

THE SMALL BUT POWERFUL VOICE IN AMERICAN ELECTIONS:
A DISCUSSION OF VOTING RIGHTS LITIGATION ON BEHALF OF
AMERICAN INDIANS*

Jennifer L. Robinson** and Stephen L. Nelson***

I.	Introduction.....	92
II.	Background and History of Voting Rights for American Indians.....	96
	A. The Status of American Indians in the U.S. Constitution...	96
	B. The Marshall Trilogy	97
	C. The Civil Rights Act of 1866 and the Fourteenth Amendment to the U.S. Constitution	99
	D. Indian Citizenship and the Indian Citizenship Act of 1924.....	101
	1. Residency.....	103
	2. Self-Termination.....	104
	3. Guardianship.....	106
	4. Taxation	106
	5. Literacy	107
	E. The Voting Rights Act of 1965	107
	1. The VRA as Originally Enacted	108
	2. VRA Renewals and Amendments	110
	3. <i>Shelby County v. Holder</i> and the VRA	113
	4. The VRA and American Indians.....	114
III.	Voting Rights Cases on behalf of American Indians.....	116
	A. Litigation by Geography and Political Subdivision	132

*The authors would like to thank Alaina Mothershead, a University of Utah undergraduate student and intern for the University of Utah's Kem C. Gardner Policy Institute, for her superb research assistance and contributions to this article.

**Associate Director, Kem C. Gardner Policy Institute, University of Utah.

***Assistant United States Attorney, United States Attorney's Office for the District of Utah, and Associate Instructor, Department of Political Science, University of Utah. The data and conclusions presented in this article are the authors' own and do not necessarily represent the position of the Department of Justice or the University of Utah.

B.	Principal Counsel in American Indian Voting Rights Litigation	136
C.	American Indian Voting Rights Cases by Type.....	137
IV.	Implications of Voting Rights Litigation.....	145
A.	Continued Discrimination	145
B.	Success Following Litigation.....	146
V.	Conclusion	148

I. INTRODUCTION

Throughout the history of the United States, American Indians have “routinely face[d] hurdles in exercising the right to vote and securing representation.”¹ The barriers faced by Indians seeking to vote frequently “resemble the ones confronted by blacks in the South and Latinos in the Southwest.”² However, because of Indians’ “distinctive status within the American political order[,]”³ including the fact that Indians were not generally granted American citizenship until 1924,⁴ Indians “encountered a variety of additional and unique [voting-related] obstacles placed before them by state officials.”⁵ Sadly, in part because of their unique, “extra-constitutional political status”⁶ within the American legal system,⁷ and in part because of overt disenfranchisement efforts on behalf of state and local authorities,⁸ “full enfranchisement [came] late to the descendants of America’s first inhabitants.”⁹

¹*Developments in the Law — Indian Law: Chapter Four: Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1732 (2016) [hereinafter *Developments in the Law — Indian Law*].

²Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1422 (2011) (reviewing LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2010)).

³*Id.* at 1423.

⁴*See* Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

⁵Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 273 (2004) (citing David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL’Y 732, 737 (2000)).

⁶*Id.* at 272–73.

⁷*See* discussion *infra* at Section II.A.

⁸*See* discussion *infra* at Section II.B.

⁹Karlan, *supra* note 2, at 1422 (citing McDONALD, *supra* note 2, at 45). Karlan also notes that, “[i]f anything, South Carolina seems further along the path to political equality than South Dakota.”

The Voting Rights Act was “designed by Congress to banish the blight of racial discrimination in voting”¹⁰ as a “comprehensive statute to battle voter discrimination collectively at a national level and at an individual jurisdiction level.”¹¹ With the passage of the VRA, the “federal government has enjoyed substantial authority in regulating elections, particularly when issues of race are implicated,”¹² and Justice Ginsburg described the VRA as “one of the most consequential, efficacious and amply justified exercises of the federal legislative power in our Nation’s history.”¹³ Because of the VRA, as noted by the Supreme Court in *Northwest Austin Municipal Utility District No. One v. Holder*, “we are now a very different Nation.”¹⁴

Indians’ enfranchisement efforts undoubtedly benefitted from the passage of the VRA in 1965;¹⁵ however, “Indian and Alaska Native voters have been underrepresented, and still today, basic voter access issues pose serious obstacles in Indian country.”¹⁶ A number of issues conspire to make it

Id. at 1423. In addition to overt disenfranchisement efforts, past discrimination and low socio-economic status also contribute to decreased political participation on behalf of American Indians. *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5*, 804 F.2d 469, 474–75 (8th Cir. 1986) (“Low political participation is one of the effects of past discrimination.”); *Stabler v. Cty. of Thurston*, 129 F.3d 1015, 1023 (8th Cir. 1997) (“[D]isparate socio-economic status is causally connected to Native Americans’ depressed level of political participation.”); *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000) (stating that lower social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process); *Windy Boy v. Cty. of Big Horn*, 647 F. Supp. 1002, 1017 (D. Mont. 1986) (“Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors . . . but the lingering effect of past discrimination is certainly one of those factors.”).

¹⁰*South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

¹¹L. Darnell Weeden, *The Supreme Court’s Rejection of the Rational Basis Standard in Shelby County v. Holder Invites Voter Suppression*, 33 MISS. C.L. REV. 219, 220 (2014) (citing Sudeep Paul, *The Voting Rights Act’s Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 271, 273 (2013)).

¹²Joshua S. Sellers, *Shelby County as a Sanction for States’ Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 367 (2015) (citing Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 485 (2014)).

¹³*Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting).

¹⁴557 U.S. 193, 211 (2009).

¹⁵See DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE* 176–90 (2007) (describing the impacts of the VRA for American Indians—this includes access to ballot, ability to elect minority candidates, and having better representation that leads to different policy outcomes that benefit American Indians).

¹⁶Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 270 (2015) [hereinafter Wolfley, *You Gotta Fight*].

difficult for many Indians to vote. These issues include geographical constraints and the rural nature of Indian Country,¹⁷ written and spoken language barriers and difficulties,¹⁸ and restrictive local voting ordinances enacted by local governments.¹⁹

While the Indian voting voice is undoubtedly small on a national scale, “Indians make up a significant voting bloc and have proven that their votes can determine the fate of national races.”²⁰ For example, in 2002, Tim Johnson (D-SD) was re-elected in large part due to increased turnout by Indian voters.²¹ American Indian voters also exert significant influence in

¹⁷“Indian country” includes (1) federal reservations, whether created by statute or Executive Order; (2) dependent Indian communities; and (3) Indian allotments to which title has not been extinguished. 18 U.S.C. § 1151 (2012); *see also* U.S. DEP’T OF JUSTICE, OFFICE OF THE U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL 677 (2001), <https://www.justice.gov/usam/criminal-resource-manual-677-indian-country-defined>. Naomi White, a Navajo Tribe member living outside Window Rock, Arizona, resides in an area so rural that the U.S. Postal Service does not deliver mail to her home. Aura Bogado, *Democracy in ‘Suspense’: Why Arizona’s Native Voters Are in Peril*, THE NATION (Oct. 18, 2012), <http://www.thenation.com/article/democracy-suspense-why-arizonas-native-voters-are-peril> [<http://perma.cc/P2F8-NU89>]. White was kept from voting in at least two elections in 2012 when the Apache County Recorder deemed the physical address White listed on her voter-registration form “too obscure” and did not assign White to a voting precinct. *Id.* The county considered White to be an inactive voter and would not allow her to vote by absentee ballot. *Id.*

¹⁸*Developments in the Law — Indian Law*, *supra* note 1, at 1731. Agnes Laughter, who is Navajo and lives in Chilchinbeto, a community in the Navajo Nation northeast of Flagstaff, Arizona, speaks only Navajo, does not read or write, and does not possess an original birth certificate. *See* Bogado, *Democracy in Suspense*, *supra* note 17. Laughter was unable to vote in the 2006 elections after Arizona passed a law requiring voters to provide certain forms of identification prior to voting. *See id.*

¹⁹*See Developments in the Law — Indian Law*, *supra* note 1, at 1731. Thomas Poor Bear, a member of the Oglala Sioux Tribe who resides in the community of Wanblee, in the Pine Ridge Reservation in Jackson County, South Dakota, was at one point required to vote in the county seat, Kadoka, a sixty-mile round-trip journey from Wanblee. *See* Complaint at 3–4, 7, Poor Bear v. Cty. of Jackson, No. 14-5059, 2014 WL 4702282 (D.S.D. Sept. 18, 2014). Jackson County officials initially refused Poor Bear’s request to establish a satellite elections office in Wanblee. *See id.* at 6, 8, 12–13. Poor Bear and other Oglala Sioux members filed suit against the county, and the county eventually relented and established a satellite elections office in Wanblee. *See Developments in the Law — Indian Law*, *supra* note 1, at 1731.

²⁰Jackson, *supra* note 5, at 270.

²¹*Id.* (citing MICHAEL BARONE, GRANT UJIFUSA & DOUGLAS MATTHEWS, THE ALMANAC OF AMERICAN POLITICS 1468 (2004) (“This election [referring to the Johnson/Thune 2002 U.S. Senate race] turned out to be the closest in the nation. During most of election night and into the morning Thune led in the counting. Then the last two precincts came in, from Shannon County, which includes most of the Pine Ridge Indian Reservation. Those two precincts put Johnson over the top,

local elections, and, once Indians are elected, they are able to become influential players in the political process and affect policies that benefit Indians in their communities, who without their representation had been previously neglected.²² American Indians thus represent a small but powerful voice within the American electorate.

The purpose of this article is to further existing knowledge of Indian voting rights cases litigated pursuant to the VRA and other voting rights legislation. Although the history of discrimination against Indian voters is well-documented in state and federal case law²³ and Congressional hearings,²⁴ the “vulnerability of the Indian franchise . . . [is an] oft-overlooked corner of the voting rights world” as contained in public law scholarship.²⁵ The purpose of this article is to fill this gap in knowledge by

by a margin of 524 votes—in percentage terms, 50.1%-49.9%. In Shannon County, 3,118 votes were cast, as compared to 1,953 in the 2000 presidential election. The county voted 92%-8% for Johnson. In the six main reservation counties, turnout was 11, 275, up from 7,500 in 2000. These six counties voted 78%-21% for Johnson. In 43 of the other 60 counties, Johnson’s percentage declined from 1996, when he won 51% statewide.”).

²² See MCCOOL ET AL., *supra* note 15, at 175 (noting “[t]he changes due to the [Voting Rights Act] have been profound for American Indians. The implementation of bilingual election programs has directly increased voter registration and turnout amount American Indians . . . The role of Section 2 has been equally important in altering the political landscape in Indian Country . . . The election of Indian candidates has led to positive impacts on services, Indians’ access to government, and Indians’ perception of government.”).

²³ See Wolfley, *You Gotta Fight*, *supra* note 16, at 278 (citing *Buckanaga v. Sisseton Indep. Sch. Dist.*, No. 54-5, 804 F.2d 469 (8th Cir. 1986) (challenge to at-large election system in a South Dakota school district by Sisseton-Wahpeton Tribal members); *Sanchez v. King*, 550 F. Supp. 13 (D.N.M. 1982), *aff’d*, 103 S. Ct. 32 (1982) (challenge involving Navajo voters’ action against New Mexico reapportionment plan); *Windy Boy v. Cty. of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986) (challenge to at-large elections in Montana by Crow and Northern Cheyenne Tribal members); *Ratcliff v. Mun. of Anchorage*, No. A86-036 (D. Alaska 1989) (involving Alaskan Natives’ challenge to Anchorage City reapportionment plan); *Love v. Bd. of Educ.*, No. 87-105-CIV-3 (D.N.C. 1987) (successful challenge on behalf of Lumbee Indians to multi-member districting in North Carolina); *Blackmoon v. Charles Mix Cty.*, 386 F. Supp. 2d 1108 (D.S.D. 2005) (VRA and Fourteenth Amendment challenge to county commission districts dividing townships populated by Indian voters)).

²⁴ See *id.* at 278 (citing *Continued Need for Voting Rights Act: Hearing Before the Subcomm. on Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2019 (2006); *Continuing Need for Section 203’s Provision for Limited English Proficient Voters: Hearing Before the Subcomm. on the Judiciary*, 109th Cong. (2006); *Voting Rights Act: Section 203-Bilingual Election Requirements (Part I & II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005)).

²⁵ *Developments in the Law — Indian Law*, *supra* note 1, at 1754. For a general discussion of Indian voting rights in public law scholarship, see Jackson, *supra* note 5, at 273–74. See also

collecting, analyzing, and presenting voting rights cases litigated on behalf of American Indians in a systematic, empirical, and value-neutral manner. Part II of this article details the history of American Indian voting rights, beginning with the status of Indians within the U.S. Constitution and concluding with a discussion of recent Supreme Court decisions interpreting the VRA. Part III of this article presents and describes the ninety voting rights cases brought on behalf of Indian voters since 1965 and other observations about litigation on behalf of Indian voting rights in the post-VRA era. Part IV of this article discusses the significance of these cases and places these cases into context following the Supreme Court's recent decision in *Shelby County v. Holder*.

II. BACKGROUND AND HISTORY OF VOTING RIGHTS FOR AMERICAN INDIANS

The history of voting rights for American Indians is “unique and complex” and “mirrors their long, cyclic relationship with the federal government.”²⁶ The data described in Section III of this article represent the state of this “long, cyclic” relationship today. In order to place the discussion of this data into historical context, this section describes: (1) the status of American Indians in the U.S. Constitution; (2) the Marshall Trilogy, a trio of cases decided by the U.S. Supreme Court; (3) the Civil Rights Act of 1866 and the Fourteenth Amendment to the U.S. Constitution; (4) the Indian Citizenship Act of 1924; (5) the Voting Rights Act of 1965; and (6) several recent U.S. Supreme Court decisions impacting American Indians' voting rights, including *Shelby County v. Holder*.

A. *The Status of American Indians in the U.S. Constitution*

As originally enacted, prior to the ratification of the Fourteenth Amendment, the Constitution only generally referenced the concept of

Laughlin McDonald et al., *Voting Rights in South Dakota: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 195, 195–99 (2007) [hereinafter *Voting in South Dakota*]; Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004) [hereinafter *Voting Rights Act, A Case Study*]; Daniel McCool, *Indian Voting*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105–30 (Vine Deloria, Jr. ed., 1985); MCDONALD, *supra* note 2, at 23–29 (2010).

²⁶Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 167 (1991).

citizenship, and only referred to “Citizen[s] of the United States”²⁷ and “Citizens of each State.”²⁸ The Framers specifically struggled with the role and exact legal status of American Indians.²⁹ Only two articles of the U.S. Constitution mention American Indians, but “neither clarifies their relationship with the federal government.”³⁰ Article 1, Section 2 excludes Native Americans for purposes of congressional district appointment.³¹ Article 1, Section 8 assigns Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”³² These ambiguous references were “understood neither to expressly confer U.S. citizenship on Indians nor to expressly prohibit extending citizenship to Indians.”³³

B. The Marshall Trilogy

In the early 1800s, the Supreme Court issued three opinions which helped better-define the relationship between American Indians and the United States government. These opinions, referred to as the Marshall Trilogy, established Indian tribes “as distinct, independent communities”³⁴ and serve as “the foundation of jurisdictional law excluding the states from power over Indian affairs.”³⁵ The trilogy, in other words, established the legal tradition of congressional power and authority over tribes exclusive of the States. The trilogy also illustrates the difficulty in defining the exact legal status of American Indians.

The first Marshall Trilogy case, *Johnson v. M’Intosh*,³⁶ involved the Doctrine of Discovery, or the agreement between European nations that once a European country “discover[ed]” a particular area of land, the Indians living

²⁷ U.S. CONST. art. I, § 3, cl. 3.

²⁸ *Id.* art. IV, § 2, cl. 1.

²⁹ See MCCOOL ET AL., *supra* note 15, at 1.

³⁰ Jennifer L. Robinson, *The Right to Vote: A History of Voting Rights and American Indians*, in MINORITY VOTING IN THE UNITED STATES 3, 3 (Kyle L. Kreider & Thomas J. Baldino eds., 2016).

³¹ U.S. CONST. art. I, § 2, para. 3.

³² *Id.* art. I, § 8, cl. 3.

³³ FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 156 (2009).

³⁴ Robinson, *supra* note 30, at 5.

³⁵ *Id.* (citing WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUT SHELL* 19 (6th ed. 2015)).

³⁶ 21 U.S. 543 (1823).

there could only legally transfer their land to the “discovering Nation.”³⁷ The Doctrine of Discovery served both to suppress conflict between rival European nations over the right to possess Indian lands and to constrain the rights of Indians to transfer their lands freely.³⁸ The issue in *Johnson* involved competing land transfer claims; the first claim involved the transfer of land from a tribe to a non-Indian and the second claim involved a foreign power laying claim to the same property pursuant to the Doctrine of Discovery.³⁹ The Supreme Court held that the Indians’ right of occupancy was only extinguishable by a discovering European nation.⁴⁰

The second Marshall case, *Cherokee Nation v. Georgia*,⁴¹ came before the Supreme Court after Georgia divided Cherokee territory, invalidated all Cherokee laws, and restricted the Cherokee’s attempts to act as a government.⁴² The Cherokee Nation was seeking an injunction to prevent Georgia from enforcing state laws within Cherokee Tribal territory.⁴³ The issue before the Court was whether the Cherokee Nation was a foreign nation, for purposes of being able to file suit under the Supreme Court’s original jurisdiction.⁴⁴

Before addressing the merits of the case, the Court had to determine whether it could assert original jurisdiction⁴⁵ over the case.⁴⁶ In making that determination, the Court addressed the issue of whether the Cherokee Nation was a foreign nation, for purposes of original jurisdiction:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the

³⁷Robinson, *supra* note 30, at 4 (citing VINE DELORIA JR., NATIONS WITHIN 2 (1984) (“Every legal doctrine that today separates and distinguishes American Indians from other Americans traces its conceptual roots back to the Doctrine of Discovery and the subsequent moral and legal rights and responsibilities of the United States with respect to Indians.”)).

³⁸*Id.*

³⁹See *Johnson*, 21 U.S. at 571–72.

⁴⁰*Id.* at 604–05.

⁴¹30 U.S. 1 (1831).

⁴²See CANBY, *supra* note 35, at 17.

⁴³*Cherokee Nation*, 30 U.S. at 15.

⁴⁴*Id.* at 15–16.

⁴⁵U.S. CONST. art. 3, § 2, para. 1.

⁴⁶*Cherokee Nation*, 30 U.S. at 15.

acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.⁴⁷

In ruling that the Cherokee Nation was not a foreign nation, and that it therefore lacked original jurisdiction over the case, the Court never reached the question of its power over the State of Georgia.⁴⁸

The final Marshall Trilogy case, *Worcester v. Georgia*, was heard the following term and also involved the issue of state legal jurisdiction within tribal property.⁴⁹ In *Worcester*, several Vermont residents were arrested for preaching among the Cherokee without a state license in violation of Georgia law (at the time, Georgia law required non-Indians residing on Indian Country to obtain a license issued by the state government).⁵⁰ As it did in the previous term, the *Worcester* Court determined it lacked jurisdiction and declined to reach the merits of the case.⁵¹

The Marshall Trilogy established the limits of state authority on tribal lands. The Trilogy serve as “the foundation of jurisdictional law excluding the states from power over Indian affairs.”⁵² The Trilogy also established tribes as distinct, independent communities within the boundaries of the United States and “solidified Congressional power over Indian tribes exclusive of the States.”⁵³

C. The Civil Rights Act of 1866 and the Fourteenth Amendment to the U.S. Constitution

In 1866, Congress established civil rights for freed slaves by passing the Civil Rights Act.⁵⁴ Although the Civil Rights Act provided citizenship and

⁴⁷ *Id.* at 17.

⁴⁸ *See id.* at 20.

⁴⁹ *See* 31 U.S. 515 (1832).

⁵⁰ *Id.* at 537–38.

⁵¹ *See Robinson, supra* note 30, at 5.

⁵² *Id.* (citing CANBY, *supra* note 35, at 18).

⁵³ *Id.*

⁵⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

other benefits and rights to “all persons born in the United States . . . of every race and color,” it excluded “Indians not taxed.”⁵⁵ Similarly, the Fourteenth Amendment, which was “[i]n large part . . . designed to ensure the constitutionality of the [Civil Rights] Act,”⁵⁶ further guaranteed and protected the citizenship rights of freed slaves but also excluded “Indians not taxed.”⁵⁷

The inclusion of the phrase “Indians not taxed” in both the Civil Rights Act and the Fourteenth Amendment “was part of a larger argument over the nation’s Indian policy” during the time period.⁵⁸ Specifically, Senator Doolittle’s arguments for including “Indians not taxed” in the Fourteenth Amendment was two-fold: (1) Indians were an inferior race; and (2) if

⁵⁵ *Id.* The Civil Rights Act states, in part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

⁵⁶ WILLIAM COHEN AND JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 22 (14th ed. 2013).

⁵⁷ U.S. CONST. amend. XIV, §§ 1–2. The Fourteenth Amendment reads:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Id.

⁵⁸ Robinson, *supra* note 30, at 6.

Indians obtained the right to vote, they would be the political majority in some areas of the country.⁵⁹

Years after the passage of the Civil Rights Act, the Supreme Court addressed the issue of Indian citizenship and the application of the Fourteenth Amendment to American Indians in *Elk v. Wilkins*.⁶⁰ The case involved an American Indian, John Elk, who was denied the right to vote in Nebraska despite being subject to state and federal taxation.⁶¹ The Supreme Court held that Elk, who had severed his tribal ties, did not have the right to vote because he was not a citizen.⁶² The Supreme Court's analysis focused on two avenues of citizenship: (1) birth; and (2) naturalization.⁶³

D. Indian Citizenship and the Indian Citizenship Act of 1924

Beginning in the mid-1800s, the federal government began the process of assimilating Indians into white culture, obtaining Indian lands, and abolishing tribal governments through naturalization and citizenship.⁶⁴ This process included means that were “‘basically genocide, replete with statements that all Indians should be exterminated forthwith.’”⁶⁵ During this time period, the U.S. government granted Indians citizenship through a variety of methods, “‘including treaties, allotments, military service, and special acts of Congress.’”⁶⁶

The Oklahoma Enabling Act (OEA), which created the state of Oklahoma and granted citizenship to Indians living in the territory, is an example of Indian assimilation through legislative act.⁶⁷ Indians who served in the military and were honorably discharged after World War I also had the opportunity to become citizens.⁶⁸ Between 1854 and 1924, Indians were naturalized under different treaties and statutes, including the General

⁵⁹ MCCOOL ET AL., *supra* note 15, at 3–4.

⁶⁰ 112 U.S. 94, 94 (1884).

⁶¹ *See id.* at 110–11 (Harlan, J., dissenting) (“[W]e submit that the petition does sufficiently show that the plaintiff was taxed . . .”). *But see id.* at 99 (“[T]he plaintiff . . . does not allege . . . that he has ever been . . . taxed . . .”).

⁶² *Id.* at 109.

⁶³ *Id.* at 101.

⁶⁴ Robinson, *supra* note 30, at 7.

⁶⁵ *Id.* (citing MCCOOL ET AL., *supra* note 15, at 5).

⁶⁶ *Id.* at 7.

⁶⁷ *See* MCCOOL ET AL., *supra* note 15, at 7.

⁶⁸ *Id.*

Allotment Act, also known as the Dawes Act of 1887.⁶⁹ Under the Dawes Act, whereby Indians departed the reservation and severed their tribal ties, reservation lands were divided “into individual landholdings for tribal members.”⁷⁰ The plots were held in trust by the government for twenty-five years.⁷¹ The federal government sold off the remaining lands to the public.⁷²

“By 1924, nearly two-thirds of all Indians were United States citizens”⁷³ The Indian citizenship question, however, was not resolved until Congress passed the Indian Citizenship Act (ICA) on June 2, 1924.⁷⁴ The Act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all noncitizens Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.⁷⁵

Congress only intended the ICA to resolve the issue of federal citizenship for Indians and did not envision the Act to change state suffrage laws.⁷⁶ During the congressional debate on the ICA, Representative Homer Snyder (R-NY) assured Representative Finis Garrett (D-TN) that the ICA was not intended to “have any effect upon the suffrage qualifications in any state.”⁷⁷

Elections in the United States are administered at the state and local levels based primarily on state law, and, despite the passage of the ICA, individual states continued to establish requirements and procedures that prohibited Indians from voting.⁷⁸ As late as 1940, nine states—Arizona, Colorado,

⁶⁹Robinson, *supra* note 30, at 7.

⁷⁰MCCOOL ET AL., *supra* note 15, at 6.

⁷¹Robinson, *supra* note 30, at 19 n.17.

⁷²*Id.*

⁷³*Id.* at 7 (citing Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012))).

⁷⁴*See* Indian Citizenship Act, 43 Stat. 253.

⁷⁵*Id.*

⁷⁶Robinson, *supra* note 30, at 7.

⁷⁷65 CONG. REC. 9303 (1924).

⁷⁸Robinson, *supra* note 30, at 8. In addition to inconsistent federal policies towards Indians, state governments “have had a history of conflict and antagonism with Indian tribes . . . [and t]his hostility persists today.” Wolfley, *You Gotta Fight*, *supra* note 16, at 269; *see also* United States v.

Idaho, Maine, Mississippi, New Mexico, North Carolina, Utah, and Washington—continued to deny Indians the right to vote.⁷⁹ The five most common methods utilized by state and local governments to prohibit Indians from voting, sometimes described as “second generation barriers to voting,”⁸⁰ in the post-ICA time period are: (1) residency; (2) self-termination; (3) guardianship; (4) taxation; and (5) literacy.⁸¹ These five methods are described in detail below.

1. Residency

The residency method for denying Indians the right to vote centered around the argument that Indians living on reservations were not legal residents of their states, and thus, not eligible to vote in state and local elections.⁸² An example of a residency restriction was Utah’s law, which stated that “any person living upon any Indian or military shall not be a resident of Utah, within the meaning of this chapter, unless such person had acquired a residence in some county prior to taking up his residence upon such Indian or military reservation.”⁸³ Utah, New Mexico, and other states utilized residency requirements to effectively exclude American Indians from the political process within their states.⁸⁴ In 1957, when it amended its state code, Utah became the last state to remove the residency ban.

Kagama, 118 U.S. 375, 384 (1886) (“[Indian tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”).

⁷⁹Robinson, *supra* note 30, at 8. Indians seeking office also faced significant barriers from state and local governments during this time period. *See id.* at 20 n.21. Most of these restrictions involved challenges to Indians living on reservations who did not pay taxes and were not subject to the laws of the community. *Id.* For example, in 1973, the Arizona Supreme Court rejected Apache County’s arguments that Navajo member Tom Shirley’s candidacy be disqualified because he was not subject to state taxes. Shirley v. Superior Court, 513 P.2d 939, 939–40 (Ariz. 1973).

⁸⁰*Developments in the Law — Indian Law*, *supra* note 1, at 1754.

⁸¹*See* Robinson, *supra* note 30, at 8.

⁸²Allen v. Merrell, 305 P.2d 490, 490 (Utah 1956); Montoya v. Bolack, 372 P.2d 387, 387–90 (N.M. 1962) (discussing cases); Shirley v. Superior Court, 513 P.2d 939, 939–40 (Ariz. 1973).

⁸³Robinson, *supra* note 30, at 8 (citing An Act Providing for Elections 1897, 172; Revised Statutes of Utah 1898, 1907, 1917, 1933).

⁸⁴*See id.* at 8, 20 n.25.

2. Self-Termination

Some states also utilized self-termination, or the requirement that an Indian abandon his or her tribal ties, to restrict Indians from voting in state and local elections.⁸⁵ In some states, such as North Dakota, this requirement came directly from the state constitution or state code.⁸⁶ North Dakota's state constitution once restricted voting to "civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election."⁸⁷ This provision remained a part of the North Dakota Constitution until voters removed it in 1958.⁸⁸ Similarly, in New Mexico, the New Mexico Supreme Court determined in 1962 that "nothing exists in its constitution or statutes prohibiting an Indian from voting in a proper election, provided he fulfills the statutory requirements required by any other voter and that polling places be located on the reservation."⁸⁹

⁸⁵ *Id.* at 8.

⁸⁶ *Id.*

⁸⁷ N.D. CONST. art. V, § 121 (amended 1958). The clause reads, in whole:

Every male person of the age of twenty-one years and upwards belonging to either of the following classes, who shall have resided in the state one year, in the county six months and in the precinct ninety days next preceding any election, shall be deemed a qualified elector at such election: First. Citizens of the United States. Second. Persons of foreign birth who shall have declared their intention to become citizens, one year and not more than six years prior to such election, conformably to the naturalization laws of the United States. Third. Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election.

Id. §§ 121–29. In 1898, the North Dakota Constitution was renumbered, and Sections 121 to 129 of Article 5 became Article 2 in the revised constitution. *See* Robinson, *supra* note 30, at 20 n.27.

⁸⁸ Robinson, *supra* note 30, at 8. The section on Indian eligibility for voting did not change until June 24, 1958, when voters elected to remove the provision by a margin of 99,749 to 25,269. *Id.* The law currently states:

Every person of the age of twenty-one or upwards who is a citizen of the United States and who shall have resided in the state one year and in the county ninety days and in the precinct thirty days next preceding an election shall be a qualified elector at such an election. Provided that where a qualified elector moves from one precinct to another within the state he shall be entitled to vote in the precinct from which he moved until he establishes residence in the precinct to which he moves.

N.D. CONST., art. II.

⁸⁹ *See* Jackson, *supra* note 5, at 273 (citing *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962); *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 543 P.2d 1176, 1776 (N.M. 1975)). The New Mexico Supreme Court stated:

The self-termination requirement was often motivated by state government questions about “whether Indians could be loyal Americans given their fidelity to their tribal governments.”⁹⁰ For example, the Minnesota Supreme Court required Indians to be “‘civilized’ before they could vote.”⁹¹ Tribal Indians, according to the court, become eligible to vote “‘by taking up [their] abode outside the reservation and there pursuing the customs and habits of civilization.’”⁹² As recently as 2002, a state legislator in South Dakota stated 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.”⁹³

The self-termination requirement was often closely linked to the residency requirement in arguments made by state officials to prohibit Indians from voting. In Utah, for example, the state Supreme Court relied on both self-termination and residency to uphold the prohibition on Indian voting.⁹⁴ Utah had prohibited Indians living on reservations from voting since statehood,⁹⁵ and, in 1940, Utah Attorney General Joseph Chez issued an opinion declaring that “the statute was no longer applicable because of the changed attitudes toward occupants of Indian lands and that therefore the voting franchise should be granted to citizens residing thereon.”⁹⁶ Following this opinion, Indians residing on the Uintah and Ouray Reservation in Duchesne County voted until 1956 when Attorney General E.R. Callister issued a contradictory opinion declaring the validity of the state statute prohibiting Indians living on reservations from voting.⁹⁷ This opinion, in

The seriousness of the problem, namely that of allowing persons to elect officials to whom they owe no allegiance and whose laws or directions they are not bound to obey, is a matter for legislative consideration. The fact that a person living on a reservation may not be subject to the process of the courts or the directions of state or country officials is of serious moment, but so is the refusal of the right to vote.

Montoya, 372 P.2d. at 394.

⁹⁰ Jackson, *supra* note 5, at 274 (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

⁹¹ *Id.* (citing *Opsahl v. Johnson*, 163 N.W. 988 (Minn. 1917)).

⁹² *Id.* (citing *Opsahl*, 163 N.W. at 991).

⁹³ *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Representative John Teupel).

⁹⁴ Robinson, *supra* note 30, at 8 (citing *Allen v. Merrell*, 305 P.2d 490 (Utah 1956)).

⁹⁵ *Id.* at 8 (citing An Act Providing for Elections 1897, 172; Revised Statutes of Utah 1898, 1907, 1917, 1933).

⁹⁶ *Id.* at 8–9 (citing Op. of the Att’y Gen., State of Utah (October 25, 1940)).

⁹⁷ *Id.* at 9.

relevant part, stated: “Indians who live on the reservation are not entitled to vote in Utah. . . . Indians living off the reservation may, of course, register and vote in the voting district in which they reside, the same as any other citizen.”⁹⁸

3. Guardianship

States also prohibited Indians from voting under a guardianship theory. Guardianship involved the “notion that Indians [were] under guardianship by virtue of the fact that Indian lands were under federal trusteeship.”⁹⁹ Guardianship theory was challenged in court as early as 1928,¹⁰⁰ and guardianship provisions were some of the last voting restrictions on Indians to be struck from state constitutions.¹⁰¹ For example, Arizona’s constitutional provision denying Indians the right to vote because they were “under guardianship” was not stricken by the Arizona Supreme Court until 1948.¹⁰² The Arizona Supreme Court had previously declared that because Indians were “persons under guardianship,” they were thus ineligible to vote.¹⁰³

4. Taxation

States also used the issue of taxation as a basis for denying Indians the right to vote. The rationale behind these policies involved the theory that “one should not have ‘representation without taxation,’ a spin on the revolutionary slogan ‘no taxation without representation.’”¹⁰⁴ As late as 1940, six states—Idaho, Maine, Mississippi, New Mexico, Rhode Island, and Washington—continued to prohibit “Indians not taxed” from voting.¹⁰⁵ Multiple lawsuits in the western states challenged these policies.¹⁰⁶

⁹⁸ *Id.* (citing Op. of the Att’y Gen., State of Utah (March 23, 1956)).

⁹⁹ Robinson, *supra* note 30, at 9 (citing Helen L. Peterson, *American Indian Political Participation*, 311 ANNALS AM. ACAD. POL. & OC. SCI. 116, 121 (1957)).

¹⁰⁰ See *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928).

¹⁰¹ *Developments in the Law — Indian Law*, *supra* note 1, at 1735.

¹⁰² Jackson, *supra* note 5, at 273 (citing ARIZ. CONST. art. VII, § 2).

¹⁰³ *Porter*, 271 P. at 419; Jackson, *supra* note 5, at 273.

¹⁰⁴ Robinson, *supra* note 30, at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (collecting cases).

5. Literacy

Literacy tests are most commonly associated with state and local attempts to disenfranchise African Americans living in the South.¹⁰⁷ However, several states with large American Indian populations also used literacy tests to limit voting. According to the Council of State Governments, nineteen states prohibited illiterate people from voting in 1940.¹⁰⁸ The states with literacy requirements for voting in 1940 were: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oklahoma, Oregon, South Carolina, Virginia, Washington, and Wyoming.¹⁰⁹ In all but two of these states (Arizona and Oklahoma), the percentage of American Indians living within the state was less than one percent in 1940.¹¹⁰ In Arizona, in 1940, American Indians made up eleven percent of the state population and in Oklahoma, in 1940, American Indians made up three percent of the state population.¹¹¹

E. The Voting Rights Act of 1965

Signed into law on August 6, 1965, Congress passed the VRA after it “determined that the existing federal anti-discrimination laws were not sufficient to overcome the resistance by state officials to enforcement of the Fifteenth Amendment.”¹¹² Prior to the VRA, the method for addressing voting discrimination involved initiating litigation on a case-by-case basis, which was an ineffective way to address voter disenfranchisement.¹¹³ Specifically, “as soon as one discriminatory practice or procedure was proven to be unconstitutional and enjoined, a new one would be substituted in its

¹⁰⁷ *See id.*

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *See id.* at 10.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *History of Federal Voting Rights Laws*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last updated July 28, 2017).

¹¹³ *See* Robinson, *supra* note 30, at 11 (citing Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 17 (Bernard Grofman & Chandler Davidson, eds., 1992); Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics*, 5 U. PA. J. CONST. L. 665, 685 (2002); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1251 (1989) [hereinafter *Quiet Revolution*]).

place and litigation would have to commence anew.”¹¹⁴ The VRA was intended to “increase the power of the U.S. Department of Justice and to force states and local jurisdictions with a history of voting discrimination to justify changes to their voting laws, thus ending the case-by-case approach [to addressing voter disenfranchisement at the state and local levels].”¹¹⁵

1. The VRA as Originally Enacted

The VRA contained provisions that were unique to federal law at the time and had national reach. For example, the VRA suspended literacy tests as a voter qualifying device in the United States.¹¹⁶ The VRA also authorized federal oversight of voter registration and new voting laws to ensure compliance in certain covered jurisdictions. The original VRA trigger formula required federal supervision for state and local jurisdictions with literacy tests or other similar voter qualification devices in effect on November 1, 1964, “if less than 50 percent of the voting-age residents were registered to vote on November 1, 1964, or actually voted in the 1964 presidential election”¹¹⁷ A year after its enactment, the Supreme Court upheld the constitutionality of the VRA in 1965, stating that the VRA was “designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”¹¹⁸

Section 2 of the VRA bans “voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups protected by the Act.”¹¹⁹ Unlike some other provisions of the VRA, Section 2 is permanent and does not require periodic renewal.¹²⁰ Most of the litigation pursuant to Section 2 involves challenges to at-large

¹¹⁴*History of Federal Voting Rights Laws*, *supra* note 112. McCrary described this process as follows: “Even those judges who sought to eliminate discriminatory barriers found that every time the courts struck down one procedure, Southern local officials or state legislators devised newer, more subtle ways of minimizing black voter registration.” McCrary, *supra* note 113, at 685.

¹¹⁵Robinson, *supra* note 30, at 11.

¹¹⁶*See* 42 U.S.C. § 1973a(b) (2012) (requiring that to obtain release from federal regulations a state or subdivision must obtain a declaratory judgment to the effect that for the preceding ten years no literacy tests or similar devices were used to deny the right to vote for racial reasons).

¹¹⁷Robinson, *supra* note 30, at 11.

¹¹⁸*South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹¹⁹Robinson, *supra* note 30, at 11.

¹²⁰*Id.*

election systems.¹²¹ Section 3 of the VRA describes remedies federal courts can impose on state and local jurisdictions for violations of Section 2.¹²²

An important component of Section 5 of the VRA, Section 4 establishes a “coverage formula” for purposes of determining which states and local jurisdictions are subject to the VRA’s coverage provisions.¹²³ Section 5 of the VRA required certain state and local jurisdictions with histories of low voter registration and turnout to obtain “‘preclearance’ for new voting practices and procedures from either the U.S. District Court for the District of Columbia or the United States Attorney General.”¹²⁴ Section 5’s covered jurisdictions were determined by a formula contained in Section 4 of the VRA and originally included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and several local political subdivisions in Hawaii, Idaho, and North Carolina.¹²⁵ These provisions of the VRA “assigned federal examiners to list qualified applicants to vote and to serve as poll watchers,” and also “authorized the Attorney General to institute civil actions to seek enforcement of the [VRA].”¹²⁶

¹²¹ *Id.*; see MCCOOL ET AL., *supra* note 15, at 155.

¹²² See 42 U.S.C. §§ 1973a(a)–(c) (2012).

¹²³ See Robinson, *supra* note 30, at 11–12.

¹²⁴ Jackson, *supra* note 5, at 275 (citing 42 U.S.C. § 1973c(a) (“Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) . . . are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”)).

¹²⁵ Robinson, *supra* note 30, at 11–12 (citing Davidson, *supra* note 113, at 18–19); *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/section-4-voting-rights-act> (last updated Aug. 8, 2015)).

¹²⁶ Jackson, *supra* note 5, at 275 (citing 42 U.S.C. §§ 1973(d)–(f), (j) (“(Sections 6, 7, and 8). Federal Election Observers. Section 6. Section 6 authorizes the Attorney General to request the U.S. Office of Personnel Management to send federal examiners to list eligible voters for registration in any political subdivision of a state if the political subdivision is covered by Section 4(a). Section 7. Section 7 prescribes procedures for the listing of voter registrants by federal examiners. Section 8. Section 8 authorizes the Attorney General to request the Office of Personnel Management to send election observers to any political subdivision where an examiner has been assigned.”)).

2. VRA Renewals and Amendments

Unlike Section 2, Section 5 is temporary and subject to periodic renewal, and was renewed by Congress in 1970, 1975, 1982, and 2006.¹²⁷ The 1970 Amendments extended the period of time for which VRA-covered areas must refrain from employing literacy tests from five to ten years and added districts to the list that were previously covered under Section 4.¹²⁸ Perhaps most importantly, the 1970 Amendments also “validated the Supreme Court’s broad interpretation of the scope of the Section 5 preclearance requirements.”¹²⁹

In 1975, Congress voted to extend the VRA an additional seven years and made several important additions to the Act.¹³⁰ The 1975 Amendments extended the VRA’s protections to “language minorities,” including American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage who live in certain covered jurisdictions.¹³¹ During the hearings surrounding the 1975 Amendments, Congress heard “extensive testimony” about the disenfranchisement of African Americans, Hispanics, Asian Americans, and American Indians by state and local jurisdictions.¹³²

Under the 1975 Amendments, Congress made the VRA’s temporary ban on the use of literacy tests and other similar devices permanent¹³³ and also added Section 203 to the VRA, requiring certain jurisdictions to provide oral assistance and election materials in languages accessible to language minorities for a ten-year period.¹³⁴ Jurisdictions subject to Section 203 must

¹²⁷ See Robinson, *supra* note 30, at 12.

¹²⁸ See Jackson, *supra* note 5, at 276 (citing Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); CONGRESSIONAL QUARTERLY ALMANAC, 91st Cong. 2d Sess. (1970)).

¹²⁹ *Id.* at 276–77 (citing Voting Rights Act Amendments of 1970, 84 Stat. 314).

¹³⁰ See *id.* at 277 (citing GARRINE P. LANEY, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 17–18 (last updated June 12, 2008), http://digital.library.unt.edu/ark:/67531/metadc26107/m1/1/high_res_d/95-896_2008Jun12.pdf); see also An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (1975).

¹³¹ See 42 U.S.C. § 1973aa-1a(e) (2012); see also Robinson, *supra* note 30, at 13 (explaining that these jurisdictions include areas “where (1) the U.S. Census Bureau determined that more than 5 percent of voting-age citizens were of a single-language minority, (2) election materials had been printed only in English for the 1972 presidential election, and (3) less than 50 percent of voting-age citizens had registered or voted in the 1972 presidential election”).

¹³² Jackson, *supra* note 5, at 277 (citing LANEY, *supra* note 130, at 18).

¹³³ *Id.* (citing LANEY, *supra* note 130, at 18).

¹³⁴ 42 U.S.C. § 1973aa-1a(c); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 401-02 (codified at 42 U.S.C. § 1973b(f)(3) (1982)). Robinson, *supra* note 30, at 14

provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, [and] it shall provide them in the language of the applicable minority group as well as in the English language.”¹³⁵ If a language is unwritten, as is the case for some American Indian and Alaskan Native languages, Section 203 requires jurisdictions to provide oral assistance and publicity to voters.¹³⁶ Currently, Section 203 requires approximately eighty local jurisdictions in seventeen states to provide language assistance to American Indian voters.¹³⁷

In 1982, Congress renewed Section 5 of the VRA for twenty-five years.¹³⁸ The 1982 Amendments also included a new standard, in part a response to the Supreme Court’s 1980 decision, *Mobile v. Bolden*,¹³⁹ by which state and local jurisdictions could terminate coverage of certain provision of the VRA.¹⁴⁰ The 1982 Amendments also included provisions designed to address minority vote dilution in the United States.¹⁴¹ The Senate Judiciary Committee majority report on the 1982 Amendments included the following relevant factors for consideration in determining voter dilution:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the

(noting that, under Section 203, “[c]overed language minorities were limited to American Indians, Asian Americans, Alaskan Natives, and Spanish-heritage citizens—the minority groups Congress found to have faced barriers in the political process. A jurisdiction is covered under Section 203 in which the number of U.S. citizens of voting age . . . (1) is more than 10,000; or (2) is more than 5 percent of all voting-age citizens; or (3) is on an Indian reservation and exceeds 5 percent of all reservation residents; or (4) has a [sic] illiteracy rate as a group higher than the national illiteracy rate”).

¹³⁵ 42 U.S.C. § 1973aa–1a(c); 52 U.S.C.A. § 10303(f)(4) (2015).

¹³⁶ 42 U.S.C. § 1973aa–1a(c); 52 U.S.C.A. § 10303(f)(4).

¹³⁷ Robinson, *supra* note 30, at 14 (noting Section 203 also covers some additional jurisdictions for minority language voters other than American Indians).

¹³⁸ See 42 U.S.C. § 1973b(a)(8); An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Act Extended, Strengthened, in CONGRESSIONAL QUARTERLY ALMANAC, 97th Cong., 2d Sess. 373–74 (1982), <http://library.cqpress.com/cqalmanac/cqal82-1164618>.

¹³⁹ See Robinson, *supra* note 30, at 14 (explaining that the Mobile Court “required that plaintiffs must show that the voting system or procedure was established or was being maintained with a racially discriminatory purpose” and “that any claim of vote dilution was to include proof of racially discriminatory purpose or intent”).

¹⁴⁰ See 42 U.S.C. § 1973aa–1a(a).

¹⁴¹ See *id.* § 1973(b).

- members of the minority group to register, to vote, or otherwise to participate in the democratic process.
2. The extent to which voting in the elections of the state or political subdivision is racially polarized.
 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.
 4. If there is a candidate's slating process, whether the members of the minority group have been denied access to that process.
 5. The extent to which the members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinders their ability to participate effectively in the political process.
 6. Whether the political campaigns have been characterized by overt or subtle racial appeals.
 7. The extent to which members of a minority group have been elected to public office in the jurisdiction.
 8. Whether there is a significant lack of responsiveness on the part of election officials to the particularized needs of the member of the minority group.
 9. Whether the policy underlying the state or political subdivisions' use of such voting qualifications, prerequisites to voting, standards, practice or procedure is tenuous.¹⁴²

¹⁴²S. JUDICIARY COMM. REP. NO. 97-417, at 28–29 (1982).

These factors established not only a “clear standard for states and local jurisdictions to follow in redistricting processes[,]” but also assist federal district courts in evaluating and determining vote dilution cases.¹⁴³

In 2006, Congress renewed Section 5 for an additional twenty-five years.¹⁴⁴ Congressional hearings on the 2006 renewal identified significant progress in the efforts to ensure the protection of minority voting rights, but recognized that “[v]estiges of discrimination in voting continue to exist.”¹⁴⁵ In addition to extending the VRA, the 2006 Amendments also restored the “broader definition of purposeful discrimination and the emphasis on a minority community’s ability to elect candidates of their choice,” and allowed for prevailing parties in voting rights lawsuits to recover attorney’s fees incurred during litigation.¹⁴⁶ With the 2006 renewal, Section 5 covered nine states in their entirety: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.¹⁴⁷ By this time, Section 5 also covered certain individual counties, cities, and towns in seven additional states: California, Florida, New York, North Carolina, South Dakota, Michigan, and New Hampshire.¹⁴⁸

3. *Shelby County v. Holder* and the VRA

Section 5 of the VRA, the provision requiring certain jurisdictions to obtain preclearance from the federal court or federal government for changes relating to voter qualification or voter prerequisites, “was always the most controversial element of the [VRA].”¹⁴⁹ This section was also “strongly

¹⁴³Robinson, *supra* note 30, at 15–16 (noting the Supreme Court, in *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986), held that a plaintiff in a Section 2 challenge to a multimember district election must meet the following three criteria: “(1) [t]he minority population must be ‘sufficiently large and geographically compact’ to constitute a majority in one or more districts; (2) the minority population must be ‘politically cohesive’; and (3) the majority population must vote as a bloc usually to defeat the minority’s preferred candidate”).

¹⁴⁴Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1973b(a), 1973c).

¹⁴⁵*Id.* (“The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”).

¹⁴⁶Robinson, *supra* note 30, at 16–17.

¹⁴⁷*Id.* at 12.

¹⁴⁸*See id.*

¹⁴⁹Sellers, *supra* note 12, at 369.

opposed by jurisdictions [mostly located in the South] subject to the preclearance provision.”¹⁵⁰ In 2013, the Supreme Court addressed *Shelby County, Alabama’s* constitutional challenge to both Section 4 and Section 5.¹⁵¹ *Shelby County* specifically argued that Section 4’s coverage formula was outdated, and that “Congress failed in 2006 to build a record that distinguished between covered and noncovered jurisdictions and that, in any event, the regime of federal preclearance in Section 5 [of the VRA] violated states’ rights” under the Fourteenth and Fifteenth Amendments.¹⁵² In a divided opinion, the Court invalidated Section 4(b) of the VRA, “which provided the coverage formula that determined which jurisdictions would be subject to section 5 preclearance, thereby rendering section 5 inoperative.”¹⁵³

In the aftermath of *Shelby County*, Congress is “left with an opportunity to critically evaluate Section 4 and devise a new formula” for purposes of Section 5 of the VRA.¹⁵⁴ One House of Representatives proposal, the Voting Rights Amendment Act of 2015, which sought to restore protections for minority voters removed as a result of *Shelby County*, has not been enacted.¹⁵⁵ The amendments under this proposal “include universalistic rules (requiring disclosure of voting changes) with a continued use of a race-targeted preclearance scheme, including a new coverage formula for Section 4”¹⁵⁶ Despite bipartisan support, the future viability of the 2015 Amendments is in doubt given the current partisan makeup of Congress.¹⁵⁷

4. The VRA and American Indians

Although it was passed, in large part, to address the disenfranchisement of African American voters in the Jim Crow-era South, the VRA “has been

¹⁵⁰ *Id.*

¹⁵¹ See *Shelby County v. Holder*, 133 S. Ct. 2612, 2612 (2013).

¹⁵² Wolfley, *You Gotta Fight*, *supra* note 16, at 272 (citing *Shelby County*, 133 S. Ct. at 2628–29).

¹⁵³ *Developments in the Law — Indian Law*, *supra* note 1, at 1742 (citing *Shelby County*, 133 S. Ct. at 2631).

¹⁵⁴ Wolfley, *You Gotta Fight*, *supra* note 16, at 273.

¹⁵⁵ See Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. (2015); see also Wolfley, *You Gotta Fight*, *supra* note 16, at 273–74.

¹⁵⁶ Wolfley, *You Gotta Fight*, *supra* note 16, at 273 (citing H.R. 885 §§ 3(b), 4).

¹⁵⁷ See *id.* at 274 (explaining that movement on the House Bill seems unlikely given current conflict between Republicans and Democrats in Congress).

the single most important tool in protecting Indian voting rights.”¹⁵⁸ “Advocates for voting rights for Indians have made steady use” of the VRA and its subsequent amendments in the effort to assert Indians’ right to vote.¹⁵⁹ Specifically, “[t]hey have challenged total exclusions from the ballot box, attempts to discourage their participation, and electoral systems that make their participation fruitless.”¹⁶⁰

The VRA has also had a positive impact on American Indian voter registration and election turnout, and has increased representation in local elected offices, which “changes [American Indians’] perception of government responsiveness.”¹⁶¹ Despite the passage of the VRA and the successful election of American Indian candidates,¹⁶² however, it is also important to note that “Indian registration and voting rates remained low,”¹⁶³ and American Indians continue to face economic¹⁶⁴ and geographical barriers¹⁶⁵ that depress voting rates among American Indian and Alaskan Native communities.

¹⁵⁸ *Developments in the Law — Indian Law*, *supra* note 1, at 1742 (citing MCCOOL ET AL., *supra* note 15, at 88–89).

¹⁵⁹ MCCOOL ET AL., *supra* note 15, at 44.

¹⁶⁰ *Id.* at 88–89.

¹⁶¹ Robinson, *supra* note 30, at 18.

¹⁶² See Ryan D. Dreveskracht, *Enfranchising Native Americans After Shelby County v. Holder: Congress’s Duty to Act*, 70 NAT’L LAW. GUILD REV. 193, 214 (2013) (noting that the “successful election of Indian candidates has also brought about positive shifts to laws, services, and policies provided by counties to their Indian residents”).

¹⁶³ Karlan, *supra* note 2, at 1433.

¹⁶⁴ See Wolfley, *You Gotta Fight*, *supra* note 16, at 280–81 (noting the “American Indians and Alaska Natives continue to suffer from some of the highest levels of poverty in the United States . . . [and] [a]mong tribal members nationwide, forty-nine percent of the available labor force is unemployed”). The connection “between a depressed socio-economic status and reduced political participation is direct as noted by the Supreme Court: ‘political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.’” *Id.* at 281 (citing *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986)).

¹⁶⁵ See *Developments in the Law — Indian Law*, *supra* note 1, at 1737. Specifically, the fact that “[r]egistration [to vote] in person may be difficult given geographic distance, and though states must provide for voter registration by mail, [r]egistration forms have been rejected for failing to have a proper street address, even though there is no address numbering system in many rural areas.” *Id.* (citing Adam Cohen, Opinion, *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>). Moreover, with proper registration Indian voters may still face limitations:

III. VOTING RIGHTS CASES ON BEHALF OF AMERICAN INDIANS

At least ninety voting rights cases were brought on behalf of Native American voters between 1965 and 2016.¹⁶⁶ These cases were brought under the Voting Rights Act, the National Voter Registration Act, the Fourteenth Amendment, and/or the Fifteenth Amendment.¹⁶⁷ The cases included in this list were identified through documents provided by the Department of Justice's Voting Section, the Voting Rights Project of the American Civil Liberties Union (ACLU), archives of the National Indian Youth Council held at the Center for Southwest Research at the University of New Mexico, and searches of the Department of Justice and ACLU's Voting Rights Project websites, LexisNexis, PACER docket, state dockets, and literature reviews.

Table 1: American Indian Voting Rights Cases, 1965-2016

Case Name	Latest/Major Court Opinion	Holding
<i>Klahr v. Williams</i>	339 F. Supp. 922 (D. Ariz. 1972)	In long-running redistricting dispute, court finds Navajo Reservation was

[E]ven if an Indian voter successfully registers and procures the requisite identification, she may still lack access to the physical places and mechanisms for voting. Polling places are often far from Indian communities: some communities are more than 100 miles from the nearest polling place by road, and [some] communities are not connected by road to their polling places at all.

Id. at 1738 (citing Natalie Landreth, Opinion, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, THE GUARDIAN (June 10, 2015, 12:00 pm), <http://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights>).

¹⁶⁶ See *infra* Table 1. The exact number of cases is difficult to determine as some cases may be unpublished. This total includes cases filed and one Department of Justice "notice letter" of authorization to sue, which settled without a complaint being filed.

¹⁶⁷ See, e.g., *Apache County v. U.S.*, 256 F. Supp. 903, 905 (D.D.C. 1966) (seeking a declaratory judgement on behalf of the Navajo Indians under the Voting Rights Act); *Klahr v. Williams*, 339 F. Supp. 922, 925 (D. Ariz. 1972) (challenging the apportionment of the Navajo Indian Reservation as a violation of the Equal Protection Clause of the Fourteenth Amendment); *Goddard v. Babbitt*, 536 F. Supp. 538, 543 (D. Ariz. 1982) (arguing Arizona's redistricting legislation violated the Fifteenth Amendment because it diluted racial and ethnic minority voting strength).

2018]

THE SMALL BUT POWERFUL VOICE

117

		intentionally divided to destroy electoral strength.
<i>Apache County v. U.S.</i>	256 F. Supp. 903 (D.D.C. 1966)	Intervention denied. Bailout is permitted.
<i>Goodluck v. Apache County</i> consolidated with: <i>U.S. v. Arizona</i>	417 F. Supp. 13 (D. Ariz. 1975), <i>aff'd</i> 429 U.S. 876 (1976)	Indians are citizens and have the right to vote. The apportionment is invalid.
<i>Little Thunder v. South Dakota</i>	518 F.2d 1253 (8th Cir. 1975)	Yes, plaintiffs prevail.
<i>Maine v. U.S.</i>	Order and partial summary judgment, Sept. 17, 1976; stipulation July 5, 1977	Eighteen municipalities are released from coverage, but Passamaquoddy Pleasant Point Reservation remains covered under Sec. 203.
<i>Simenson v. Bell and Plotkin</i> (originally <i>Simenson v. Levi and Barabba</i>)	Memorandum and order, Jan. 24, 1978	County fails to show that illiteracy rate of Indians in county is below national average.
<i>New Mexico v. U.S.</i>	Order, July 30, 1976	English-only elections were not discriminatory because language minority was also fluent in English.
<i>Choctaw and McCurtain Counties v. U.S.</i>	Order, May 12, 1978	English-only elections were not discriminatory because language minority was also fluent in English.
<i>Independent School Dist. Of Tulsa v. Bell</i>	Memorandum opinion, December 7, 1977	Summary judgment for plaintiff. DOJ did not object.
<i>Apache County High School District</i>	Memorandum opinion, June 12, 1980	Summary judgment for defendants.

<i>(Arizona) v. U.S.</i>		
<i>U.S. v. Town of Bartelme</i>	Order, February 17, 1978	Plaintiffs win preliminary injunction.
<i>U.S. v. Humboldt County</i>	Order, September 7, 1978	Plaintiffs win temporary restraining order.
<i>U.S. v. Thurston County, Neb.</i>	Consent decree May 9, 1979	County agrees to create seven single-member districts.
<i>U.S. v. Tripp County, S.D.</i>	Order, February 6, 1979	State ordered to submit plan.
<i>U.S. v. South Dakota; Fall River County, S.D.</i>	636 F. 2d. 241 (8th Cir. 1980)	8 th Circuit reverses District Court and rules exclusion does violate Equal Protection.
<i>U.S. v. County of San Juan, N.M.</i>	Stipulation, April 8, 1980	County agreed to change to single-member districts after 1980 census.
<i>U.S. v. County of San Juan, N.M.</i>	Stipulation, April 8, 1980	County agrees to expand Navajo voter registration, information, and assistance program.
<i>U.S. v. South Dakota; Tripp County, Fall River County</i>	Order, May 20, 1980	Implementation of the law is enjoined.
<i>Canady v. Lumberton City</i>	454 U.S. 957 (1981)	District court required preclearance, and Supreme Court enjoined election without it.
<i>South Dakota v. U.S.</i>	Consent decree, Dec. 2, 1981	Act is not pre-cleared. New tax, contracting, and election provisions are agreed to.
<i>Goddard v. Babbitt</i>	536 F. Supp. 538 (D. Ariz. 1982)	Districts struck down; stipulated revised plan places reservation in

2018]

THE SMALL BUT POWERFUL VOICE

119

		one district instead of three.
<i>Sanchez v. King</i>	550 F. Supp. 13 (D.N.M. 1982), <i>aff'd</i> 459 U.S. 801 (1983); order on remand Aug. 8, 1984	Apportionment based on prior votes cast violates Equal Protection. Subsequent plan dilutes votes in violation of Sec. 2.
<i>Shakopee Mdewakanton Sioux Community, Edith Crooks, and the U.S. (intervenor) v. City of Prior Lake, Minn.</i>	771 F.2d 1153 (8th Cir. 1985)	8 th Circuit upholds district court injunction and rules deannexation is invalid, so Indians may vote.
<i>Windy Boy v. Big Horn County, Mont.</i>	647 F. Supp 1002 (D. Mont. 1986)	Court orders defendants to propose new plan with at least some members elected by district.
<i>U.S. v. San Juan County, Utah</i>	Settlement and order, April 4, 1984	County agrees to change to three single-member districts.
<i>U.S. v. San Juan County, Utah</i>	Settlement and order, January 11, 1983	County agrees to improve assistance to Navajo voters.
<i>Largo v. McKinley Consolidated School District</i>	Consent decree, March 21, 198	School district adopts single-member districts in November 1986.
<i>Estevan v. Grants-Cibola County School District</i>	Order to enjoin election, Dec. 17, 1984	Parties agree to postpone election to see if legislature mandates single districts, which it shortly does.
<i>Tso v. Cuba Independent School District</i>	Consent decree, May 18, 1987	Five single-member districts created, with new elections for all seats.

<i>Buckanaga v. Sisseton School Dist., S.D.</i>	804 F.2d 469 (8th Cir. 1986); 15 Indian L. Rep. 3119 (D.S.D. 1988)	Court of Appeals reverses District Court and finds violation. 1988 consent decree adopts cumulative voting for at-large seats.
<i>American Horse v. Kundert</i>	Order, November 5, 1984	Court orders county to permit Indians to vote.
<i>Felipe and Ascencio v. Cibola County Commission</i>	Consent decree, Feb. 18, 1987	County adopts single-member districts for commissioner elections.
<i>Fiddler v. Sieker</i>	Order, October 22, 1986	Court ordered extended deadline for registration.
<i>Black Bull v. Dupree School District</i>	Settlement, May 14, 1986	School district agrees to establish polling places on reservation, reschedule election, and do more publicity.
<i>Kirk v. San Juan College Board</i>	Order, February 1987	Court requires single-member districts.
<i>U.S. v. McKinley County, N.M.</i>	941 F. Supp. 1062 (D.N.M. 1996)	County agrees to improved assistance and federal examiners, but when US wants to extend examiners for 10 more years, court refuses. Parties settle in 1997 for extension till 2001.
<i>U.S. v. McKinley County, N.M.</i>	Consent decree, Jan. 13, 1986	County agrees to restructure the precinct boundaries, increase the number of polling places from 19 to 25, announce the new precincts to voters.

2018]

THE SMALL BUT POWERFUL VOICE

121

<i>Casuse v. City of Gallup</i>	746 P.2d 1103 (N.M. 1987)	Case certified to New Mexico Supreme Court, which rules state law invalidates home rule charter.
<i>Clark v. Holbrook Unified School District</i>	703 F. Supp. 56 (D.C. Ariz. 1989)	Judge orders hearing on plaintiffs' motion for a preliminary injunction.
<i>U.S. v. Arizona</i>	Consent decrees, May 22, 1989 and Sept. 28, 1993; dismissed Dec. 14, 1995.	State agrees to create Navajo Election Information program.
<i>Bowannie v. Bernalillo School District</i>	Consent decree, Nov. 23, 1988	District adopts single-member districts.
<i>U.S. v. State of New Mexico; Sandoval County, N.M.</i>	Settlement in 1990; consent orders in 1994, 1997, 2011	State agrees to create Native American Election Information program; county fails to fully comply, then later consents to terms.
<i>Cuthair v. Montezuma-Cortez, Colo. School District</i>	7 F. Supp. 2d 1152 (D. Colo. 1998)	At-large election for all seats does violate Sec. 2. Under consent decree one majority-minority district is created, with other seats elected at-large.
<i>Grinnell v. Sinner</i>	None	The plaintiffs failed to demonstrate the first <i>Gingles</i> test factor because the plaintiffs could not create a district with an Indian majority.
<i>Stabler v. Thurston County, Neb.</i>	129 F.3d 1015 (8 th Cir. 1997), <i>cert. denied</i> 523 U.S. 1118 (1998)	Court of Appeals upholds District Court requirement of third

		majority-minority district, but finds plaintiffs did not meet three <i>Gingles</i> preconditions for striking at-large school board and village elections.
<i>U.S. v. Cibola County, N.M.</i>	Joint stipulation April 21, 1994; order April 22, 2004	County agrees to detailed Native American Election Information Program; after ten years DOJ obtains two-year extension due to incomplete implementation.
<i>U.S. v. Socorro County, N.M.</i>	Consent agreement, April 11, 1994	County agrees to detailed Native American Election Information Program.
<i>U.S. v. Arizona</i>	No. CIV-94-1845-PHX-EHC, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. Oct. 17, 1994)	Court enjoins judicial election until preclearance obtained.
<i>Arizona v. Reno</i>	887 F. Supp. 318 (D.D.C. 1995), cert. granted but then dismissed pursuant to Rule 46, 516 U.S. 1155 (1996)	Sec. 5 preclearance does not require meeting the Sec. 2 standard of nondiscriminatory effects, but U.S. is entitled to discovery for evidence of discriminatory purpose.
<i>Old Person v. Brown (originally Old Person v. Cooney)</i>	230 F.3d 1113 (9th Cir. 2000); 182 F. Supp. 2d 1002 (D. Mont. 2002)	9th Circuit vacates finding of no dilution, but on remand district court again finds no

		dilution and even if dilution, no available remedy, given imminence of post-2000 redistricting.
<i>U.S. v. Parshall, N.D., School District</i>	None	Negotiations following notice letter led to election of April 15, 1997, adopting district system for elections.
<i>U.S. v. Roosevelt County, Mont., Board of Commissioners</i>	Consent agreement, March 24, 2000	County agrees to create three single-member districts.
<i>U.S. v. Bernalillo County, N.M.</i>	Consent decree, April 27, 1998; stipulation July 1, 2003	County agrees to provide numerous specific types of assistance to Navajo-speaking voters.
<i>U.S. v. Benson County, N.D.</i>	Consent decree: Mar. 10, 2000.	Five single-member districts have been implemented because at-large voting violates Section 2.
<i>Matt v. Ronan School District</i>	Stipulation, January 13, 2000	School district agrees to create two multi-member districts, one of which is majority-minority.
<i>Alden v. Rosebud County Board of Commissioners</i>	Order, May 10, 2000	Court orders creation of three single-member districts before redistricting based on 2000 census occurs.
<i>U.S. v. Day County and Enemy Swim Sanitary District, S.D.</i>	Consent decree with county, May 14, 1999; with sanitary district n/a	County defendants agree to approve incorporation of inclusive sanitary district but not

		restricted district; Enemy Swim District continues litigation, but settles after motion for summary judgment is denied.
<i>U.S. v. Blaine County, Mont.</i>	363 F.3d 897 (9 th Cir. 2004)	9 th Circuit upholds district court ruling that at-large elections do violate Sec. 2 and dismissing defendants' argument that Sec. 2 is unconstitutional.
<i>McConnell v Blaine Co.</i>	Denial of intervention: 37 F. App'x 276 (9 th Cir. 2002)	Private suit filed when courts denied plaintiffs' intervention in <i>U.S. v. Blaine County</i> . Private parties appear as plaintiff-intervenors-appellees in 363 F.3d 897.
<i>Emery v. Hunt</i>	615 N.W.2d 590 (S.D. 2000) USDC order, Aug. 10, 2000 272 F.3d 1042 (8 th Cir. 2001) (fees)	USDC certifies to state supreme court, which rules redistricting permitted only once a decade. Federal claims are mooted. Attorney fee issues later go to 8 th Circuit.
<i>Frank v. Forest County, Wis.</i>	336 F.3d 570 (7 th Cir. 2003)	Deviation in size is acceptable when district populations are so small. Plaintiffs fail to meet <i>Gingles</i> political cohesion criterion on Sec. 2 claim.
<i>Vigil v. Lujan (Consolidated with</i>	None	Decision: <i>Grove v. Emison</i> established that

2018]

THE SMALL BUT POWERFUL VOICE

125

<i>Padilla v. Johnson)</i>		federal courts were to defer to state proceedings. The court ordered that they would defer to the state but retained jurisdiction over the matter and could set a deadline for the state. March 15, dismissed as moot.
<i>Bone Shirt v. Hazeltine</i>	Re preclearance: 200 F. Supp. 2d 1150 (D.S.D. 2002) Re vote dilution: 336 F. Supp. 2d 976 (D.S.D. 2004) Opinion, Aug. 22, 2006	Legislative districts do require preclearance, and particular districts do violate Sec. 2. The Court of Appeals Affirmed the Sec. 2 decision.
<i>Quick Bear Quiver v. Hazeltine</i> (<i>Quick Bear Quiver v. Nelson</i>)	Consent order, Nov. 8, 2002 Opinion and Order, Jul. 13, 2005. 387 F. Supp. 2d 1027 (2005)	S.D. agreed to seek preclearance of 600+ statutes and regulations since 1972 and refrain from implementing two specific statutes until preclearance obtained. HB1265 became effective without preclearance in 2005, allowing for redistricting multiple times per decade. The court issued a preliminary injunction, enjoining its enforcement.
<i>Navajo Nation v. Arizona Independent</i>	230 F. Supp. 2d 998 (D. Ariz. 2002)	Indian plaintiffs withdrew from the case

<i>Redistricting Commission</i>		when DOJ objected to preclearance because of districts in Hispanic but not Indian areas of the state.
<i>Weddell v. Wagner Community School District</i>	Consent decree, March 18, 2003	School board members will continue to be elected at-large, but a cumulative voting system will be enacted. Polling place will be relocated.
<i>Jepsen v. Vigil-Giron</i>	None	The court agreed that the Navajo and Jicarilla Apache Nations had established all of the <i>Gingles</i> factors and demonstrated their case through the totality of the circumstances. The nations' plan was chosen as the remedy in the Northwestern quadrant of the state, unlike the vetoed first and second house plans. The second house plan was enacted in the rest of the state.
<i>Cottier v. City of Martin, S.D. (originally Wilcox v. Martin)</i>	Reply Brief Oct. 25, 2010	In District Court, the Plaintiffs failed to prove white bloc voting sufficiently to meet third <i>Gingles</i> criterion. The Court of Appeals reversed this and remanded the case

2018]

THE SMALL BUT POWERFUL VOICE

127

		<p>back to the district to determine eligibility for relief.</p> <p>The Court of Appeals vacated the reversal and remanded for dismissal.</p> <p>Writ for Certiorari denied.</p>
<i>Kirkie v. Buffalo County, S.D.</i>	Consent decree, Feb. 10, 2004.	County agreed to new equal-sized districts and a special election.
<i>Daschle v. Thune</i>	Temporary Restraining Order: November 2, 2004	The court issued a temporary restraining order so that the candidate and his supporters could no longer follow and keep record of Indian voters.
<i>Johnson-Lee v. City of Minneapolis</i>	Per Curium Opinion: Mar. 3, 2006	The plaintiffs failed to demonstrate the 1 st and 3 rd <i>Gingles</i> provision. Defendants motion for summary judgment granted. The court of appeals affirmed the decision.
<i>ACLU of Minnesota v. Kiffmeyer</i>	Consent Decree: Sept. 12, 2005	The state will permit tribal ID for voter identification and for registration in conjunction with a utility bill providing an address.
<i>Hartung v. City of Billings, Mont.</i>	Order: Jan. 26, 2006	The Billings City Council adopted an

		emergency ordinance changing the ward boundaries which was later accepted as a permanent change. Following the plaintiff's Suggestion of Mootness, the case was dismissed as moot.
<i>Blackmoon v. Charles Mix County</i>	Consent Decree: Dec. 4, 2007.	The Consent Decree ordered federal observers until Dec. 1, 2014. The court would retain jurisdiction over the case until Dec. 1, 2024, meaning the county would be subject to preclearance for the same period. The 2006 districting remedy would remain in use.
<i>Large v. Fremont County, Wyo.</i>	Opinion: Feb. 22, 2012.	By the <i>Gingles</i> and Totality measures, the at-large system dilutes the Native Vote. The defendants must propose a remedy by July 30, 2010. The following proposed remedy failed to fix the problem. The district court implemented a single member district plan. The court of appeals affirmed the district decision.
<i>Janis v. Nelson</i>	Settlement Agreement: May 25,	Individuals sentenced to probation or a fine

2018]

THE SMALL BUT POWERFUL VOICE

129

	2010.	retain the right to vote while those sentenced to prison do not. The state will train auditors and poll workers about felony exclusion, and the exclusion algorithms of Shannon and Todd counties will be submitted for preclearance.
<i>Spirit Lake Tribe v. Benson County, N.D.</i>	Memorandum and Order, Oct. 21, 2010	The preliminary injunction was partially granted and partially denied as the Fort Totten and Warwick polling locations were to stay open while the county could close the others as it pleased.
<i>Brooks v. Gant</i>	Memorandum Opinion and Order, Aug. 6, 2013	The county agreed to provide a location for the full early voting period through 2018. Therefore, all motions for summary judgment denied as moot and motion for dismissal granted.
<i>Maestas v. Hall (Consolidated Egolf v. Duran)</i>	Opinion: Feb. 21, 2012	The legislative map violated the VRA. The court remanded it back to the district court to draw its own maps.
<i>Wandering Medicine v. McCulloch</i>	Settlement: June 10, 2014.	The counties must open satellite offices and the tribes must provide space for them.
<i>Arizona v. Inter Tribal</i>	Opinion: June 17,	In a 7-2 decision, the

<i>Council of Arizona</i>	2013	Supreme Court affirmed the U.S. Court of Appeals for the Ninth Circuit decision. NVRA's requirement for states to use the "accept and use" uniform federal form for voter qualifications preempts Arizona's state proposition. The Elections Clause is what allows Congress to establish such a standard.
<i>Jackson v. Board of Trustees of Wolf Point</i>	Consent Decree: Mar. 13, 2014 Order: Apr. 9, 2014	New single member districts have been established with only 1.54 population variance with one at-large member. The decision is based on the Fourteenth Amendment Equal Protection Clause, not the VRA.
<i>Toyukak v. Treadwell</i>	Stipulated Judgment and Order: Sept. 30, 2015.	The Court released a partial Decision on Record on September 3, 2014, favoring the plaintiffs Section 203 claim. According to an order of interim remedies, the Division of Elections was to follow the 2014 Language Assistance Program Tasks List for the three census areas

2018]

THE SMALL BUT POWERFUL VOICE

131

		in the 2014 general election Changes include a toll-free help line, another edit and full translation of the Official Election Pamphlet, a voter term glossary, and bilingual poll worker screening and training. Case was settled in 2015.
<i>Poor Bear v. Jackson County, S.D.</i>	Order: June 17, 2016	Motion to dismiss granted on ripeness.
<i>Brakebill v. Jaeger</i>	Preliminary Injunction: Order, Aug. 1, 2016 Fail-Safe Provision: Order, Sept. 20, 2016	The Court granted a preliminary injunction as plaintiffs proved harms and public interest by the <i>Dataphase</i> factors. The decision is based on the Constitutional argument, not the VRA. Fail-safe provisions must be re-implemented.
<i>Sanchez v. Cegavske</i>	Order: Oct. 7, 2016	The request for the motion for injunction is granted regarding early and election-day in-person voting but denied for in-person voter registration, based on the Sec. 2 claim.
<i>United States and Shannon County, S.D.</i>	Memorandum of Agreement: Apr. 23, 2010	Avoiding costly litigation, the parties came to an agreement. The county must establish a plan to

		provide materials, assistance, poll worker training, an election coordinator, and must welcome federal observers.
<i>Navajo Nation Human Rights Commission v. San Juan County</i>	Complaint: Feb. 25, 2016. Motion regarding discovery: March 2017	Motion regarding discovery denied. No decision yet.
<i>Navajo Nation v. San Juan County, Utah</i>	Memorandum Decision and Order, Feb. 19, 2016	Summary judgment granted for Navajo Nation based on 2011 reapportionment of the single-member districts.
<i>Feldman v. Arizona Secretary of State's Office</i>	En Banc Opinion and Order: Nov. 4, 2016.	The cases were not consolidated. The preliminary injunction as to Arizona H.B. 2023 was denied. The Ninth Circuit court affirmed this denial. The En Banc court granted the preliminary injunction pending appeal.

A. *Litigation by Geography and Political Subdivision*

Most voting rights litigation for Native Americans has occurred in the western and midwestern United States.¹⁶⁸ Of the ninety cases, fifty-two are

¹⁶⁸ *Census Regions and Division of the United States*, U.S. CENSUS BUREAU (2015), <https://www.census.gov/geo/reference/webatlas/divisions.html>. The geographical divisions used in this Article come from the U.S. Census Bureau. The four regions are the Northeast, the Midwest, the South, and the West. The Northeast region includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The Midwest region includes: Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio,

in the West, and thirty-four cases are in the Midwest, twenty-two of which are in South Dakota. It is not surprising that the majority of the cases come from these two regions considering their larger populations of American Indians as compared to other parts of the country. For comparison, three cases are in the South, and one case is in the Northeast region.

Four states stand out as having significantly more cases than others: South Dakota, New Mexico, Arizona, and Montana. South Dakota has had twenty-two American Indian voting rights cases, more than any other state in the nation, since 1965. American Indians make up 10.4% of the population in South Dakota,¹⁶⁹ and there are nine tribes with reservations and tribal lands in the state, more than any other state.¹⁷⁰ New Mexico has had twenty voting rights cases. New Mexico is home to nineteen pueblos and three reservations,¹⁷¹ and American Indians constitute 11.9% of the state's population.¹⁷² Arizona's population is comprised of 6.3% of American

South Dakota, and Wisconsin. The South includes Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Tennessee, Virginia, West Virginia. The West includes: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Utah, Washington, and Wyoming. *Id.*; see *infra* Table 2.

¹⁶⁹Population Division, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (2017), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. The population estimate for American Indians is based upon those who identify their race as American Indian or Alaskan Native alone or in combination with another race. *Id.*

¹⁷⁰See *Nine Tribes in South Dakota*, S.D. DEP'T OF TRIBAL REL. (2011), <http://www.sdtribalrelations.com/ninetribes.aspx>. The nine tribes and reservations in South Dakota are Cheyenne River Indian Reservation, Crow Creek Indian Reservation, Flandreau Santee Tribal Lands, Lower Brule Indian Reservation, Pine Ridge Indian Reservation, Rosebud Indian Reservation, Sisseton-Wahpeton Oyate Tribal Lands, Standing Rock Indian Reservation, and Yankton Tribal Lands. *Id.* More information on each tribe and their reservation/tribal land is available from the South Dakota Department of Tribal Relations.

¹⁷¹See N.M. INDIAN AFF. DEP'T, <http://www.iad.state.nm.us/index.html>. The nineteen pueblos in New Mexico are: Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni. *Id.* The Apache Tribes and Nations are: (1) Apache: Jicarilla; (2) Apache: Mescalero; and (3) Fort Sill Apache Tribe. The Navajo Nation also is located partially in the state of New Mexico. *Id.* More information on each is available from the New Mexico Indian Affairs Department.

¹⁷²U.S. CENSUS BUREAU, *supra* note 169. The population estimate for American Indians is based upon those who identify their race as American Indian or Alaskan Native alone or in combination with another race. *Id.*

Indians¹⁷³ and has twenty-two distinct tribes.¹⁷⁴ The state of Arizona has had twelve voting rights cases. Montana's population is comprised 8.4% of American Indians¹⁷⁵ and includes seven reservations and the state recognized Little Shell Tribe of Chippewa Indians.¹⁷⁶ Montana has had eleven voting rights cases between 1965 and 2016 brought on behalf of Native Americans. The other states have had five or fewer voting rights cases since 1965.

Table 2: American Indian Voting Rights Cases by Region, 1965-2016

Region	Cases
West	52
Midwest	34
South	3
Northeast	1

¹⁷³ *Id.*

¹⁷⁴ See ARIZ. GOVERNOR'S OFF. ON TRIBAL REL., <https://gotr.azgovernor.gov/gotr/tribes-arizona> (last updated December 14, 2016); ARIZ. DEP'T OF ECON. SECURITY (2017), <https://des.az.gov/about-des/tribal-relations/arizona-tribes-information>. The twenty-two tribes in Arizona are: Ak-Chin Indian Community, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab-Paiute Tribe, Navajo Nation, Pascua Yaqui Tribe, Pueblo of Zuni, Quechan Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe. *Id.*

¹⁷⁵ U.S. CENSUS BUREAU, *supra* note 169. The population estimate for American Indians is based upon those who identify their race as American Indian or Alaskan Native alone or in combination with another race. *Id.*

¹⁷⁶ See MONT. GOVERNOR'S OFF. OF INDIAN AFF. (2016), <http://tribalnations.mt.gov/tribalnations>. Montana is home to the state-recognized Little Shell Tribe of Chippewa Indians and seven federally recognized Indian tribes and their reservations: Blackfoot Tribe of the Blackfoot Reservation, Chippewa Cree Tribe of the Rocky Boy's Reservation, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Crow Tribe of the Crow Reservation, Fort Belknap Tribes of the Fort Belknap Reservation, Fort Peck Tribes of the Fort Peck Reservation, and Northern Cheyenne Tribe of the Northern Cheyenne Reservation. *See id.*

Table 3: American Indian Voting Rights Cases by State, 1965-2016

State	Cases	American Indian Population as a Percent of Total State Population ¹⁷⁷
South Dakota	22	10.4%
New Mexico	20	11.9%
Arizona	12	6.3%
Montana	11	8.4%
North Dakota	5	6.6%
Utah	4	2.3%
Minnesota	3	2.2%
Oklahoma	2	13.7%
Wisconsin	2	1.8%
Nevada	2	2.7%
Nebraska	2	2.1%
Maine	1	1.5%
North Carolina	1	2.3%
Colorado	1	2.7%
Wyoming	1	3.7%
Alaska	1	19.9%
Total	90	

Cases include challenges to states, counties, municipalities, school districts, and special service districts. Of the ninety cases, forty-five are challenges to election laws or procedures in counties. Twenty-four are challenges to states, sixteen are challenges to school districts, eight challenge municipalities, and one challenges a sanitary district.

¹⁷⁷U.S. CENSUS BUREAU, *supra* note 169. The population estimate for American Indians is based upon those who identify their race as American Indian or Alaskan Native alone or in combination with another race. *Id.*

Table 4: American Indian Voting Rights Case by Governmental Entity, 1965-2016¹⁷⁸

Governmental Entity	Cases
State	24
County	45
Municipality	8
School District	16
Other (Sanitary District)	1

B. Principal Counsel in American Indian Voting Rights Litigation

Two principal organizations frequently litigate on behalf of American Indians—the Voting Section of the U.S. Department of Justice and the Voting Rights Project of the American Civil Liberties Union (ACLU).¹⁷⁹ The Department of Justice has an explicit role to enforce voting rights laws through litigation and an administrative role in appointing federal examiners and election observers.¹⁸⁰ The Department of Justice does this through their Voting Section within the Civil Rights Division.¹⁸¹ The Department has extensive resources for enforcing voting rights laws.¹⁸² The Department's entire FY17 budget was \$28.8 billion with 117,274 staff positions, including attorneys, historians, and research staff.¹⁸³ They have filed thirty-seven cases on behalf of American Indians since 1965. The number of cases filed by the Department varies by administration. The Department only filed two cases involving American Indians during the first Reagan administration and no cases were filed during the George H.W. Bush administration.

¹⁷⁸ Some cases involve multiple governmental entities and thus the total exceeds ninety cases.

¹⁷⁹ See *Voting Section Litigation*, U.S. DEP'T OF JUST. (last updated Dec. 4, 2017), <https://www.justice.gov/crt/voting-section-litigation>; AM. CIV. LIBERTIES UNION VOTING RTS. PROJECT (2017), <https://www.aclu.org/issues/voting-rights>.

¹⁸⁰ See *About Federal Observers and Election Monitoring*, U.S. DEP'T OF JUST. (last updated Mar. 15, 2017), <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>.

¹⁸¹ *Id.*

¹⁸² See *id.*

¹⁸³ See *Annualized Continuing Resolution*, U.S. DEP'T OF JUST. (2017), <https://www.justice.gov/jmd/page/file/968216/download>.

Enforcement of voting rights for American Indians has also depended heavily upon private litigation. Of the ninety cases, fifty-four have been filed by private parties. The most active organization is the ACLU's Voting Rights Project. The Voting Rights Project began in 1965 and has filed twenty-three cases on behalf of American Indians since its first case in 1980. The Voting Rights Project has been active during periods when the Department of Justice has been less active. Other organizations have also played a role in litigating on behalf of Indian voters, including the National Indian Youth Council, the Native American Rights Fund, the Lawyers' Committee for Civil Rights, and more.¹⁸⁴

Table 5: American Indian Voting Rights Cases by Counsel, 1965-2016¹⁸⁵

Counsel for American Indians	Cases
US Department of Justice (DOJ)	37
American Civil Liberties Union (ACLU)	23
National Indian Youth Council (NIYC)	10
Native American Rights Fund (NARF)	4
Lawyers' Committee for Civil Rights Under Law	3
Legal Services	3
Indian Law Resource Center	3
Other ¹⁸⁶	25

C. American Indian Voting Rights Cases by Type

The ninety voting rights cases involving American Indians can be categorized into seven types. These case types include challenges to at-large elections, discriminatory administration of election procedures, disputes over redistricting, enforcement or interpretation of Section 203, disputes over Section 5 preclearance, denial of access to ballot, and bailout actions.¹⁸⁷

¹⁸⁴ See *infra* Table 5.

¹⁸⁵ The total count of cases in Table 5 exceeds ninety because some cases involved multiple counsel and some were consolidated.

¹⁸⁶ "Other" includes private counsel and four cases for which counsel was not identified in the written opinion. See *Grinnell v. Sinner*, No. A1-92-066 (D.N.D. 1992); *Vigil v. Lujan*, 191 F. Supp. 2d 1273 (D.N.M. 2001); Complaint, *Daschle v. Thune*, No. 4:04-cv-04177 (D.S.D. Nov. 1, 2004); Final Judgment and Order Adopting Congressional Redistricting Plan, *Jepsen v. Vigil-Giron*, No. D-0101-CV-2001-02177, 2002 WL 35459962 (N.M. Dist. Jan. 8, 2002).

¹⁸⁷ See *infra* Table 6.

Some cases address more than one voting rights issue and thus some are counted more than once in Table 6.

The most common case type encompasses challenges to at-large elections.¹⁸⁸ With at-large electoral systems, all voters within the political subdivision can vote for all the seats up for election. The elected officials then represent the entire political subdivision. This is in contrast to a single-member system where a political subdivision is divided into sections, and each section is represented by a single elected official. At-large elections are effective tools for whites to maintain political control.¹⁸⁹ When local governments, such as city councils, school boards, and county commissions are elected at-large, the white majority within a community can utilize racial block voting to elect all members of the governing body and freeze out minority candidates.¹⁹⁰

American Indian voters have rarely been successful in at-large electoral systems. Previous research found that in nineteen jurisdictions in Indian Country where at-large systems were used, only six American Indian candidates had ever been elected.¹⁹¹ When these systems are replaced with single-member districts, Indian candidates are very successful; however, they are less successful when at-large systems are replaced with mixed systems or cumulative voting systems.¹⁹² In an earlier study that examined fifteen cases where the at-large system was replaced with a single member system, Indian candidates won in all but two instances.¹⁹³ Similar results have been found

¹⁸⁸ *See id.*

¹⁸⁹ *See generally* *Voting in South Dakota*, *supra* note 25, at 214.

¹⁹⁰ At-large electoral systems have been found to harm the success of minority candidates, including American Indians, Hispanics and Blacks. *See* Albert K. Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors*, 12 URB. AFF. Q. 223, 223 (1976); *see generally* CHANDLER DAVIDSON, *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (Bernard Grofman & Chandler Davidson eds., 1994); MCCOOL ET AL., *supra* note 15, at 158; Theodore P. Robinson & Thomas R. Dye, *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133 (1978); Delbert Taebel, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics*, 59 SOC. SCI. Q. 142 (1978); Richard Engstrom & Michael McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344 (1981); Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 42 J. OF POL. 982 (1981).

¹⁹¹ MCCOOL ET AL., *supra* note 15, at 158.

¹⁹² *Id.*

¹⁹³ *Id.* at 159.

for black and Hispanic candidates.¹⁹⁴ In Big Horn County, Montana, no American Indian candidate had ever been elected to the three-person county commission under the at-large system.¹⁹⁵ The system was replaced with a single-member district system in 1986 as a result of a court order, and John Doyle, Jr., an American Indian, was elected in 1987. Commissioner Doyle credits the lawsuit and the single-member system for his electoral success.¹⁹⁶

The creation of single-member district systems does not resolve all voting rights disputes within a political subdivision. Conflicts arise over the boundary lines after reapportionment following a decennial census. Reapportionment following a census may be appropriate if the population has changed in such a way as to impact the one-person, one-vote principle. Conflicts also arise over a lack of reapportionment following the census. For example, in 1984, San Juan County, Utah, agreed via consent decree to change from an at-large election system to a single-member system to elect the three-person county commission following a suit brought by the U.S. Department of Justice.¹⁹⁷ Since the first election using the new system, an American Indian has held a seat on the commission, representing District 3.¹⁹⁸ The county reapportioned the districts following the 2010 Census, but the boundary lines for District 3, the district with an American Indian majority, were not redrawn.¹⁹⁹ The county's population has increased from 12,253 people in 1980 to 14,746 people in 2010.²⁰⁰ In 2012, the Navajo

¹⁹⁴ See Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 112 (1994) (finding that when at-large systems are replaced with single-member districts, black candidates are more successful for legislative seats); see also MCCOOL ET AL., *supra* note 15, at 159 (finding that Hispanic candidates in Texas were more successful in single-member districts than in at-large systems); Engstrom & McDonald, *supra* note 190, at 348–352 (citing research which demonstrates that at-large systems underrepresent blacks more than district systems).

¹⁹⁵ See MCCOOL ET AL., *supra* note 15, at 160.

¹⁹⁶ *Id.* at 160; see generally *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).

¹⁹⁷ MCCOOL ET AL., *supra* note 15, at 160.

¹⁹⁸ See *Navajo Nation v. San Juan County*, 162 F. Supp. 3d 1162, 1169 (D. Utah 2016).

¹⁹⁹ See *id.* at 1170.

²⁰⁰ Compare U.S. DEP'T. OF COMMERCE BUREAU OF THE CENSUS, POPULATION OF STATES AND COUNTIES OF THE UNITED STATES: 1790 TO 1990 at 162 (Richard L. Forstall ed., 1996) (stating the population of San Juan County, Utah, in 1980), with U.S. Census Bureau *QuickFacts: San Juan County, Utah*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/sanjuancountyutah/PST040216> (last updated July 1, 2016) (stating the population of San Juan County, Utah, on April 1, 2010).

Nation sued San Juan County, Utah, arguing that the county has packed American Indian voters into a single district and, by failing to reapportion the districts, has violated the Equal Protection Clause of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act.²⁰¹

In 2016, the U.S. District Court for Utah found the following:

The [c]ounty's redistricting decisions predominated by racial classifications violate the Equal Protection Clause because they are not narrowly tailored to serve a compelling governmental interest and cannot survive strict scrutiny. On this basis, Navajo Nation is entitled to summary judgment on its first claim for relief. San Juan County's motion for summary judgment is denied on the merits to the extent that it addresses the Equal Protection claim asserted in the first claim for relief, and denied as moot to the extent it addresses any other theory that could support Navajo Nation's first claim. Because San Juan County Commission District Three violates the Equal Protection Clause, the districts in the [c]ounty must be redrawn.²⁰²

San Juan County, Utah, is not the only political subdivision that has had a challenge to their district line boundaries. Of the ninety American Indian voting rights cases, twenty have involved disputes over redistricting.²⁰³

Discriminatory election practices are the second most common type of voting rights case for American Indians. These illegal practices have involved issues such as not providing adequate polling places and the location of polling places. For example, in *Black Bull v. Dupree School District*, American Indians had to travel up to 150 miles to vote in school district elections.²⁰⁴ The question before the court was if the county provided insufficient polling places on the reservation in violation of Section 2 of the Voting Rights Act and the First, Fourteenth, and Fifteenth Amendments.²⁰⁵ The case was settled in 1986, and the school district agreed to establish polling places on the Cheyenne River Reservation, reschedule the election, and provide more publicity regarding the new election date.²⁰⁶ Of the 90

²⁰¹ *Navajo Nation*, 162 F. Supp. 3d at 1171.

²⁰² *Id.* at 1183 (footnotes omitted).

²⁰³ See *infra* Table 6.

²⁰⁴ Wolfley, *You Gotta Fight*, *supra* note 16, at 278 n.74.

²⁰⁵ MCCOOL ET AL., *supra* note 15, at 55.

²⁰⁶ *Id.* at 72.

American Indian voting rights cases, 22 have involved discriminatory administration of election procedures.²⁰⁷

Section 203 of the Voting Rights Act protects Asian American, American Indian, Alaskan Native, and Spanish-speaking language minorities.²⁰⁸ It requires that all election-related written material and oral assistance at the polls be in the minority's language if they make up five percent of the population of a jurisdiction or Indian reservation.²⁰⁹ This is a relatively little-known section of the Voting Rights Act. It is largely implemented administratively, and all American Indian Section 203 enforcement cases have been resolved with consent agreements.²¹⁰ There have been 11 cases involving Section 203, many of which have involved New Mexico or political subdivisions of the state. In a recent case, *Toyukak v. Treadwell*, two Alaskan tribal counsels and two Alaska Native voters filed suit charging election officials in the state with violating Section 203 by failing to translate all of the election materials and information provided in English into the covered native languages and appropriate dialects in the Dillingham Census Area (DCA), Wade Hampton Census Area (WHCA), and the Yukon-Koyukuk Census Area (YKCA).²¹¹ In 2015, the case was settled, and the state agreed to "provide increased language assistance for Yup'ik-speaking voters . . . and for Gwich'in-speaking voters in the Yukon-Koyukuk Census Area."²¹² For the first time, the State will translate the entire Official Election Pamphlet, which provides information in advance of the election about candidates and ballot measures, not simply in English, Spanish, and Tagalog, but also in Gwich'in and up to six different dialects of Yup'ik."²¹³ Of the 90 American Indian voting rights cases, 11 have involved enforcement or interpretation of Section 203.²¹⁴

The purpose of Section 5 of the Voting Rights Act is to prevent districts with a history of discrimination from implementing new discriminatory laws

²⁰⁷ See *infra* Table 6.

²⁰⁸ Voting Rights Act of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975).

²⁰⁹ *Id.*

²¹⁰ MCCOOL ET AL., *supra* note 15, at 74.

²¹¹ Alaska's Proposal in Response to Court's Order of Sep. 3, 2014, at 1, 3, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, 2014 WL 10048905 (D. Alaska Sept. 5, 2014).

²¹² Press Release, The State of Alaska and Alaska Native Voters and Tribal Councils Reach Settlement in Historic Language Assistance Case for Gwich'in and Yup'ik-speaking Voters (September 10, 2015).

²¹³ *Id.*

²¹⁴ See *infra* Table 6.

or procedures. Section 5 requires covered jurisdictions to seek preclearance for all changes to voting laws and practices from the U.S. Attorney General or the U.S. District Court for the District of Columbia.²¹⁵ The “ACLU litigation following the 2001 legislative redistricting in South Dakota also clearly demonstrated the importance of the preclearance requirement.”²¹⁶ There have been 10 cases involving Section 5 preclearance for American Indians. This section of the Voting Rights Act became unenforceable following the *Shelby County* decision, as discussed in the previous section.²¹⁷ Of the 90 American Indian voting rights cases, 10 have involved disputes over Section 5 preclearance.²¹⁸

“Congress acknowledged the unusual leverage that Section 5 creates over covered jurisdictions by including the bailout provisions in Section 4.”²¹⁹ Section 4 also included a provision allowing a termination or “bailout” of the covered jurisdiction through application to the U.S. District Court for the District of Columbia.²²⁰ The Supreme Court held in *Northwest Austin Municipal Utility District Number One v. Holder* that any jurisdiction currently required to make Section 5 submissions may seek to “bailout” from coverage if it meets the statutory criteria set forth below:

1. The successful “bailout” applicant must demonstrate that during the past ten years:
 - a) No test or device has been used within the jurisdiction for the purpose or with the effect of voting discrimination;
 - b) All changes affecting voting have been reviewed under Section 5 prior to their implementation;
 - c) No change affecting voting has been the subject of an objection by the Attorney General or the

²¹⁵Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965).

²¹⁶MCCOOL ET AL., *supra* note 15, at 86.

²¹⁷*Developments in the Law — Indian Law*, *supra* note 1, at 1742 (citing *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013)).

²¹⁸*See infra* Table 6.

²¹⁹MCCOOL ET AL., *supra* note 15, at 86.

²²⁰Voting Rights Act of 1965, 79 Stat. 437.

2018]

THE SMALL BUT POWERFUL VOICE

143

denial of a Section 5 declaratory judgment from the District of Columbia district court;

- d) There have been no adverse judgments in lawsuits alleging voting discrimination;
- e) There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;
- f) There are no pending lawsuits that allege voting discrimination; and
- g) Federal examiners have not been assigned;
- h) There have been no violations of the Constitution or federal, state or local laws with respect to voting discrimination unless the jurisdiction establishes that any such violations were trivial, were promptly corrected, and were not repeated.

Before being allowed to “bailout”, the jurisdiction must have eliminated those voting procedures and methods of elections that inhibit or dilute equal access to the electoral process. It also must demonstrate that it has made constructive efforts to eliminate intimidation and harassment of persons seeking to register and vote and expand opportunities for voter participation, such as opportunities for registration and voting, and to appoint minority officials throughout the jurisdiction and at all levels of the stages of the electoral process. The jurisdiction must also present evidence of minority electoral participation.

In addition, these requirements apply to all governmental units within the geographical boundaries of the jurisdiction. Thus, if a county is seeking to “bailout”, it must establish each criteria for every city, town, school district, or other entity within its boundaries.

The jurisdiction seeking “bailout” must publicize the intended commencement and any proposed settlement of the action; any aggrieved party may intervene in the litigation. After the granting of a declaratory judgment, the statute

requires a ten-year “recapture” period. During this time, the district court may reopen proceedings should the jurisdiction engage in any conduct that would have prevented the jurisdiction from bailing out in the first instance. Under such circumstances, the district court will review the evidence and determine whether to reinstate coverage.²²¹

There have been 5 bailout cases involving American Indians between 1965-2016;²²² indeed the first use of this bailout provision concerned American Indians in Apache County, Arizona, in 1966.²²³

Even with passage of the Indian Citizenship Act and the Voting Rights Act, American Indians’ right to register, vote, and run for office can be abridged. These types of cases are known as denial of access to the ballot. There have been seven such cases involving American Indians since 1965. “A local effort to keep South Dakota Indians from voting at all appeared as recently as the late 1990s. White landowners formed the Enemy Swim Sanitary District that specifically excluded the Indian-owned lands in the vicinity.”²²⁴ The Department of Justice filed a case challenging the intentional exclusion of Indian residents and tribal lands from a proposed sanitary district.²²⁵ The Justice Department argued that the district violated Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments.²²⁶ The case was settled in 2000 in favor of American Indians.²²⁷

Table 6: American Indian Voting Rights Case by Category, 1965-2016²²⁸

Case Type	Cases
Challenges to at-large elections	26
Discriminatory administration of election procedures	22
Disputes over redistricting	20

²²¹ *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/section-4-voting-rights-act> (last updated Aug. 8, 2015).

²²² *See infra* Table 6.

²²³ *Apache County v. U.S.*, 256 F. Supp. 903, 905 (D.D.C. 1966).

²²⁴ *McCOOL ET AL.*, *supra* note 15, at 71.

²²⁵ *Id.*

²²⁶ *Id.* at 62.

²²⁷ *Id.* at 71.

²²⁸ This list exceeds 90 cases because some cases addressed more than one legal issue.

Enforcement or interpretation of Section 203	11
Disputes over Section 5 preclearance	10
Denial of access to ballot	7
Bailout actions	5

IV. IMPLICATIONS OF VOTING RIGHTS LITIGATION

The success of American Indian voting rights cases is clear. Of the ninety cases identified by this research, American Indians prevailed in nearly all instances. The question that follows is, what are the implications of this success? As described below, there are two primary implications: (1) the continuation of voting rights litigation indicates that discrimination continues to plague American Indians; and (2) the successful cases have resulted in political changes and policy changes in Indian Country.

A. Continued Discrimination

In the past ten years, 2006-2016, there have been fifteen voting right cases filed on behalf of American Indians.²²⁹ These cases revolve around the following three legal issues: discriminatory administration of election procedures, disputes over redistricting, and enforcement of Section 203.²³⁰ There have been no challenges to at-large elections, claims regarding the denial of ballot access, or disputes over Section 5 or bailouts involving American Indians since 2006.²³¹ From this data, it appears that discrimination in the area of voting rights continues to impact American Indian voters. The difference seems to be the type of discrimination that Indians are facing. During the first four decades after passage of the Voting Right Act in 1965, Indians primarily challenged laws and procedures that denied full participation—such as denial of the right to vote, the lack of election materials in native languages, and many Section 2 cases.²³² From these data, there seems to be a shift in the types of cases being brought forward. The reasons for this shift are not immediately apparent from these data, but may be because much of the problems experienced earlier have been resolved, and new discriminatory laws and procedures are being implemented in Indian

²²⁹ See *supra* Table 1.

²³⁰ See *id.*; see also *supra* Table 6.

²³¹ See *supra* Table 1.

²³² See *id.*

Country that are now being challenged. Exploring these issues further is a question for future research.

B. Success Following Litigation

Success in the courtroom has brought forward political and policy changes for Indians. The positive effects include: (1) changes in voting structures and the subsequent elections of American Indians to public office; (2) the increase in registrations and turnout among American Indians; and (3) positive influences on services, access to government, and perception of government among American Indians.

One of the most significant changes resulting from voting rights litigation is the change in voting structures, particularly at-large electoral systems that can cause vote dilution. These systems limit the ability of minorities, including American Indians, to elect candidates for their choice and hinder the success of minority candidates.²³³ Once these at-large systems are replaced with single member systems, there are dramatic gains in the success of Indians elected to public office.²³⁴

Previous research has found that there is an increase in voter registration and turnout among American Indians following the success of voting rights cases that addressed at-large elections, Section 2 challenges.²³⁵ It appears that the role of empowerment, defined as an Indian holding elected offices, is significant in impacting perceptions and attitudes of American Indians. An earlier study that examined the elections of American Indians in three counties that had Section 2 voting rights cases provides, in pertinent part, as follows:

The election of an Indian to county office was a major contextual change in each of the three counties, and the

²³³ See generally Davidson & Korbel, *supra* note 190; Engstrom & McDonald, *supra* note 190; Grofman & Davidson, *supra* note 190; Karnig, *supra* note 190; MCCOOL ET AL., *supra* note 15; Robinson & Dye, *supra* note 190; Taebel, *supra* note 190. A handful of studies have failed to show the detrimental effects of at-large elections on minority candidates. See generally Leonard A. Cole, *Electing Blacks to Municipal Office: Structural and Social Determinants*, 10 URBAN AFFAIRS QUARTERLY 17 (1974); Susan S. MacManus, *City Council Election Procedures and Minority Representation: Are They Related?*, 59 SOCIAL SCIENCE QUARTERLY 153 (1978); Susan Welch & Albert K. Karnig, *Correlates of Female Office Holding in City Politics*, 41 JOURNAL OF POLITICS 2 (1979).

²³⁴ Jennifer L. Robinson, *Empowerment of American Indians and the Effect on Political Participation* (Dec. 2010) (unpublished Ph.D. dissertation, The University of Utah), at iii–iv.

²³⁵ *Id.* at 171.

change had a positive impact on voter participation among Indians by influencing perceptions of government and attitudes of American Indians. Furthermore, the positive effect of empowerment on American Indian voters is both immediate and long-lasting. The positive effect on American Indian political behavior is evident immediately after empowerment, that is, Indians vote at higher rates in the first election following empowerment than prior to empowerment. Turnout continues to increase over time for American Indians, in contrast to non-Indian populations, indicating the long-lasting, positive effects of empowerment on Indian political behavior.²³⁶

There are other factors beyond empowerment due to the successful election of American Indians that have driven the increase in political participation among American Indians, including voter registration drives, “business development, new wealth from casinos, the need to interact with nontribal governments, and obtainment of state and federal funds for health clinics, education improvements, water-reclamation, projects, and cleanup of old mining areas.”²³⁷

When minorities are elected to public office, there is a substantial shift in “responsiveness to minority interests and the inclusion of minorities in decision-making.”²³⁸ The election of Indians to public office has a positive impact on services within the political subdivision, Indians’ access to government, and Indians’ perception of government. These results are similar to the positive effects found for African Americans and Hispanics.²³⁹ Indian elected officials are divided as to their impact on laws and regulations in their

²³⁶ See *id.* at iii–iv.

²³⁷ MCDONALD, *supra* note 2, at 259.

²³⁸ *Quiet Revolution*, *supra* note 113, at 1277.

²³⁹ See RUFUS P. BROWNING, DALE ROGERS MARSHALL & DAVID H. TABB, PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 18–19 (1984); David Campbell & Joe R. Feagin, *Black Politics in the South: A Descriptive Analysis*, 37 JOURNAL OF POLITICS 129, 158 (1975); Leonard A. Cole, *Blacks in Power: A Comparative Study of Black and White Elected Officials*, 10 URBAN AFFAIRS QUARTERLY 17, 36 (1976); Thomas R. Dye & James Renick, *Political Power and City Jobs: Determinants of Minority Employment*, 62 SOCIAL SCIENCE QUARTERLY 475, 485 (1981); see generally Peter K. Eisinger, *Black Employment in Municipal Jobs: The Impact of Black Political Power*, 76 AMERICAN POLITICAL SCIENCE REVIEW 380 (1982); WILLIAM R. KEECH, THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY (1968).

jurisdictions.²⁴⁰ This finding is not surprising considering that Indian elected officials are often still in outnumbered; for example, Indian elected officials may be only one person on a three-person county commission, limiting their ability to impact laws and policies.²⁴¹

The impact of voting rights litigation has been positive by numerous measures.²⁴² Indians are more successful when discriminatory electoral structures are dismantled.²⁴³ Registration and turnout have increased. And, for American Indians, there have been positive impacts on services, access to government, and perceptions of government.²⁴⁴

V. CONCLUSION

American Indians, both historically and today, face many hurdles and barriers related to voting enfranchisement. The VRA, and other voting rights-related legislation, has provided American Indians with an important legal vehicle through which they have, in large part, successfully litigated and enforced their voting rights in federal district and appellate courts. Although the types of voting rights challenges American Indians are litigating have changed over the years, the importance of successfully pursuing voting rights litigation for the American Indian community remains to this day.

²⁴⁰ See MCCOOL ET AL., *supra* note 15, at 165–171.

²⁴¹ *See id.*

²⁴² The impact of voting rights litigation has resulted in several benefits for American Indians:

Increased Indian office holding and political participation has certainly not redressed all of the legitimate grievances of the Indian community nor realized all the goals of the modern movement for Indian self-determination, but it has conferred undeniable benefits. It has made it possible for American Indians to participate in and influence elections as well as elect candidates of their choice. It has made it possible for Indians to pursue careers in politics and make the values and resources of Indians communities more available to society as a whole. It has provided Indian role models, conferred racial dignity, and helped dispel the myth that Indians are incapable of political leadership. It has also required whites to deal with Indians more nearly as equals, a change in political relationships with profound implications.

MCDONALD, *supra* note 2, at 265.

²⁴³ *See id.*

²⁴⁴ *See id.*