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## American Indians and the Right to Vote: Why the Courts Are Not Enough

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# AMERICAN INDIANS AND THE RIGHT TO VOTE: WHY THE COURTS ARE NOT ENOUGH

**Abstract:** American Indians and Alaska Natives face new barriers in exercising their fundamental right to vote. Recently, states have introduced and implemented facially neutral voting rules aimed at eliminating voter fraud. These rules, as well as strict voter identification and increased reliance on mail-in ballots, disproportionately suppress American Indian votes. The Voting Rights Act of 1965 was critical in providing American Indians a way to challenge discriminatory practices, but the Act only partially addresses the problems American Indians face in voting. New federal legislation is necessary to address present-day barriers American Indians experience in accessing the ballot box. This Note explores the history of American Indian voting rights and current state policies that suppress American Indian votes before arguing in support of federal legislation.

## INTRODUCTION

In 2006, Arizona denied Agnes Laughter, an eighty-year-old member of the Navajo Nation, her right to vote because she did not have proper identification.<sup>1</sup> Determined to exercise her rights in the next election, Laughter attempted to obtain an Arizona state-issued photo identification card.<sup>2</sup> She lacked an original birth certificate, however, because she was born at her home in the rural community of Chilchinbeto.<sup>3</sup> After Laughter received a delayed birth certificate, the Motor Vehicles Department in Flagstaff incorrectly told Laughter

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<sup>1</sup> Aura Bogado, *Democracy in 'Suspense': Why Arizona's Native Voters Are in Peril*, THE NATION (Oct. 18, 2012), <https://www.thenation.com/article/democracy-suspense-why-arizonas-native-voters-are-peril/> [https://perma.cc/8KW6-V42M]. The Navajo Nation includes parts of Arizona, Utah, and New Mexico, and has over 300,000 members. *Id.*

<sup>2</sup> *Id.* Arizona allows American Indians to vote with a photo tribal enrollment card, but the Navajo Nation did not begin issuing these cards until November 2011. *Id.* Obtaining one of these tribal enrollment cards cost seventeen dollars when first issued, meaning members living in poverty could not obtain a tribal enrollment card. *Id.*; Noel Lyn Smith, *First Tribal ID Cards Issued*, NAVAJO TIMES (Nov. 17, 2011), <http://www.navajotimes.com/news/2011/1111/111711ids.php> [https://perma.cc/H8B7-JPSW]. Arizona allows voters to present two forms of non-photo identification to vote, including car registration, insurance cards, utility statements, or property tax statements. Bogado, *supra* note 1. Many Navajo Nation members, however, live below the poverty line, do not own cars, and do not have access to utilities, so obtaining two forms of non-photo identification can be difficult. *Id.*

<sup>3</sup> Bogado, *supra* note 1. Chilchinbeto is a chapter of the Navajo Nation with approximately 1,300 members. Cindy Yurth, *Most Neglected? Chapter VP Says Most Neglected Chapter Is Chilchinbeto*, NAVAJO TIMES (Mar. 10, 2011), <https://www.navajotimes.com/news/2011/0311/031011neglected.php> [https://perma.cc/4XLG-VGWZ]. The Navajo Nation is divided into five agencies, and each agency is divided into chapters. *Navajo Nation Chapters*, NAVAJO NATION GOV'T, <http://www.navajo-nsn.gov/chapters.htm> [https://perma.cc/34UG-FUG2].

she could not use the delayed birth certificate to obtain an identification card.<sup>4</sup> After ten hours of work with twelve people, Laughter finally obtained her Arizona identification card.<sup>5</sup>

Lucille Vivier, a member of the Turtle Mountain Band of Chippewa Indians, resides in Dunseith, North Dakota with her mother and four children.<sup>6</sup> She cares for all of these relatives.<sup>7</sup> After paying for electricity, water, groceries, transportation, and health care, Vivier usually has three dollars left each month.<sup>8</sup> Vivier was unable to vote in the November 2014 general election because she had a Turtle Mountain Tribal identification card without an address on it.<sup>9</sup> The majority of places on the reservation, both residential and business, do not have street addresses.<sup>10</sup> When Vivier attempted to find her residential address, she received conflicting information from the local police department, the Bureau of Indian Affairs, and Federal Express.<sup>11</sup> Because of Vivier's lack of income and confusion surrounding her correct address, she could not obtain a new North Dakota state identification document (ID) or tribal ID, meaning she was unable to vote in North Dakota.<sup>12</sup>

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<sup>4</sup> Bogado, *supra* note 1. If Laughter's lawyer had not accompanied her to the Motor Vehicles Department, Laughter might not have been able to obtain an identification card with her delayed birth certificate. *See id.* (indicating that Laughter's lawyer had to prove that a delayed birth certificate is valid).

<sup>5</sup> *Id.* Laughter had to rely on other people to provide transportation from her small, rural community; language interpretation, because she only speaks Navajo; and legal assistance to explain what documents she would need. *Id.*

<sup>6</sup> Declaration of Lucille Vivier ¶¶ 1–2, *Brakebill v. Jaeger*, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (No. 1:16-cv-8). Dunseith is approximately sixteen miles outside of the Turtle Mountain Band of Chippewa Indian Reservation but has a high population of tribal members. *City of Belcourt, TURTLE MOUNTAIN BAND CHIPPEWA INDIANS*, <https://tmchippewa.com/about-us/> [<https://perma.cc/7HN6-WA3F>].

<sup>7</sup> Declaration of Lucille Vivier, *supra* note 6, ¶ 2. Three of the children have special needs, and they all reside in her mother's three-bedroom house. *Id.*

<sup>8</sup> *Id.* To care for her mother and children, Vivier receives \$735 per month in disability assistance and \$89 per month in food stamps. *Id.*

<sup>9</sup> *Id.* ¶ 3. North Dakota will accept a tribal identification card as a valid form of identification, but it requires all voter identification to contain a street address. N.D. CENT. CODE § 16.1-01-04.1(3)(a)(2) (2019). If the tribal identification does not include a street address, North Dakota will accept a current utility bill; current bank statement; check issued by a federal, state, or local government; paycheck; or document issued by a federal, state, or local government to verify a residential street address. *Id.* § 16.1-01-04.1(3)(b).

<sup>10</sup> Declaration of Lucille Vivier, *supra* note 6, ¶ 6.

<sup>11</sup> *Id.* Each of these departments provided Vivier with a different address that theoretically corresponds to her house. *Id.*

<sup>12</sup> *Id.* ¶ 6, 10; *see Photo Identification*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/passports/how-apply/identification.html> [<https://perma.cc/6X47-FHGW>] (defining identification document by the abbreviation "ID"). In North Dakota, it costs seven dollars to obtain a birth certificate, which is necessary to get a new state identification card. Declaration of Lucille Vivier, *supra* note 6, ¶ 5. It costs ten dollars for a new tribal identification card. *Id.* ¶ 8. This does not include costs for transportation and a babysitter to care for Vivier's mother and children while she is away. *Id.*

Access to voting is critical to ensure minority communities can seek equality in all spheres of public life.<sup>13</sup> All other citizenship rights, such as the right to religious freedom or a trial by jury, flow from having access to the ballot box to elect a public official of one's choosing.<sup>14</sup> Throughout American history, the right to vote extended from only white men owning property to citizens of color in 1870, to females in 1920, and to eighteen-year-olds in 1971.<sup>15</sup> Despite receiving the right to vote in 1870, the fight for black Americans to exercise their right to vote extended for a century.<sup>16</sup> The struggle ensuing from discriminatory Jim Crow policies to the Voting Rights Act of 1965 (Voting Rights Act), which banned racially discriminative policies, is well-documented.<sup>17</sup> Although less documented, the fight for American Indians and Alaska Natives (American Indians)<sup>18</sup> to achieve voting rights is also based in racism and prejudice.<sup>19</sup>

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<sup>13</sup> See Martin Luther King Jr., *Civil Right No. 1—The Right to Vote*, N.Y. TIMES MAG., Mar. 14, 1965, at 315 (advocating that the right to vote will increase African American advancement in areas such as employment, housing, and education by voting out elected officials who keep them in an inferior status); see also David Herbert Donald, *Protest at Selma: Martin Luther King, Jr. & the Voting Rights Act of 1965*, NEW REPUBLIC (Nov. 3, 1978), <https://newrepublic.com/article/72530/protest-selma-martin-luther-king-jr-the-voting-rights-act-1965-0> [<https://perma.cc/DZ4Z-2XXZ>] (noting that President Lyndon B. Johnson declared that voting is a start to destroying the barriers for minority communities).

<sup>14</sup> See OFFICE OF THE WHITE HOUSE PRESS SEC'Y, A REPORT ON THE PROGRESS IN THE FIELD OF CIVIL RIGHTS BY ATTORNEY GENERAL ROBERT F. KENNEDY TO THE PRESIDENT 1 (1963), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/01-24-1963.pdf> [<https://perma.cc/2TYH-UAAN>] (declaring that the right to vote is critical to other rights of citizenship within the country and the Department of Justice should aim to protect that right). Since constitutional rights can be amended and lost by a vote of two-thirds of the House of Representatives and Senate, the right to vote is critical to protecting civil rights for all. See U.S. CONST. art. V (providing the process to amend the Constitution). Voting by the public gives elected officials the legitimacy to govern according to the wishes of the people and is fundamental to democracy. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating in dicta that voting is a fundamental right necessary to protect other rights).

<sup>15</sup> U.S. CONST. amend. XV, § 1; *id.* amend. XIX; *id.* amend. XXVI, § 1 (granting the right to vote to people of color, women, and eighteen-year-old individuals).

<sup>16</sup> See GARY MAY, BENDING TOWARDS JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY, at x (2003) (discussing how African Americans received the right to vote after a struggle of over one hundred years). Black Americans in the Deep South faced poll taxes, literacy tests, and general intimidation tactics to prevent them from exercising their right to vote. *Id.* at ix.

<sup>17</sup> See *id.* (illustrating how African Americans were able to exercise their right to vote after the Voting Rights Act of 1965 banned Jim Crow policies). Jim Crow refers to the laws implemented to segregate and disenfranchise black Americans, beginning in the 1890s. *Jim Crow Laws*, WGBH, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> [<https://perma.cc/6AF5-HY24>]. The Supreme Court upheld the doctrine of racial segregation in all public facilities. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

<sup>18</sup> Wherever possible, this Note attempts to refer to Native people by their specific tribal name, but when referring to American Indians and Alaska Natives generally, it uses "American Indians" for the sake of brevity while recognizing the important cultural differences. See *Frequently Asked Questions*, BUREAU INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/UW3V-5GRZ>] (contrasting "Indian American," those belonging to tribes in the continental United States, and "Alaska Native," those belonging to tribes and villages in Alaska).

Even though American Indians became United States citizens in the 1920s, many states refused to grant American Indians the right to vote until two decades later.<sup>20</sup> Despite the success of the Voting Rights Act in mitigating discriminatory voting practices against American Indians, American Indians still face challenges in exercising their right to vote.<sup>21</sup> These new age practices, though facially neutral, suppress minority votes.<sup>22</sup> The majority of American Indians may not have the time or resources to go through the process Agnes Laughter faced in order to obtain identification to vote.<sup>23</sup> A voter without a residential address, like Lucille Vivier, would have to request an address from the state and get a new form of identification with that new address.<sup>24</sup>

Furthermore, states have also implemented additional practices that suppress American Indian votes.<sup>25</sup> Polling locations are rarely located close to reservation lands, which requires American Indian voters to travel long distances

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<sup>19</sup> See Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 92, 95–96 (2018) (indicating that the voting rights history of American Indians is less documented, but American Indians fought unique voting barriers); see also Matthew G. McCoy, *Hidden Citizens: The Courts and Native American Voting Rights in the Southwest*, 58 J. SW. 293, 293 (2016) (indicating that the American Indian fight for the right to vote is often overlooked in the broader civil rights movement of the United States).

<sup>20</sup> Robinson & Nelson, *supra* note 19, at 102–03. The Indian Citizenship Act of 1924 automatically provided citizenship for all American Indians. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)). New Mexico, however, did not provide American Indians with the right to vote until 1948. DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 13 (2007). Arizona also did not provide American Indians with the right to vote until 1948. *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948).

<sup>21</sup> See MCCOOL ET AL., *supra* note 20, at 44 (discussing how American Indian challenges to voting discrimination typically fall under the Voting Rights Act of 1965); Note, *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1737 (2016) (asserting that states implement new voting practices that make voting more difficult for American Indians even though the laws are not directed at American Indian voters).

<sup>22</sup> Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-pri-voter-suppression/565355/> [<https://perma.cc/B6ZM-H4S6>]. A survey conducted by the Public Religion Research Institute and *The Atlantic* found that black and Latino voters faced more structural barriers in the 2016 election. *Id.* The survey found that while the voting processes were racially neutral, the effects of the laws were not. *Id.*

<sup>23</sup> See Bogado, *supra* note 1 (indicating that it took hours and multiple people to help Laughter obtain a state identification card and many American Indians do not have access to the same transportation or legal assistance).

<sup>24</sup> See Camila Domonoske, *Many Native IDs Won't Be Accepted at North Dakota Polling Places*, NPR (Oct. 13, 2018), <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places> [<https://perma.cc/RL9J-EH8L>] (reporting that when North Dakota implemented the voter identification law that required residential street addresses, residents had to call their county's 911 coordinator to receive a street address and request a letter confirming the address).

<sup>25</sup> See Robinson & Nelson, *supra* note 19, at 116–32 (providing a table of voting rights cases brought on behalf of American Indians and indicating that the cases included challenges to at-large elections, enforcement of the Voting Rights Act, and discriminatory practices in election procedures).

to cast their ballot.<sup>26</sup> States have also adopted voter dilution tactics that weaken the significance of minority votes, despite the voters' ability to cast a ballot.<sup>27</sup> Additionally, states have made it a felony to deliver another individual's ballot, burdening American Indians who do not have regular access to mail and rely on others to deliver and pick up mail.<sup>28</sup> While policies that negatively affect American Indian voters are usually adopted with the said goal of combatting voter fraud, reported cases of voter fraud have typically been very low.<sup>29</sup>

Voting is the cornerstone of democracy, as it gives the electorate the ability to choose their representatives.<sup>30</sup> High levels of voter suppression weaken democracy.<sup>31</sup> In order to address and prevent American Indian voter suppression, this Note argues that federal legislation is necessary to protect American Indians' right to vote from discriminatory procedures.<sup>32</sup> Courts can react to invalid, discriminatory voting practices, but court decisions cannot take the

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<sup>26</sup> See NAT'L CONG. OF AM. INDIANS, URGING DOJ TO INCREASE ENFORCEMENT OF THE VOTING RIGHTS ACT IN INDIAN COMMUNITIES 1 (2016), [http://www.ncai.org/attachments/Resolution\\_pUIPeRgAFaCEqaeMNCnCnjznlKCgcMFSfiXylwVgMABwPtR YXxf\\_SPO-16-055%20final.pdf](http://www.ncai.org/attachments/Resolution_pUIPeRgAFaCEqaeMNCnCnjznlKCgcMFSfiXylwVgMABwPtR YXxf_SPO-16-055%20final.pdf) [<https://perma.cc/R8TQ-TSYC>] (stating that members of the Shoshone-Paiute Tribe had to drive one hundred miles to their polling location and members of the Goshute Indian Reservation have had to travel more than eighty miles to their polling location).

<sup>27</sup> See Note, *supra* note 21, at 1735 (arguing that state governments are able to dilute the effectiveness of American Indian votes by adopting various attempts at redefining district boundaries).

<sup>28</sup> ARIZ. REV. STAT. ANN. § 16-1005(H) (2019). Arizona provides an exception for family, household members, and caregivers, but does not allow an individual to have a neighbor mail their completed ballot. *Id.* § 16-1005(I)(2)(A). In Montana, voters approved a referendum that prohibits anyone, other than a caregiver or family member, from submitting another individual's completed ballot in person. *Returning Ballots More Complicated with Montana LR-129*, BILLINGS GAZETTE (Mar. 20, 2019), [https://billingsgazette.com/opinion/editorial/gazette-opinion-returning-ballots-more-complicated-with-montana-lr/article\\_73d043d7-95c0-5684-8628-74d1a6c21209.html](https://billingsgazette.com/opinion/editorial/gazette-opinion-returning-ballots-more-complicated-with-montana-lr/article_73d043d7-95c0-5684-8628-74d1a6c21209.html) [<https://perma.cc/T9KM-BXPX>].

<sup>29</sup> See Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html> [<https://perma.cc/JA8M-ZX95>] (stating that state officials adopted North Dakota's voter identification law to address voter fraud and the potential of non-residents obtaining a post-office box in the state and then using that address to illegally vote in North Dakota); Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html> [<https://perma.cc/7W3D-YLZF>] (observing that no state has uncovered evidence of voter fraud despite claims of its severity by the Trump administration).

<sup>30</sup> See *Harrison*, 196 P.2d at 459 (affirming that the right to vote is the most critical civil right in overturning Arizona's ban on American Indians voting).

<sup>31</sup> See CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 116 (2018) (arguing that the suppression of minority votes has caused the House of Representatives to be unrepresentative of the people they represent and that this weakening of democracy must be rectified as it was after Jim Crow).

<sup>32</sup> See *infra* notes 247–272 and accompanying text.

place of sweeping reforms that specifically address the problems faced by American Indians.<sup>33</sup>

Part I of this Note traces the history of the relationship between American Indians and the federal government leading to their eventual citizenship and the right to vote.<sup>34</sup> Part I also highlights state responses and attempts to disenfranchise American Indians residing in that state.<sup>35</sup> Part I ends by discussing how the Voting Rights Act was an important tool in ensuring American Indians have access to the ballot box, along with current proposals to address the barriers American Indians still face in voting.<sup>36</sup> Part II looks at modern state actions that suppress the American Indian vote and why courts are an ineffective tool for ending these policies.<sup>37</sup> Part III analyzes the need for federal legislation to address the barriers American Indians face in voting and lays out possible actions to ensure American Indians have equal access to voting.<sup>38</sup>

## I. HISTORY AND STATUS OF AMERICAN INDIAN VOTING RIGHTS

The evolution of American Indian citizenship status and voting rights in the United States is crucial for understanding the significance of current barriers American Indians face in attempting to cast a ballot.<sup>39</sup> Section A of this Part highlights American Indians' relationship with the federal government and the eventual road to citizenship.<sup>40</sup> Section B discusses how state governments still denied American Indians the right to vote, despite their status as United States citizens.<sup>41</sup> Section C shows the importance of the Voting Rights Act in allowing American Indians to access the ballot box.<sup>42</sup> Lastly, Section D describes the current proposals to address American Indian voting.<sup>43</sup>

### *A. American Indian Lack of Recognition from the Federal Government to Eventual Citizenship*

Despite being the United States' first residents, American Indians' political relationship with the federal government was difficult to define as the Unit-

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<sup>33</sup> See *infra* notes 228–246 and accompanying text (explaining why the judiciary is not an effective tool in addressing the barriers in voting).

<sup>34</sup> See *infra* notes 44–81 and accompanying text.

<sup>35</sup> See *infra* notes 82–100 and accompanying text.

<sup>36</sup> See *infra* notes 101–163 and accompanying text.

<sup>37</sup> See *infra* notes 164–246 and accompanying text.

<sup>38</sup> See *infra* notes 247–273 and accompanying text.

<sup>39</sup> See Robinson & Nelson, *supra* note 19, at 92 (noting that the government's lack of recognition of American Indians throughout history affected current voting rights).

<sup>40</sup> See *infra* notes 44–81 and accompanying text.

<sup>41</sup> See *infra* notes 82–100 and accompanying text.

<sup>42</sup> See *infra* notes 101–145 and accompanying text.

<sup>43</sup> See *infra* notes 146–163 and accompanying text.

ed States expanded westward.<sup>44</sup> In a series of cases known as the “Marshall Trilogy,” Justice John Marshall and the United States Supreme Court defined American Indian tribes as independent communities within the United States and outlined American Indians’ lack of rights.<sup>45</sup> First, in 1823, the Supreme Court in *Johnson v. M’Intosh* held that as independent communities, tribes retain a legal right to occupy their land.<sup>46</sup> Only the federal government, however, and not tribal governments, could transfer title of that land.<sup>47</sup> In 1831, in *Cherokee Nation v. Georgia*, the Court established that tribes were not foreign nations, but rather domestic dependent nations.<sup>48</sup> The relationship was similar to that of a ward and guardian, where the guardian protects the ward.<sup>49</sup> One year later, in 1832 in *Worcester v. Georgia*, Justice Marshall further defined that relationship and established that only the federal government, not state governments, had authority over tribal lands.<sup>50</sup> These critical cases laid the framework for defining the tribal and federal relationship.<sup>51</sup>

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<sup>44</sup> See McCoy, *supra* note 19, at 293 (indicating that Justice John Marshall’s decision in two milestone cases served as a turning point in defining the federal government’s relationship with American Indians); Hunter Malasky, Note, *Tribal Sovereign Immunity and the Need for Congressional Action*, 59 B.C. L. REV. 2469, 2473 (2018) (stating that laws regarding American Indians happened alongside westward expansion); see also *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 16 (1831) (finding that, despite being independent communities, tribes are not foreign nations in relation to the United States government).

<sup>45</sup> Jeannette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 168 (1991). The “Marshall Trilogy” included *Johnson v. M’Intosh* in 1823, *Cherokee Nation v. Georgia* in 1831, and *Worcester v. Georgia* in 1832. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, HUM. RTS., Spring 2015, at 3, 3. Over the span of nine years, the Supreme Court defined the relationship between American Indians living in the United States with the federal government. *Id.*

<sup>46</sup> See 21 U.S. (1 Wheat.) 543, 603 (1823) (arguing that American Indians had a right of possession to the land but that the federal government had the ultimate title).

<sup>47</sup> See *id.* (finding that even though the plaintiffs acquired their title from the tribe it is not a title that can be recognized by the federal government because only the federal government could acquire land from tribes through federal treaties).

<sup>48</sup> 30 U.S. at 17.

<sup>49</sup> *Id.* The Cherokee Nation sought an injunction to stop Georgia from enforcing its laws to take Cherokee Nation land and strip them of their political rights. *Id.* at 15. Justice Marshall refused to hear the merits of the case and blocked the injunction because the Cherokee Nation was not a foreign nation, and, therefore, the Court had no jurisdiction in the case under article III, section 2 of the Constitution. *Id.* at 43. Article III, section 2 of the Constitution gives the Supreme Court jurisdiction to hear cases between a state and foreign nation. U.S. CONST. art. III, § 2.

<sup>50</sup> 31 U.S. (1 Pet.) 515, 561 (1832). Samuel Worcester and other missionaries violated a Georgia law that required non-Cherokees to obtain a license to live in the Cherokee Nation. *Id.* at 563. Worcester argued that the state could not enforce this law in the Cherokee Nation because of the sovereign tribal right to manage their own affairs. *Id.* at 539. The Court found that the federal government’s authority to regulate affairs with tribes is vested in the Constitution which provides that Congress has the power to regulate commerce with tribes. *Id.* at 559.

<sup>51</sup> MCCOOL ET AL., *supra* note 20, at 2. Given the confusing language used by Justice Marshall, the relationship between American Indians and the federal government remained complicated for years to follow. *Id.*

Shortly thereafter, Congress passed the Civil Rights Act of 1866, which allowed freed slaves to become United States citizens.<sup>52</sup> The Civil Rights Act automatically declared all people born in the United States, regardless of race, to be citizens.<sup>53</sup> The Act, however, excluded American Indians.<sup>54</sup> In order to ensure the constitutionality of the Civil Rights Act, Congress adopted the Fourteenth Amendment in 1868, which provided citizenship to former slaves.<sup>55</sup> The Fourteenth Amendment did not contain any mention of American Indians.<sup>56</sup> The Fourteenth Amendment's silence on the issue of American Indians raised the question of whether the Amendment made American Indians citizens.<sup>57</sup> Legislators, however, did not intend American Indians to become citizens through the Civil Rights Act of 1866 and the Fourteenth Amendment, because they saw American Indians as uncivilized and inferior.<sup>58</sup> Additionally, legislators feared that extending citizenship, and thus voting rights, to American Indians would create a new political majority in Congress.<sup>59</sup>

Despite the majority agreement that American Indians should not become United States citizens, debate existed on whether the Fourteenth Amendment should include specific language excluding American Indians.<sup>60</sup> Some senators argued that the Fourteenth Amendment should specifically exclude "Indians not taxed," mirroring the language in the Civil Rights Act of 1866.<sup>61</sup> Ultimate-

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<sup>52</sup> Robinson & Nelson, *supra* note 19, at 99–100. *See generally* Civil Rights Act of 1866, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2018)) (declaring that all persons born in the United States, except American Indians, are citizens).

<sup>53</sup> Civil Rights Act of 1866 § 1.

<sup>54</sup> *Id.* The Civil Rights Act of 1866 said "that all person born in the United States . . . excluding Indians not taxed, are hereby declared to be citizens of the United States." *Id.*

<sup>55</sup> *See* U.S. CONST. amend. XIV, § 1 (ensuring that people born in the United States are given the full protection of state and federal laws). Questions remained on whether Congress had the power to grant citizenship to all freed slaves with the Civil Rights Act of 1866. G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 774 (2014). The Fourteenth Amendment removed any questions regarding the constitutionality of the Civil Rights Act of 1866 by stating that no state could "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." *Id.* at 775; *see* U.S. CONST. amend. XIV, § 1.

<sup>56</sup> *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdictions thereof, are citizens of the United States and of the State wherein they reside.").

<sup>57</sup> *Id.* The Civil Rights Act of 1866 did specify that American Indians could not become citizens with this act. Civil Rights Act of 1866 § 1; *see* CONG. GLOBE, 39th Cong., 1st Sess. 182, 2892 (1866) (indicating that Senator James Doolittle from Wisconsin argued that the Fourteenth Amendment should specify that American Indians were not citizens because they were an inferior race and could become a political majority if they were given citizenship).

<sup>58</sup> MCCOOL ET AL., *supra* note 20, at 4.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *See* CONG. GLOBE, 39th Cong., 1st Sess. 182, 2892–93 (showing the debate between Senator Howard from Michigan and Senator James Doolittle from Wisconsin over whether the language "Indians not taxed" should be included in the Fourteenth Amendment).

<sup>61</sup> Civil Rights Act of 1866 § 1; Robinson & Nelson, *supra* note 19, at 100–01.

ly, however, the Amendment did not include the language.<sup>62</sup> Legislators indicated that the Fourteenth Amendment had two requirements on who could be included in the Amendment.<sup>63</sup> First, individuals must be born or naturalized in the United States.<sup>64</sup> Second, individuals must also be under the complete jurisdiction of the United States.<sup>65</sup> American Indians, at least those who still resided in their tribes, were not under the complete jurisdiction of the United States.<sup>66</sup> There was also a concern that including the language “Indians not taxed” would allow American Indians to become citizens by paying taxes.<sup>67</sup> For these reasons, the Act did not include the language, but it was understood to exclude American Indians from citizenship.<sup>68</sup>

The Supreme Court addressed the issue of American Indians and citizenship two decades after the Fourteenth Amendment’s adoption.<sup>69</sup> In 1884, in *Elk v. Wilkins*, the Supreme Court denied the right to vote to all American Indians, including those taxed, and concluded that the Fourteenth Amendment only provided citizenship by birth and naturalization.<sup>70</sup> With this ruling, American

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<sup>62</sup> See U.S. CONST. amend. XIV, § 1 (making no mention of Indians or tribes in the Amendment but stating “all persons born or naturalized in the United States”).

<sup>63</sup> See Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 568 (2000) (indicating that senators opposed to including the language argued that American Indians would have to be under “complete jurisdiction of the United States” in addition to being born in the United States to gain citizenship under the Fourteenth Amendment).

<sup>64</sup> See U.S. CONST. amend. XIV, § 1 (requiring, in the first sentence, for persons to be born or naturalized in the United States).

<sup>65</sup> See *id.* (stating that persons must also be under the “complete jurisdiction of the United States” in order to be given the protections and privileges of the Fourteenth Amendment).

<sup>66</sup> Maltz, *supra* note 63, at 568.

<sup>67</sup> *Id.* If taxed American Indians became citizens, states could decide to confer national citizenship to American Indians through state taxes. *Id.*

<sup>68</sup> *Id.* The Senate Judiciary Committee issued a report four years after the passage of the Fourteenth Amendment confirming that American Indians with allegiance to their tribes were not under the jurisdiction of the federal government in regards to the Fourteenth Amendment. *Id.* The report said that American Indians who chose to disavow their tribal allegiance were under the complete control of the federal government. *Id.* at 569.

<sup>69</sup> See *Elk v. Wilkins*, 112 U.S. 94, 94 (1884) (determining that American Indians are not United States citizens). John Elk was born in an American Indian tribe but severed his relationship with the tribe and was a resident of Omaha, Nebraska. *Id.* at 98–99. Elk’s voter registration in Omaha was denied and this case was brought. *Id.* at 96. The question was whether Elk was a United States citizen under the Fourteenth Amendment since he disaffiliated with the tribe. *Id.* at 99. If Elk was a citizen under the Fourteenth Amendment, then the Fifteenth Amendment guaranteed his right to vote. *Id.* at 98; see U.S. CONST. amend. XV, § 1 (stating that United States citizens have the right to vote).

<sup>70</sup> 112 U.S. at 101. The Court held that even though Elk had severed ties with his tribe, he was not born under the control of the United States. *Id.* at 102.

Indians could only become citizens by an act of Congress.<sup>71</sup> As a result, Congress began to provide individual and tribal naturalization through treaties.<sup>72</sup>

From the late 1800s to the early 1900s, the federal government began to obtain tribal lands and attempted to eliminate tribal governments.<sup>73</sup> Many American Indians became citizens through this allotment process.<sup>74</sup> Additionally, Congress passed legislation providing other ways for American Indians to become citizens.<sup>75</sup> For example, American Indians could become citizens by adopting civilized life, serving in the American military, marrying a United States citizen, and being born to United States citizens.<sup>76</sup> Through these acts of Congress, two-thirds of American Indians gained citizenship by 1924.<sup>77</sup>

Given that so many American Indians already had United States citizenship, Congress enacted the Indian Citizenship Act in 1924 to automatically provide citizenship to American Indians.<sup>78</sup> The Indian Citizenship Act served

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<sup>71</sup> See *id.* at 104 (arguing that Congress had passed legislation to naturalize certain tribes and, therefore, those laws would be meaningless if American Indians could become citizens without an act from the government).

<sup>72</sup> See MCCOOL ET AL., *supra* note 20, at 6 (providing examples of statutes that were passed to provide citizenship and describing the process as being unsystematic over a period of years). For example, the Treaty of Fort Laramie in 1868 allowed members of the Arapaho Nation to retain exclusive use of their land, which became the Great Sioux Reservation, and to become United States citizens. *Id.* at 5. In 1980, in *United States v. Sioux Nation of Indians*, the Supreme Court ruled that the government had violated the terms of the treaty and ordered just compensation to the Sioux tribes after the army stopped protecting the reservation. 448 U.S. 371, 378, 424 (1980).

<sup>73</sup> Wolfley, *supra* note 45, at 177–78. For example, the General Allotment Act of 1887, or the Dawes Act, was adopted to assimilate Indians and take tribal lands for white settlement. *Id.* at 177. The Dawes Act dismantled tribal governments and allocated the land into individual allotments for tribal members. MCCOOL ET AL., *supra* note 20, at 6. White settlers were able to purchase the remaining American Indian land. *Id.* Tribal members who accepted allotments became United States citizens if they adopted white culture. *Id.* Some tribes held citizenship ceremonies to symbolize their American citizenship. Wolfley, *supra* note 45, at 178. For example, in one tribe, a man would take the handles of a plow to symbolize American citizenship after shooting an arrow to symbolize the end of his tribal affiliation. *Id.*

<sup>74</sup> Wolfley, *supra* note 45, at 178. Underlying the policy for American Indian citizenship was the belief that American Indians could only become citizens once they were civilized and had adopted white culture. See MCCOOL ET AL., *supra* note 20, at 7 (indicating that Congress provided citizenship to American Indians when they abandoned their American Indian affiliation).

<sup>75</sup> Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 123–24 (1999).

<sup>76</sup> *Id.* In 1919, Congress declared that American Indians who served in World War I could be granted citizenship by a court. *Id.* at 123 n.92.

<sup>77</sup> Robinson & Nelson, *supra* note 19, at 102.

<sup>78</sup> See Indian Citizenship Act of 1924 (granting citizenship to all American Indians). The Indian Citizenship Act of 1924 differed from previous acts of Congress conferring citizenship, which required American Indians to become citizens through a court's consent. Porter, *supra* note 75, at 124. Citizenship was not sought by many American Indians, as some American Indians hoped to assert their tribal sovereignty. Wolfley, *supra* note 45, at 180–81. The granting of citizenship was seen as the last step in assimilating American Indians to white society. See *id.* (indicating that many American Indians were skeptical of white assimilation and opposed the citizenship law).

as a regulatory tool, rather than a social one.<sup>79</sup> It was implemented to prevent the Secretary of the Interior from having broad authority to determine when and how American Indians became citizens.<sup>80</sup> Despite becoming citizens under the Indian Citizenship Act and obtaining the rights associated with citizenship, American Indians could not exercise their right to vote.<sup>81</sup>

### *B. State Government Attempts to Deny American Indians the Right to Vote*

Fraught with hostility towards tribes, several states adopted legislation to deny American Indians the right to vote despite the federal government granting citizenship.<sup>82</sup> Even though the Fifteenth Amendment gave all citizens the right to vote, the Constitution also provides states with control over elections and allowed states to deny American Indians the right to vote for reasons other

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<sup>79</sup> Porter, *supra* note 75, at 125. Some argued that granting citizenship would not be in the best interest of the American political system or American Indians. *Id.* Others strongly argued that citizenship was important for American Indians. *See id.* (stating that supporters of American Indian citizenship argued that it was necessary for American Indians to be equal under United States laws).

<sup>80</sup> *Id.* at 124. Progressives on the Senate Committee on Indian Affairs wanted to eliminate the bureaucracy involved in granting citizenship to American Indians, and, therefore, proposed the automatic law. *Id.* at 124–25.

<sup>81</sup> MCCOOL ET AL., *supra* note 20, at 8. There was widespread confusion amongst members of the government on whether the Act provided American Indians the right to vote. *Id.* Debate on the House floor indicates that representatives did not intend for American Indians to be able to vote as citizens under the new law. *Id.* The Department of the Interior, however, believed that American Indians received the right to vote. *Id.*

<sup>82</sup> *See* United States v. Kagama, 118 U.S. 375, 384 (1886) (identifying the distrust between states and tribes with both sides viewing the other as the enemy); Opsahl v. Johnson, 163 N.W. 988, 991 (Minn. 1917) (holding that American Indians in Minnesota were not able to vote in elections in part because American Indians were not assimilated into white society); *see also* McCoy, *supra* note 19, at 295 (providing examples of states denying American Indians the right to vote). The federal government had initially seen American Indians as a temporary problem, assuming most American Indians would be quickly engulfed in mainstream culture. MCCOOL ET AL., *supra* note 20, at 8–9. Given the assumption that American Indians would lose their tribal connections, the federal government lacked an urgency in determining whether American Indians had the right to vote. *See id.* (stating that many believed American Indians would be engulfed by white culture and would not remain a separate part of the population). Southwestern states have larger American Indian populations, making the issue of residency more salient. McCoy, *supra* note 19, at 295. For example, eleven percent of Oklahoma's, ten percent of New Mexico's, and five percent of Arizona's population is American Indian or Alaskan Native over eighteen years old. NAT'L CONG. OF AM. INDIANS, EVERY NATIVE VOTE COUNTS: FAST FACTS 2 (2012), [http://www.ncai.org/initiatives/campaigns/NCAI\\_NativeVoteInfographic.pdf](http://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf) [<https://perma.cc/VP2W-XEU5>].

than outright discrimination.<sup>83</sup> For example, states adopted provisions that excluded American Indians who did not pay taxes from the right to vote.<sup>84</sup>

Arizona's constitution stated that "no person under guardianship" was able to vote.<sup>85</sup> The state legislature drafted this provision to specifically target American Indians based on Justice Marshall's language in *Cherokee Nation*.<sup>86</sup> Justice Marshall referred to American Indians tribes as "wards" seeking protection from the federal government, which acts as a "guardian."<sup>87</sup> The Arizona Supreme Court upheld this constitutional provision in 1926 in *Porter v. Hall* after the Indian Citizenship Act was adopted.<sup>88</sup> Two decades later, in 1948, however, the Arizona Supreme Court overruled this provision in *Harrison v. Laveen*.<sup>89</sup>

In *Porter*, the Arizona Supreme Court also held American Indians to be residents of the state if the reservations were legally within the boundaries of the state.<sup>90</sup> In that case, the Arizona Supreme Court determined that American Indians could not vote because they were under guardianship.<sup>91</sup> At the same

<sup>83</sup> See U.S. CONST. art. 1, § 4 (stating that "the Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature"); *id.* amend. XV, § 1 (providing that citizens' right to vote cannot be "denied or abridged . . . on account of race, color, or previous condition of servitude"). This allowed states to create procedures that do not disenfranchise American Indians because of their race, but do so for other reasons allowed by the Constitution. See *id.* art. 1, § 4 (allowing states to determine the procedures to voting).

<sup>84</sup> Wolfley, *supra* note 45, at 185. In 1940, Idaho, Maine, Mississippi, New Mexico, Rhode Island, and Washington did not allow American Indians who did not pay taxes to vote. *Id.* New Mexico denied the right to vote to American Indians who did not pay taxes in their 1912 state constitution. N.M. CONST. art. 7, § 1 (1912). Most of these states argued that American Indians should not be able to make decisions that do not affect them. Wolfley, *supra* note 45, at 185. In 1917, in *Opsahl*, the Minnesota Supreme Court denied residents of the Red Lake Chippewa Tribe the right to vote because the tribe did not pay taxes. 163 N.W. at 990. The court reasoned, in part, that since American Indians not taxed are not included in determining representation for the state legislature, they also should not be able to vote. *Id.* The court also held that American Indians were ineligible to vote in the state because they had not adopted civilized life. *Id.* at 991.

<sup>85</sup> ARIZ. CONST. art VII, § 2(c) (1912). The language stated "[n]o person under guardian ship . . . shall be qualified to vote at any election . . ." *Id.*

<sup>86</sup> McCoy, *supra* note 19, at 295; see also *Cherokee Nation*, 30 U.S. at 17 (referring to American Indians tribes as "wards" of the federal government).

<sup>87</sup> *Cherokee Nation*, 30 U.S. at 17. The Supreme Court continued to refer to American Indians as "wards" under the guardianship of the United States. See *Kagama*, 118 U.S. at 383–84 (describing tribes as wards because the tribes are entirely dependent on the federal government).

<sup>88</sup> 271 P. 411, 419 (Ariz. 1928) (McAlister, J., concurring). The two plaintiffs, members of the Pima Indian Tribe that resided on the Gila River Reservation, attempted to register to vote but were denied. *Id.* at 413. The Arizona Supreme Court found that even though they were residents of Arizona, they were under guardianship and therefore not qualified to register to vote. *Id.* at 418.

<sup>89</sup> 196 P.2d at 463. The Arizona Supreme Court found that the guardianship provision in their constitution referred to a legal relationship and not to American Indians in the state. *Id.*

<sup>90</sup> 271 P. at 415.

<sup>91</sup> *Id.* at 418. The Court held that American Indians were under guardianship because they were incapable of managing their own affairs, given that tribes are not able to terminate their relationship with the federal government. *Id.* at 417.

time, some states wrestled with whether to consider American Indians residents.<sup>92</sup> For example, in 1956, in *Allen v. Merrell*, the Supreme Court of Utah upheld a statute that said American Indians living on reservations were not residents of Utah.<sup>93</sup> The court held that American Indians were not residents because the federal government—not Utah—had authority over the reservation.<sup>94</sup> Despite being United States citizens, the Supreme Court of Utah held that American Indians were less affected by the state's functions and, therefore, not residents of the state.<sup>95</sup> In *Montoya v. Bolack*, however, the New Mexico Supreme Court in 1962 came to the opposite conclusion and determined that American Indians must be residents and given the right to vote.<sup>96</sup>

During the Second World War, at least ninety-nine percent of all eligible American Indians registered for the draft, and, by the end of the war, one-third of all eligible American Indian men had served in the military.<sup>97</sup> While fighting for the rights of others abroad, American Indians began to fight for their rights at home as well.<sup>98</sup> In 1944, leaders from the Pima and Tohono O'odham Nations asked Congress to address American Indian voting, and, in 1946, Navajo World

<sup>92</sup> Compare *Montoya v. Bolack*, 372 P.2d 387, 394 (N.M. 1962) (holding American Indians have a right to vote in New Mexico because they are residents of the state), with *Allen v. Merrell*, 305 P.2d 490, 492 (Utah 1956) (holding that American Indians living on reservations were not residents of Utah and, therefore, did not have the right to vote).

<sup>93</sup> 305 P.2d at 492.

<sup>94</sup> *Id.* States determine their own requirements for voting, and the Utah Supreme Court found that the state could exclude American Indians living on reservations. *Id.* The United States Supreme Court granted certiorari on the issue and remanded the case to the Utah Supreme Court. *Allen v. Merrell*, 353 U.S. 932, 932 (1957). In the wake of the Supreme Court decision, Utah repealed the section and American Indians living on reservations were deemed residents of the state. *Rothfels v. Southworth*, 356 P.2d 612, 613 (Utah 1960).

<sup>95</sup> *Allen*, 305 P.2d at 492. The Utah Supreme Court also expressed concern that it would not be appropriate for American Indians to potentially outnumber white voters in Utah because they did not pay taxes to support the state government's functions. *Id.* at 495.

<sup>96</sup> 372 P.2d at 394. A non-American Indian who had lost his campaign for lieutenant governor because Navajos voted for the other candidate brought this case arguing Navajos should not be able to vote, and the New Mexico Supreme Court ruled otherwise. *Id.* at 388, 394.

<sup>97</sup> Thomas D. Morgan, *Native Americans in World War II*, 35 ARMY HIST. 22, 23 (1995). As noted by Lt. Col. Thomas D. Morgan, USA (Ret.), the large number of American Indians who were willing to serve and fight for the United States in a foreign land showed immense loyalty. *Id.* In World War II, the Navajo Code Talkers' contributions were critical to the United States' success in the war. See Eric Levenson, *The Incredible Story of the Navajo Code Talkers That Got Lost in All the Politics*, CNN (Nov. 29, 2017), <https://www.cnn.com/2017/11/28/us/navajo-code-talkers-trump-who/index.html> [<https://perma.cc/SGQ7-4SY2>] (describing how the secret Navajo code allowed troops to transmit important messages regarding strategy and tactics). For example, Marines could not have taken Iwo Jima without the success of the Navajo Code Talkers, who transmitted over 800 messages in two days. *Id.*

<sup>98</sup> McCoy, *supra* note 19, at 298. Ralph Anderson, a Navajo soldier, wrote to the Navajo superintendent encouraging him to support the right to vote for American Indians. Ralph Anderson, *April 30, 1943*, in FOR OUR NAVAJO PEOPLE: DINÉ LETTERS, SPEECHES, AND PETITIONS, 1900–1960, at 144, 144 (Peter Iverson ed., 2002). He noted that they were citizens without the right to vote and that hundreds of Navajo men served in the military and pledged their allegiance to the United States. *Id.*

War II veterans testified before Congress.<sup>99</sup> Despite the lack of response from Congress, President Harry S. Truman's civil rights commission addressed voting in their final report and argued to extend the franchise to American Indians.<sup>100</sup>

### C. Effects of the Voting Rights Act of 1965 on American Indian Voting

The Voting Rights Act not only addresses the methods of discrimination, intimidation, and violence against African Americans during the Jim Crow South, but it also prohibits discriminatory voting practices against all minorities.<sup>101</sup> The Voting Rights Act benefits American Indians by providing an easier way to challenge state election laws that denied American Indians the right to vote.<sup>102</sup> The Voting Rights Act is the most important piece of legislation in enfranchising American Indians.<sup>103</sup>

Section 2 of the Voting Rights Act makes it unlawful for states to adopt voting rules that discriminate against specific minority groups.<sup>104</sup> Cases brought under Section 2 fall under two categories.<sup>105</sup> First, a law could outright deny a group the right to vote, known as "vote denial."<sup>106</sup> Second, a law could

<sup>99</sup> McCoy, *supra* note 19, at 298–99.

<sup>100</sup> *Id.* at 298. The commission's report stated that the exclusion of Indians who were not taxed from voting was not a valid argument because American Indians were subject to federal taxes and certain state taxes. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 40 (1946).

<sup>101</sup> Terrye Conroy, *The Voting Rights of 1965: A Selected Annotated Bibliography*, 98 L. LIBR. J. 663, 663–64 (2006). During the "Freedom Summer" of 1964, officials arrested and murdered students who were registering African Americans to vote. *Id.* at 664. Activism for the right to vote characterized the year 1965. *See id.* (describing the events that took place in March of 1965). Martin Luther King Jr. and other organizers planned a march in March of 1965 from Selma, Alabama to the state capitol in Montgomery. *Id.* As protestors crossed the Edmund Pettus Bridge in Selma, they were stopped by state troopers. *Id.* State troopers attacked the protestors with whips, clubs, and tear gas. *Id.* This day is known as "Bloody Sunday." *Id.*

<sup>102</sup> MCCOOL ET AL., *supra* note 20, at 88 (indicating that American Indians in the southwest have relied on the Voting Rights Act to challenge exclusions from the right to vote); Wolfley, *supra* note 45, at 193 (stating that the Voting Rights Act is the primary tool for American Indians to assert their constitutional right to vote).

<sup>103</sup> *See* MCCOOL ET AL., *supra* note 20, at 45 (arguing that the Voting Rights Act was critical for citizens of color and approximately seventy-four cases were brought in regards to American Indians' right to vote). While it is impossible to ascertain the exact number of cases filed on behalf of American Indians under the Voting Rights Act, American Indians and advocacy groups have had success through consent agreements and court-imposed sanctions. *Id.* at 46. Daniel McCool, professor of American Indian policy at the University of Utah, analyzed all of the cases brought on behalf of American Indians from 1965 to 2006 and found only four cases that were decided against American Indians. *Id.* at 45.

<sup>104</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2018)).

<sup>105</sup> Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2149 (2015).

<sup>106</sup> *Id.* Vote denial cases were rarely brought until 2013, when the Supreme Court ruled on the Voting Rights Act in *Shelby County v. Holder*, likely because section 5's preclearance requirement stopped vote denial laws from going into effect. *See* 570 U.S. 529, 529 (2013); *see, e.g.*, League of

make a vote less important, known as “vote dilution.”<sup>107</sup> Section 3 of the Act provides sanctions that federal courts can impose on state jurisdictions that violate section 2.<sup>108</sup> For example, the court can require the jurisdiction to submit any future voting changes to the Department of Justice for preclearance.<sup>109</sup>

Sections 2 and 3 of the Voting Rights Act are paramount in responding to discriminatory state practices, but the Voting Rights Act was also key in preventing these practices from going into effect.<sup>110</sup> Part (b) of section 4 creates a coverage formula that includes all states and jurisdictions that used literacy tests or other tests as a precondition to voter registration.<sup>111</sup> Section 5 requires certain jurisdictions, identified using this coverage formula, to receive preclearance from the Department of Justice or the United States District Court for the District of Columbia for any changes in their voting and election rules.<sup>112</sup>

The 1975 Amendments to the Voting Rights Act are especially important, because the amendments require jurisdictions to provide oral assistance and translated election materials in the applicable minority group’s language.<sup>113</sup>

Women Voters of N.C. v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014) (indicating that while section 2 is primarily used for vote dilution cases, courts do address vote denial claims).

<sup>107</sup> Elmendorf & Spencer, *supra* note 105, at 2149. Vote dilution claims include any law that makes it harder for eligible voters to vote. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014).

<sup>108</sup> See Voting Rights Act of 1965 § 3 (stating that a court can require federal election examiners to oversee elections when a state violates the Fifteenth Amendment). Section 2 is critical because it was one of the only permanent provisions of the Voting Rights Act. Conroy, *supra* note 101, at 665. Many of the other provisions were set to expire after a set amount of time, with legislators assuming discriminatory practices would end by that point. See MCCOOL ET AL., *supra* note 20, at 22, 25 (explaining that the 1970 amendments extended certain provisions of the law).

<sup>109</sup> Voting Rights Act of 1965 § 3(c).

<sup>110</sup> See *id.* §§ 2–3 (providing an avenue through litigation to argue state election practices are discriminatory); *League of Women Voters*, 769 F.3d at 239 (stating that the success of section 5 prevented laws with a discriminatory effect from going into place).

<sup>111</sup> Voting Rights Act of 1965 § 4(b). Section 4(b) provides two requirements for when a jurisdiction might be included under section 5. *Id.* First, a state is subject to section 5 if it used any tests to determine voting eligibility before or on November 1, 1964. *Id.* Second, a state is also subject to section 5 if less than fifty percent of the voting age population voted in the 1964 presidential election. *Id.*

<sup>112</sup> *Id.* § 5. Originally, section 5 covered Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as parts of Hawaii, Idaho, and North Carolina. Robinson & Nelson, *supra* note 19, at 109.

<sup>113</sup> See Voting Rights Act Amendments, Pub. L. No. 94-73, sec. 203, 89 Stat. 400, 401–02 (1975) (codified as amended at 42 U.S.C. § 1937b) (requiring states to provide language assistance while voting); Brief of Amici Curiae the Navajo Nation et al., in Support of Appellees at 10, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (No. 08-322) (citing Apache Cty. High Sch. Dist. No. 90 v. United States, No. 77-1815 (D.D.C. June 12, 1980)) (describing how Apache County entered into a Consent Decree after an investigation revealed that their lack of language assistance was discriminatory). Prior to the adoption of the 1975 amendments, Arizona purged many American Indian voters from their records, and, even though the state notified voters by mail prior to the purge, many Navajos did not understand the significance because the notices were in English. MCCOOL ET AL., *supra* note 20, at 26. The Voting Rights Act Amendments of 1970 were also important because

Section 203 specifically addresses the language barriers for American Indians and Alaskan Natives.<sup>114</sup> It requires a jurisdiction that includes a tribal reservation where more than five percent of the voting-age residents speak a non-English language to provide language assistance.<sup>115</sup>

In *Apache County High School No. 90 v. United States*, decided in 1980, the District Court for the District of Columbia determined that Apache County prevented Navajos from participating in a special election by holding the election in a part of the county with little to no American Indians and with only English voting materials.<sup>116</sup> The county agreed to provide language assistance in a settlement agreement.<sup>117</sup> By adopting the 1975 Amendments, Congress indicated that since language minorities did not have equal access to education, English-only voter registration and procedures negatively affected turnout rates among language minorities.<sup>118</sup> As of 2016, approximately sixty local jurisdictions in twelve states are required to provide language assistance, either verbally or written, to American Indians during voting.<sup>119</sup>

In 1982, Congress adopted additional amendments to the Voting Rights Act to address minority vote dilution within certain jurisdictions.<sup>120</sup> Vote dilution occurs through a variety of practices and results in the weakening of a sin-

those amendments banned literacy tests nationwide and updated the formula for the preclearance requirement in section 5. *Id.* at 25.

<sup>114</sup> Voting Rights Act Amendments of 1975 sec. 203. Covered languages include those of American Indians, Asian Americans, and Spanish-heritage voters. *About Language Minority Voting Rights*, U.S. DEP'T JUST. (Mar. 27, 2019), <https://www.justice.gov/crt/about-language-minority-voting-rights> [https://perma.cc/V5MJ-MPUF]. Covered jurisdictions are determined based on Census data, and the most recent covered jurisdictions were determined in 2016. *Id.*

<sup>115</sup> *About Language Minority Voting Rights*, *supra* note 115. Section 203 also requires that jurisdictions must provide oral assistance when a minority language is unwritten, which is common for many tribal languages. Robinson & Nelson, *supra* note 19, at 111.

<sup>116</sup> Brief of Amici Curiae, *supra* note 113, at 10 (citing *Apache Cty. High Sch. Dist. No. 90*, No. 77-1815). In an effort to avoid school integration, the county held a special election regarding school funding in a part of the county with no American Indians. *Id.* The court found that American Indian turnout in the election was suppressed because of the lack of language assistance during in-person and absentee voting procedures and the lack of Navajo language meetings about the special election. *Id.*

<sup>117</sup> *See id.* (indicating that the county agreed to implement a number of changes in their voting procedures in a Consent Decree).

<sup>118</sup> Wolfley, *supra* note 45, at 195.

<sup>119</sup> Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532, 87,533–38 (Dec. 5, 2016).

<sup>120</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, 96 Stat. 131, 134 (1982). The Senate Judiciary Committee issued a report on the 1982 amendments and set forth a list of factors for the courts to consider in determining the success of a vote dilution claim. *Section 2 of the Voting Rights Act*, U.S. DEP'T JUST. (Sept. 27, 2019), <https://www.justice.gov/crt/section-2-voting-rights-act> [https://perma.cc/6DBR-NM44]. These factors included the political subdivision's past with regards to voting discrimination, racial polarization of elections, exclusion of minority candidates in elections, and whether minority candidates have been represented in public office in the jurisdiction. *Id.* The Committee also noted that the list of factors was not exhaustive and did not say how many factors would need to be present for plaintiffs to win. *Id.*

gle group's votes even though the right to cast a ballot is not denied.<sup>121</sup> Dilution of the American Indian vote occurs through either at-large voting, where the majority voters can choose all members or officials, or reapportionment plans, which divide or concentrate minority voters.<sup>122</sup> For example, in *Windy Boy v. County of Big Horn*, the District Court for Montana in 1986 held that Big Horn County's at-large elections were unlawful after the plaintiffs showed past and present discrimination against Crow and Northern Cheyenne members.<sup>123</sup>

Section 5 of the Voting Rights Act of 1965 required the federal government to review potential voting changes in covered jurisdictions before implementation.<sup>124</sup> In 2013, however, the Supreme Court in *Shelby County v. Holder* invalidated section 5.<sup>125</sup> Prior to *Shelby County*, the Department of Justice and District Court for the District of Columbia reviewed any proposed changes from these covered jurisdictions for a discriminatory purpose or a discriminatory effect.<sup>126</sup> By 2013, section 5 of the Voting Rights Act covered Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, along with jurisdictions in California, Florida, Michigan, New York, North Carolina, and South Dakota.<sup>127</sup> Section 5 protected American Indian voters because Alaska, Arizona, and South Dakota have large populations of American Indians.<sup>128</sup>

Because section 5 required states and jurisdictions to obtain preclearance before implementing new voting processes, states included in section 5 strong-

<sup>121</sup> Wolfley, *supra* note 45, at 198; *see, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 79–80 (1985) (holding that a multimember form of districting in North Carolina violated section 2 of the Voting Rights Act because it weakened the ability of black voters to participate in the political process and elect representatives of their choice); *see also Windy Boy v. Cty. of Big Horn*, 647 F. Supp. 1002, 1023 (D. Mont. 1986) (ordering Big Horn County in Montana to redistrict into single-member districts because the at-large scheme was discriminatory).

<sup>122</sup> Wolfley, *supra* note 45, at 198.

<sup>123</sup> 647 F. Supp. at 1004, 1022. Single-member districts are a solution to discriminatory at-large voting plans and were used in claims in New Mexico, Arizona, and Colorado. Wolfley, *supra* note 45, at 199.

<sup>124</sup> Voting Rights Act of 1965 § 5. Section 4(b)'s coverage formula determined which jurisdictions had to be reviewed under section 5. *Id.* §§ 4(b), 5.

<sup>125</sup> 570 U.S. at 529 (holding that the coverage formula in section 4(b) is unconstitutional).

<sup>126</sup> Voting Rights Act of 1965 § 5. If the proposed law was found to have a discriminatory effect, the state could not enact the change. *Id.*

<sup>127</sup> *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, U.S. DEP'T JUST. (Aug. 6, 2015), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/7FUM-8QBV>]. States and jurisdictions were subject to the section 5 preclearance requirement based on the coverage formula provided in section 4(b) of the Voting Rights Act. *Id.*

<sup>128</sup> *See Note, supra* note 21, at 1742–43 (indicating that Arizona and Alaska had statewide coverage as well as two counties in South Dakota with a high population of American Indians). Alaska, Arizona, and South Dakota have American Indian populations of approximately fifteen percent, five percent, and nine percent, respectively. *QuickFacts: Alaska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ak> [<https://perma.cc/9Q3H-HNAX>]; *QuickFacts: Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/az> [<https://perma.cc/L5PW-M2VA>]; *QuickFacts: South Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/sd> [<https://perma.cc/E4JL-BAAL>].

ly disliked the provision.<sup>129</sup> Shelby County, Alabama challenged the constitutionality of section 4, part (b) and section 5.<sup>130</sup> The Supreme Court held the coverage formula of section 4 used outdated information and thus was unconstitutional.<sup>131</sup> This invalidated the section 5 preclearance requirement, because the coverage formula determined the jurisdictions, state and local, subject to preclearance.<sup>132</sup> After the *Shelby County* decision, several previously-covered states quickly passed changes to their voting practices.<sup>133</sup>

Instead of relying on section 5 to invalidate new voting procedures, any challenges to changes to voting with a discriminatory effect must be argued under section 2.<sup>134</sup> Circuit courts take different approaches when considering section 2 claims.<sup>135</sup> For example, the Fourth, Fifth, and Sixth Circuit Courts of Appeals suggest that a voting procedure violates section 2 if (1) it disproportionately burdens a protected class and (2) historical conditions that produced discrimination caused this burden.<sup>136</sup> The Seventh Circuit Court of Appeals

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<sup>129</sup> See MCCOOLET AL., *supra* note 20, at 23 (indicating that section 5 was the most controversial part of the Voting Rights Act and prevented jurisdictions from implementing voting procedures that might negatively impact minority voters).

<sup>130</sup> *Shelby County*, 570 U.S. at 540; see Robinson & Nelson, *supra* note 19, at 113–14 (stating that the preclearance requirement of section 5 was controversial and opposed by covered Southern states). The Supreme Court did not issue a ruling on section 5 because Congress could create a new formula where states would be subject to preclearance. *Shelby County*, 570 U.S. at 557.

<sup>131</sup> *Shelby County*, 570 U.S. at 551. The Court held that since the coverage formula was based on literacy tests and voter registration from the 1960s and 1970s, the formula no longer met current needs. *Id.*

<sup>132</sup> See *id.* at 557 (holding the coverage formula to be unconstitutional but indicating that Congress could pass legislation for a new coverage for section 5).

<sup>133</sup> See JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 3–4 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf) [<https://perma.cc/FL3E-3NBW>] (discussing the high number of voters that Georgia purged from its voter registration rolls after the *Shelby County* decision); Adam Liptak & Michael Wines, *Strict North Carolina Voter ID Law Thwarted After Supreme Court Rejects Case*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html> [<https://perma.cc/92GJ-F9TF>] (noting that one of the strictest voter ID laws was adopted by North Carolina after the *Shelby County* decision); Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, THE GUARDIAN (June 25, 2013), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [<https://perma.cc/N5W4-9HBB>] (reporting that Texas passed a controversial voter ID law that requires a photo identification to vote the same day that the decision in *Shelby County* was given).

<sup>134</sup> Elmendorf & Spencer, *supra* note 105, at 2147. During the oral argument for *Shelby County*, Justice Kennedy questioned whether a difference existed between a section 2 preliminary injunction and section 5 preclearance. Transcript of Oral Argument at 37, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

<sup>135</sup> See Elmendorf & Spencer, *supra* note 105, at 2148 (indicating that each section 2 claim is unique and the rulings are heavily dependent on the judge who hears the case).

<sup>136</sup> *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015); *League of Women Voters*, 769 F.3d at 240; *Ohio State Conference of the NAACP*, 768 F.3d at 554, *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

developed a stricter standard that requires a discriminatory intent rather than a disparate outcome.<sup>137</sup>

Given the split between the circuit courts, relying on section 2 might not be as protective as section 5's invalidated preclearance requirement.<sup>138</sup> Under section 5, the Department of Justice reviewed proposed changes as to whether the practice denies or curtails the right to vote based on race.<sup>139</sup> Additionally, although section 2 might stop voting procedures that would have been invalid under section 5, individuals can only bring claims under section 2 after the voting procedure in question goes into effect.<sup>140</sup> Section 2 claims also require plaintiffs to go through the lengthy litigation process.<sup>141</sup>

Section 3 also provides many of the same protections that section 5 did prior to the *Shelby County* decision.<sup>142</sup> Section 3 allows courts to require jurisdictions that violated the Fourteenth and Fifteenth Amendments to submit voting changes to the Department of Justice, much like the preclearance requirement of section 5.<sup>143</sup> In 1980, in *City of Mobile v. Bolden*, the Supreme Court held that a discriminatory intent in a voting practice is necessary to establish a violation of the Fourteenth or Fifteenth Amendments.<sup>144</sup> Under the standard of *City of Mo-*

<sup>137</sup> Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014).

<sup>138</sup> See *id.* (holding that an intent to discriminate is necessary to constitute a violation of section 2).

<sup>139</sup> *About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST. (Dec. 4, 2017), <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<https://perma.cc/X3F9-WLBB>]. Section 5 provides two methods to gain preclearance: judicial or administrative review. *Id.* Under judicial review, a three-judge panel of the D.C. District Court determines whether the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race . . . .” *Id.* (quoting 52 U.S.C. § 10302(c)). Under administrative review, the Civil Rights Division of the Department of Justice applies the same standard as the D.C. District Court. *Id.* In either review, the state has the burden to prove the change is nondiscriminatory. *Id.*

<sup>140</sup> Elmendorf & Spencer, *supra* note 105, at 2143.

<sup>141</sup> See *More Observations on Shelby County, Alabama, and the Supreme Court*, CAMPAIGN LEGAL CTR. (Mar. 1, 2013), <https://campaignlegal.org/update/more-observations-shelby-county-alabama-and-supreme-court> [<https://perma.cc/4BYN-P8AU>] (arguing that less than five percent of section 2 cases result in a preliminary injunction and thus suggesting that section 2 claims are usually lengthy and costly).

<sup>142</sup> Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1997–98 (2010).

<sup>143</sup> Voting Rights Act of 1965 § 3; Crum, *supra* note 142, at 2006. Section 3 also allows courts to require federal election monitors at polling locations to ensure compliance with the Voting Rights Act. Voting Rights Act of 1965 § 3. For example, in 2011, in *United States v. Sandoval County*, the District Court of New Mexico found that Sandoval County would be subject to federal election observers under section 3 after failing to provide oral instructions and assistance in Navajo and Keresan languages. 797 F. Supp. 2d 1249, 1250 (D.N.M. 2011).

<sup>144</sup> 446 U.S. 55, 62 (1989). Black voters in Mobile, Alabama argued that the at-large system of voting diluted the minority votes and was unconstitutional under section 2 of the Voting Rights Act. *Id.* at 58. The Court in *City of Mobile* reasoned that it was necessary to show a discriminatory intent to violate the Voting Rights Act because it had previously established that a claim under the Equal Protection Clause also required proof of a discriminatory intent. *Id.* at 68.

bile, a finding of a discriminatory effect does not violate section 3 unless the jurisdiction specifically intended to discriminate against a group of voters.<sup>145</sup>

#### D. Current Voting Reform Proposals

Although the Voting Rights Act has been amended five times since its implementation, there has not been substantive voting reform legislation since 2006.<sup>146</sup> Prior to 2006, however, Congress passed legislation to increase access to the right to vote.<sup>147</sup> The National Voter Registration Act of 1993 (NVRA) creates a uniform federal form for voter registration, and the Act required states to implement simplifying systems.<sup>148</sup> Under the NVRA, state motor vehicle offices must provide opportunities for citizens to register to vote.<sup>149</sup> Congress, through the NVRA, intended to increase the number of registered voters and to enhance voter participation.<sup>150</sup>

Legislation to specifically address American Indian voting has been introduced and proposed to Congress, but it has not been passed.<sup>151</sup> For example, in 2015, the Department of Justice proposed the Tribal Equal Access to Voting Act of 2015 (TEAVA).<sup>152</sup> If passed, TEAVA would require states to place at least one polling location on tribal lands to increase tribal participation in fed-

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<sup>145</sup> See Note, *supra* note 21, at 1746 (arguing that the scope of section 3 is smaller than section 2 given the high standard that must be met under *City of Mobile*).

<sup>146</sup> See *Voting Rights Act: Major Dates in History*, ACLU, <https://www.aclu.org/voting-rights-act-major-dates-history> [<https://perma.cc/3K6S-Y9Q9>] (providing the history of voting rights legislation in the United States). Congress amended the Voting Rights Act in 1970, 1975, 1982, 1992, and 2006. *Id.*

<sup>147</sup> See National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2(b), 107 Stat. 77, 77 (1993) (codified as amended at 42 U.S.C. § 1973gg (2018)) (including as purposes of the National Voter Registration Act (NVRA) protecting the right to vote and simplifying the voter registration process).

<sup>148</sup> *Id.* § 8(b) (demanding states maintain accurate voter registration lists and prohibiting the removal of any individuals from the list for failing to vote in an election).

<sup>149</sup> *Id.* § 5(a)(1) (requiring driver's license applications and renewal applications to serve as an application for voter registration in the state).

<sup>150</sup> *Id.* § 2(b)(1)–(2) (stating that the goal of the legislation was to increase the number of registered voters and the number of voters participating in elections).

<sup>151</sup> See Letter from Peter J. Kadzik, Assistant Attorney Gen., U.S. Dep't of Justice, to Honorable Joseph R. Biden, President, U.S. Senate 1 (May 21, 2015), <http://www.carlyleconsult.com/images/Tribal-Equal-Access-to-Voting-Act.pdf> [<https://perma.cc/7QEM-YBXS>] (proposing the Tribal Equal Access to Voting Act of 2015 (TEAVA)); see also Native American Voting Rights Act of 2015, S. 1912, 114th Cong. (2015) (introducing the Native American Voting Rights Act of 2015 (NAVRA) to the Senate).

<sup>152</sup> Letter from Peter J. Kadzik to Joseph R. Biden, *supra* note 151, at 3. The Department of Justice proposed TEAVA to the Senate after working in conjunction with tribes on how to address barriers to voting. *Id.* at 1. The Department of Justice proposed TEAVA to address the lack of polling locations on reservations. *Id.*

eral elections.<sup>153</sup> Additionally, Montana Senator Jon Tester introduced the Native Americans Voting Rights Act of 2015 (NAVRA) to expand upon the protections of TEAVA.<sup>154</sup> If passed, NAVRA would require the federal government to review all changes on American Indians reservations that affect voter registration sites, early voting locations, and election day polling locations.<sup>155</sup> NAVRA additionally demands all states to accept tribal identification to satisfy a voting requirement.<sup>156</sup> The Senate did not take any actions on NAVRA, even though tribes were generally supportive of the bill.<sup>157</sup>

The preclearance requirement of the NAVRA resembles section 4, part (b) and section 5 of the Voting Rights Act, but there are key differences.<sup>158</sup> First, NAVRA applies to all states and does not have a coverage formula.<sup>159</sup> In *Shelby County*, the Supreme Court specifically ruled that the section 4, part (b) coverage formula was unconstitutional because it singled out specific states based on outdated information.<sup>160</sup> Additionally, NAVRA does not require preclearance for all voting changes.<sup>161</sup> NAVRA only requires preclearance for changes to polling locations and hours on reservations.<sup>162</sup> With these differences, NAVRA should not face the same constitutional challenges as the Voting Rights Act.<sup>163</sup>

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<sup>153</sup> *Id.* at 3. The Senate never introduced TEAVA. Kaitlyn Schaeffer, *Securing Equal Access to the Ballot for Native Americans*, ALI ADVISER (Feb. 8, 2018), <http://www.thealiadviser.org/american-indian-law/securing-equal-access-ballot-native-americans/> [https://perma.cc/KU9A-25W2].

<sup>154</sup> Native American Voting Rights Act of 2015. Senators Heidi Heitkamp (D-N.D.), Tom Udall (D-N.M.), and Al Franken (D-Minn.) joined Senator Tester in introducing the legislation to the Senate. *Id.*

<sup>155</sup> *Id.* § 3. The Department of Justice or D.C. District Court would review any voting change that affected American Indians to ensure the change would not have a discriminatory effect and suppress American Indian votes. *Id.* § 3(b)(1)(A).

<sup>156</sup> *Id.* § 4(f). NAVRA would also require the Attorney General and Department of Justice to have annual consultations with tribes to ensure access to the ballot is being met. *Id.* § 8.

<sup>157</sup> Schaeffer, *supra* note 153.

<sup>158</sup> Compare Voting Rights Act of 1965 § 4(b) (providing the coverage formula for section 5 of the Voting Rights Act), with Native American Voting Rights Act of 2015 § 3 (providing new requirements for states with reservations to have certain changes precleared).

<sup>159</sup> Native American Voting Rights Act of 2015 § 3(a). NAVRA requires state attempts to eliminate or move of polling locations on American Indian reservations to be precleared by the Department of Justice or the D.C. District Court. *Id.* The requirement applies to all American Indian reservations. *Id.*

<sup>160</sup> See 570 U.S. at 551 (holding that the coverage formula was determined based on information from over forty years ago). Chief Justice Roberts specifically indicated that Congress had the ability to create another coverage formula and that the Court was not issuing a ruling on section 5 of the Voting Rights Act. *Id.*

<sup>161</sup> See Native American Voting Rights Act of 2015 § 3(a) (stating that the preclearance provision only requires changes regarding the location or hours of polling offices on American Indian reservations to be submitted for preclearance).

<sup>162</sup> *Id.*

<sup>163</sup> See *Shelby County*, 570 U.S. at 557 (striking down the coverage formula of the Voting Rights Act but acknowledging that voter discrimination still exists and a new formula addressing present-day problems would not be unconstitutional).

## II. CURRENT STATE VOTING RULES THAT SUPPRESS AMERICAN INDIAN VOTES AND THE LIMITS OF LITIGATION AS A REMEDY

While the Voting Rights Act prevented many voting laws with a discriminatory intent, states have still enacted new voting changes that suppress American Indian votes.<sup>164</sup> While these efforts do not explicitly address American Indians, they place a higher burden on an already disadvantaged group.<sup>165</sup> American Indians have been successful in bringing lawsuits challenging discriminatory voting, but litigation comes at a high cost.<sup>166</sup> Section A of this Part lists current tactics that suppress American Indian votes, including (1) implementing voter identification laws, (2) passing ballot harvesting laws, (3) reducing the number of polling hours and locations, (4) practicing voter dilution mechanisms, (5) failing to provide language assistance, and (6) other covert tactics.<sup>167</sup> Section B explains why these policies are adopted and how the courts are an ineffective solution to address these voter suppression tactics.<sup>168</sup>

### A. Voter Suppression Tactics

Despite the success of the Voting Rights Act of 1965 in providing minority communities' access to the ballot box, state governments still enact new voting procedures that suppress minority votes.<sup>169</sup> Given that American Indians historically have low voter turnout, advocates worry that these voting changes will further suppress American Indian votes.<sup>170</sup> Policies and practices that af-

<sup>164</sup> See Note, *supra* note 21, at 1737 (declaring that there are new ways that states have suppressed minority voters without explicitly banning the right to cast a vote).

<sup>165</sup> *Id.*

<sup>166</sup> See Kira Lerner, *Native Americans' Right to Vote Is Under Attack*, THINKPROGRESS (June 20, 2018), [https://thinkprogress.org/for-native-americans-the-right-to-vote-is-under-attack-f667a402d63c/\[https://perma.cc/HHK7-RJZY\]](https://thinkprogress.org/for-native-americans-the-right-to-vote-is-under-attack-f667a402d63c/[https://perma.cc/HHK7-RJZY]) (stating that American Indians and advocacy groups filed over ninety voting rights cases since the enactment of the Voting Rights Act and American Indians were successful in approximately ninety-three percent of lawsuits). American Indians have also had success since the Supreme Court decision in *Shelby County v. Holder* in 2013. *Id.*; see *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (declaring unconstitutional section 4(b) of the Voting Rights Act).

<sup>167</sup> See *infra* notes 169–227 and accompanying text.

<sup>168</sup> See *infra* notes 228–246 and accompanying text.

<sup>169</sup> See Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities*, *Journalist Says*, NPR (Oct. 23, 2018), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says> [<https://perma.cc/83SU-XEJQ>] (describing the different types of policies enacted in different states that suppressed minority votes); Danny Hakim & Michael Wines, *'They Don't Really Want Us to Vote': How Republicans Made It Harder*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/politics/voting-suppression-elections.html> [<https://perma.cc/P5XL-MGS5>] (discussing voter suppression methods, which can include reducing early voting hours and introducing strict voter identification laws, and legal efforts to combat them).

<sup>170</sup> TOVA WANG, DĒMOS, ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES: NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 6 (2012), <https://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf> [<https://perma.cc/RM49-EH2Y>]. While turnout is difficult to determine for the small population, DĒmos found that the voter turnout

fect American Indian turnout include (1) strict voter ID laws, (2) ballot harvesting laws that make it a felony to collect others' ballots, (3) reduced polling hours and locations, (4) voter dilution practices, (5) policies denying language assistance, and (6) other covert tactics.<sup>171</sup>

### 1. Voter Identification Laws

States have enacted voter ID laws that require voters to present state- or government-issued ID, usually with a valid expiration date and photograph.<sup>172</sup> These laws are problematic for American Indian voters for several reasons.<sup>173</sup> Many eligible American Indian voters must travel long distances to a state ID-issuing office, which requires finding transportation during the office's open hours.<sup>174</sup> Additionally, many American Indian do not have access to reliable transportation to reach these offices.<sup>175</sup> As demonstrated by Lucille Vivier, getting to an issuing office involves coordination of transportation, costs, and childcare.<sup>176</sup>

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rate among registered American Indians and Alaska Natives was up to fourteen percentage points lower than that of other minority groups. *Id.*

<sup>171</sup> See Note, *supra* note 21, at 1735–41 (arguing that there are several facially neutral techniques that states implement that negatively affect the American Indian vote). For discussion of voter ID laws see *infra* notes 172–185 and accompanying text; for ballot harvesting see *infra* notes 186–191 and accompanying text; for increased reliance on mail-in voter ballots see *infra* notes 192–203 and accompanying text; for voter dilution see *infra* notes 204–216 and accompanying text; for lack of language assistance see *infra* notes 217–222 and accompanying text; and for other covert tactics see *infra* notes 223–227 and accompanying text.

<sup>172</sup> Sally Harrison, Comment, *May I See Your ID? How Voter Identification Laws Disenfranchise Native Americans' Fundamental Right to Vote*, 27 AM. INDIAN L. REV. 597, 597–98 (2012). At least ten percent of all eligible voters do not have the type of identification necessary to register to vote under these new laws. KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1 (2012), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Challenge\\_of\\_Obtaining\\_Voter\\_ID.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Challenge_of_Obtaining_Voter_ID.pdf) [<https://perma.cc/T4DK-LPUN>].

<sup>173</sup> See Brief of Amici Curiae National Congress of American Indians et al. in Support of Petitioners at 15, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25) (indicating that many American Indians cannot afford the costs of obtaining a valid photo ID, which can include transportation to an issuing office and the fee charged by the state).

<sup>174</sup> *Id.*; see Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html?noredirect=on&utm\\_term=.260812e8d7a0](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?noredirect=on&utm_term=.260812e8d7a0) [<https://perma.cc/J3RA-FG6D>] (outlining the difficulties minority groups have in obtaining a valid identification for voting because they do not have access to the required documents and lack the transportation to an issuing office). For example, some Alaskan Natives must travel by air to reach an identification issuing office because it is the only office in a 75,000-square-mile area. Brief of Amici Curiae, *supra* note 173, at 16.

<sup>175</sup> Brief of Amici Curiae, *supra* note 173, at 15–16. American Indians are twice as likely to not have access to a car than the general population, and less than ten percent have access to public transportation. *Id.*

<sup>176</sup> See *supra* notes 6–12 and accompanying text.

Even if an individual finds transportation to a state ID-issuing office, he or she may not have the necessary documents, such as a birth certificate or proof of residence, to obtain a state- or government-issued ID.<sup>177</sup> Many American Indians are not born at a hospital and, therefore, do not have a birth certificate, which is often necessary to obtain a state-issued ID.<sup>178</sup> Additionally, the Indian Health Service did not provide birth certificates for American Indians before the 1960s.<sup>179</sup> American Indians are also more likely to rely on a tribal ID card, which are not state- or government-issued.<sup>180</sup>

Additionally, stricter voter ID laws, such as the North Dakota law that requires a current residential street address, suppress American Indian voters even further.<sup>181</sup> American Indians living on reservations are not required to have a residential address and instead rely on receiving mail from a post office

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<sup>177</sup> Brief of Amici Curiae, *supra* note 173, at 10–11. Additionally, many American Indians do not have access to utilities, such as electricity in their homes, and therefore do not have a utility bill. *Id.* at 12.

<sup>178</sup> *Id.* at 10–11. States will allow residents to file for a delayed birth certificate when a birth is not recorded within one year, but it is a long, expensive process. See *How to Get a Delayed Birth Certificate for Passport Application*, U.S. PASSPORT SERV. GUIDE, <https://www.us-passport-service-guide.com/delayed-birth-certificate-for-us-passport.html> [<https://perma.cc/ATH5-VLWB>] (outlining who can qualify for a delayed birth certificate and the steps to obtain one); see, e.g., *Arizona Delayed Birth Registration Document Checklist for Native Americans Born Before 1970*, ARIZ. DEP'T HEALTH SERVS., <https://azdhs.gov/documents/licensing/vital-records/delayed-birth-certificate-checklist-native-americans.pdf> [<https://perma.cc/2DZJ-4NS3>] (providing the lengthy questionnaire Arizona applicants must complete for a delayed birth certificate); *How to File a Delayed Certificate of Birth*, KAN. DEP'T HEALTH & ENV'T, [http://www.kdheks.gov/vital/download/Delayed\\_Birth\\_Flyer.pdf](http://www.kdheks.gov/vital/download/Delayed_Birth_Flyer.pdf) [<https://perma.cc/57WV-F6CS>] (stating that a delayed birth certificate costs at least \$35 for the filing fee and certified copy fee). Additionally, American Indians requesting a delayed birth certificate must submit an Official Tribal Enrollment Record and other evidentiary documents to support the name, sex, date of birth, place of birth, the mother's name, and the mother's date of birth of the requester. See, e.g., *Arizona Delayed Birth Registration Document Checklist for Native Americans Born Before 1970*, *supra* (listing the requirements that American Indians must prove to receive a delayed birth certificate).

<sup>179</sup> Brief of Amici Curiae, *supra* note 173, at 10–11. The Indian Health Service is a part of the Department of Health and Human Services. *Agency Overview*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/overview/> [<https://perma.cc/Q4SG-N6DS>]. The National Congress of American Indians found that as many as twenty percent of American Indians could not provide a birth certificate. Brief of Amici Curiae, *supra* note 173, at 10–11.

<sup>180</sup> See Harrison, *supra* note 172, at 619–20 (highlighting that individuals with a tribal ID often solely rely on it as their main and only form of identification). Tribal governments, which have sovereign authority over their territory, will often issue ID cards for their members. Brief of Amici Curiae, *supra* note 173, at 18. Several states allow American Indians to vote with a tribal ID, but others require a state or federal government-issued ID card. See *Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES (Jan. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Details> [<https://perma.cc/4WCS-FSBT>] (providing a table of all states' voter ID requirements).

<sup>181</sup> See N.D. CENT. CODE § 16.1-01-04.1(2)(b) (2019) (requiring voters to provide a residential street address on their ID in order to vote); Harrison, *supra* note 172, at 619 (arguing that American Indians face unique challenges when it comes to presenting the necessary ID in order to comply with voter ID laws).

box.<sup>182</sup> This is partly because reservation roads are severely underdeveloped, thus making travel difficult.<sup>183</sup> Additionally, many American Indian homes do not have a residential address or residents are never told they have a residential address.<sup>184</sup> American Indians bear an additional burden to determine their address while also attempting to obtaining a state- or government-issued ID.<sup>185</sup>

## 2. Ballot Harvesting Bans

Over the past few elections, states have expressed concerns with third-parties collecting and manipulating absentee ballots, called “ballot harvesting.”<sup>186</sup> In 2016, for example, Arizona passed a law making it a felony for individuals to collect and turn in another voter’s completed ballot.<sup>187</sup> With the

<sup>182</sup> Complaint for Declaratory and Injunctive Relief at 20, *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018) (No. 1:16-cv-08). Tribal identification cards often do not contain a resident’s address, even if they may have one, and the Bureau for Indian Affairs does not require tribal governments to include a residential address on tribal identification cards. *Id.*

<sup>183</sup> See NAT’L CONG. OF AMERICAN INDIANS & THE LEADERSHIP CONFERENCE EDUC. FUND, TRIBES & TRANSPORTATION: POLICY CHALLENGES AND OPPORTUNITIES 2 (2011), [http://civilrightsdocs.info/pdf/reports/Tribes\\_and\\_Transportation\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Tribes_and_Transportation_Report.pdf) [<https://perma.cc/9GC8-HTWA>] (stating that roads on American Indian reservations are severely underfunded and underdeveloped). In 2010, sixty percent of tribal roads were unpaved. *Id.* Road maintenance is also underfunded, with state governments spending less than \$500 per road-mile on reservations and between \$4,000 and \$5,000 per road-mile on other state roads and highways. *Id.*

<sup>184</sup> Complaint for Declaratory and Injunctive Relief, *supra* note 182, at 20. For example, when government officials spoke to residents, they received conflicting information, causing homes to be recorded with multiple house numbers and different zip codes. *Id.*

<sup>185</sup> *Id.* The North Dakota Secretary of State’s office said that residents without an address could request a free street address along with a letter confirming the address from their county’s 911 coordinator. Memorandum from N.D. Sec’y of State’s Office to Tribal Leaders of Native Am. Tribes Located in N.D. 2 (Sept. 28, 2018), <https://vip.sos.nd.gov/pdfs/Portals/VotingInformationforTribalMembers.pdf> [<https://perma.cc/CX7D-2ZL4>]. Advocates claim that many American Indians do not know that they can request an address. Complaint for Declaratory and Injunctive Relief, *supra* note 182, at 27–28. Additionally, advocates claim it would be more efficient to let the tribes access 911 addresses instead of requiring individuals to do it. *Domonoske, supra* note 24.

<sup>186</sup> See, e.g., Griffin Connolly, *North Carolina Woman Admits to ‘Harvesting’ Ballots for Mark Harris Operative*, ROLL CALL (Dec. 4, 2018), <https://www.rollcall.com/news/politics/north-carolina-woman-admits-harvesting-ballots-mark-harris-operative> [<https://perma.cc/3SZP-KNYF>] (indicating that although North Carolina bans a third party from collecting completed ballots, a woman admitted she was paid to pick up ballots during the 2018 election and acknowledged that she does not know what happened to the ballots after she returned them to the campaign office); Colby Itkowitz, *Paul Ryan Isn’t Saying There Was Voter Fraud in California. But . . .*, WASH. POST (Nov. 29, 2018), [https://www.washingtonpost.com/politics/2018/11/29/paul-ryan-isnt-saying-there-was-voter-fraud-california/?utm\\_term=.8fb89530432a](https://www.washingtonpost.com/politics/2018/11/29/paul-ryan-isnt-saying-there-was-voter-fraud-california/?utm_term=.8fb89530432a) [<https://perma.cc/FFB7-V4WM>] (stating that 2018 was the first year California allowed a third party to return ballots and that the Orange County Republican Party Chairman questioned the practice).

<sup>187</sup> ARIZ. REV. STAT. ANN. § 16-1005(H) (2019). The provision provides an exception for a “family member, household member, or caregiver” who collects the ballot of a voter. *Id.* § 16-1005(I). The Ninth Circuit Court of Appeals in *Democratic National Committee v. Regan* in 2018 upheld the Arizona law and declared that the provision did not violate the Fourteenth Amendment, Fifteenth

new law, it is unlawful for a neighbor or friend to return another's filled-in ballot to a mailbox or election office.<sup>188</sup> This policy hurts American Indians in Arizona, for example, because approximately twenty-five percent of homes have access to a car.<sup>189</sup> American Indians also often rely on neighbors to run errands, especially given the high elderly population on the reservation.<sup>190</sup> Laws like this place a high burden on American Indians to return each individual ballot and make voters afraid of potentially breaking the law.<sup>191</sup>

### 3. Increased Reliance on Mail-In Ballots

The shift towards mail-in ballots also suppresses American Indians voters.<sup>192</sup> With the increase in voting by mail, in-person voting opportunities have decreased, including shorter polling hours and fewer polling locations.<sup>193</sup> With unreliable mail delivery on reservations, American Indians risk not receiving their ballot or not having their mail-in ballot picked up.<sup>194</sup> American Indians also rely on in-person language assistance to translate their ballots.<sup>195</sup>

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Amendment, or section 2 of the Voting Rights Act because the plaintiffs did not show that the law deprived minority voters of their right to vote. 904 F.3d 686, 697 (9th Cir. 2018).

<sup>188</sup> See ARIZ. REV. STAT. ANN. § 16-1005(H) The law was passed to curb absentee voter fraud and minimize the opportunities for ballot tampering, loss, and destruction. Democratic Nat'l Comm. v. Regan, 329 F. Supp. 3d 824, 852 (D. Ariz. 2018).

<sup>189</sup> Lerner, *supra* note 166.

<sup>190</sup> *Id.* In 2016, the median household income of single-race American Indians, including Alaskan Natives, was \$39,719, compared to \$57,617 for the general population. *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf> [<https://perma.cc/U89S-4F8U>]. Approximately ten percent of single-race American Indians are age sixty-five or older. *Id.*

<sup>191</sup> Lerner, *supra* note 166.

<sup>192</sup> See *Voting by Mail*, N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/interactive/2012/10/07/us/voting-by-mail.html> [<https://perma.cc/Y7RQ-F65C>] (providing information regarding the increase of voting by mail, especially in western states). For example, in Montana, twenty-six percent of voters voted by mail in 2008. *Id.* That percentage increased to forty-one percent in 2010. *Id.*

<sup>193</sup> See THE LEADERSHIP CONFERENCE EDUC. FUND, THE GREAT POLL CLOSURE 7 (2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf> [<https://perma.cc/7CF8-36G2>] (indicating that over two hundred polling locations closed in Arizona since the *Shelby County* decision in 2013).

<sup>194</sup> See Jean Schroedel & Melissa Rogers, *What Keeps Native Americans from Voting—and What Could Change This*, WASH. POST (Oct. 18, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/18/what-keeps-native-americans-from-voting-and-what-could-change-this/?noredirect=on&utm\\_term=.34153b5e0618](https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/18/what-keeps-native-americans-from-voting-and-what-could-change-this/?noredirect=on&utm_term=.34153b5e0618) [<https://perma.cc/Y4AN-DZZW>] (arguing that American Indians prefer not to vote by mail in part because they do not have regular mail delivery). Given that most American Indian reservations are in remote areas with unmarked roads, mail delivery is infrequent. Abigail Abrams, *Voting Rights 2016: Native Americans Struggle to Overcome Barriers Ahead of Arizona Elections*, INT'L BUS. TIMES (Mar. 22, 2016), <https://www.ibtimes.com/voting-rights-2016-native-americans-struggle-overcome-barriers-ahead-arizona-2340458> [<https://perma.cc/896J-FMMY>].

<sup>195</sup> Lerner, *supra* note 166. Several American Indian languages are unwritten, so individuals who speak those languages rely on oral translations of their ballots and elections materials. *Id.*

With the decreased number of polling locations, American Indians often travel long distances in order to cast a vote, thus decreasing turnout.<sup>196</sup> For example, in 2016, in *Sanchez v. Cegavske*, the District Court of Nevada held that Washoe County must provide a polling location for early voting on the Pyramid Lake and Walker River Paiute reservations.<sup>197</sup> The long distance required to travel violated section 2 of the Voting Rights Act.<sup>198</sup> Two other tribes, in close proximity to Pyramid Lake and Walker River Paiute reservations, were not affected by the decision.<sup>199</sup> Before the *Sanchez* ruling, members of the four tribes voted at similar rates.<sup>200</sup> After the addition of a polling location less than two miles away, the Pyramid Lake and Walker River Paiute tribes turnout rates increased to approximately twenty-four percent.<sup>201</sup> Before, the turnout was only eleven percent.<sup>202</sup> The turnout for the other reservations stayed the same.<sup>203</sup>

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<sup>196</sup> Schroedel & Rogers, *supra* note 194; see *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 977 (D. Nev. 2016) (requiring Nevada to set up additional satellite early voting locations because American Indians had to travel long distances in order to vote). During the 2014 election, residents of the Crow Creek Indian Reservation in South Dakota were not provided with an early voting polling location on the reservation. Kira Lerner, *How a South Dakota County Is Suppressing the Native American Vote*, THINKPROGRESS (Oct. 24, 2014), <https://thinkprogress.org/how-a-south-dakota-county-is-suppressing-the-native-american-vote-233655d3b345/> [<https://perma.cc/QG2L-ADZP>]. While South Dakota allows early voting, residents of the Crow Creek Reservation had to travel approximately twenty-five miles one-way to the neighboring city to cast an early ballot. *Id.* The neighboring city has a population of fourteen, and the Crow Creek Reservation has two thousand tribal members over three counties. *Id.*

<sup>197</sup> 214 F. Supp. 3d at 977. The court granted the plaintiffs' injunction for early voting locations in Nixon, the capitol of the Pyramid Lake Paiute Tribe, and Schurz, the capitol of the Walker River Paiute Tribe. *Id.* at 966, 977.

<sup>198</sup> *Id.* at 975. Voters in the Pyramid Lake Paiute Tribe had to drive sixty-four roundtrip miles to the nearest polling location. *Id.* at 974. The court found that this distance, coupled with the unemployment and poverty of American Indians, violated section 2 because it placed unnecessary burdens on a specific group to exercise their voting rights. *Id.* Residents in the Walker River Paiute Tribe had to drive sixty-eight roundtrip miles to vote. *Id.* at 975.

<sup>199</sup> Schroedel & Rogers, *supra* note 194. The decision did not apply to voters in the Duck Valley Shoshone-Paiute Reservation and Yerington Paiute Reservation. *Id.*

<sup>200</sup> *Id.* Long distances to a polling location affect registration and in-person voting. THE NATIVE AM. VOTING RIGHTS COAL., VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA, AND SOUTH DAKOTA 7 (2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf> [<https://perma.cc/M5AQ-ZJ7D>]. In a survey conducted by the Native American Voting Rights Coalition, ten percent of respondents in New Mexico, fifteen percent in Arizona, twenty-seven percent in Nevada, and twenty-nine percent in South Dakota indicated that the travel distance was a factor in their decision to not register to vote. *Id.*

<sup>201</sup> Schroedel & Rogers, *supra* note 194.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* Advocacy groups frequently argue the distance American Indians must travel to cast a ballot is discriminatory. Lerner, *supra* note 196. Four Directions, an American Indian voting rights group, filed a lawsuit in October 2014 alleging that the lack of a polling location in Jackson County, South Dakota, prevented members of the Oglala Sioux tribe from voting. *Id.* An additional early voting polling center opened close to where members of the Oglala Sioux tribe resided after a preliminary injunction. *Id.*

#### 4. Voter Dilution

Redistricting and gerrymandering also dilute the American Indian vote.<sup>204</sup> The two most common representation systems are at-large systems, where voters in the jurisdiction vote for each representative, and district-based system, where voters in a jurisdiction elect one representative.<sup>205</sup> At-large systems dilute minority votes by giving minority voters a numerical disadvantage.<sup>206</sup> The majority of American Indians voting rights cases are challenges to at-large systems.<sup>207</sup>

For example, in 2010, the District Court for the District of Wyoming in *Large v. Fremont County* found that Fremont County had violated section 2 of the Voting Rights Act by using an at-large voting system.<sup>208</sup> Fremont County's population was approximately twenty percent American Indian, but the Fremont County Board of Commissioners had no American Indian representation on the Board.<sup>209</sup> The Court found that the at-large system was unconstitutional because, even though American Indians nominally had the right to vote, the voting system rendered their right to vote meaningless.<sup>210</sup>

District-based systems also apportion districts to dilute minority votes.<sup>211</sup> Even though each district elects a specific number of representatives, minority voters can be divided into separate districts to dilute their vote.<sup>212</sup> Additionally, minority voters can be grouped into one overpopulated district to ensure minori-

<sup>204</sup> See Note, *supra* note 21, at 1735 (indicating that state and local governments have used various techniques, including redistricting and gerrymandering, to dilute the effect of American Indian votes); see *Navajo Nation v. San Juan County*, 162 F. Supp. 3d 1162, 1165, 1171 (D. Utah 2016) (finding that the county violated the Equal Protection Clause by redistricting in a manner that ensured the consolidation of Navajo voters into one district).

<sup>205</sup> See Note, *supra* note 21, at 1735 (describing at-large and district-based systems).

<sup>206</sup> MCCOOL ET AL., *supra* note 20, at 75. American Indians see important gains in representation when districts switch from at-large systems to single member districts. Jennifer L. Robinson, *Empowerment of American Indians and the Effect on Political Participation 1* (Dec. 2010) (unpublished Ph.D. dissertation, University of Utah), <https://collections.lib.utah.edu/ark:/87278/s6000gt2> [<https://perma.cc/MM5Q-R738>] (finding that when fifteen at-large jurisdictions switched to single member districts, approximately eighty-five percent of the jurisdictions elected American Indians). At-large systems for school boards and county commissions hurt American Indians because these governmental bodies control and manage services that are critical to American Indians at a local level. MCCOOL ET AL., *supra* note 20, at 75.

<sup>207</sup> MCCOOL ET AL., *supra* note 20, at 75; see, e.g., *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 470 (8th Cir. 1986) (asking whether at-large school board elections violate section 2 of the Voting Rights Act); *Windy Boy v. Cty. of Big Horn*, 647 F. Supp. 1002, 1004, 1023 (D. Mont. 1986) (finding the at-large elections of the Board of Commissioners and school board violate the Voting Rights Act); *Casuse v. City of Gallup*, 746 P.2d 1103, 1105 (N.M. 1987) (holding that a city's at-large elections for city council are invalidated by a state law requiring single member districts for cities of a population over 10,000).

<sup>208</sup> 709 F. Supp. 2d 1177, 1231 (D. Wyo. 2010), *aff'd* 670 F.3d 1133 (10th Cir. 2012).

<sup>209</sup> *Large*, 670 F.3d at 1135–36.

<sup>210</sup> See *id.* at 1148 (affirming the district court's finding that the at-large system of voting violated section 2 of the Voting Rights Act).

<sup>211</sup> Note, *supra* note 21, at 1735–36.

<sup>212</sup> *Id.*

ty representation remains small.<sup>213</sup> In 2016, in *Navajo Nation v. San Juan County*, the District Court for the District of Utah found the county violated the Constitution's Equal Protection Clause by failing to redraw district lines around the Navajo Nation, which ensured they were all only voting in one district.<sup>214</sup> After the 2010 Census, the county failed to redraw district lines of District Three, where the majority of Navajo voters lived.<sup>215</sup> After this case, the new boundaries, which broke up the Navajo Nation, gave Navajos a majority in two districts.<sup>216</sup>

## 5. Lack of Language Assistance

Section 203 of the Voting Rights Act requires states to provide language assistance to Native-American, Asian-American, Alaskan-Native, and Spanish-heritage citizens.<sup>217</sup> Additionally, because many American Indian languages are unwritten, election officials must also provide oral assistance.<sup>218</sup> American Indians, however, often experience problems receiving the language assistance need-

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<sup>213</sup> *Id.* For example, in *Goodluck v. Apache County*, the Arizona county malapportioned Navajo members in the three districts. 417 F. Supp. 13, 16 (D. Ariz. 1975). District 3 represented a population of 26,700 people and District 1 represented 1,700 people. *Id.* at 14. District 3 had a majority of Navajo members, and District 1 only had seventy Navajo members. *Id.* The court found that the county had incorrectly apportioned its population in the districts and was forced to redistrict to meet federal standards. *Id.* at 16.

<sup>214</sup> 162 F. Supp. 3d at 1169–70; see U.S. CONST. amend. XIV, § 1 (providing that states cannot “deny to any person within its jurisdiction the equal protection of the laws”). The Navajo Nation argued that San Juan County violated the Equal Protection Clause because the county drew its district lines based on race. *Navajo Nation*, 162 F. Supp. 3d at 1173.

<sup>215</sup> 162 F. Supp. 3d at 1170.

<sup>216</sup> See Courtney Tanner, *Federal Judge Sides with San Juan County, Says It's Been 'Pretty Vigorous' in Implementing New Voter Boundaries That Benefit Navajo Residents*, SALT LAKE TRIB. (July 2, 2018), <https://www.sltrib.com/news/politics/2018/07/02/federal-judge-sides-with/> [<https://perma.cc/YLE6-6ART>] (indicating the change in the majority of the three districts in San Juan County in southeastern Utah). The controversy of San Juan County's redistricting endured six years of litigation. *Id.* In January of 2019, San Juan County swore in its first majority Navajo county commission. Cindy Yurth, *San Juan County's First Majority-Navajo Commission Sworn In*, NAVAJO TIMES (Jan. 7, 2019), <https://navajotimes.com/reznews/san-juan-countys-first-majority-navajo-commission-sworn-in/> [<https://perma.cc/42TJ-KAXU>]. The dispute over the county commission, however, is unlikely to end soon. *Id.* Willie Grayeyes' Republican opponent alleged that he does not actually live in the county and filed a lawsuit to invalidate the election results. *Id.*

<sup>217</sup> *Language Minority Citizens*, U.S. DEP'T JUST. (Feb. 26, 2018), <https://www.justice.gov/crt/language-minority-citizens> [<https://perma.cc/H298-VKN9>]. All election materials, including voter registration, polling location notices, sample ballots, instructional ballots, pamphlets, and absentee and regular ballots must be available in the minority language. *Id.*

<sup>218</sup> *Id.* Oral translations are also important because American Indians have lower literacy rates compared to non-Native individuals. See *Literacy*, AM. INDIAN EDUC. FUND, [http://www.nativepartnership.org/site/PageServer?pagename=aief\\_services\\_literacy](http://www.nativepartnership.org/site/PageServer?pagename=aief_services_literacy) [<https://perma.cc/B9YU-9PFE>] (highlighting that in 2011, fourth-grade American Indians scored on average nineteen points lower than non-Native students in reading).

ed.<sup>219</sup> For example, Alaska's population is comprised of approximately twenty percent native people, but, in 2016, a federal court found that counties failed to provide election materials in the Yup'ik, Inupiaq, and Gwich'in languages.<sup>220</sup> The court found that the state had not provided enough information in the Native languages as in English, a standard required by the Voting Rights Act.<sup>221</sup> By providing language assistance, American Indian voters are more likely to feel involved in the process because they will know the significance of their vote.<sup>222</sup>

## 6. Covert Tactics

Although the policies previously discussed all relate to legal changes in the voting process, subtle, unofficial changes have also decreased the Native-American vote.<sup>223</sup> For example, one Native American Rights Fund attorney discussed the impacts of a polling place being located inside a sheriff's office.<sup>224</sup> The presence of the sheriff frightened American Indian voters, thus making them less likely to vote.<sup>225</sup> Additionally, after the non-native County Sheriff showed up at the Pine Ridge Indian Reservation voting office, turnout decreased.<sup>226</sup> With a general distrust of government, these intimidation methods are likely to decrease already-suppressed American Indian votes.<sup>227</sup>

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<sup>219</sup> Note, *supra* note 21, at 1740 (describing the problems in receiving language assistance, including unwritten languages where oral instructions must be provided and the difficulty in translating certain election terms).

<sup>220</sup> Julie Turkewitz, *For Native Americans, a 'Historic Moment' on the Path to Power at the Ballot Box*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/native-american-voting-rights.html> [<https://perma.cc/YMJ8-CJK3>]. Voter turnout in native villages increased significantly when officials provided voters with language assistance. *Id.*

<sup>221</sup> Richard Mauer, *Native Language Speakers Win Voting Rights Lawsuit Against State*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), <https://www.adn.com/politics/article/native-language-speakers-win-lawsuit-against-state/2014/09/03/> [<https://perma.cc/T4FE-KWL9>]. U.S. District Judge Sharon Gleason suggested that Alaskan officials should leverage language assistance programs, including the telephone hotline and interpreters, to encourage American Indians to vote. *Id.* Judge Gleason also refused to agree with assistant attorney general Margaret Paton-Walsh that Alaska did not have enough time or resources to provide language assistance in the two months before the election. *Id.*

<sup>222</sup> See Turkewitz, *supra* note 220 (noting that turnout in villages that provided language assistance in Alaska rose by approximately twenty percent).

<sup>223</sup> Lerner, *supra* note 166 (discussing the antagonism that American Indians face from police or non-Native poll workers when attempting to vote).

<sup>224</sup> *Id.* The Native American Rights Fund is a national, nonprofit organization that provides legal services to tribes and individuals and ensures federal, state, and local governments are held accountable in all areas. *About Us*, NATIVE AM. RTS. FUND, <https://www.narf.org/about-us/> [<https://perma.cc/PP23-JA75>].

<sup>225</sup> See Lerner, *supra* note 166 (discussing how the sheriff would have police cars on the road to the polling location).

<sup>226</sup> 2014: *Who Called the Sheriff?*, FOUR DIRECTIONS, <http://www.fourdirectionsvote.com/protection/2014-who-called-the-sheriff/> [<https://perma.cc/Y9KQ-FDCL>]. Four Directions, an advocacy group working to protect tribal voting rights, filed complaints with the Attorney General, the Secre-

### B. Reasons for Voter Suppression and Limits of Litigation

Voter suppression is not the articulated goal of these policy changes.<sup>228</sup> Most states argue that they implement these changes to prevent voter fraud.<sup>229</sup> Reported cases of voter fraud, however, have consistently remained low.<sup>230</sup> American Indians tend to vote for the Democratic Party, so a suppression of the American Indian vote tends to help Republican candidates.<sup>231</sup> Democratic candidates have won elections with small margins in places with high American Indian populations.<sup>232</sup> Many advocates believe new voting rules, such as

tary of State, and the United States Attorney. *Id.* The United States Attorney sent federal election monitors to the polling location on Pine Ridge. *Id.*

<sup>227</sup> Schroedel & Rogers, *supra* note 194 (discussing the distrust American Indians have against other government officials).

<sup>228</sup> See Astor, *supra* note 29 (stating that North Dakota adopted its voter identification law to prohibit non-residents from obtaining a P.O. box in the state and then using it to illegally vote with the P.O. box address in North Dakota); Tackett & Wines, *supra* note 29 (reporting that despite the Trump administration's claims of rampant voter fraud, no state has uncovered evidence of such).

<sup>229</sup> See Matt Vasilogambros, *Would You Give Your Ballot to a Stranger?*, PEW CHARITABLE TR. (Oct. 11, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/11/would-you-give-your-ballot-to-a-stranger> [<https://perma.cc/XZ6U-CQ86>] (stating that Arizona implemented its law on ballot harvesting to address problems with voter fraud in state elections). In the 2016 election, *The Washington Post* found four cases of voter fraud in the entire country. Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm\\_term=.079e6662503f](https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.079e6662503f) [<https://perma.cc/DM3Y-CYVF>].

<sup>230</sup> Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.8f7537ab7f39](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.8f7537ab7f39) [<https://perma.cc/MR6K-XRCZ>].

<sup>231</sup> See John Nichols, *Will North Dakota's Discriminatory Voter-ID Law Cost Democrats the Senate?*, THE NATION (Oct. 15, 2018), <https://www.thenation.com/article/will-north-dakotas-discriminatory-voter-id-law-cost-democrats-the-senate/> [<https://perma.cc/M87P-7MUN>] (indicating that American Indians tend to vote for Democratic candidates, with over eighty percent voting for Democrats in certain counties in North Dakota).

<sup>232</sup> See *Senate Map*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/senate.html> [<https://perma.cc/SGQ6-TN79>] (showing that Senator Heidi Heitkamp won her election in 2012 by approximately 3,000 votes); see also *Tribal Nations*, N.D. INDIAN AFF. COMMISSION, <http://indianaffairs.nd.gov/tribal-nations/> [<https://perma.cc/5DTS-FSVM>] (stating that there are approximately 30,000 American Indians in North Dakota). In 2002, in a tight race in South Dakota between Republican John Thune and Democratic Tim Johnson, Johnson's success was credited to the American Indian vote. Cara Hetland, *South Dakota Senate Candidates Look to Indians for Victory*, MINN. PUB. RADIO (Oct. 26, 2004), [http://news.minnesota.publicradio.org/features/2004/10/18\\_hetlandc\\_sdindianvote/](http://news.minnesota.publicradio.org/features/2004/10/18_hetlandc_sdindianvote/) [<https://perma.cc/HE9V-3CTH>]. Additionally, when Janet Napolitano won her race for Arizona governor in 2002, her success was also credited to the American Indian vote. Victoria M. Massie, *Voting from a Native American Reservation Is Much Harder Than It Should Be*, VOX (Oct. 28, 2016), <https://www.vox.com/identities/2016/10/28/13386492/native-american-voting-access-reservation> [<https://perma.cc/U264-XZUJ>].

the one adopted by North Dakota, are part of Republican efforts to suppress communities that typically vote against them.<sup>233</sup>

American Indians have experienced tremendous success in stopping voter suppression tactics in the judiciary since the signing of the Voting Rights Act.<sup>234</sup> This success has continued since the Supreme Court's 2013 decision in *Shelby County v. Holder*, with courts recognizing the barriers that still exist for American Indians.<sup>235</sup> Even though American Indians have successfully brought lawsuits against voter discrimination, litigation comes with high burdens.<sup>236</sup> First, litigation is incredibly expensive.<sup>237</sup> This cost is increased when working with remote, rural parts of the country.<sup>238</sup> Second, litigation is also more expensive for advocacy groups under President Donald Trump's administration, which has not taken an interest in voting rights cases.<sup>239</sup> Lastly, because litigation is reactionary, the implementation of a suppressive practice can still affect voting rights in certain elections before being litigated in the courts.<sup>240</sup>

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<sup>233</sup> See Julian Brave NoiseCat, *Republicans Wanted to Suppress the Native American Vote. It's Working*, THE GUARDIAN (Oct. 26, 2018), <https://www.theguardian.com/us-news/2018/oct/26/the-real-reason-for-voter-id-laws-to-prevent-native-americans-from-voting> [<https://perma.cc/9N78-PPRD>] (arguing that the North Dakota voter ID law was part of a Republican desire to suppress Democratic voters); see also Hakim & Wines, *supra* note 169 (arguing generally that a variety of voter suppression tactics dilute Democratic voters).

<sup>234</sup> Lerner, *supra* note 166. Since the implementation of the Voting Rights Act, there have been over ninety cases filed regarding voting procedures that suppress American Indian votes, and American Indians were successful in almost all of them. *Id.*

<sup>235</sup> *Id.* During the first five years after *Shelby County*, American Indians brought seven lawsuits for voting discrimination, and six concluded that discrimination against American Indians voters was present. *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Kira Lerner, *Native American Leaders Tell Senate to Restore Voting Rights Act*, THINKPROGRESS (July 18, 2018), <https://thinkprogress.org/native-american-leaders-tell-senate-to-act-to-protect-voting-rights-f87495fcd13/> [<https://perma.cc/2724-JM72>].

<sup>238</sup> *Id.* For example, when working in Alaska, litigation costs can skyrocket when witnesses and plaintiffs must fly to and from very remote locations where travel is difficult. Lerner, *supra* note 166.

<sup>239</sup> See *Donald Trump Wants Tough Justice—With One Exception*, THE ECONOMIST (May 18, 2018), <https://www.economist.com/united-states/2018/05/19/donald-trump-wants-tough-justice-with-one-exception> [<https://perma.cc/8P3E-Z585>] (arguing that the Department of Justice under President Trump has failed to bring a voting rights case and instead has focused on the supposed accuracy of state voter registration lists). The Obama administration was involved in pursuing voting rights cases, but there has been an explicit policy shift from the Trump administration to limit involvement in voting rights cases. See *id.* (discussing how the Trump administration completely reversed an Obama administration argument that purging voter registration lists is unconstitutional).

<sup>240</sup> See Bogado, *supra* note 1 (indicating that Arizona denied Agnes Laughter her right to vote in 2006 and even a reversal of the law would not allow Laughter's vote to count in 2006); see also *supra* notes 172–227 and accompanying text (describing the different policies that states can implement to suppress minority votes). Given that American Indian votes can decide election results, it is important for all eligible voters to be given the opportunity to cast a ballot. See NAT'L CONG. OF AM. INDIANS, *supra* note 82 (indicating that approximately 17,000 American Indians in Montana voted in 2006 and Senator Jon Tester won his election by less than 4,000 votes).

Additionally, successful litigation does not ensure that the same procedure is not implemented elsewhere to suppress minority votes.<sup>241</sup> Because *Shelby County* dismantled the preclearance requirement of the Voting Rights Act, states can implement discriminatory voting practices, have a court rule the practice to be invalid, pass another voting procedure change, and then require advocates to file another lawsuit.<sup>242</sup> This is what happened with North Dakota's voter identification law requiring a residential street address.<sup>243</sup> In 2016, in *Brakebill v. Jaeger*, the District Court for the District of North Dakota declared North Dakota's voter identification law, which removed the fail-safe options for voters who did not have an acceptable form of identification, invalid.<sup>244</sup> One year later, North Dakota passed a similar version of the law.<sup>245</sup> Advocacy groups had to file another challenge, and the Eighth Circuit Court of Appeals ultimately ruled against them.<sup>246</sup>

### III. NEED FOR FEDERAL LEGISLATION TO ADDRESS THE BARRIERS AMERICAN INDIANS FACE

Given litigation's ineffective method of responding to discriminatory voting practices, Congress should pass federal legislation that directly addresses American Indian voting rights.<sup>247</sup> In 2013, in *Shelby County v. Holder*, Chief

<sup>241</sup> Lerner, *supra* note 166.

<sup>242</sup> *Id.*

<sup>243</sup> See *Brakebill v. Jaeger*, 932 F.3d 671, 674–75 (8th Cir. 2019) (detailing the passage of the North Dakota voter ID law and the subsequent legal challenges); see also *supra* notes 181–185 and accompanying text (describing why North Dakota's voter identification law is detrimental to American Indians).

<sup>244</sup> 2016 WL 7118548, at \*13 (D.N.D. Aug. 1, 2016) (finding that the North Dakota law was invalid because it did not provide alternatives for those who do not have a valid identification).

<sup>245</sup> *Brakebill*, 932 F.3d at 674; *North Dakota Again Passes Discriminatory Voter ID Law*, NATIVE AM. RTS. FUND (May 9, 2017), <https://www.narf.org/north-dakota-voter-id-law/> [<https://perma.cc/N6FE-R8HY>]; see N.D. CENT. CODE § 16.1-01-04.1(2)(b) (requiring an identification card to show a street address). The second law allows voters six days after an election to present election officials with a qualifying ID, but does not provide fail-safe mechanisms for voters who are unable to obtain an ID with a current street address. See *North Dakota Again Passes Discriminatory Voter ID Law*, *supra* (arguing that the new law does not provide the necessary fail-safe mechanisms to ensure American Indian voters are not disenfranchised).

<sup>246</sup> See *Brakebill*, 932 F.3d at 678 (finding that the voter ID law does not place a “substantial burden” on most voters); Complaint for Declaratory and Injunctive Relief at 2, *Spirit Lake Tribe v. Jaeger*, 2018 WL 5722665 (D.N.D. Nov. 1, 2018) (No. 1:18-cv-222) (challenging the newest iteration of the voter ID law as unconstitutional). Members of the Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians, and Standing Rock Sioux Tribe joined the complaint, arguing that the strict voter ID law discriminated against the members of their tribes. Complaint for Declaratory and Injunctive Relief, *supra*, at 4, 12, 14. The Native American Rights Fund and the Campaign Legal Center were involved in bringing this case with the plaintiffs. *Id.* at 40.

<sup>247</sup> See Jeannette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 270–71 (2015) (arguing that Congress should pass legislation to protect the right to vote and address racial discrimination in voting); see also *supra* notes 234–246 and accompanying text (explaining why litigation is ineffective).

Justice Roberts specifically acknowledged that Congress could pass a new coverage formula for preclearance.<sup>248</sup> Federal voting legislation that does not include specific provisions protecting American Indians will not address the new voter suppression tactics.<sup>249</sup> For example, the NVRA requires states to have a simplified system for citizens to register to vote.<sup>250</sup> The NVRA provides a uniform federal form in which citizens can register to vote.<sup>251</sup> This form is only helpful if citizens have access to a printer to print the form, mail to send back the form, and transportation to a polling location to cast a vote.<sup>252</sup> The NVRA fails to address the specific problems American Indians encounter, such as a lack of access to reliable mail or transportation.<sup>253</sup>

The best way to end barriers American Indians face in voting is by directly addressing the specific issues.<sup>254</sup> In 2015, the Department of Justice proposed TEAVA to address these obstacles.<sup>255</sup> TEAVA requires states that have an American Indian reservation to place at least one polling location on tribal lands in a location selected by the tribal government.<sup>256</sup> This would address the issue in *Sanchez v. Cegavske*, where the District Court of Nevada in 2016

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<sup>248</sup> 570 U.S. 529, 557 (2013). In striking down the coverage formula from the Voting Rights Act, the Supreme Court said that Congress could create a new coverage formula to address current voting discrimination. *Id.*

<sup>249</sup> See Wolfley, *supra* note 247, at 270 (arguing that universal approaches will not abolish the specific barriers that American Indians face in casting a ballot).

<sup>250</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2(b), 107 Stat. 77, 77 (codified as amended at 42 U.S.C. § 1973gg (2018)) (stating the goals of the Act include increasing the number of registered voters, simplifying the system to vote, and safeguarding voter registration lists).

<sup>251</sup> *Id.* § 6(a). The National Mail Voter Registration Form is used to register any United States citizen to vote. *Id.* Under the NVRA, the Federal Elections Commission created the National Mail Voter Registration Form for federal elections. *Id.* § 9(a)(2). The National Mail Voter Registration Form is found on the Federal Elections Commission website. *National Mail Voter Registration Form*, U.S. ELECTION ASSISTANCE COMMISSION, <https://www.eac.gov/voters/national-mail-voter-registration-form/> [<https://perma.cc/U7XU-JK8S>].

<sup>252</sup> See *National Mail Voter Registration Form*, *supra* note 251 (providing a voter registration form online).

<sup>253</sup> See Schroedel & Rogers, *supra* note 194 (arguing that very few American Indians vote by mail because they are unable to rely on regular delivery); see also *American Indian and Alaskan Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> (stating that approximately twenty-five percent of single-race American Indians were below the federal poverty level in 2016).

<sup>254</sup> See Note, *supra* note 21, at 1744 (arguing that the Voting Rights Act has only partially eliminated voting barriers for American Indians and federal legislation is necessary to address specific barriers for American Indians).

<sup>255</sup> See Letter from Peter J. Kadzik to Joseph R. Biden, *supra* note 151, at 1 (proposing language for a bill to address the barriers American Indians face in getting to a polling location).

<sup>256</sup> *Id.* An additional location is required if the tribe is able to show that having only one location does not provide equal access and opportunities for some members to vote. *Id.* at 5.

found the lack of polling locations placed an unreasonable burden on American Indians.<sup>257</sup>

While TEAVA addresses one of the voting procedures that suppresses American Indian votes, it puts a burden on smaller tribes.<sup>258</sup> TEAVA requires tribal governments to provide election officials to be at the polling location during all open hours.<sup>259</sup> Additionally, the tribe must provide the necessary training to poll workers.<sup>260</sup> These requirements are difficult for small tribes with fewer resources.<sup>261</sup> TEAVA also does not address the voter identification laws, lack of language assistance, nor voter dilution.<sup>262</sup>

Recognizing the deficiencies of TEAVA, NAVRA expands upon the recommendations in TEAVA.<sup>263</sup> NAVRA requires the federal government to review all changes in voting on American Indian reservations that affect voter registration sites, early voting locations, and election day polling locations.<sup>264</sup> NAVRA additionally demands all states to accept tribal identification as a voting requisite.<sup>265</sup> NAVRA is critical because it specifically addresses the lack of access to polling places and difficulties in obtaining a government issued ID.<sup>266</sup>

<sup>257</sup> See 214 F. Supp. 3d 961, 973 (D. Nev. 2016) (finding that not having a polling office located on the reservation was a violation of the Voting Rights Act because residents on the reservation had to travel large distances to their nearest polling location).

<sup>258</sup> See, e.g., Letter from Peter J. Kadzik to Joseph R. Biden, *supra* note 151, at 1 (requiring tribes to provide election officials to staff polling locations and indicating that the failure to provide staff might result in the closing of a polling location on a reservation).

<sup>259</sup> *Id.* While the state must provide compensation for the poll workers, the tribe must choose election officials and poll workers to staff the location during open hours. *Id.*

<sup>260</sup> *Id.* The tribe must provide training to the poll workers in accordance with the state requirements for other polling locations. *Id.*

<sup>261</sup> Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, THE GUARDIAN (June 10, 2015), <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights> [<https://perma.cc/UE4L-X5ZA>] (explaining that some tribes might not have the capacity or expertise to staff and train workers at polling locations).

<sup>262</sup> See Letter from Peter J. Kadzik to Joseph R. Biden, *supra* note 151, at 1 (explaining that TEAVA addresses the lack of polling locations on or near tribal reservations but fails to identify other barriers that American Indians face in exercising their right to vote).

<sup>263</sup> Native American Voting Rights Act of 2015, S. 1912, 114th Cong. (2015). Senator Jon Tester from Montana introduced the bill in the Senate Judiciary Committee, but the proposed legislation was never voted out of committee. See *id.*

<sup>264</sup> *Id.* § 3. For example, the state cannot (1) eliminate a polling site on a tribal reservation if it is the only location; (2) change the location of a polling site on a reservation to more than one mile from its current location or beyond natural boundaries that would make travel difficult; (3) eliminate in-person voting on a reservation; (4) decrease early voting opportunities on a reservation; or (5) change the dates of early voting on a reservation. *Id.* § 3(a).

<sup>265</sup> *Id.* § 4(f).

<sup>266</sup> See *id.* §§ 3–4 (identifying ways to increase American Indians' access to polling sites in sections 3 and 4 and requiring tribal ID to be a valid form of ID in section 4(f)); Note, *supra* note 21, at 1744 (arguing that NAVRA adds important elements to TEAVA).

Congress has failed to take actions on NAVRA since its introduction, likely because of partisan politics.<sup>267</sup>

Ultimately, Congress needs to adopt legislation to address the specific barriers American Indians face in attempting to vote, barriers that include strict voter ID laws, ballot harvesting laws, reduction in polling hours and locations, voter dilution tactics, and lack of language assistance.<sup>268</sup> Additionally, legislation must include the preclearance requirement of NAVRA, or a similar provision, to preemptively protect American Indians' access to the ballot box.<sup>269</sup> Without a preclearance requirement, American Indians will have to rely on piecemeal litigation to protect their right to vote.<sup>270</sup> Through preclearance, facially neutral but discriminatory laws will be stopped before going into effect.<sup>271</sup> In order to ensure that the preclearance requirement is constitutional, Congress can use data from the past three elections to determine jurisdictions that have had low American Indian voter turnout.<sup>272</sup> These proposals will ensure that American Indian voters are able to cast a meaningful vote.<sup>273</sup>

## CONCLUSION

Voting is the cornerstone of democracy. Through voting, the public chooses officials whom they believe will represent their best interests. When this right is taken away, democracy weakens because the public no longer believes the government will act in the public's best interests. This is especially true for already disadvantaged minority groups, such as American Indians. De-

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<sup>267</sup> See MCCOOL ET AL., *supra* note 20, at 179–80 (describing how Democrats and Republicans have attempted to appeal to the American Indian vote throughout various elections cycles because, although American Indians tend to vote Democratic, American Indians have weak party loyalty); Trip Gabriel, *Voting Issues and Gerrymandering Are Now Key Political Battlegrounds*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/us/politics/voting-gerrymander-elections.html> [<https://perma.cc/J2RH-674E>] (arguing that the changing demographics of the electorate favor Democrat candidates but the restrictions on voting and redistricting benefit Republicans).

<sup>268</sup> See Wolfley, *supra* note 247, at 270 (arguing that legislation is necessary to address the challenges American Indians face in attempting to vote); see also *supra* notes 172–227 and accompanying text (describing how these policies suppress American Indian votes through facially neutral tactics).

<sup>269</sup> See MCCOOL ET AL., *supra* note 20, at 23 (stating that Congress adopted section 5 of the Voting Rights Act of 1965 to stop districts from implementing mechanisms that weakened the impact of minority votes).

<sup>270</sup> See Lerner, *supra* note 166 (quoting Daniel McCool, American Indian policy professor at University of Utah, and saying that the number of Voting Rights Act cases will likely increase without section 5's preclearance requirement).

<sup>271</sup> See Native American Voting Rights Act of 2015 § 3 (requiring the federal government to review voting changes that occur on a tribal reservation).

<sup>272</sup> See *Shelby County*, 570 U.S. at 557 (indicating that Congress could create a new coverage formula which would be constitutional to determine preclearance).

<sup>273</sup> See Lerner, *supra* note 166 (arguing that a preclearance requirement is necessary to protect the right to vote for American Indians); see also *Shelby County*, 570 U.S. at 557 (arguing that any type of voter discrimination is not allowed and Congress needs to protect the right to vote).

spite being the United States' first inhabitants, American Indians were not considered legal citizens until 1924 after decades of assimilation policies, and could not vote in states until much later. The Voting Rights Act provided a path to challenge discriminatory laws, but the elimination of section 5's preclearance requirement gives American Indians one less layer of protection.

While states implement new voting practices that are facially neutral, advocacy groups cannot rely on the Voting Rights Act to combat these policies given the limits of litigation. Litigation is costly, time-consuming, and reactionary. The federal government needs to implement a comprehensive plan, like the Native American Voting Rights Act, to preemptively address the barriers faced by American Indians. A preclearance requirement is critical to any legislation. Legislation must also address the lack of polling locations on American Indian reservations, enforce tribal identification as a valid form of identification, and establish consultations with American Indian tribes to understand the threats to the right to vote for each individual group.

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