American voters in eastern Oklahoma were slower to abandon the Democratic Party than their white counterparts).

227. Letter from Peter J. Kadzik, Assistant Att’y Gen., to Vice President Joe Biden, *supra* note 169. TEAVA required states to provide polling places and voting materials for federal elections to any tribe that filed a formal request.

228. Native American Voting Rights Act of 2015, S. 1912, 114th Cong. (2015). NAVRA incorporated TEAVA’s provisions, and additionally required (1) that states with early voting provide at least one early voting location on reservation land upon the request of a tribe for such a location; (2) the provision of federal election observers upon tribal request; (3) that states with voter ID laws accept forms of tribal identification; (4) the provision of bilingual voting assistance to voters whose native languages are historically unwritten; (5) that the Attorney General consult with tribes on Native voting issues on a yearly basis; and (6) the implementation of a limited preclearance regime. *Id.*

In the years that followed, several political barriers to Native voting rights legislation have emerged. In 2016, Donald Trump, whose public statements prior to assuming office suggested he was not a proponent of Native rights,<sup>229</sup> entered the White House. Senator Chuck Grassley, who has a record of opposing both voting rights legislation<sup>230</sup> and Native issues,<sup>231</sup> chaired the Judiciary Committee, which has jurisdiction over voting rights bills. In short, the outlook for addressing Native voter suppression by federal legislation seemed bleak. However, events that occurred in late 2018 and early 2019 suggest that the political tide might be turning once again. In November 2018, Democrats took back the House. Around the same time, Senator Tom Udall introduced the Native American Voting Rights

---

229. Nidhi Subbaraman, *Trump's Decades of Insults Against Native Americans Sends Tribal Leaders Toward Clinton*, BUZZFEED NEWS (Sept. 26, 2016), <https://www.buzzfeednews.com/article/nidhisubbaraman/native-tribes-and-trump> [<https://perma.cc/9K2S-R24V>] (chronicling statements President Trump made prior to his election that had tribal leaders “bracing” for his presidency). Since assuming office, Trump’s actions have, in general, further entrenched and justified Native voters’ distrust of his administration. See, e.g., Dan Diamond, *Trump Challenges Native Americans’ Historical Standing*, POLITICO (Apr. 22, 2018), <https://www.politico.com/story/2018/04/22/trump-native-americans-historical-standing-492794> [<https://perma.cc/LXK3-H79S>] (discussing the Trump administration’s shift in policy with respect to tribes’ sovereign status in providing healthcare benefits); Tom DiChristopher, *Trump Ignores Question about Standing Rock Sioux After Signing Dakota Access Order*, CNBC (Jan. 24, 2017), <https://www.cnbc.com/2017/01/24/trump-ignores-standing-rock-sioux-question-after-dakota-access-order.html> [<https://perma.cc/K9XG-4UKP>] (discussing President Trump’s decision to issue an executive order to move the Dakota Access Pipeline forward over the objections of the Standing Rock Sioux and other tribes whose access to water and sacred grounds would be put in jeopardy by the pipeline); Roey Hadar, *Native American Leaders Ask Trump to Apologize for ‘Shameful’ Wounded Knee Remarks*, ABC NEWS (Jan. 14, 2019), <https://abcnews.go.com/Politics/native-american-leaders-trump-apologize-shameful-wounded-knee/story?id=60374772> [<https://perma.cc/U39H-H79R>]; Tom Perez, *Trump Is Breaking the Federal Government’s Promises to Native Americans*, L.A. TIMES (Aug. 7, 2017) <https://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html> [<https://perma.cc/D44N-D5MR>] (discussing the “many areas where the Trump administration wants to break [the] government’s promises to Indian Country,” including repealing Obamacare, leaving many Native Americans uninsured, and planning to build the U.S.-Mexico border wall through one of the Tohono O’odham Nation’s sacred burial grounds); Kate Wheeling, *What Native Americans Stand to Lose if Trump Opens up Public Lands for Business*, PAC. STANDARD (Dec. 7, 2017), <https://psmag.com/environment/what-native-americans-stand-to-lose-if-trump-opens-up-public-lands-for-business> [<https://perma.cc/F9X4-6VSA>] (arguing that the Trump administration’s attempt to open up public lands such as Bears Ears to resource exploitation would threaten tribes’ connections to their heritage and ancestry); U.S. DEP’T OF JUSTICE, OFF. OF VIOLENCE AGAINST WOMEN, 2017 TRIBAL CONSULTATION REPORT 29 (2017) (noting that while the Trump administration has stated that it is “committed to tribal nations,” its “actions in the past year suggest otherwise.”).

230. See Jennifer Bendery, *Sen. Grassley: No Need to Fix Voting Rights Act Since ‘More Minorities Are Already Voting’*, HUFFINGTON POST (Apr. 27, 2015), [https://www.huffingtonpost.com/2015/04/27/chuck-grassley-voting-rights-act\\_n\\_7153710.html](https://www.huffingtonpost.com/2015/04/27/chuck-grassley-voting-rights-act_n_7153710.html) [<https://perma.cc/DF9L-XGCU>].

231. See, e.g., Scott Keyes, *Top GOP Senator: Native American Juries Are Incapable of Trying White People Fairly*, THINKPROGRESS (Feb. 21, 2013), <https://thinkprogress.org/top-gop-senator-native-american-juries-are-incapable-of-trying-white-people-fairly-c399c20454cd/> [<https://perma.cc/4LH8-XT4N>].

Act of 2018 (“NAVRA 2018”).<sup>232</sup> In March 2019, Senator Udall and Representative Ben Ray Lujan jointly reintroduced that bill, in the Senate and the House respectively, as the Native American Voting Rights Act of 2019 (“NAVRA 2019”).<sup>233</sup>

It is important to note that while these developments certainly suggest that there is momentum to address Native voting rights issues, many hurdles persist, largely along partisan lines. Republicans—still in control of the Senate and the White House—have historically been and largely remain unreceptive to addressing Native voter suppression: Senator Udall’s bill received no Republican co-sponsors, and of the 85 legislators who co-sponsored Representative Lujan’s bill, only one was a Republican.<sup>234</sup>

### 3. *Substance of a Federal Legislative Solution*

Any federal legislative proposal that seeks to equalize access to the ballot for Native Americans must address both the current disenfranchisement tactics states use against minority communities, such as vote dilution and voter identification laws, and those barriers that are unique to Native communities and Native individuals. In addition, a legislative proposal should regulate federal, state, and local elections. However, due to the concerns addressed in Section V, federal legislation seeking to regulate state and local elections will rest on shakier constitutional grounds.

One of the greatest challenges Native Americans face in voting is distant polling locations. One 2017 survey by the Native American Voting Rights Coalition reported that nearly one-third of Native voters in South Dakota stated that the distance they would have to travel to cast a ballot affected their decision to vote.<sup>235</sup>

---

232. Native American Voting Rights Act of 2018, S. 3543, 115th Cong. (2018).

233. Native American Voting Rights Act of 2019, S. 739, 116th Cong. (2019); H. 1694, 116th Cong. (2019). Senator Udall’s bill (1) provides mechanisms to expand opportunities for voter registration in Indian Country; (2) provides a mechanism through which a tribe can request physical polling locations in each voting precinct in Indian Country where there are eligible voters for federal elections; (3) expands opportunities for mail-in voting; (4) clarifies what language assistance is required for voting under existing federal law; (5) provides a mechanism to expand opportunities for early voting and bolsters those protections; (6) establishes a limited preclearance regime under which state actions that have historically suppressed the Native vote must be pre-approved prior to implementation; (7) requires that forms of identification issued by federally recognized tribes and federal agencies be acceptable forms of voter identification in states that require identification to vote in federal elections, even where those identification cards do not have residential addresses; (8) allows tribes to request federal election observers; and (9) provides for the creation and funding of task forces throughout the United States to address barriers to voting that are specific to certain communities. *Id.*

234. See H.R. 1694, *supra* note 233 (Representative Tom Cole is a Republican from Oklahoma).

235. THE NATIVE AMERICAN VOTING RIGHTS COALITION, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA, AND SOUTH DAKOTA 7 (2018), available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf> [<https://perma.cc/ZBH4-6FMY>].



Perhaps because placing polling locations on tribal land is less politically contentious<sup>236</sup> than other voting rights measures, all previously discussed Native voting bills provide a mechanism for doing so. TEAVA, NAVRA 2015, and NAVRA 2019 all call for increased access to polling locations on reservation lands, enabling tribes to request that polling locations be placed and remain open on tribal land.<sup>237</sup> In a similar vein, any legislative solution should provide a mechanism by which a tribe can locate a registration office within its community. This will alleviate issues involved with traveling to distant registration offices and interacting with sometimes hostile registration officers, as well as problems with mail-in registration and language barriers.

Federal legislation can also easily provide language assistance to help Native American voters. Federal law already requires language services to be provided; by appropriating additional funds for laws such as VRA Section 203, Congress can enhance compliance with these provisions. Such funds can be used to provide a wider variety of language services at voter registration sites and polling locations. The funding could also be used to better train and educate poll workers about what types of services voters are entitled to receive under federal law.

As highlighted previously, other obstacles Native voters face include vote dilution, voter identification laws, voter intimidation and harassment, and the proliferation of misinformation.<sup>238</sup> To combat Native vote dilution and election laws that disproportionately impact Native communities either by design or by circumstance, such as voter identification laws, Congress could enact a limited preclearance regime that applies to states and localities that overlap with Indian Country. This preclearance regime could resemble VRA preclearance, requiring states or political subdivisions home to tribal communities to submit election-related changes in law or regulations to the federal government for pre-approval. Such a preclearance regime would likely encounter conservative political pushback and be criticized as outside Congress' Fifteenth Amendment enforcement power. To

---

236. Recent court victories have required states to place satellite polling locations on tribal lands, suggesting that it would be harder for Republicans to oppose this measure. *See Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 977 (D. Nev. 2016) (granting a preliminary injunction requiring Nevada's Secretary of State to open registration sites and polling locations on reservations for two tribes); *Bear v. County of Jackson*, 5:14-CV-05059-KES, 2017 WL 52575 at \*1 (D.S.D. 2017) (discussing settlement agreement between South Dakota and Oglala Sioux Tribe that requires the state to provide a satellite office for registration and voting on the Pine Ridge Indian Reservation).

237. *See, e.g.*, Letter from Peter J. Kadzik, Assistant Att'y Gen., to Vice President Joe Biden, *supra* note 169; Native American Voting Rights Act of 2015, *supra* note 228; Native American Voting Rights Act of 2019, *supra* note 233.

238. Many of the suggestions that follow are similar to or overlap with recently proposed Native voting rights legislation. *See* Letter from Peter J. Kadzik, Assistant Att'y Gen., to Vice President Joe Biden, *supra* note 169 (providing draft language for a bill that would allow tribes to request that polling places be located on tribal land in federal elections); Native American Voting Rights Act of 2015, *supra* note 228 (providing comprehensive reforms for, apparently, local, state, and federal elections); Native American Voting Rights Act of 2019, *supra* note 233 (providing a variety of reforms tailored to address the major hurdles Native Americans face in attaining equal access to the ballot for federal elections).

avoid the *Shelby County* issue, the law could be tailored more narrowly to include only those states that overlap with Indian Country that have recently engaged in some action that has made it more difficult for Native people to participate in the political process, as well as allow jurisdictions to be bailed out, or removed from a preclearance regime's purview, for good behavior.

To further protect Native voters from discriminatory voter identification laws, Congress can require states to accept tribal forms of identification for the purposes of registering and voting, even when Native voters do not have a photo ID or do not list a physical address. Congress can also mandate acceptance of forms of identification that tribal members might be more likely to have, such as a certificate of Indian blood. Of course, a federal legislative proposal overriding state voter identification requirements would, like a proposed preclearance regime, almost certainly draw conservative political pushback. To prevent poll workers or others from giving Native voters incorrect information, or from harassing or intimidating Native voters, Congress can require that federal election observers be dispatched upon request to polling locations where tribes have reported instances of harassment, intimidation, or voter misinformation targeted at Native Americans. These federal observers could also ensure that states and localities are complying with VRA Section 203, as well as other federal election laws.

## VI. CONCLUSION

From the time Native Americans were granted U.S. citizenship, states have made it difficult for them to fully participate in the political process. State tactics have included requiring identification to vote and register, situating polling locations far from tribal land, skirting the VRA's language assistance requirements, gerrymandering or otherwise seeking to dilute the voting power of Native communities, and misinforming or intimidating Native voters. These tactics augment structural barriers Native Americans face to being full participants in the political system. The VRA has been Native Americans' key tool for combatting voter suppression. However, the decision in *Shelby County* and other doctrinal developments in VRA jurisprudence have made that legislation a less potent protector of voting rights. Litigation—another tool deployed by Native communities—has varied pitfalls as well: it is costly, time-consuming, and does not always provide lasting solutions.

To equalize access to the ballot, Native Americans need enduring solutions to these issues: a legislative fix. Because states have historically been the primary perpetrators of Native voter suppression and continue to exhibit animosity toward tribes and tribal members, they cannot be trusted to enact and enforce Native voting rights legislation. Congress, which has both the authority and the responsibility to protect Native rights, has the power to pass legislation that regulates elections. It must leverage these powers and act now to address the grievous civil rights violations preventing fair representation for Native communities.