

**YOU GOTTA FIGHT FOR THE RIGHT TO VOTE:
ENFRANCHISING NATIVE AMERICAN VOTERS**

*Jeanette Wolfley**

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* Assistant Professor, University of New Mexico School of Law. A special thank you to my research assistants Stephanie Salazar and Tracy Canard Goodluck.

INTRODUCTION

Five decades ago, Congress passed the Voting Rights Act (“VRA”) of 1965.¹ Since its passage, the Voting Rights Act has created the opportunity to vote for many racial and language minorities across the country and has survived many challenges until the U.S. Supreme Court issued two decisions involving voting rights in its 2012–2013 term. On June 25, 2013, in *Shelby County v. Holder*,² a divided Supreme Court struck down Section 4—a key provision of the 1965 Voting Rights Act—as unconstitutional.³ The Court’s decision terminated a preclearance coverage formula that has subjected numerous jurisdictions (including states and counties with sizeable American Indian and Alaska Native populations) with discriminatory voting rights histories to the U.S. Department of Justice’s (“DOJ”) oversight.⁴ In writing for the majority, Chief Justice John Roberts explained that “things have changed dramatically” for the better in the states and counties subject to the preclearance requirement, and “that these improvements are in large part because of the Voting Rights Act” and accordingly strict supervision over the covered jurisdictions is no longer warranted.⁵ *Shelby County* is a momentous holding. It terminates the most successful and prominent piece of civil rights legislation in American history.⁶ The Court’s decision is also remarkable in an area where Congress had historically enjoyed great deference.⁷

1 42 U.S.C. § 1973 *et seq.*

2 133 S. Ct. 2612 (2013).

3 *Id.* at 2631.

4 *Id.*

5 *Id.* at 2625–26 (emphasis omitted).

6 In *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612, the Supreme Court upheld the constitutionality of the Voting Rights Act of 1965 and stated that it was “designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”

7 Since the VRA’s original enactment in 1965, Congress has consistently reauthorized the Act. Congress extended the VRA in 1970 and 1975. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400. In 1982, Congress extended the VRA to include Section 5. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. That same year, Congress amended Section 2. *Id.* at 134 (codified at 42 U.S.C. § 1973 (2006)). And Congress extended the language assistance provisions. *Id.* at 135 (codified at § 1973aa-1a). Finally, Congress added a section governing assistance to voters who are blind, disabled, or illiterate. *Id.* (codified at § 1973aa-6). In 2006, Congress again extended the temporary provisions of Sections 4 and 5 of the VRA, and the bilingual election requirements, and the continued requirement for the Justice Department’s preapproval of voting changes. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. § 1973b(a), § 1973c (2006)).

On June 17, 2013, one week before the *Shelby County* decision, the Court decided another voting rights challenge. In *Arizona v. Inter Tribal Council*, the Court held that the federal National Voter Registration Act of 1993 (“NVRA”) preempted Arizona’s requirement that voters provide proof of citizenship in order to register to vote.⁸ Certainly, this decision was not as symbolic as *Shelby County*, but nonetheless is significant for minority voters and voters in general. *Inter Tribal Council* is important because it is one of the Court’s first comprehensive review of the Elections Clause of the Constitution.⁹ Significantly, the Court found the Elections Clause and Congress’s power to preempt state laws under the Elections Clause both broad and sweeping, unlike the *Shelby County* decision wherein the Court declined to defer to congressional remedies under the VRA.

In the aftermath of *Shelby County*, many voting rights litigators and scholars are contemplating what the case means for the future of Black and Latino minority voting rights across the country.¹⁰ To date, however, scholars’ and practitioners’ reaction to and focus on the *Shelby County* decision has not considered or identified its impact on Indian voters or reservation residents. Accordingly, this Article seeks to fill the void by examining the *Shelby County* and *Inter Tribal Council* decisions and provide some insight and effective responses with regard to their impacts on Native American voters across Indian country. The Native American vote, although small in overall population numbers, is a powerful vote in local and state elections.¹¹

⁸ 133 S. Ct. 2247, 2260 (2013). The NVRA requires states to establish voter registration procedures for federal elections so that eligible citizens might apply to register to vote simultaneously while applying for a driver’s license, by mail, and at selected state offices that serve the public. 42 U.S.C. § 1973gg-6 (2006).

⁹ See generally Samuel Issacharoff, *Comments: Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 111–12 (2013) (discussing the Court’s account of federal power under the Elections Clause in *Inter Tribal Council*).

¹⁰ On July 1, 2013, the Brookings Institute brought together scholars and practitioners in the area of voting rights to discuss the Court’s decision and the future of voting rights. See Thomas E. Mann & Raffaella L. Wakeman, *Voting Rights After Shelby County v. Holder*, BROOKINGS (June 25, 2013), <http://www.brookings.edu/events/2013/07/01-voting-rights-shelby-holder> (previewing the July 1st discussion). None of the discussion addresses *Shelby County*’s implications on Indian or Alaska Native voters.

¹¹ There are approximately 1.9 million tribal members that make up the total enrollment of the 562 federally recognized Indian tribes in the United States. OFFICE OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS, U.S. DEP’T. OF INTERIOR, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at i–ii (2003) [hereinafter LABOR FORCE REPORT] (citing Brief for National Congress of American Indians as Amicus Curiae Supporting Appellants, *Mark Wandering Medicine v. McCullough*, 544 F. App’x. 699 (9th Cir. 2013) (No. 12-35926) [hereinafter NCAI Brief]).

Some scholars are advocating for a universalism approach to protect all citizens' rights to vote as reflected in the Help America Vote Act ("HAVA")¹² and the NVRA,¹³ which was at issue in *Inter Tribal Council*. This approach to voting seeks to provide uniform protections to everyone rather than seeking to protect a particular group from discrimination.¹⁴ They advocate for utilizing the broad congressional power that stems from the Elections Clause to create a new administrative process based on election regulation for voting that is separate from the current race-based standard of the VRA. Others have proposed that, given the continuing discrimination in this country, there must be new or revised protections as envisioned in the VRA for racial and language minority voters.¹⁵ They would not abandon the Fifteenth Amendment or the Section 5 preclearance, but make it more current and dynamic.

While the VRA preclearance system is often associated with deep Southern states, such as Alabama, Mississippi, and Georgia, three non-southern states and counties therein—Arizona, Alaska, and South Dakota—are covered jurisdictions with large populations of

¹² The dispute surrounding the 2000 presidential election prompted leaders of both parties to seek legislation to reform federal elections procedures. The result, the Help American Vote Act of 2002 ("HAVA"), was signed into law on October 29, 2002. Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–545). Title I of HAVA provides for federal funding for the replacement of voting machines and to train state poll workers. HAVA, §§ 101–106, 42 U.S.C. §§15301–306. Title II creates the Election Assistance Commission (EAC), responsible for establishing voluntary election guidelines for use by the states as well as certifying voting systems. *Id.* at §§ 201–96 (codified at §§ 15321–472). Title III requires states to implement elections procedures and technology that meet certain guidelines in federal elections. *Id.* at §§ 301–12 (codified at §§ 15481–502). Finally, Title IV provides a means of enforcement by the Attorney General's office, which can sue a state that is in violation of the mandatory requirements. *Id.* at § 401 (codified at 42 U.S.C. § 15511–12).

¹³ Also known as the "Motor Voter Act," the National Voter Registration Act requires states' motor vehicle departments to provide individuals the opportunity to register to vote when they obtain a driver's license. 42 U.S.C. § 1973gg–6(a) (2006). *See generally* Issacharoff, *supra* note 9, at 109–10 ("The biggest immediate effect of the NVRA was to require states to alter their driver's license forms to provide a detachable tab for voter registration through a provision popularly known as the 'motor-voter' law."); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *HOW. L.J.* 741 (2006) (discussing the voting rights protections provided by the NVRA).

¹⁴ *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 *Yale L.J.* 2838, 2838 (2014) ("Responses like these are universalist, because rather than seeking to protect any particular group against discrimination, they formally provide uniform protections to everyone."); Issacharoff, *supra* note 9, at 103–07 (discussing the new voter protection and jurisprudence).

¹⁵ *See* Spencer Overton, *Voting Rights Disclosure*, 127 *HARV. L. REV. F.* 19, 21, 28 (2013) (stating that he would require greater disclosures to protect minorities).

Native American voters.¹⁶ And eighty counties in seventeen states are covered under Section 203 of the VRA because of their American Indian and Alaska Native populations.¹⁷ Jurisdictions covered by Section 203 are specifically required to provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” in both English and the applicable minority language.¹⁸ In the case of Indian communities with oral or historically unwritten languages, the jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting.”¹⁹

Indian voting in the United States has a unique and complex history (different than other racial or language minority communities), which reflects shifting federal Indian policies and laws toward Indians, paternalistic and discriminatory attitudes, and assimilation and then separation of Indians from mainstream society.²⁰ It was not until 1924 that all Indians were granted U.S. citizenship in the Indian Citizenship Act.²¹ Coupled with the inconsistent federal Indian policy is the authority of the states under the Elections Clause to prescribe the times, places, and manner of holding elections for state, local, and federal offices. State governments and its officials have had a history of conflict and antagonism with Indian tribes. Indeed, the often-quoted language of the Supreme Court in 1886 summed up the tribal-state political relationship: “[Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”²² This hostility persists today. State election offi-

16 See Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended, 28 C.F.R. pt. 51, app. (2010).

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

18 42 U.S.C. §1973aa-1a(c) (2006).

19 *Id.*

20 For a discussion of these ever changing federal policies and treatment of Indians as citizens, see Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 168–82 (1991). See generally LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010); ACLU VOTING RIGHTS PROJECT, VOTING RIGHTS IN INDIAN COUNTRY: A SPECIAL REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2009) [hereinafter ACLU SPECIAL REPORT].

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

22 *United States v. Kagama*, 118 U.S. 375, 384 (1886). In case after case, states and local governments have sought to assert their governmental authority over Indians and their territory. Repeatedly, courts have been called upon to adjust tribal-state relations, usually

cials are reluctant to provide access to the franchise for Indian voters, and Indian voters cautiously participate in state and local elections. And, notwithstanding the Indian Citizenship Act, some states continue to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.²³

Historically, voting rights in Indian country were overlooked by the civil and voting rights movements, which focused primarily on Black and Hispanic communities. For Indians and Alaska Natives, there has never been an ongoing large-scale campaign or project to address the voting violations affecting Indian voters.²⁴ Accordingly, Indian and Alaska Native voters have been underrepresented, and still today, basic voter access issues pose serious obstacles in Indian country. In 2004, American Indians voted in record numbers and their participation was credited as outcome determinative in several political races.²⁵ Such a powerful voting base consequently has resulted in voter discrimination, and, historically, American Indians and Alaska Natives have had to seek judicial protection to participate in local, state, and federal elections.²⁶

To be sure, Congress and the states must continue to take steps to protect access to the franchise as envisioned in the Fifteenth Amendment. There must be reliance on new modern tools, such as the NVRA,²⁷ to make access to cast a ballot more efficient and less burdensome for all citizens while updating or reformulating pre-clearance requirements under the VRA. The NVRA, a universal

limiting state criminal jurisdiction, state taxing power, state regulatory authority, and state court jurisdiction in Indian country.

²³ See Letter from Joe Garcia, President, National Congress of American Indians to Unidentified U.S. Senator (May 5, 2006), in *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong.* 309 (2006).

²⁴ For a short period of time, from 1985 to 1988, the Native American Rights Fund supported a Voting Rights Project and litigated some cases in Indian country. It has begun litigating some cases in Alaska. More recently, the American Civil Liberties Union has taken on a number of Indian voting cases in the Great Plains area. See generally *ACLU SPECIAL REPORT*, *supra* note 20.

²⁵ See DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 177–83 (2007) (providing examples of Indian voters strong voting impact); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 *MONT. L. REV.* 269, 270–71 (2004) (stating that Indians make up a significant voting block in some states and have determined the fate of certain races). In 2002, Indian voters in South Dakota overwhelmingly supported the election of Senator Tim Johnson, and he barely won his re-election with only 524 votes. *Id.* at 270 & n.7 (quoting MICHAEL BARONE ET AL., *THE ALMANAC OF AMERICAN POLITICS* 1468 (Charles Mahtesian ed. 2004)).

²⁶ See generally MCCOOL, *supra* note 25; McDONALD, *supra* note 20; Wolfley, *supra* note 20.

²⁷ 42 U.S.C. § 1973gg-6 (2006).

measure protecting all voters in federal elections, is a valuable asset for addressing basic access to the ballot. It, however, does not address the ongoing legacy of racial discrimination for racial and language minority voters. Consequently, new or revised provisions or some process provided for in the VRA are still needed. This Article begins with a review of *Shelby County* and *Inter Tribal Council* in Part I. Part II provides a history of voting discrimination and the unique obstacles placed on Indian voters. In Part III, the Article examines the applicability of the universal laws (NVRA and HAVA) and the VRA to voting in Indian country. Finally, it provides a more comprehensive discussion of voting measures, actions, cooperative agreements, and laws that should be considered and implemented by Indian tribes, states, the federal government, and Indian voters to address the void left after *Shelby County*.

I. REVIEW OF *SHELBY COUNTY* AND *INTER TRIBAL COUNCIL*

A. Shelby County

In 2010, Shelby County, Alabama filed its lawsuit challenging the constitutionality of Sections 4 and 5 of the VRA.²⁸ These two provisions are at the heart of the VRA.²⁹ Working together, Section 4 and Section 5 required certain covered jurisdictions to gain federal pre-clearance for any voting related law or procedure, such as a voter identification law, polling place change, or redistricting. The original Section 4 coverage formula included all jurisdictions that had used a test or device (such as a literacy test or poll tax) on November 1, 1964 that restricted the right to vote and whether less than 50% of voting age persons were registered for or voted in the 1964 election.³⁰ As originally enacted in 1965, Section 4 covered the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia in their entirety, as well as political subdivisions in Arizona, Idaho, and North Carolina.³¹ In 1975, Congress renewed Section 5 and adopted a separate coverage formula to extend VRA protections to specific language minority groups.³² Under this formula, Alaska, Ari-

²⁸ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2621–22 (2013).

²⁹ *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966), *abrogated by* *Shelby Cnty.*, 133 S. Ct. 2612 (describing the VRA’s special provisions as the “heart of the Act”).

³⁰ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. § 1973a(c) (2006)).

³¹ *Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended*, 28 C.F.R. pt. 51, app. (2010).

³² Pub. L. No. 94-73, 89 Stat. 400 (1975). (1) Federal observers and preclearance protections were extended to any jurisdiction in which a single language minority group made

zona, and Texas were covered in their entirety, as well as parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.³³ But covered jurisdictions could bail out of the preclearance requirement under Section 3 of the VRA by demonstrating a clean voting rights record for the preceding five years.³⁴

The controversy in *Shelby County* concerned the constitutionality of the Section 4 coverage formula.³⁵ Shelby County argued that the coverage formula was outdated, that Congress failed in 2006 to build a record that distinguished between covered and noncovered jurisdictions and that, in any event, the regime of federal preclearance in Section 5 violated states' rights.³⁶ The United States, along with other defenders of the VRA, urged the Court to defer to Congress on the maintenance of coverage and pointed to the ample congressional record showing continued threats to minority voting rights in the covered jurisdictions as justification for upholding the VRA.³⁷

Chief Justice Roberts, writing for the majority, agreed with Shelby County that Section 4 was unconstitutional and exceeded Congress's powers to enforce civil rights under the Fourteenth and Fifteenth Amendments.³⁸ For the majority, the critical gap in the congressional record justifying the law was its detachment to the coverage formula itself. Thus, even though Congress determined in 2006, based on its reauthorization hearings, that the covered jurisdictions pose greater dangers to minority voting rights, the Court found there were no

up more than five percent of the voting age population; (2) election materials had been prepared only in English in the 1972 presidential election; and (3) less than fifty percent of voting age citizens had registered to vote in the 1972 presidential election. *Id.*

³³ 28 C.F.R. pt. 51, app.

³⁴ A covered jurisdiction may seek a bail out by filing a declaratory judgment lawsuit before a three-judge panel in the federal District Court for the District of Columbia. 42 U.S.C. §§ 1973b(a)(1), 1973c(a) (2006). Numerous jurisdictions successfully bailed out under this provision. See Section 4 of the Voting Rights Act, DEPT. OF JUSTICE, www.justice.gov/crt/section-4-voting-rights-act (last modified Aug. 8, 2015) (listing jurisdictions currently bailed out).

³⁵ Shelby County was not permitted to bail out because the DOJ had objected to proposed changes covered by the County. Instead of resolving these objections under the VRA, the County filed a lawsuit challenging the constitutionality of the VRA. *Shelby Cnty.*, 133 S. Ct. at 2621–22.

³⁶ *Id.* at 2628–29.

³⁷ *Id.* at 2629. The dissent found the congressional record sufficient to justify the continued use of the Section 4 formula. *Id.* at 2635–36 (Ginsburg, J., dissenting). It also emphasized the threats to minority voting rights including racially polarized voting, racial gerrymandering, vote dilution, and the Department of Justice's preclearance denials. *Id.* at 2636.

³⁸ Justice Clarence Thomas also concurred separately to emphasize that he considered the federal preclearance regime under Section 5 to be unconstitutional, in addition to the Section 4 coverage formula. *Shelby Cnty.*, 133 S. Ct. at 2631–32 (Thomas, J., concurring).

connections between such findings and the trigger for coverage under Section 4, such as literacy tests and low voter turnout in 1964, 1968, and 1972.³⁹ Relying upon the Court's earlier decision in *Northwest Austin Municipal Utility District Number One v. Holder* ("NAMUDNO"),⁴⁰ the Court found the "current burdens" of the VRA did not match "current needs."⁴¹ Chief Justice Roberts in *NAMUDNO* utilized a doctrine of "equal sovereignty" and suggests that the Section 5 preclearance requirement violates this principle, but Chief Justice Roberts says very little to explain what it means, and how such a principle relates to Congressional power under the Fifteenth Amendment.⁴² The Court, in *NAMUDNO*, concluded 7-1, rather than decide the issue of constitutionality, it was better to read the VRA to allow bailout by covered districts, even though they did not register their own voters.⁴³

Instead of striking down Section 5, the Supreme Court in *Shelby County* held the coverage formula of Section 4 of the Act unconstitutional, but the effect of the Court's ruling was the same because Section 5 requirements are determined by the Section 4 coverage formula. This means that no previously covered jurisdictions under Section 5 will be required to submit voting laws changes to the Department of Justice. The Supreme Court stated that Section 5 remained viable if Congress establishes a new coverage formula that considers "current conditions."⁴⁴

Congress is thus left with an opportunity to critically evaluate Section 4 and devise a new formula. On February 11, 2015, Congress introduced the Voting Rights Amendment Act of 2015, a bipartisan bill intended to reinstate protections for minority voters post-*Shelby County*.⁴⁵ The proposed VRA Amendments include universalistic rules (requiring disclosure of voting changes) with a continued use of a race-targeted preclearance scheme, including a new coverage formula for Section 4 of the VRA.⁴⁶ Certainly, the debate and final resolu-

³⁹ *Id.* at 2618–19 (majority opinion) ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.").

⁴⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 196–97, 207, 211 (2009) [hereinafter *NAMUDNO*].

⁴¹ *Shelby Cnty.*, 133 S. Ct. at 2619, 2622, 2631.

⁴² *NAMUDNO*, 557 U.S. at 205.

⁴³ Justice Thomas dissented in part declaring the statute unconstitutional. *NAMUDNO*, 557 U.S. at 2612 (Thomas, J., dissenting).

⁴⁴ *Shelby Cnty.*, 133 S. Ct. at 2631 ("We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.").

⁴⁵ Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. (2015).

⁴⁶ *Id.* §§ 3(b), 4.

tion over these amendments remain essential to address the continuing problem of race discrimination in elections. Unfortunately, any movement by Congress on the 2015 bill seems quite unlikely given the polarization of the Democratic and Republican parties.

Congress could also seek to utilize the other VRA provisions, such as Section 3, to bail in jurisdictions that are discriminating against minority voters. Spencer Overton offers some good suggestions along these lines, including expanding the VRA's bail-in provision to subject jurisdictions with a recent voting rights violation to preclearance.⁴⁷ Additionally, Congress should consider adding new provisions to Section 5 or Section 2, expand the scope of Section 203, and provide for direct tribal review and input on any state election law proposals as discussed in this Article.

B. Inter Tribal Council

The NVRA⁴⁸ “requires States to provide simplified systems for registering to vote in *federal* elections.”⁴⁹ “The Act requires each State to permit prospective voters to ‘register to vote in elections for Federal office’ by any of three methods: simultaneously with a driver’s license application, in person, or by mail.”⁵⁰ *Inter Tribal Council* concerned the third method, registration by mail. The NVRA requires that each state “accept and use” a uniform federal form when registering voters for federal elections.⁵¹ The content of this form is prescribed by the Election Assistance Commission (“EAC”), a federal agency, and requires an applicant to swear, under penalty of perjury, that he or she is a U.S. citizen.⁵²

However, the Arizona law—Proposition 200—required a voter registration official to reject any application for registration, including a federal form that is not accompanied by documentary evidence of citizenship.⁵³ The question in *Inter Tribal Council* was whether the documentary evidence of citizenship requirement as applied to ap-

47 See Overton, *supra* note 15, at 30–31. Overton also proposes quicker, more efficient and less expensive procedures in VRA cases and the adoption of a burden-shifting system that requires states and localities that adopt voting rules that pose an especial risk of discrimination against race or language minority voters to show that fair and less harmful alternatives do not exist. *Id.*

48 42 U.S.C. § 1973gg *et seq.* (2006).

49 *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247, 2251 (2013) (quoting *Young v. Fordice*, 520 U.S. 273, 275 (1997)).

50 *Id.*

51 42 U.S.C. § 1973gg-4(a)(1).

52 42 U.S.C. § 1973gg-7(b)(2)(A)–(C).

53 *Inter Tribal Council*, 133 S. Ct. at 2251.

plicants using the federal form was preempted by the NVRA. In a majority opinion written by Justice Antonin Scalia, the Court said “yes.”⁵⁴

In 2004, Arizona voters passed Proposition 200, otherwise known as the Arizona Taxpayer and Citizen Protection Act, which amended Arizona law⁵⁵ to require that prospective voters provide documentary proof of citizenship in order to register to vote. The proof of citizenship could be satisfied by presenting: “(1) a photocopy of the applicant’s passport or birth certificate, (2) a driver’s license number, if the license states that the issuing authority verified the holder’s U.S. citizenship, (3) evidence of naturalization, (4) tribal identification, or (5) ‘[o]ther documents or methods of proof’” as established elsewhere in federal immigration law.⁵⁶

Upon the passage of Proposition 200, numerous plaintiffs sought to enjoin the changes in the law. The United States District Court for the District of Arizona consolidated the cases and ruled Proposition 200 did not violate Section 2 of the VRA or the Equal Protection Clause of the Fourteenth Amendment, did not constitute a poll tax under the Fourteenth Amendment, and was not superceded by the NVRA.⁵⁷ The plaintiffs appealed. In *Gonzales v. Arizona*, the Ninth Circuit held that the NVRA preempted Proposition 200.⁵⁸ The Ninth Circuit found that Proposition 200’s proof of citizenship requirement would mandate a county clerk to reject any voter registration, including the federal form, unaccompanied by adequate proof of citizenship.⁵⁹ Such a requirement could not be reconciled with “the NVRA’s [] require[ment] that states ‘accept and use’ the Federal Form”⁶⁰ The State of Arizona argued that Proposition 200 addressed fraudulent voter registration, but the Ninth Circuit found that the Elections

54 *Id.*

55 *See* *Gonzales v. Arizona*, 485 F.3d 1041, 1047 (9th Cir. 2007) (noting that Proposition 200 amended Arizona law).

56 *Inter Tribal Council*, 133 S. Ct. at 2252 (quoting Ariz. Rev. Stat. § 16-166(F) (West Supp. 2012)). *See also* *The Supreme Court, 2013 Term—Leading Cases: Elections Clause — Federal Preemption of State Law — Federal Voter Registration* *Arizona v. Inter Tribal Council of Arizona, Inc.*, 127 HARV. L. REV. 198, 199 (2013) [hereinafter *The Supreme Court Leading Cases*].

57 *Gonzales*, 485 F.3d at 1048–51.

58 *Gonzales v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff’d sub nom.*, *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247 (2013). *See also* *The Supreme Court Leading Cases*, *supra* note 56, at 199.

59 *Gonzales*, 677 F.3d at 397. *See also* *The Supreme Court Leading Cases*, *supra* note 56, at 199.

60 *Gonzales*, 677 F.3d at 396–99. *See also* *The Supreme Court Leading Cases*, *supra* note 54, at 199–200.

Clause of the U.S. Constitution gave Congress the last word on how to address this issue in federal elections.⁶¹

The Supreme Court affirmed, holding that the NVRA precludes Arizona from requiring an applicant using the federal form to submit information beyond that required by the form itself.⁶² Justice Scalia began the Court's opinion by citing to the Elections Clause, which "empowers Congress to preempt state regulations governing the 'Times, Places and Manner' of holding congressional elections."⁶³ The Court observed that the Elections Clause has two functions. First, it imposes on states a duty to prescribe the time, place, and manner. Second, it provides Congress with the power to alter those state laws or regulations. The Court stated the Elections Clause's scope is "broad" and "'Times, Places, and Manner'" are "'comprehensive words.'"⁶⁴ The Court's review of the Elections Clause in *Inter Tribal Council* is probably the most comprehensive to date.⁶⁵

Justice Scalia reviewed the text of the NVRA and the Arizona Proposition 200 language. The Court noted that states like Arizona "retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."⁶⁶ The Court observed that Arizona's law would "permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form."⁶⁷ This was unacceptable to the Court because "[i]f that is so, the Federal

61 *Gonzales*, 677 F.3d at 403.

62 *Inter Tribal Council*, 133 S. Ct. at 2257.

63 *Id.* at 2253 (citing U.S. CONST. art I, § 4, cl. 1).

64 *Id.* The Elections Clause gives Congress far greater power to affect state legislation than other constitutional provisions. *See, e.g., Foster v. Love*, 522 U.S. 67, 69 (1997) ((quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995) (recognizing Congressional "power to override state regulations" by establishing uniform rules for federal elections, binding on the States)); *Ass'n of Cmty. Orgs. for Reform Now ("ACORN") v. Edgar*, 56 F.3d 791, 792–93 (7th Cir. 1995) (upholding the NVRA and noting that through the Elections Clause, Congress may "intrude[] deeply into the operation of state government"). When Congress acts under the Elections Clause—as it did when enacting the NVRA—its regulations "are paramount" to state regulations, which "cease[] to be operative" to the extent they conflict with the federal law. *Foster*, 522 U.S. at 69 (quoting *Ex parte Siebold*, 100 U.S. 371, 384 (1880)).

65 *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 5–6 (2010) ("Although the Supreme Court has heard several challenges to . . . [election] statutes, it never has examined thoroughly the intended scope of the congressional power under the Times, Places and Manner Clause." (footnote omitted)).

66 *Inter Tribal Council*, 133 S. Ct. at 2255 (footnote omitted).

67 *Id.* at 2256.

Form ceases to perform any meaningful function, and would be a feeble means of ‘increas[ing] the number of eligible citizens who register to vote in elections for Federal office.’”⁶⁸

Next, the Court considered whether the presumption against preemption under the Supremacy Clause should apply. The Court declined to follow the Supremacy Clause analysis because it has “never mentioned such a principle in [its] Elections Clause cases.”⁶⁹ It further observed that “[w]hen Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States.”⁷⁰

Additionally, the Court found that any “federalism concerns underlying the presumption in the Supremacy Clause . . . are somewhat weaker” in the Elections Clause context.⁷¹ The Court concluded that the “fairest reading of the statute” resulted in Arizona’s proof of citizenship requirement to be “‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form.”⁷²

The impact of the two recent voting rights decisions is significant. Post-*Shelby County*, a number of formerly covered jurisdictions have sought to dilute minority voting strength by altering electoral districts, moving from district-based to at-large elections, and changing election dates.⁷³ This highlights the limits of the NVRA in protecting voters in state and local elections. All of this suggests that the universalism proposal does not go far enough to capture the host of voting issues in Indian country and other minority communities.

II. YOU GOTTA FIGHT FOR THE RIGHT . . . TO VOTE

A. *Indian Voting Challenges*

In *Shelby County*, the Supreme Court minimizes racial discrimination in voting because of the dramatic increase in Black voter registration and thus concludes that the Section 4 coverage formula is no longer appropriate. Therefore, the strict manner in which the Court

68 *Id.* (citation omitted).

69 *Id.* (footnote omitted).

70 *Id.* at 2257 (emphasis in original) (footnote omitted).

71 *Id.* at 2257.

72 *Id.* (quoting *Ex parte Siebold*, 100 U.S. 371, 397 (1879)).

73 Bagenstos, *supra* note 14, at 2870–71; see Wendy Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CENTER FOR JUSTICE (June 17, 2014), http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf (analyzing the state of voting laws in 2014).

treats or views state electoral laws is not warranted. The fact that progress has been made on the issue of race does not mean that Congress should eliminate Section 4 because racial discrimination is not some historical anomaly. Consequently, in many parts of the United States, and particularly Indian country, basic access to the ballot box remains a formidable challenge.⁷⁴ States, counties, and local jurisdictions with large Indian populations continue to manipulate election rules to lower turnout or dilute the votes of Indian voters.⁷⁵ Any effort to discount or minimize the need to prevent racial discrimination in voting under the VRA on or near Indian reservations would be a mistake. Federal oversight and supervision is still needed and warranted as provided under the NVRA. Indeed, there is still much work to be accomplished in Indian country for Indian voters.

The history of discrimination against Indian voters is well documented in a plethora of cases,⁷⁶ Congressional hearings held to reauthorize the VRA,⁷⁷ law review articles,⁷⁸ and books.⁷⁹ To be sure there

⁷⁴ For example, one day before the general federal election a federal court ordered a South Dakota county official to permit Indians to vote, overturning the county auditor's rejection of hundreds of registration cards from an Indian registration drive. *American Horse v. Kundert*, No. 84-5159 (D.S.D. Nov. 5, 1984). Indian voters have challenged the denial of polling places in outlying Indian communities. In *Black Bull v. Dupree School District No. 64-2*, No. 86-3012 (D.S.D. May 14, 1986) (Stipulation for Settlement), the Dupree School District was ordered to establish four polling places on the Cheyenne River Sioux Reservation. Prior to the lawsuit, Indian voters were forced to travel up to 150 miles roundtrip to vote in school board elections. See other examples in Wolfley, *supra* note 20, at 200-01.

⁷⁵ See *supra* note 25.

⁷⁶ See, e.g., *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469 (8th Cir. 1986) (deciding a challenge to at-large election system in a school district in South Dakota by Sisseton-Wahpeton Tribal members); *Sanchez v. King*, 550 F. Supp. 13 (D.N.M. 1982), *aff'd*, 103 S. Ct. 32 (1982) (addressing Navajo voters' action against reapportionment plan of New Mexico); *Windy Boy v. Cnty. of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986) (presenting a challenge to at-large elections in Montana by Crow and Northern Cheyenne Tribal Members); *Ratcliff v. Mun. of Anchorage*, No. A86-036 (D. Alaska 1989) (deciding a challenge to the reapportionment plan of City by Alaska Natives); *Love v. Bd. of Educ.*, No. 87-105-CIV-3 (D.N.C. 1987) (showing how the Lumbee Indians successfully challenged multi-member districting in North Carolina); *Blackmoon v. Charles Mix Cnty.*, 386 F. Supp. 2d 1108 (D.S.D. 2005) (deciding challenge to county commission districts splitting townships populated by Indian voters in violation of VRA and Fourteenth Amendment).

⁷⁷ See e.g., *Continued Need for Voting Rights Act: Hearing Before the Subcomm. on Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2019 (2006); *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *Voting Rights Act: Section 203-Bilingual Election Requirements (Part I & II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005).

⁷⁸ See e.g., Jackson, *supra* note 25; Laughlin McDonald et al., *Voting Rights in South Dakota: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 195 (2007); Laughlin McDonald, *The Voting*

continues to be a deep-seated resistance from majority non-Indian communities that border Indian reservations, and in local county, commission, and school board elections. There are a broad range of discriminatory election practices, including at-large elections,⁸⁰ redistricting plans that dilute Indian voting,⁸¹ new identification and registration requirements for voting,⁸² lack of minority language assistance, and refusal to comply with the VRA's preclearance provisions⁸³ that plague Indian country.

Over the years, the states have made five basic arguments in justifying the denial of voting rights to Indians. First, states have maintained that the failure to sever tribal ties made Indians ineligible under certain state constitutions and laws.⁸⁴ Second, the phrase "Indians not taxed" was used as an economic argument that Indians should not be permitted to vote or participate in revenue decisions, such as school bond elections, because they did not pay state taxes.⁸⁵ Third, states claimed that Indians under federal "guardianship" disqualified them from voting according to state constitutions that used the phrase "guardianship," "*non compos mentis*," or "insane."⁸⁶ Fourth, states used residence clauses in certain election statutes, which posited that a person living on an Indian reservation located within a state

Rights Act in Indian Country: South Dakota, A Case Study, 29 AM. INDIAN L. REV. 43 (2004); Wolfley, *supra* note 20.

79 Daniel McCool, *Indian Voting*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105 (Vine Deloria, Jr. ed., 1985); McDONALD, *supra* note 20; MCCOOL, *supra* note 25.

80 At-large elections are those in which candidates are elected by the entire electorate rather than by district; in such a situation, a minority group may have its votes diluted because the majority group usually have enough votes to defeat the minority group's candidates of choice.

81 Redistricting refers to the process of redrawing the lines of voting districts. This state process usually takes place after each ten-year census and is required for all jurisdictions and legislative bodies that use districts, including the U.S. Congress, state legislatures, county commissions, city or town councils and school boards. For state and local districts, the principle of one person, one vote requires the jurisdiction to make an honest and good faith effort to draw electoral districts of as nearly equal population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

82 See Complaint, *ACLU v. Kiffmeyer*, No. 04-CV-4653JMR/FLN, 2004 WL 2428690 (D. Minn. Oct. 27, 2004) (challenging Minnesota's identification requirements for individuals registering to vote); *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. May 27, 2008).

83 Until South Dakota was sued by Indian voters in *Quick Bear Quiver v. Hazeltine*, No. 02-5069 (D.S.D. Dec. 27, 2002), the state never complied with Section 5 by submitting changes to their election laws or regulations. "From the date of its official coverage [under the VRA] in 1976 until 2002, South Dakota enacted [or promulgated] more than 600 statutes and regulations having an effect on elections or voting . . . but submitted fewer than ten for preclearance." McDonald, *supra* note 78, at 196-97 (footnote omitted).

84 Wolfley, *supra* note 20, at 182-83.

85 *Id.* at 184-86.

86 *Id.* at 186-88.

was not a resident of the state, to bar Indians from voting.⁸⁷ Finally, states invoked the tribal sovereignty argument, which asserts that Indians do not care or wish to participate in state or county affairs and instead wish to only participate in tribal government affairs and federal elections.⁸⁸ For example, in 2002, a South Dakota State legislator stated on the floor of the State Senate that he would “lead[] the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty”⁸⁹

B. Disparities in Indian Country

Similar to the voting barriers present in Black and Latino communities, states and local counties have turned from basic blatant barriers to more sophisticated means to dilute the Indian vote. Since the VRA’s passage, over seventy cases have been brought under either the VRA or the Fourteenth and Fifteenth Amendments in which Indian voters’ interests were at stake.⁹⁰ This number is strikingly low compared to the hundreds of cases brought on behalf of Black and Latino voters primarily due to the lack of attorneys working in the area of Indian voting rights, the dearth of financial resources, and the absence of voter education about the VRA’s protections.

Indian voters also share many of the same disparities in education, income, employment, and general wellbeing as other racial minority voters as compared to White voters. For example, American Indians and Alaska Natives continue to suffer from some of the highest levels of poverty in the United States. According to the 2000 Census, “American Indians and Alaska Natives living on reservations have an average . . . per capita income of \$12,452,”⁹¹ drastically lower than the national median income of \$50,054 in all households.⁹² Among tribal

87 *Id.* at 188–90.

88 *Id.* at 190–92.

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

90 See MCCOOL, *supra* note 25, at 46, 48–68 (collecting cases). Since the publication of McCool’s book in 2007, there have been numerous other cases filed in McDonald, *supra* note 77.

91 NCAI Brief, *supra* note 11, at 8 (dismissing the appeal as moot and vacating the district court order, and expressing no opinion on the merits) (citing Trib Choudhary, *Navajo Nation Data From U.S. Census 2000*, THE NAVAJO NATION DIVISION OF ECONOMIC DEVELOPMENT, 65–68 Tbl. 33 (2000), <http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf>).

92 *Id.* at 8 (citing Carmen DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, UNITED STATES CENSUS BUREAU 6 Tbl. 1 (2012), <http://www.census.gov/prod/2012pubs/p60-243/pdf>).

members nationwide, forty-nine percent of the available labor force is unemployed.⁹³ The link between a depressed socio-economic status and reduced political participation is direct as noted by the Supreme Court: “political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”⁹⁴

Generally, many Indian reservations are rural and remote, and isolated Indian community members must travel many miles on dirt roads to the local store, trading post, or local county seat, which are located off-reservation. In Alaska, access to Alaska Native villages is generally by boat or airplane.⁹⁵ Imagine having to take a plane to register and cast your vote because the state will not place a registration or polling place in your native village. The cost of gas to travel by car to county seats (often 40 to 150 miles) to register to vote or vote is enough to discourage tribal members from using late registration and early voting mechanisms available in local counties.⁹⁶ Traveling off-reservation to exercise the franchise also assumes that Indian voters have access to a car, boat, plane, or public transportation, which is not always the case. Indeed, only about six percent of tribal governments have a public transit system.⁹⁷ Further distances means a greater cost incurred to exercise one’s vote.⁹⁸ In stark contrast, nearby convenient voting polls is an advantage that the average non-Indian citizen takes for granted.

In addition to the lack of public transit systems on reservations and physical isolation, tribal members are technologically isolated too. Given the remote rural conditions on reservations and Alaska Native villages, many tribes do not have the infrastructure for tele-

⁹³ *Id.* at 8–9 (citing LABOR FORCE REPORT, *supra* note 11, at 1).

⁹⁴ *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986).

⁹⁵ See Natalie Landreth & Moira Smith, *Voting Rights in Alaska 1982–2006*, RENEWTHEVRA.ORG 8 (Mar. 2006), <http://www.protectcivilrights.org/pdf/voting/AlaskaVRA.pdf>.

⁹⁶ NCAI Brief, *supra* note 11, at 10–11. In a 2012 voting case in South Dakota, a federal district court held that the Indian plaintiffs had “less opportunity than other members of the electorate to participate in the political process” in violation of Section 2 of the Voting Rights Act, based on evidence that voters were required to travel about three hours to exercise their right to vote. *Brooks v. Gant*, No. CIV. 12-5003-KES, 2012 WL 4482984, at *6 (D.S.D. Sept. 27, 2012).

⁹⁷ NCAI Brief, *supra* note 11, at 11 (citing BUREAU OF INDIAN AFFAIRS, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA–21 REAUTHORIZATION RESOURCE PAPER (2003)).

⁹⁸ *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

communication services. Often reservation residents lack wireless connectivity, wireless providers, or basic wireline providers. Consequently, while the task of downloading a registration form from the internet, printing it out, completing it, and mailing it to the county seat is simple for the majority of voters, that is not the case for Native Americans, since many do not have basic broadband connectivity⁹⁹ or the equipment to print a registration form. Indeed, in *Spirit Lake Tribe v. Benson*, the North Dakota federal district court found state mail-in ballots unacceptable for tribal voters and required polling places to be established on the reservation.¹⁰⁰

Thus, even though the universal provisions of the NVRA that provide for registration of voters for federal elections at state facilities are laudable, it does not provide full protection to on-reservation voters. Moreover, HAVA requires anyone who has registered by mail and has not previously voted to present photo identification at the polls on Election Day or other governmental identification that shows a voter's name and address. This requirement has led to states denying Indian voters who use tribal photo identification.¹⁰¹

Eighty jurisdictions in seventeen states are covered under Section 203 of the VRA because of their American Indian populations.¹⁰² Section 203 of the VRA (added in 1975) requires certain states and political subdivisions to provide voting materials and oral assistance in languages other than English.¹⁰³ While there are several tests for coverage, the requirement is imposed upon jurisdictions with significant language minority populations who are limited English-proficient and where the illiteracy rate of the language minority is higher than the national literacy rate. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and more than four thousand local jurisdictions in twenty-seven other states, from Alaska to Florida and New York to Arizona.¹⁰⁴

Jurisdictions covered by Section 203 are specifically required to provide "any registration or voting notices, forms, instructions, assis-

99 NCAI Brief, *supra* note 11, at 12–14 (citing *National Broadband Map*, BROADBANDMAP.GOV (Dec. 1, 2013), <http://www.broadbandmap.gov/summarize/native-nations/all-native-nations>).

100 *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 U.S. Dist. LEXIS 116827, at *13–14 (D.N.D. 2010).

101 *ACLU v. Kiffmeyer*, No. 04-CV-4653 MJR/FLN, 2004 WL 2428690, at *1–2 (D. Minn. Oct. 28, 2004).

102 ACLU SPECIAL REPORT, *supra* note 20, at 12.

103 42 U.S.C. § 1973aa-1a(c) (2006).

104 ACLU SPECIAL REPORT, *supra* note 20, at 12. The bilingual voting materials requirement is scheduled to expire in 2031.

tance, or other materials or information relating to the electoral process, including ballots,” in both English and the applicable minority language.¹⁰⁵ In the case of Indian communities with oral or historically unwritten languages, the jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting.”¹⁰⁶ Many Alaskan Natives’ and Indians’ first language is their native language, and they often continue to speak and conduct business in tribal languages. Maintenance of native languages is not only desirable but strongly supported by federal policies.¹⁰⁷

While Section 203 has empowered the Indian community in the political process,¹⁰⁸ voter disenfranchisement continues to plague language minority communities through barriers that include habitual noncompliance with the VRA, institutional disenfranchisement, racially hostile poll workers, and voter intimidation. The U.S. Department of Justice has had to bring lawsuits to enforce the language provisions, bringing dozens over the last twenty-five years, including several on behalf of American Indians.¹⁰⁹ Common problems have revolved around inadequate numbers of trained bilingual poll workers, incomplete or insufficient amount of translated election materials, and the failure to develop translated materials for the electronic media. As a result of these lawsuits, counties have been required to establish language information programs, employ outreach workers

¹⁰⁵ 42 U.S.C. § 1973aa-1a(c) (2006).

¹⁰⁶ *Id.*

¹⁰⁷ *See e.g.*, Native American Languages Act of 1990, Pub L. No. 101-477, §§ 104-07, 104 Stat. 1152, 1153-56 (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2006)).

¹⁰⁸ *Voting Rights Act: Section 203-Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2, 34 (2005) [hereinafter *Bilingual Election Requirements Hearing*].

¹⁰⁹ *See Voting Section Litigation, Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, JUSTICE.GOV, <http://www.justice.gov/crt/voting-section-litigation> (last updated Aug. 12, 2015) [hereinafter *Voting Section Litigation*] (citing cases about alleged violations of the VRA); *see, e.g.*, Apache Cnty. High School Dist. No. 90 v. United States, No. 77-1815 (D.D.C. June 12, 1980) (denying preclearance request because it failed to disseminate election issues in the Navajo language); *United States v. Cnty. of San Juan*, No. 79-508JB (D.N.M. April 8, 1980) (holding that the county failed to provide bilingual information, and Navajo interpreters at polls). In 1998, the United States filed suit in New Mexico. *See United States v. Bernalillo Cnty.*, No. CV-98-156 BB/LCS (D.N.M. Apr. 27, 1998) (Consent Decree) (enforcing language assistance provisions on behalf of Navajo Indians on the Cañoncito Reservation). The county had failed to comply with the VRA in the areas of “dissemination of election information, voter registration, voter registration cancellation procedures, absentee voting . . . language assistance at the polls, and the training of polling officials.” *Id.* In *Nick v. Bethel*, Alaska Native plaintiffs challenged Alaska’s failure to comply with the language assistance provisions to the detriment of Alaska Natives who read and speak the Yup’ik language. Complaint at 1-2, *Nick v. Bethel*, 3:07-cv-00098-TMB, 2007 WL 4401668 (D. Alaska June 11, 2007).

to assist in all aspects of voting by Indians,¹¹⁰ provide language assistance and translators at the polls, provide sample ballots in the native language, and supply a glossary of election terms in the native language.¹¹¹ The Justice Department has inconsistently enforced these requirements and has only more recently in the past ten years utilized Section 203 to file more litigation.¹¹²

No doubt a voting ballot can be overly complicated to understand when the voter is limited in English proficiency. And the highly sophisticated content of lengthy referenda, the technical instructions for casting a provisional ballot, or the voting machine itself can confuse the most seasoned English speaking voter. Confusing ballots and instructions, in fact, contributed to the Florida recount in the 2000 Elections.¹¹³ Disenfranchisement continues to plague Indian voters.

III. PROTECTING THE DREAM: THE FUTURE OF NATIVE AMERICAN VOTING RIGHTS IN INDIAN COUNTRY

A. *Universal Approaches*

Do universal approaches like the NVRA, which was applied in *Inter Tribal Council*, and HAVA¹¹⁴ effectively confront the voting problems of Indian country today? These universal measures focus on the issues of vote denial, which include practices or procedures that limit a would-be voter's ability to register and cast a ballot or have that vote counted.¹¹⁵ They address voting access barriers in general that may affect all voters and apply to only federal elections. Critically, for Indian and Alaska Native voters, the universal laws do not consider the enduring problems of racial discrimination and the disparities involving education, income, and general socioeconomic factors. Nor do

110 United States v. Arizona, No. 88-1989 at 1, 4-5, 11, 14 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 27, 1993); *Bilingual Election Requirements Hearing*, *supra* note 108, at 126, 129-30, 136, 139 (appendix to the statement of Bradley J. Scholozman).

111 See *Nick*, 3:07-CV-00098-TMB, at *2, 7-9.

112 See *Voting Section Litigation*, *supra* note 109.

113 *Voting Irregularities in Florida During The 2000 Presidential Election*, U.S. COMM'N ON CIVIL RIGHTS (June 2001), <http://www.usccr.gov/pubs/vote2000/report/main.htm>.

114 Title III of HAVA establishes uniform requirements for all voting systems used in federal elections. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1704-06 (codified at 42 U.S.C. § 15481 (Supp. IV 2002)).

115 Historically these types of claims challenged practices such as literacy tests, poll taxes, white primaries, and English-only ballots. See *e.g.*, *Farrakhan v. Gregoire*, 590 F.3d 989, 998 n.13 (9th Cir. 2010), *rev'd on other grounds* by *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc) (citing Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006)).

such universal laws consider the Indian voters who speak their native language and thereby leave language obstacles in place. The universal laws fail to address the unique issues facing rural and isolated Indian reservation communities. Finally, they “leave the details of election administration to the states and counties.”¹¹⁶

In many respects, a universalistic approach that effectively attacks burdensome identification laws and limits on early voting would better serve Indian voters.¹¹⁷ However, this approach would also leave significant discrimination against American Indian and Alaska Native voters unremedied.¹¹⁸ For example, in a recent voting rights case in Montana, *Mark Wandering Medicine v. McCulloch*, tribal members from three reservations—Crow, Northern Cheyenne, and Fort Belknap—challenged the State’s refusal to establish early voter and registration sites in satellite locations on the three Indian reservations as violative of Section 2 of the VRA.¹¹⁹ Although Montana law provided for early voting and registration and the creation of satellite election offices, it was the location of off-reservation sites that hampered Indian voting and registration.¹²⁰ Indian voters were required to travel many miles to off-reservation county seats. The Ninth Circuit dismissed the case as moot since it only included the 2012 election.¹²¹ Consequently, even though there may be early voting and registration in a state as promoted by the universal laws, it does not assist Indian voters (in fact, it decreases or stagnates Indian voting) if the state refuses to provide registration and voting sites in isolated, rural Indian communities.¹²² Moreover, it may discourage voters when they hear, by word

116 Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207–08 (2005).

117 Bagenstos, *supra* note 14, at 2870.

118 *Id.*

119 *Mark Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083, 1085–86 (D. Mont. 2012), *vacated* by *Mark Wandering Medicine v. McCulloch*, 544 F. App’x 699, 699–700 (9th Cir. 2013) (dismissing the appeal as moot and vacating the district court order while expressing no opinion on the merits).

120 Or in the case of Indian voters in South Dakota, a hearing in support of a bill to create more on-reservation polling places was scheduled three hours away from the reservation at 7:30 a.m., which made it extremely difficult for tribal members to attend and testify. The bill was defeated. See *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2027 (2006) (appendix to the statement of Wade Henderson).

121 *Mark Wandering Medicine*, 544 F. App’x at 699–700.

122 Similarly, in *Spirit Lake Tribe v. Benson County*, the federal district court rejected the county’s argument that mail-in voting ballots increased voter participation, stating, “[w]hile such an argument is tenable in communities with stable housing arrangements, poverty and transience on the Reservation make[] mail balloting more difficult for tribal members.” No. 2:10-cv-095, 2010 U.S. Dist. LEXIS 116827, at *10 (D.N.D. Oct. 21, 2010).

of mouth, that there will not be satellite registration or voting sites on reservations.

The universal approach also fails to address the differences in race discrimination among various groups and places. For example, a voter identification law may not be especially burdensome for most voters in most locations, but in some communities the same law may be quite burdensome for an identifiable and a proportionately minority-heavy group of voters.¹²³ Indeed, those who are minorities, poor, disabled, and elderly are less likely than other residents to have photo identification.¹²⁴ Or, in the case of Indian voters, many hold tribal photo identification, but not state identification cards. Shortly before the 2004 presidential election, several Indians in Minnesota, in *ACLU v. Kiffmeyer*, challenged a state law prohibiting election officials from accepting a tribal identification card (which bore a picture of the tribal member) as identification at the polls unless the tribal member lived on a tribal reservation.¹²⁵ Many tribes issue identification cards that do not make the distinction between a tribal member's on-reservation or off-reservation residence status. In fact, many tribal members consider their reservation their home and thus maintain a local reservation address on their tribal identification cards. On October 29, 2004, the Minnesota federal court issued a preliminary injunction against the state law denying tribal identifications and finding that tribal identification cards with addresses "are sufficient proof of identity and residency" in order to register and vote.¹²⁶ The court further ruled that a tribal member offering a tribal identification card that did not contain a current address could, consistent with the state's treatment of other photo identification (e.g., military and student), provide a utility bill.¹²⁷

Additionally, a universalistic approach primarily focuses on statewide voting access laws that are likely to be important in national elections. Those laws, however, do not address the state suppression

¹²³ Bagenstos, *supra* note 14, at 2871.

¹²⁴ See Keesha Gaskins & Sundeep Iyer, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf (noting that many American citizens lack the proper documentation required by state voting laws).

¹²⁵ Complaint at 8–9, *ACLU v. Kiffmeyer*, No. 04-CV-4653 JMR/FLN, 2004 WL 2428690 (D. Minn. Oct. 27, 2004).

¹²⁶ *ACLU v. Kiffmeyer*, No. 04-CV-4653 MJR/FLN, 2004 WL 2428690, at *3 (D. Minn. Oct. 28, 2004).

¹²⁷ *Id.* at *3–4.

of the effective power of Indian voters on the local level¹²⁸ (school board and commissioner elections). Moreover, when we move from issues of vote access and denial to those of vote dilution, the universal laws are powerless to address the *dilutive* strand of voting discrimination.¹²⁹ Section 2 of the VRA prohibits voting procedures that deny or abridge the right to vote on account of race.¹³⁰ Section 2(a) explicitly establishes a results test such that a plaintiff need not prove that a voting practice was adopted or maintained with discriminatory intent. Vote dilution often results from at-large elections, racial gerrymandering, annexations, and similar practices that dilute the values of votes cast by minority voters in places where they are able to cast a ballot.¹³¹

As noted by Justice Ruth Bader Ginsburg in her dissent in *Shelby County*, “[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as ‘second-generation barriers’ to minority voting.”¹³² A great deal of modern voting discrimination against Black, Latino, Indian, and Alaska Native voters involves vote dilution, not vote denial. Such dilution takes place at the county and local—not state—levels, areas where the NVRA and HAVA have no force. Indeed, the overwhelming majority of Section 5 objections since 2000—86.4%—involved localities rather than states.¹³³ And, Section 2 of the VRA continues to provide nationwide protections against voting discrimination, particularly vote dilution election schemes.

For instance, at-large and district-based elections could be consistent with principles of good government by providing smaller districts for its voters. However, if a school district changes from one to the other form of representation in response to changing racial demographics, we may justifiably fear discrimination.¹³⁴ For example, if a population changes in a township from majority White to majority Indian, and the local county changes the district-based voting to at-

128 Bagenstos, *supra* note 14, at 2871.

129 *Id.* at 2872.

130 42 U.S.C. § 1973 (2006).

131 *See* *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999) (explaining that vote dilution occurs when an election practice leads to the dilution of minority voting strength and results in a lower ability for minorities to elect the representative of choice). *See also* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting) (arguing that racial gerrymandering and the adoption of a system of at-large voting have served as barriers to minority voting and lead to minority vote dilution).

132 *Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).

133 *See* Justin Levitt, VRA Preclearance (A Response to Pildes/Tokaji, pt. 2), ELECTION L. BLOG (Aug. 19, 2013, 5:16 PM), <http://electionlawblog.org/?p=54564>.

134 Bagenstos, *supra* note 14, at 2872.

large elections, which is likely to reduce the impact of the Indian vote, there is cause for concern that the electoral system is being manipulated. A universal approach provides no basis to attack this sort of electoral change—which is an extremely common means by which minority voters are deprived of full and equal participation in local democracy.¹³⁵ And, given the creativity of those who would engage in race discrimination, a general identifiable set of prohibited practices in a universal law will not combat discrimination effectively.¹³⁶ Voting discrimination has moved from the *de jure* to the *de facto*. In my view, although universalistic efforts to promote access to the ballot are valuable tools in general, and should be utilized, we must look beyond these approaches in the aftermath of *Shelby County*. The universal approaches do not adequately respond to the voting problems of today.

B. Measures Directed at Race Discrimination

If the universal federal NVRA approach applied in *Inter Tribal Council* does not fit well in Indian country, what other measures are responsive to the gap left after *Shelby County*?² In my opinion there still needs to be measures or laws that are specifically directed at the problems of race discrimination in voting. In short, a revised version of the VRA must still be in place to protect the voting rights of language and racial minority voters. As long recognized by the Supreme Court, the VRA addresses the combination of race discrimination and the right to vote, which is “preservative of all rights.”¹³⁷ I offer the following responsive measures to the *Shelby County* and *Inter Tribal Council* decisions as they apply in Indian country for Alaska Native and American Indian voters.

1. VRA Preclearance and an Indian-Specific Provision

All racial, ethnic, and language minorities have benefited from the VRA either through basic access to the ballot, gains in minority elected officials, growth in registration, or election participation. Most of these gains are attributable to Section 5 as a protective measure for minority citizens. With the demise of Section 4 and Section 5’s application of preclearance, Congress has the opportunity to criti-

¹³⁵ *Id.*

¹³⁶ Indeed, felon disenfranchisement and voter identification laws have not been successfully attacked, yet they raise significant race discrimination concerns. See *Farrakhan*, 590 F.3d at 993 (involving Native American inmates challenging Washington’s felon disenfranchisement law as racially discriminatory).

¹³⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

cally review, create, and expand the reach of Section 5 or new measures to protect voters.

The Supreme Court in *Shelby County* urged Congress to consider current conditions in considering a new Section 4 formula. Undoubtedly, Congress will have to undertake a review and consider whether to revive Section 5 by crafting a new coverage formula. And in doing so, Congress will need to update the preclearance list of covered states and counties. Although the majority of the Supreme Court in *Shelby County* was color blind in rendering its decision, Congress should remain cognizant of past discrimination in the covered jurisdictions in developing a new formula for preclearance. Some factors that Congress should continue to consider are: (1) the most recent Section 5 violations by a covered jurisdiction; (2) the most recent Section 2 violations by the covered jurisdiction; (3) the history of a covered jurisdiction's failure to submit its amendments or new voting laws; (4) time frames of five to ten years in which a covered jurisdiction may be under Section 5; (5) the existence of polarized voting; (6) voting changes that have not gone forward as a result of Section 5; and (7) violations of Section 203, the language assistance provisions. Evidence of any of these factors would demonstrate a persistent need for federal oversight to protect racial and language minority voters.

Congress should enact a specific preclearance provision requiring the Department of Justice or states to submit election law revisions or new laws directly to Indian tribes and Alaska Native governments for review and comment.¹³⁸ Congress has exclusive authority over Indian affairs as provided in the Indian Commerce Clause of the Constitution.¹³⁹ This exclusive and plenary authority of Congress in Indian affairs has permitted Congress to enact legislation placing both restrictions, and relaxing restrictions on tribal authority,¹⁴⁰ and conferring an employment preference for Indians in the Bureau of

¹³⁸ Providing such state election information to tribes is consistent with the federal trust obligations, and the government-to-government relationship between Indian tribes and the federal government.

¹³⁹ U.S. CONST. art. I, § 8, cl. 3 grants Congress the power to regulate commerce "with the Indian Tribes." See *Cherokee Nation v. Georgia*, 30 U.S. 1, 18–19 (1831) (analyzing the Commerce Clause treatment of Indians and tribes as distinct political entities). In addition, the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, played a major role in structuring the federal-tribal relationship. See *United States v. Lara*, 541 U.S. 193, 200 (2004) ((stating that the Commerce and Treaty Clauses of the Constitution are the basis for "plenary and exclusive" power of Congress) (citations omitted) (quoting other sources)).

¹⁴⁰ *Lara*, 541 U.S. at 200.

Indian Affairs.¹⁴¹ As long as a specific piece of legislation is “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” the special legislation will be upheld.¹⁴² Given the history of discrimination by states against Indians, and the state’s dismal track record in making the ballot box accessible to Indian voters, there is good reason for Congress to enact a provision for Indians in the area of preclearance.

In addition to the plenary authority of Congress, the United States’ departments and agencies have a special trust responsibility to protect Indian and tribal interests. The trust obligation is “one of the cornerstones of Indian law”¹⁴³ to individual Indians and tribes, and this obligation is in addition to its general obligation to protect the civil rights of citizens under the Constitution. Direct tribal participation in the preclearance review process will enable tribes to communicate their support or objections to the Department of Justice regarding proposed election law changes. An Indian specific preclearance provision is justified based on the exclusion power of Congress in Indian affairs and the fiduciary duties owed to Indian voters.

On May 21, 2015, the DOJ announced it was transmitting legislation to Congress that would require states or localities whose territory contains all or part of an Indian reservation to provide a minimum of one polling place for each such tribe, in a location selected by the Tribe.¹⁴⁴ In proposing the stand-alone legislation, the DOJ recognized the history of discrimination and significant voting obstacles faced by American Indians and Alaska Natives.¹⁴⁵ The legislative proposal would also require the states to: (1) designate an officer for compliance with the act and provide notice of the officer to tribes; (2) provide compensation to election officials and poll workers at polling places in the same manner at off-reservation polling places; (3) provide additional polling places if based on the circumstances,

141 *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974) (holding that Indian preference legislation does not violate the equal protection component of the Fifth Amendment Due Process Clause).

142 *Id.* at 555.

143 FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a], at 412 (Nell Jessup Newton ed., 2012).

144 Tribal Equal Access to Voting Act of 2015 (proposed May 21, 2015).

145 *See* Press Release, Dep’t of Justice, Department of Justice Proposes Legislation to Improve Access to Voting for American Indians and Alaska Natives (May 21, 2015), <http://www.justice.gov/ops/pr/departement-justice-proposes-legislation-to-improve-access-to-voting-for-american-indians-and-alaska-natives.pdf> (discussing the proposed legislation).

such as a larger tribal populations; and (4) provide voting machines, ballots, provisional ballots and other voting materials to the same extent at other polling places.¹⁴⁶ The state's obligations are contingent on the tribe filing a timely request, certifying it has arranged for access to—and appropriate staffing for—the polling place, and ensure the polling is open to Indian and non-Indian voters.¹⁴⁷ The legislation provides for civil relief by the United States or an Indian tribe to enforce the provisions. It does not provide for a private right of action by individual voters.¹⁴⁸

On July 30, 2015, Senator Jon Tester of Montana, introduced Senate Bill 1912, which contains provisions offered by the DOJ.¹⁴⁹ The bill also expands the protections for Indian voters by including a pre-clearance provision for a state that seeks to eliminate polling places, in-person voting by Indians, or remove early voting involving Indian voters.¹⁵⁰ It amends the bilingual elections requirements¹⁵¹ and the Voting Rights Act to assign federal observers to reservation polling places,¹⁵² as well as provides that the Attorney General will consult annually with tribes about voting issues.¹⁵³

2. *Transparency and Disclosure to Tribes and the Public of Changes in All Election Laws*

If a new coverage formula under Section 4 is not part of the future landscape, state and local jurisdictions revising their election laws must provide some process of accountability through full disclosure to the federal government, the public, and tribes of all local election changes. State and local governments have a responsibility to provide transparency and fairness to their citizens. Moreover, transparency and full disclosure minimize the opportunity for preferential treatment and the advancement of certain interests and risk to all voters. Transparency means that information about state or local elections and proposed changes to any regulations, guidelines, and laws (in all local and state elections, not only federal elections) must be provided

¹⁴⁶ Tribal Equal Access, *supra* note 144, § 5(a).

¹⁴⁷ *Id.* § 5(b).

¹⁴⁸ *Id.* § 6.

¹⁴⁹ Native American Voting Rights Act of 2015, S. 1912, 114th Cong. § 4 (2015).

¹⁵⁰ *Id.* § 3.

¹⁵¹ *Id.* § 5.

¹⁵² *Id.* § 6.

¹⁵³ *Id.* § 8.

and in easily understandable forms and media.¹⁵⁴ In the case of jurisdictions that are covered by Section 203, they must be made available in voters' native language. Such information must be freely available and directly accessible to Indian voters who will be affected by the laws, regulations, policies, and procedures. All proposed changes in elections laws should also be provided directly to tribal governments or Alaska Native villages so that they may review and disseminate such information to their reservation voters or membership.

Election law changes should also be made available to the public. Since the passage of the Section 5 provisions, which require election law changes to be submitted to the DOJ, public interest and involvement in elections has grown dramatically. Many partisan and non-partisan committees, government groups, and private, non-profit centers monitor changes in elections laws on an ongoing basis.¹⁵⁵ They have the resources to analyze and provide comments on such elections changes in a timely and efficient manner compared to Indian voters who do not have access to the Internet, and the resources or legal expertise to respond to proposed state voting laws and regulations. Public access to state proposed changes to election laws is necessary to fully inform the voters and enable them to adequately review and provide comments.

3. *Enforcement of Language Provisions*

Like the VRA's preclearance requirement, Section 203 is predicated on congressional findings of past discrimination and is designed to create a structural remedy that is limited in time and scope. Congress has determined that American Indians and Alaska Natives continue to experience hardships when attempting to vote because of their limited ability to speak English and to read the ballots.¹⁵⁶ The 2000 Census data reported that 21.4% of American Indians are lim-

¹⁵⁴ Samuel Issacharoff proposes full disclosure but only for federal elections and not local elections. Issacharoff, *supra* note 9, at 120–24. But Spencer Overton urges full disclosure for all elections and argues that “states and localities with significant minority populations and racially polarized voting . . . would require disclosure . . . identifying the anticipated effect of all types of voting changes on racial and language minorities . . .” Overton, *supra* note 15, at 28.

¹⁵⁵ See, e.g., *Our Mission*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/about> (last visited Sept. 22, 2015) (noting that the Center's work includes voting rights).

¹⁵⁶ Brief for Navajo Nation et al. as Amici Curiae Supporting Respondents at 23, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (citing H.R. REP. NO. 109-478, at 45 (2006)). For example, the illiteracy rate for Arizona Indians is nineteen times the national rate. *Continued Need*, *supra* note 98, at 1367, 1379 (statement of Wade Henderson).

ited English-proficient.¹⁵⁷ Indeed, Congress reauthorized the temporary, minority language provisions because “there are still language barriers that make it difficult or impossible for citizens to understand election ballots.”¹⁵⁸ Accordingly, every effort should be made to see that jurisdictions covered by Section 203 of the VRA comply with the law. As noted, most of the cases in this area have been filed by the Department of Justice. Between 2001 and 2006, the DOJ filed more minority language violation cases than in the previous twenty-six years.¹⁵⁹ The DOJ also needs to scrutinize local and county elections in addition to federal elections.

HAVA offers a system of government payments and grants that allows language measures to be incorporated into states’ voting system improvements and technological innovations. The law contains provisions for payments to states for “[i]mproving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, . . . and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.”¹⁶⁰

The State of California received funding under HAVA¹⁶¹ which resulted in the State: (1) “producing and distributing election materials, in conjunction with local elections officials and community-based . . . organizations, in appropriate languages, printed materials, websites, website templates, and video on DVD or other appropriate media, [(2)] providing training to elections officials and poll workers and [(3)] educating voters on how to participate in the elections process, including, but not limited to, voter guides targeted to older voters and voters with disabilities, including low literacy, and minority language voters.”¹⁶² HAVA and other electoral assistance laws based

157 Brief for Navajo Nation et al., *supra* note 156, at 26 (citing *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2020–91 (2005) (appendix to the Statement of Laughlin McDonald)).

158 *Id.* at 25 (citing H.R. REP. NO. 109-478, at 147 (2006)).

159 *Id.* at 27 (citing *Bilingual Election Requirements Hearing*, *supra* note 108 (testimony of Bradley Schlozman)).

160 Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1669 (codified at 42 U.S.C. § 15301(b)(1)(G) (2002)).

161 Title I of HAVA makes federal funds available to states to improve their voting system technology and methods of casting and counting votes, to provide assistance to limited-English proficient voters, and to establish toll-free hotlines through which voters may report possible voting fraud and voting rights violations. Pub. L. No. 107-252, 116 Stat. 1168 (codified in 42 U.S.C. § 15301 (Supp. IV. 2002)).

162 Alex Padilla, California Secretary of State, *Section 3: Voter Education, Election Official Training and Poll Worker Training—California’s Plan for Voting in the 21st Century*, Section 254(a)(3), 73 (2003), http://elections.cdn.sos.ca.gov/HAVA_finalplan_12-03.pdf.

on congressional appropriations have the potential to provide greater access to limited English-proficient voters.

California worked to ensure that registration and election materials are accessible to the widest possible audience, including persons with disabilities, language assistance needs, and limited literacy skills.¹⁶³ State governments should establish procedures and criteria for individuals and organizations to apply for grants to assist in training and education activities, including identification and recruitment of minority language poll workers. The criteria to qualify for these grants must include demonstrated expertise and experience in voter training and education and poll worker recruitment activities. The grant program should develop materials in appropriate languages that contain useful information regarding the election process and how to participate in it. The materials should be posted in polling places, on the Internet, and elsewhere. The grant program must also include evaluative measures to assess the effectiveness of funded programs.¹⁶⁴

Prior to any election in California under Section 254(a), there must be mandatory training for poll workers to instruct them on the VRA guarantees for language and voter assistance. Sample ballots should be circulated at each precinct with native speakers to assist poll workers in translating the materials and instruction for voters. There should be broadcasts or publications in the native language before the elections. Next, on election day, there should be tribal persons and observers present to (1) ensure that Indian voters are not turned away and that they have proper access; (2) confirm that at least one poll worker (wearing some form of identification as a native speaker) at each precinct is fluent in the native language and capable of translating instruction in the native language; and (3) assure that Indian voters do not feel intimidated or afraid to seek assistance or ask questions about the process.¹⁶⁵ The continuation of federal ob-

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Reports of White polling officials harassing and intimidating Indian voters, accusations of voter fraud by Indians, and intimidation of Indian poll workers create a racially hostile environment at voter registration sites and voting polls. See F. JAMES SENSENBRENNER, JR., FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006, H.R. REP. NO. 109-478, at 25–26 (2d. Sess. 2006) (noting Department of Justice observers reporting harassment of minorities at polling sites); *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13–17 (2005) (statement of Penny L. Pew) (advocating similar measures regarding tribal observers' presence at voting sites); *Continued Need*, *supra* note 98 (statement of Wade Henderson).

servers in jurisdictions covered by Section 203 is also a must. Finally, the state or county should be required to file a pre- and post-election report detailing their compliance with any consent decrees or general efforts to provide the native language speakers with assistance and meet the requirements of Section 203.

Section 2 prohibits policies that can result in a denial or abridgement of the right to vote. This section offers a general scope of protection for language minorities under the VRA. Section 2 applies nationwide and requires a determination of either intentional discrimination or discriminatory effects resulting from a challenged practice. In practice, most claims have involved vote dilution, such as challenges to at-large election systems or redistricting plans, and litigation involving language minority plaintiffs has not typically focused on language-based discrimination. Section 2 claims should be coupled with Section 203 enforcement actions by the Justice Department to more fully include language assistance to all minority language groups.¹⁶⁶ By merging the Section 2 and Section 203 violations, the Justice Department and the courts have a broader range of remedies available and are able to cover a variety of language minority voters who may not be covered under Section 203. For example, in *United States v. City of Hamtramck*, language assistance became an element of a remedy for Section 2 violations based on race and color, but not language discrimination *per se*.¹⁶⁷

Finally, in 1982, Congress amended the VRA by adding Section 208, which states in part that “any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice....”¹⁶⁸ Although

¹⁶⁶ Angelo Ancheta discusses using the Voting Rights Act provisions, in addition to Section 203, to protect language minority voters, and examines cases that couple Section 203 and Section 2 to protect language minority voters. Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, SANTA CLARA L. DIGITAL COMMONS 2 (Jan. 1, 2007), <http://digitalcommons.law.scu.edu/facpubs/623>. For example, in *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court), the federal district court approved a settlement decree between the DOJ and the City of Boston that alleged overt discrimination against minority voters and highlighted the importance of providing language assistance to those voters. The DOJ merged the Section 203 and the Section 2 violations to cover the Spanish-speaking voters (a population large enough to trigger Section 203’s protections) as well as Chinese-American and Vietnamese-American voters (who did not meet the statistical thresholds to invoke Section 203) who had been treated disrespectfully by election workers. *Id.* at 11. These voters were ignored and improperly influenced in making ballot choices; did not receive bilingual assistance; nor receive provisional ballots. *Id.* at 1–2.

¹⁶⁷ *Id.* at 10 (citing *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 7, 2000)).

¹⁶⁸ 42 U.S.C. § 1973aa-6 (2006).

established primarily as an accommodation measure for disabled and illiterate voters, Section 208 has been applied to limited English-proficient voters when those voters require assistance to understand an English-only ballot. In formulating Section 208, Congress recognized that having the assistance of a person of one's own choice may be "the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter."¹⁶⁹ Section 208 does not impose any affirmative obligations on state or local governments to provide language assistance, but it does create the basis for a VRA violation if election officials impede or deny a voter's use of an assistor in order to vote.¹⁷⁰ The "potential for weaving together the different Voting Rights Act provisions"¹⁷¹ has found some support in recent litigation and should be used to better enforce the VRA in Indian country.

4. *Tribal-State Cooperative Agreements in Voting*

Although voting is an individual's protected right, a tribal government on reservation or within Alaska Native villages serves as a critical vehicle to providing general federal and state voting information to reservation residents. Accordingly, tribes and states should recognize the benefits of understanding intergovernmental election processes and seek potential avenues for collaboration in the area of voting. Implementation of voting in federal and state elections on Indian reservations is an area in which cooperative agreements should be considered and undertaken to fully guarantee the right to vote to all citizens. This includes non-Indian and Indian voters who reside on reservation.¹⁷² Increased two-way communication and education are keys to conquering voting issues.

¹⁶⁹ Ancheta, *supra* note 166, at 11–12 (citing S. REP. NO. 97–417, at 62 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 240–41).

¹⁷⁰ *Id.* at 12 (citing *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 584–85 (E.D. Pa. 2003)).

¹⁷¹ *Id.* at 13.

¹⁷² In the late 1800s under the federal General Allotment Act, millions of acres of lands were transferred from tribal to individual tribal members. General Allotment Act, Pub. L. No. 49-119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.). Individually owned lands were acquired by non-Indians through purchase, mortgage, fraud, foreclosures, and tax sales, which resulted in a substantial number of non-Indians living within the boundaries of many Indian reservations. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9–14 (1995) (citing *Lonewolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (illustrating how the *Lone Wolf* decision, in which the Court held that tribal consent to the loss of surplus lands was not required, negatively effected Native American peoples)).

Tribal-state cooperative agreements are not new, but none have addressed voting. Some states have enacted enabling acts for state-tribal cooperative agreements.¹⁷³ Others have issued governors proclamations announcing the state would deal with the Indian tribes directly on a government-to-government basis.¹⁷⁴ Moreover, the subject matter of tribal intergovernmental agreements is wide-ranging. A 1981 survey by the Commission on State-Tribal Relations documented such agreements in thirty subject areas.¹⁷⁵ There are successful models of state-tribal cooperation and collaboration in the areas of water rights,¹⁷⁶ taxation,¹⁷⁷ and environmental regulation,¹⁷⁸ and many other topics that can serve as a foundation for state-tribal voting agreements. Negotiated agreements among governments concerning the provision of governmental services on reservations can give certainty and avoid the necessity of costly litigation. Many of the aforementioned memoranda of agreements arose after years of dispute and tension between the tribes and states and eventually resulted in the two governmental parties reaching negotiated agreements to address jurisdictional issues, information sharing, protocol, training,

173 Montana has passed a policy statement encouraging cooperation between the state and tribes. MONT. CODE ANN. § 18-11-101 (2014). See also Nebraska State-Tribal Cooperative Agreements Act, NEB. REV. STAT. § 13-1501 (2012).

174 See David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements With American Indian Tribes as Models For Expanding Self-Government*, 1 Rev. Const. Stud. 120, 149 n.76 (1993) (“Washington Governor Booth Gardner signed the ‘Centennial Accord’ of 1989. South Dakota announced a ‘Year of Reconciliation’ by Executive Proclamation in 1990. Oregon recognized intergovernmental relationship between tribes and the state by executive proclamation on April 10, 1990. The Governors of Arizona, New Mexico and Utah, along with the President of the Navajo Nation signed a ‘Statement on Government to Government Policy,’ on January 6, 1992.” (citing Frank Pommersheim, *Tribal-State Relations: Hope for the Future?* 36 San Diego L. Rev. 239, 262–65, 265 n.181 (1991))).

175 *Id.* at 150. See also Commission on State-Tribal Relations, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (1981); Pommersheim, *supra* note 174, at 260.

176 From 1978 through 2013, Congress enacted thirty water settlement acts into law, which were successfully negotiated among tribes, states, and the federal government. Numerous other water settlements have been concluded without Congressional approval, such as the Confederated Tribes of the Warm Springs Reservation in the State of Oregon and the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana. For a listing of negotiated water settlements, see Darcy S. Bushnell, *American Indian Water Right Settlements*, http://uttoncenter.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf.

177 See, e.g., Tribal/State Tobacco Tax Compact Between the Cherokee Nation and the State of Oklahoma (Okla. June 8, 1992); Fort Peck—Montana Tobacco Tax Agreement (Mont. Apr. 1992).

178 See, e.g., Agreement Between the Confederated Tribes of the Colville Indian Reservation and the Washington State Department of Fish and Wildlife (Wash. Apr. 4, 1998) (concerning procedures for water pollution regulation); Air Quality Memorandum of Agreement Between the State of Idaho and the Shoshone-Bannock Tribes (1989).

cooperative decision-making, dispute resolution, points of contacts, meetings, and general communication and procedural matters in the particular area. Federal legislation also calls for tribes and states to negotiate the allocation of certain governing authority between them.¹⁷⁹

Significantly, tribal governments under tribal laws have established election committees or boards that are responsible under tribal law to implement tribal government elections. These tribal institutions are intimately familiar and experienced with the elections process and are a valuable asset to state and county elections offices. Tribal election boards or committees could be easily trained and certified in the state law process and tribal sites could serve as state satellite offices and be responsible for establishing polling places at established tribal district halls or public schools on reservation. Established tribal institutions can play a vital role in state elections by recruiting and providing bilingual interpreters and ensuring that state elections laws are carried out on reservation in a fair, cost effective, and expeditious manner. Utilizing tribal expertise, resources, and community support can enhance tribal-state relations and assist in the federal and state electoral process for all voters, Indian and non-Indian, who reside on reservation.

States should also consider utilizing an advisory committee, comprised of a diverse tribal membership, including elders, youth, and bilingual speakers, to assess a state's existing voting outreach programs, Section 203's language provision programs and general electoral information, and could suggest modifications to existing programs and articulate any need for new programs to better serve the voters. The state may agree to provide resources towards strengthening existing effective programs and establishing ones that will be the most effective in addressing potential VRA violations, access to voting, and voter education.¹⁸⁰

179 For instance, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1978) and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (1988) require states to negotiate agreements or compacts concerning Indian child welfare proceedings, and regulation of gaming activities on reservations.

180 In addition to tribes assisting with the state electoral process on reservation, states and tribes may wish to consider the following additional provisions for a cooperative agreement as considered by the State of California's plan: (1) establishing an outreach and education program in the Office of the Secretary of State to educate local elections officials and voters to assist in meeting the goals and requirements of the VRA and to serve as a clearinghouse for the coordination of voter education with tribal governments; (2) working with and encouraging state elections officials to work with tribal elections officials and voters; (3) producing and placing public service announcements relating to tribal poll worker recruitment and voter education; (4) producing distributing, and ar-

It may be overwhelming to initially tackle all of these proposals. One could begin with the relatively manageable matters and conflicts relating to voter access, tribal poll workers and language materials and documents, and move later to the more difficult ones such as poll locations, early voting and satellite voting centers, and costs, as the parties become more confident in working together. A simple ranking of issues is a good start. Alternatively, the parties may consider entering into an interim agreement during which time issues can be identified and the parties can negotiate a final agreement based upon educating each other and changed circumstances during the process.

Certainly, there may be tension over the best ways to accomplish the voting responsibilities, particularly issues concerning whose rules apply in a given situation and which government pays for certain activities. Enforcement is also an important issue to be addressed throughout the process. The sorting out of governmental responsibility is an ongoing process at all government levels, but past models should prove helpful. Each agreement will have to be carefully tailored to address the specific situation, measures, and solutions for voting. In some jurisdictions there may be an unwillingness by states to consider such agreements since they determine the times, places, and manner of elections. But in other jurisdictions state officials who are concerned about compliance with the VRA, avoiding protracted litigation, or simply providing voting guarantees will seek to resolve the differences and obstacles to voting for Indian voters. In short, states must be motivated to address the voting issues.

Enduring agreements often result from negotiations based on free and open communication between the parties who treat each other with respect and as equals. Indeed, in all the state-tribal cooperative agreements following education and open communication, the par-

ranging for the distribution of, materials regarding the vote participation process that are appropriate for older voters and voters with disabilities, language assistance needs, and low literacy; (5) designing, posting, and distributing websites and website templates regarding the voting process to ensure that they are accessible to native speakers; (6) targeting younger voters and those not yet old enough to vote regarding the importance of and the mechanics of participating in the voting process; (7) educating all eligible citizens, including those no longer in prison or on parole for the conviction of a felony, as to voting procedures; (8) working with federal, tribal, state, and local governmental agencies to streamline the procedures to facilitate voter registration and voter participation; (9) exploring ways to minimize the changing of polling place locations that confuse voters; (10) exploring proposals that may facilitate the opportunity to participate in the voting process, including Election Day registration, weekend voting, Election Day Holiday voting; and (11) considering promoting early voting and satellite reservation voting centers. Padilla, *supra* note 162.

ties moved beyond the difficult immediate issues to address and create innovative resolutions for the future. Comprehensive legislation, like voting laws, often lacks the ability to address specific states and reservation circumstances that exist in different areas of the country and that is why tribal-state agreements have the potential to be successful.

5. *The Right to Use Tribal Identification in Voting*

Over the past ten years there has been a flurry of states enacting laws requiring identification for voter registration and voting.¹⁸¹ The myriad of state laws vary as to what kind of identification will be accepted by state registrars for voter registration and voting. Misinformed poll workers often scrutinize and do not accept tribal identification and demand additional identification from Indian voters. Such conduct leads to lower turnouts of Indian voters as they do not wish to be questioned, intimidated, or harassed over their valid tribal identification cards.

In 2005, following the *ACLU v. Kiffmeyer* case, Minnesota amended its registration statute to eliminate the requirement that American Indians live on their tribe's reservation before their tribal ID could serve as a valid ID for voting.¹⁸² The change in state law resolved one of plaintiffs' claims, but it did not resolve the claim that rejecting tribal photo identification for registration, while accepting other forms of identification, violated the equal protection clause, as well as HAVA. On September 12, 2005, the parties agreed to a final consent judgment, which directed that tribal IDs that did not have an address, coupled with a utility bill, were also sufficient to meet state law standards for registering and voting on election day. In 2008, the Navajo Nation filed a Section 2 lawsuit against the State of Arizona challenging its voter ID law. It was later settled by expanding the types of documents Indian voters may use for identification.¹⁸³

As part of the new or amended state identification laws, states should recognize and accept tribal identification cards issued by tribal governments. Tribal government issued identification cards contain the same information that is on state identification cards, includ-

181 For a comprehensive review of the new and pending state election laws, either increasing access to vote or restricting registration and voting, see *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), www.brennancenter.org/analysis/election-2013-voting-laws-roundup.

182 MINN. STAT. ANN § 201.061 (West 2008).

183 *Navajo Nation, et al. v. Brewer, et al.*, No. 06-1575 (D. Ariz. May 27, 2008) (order approving settlement agreement and dismissal).

ing address, photograph, signature of individual, and other identifying information such as height, weight, and eye color.¹⁸⁴ And many tribal ID cards are used and accepted at airports by the Transportation Safety Administration as they have a laser identification embedded in the card. Some tribes do not place photographs on their ID cards, which may conflict with state laws requiring photographs. This may be an issue that could be resolved in a tribal-state agreement. Or, in small Alaska villages or townships and in small reservation communities, the local tribal poll worker could easily attest to the person's identification on Election Day. If, however, a photo ID is required for registration purposes at the local county office and the tribal member only has a tribal ID without a photograph, this state requirement will create a barrier to the person registering.

At least a dozen states have enacted laws that accept tribal IDs, including Arizona, Colorado, Georgia, Idaho, Michigan, Montana, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wisconsin for registering and voting.¹⁸⁵ Other states with substantial Indian populations (such as New Mexico, Oregon, California, Alaska, North Carolina, and New York) should also accept tribal IDs in enacting voter ID legislation.

6. Voter Education

Many Indian voters may not be aware of protections available to them under federal law, voting locations, and election registration deadlines. These issues must be addressed with better voter education and enhanced registration efforts. Educating and organizing the grassroots electorate leads to engagement of the voters in public policy, such as health care, environmental protection, and education, and enables them to advocate for their interests, which empowers tribal communities. At a minimum, voter education efforts must include the following topics: information on how to register to vote; information on how voters can determine the location of their poll-

184 See Tribal Identification Card of Jeanette Wolfley, from the Shoshone-Bannock Tribes of Indians (photocopy on file with the University of Pennsylvania Journal of Constitutional Law).

185 See e.g., ARIZ. REV. STAT. ANN. § 16-579 (West 2011); COLO. REV. STAT. ANN. § 1-1-104 (West 2014); GA. CODE ANN. § 21-2-417 (West 2006); IDAHO CODE ANN. § 34-1113 (West 2010); MICH. COMP. LAWS § 168.523 (1954); MONT. CODE ANN. § 13-13-114 (West 2012); N.D. CENT. CODE ANN. § 16.1-05 (West); OKLA. STAT. ANN. tit. 26, § 7-114 (West); S.D. CODIFIED LAWS § 12-18-6.1 (West 2004); UTAH CODE ANN. §20A-1-102 (West 2013); WASH. REV. CODE ANN. § 29A.40.160 (West 2011); WIS. STAT. § 5.02 (West 2013). New Mexico, by voter guidelines, requires and accepts Tribal and Pueblo government IDs for first-time registrants.

ing places and hours of voting; information on alternative voting on Election Day, such as absentee ballots and early voting; the proper use of voting systems and technology; the rights of voters to cast provisional ballots and how provisional voters can determine whether their votes were counted and, if not, why not; the rights of minority language voters in jurisdictions covered under Section 203 of the VRA to receive language assistance at the polling place; and the availability of the complaint procedure and toll-free numbers described in a state regulation or policy.¹⁸⁶

Many non-profit voter education organizations throughout the country have successfully assisted in such education efforts during federal election years.¹⁸⁷ There, however, needs to be an ongoing comprehensive education of Indian voters through tribal or community based groups. Such educational endeavors should include educating and training voters; election officials and poll workers; providing training seminars; training poll workers concerning voting equipment; and training election workers about the rights of minority language voters in jurisdiction covered by Section 203 to receive assistance at the polling site.¹⁸⁸

Nonprofit organizations have relationships with many disengaged voters and a unique ability to help get them to the polls. Registering people to vote is the first step toward voter mobilization. Get out the vote efforts are the next step toward increasing voter participation. Such efforts remind people to vote and help them get to the polls on Election Day. Use of nonprofit organizations are valuable in nonpartisan get out the vote efforts that are not time consuming or difficult.

Finally, voter registration is a key component of this process as it sets the stage for participation and engagement by eligible voters. Equally important, more registered voters means more power for a tribal community. Candidates and elected officials know who votes. They know which communities turn out and in what numbers, which means the more registered and active voters in a tribal community,

¹⁸⁶ See Padilla, *supra* note 162.

¹⁸⁷ See, e.g., PROJECT VOTE, <http://www.projectvote.org> (last visited July 24, 2015); ROCK THE VOTE, <http://www.rockthevote.org> (last visited July 24, 2015). Moreover, the Wellstone Action Fund is an excellent organization that blends community organizing, electoral protection, public policy (“Wellstone Triangle”) and training future leaders. It also has a tribal leadership component. See Native American Leadership Program, WELLSTONE, <http://www.wellstone.org/programs/native-american-leadership-program> (last visited July 27, 2015). The National Congress of American Indians has also provided election and voter education during national election years.

¹⁸⁸ See Padilla, *supra* note 162. The site has a comprehensive list of educational endeavors utilized in California to protect the rights of language minority voters.

the more attention from candidates. Tribes should consider holding candidate forums for all candidates to educate the Indian voters about local issues and educate the candidates about tribal issues. Once elected, these public officials will be more accountable to a tribal community.

CONCLUSION

The recent case of *Shelby County* gives us an opportunity to reassess the VRA and its legacy and whether its protective provisions continue to be needed throughout the United States for language and racial minority voters. While some may join the majority in *Shelby County* in concluding that the federal government need not review state election law changes any longer, in my opinion that day has not yet arrived. It is too soon to abandon the effective coverage and preclearance formula that places the obligation on states and jurisdictions known for past and ongoing discrimination to justify their electoral change. Voter suppression is alive and well in Indian country, and much work remains for American Indians and Alaska Natives. Accordingly, the VRA still is the most effective means of protecting the guarantee of the Fifteenth Amendment's right to vote.

Inter Tribal Council also presents Indian country with an occasion to evaluate the universal federal laws of the NVRA and HAVA that may assist in protecting Indian voting rights. As discussed, these laws provide general access to the ballot for all voters by instituting uniform registration and identification procedures. And given the *Shelby County* decision, judges and legislators may resist voting rights measures that target race discrimination and seek to uphold the universal laws as *Inter Tribal Council*. But despite these universal reform efforts in the wake of the 2000 and 2004 elections, the problems of partisan election officials and minority disenfranchisement remain largely unabated. States control the local and county elections and the devices used to discriminate against minority voters have become more sophisticated, and the universal laws do not go far enough to protect minority voters. There is still work to do in Indian country to effectively promote and protect the Indian vote. Although the universal laws promoting access to the ballot are worthy, voting rights activists must be ever vigilant post-*Shelby County*.

