ENFRANCHISING NATIVE AMERICANS AFTER SHELBY COUNTY v. HOLDER: CONGRESS'S DUTY TO ACT

Ryan Dreveskracht, University of Washington - Seattle Campus
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Ryan D. Dreveskracht [FN1]

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Introduction

The U.S. Constitution does not prescribe requirements for the right to take part in elections. [FN1] That right was left to the states to implement and regulate--and, for much of our history, they “generally limited the franchise to white male property owners, who were citizens of a certain age, occasionally of a specific religious faith.” [FN2] Most nonwhites were not considered legal citizens of the United States until 1868, when the Fourteenth Amendment defined a “national citizenship.” [FN3] Two years later, the Fifteenth Amendment prohibited the denial of suffrage to citizens “on account of race, color, or previous condition of servitude,” thus extending the franchise to all races. [FN4] Women were enfranchised in 1920. [FN5]

Despite these changes in law, “violent suppression of the minority vote during Reconstruction, combined with weak federal enforcement thereafter and the eventual adoption of a variety of disenfranchising measures by Southern states after 1890,” prevented most minorities from exercising their right to vote. [FN6] Many of the states instituted poll taxes that required minorities to pay a fee to vote. Other states imposed literacy tests that required minorities to answer arcane trivia to secure their rights at the polls. Still other states passed laws that limited the right to vote to those individuals whose grandparents had enjoyed the right. [FN7] Some states even enacted laws that limited participation in a state’s primary elections to white persons only. [FN8]

Native Americans were not originally part of these constitutionally enfranchised groups. Despite their being federally recognized as “persons” in 1879, [FN9] in Elk v. Wilkins the Supreme Court held that the Fourteenth Amendment did not confer citizenship on those indigenous to the United States. [FN10] According to the Court, an Indian, [FN11] “not being a citizen of the United States under the Fourteenth Amendment of the constitution, [cannot be] deprived of [a] right secured by the Fifteenth Amendment.” [FN12] The Fifteenth Amendment, in other words, was simply inapplicable--states retained the right to deny suffrage to Indians. It was not until the enactment of the Indian Citizenship Act in 1924 that Indians became eligible to vote. [FN13]

*194 Post-1924, Indians continued to struggle for actual suffrage. Notwithstanding the passage of the Indian Citizenship Act, several states, particularly Arizona, New Mexico, and Utah, continued to unequivocally deny the right to vote to Indians through much of the 1960s. [FN14] Several redistricting attempts in parts of Montana, Wyoming, and South Dakota also sought to dilute the Native American vote. Indeed, these redistricting/disenfranchisement attempts continue today. [FN15] In addition, Indians often confront “constitutional arguments contesting their suffrage, including arguments citing Native Americans' exemption from certain state taxes, as well as sovereignty arguments, claiming that Native Americans' status as members of
alien nations precludes them from voting.” [FN16]

It was not until the passage of the Voting Rights Act (VRA) in 1965 [FN17] that a mechanism for near-universal suffrage was finally put into practice. [FN18] The VRA is partially permanent, and partially provisional. Section 5, the provisional part, was passed “on an emergency basis in response to the crisis of southern black disfranchisement ninety-five years after the enactment of the Fifteenth Amendment.” [FN19] The provision required federal pre-approval, known as “pre-clearance,” of any modifications to local state election law in certain “covered” jurisdictions determined to be historically racially suspect. [FN20] While Section 5 was originally intended to expire in 1970, it has been renewed every time that it has come up for a vote, most recently until 2031, as the cornerstone of the Voting Rights Act Reauthorization and Amendments Act of 2006. [FN21] The 1975 reauthorization enlarged Section 4(b)'s coverage formula—the portion of the VRA that establishes the formula by which federal authorities determine which jurisdictions are subject to Section 5's preclearance requirements—to cover any jurisdiction that had maintained a prohibited “test or device” on November 1, 1972, and had voter registration or turnout in the 1972 presidential election of less than 50 percent. “Although not altering the basic coverage formula, this change expanded section 4(b)'s scope to encompass jurisdictions with records of voting discrimination against ‘language minorities.’” [FN22] Thus, in effect, the 1975 reauthorization also “extended special emergency protections to Latinos, Asian-Americans, and Native Americans and expanded the definition of disenfranchising devices to include the use of English-only ballots.” [FN23]

Section 2, the permanent part, created a cause of action against a state or local government when its “system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.” [FN24]

It has been argued for years that Section 5 was an unconstitutional impingement on states' right to regulate the vote. [FN25] Indeed, in *Northwest Austin Municipal Utility District No. One v. Holder*, [FN26] the Supreme Court explicitly “raised serious questions about the continued constitutionality of section 5,” warning that “the burdens imposed by section 5 may no longer be justified by *195 current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets.” [FN27] In the wake of this decision, Abigail Thernstrom, vice-chair of the U.S. Commission on Civil Rights argued:

If a challenge to the constitutionality of the amended Section 5 reaches the Supreme Court ... the provision may no longer be regarded as unimpeachably valid. ... The reworked statute rests on a racism-everywhere vision, particularly, but not exclusively, in the South. While that perspective was accurate in the 1960s, it no longer is. There is bound to be a reality check down the road. In passing the 2006 [reauthorization], undoubtedly Congress hoped to end argument over the statute until 2031 .... [Section 5] is a careless, politically expedient promise unlikely to be kept and it carries a high cost. [FN28]

In *Shelby County v. Holder*, the Supreme Court faced squarely the “serious questions” raised in *Northwest Austin* and posed by Thernstrom: “[w]hether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.” [FN29] The High Court answered in the affirmative, holding that “[o]ur country has changed” so that Section 5's preclearance formula no longer “speaks to current conditions.” [FN30]

What follows is a review of the Supreme Court's decision in *Shelby County*, and the applicability of that decision to Indian Country. [FN31] First, I give a background and context for the VRA, and then delve into a
brief outline of historic and present-day tribal-state relations. Next, I analyze the Supreme Court's decision in *Shelby County*. I then make an Indian-specific application of the legal test employed in *Shelby County*. I conclude by arguing that Section 5 is both an appropriate and necessary measure to prevent ongoing voting discrimination targeting Native American citizens. Indeed, Congress not only has the power to compel preapproval of state voting legislation that is applicable to Indian Country, but it has an obligation to do so.

**Background**

The Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by ... any State on account of race, color, or previous condition of servitude,” [FN32] and grants to Congress the “power to enforce this article by appropriate legislation.” [FN33] Put another way, as the Court described in *Rice v. Cayetano*, [FN34] the Fifteenth Amendment “reaffirmed the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise,” and it did so in language “as simple in command as it was comprehensive in reach.” [FN35]

The scope of Congress's power to enact law that implements the Fifteenth Amendment—what constitutes “appropriate legislation” [FN36]—was defined in an expansive manner. Early on, southern opponents to the Amendment argued enfanchising native americans after shelby county *196 that the newly created “radical and revolutionary” power to restrict states' authority to set their own voting qualifications “strikes at the power of the States to determine and establish, each for itself, the qualification of its own vote [rs]” [FN37] and “invade[s] the jurisdiction of State authority and subject [s] all the States [in] the Union to Federal Control.” [FN38] Some legislators, even those from northern states, couched the Amendment as bestowing upon Congress “all power over what [the] Constitution regards as the proper subject of State action exclusively.” [FN39] States, in the words of one Illinois Senator, felt their sovereignty under attack: “when the Constitution of the United States takes away from the state the control over the subject of suffrage it takes away from the State the control over her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon.” [FN40]

But this was the point—it took a change to the Constitution in order to ensure that “the political question of the right of suffrage” was available to all citizens, including those “large classes of citizens who [were being] practically ostracized from the Government.” [FN41]

**A Brief History of Tribal-State Voting Relations**

As noted above, it was long held that tribal members were not U.S. citizens. [FN42] In 1924, however, Congress amended the Nationality Act to provide that “a person born in the United States to a member of an Indian tribe shall be a national and citizen of the United States at birth.” [FN43] But were tribal members citizens of a state? How could that be, if “[s]tates have no jurisdiction over Indians in Indian country”? “If the Indian tribes are wards of the federal government and owe no allegiance to any state, and if the power over the Indian tribes rests with the federal government because it exists nowhere else,” why should a tribal member have any say in matters of state governance? [FN44]

The Ninth Circuit Court of Appeals answered these questions in *Colliflower v. Garland*:

In more recent times it has been the policy of the government to encourage the Indians to become
independent participating citizens, while at the same time preserving the territories and the rights of those tribes which elect to continue to function as such .... “As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country.” ... The general notion ... that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. [FN45]

Tribal governments, of course, had little say in these “developments.” While the Thirteenth, Fourteenth, and Fifteenth Amendments provided a *197 slight measure of greater equality for other minorities, Congress maintained the ability to quash and diminish Native American rights as it chose. [FN46] While the Fifteenth Amendment guarantees all persons, including Indians, the right to vote, the Fourteenth Amendment’s due process and equal protection rights are not guaranteed to Indians within Indian territory—which renders the application of the Fifteenth Amendment impotent in many instances. [FN47]

“Because of the local ill feeling, the people of the States where they [Indian tribes] are found are often their deadliest enemies.” [FN48] It is thus that the past “two-hundred years of federal Indian law jurisprudence ... has evolved in large part to address and accommodate the historically thorny nature of tribal-state relations.” [FN49] Although not Indian-specific, the VRA helped to accomplish this objective. [FN50]

*Shelby County v. Holder* and the Voting Rights Act

As noted above, the passage of the Fifteenth Amendment was not enough to curtail state voter discrimination--states continued to enact voting legislation “specifically designed to prevent [minorities] from voting.” [FN51] In the late 1950s Congress finally responded by passing laws to “‘facilitat[e] case-by-case litigation,” which the Supreme Court used to strike down numerous discriminatory state laws. [FN52] But this case-by-case approach proved to be ineffective in eliminating widespread voting discrimination. Voting suits were demanding, requiring “as many as 6,000 man-hours” per suit. [FN53] Even after positive judgments were secured, “favorable court decrees were circumvented with new practices that discriminated against racial minorities, and local officials outright defied court orders.” [FN54]

In 1965 Congress enacted the VRA--a “sterner and more elaborate measure” to defeat the “insidious and pervasive evil ... perpetuated ... through unremitting and ingenious defiance of the Constitution.” [FN55] Although much of the VRA was dedicated to creating a substantive private cause of action to combat the coordinated discriminatory efforts that had “infected the electoral process ... for nearly a century,” [FN56] Section 5 was “a response to the common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones were struck down.” [FN57] This provision allowed federal administration enforcement of the voting laws, rather than judicial enforcement, by forbidding certain states and local governments [FN58] from implementing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.” [FN59] Jurisdictions were subject to the original preapproval obligation of Section 5 if they were found to have used a prohibited voting test or device in 1965, and less than 50 percent of the persons of voting age voted in the presidential election of 1964. [FN60]
Essentially, under Section 5 covered jurisdictions were prohibited from making any change in their voting law unless the change is pre-approved by the Department of Justice ("DOJ"). By “freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory,” Section 5 ensured that gains in minority political participation were not eroded through new discriminatory procedures and techniques. In order to be approved, “a covered jurisdiction must prove that any change in voting practices or procedures does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color before it may implement that change.” A covered jurisdiction had two avenues available to meet this obligation. First, the jurisdiction may have submitted the proposed voting change to the Attorney General. “If the Attorney General affirmatively approve[d] the change or fail[ed] to object to it within 60 days, the change [wa]s deemed precleared.” Otherwise, “either in the first instance or following an objection from the Attorney General,” a covered jurisdiction had the option to seek preclearance for a voting change “by filing a declaratory judgment action in the United States District Court for the District of Columbia.” The change was precleared “if the court declare[d] that the proposed “qualification, prerequisite, standard, practice, or procedure d[id] not have the purpose and ... effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees” set forth elsewhere in the VRA. If a voting change subject to Section 5 has not been precleared, the plaintiff was entitled to an injunction prohibiting implementation of the change.

As noted earlier, Section 5 of the VRA was originally contemplated to be a temporary provision, to last only five years. But in 1970, having “recognized the continuing need” for Section 5, Congress reauthorized its provisions for five years. Congress extended it again in 1975, this time for seven years. In 1982, having found that the “gains” obtained by the VRA since 1965 were still “fragile” and that “[c]ontinued progress toward equal opportunity in the electoral process will be halted” if Section 5 were abandoned, Congress reauthorized it for twenty-five more years. Section 5 was reauthorized for another twenty-five years in 2006. The Supreme Court, prior to Shelby County, consistently found these extensions to be constitutional exercises of congressional prerogative.

Even though many of those jurisdictions originally covered by Section 5 were deemed “covered jurisdictions” in 2013, they were not necessarily subject to Section 5 in perpetuity. A covered jurisdiction had the option of avoiding the subjection to Section 5 if a court or the Attorney General granted it a “bailout” pursuant to VRA Section 4(a). In order to successfully “bail out,” a covered jurisdiction needed to “obtain a declaratory judgment from a three-judge court confirming that for the previous ten years the jurisdiction and its political subdivisions have not used a forbidden voting test, have not been subject to any valid objections under Section 5, and have not been assigned federal observer election coverage.” The covered jurisdiction was also required to show that it had “eliminated voting procedures ... which inhibit or dilute equal access to the electoral process’ and [has] engaged in ‘constructive efforts' to expand the ability to vote.” Sixty-nine jurisdictions successfully bailed out between 1982 and 2009. From 2009 to 2013, that number jumped substantially. In total, nearly 200 jurisdictions were successfully released from the federal list. Notably, Shelby County was not among them and, because of its prior VRA violations, was not in a position to seek a bailout.

The D.C. Circuit Court Opinion

The plaintiff in Shelby County was Shelby County, Alabama, a covered jurisdiction. Shelby County contended that when Congress reauthorized Section 5 of the VRA in 2006 “it exceeded its enumerated powers.”
The question before the Court, then, was whether “the burdens imposed by Section 5” could be “justified by current needs” and whether “its geographic coverage ... sufficiently relate[d] to the problem it targets”--essentially, is voting discrimination still a problem? The district court answered in the affirmative. The D.C. Circuit Court of Appeals agreed.

The D.C. Circuit looked to the Supreme Court's 2009 decision in *Northwest Austin* to determine (1) whether Section 5 “is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure,” and (2) whether Section 4(b) “contains an ‘obsolete’ coverage formula that fails to identify the problem jurisdictions, rendering the provision ‘no longer rational ‘in both practice and theory.’” Under the test formulated by *Northwest Austin*, the Court must conduct a “‘searching’ review of the congressional record to determine whether Section 5's imposition of the preapproval burden--as well as the serious “equal [state] sovereignty” implications that targeting a jurisdiction may have--is “congruent and proportional” to the injuries sought to be prevented.

In making this determination, the Court split the legislative record-- of “over 15,000 pages in length, and includ[ing] statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination”--into six units.

First, the Court noted “numerous ‘examples of modern instances' of racial discrimination in voting,” including:

- Kilmichael, Mississippi's abrupt 2001 decision to cancel an election when “an unprecedented number” of African Americans ran for office. [FN89]
- Webster County, Georgia's 1998 proposal to reduce the black population in three of the education board's five single-member districts after the school district elected a majority black school board for the first time.
- Mississippi's 1995 attempt to evade preclearance and revive a dual registration system initially enacted in 1892 to disenfranchise Black voters and previously struck down by a federal court.
- Washington Parish, Louisiana's 1993 attempt to reduce the impact of a majority-African American district by immediately creating a new at-large seat to ensure that no white incumbent would lose his seat.
- Waller County, Texas's 2004 attempt to reduce early voting at polling places near a historically black university and its threats to prosecute students for “illegal voting,” after two black students announced their intent to run for office.
- Mississippi ... state legislators['] oppos[ition to] an early 1990s redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the “black plan” and privately as the “nigger plan.”
- [In] Georgia, the state House Reapportionment Committee Chairman told his colleagues on numerous occasions, “I don't want to draw nigger districts.”

The Court next looked to the “hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect.” Here, the congressional record evidenced that:

- [T]he absolute number of objections has not declined since the 1982 reauthorization. ... [FN93]
- Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole or in part on discriminatory intent.
- [I]n the 1990s ... the purpose prong of Section 5 had become the dominant legal basis for objections,
with seventy-four percent of objections based in whole or in part on discriminatory intent ....

- The average number of objections per year has not declined, suggesting that the level of
discrimination has remained constant as the number of proposed voting changes ... has increased.

- Even in the six years from 2000 to 2006, after objection rates had dropped to their lowest, Attorney
General objections affected some 660,000 minority voters. [FN94]

Third, the Court looked to successful Section 2 litigation, which, it held, “reinforces the pattern of
discrimination revealed” by the specific examples of modern racial discrimination and Attorney General
objections. Section 2 “prohibits districting practices that ‘result[t] in a denial or abridgment of the right of any
citizen of the United States to vote on account of race.’” [FN95] A denial or abridgment is established if, “based
on the totality of circumstances,” it is shown that members of a racial minority “have less opportunity than other
members of the electorate to participate in the political process and to elect representatives of their choice.”
[FN96] In sum, the congressional record on this factor showed that “between 1982 and 2005, minority plaintiffs
obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from
discriminatory voting practices in at least 825 counties.” [FN97]

Fourth, the Court looked to “the tens of thousands of Federal observers that have been dispatched to observe
elections in covered jurisdictions.” [FN98] Every year between 1984 and 2000, anywhere from 300 to 600
observers were dispatched to covered jurisdictions--“amounting to 622 separate dispatches (most or all
involving multiple observers).” [FN99] In some instances, monitoring by *201 federal observers “bec[ame] the
foundation of Department of Justice enforcement efforts.” [FN100] This was the case in Conecuh County,
Alabama, and Johnson County, Georgia, for instance, where reports by federal observers enabled the federal
government to bring suit against county officials for discriminatory conduct in polling locations, ultimately
resulting in consent decrees. [FN101] As the Court saw it,

[T]his continued need for federal observers in covered jurisdictions is indicative of discrimination
and “demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to
tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as
harassment and intimidation inside polling locations.” [FN102]

Fifth, the Court found that the congressional record revealed evidence of continued discrimination in two
types of preclearance-related lawsuits. Regarding actions brought to enforce Section 5’s preclearance
requirement, Congress found that “many defiant covered jurisdictions and State and local officials continue to
enact and enforce changes to voting procedures without the Federal Government's knowledge.” [FN103] At least
105 successful Section 5 enforcement actions were brought against such covered jurisdictions between 1982 and
2004. Congress also found evidence of continued discrimination in “the number of requests for declaratory
judgments [for preclearance] denied by the United States District Court for the District of Columbia.” [FN104]
According to the congressional record, the number of unsuccessful preclearance actions has remained roughly
constant since 1966: “twenty-five requests were denied or withdrawn between 1982 and 2004, compared to
seventeen between 1966 and 1982.” [FN105]

Finally, the Court deferred to Congress's findings that the existence of Section 5 “deterred covered
jurisdictions from even attempting to enact discriminatory voting changes.” [FN106]

In Congress's view, Section 5's strong deterrent effect and the number of voting changes that have
never gone forward as a result of that effect are as important as the number of objections that have been
interposed to protect minority voters against discriminatory changes” that had actually been proposed ....
[O]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to
understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result. For this reason, the mere existence of section 5 encourages the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process. [FN107]

As to Section 4(b)--the preclearance formula--the court held that the VRA must be analyzed “as a whole,” including Section 5 and the VRA’s “mechanisms for bail-in and bailout” discussed above. [FN108] Thus, as the court viewed it, the question “is whether the statute as a whole, not just the section*202 4(b) formula, ensures that jurisdictions subject to section 5 are those in which unconstitutional voting discrimination is concentrated.” [FN109] Looking to the above six Section 5 factors, “together with the statute's provisions for bail-in and bailout” the court found that Section 4(b) “continues to single out the jurisdictions in which discrimination is concentrated” and is therefore constitutional. [FN110]

In sum, the court determined that evidence in the congressional record-- including 626 Attorney General objections that blocked discriminatory voting changes, 653 successful section 2 cases, tens of thousands of observers sent to covered jurisdictions, 105 successful section 5 enforcement actions, 25 unsuccessful judicial preclearance actions, and Section 5's strong deterrent effect--was enough to warrant continued application of “Section 5's strong medicine.” [FN111] Both Sections 5 and 4(b) of the VRA, the D.C. Circuit Court of Appeals held, were congruent and proportional. [FN112]

The Supreme Court Opinion

Instead of focusing on Section 5's preclearance requirement, as the D.C. Circuit Court of Appeals had done, the Supreme Court focused on Section 4(b) of the VRA, which details the coverage formula that determines which states and/or political subdivisions of the state are subject to preclearance. The Court, with Chief Justice Roberts writing for the majority--while acknowledging the past transformative and salutary impact of the VRA--found that Congress's 2006 decision to reauthorize the VRA without updating Section 4(b)'s coverage formula violated the “principle that all States enjoy equal sovereignty” and was therefore unconstitutional. [FN113]

Like the D.C. Circuit Court of Appeals, the Supreme Court began by reviewing Northwest Austin, [FN114] reiterating its holding that Section 5 “imposes substantial federalism costs” and “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.” [FN115] Under Northwest Austin’s “equal sovereignty” test, the Court held, “The question is whether the [VRA]'s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.” [FN116] Rather than thoroughly examining the congressional record, as the D.C. Circuit Court had done, the High Court simply held that there is no longer any amount of voter discrimination that could justify Section 4(b)'s coverage formula:

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years .... And voter registration and turnout numbers in the covered States have risen dramatically in the years since .... In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were ....
The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. [FN117]

Whether voter discrimination still exists, in other words, is inconsequential. If Congress compiles a record to show that voter discrimination still exists—as it had done in 1965, 1970, 1975, 1982, and 2006—Congress must “use the record it compiled to shape a coverage formula grounded in current conditions.” [FN118] “If Congress had started from scratch in 2006,” said the Court, “it plainly could not have enacted the present coverage formula.” In sum, Congress has been sent back to the drawing board to draft a new Section 4(b) that is based on the new types of voter discrimination that are currently employed. [FN119]

The Court’s ruling is troublesome. That voter discrimination exists, and that the VRA is needed to prevent it, is not enough. According to the rule formulated by the Court, Congress must modify the coverage formula every year that the VRA is reauthorized, based solely upon the new record compiled. [FN120] But what about those areas of the country that are still facing the disenfranchisement tactics employed in 1965, 1970, and 1975, or that continue to suffer from the impact of those tactics? Should not the VRA’s coverage formula address those problems, in addition to any new evils? [FN121] This is where the Court’s reasoning is flawed: The Court assumes that the disenfranchisement tactics used in the ’60s and ’70’s have entirely vanished. [FN122] As discussed below, they have not—at least in Indian Country.

Although Section 5 survived, it will no longer have effect unless and until Congress enacts a new statute to determine which jurisdictions should be covered. While Congress is free to write “a new formula” based on “current conditions,” [FN123] it seems unlikely Congress will act any time soon. Professor Hasen, for example, has opined that the current state of bipartisanship has “closed the door on any potential Congressional action.” [FN124] Likewise, Senate Majority Whip Dick Durbin has stated that because Congress “is embroiled in political conflict,” it is “unlikely that Congress will pass another [VRA] bill.” [FN125] Renowned constitutional law professor Erwin Chemerinsky has written that “it is hard to imagine Congress being able to ever agree on a new formula .... The effect likely will be ... election systems going into place that otherwise would have been rejected because of their impact on minority voters.” [FN126] Nor can one reasonably expect a coverage formula that would pass muster with this Supreme Court.

Following the High Court’s decision, it appears that formally covered states have gone full-throttle in passing discriminatory voting legislation. North Carolina, for instance, immediately passed legislation that has “made it harder for many people to cast ballots, with disproportionate effects on minority voters.” [FN127] It only took a few hours for Texas to pass a voter ID law, considered the strictest in the nation, which was blocked in 2012 because it “discriminated against Latino and black voters.” [FN128] Alabama [FN129] and Mississippi [FN130] are poised to pass similarly discriminatory legislation. [FN131] One district court has already found that Shelby County has effectively sanctioned “voter suppression tactics employed against members of the Latino community.” [FN132] As William Faulkner, the great author of the South who spent a lifetime exploring the theme of state-imposed racial inequality, famously wrote: “The past is never dead. It’s not even past.” [FN133]

Voting Rights in Indian Country
This section will provide numerous examples of modern instances of voting discrimination against Native Americans--instances in which the Attorney General objected to proposed voting changes that would have had a discriminatory purpose or effect upon Indian Country; instances where Section 2 litigation initiated by Native Americans has been successful; instances where Federal observers witnessed discrimination against Native Americans; instances where Section 5 enforcement has been successful in Indian Country, and where state requests for preclearance have been denied in Indian Country; and congressional findings related to discrimination in Indian Country. [FN134] Keep in mind that while the instances of discrimination against Native Americans are not as abundant in pure numbers, American Indians make up a mere 1.7 percent of the total U.S. population, compared to 16.7 percent Hispanic, 13.1 percent African American, and 5 percent persons of Asian decent. This means that Native Americans bear a disproportionate brunt of voter discrimination. [FN135]

Voting Discrimination Against Native Americans

As discussed above, it was not until well after the passage of the VRA that many jurisdictions afforded Native Americans the *de jure* right to vote. [FN136] In Idaho, Maine, Mississippi, New Mexico, and Washington, “Indians not taxed” were unequivocally banned from voting. [FN137] Arizona prohibited Indians living on reservations from voting because they were “under guardianship” of the federal government and thus disqualified from voting by the state constitution. [FN138] In Utah, Indians living on reservations were denied the right to vote because they were non-residents under state law. [FN139] Montana amended its constitution in 1932 to require that a voter be a “citizen” and a “tax-payer”--defining both terms to exclude Native Americans. [FN140] In Colorado, Indians residing on reservations were absolutely prohibited from voting until 1970. [FN141] In South Dakota, the State's Attorney General outright refused to comply with the VRA's application to Indian Country until 2002:

As a result of the [VRA's 1975] amendments, Shannon and Todd Counties in South Dakota, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance. Further, eight counties in the state, because of their significant Indian populations, were required to conduct bilingual elections .... William Janklow, at that time Attorney General of South Dakota, was outraged over the extension of Section 5 .... In a formal opinion addressed to the Secretary of State, he derided the 1975 law as a “facial absurdity.” Borrowing the states' rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power “almost meaningless.” ... Janklow expressed hope that Congress would soon repeal “the Voting Rights Act currently plaguing South Dakota.” In the meantime, he advised the Secretary of State not to comply with the preclearance requirement. “I see no need,” he said, “to proceed with undue speed to subject our State's laws to a ‘one-man veto’ by the United States Attorney General.” Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance. [FN143]

Indeed, Native communities still lack the *de facto* right to vote, due in large part to a depressed socio-economic status, the pervasive myth that Indians care only about politics on the reservation, and the lack of VRA enforcement.
One of the many legacies of discrimination against Indians is a severely depressed socioeconomic status. Native Americans living on reservations experience the highest poverty rate in the nation—five times the poverty rate for whites. Per capita income for Indians and Alaskan Natives is half that of whites. More than one in four Native Americans live below the poverty line, while the rate amongst whites is less than one in ten. Among Native Americans twenty-five years of age and over, 29 percent have not finished high school, compared to 14 percent of whites. Twenty-four percent of Indians aged sixteen to nineteen are drop-outs; four times the drop-out rate for whites. One-fourth of Indian households live in “crowded conditions,” compared to 1.6 percent of whites. Roughly 21 percent of Indian households lack telephones, compared to 1.2 percent of white households. Native American homes are three times as likely as white households to be without access to vehicles. In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80 percent, and at the Standing Rock Indian Reservation it was 74 percent. Life expectancy for Native Americans is shorter than any other minority group. According to a report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, “Indian men in South Dakota ... usually live only into their mid-50s,” and infant mortality in Indian country “is double the national average.”

To summarize: in every socioeconomic factor reported in the census, American Indians lag far behind their white counterparts. Numerous courts, both state and federal, including the U.S. Supreme Court, have held that the direct link between socio-economic status and reduced political participation is significant and not to be tolerated in VRA litigation.

Defendants in Indian voting rights cases frequently raise the “reservation defense”: dismal Native American participation in the political arena exists not because of voting discrimination, but because “Indians are mainly loyal to their tribes and simply do not care about participating in state and federal elections.” In Emery v. Hunt, for example, the state argued that “the very existence of the reservation system and the concomitant first loyalty of tribal members to the tribe and to the United States ... has produced a situation such that it cannot be that the [voting] system is responsible for any of the effects which the Plaintiffs claim.” Rather, according to the state, it was more likely that the low turnout was explained by “the United States’ [interest] in turning tribal members away from loyalty and interest in the state” and instead supporting “loyalty and interest in the tribes and the federal government.” The court rejected the State's defense, holding that it would be “the equivalent of engaging in racial stereotyping because we would be assuming that the affected Native Americans ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’” This, the Court went on, would “impose ‘the very racial stereotyping the Fourteenth Amendment forbids.’” Every court that has entertained the argument has held likewise and dismissed it out of hand.

Despite the abundance of overt discrimination taking place, only 76 voting rights cases were brought by or on behalf of American Indians between 1965 and 2010. The lack of VRA enforcement in Indian Country is the result of a combination of factors: “a lack of resources and access to legal assistance by the Indian community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments.” What is clear is that non-Indian governments are still actively attempting to suppress the Indian vote. As discussed in more detail below, where litigation has occurred, courts have consistently found patterns of widespread voting discrimination against Native Americans.

Still, even a court order does not always lead to the de facto right to vote. The U.S. v. Sandoval County
litigation offers one such instance. In that case, because it was patently obvious that the County had failed to comply with the VRA, in March of 1990 the parties entered into a settlement agreement that required Sandoval County to develop and implement a comprehensive bilingual “‘Native American Voting Rights Program’ (‘NAEIP’) designed to achieve compliance with the VRA. [FN163] The case was reopened in 1993 due to the County’s “fail[ure] to comply substantially with the provisions of the NAEIP.” [FN164] In 1994 the parties entered into a Consent Decree that would allow its termination upon the County's compliance with its terms over a ten-year period. In November of 2004, the Court found that the County had *207 still failed to comply with the Consent Decree, and extended it until 2007. [FN165] In November of 2007, the Court found that, again, “compliance problems remained,” and extended the Consent Decree until January 31, 2009. [FN166] In March of 2009 the Court found that, still, the County was not in compliance with the VRA, and extended the Consent Decree to March 1, 2011. [FN167] In July of 2011, the Court, obviously frustrated, found that the County was “not yet in substantial compliance” with the VRA and again extended the Consent Decree to March of 2013. [FN168]

**Attorney General objections to proposed voting changes, state requests for preclearance denied, and successful Section 5 litigation**

The Attorney General has also objected to numerous proposed voting changes on the grounds that they attempt to dilute the voting power of Native Americans. [FN169] In 2008, for example, Charles Mix County, South Dakota, submitted a redistricting plan that would increase the number of commissioners from three to five, and elect them from five single-member districts. [FN170] Applying the test laid out by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Authority*, [FN171] the DOJ determined that “the County has not sustained its burden of showing that the proposed change does not have a discriminatory purpose.” [FN172] First, the DOJ determined, “under the proposed plan, Native Americans can elect their candidate of choice in only one of five districts .... [T]here is no reasonable probability that Native American voters could elect their candidate of choice [under] the proposed plan.” Second, the County “has a history of voting discrimination against Native Americans”: Native Americans could not vote in the County until 1951, and when they were allowed to vote “they were discriminated against in registration and other parts of the voting process.” [FN173] Third, depositions in the *Blackmoon v. Charles Mix County* [FN174] litigation--a Section 2 lawsuit brought by Native American voters against the County-- revealed that after the 2000 Census the commissioners knew that the proposed plan would have a discriminatory effect. Finally, the DOJ observed, the timing of the redistricting plan--directly after the first Native American County Commissioner was elected--“raise[d] concerns of a discriminatory purpose.” [FN175]

On the other hand, Section 5 litigation in Indian Country has taken the course of *Samuelsen v. Treadwell*. [FN176] In *Samuelsen*, the Alaska Native plaintiffs sued the State of Alaska, alleging that the State “fail[ed] to obtain either administrative or judicial preclearance prior to implementing the change in their standards, practices, or procedures [in] violation of Section 5.” [FN177] By May of 2012, the defendants had submitted the plan to the DOJ, and it was precleared 32 days later. [FN178] The case--as are most Section 5 cases in Indian Country [FN179]--was dismissed with little fanfare. [FN180] As Congress has recognized, this shows that the mere number of objections sustained and pro-Indian final orders rendered cannot measure section 5’s importance. One must also consider*208 “the number of voting changes that have never gone forward as a result of Section 5.” [FN181]
Successful Section 2 Litigation

Native Americans plaintiffs have shown that they were being denied equal access to the political process in successful suits against local governments under Section 2 of the VRA. In *Windy Boy v. Big Horn County*, Native American residents of Big Horn County, Montana, alleged that the at-large voting system employed by the County omitted names of Indians who had registered to vote; removed Indians who had voted in primary elections from voting lists disallowing them from voting in the subsequent general election; refused to offer voter registration cards to Indians; failed to appoint Indians to county boards and commissions; and prohibited Indians from eligibility for positions such as deputy registrar. [FN184] The Court held that the plaintiffs proved a violation of Section 2:

The at-large system of voting gives Indians “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). Indian participation in the political process has been further hampered by official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote; past discrimination against Indians in hiring and appointments to boards and commissions; and reluctance to appoint Indians as election judges and deputy registrars of voters. The immense size of Big Horn County, along with the effects of discrimination in employment, health, and education, are additional barriers to full Indian participation in the electoral process. [FN185]

In *Bone Shirt v. Hazeltine*, [FN186] the plaintiff group of Indians contended that South Dakota's 2001 legislative redistricting plan diluted Indian voting strength by packing one particular district with a 90 percent supermajority of Indians. This, the plaintiffs contended, “minimized the total number of districts in which Indians could select the candidate of their choice.” [FN187] After considering the evidence admitted during a nine-day court trial, the court found that the redistricting plan violated Section 2 for the following reasons: (1) “there is a long and extensive history of discrimination against Indians in South Dakota that touches upon the right to register and to vote, and ... [t]he effects of this history are ongoing”; (2) there was “substantial evidence, both statistical and lay, demonstrate[ing] that voting in South Dakota is racially polarized among whites and Indians”; (3) “county political party structure has hindered Indians from running for and getting elected to public office”; (4) “Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process”; (5) “there is some evidence of racial appeals in political campaigns in South Dakota”; (6) there did not exist one election of an Indian candidate to the area under review; (7) “Indians do not have equal access to the political process”; (8) “nothing before the legislature supports defendants' claim that it was necessary to create a district that is over 90 percent Indian”; (9) “[t]he fact that few Indians have run for legislative office is evidence that the existing system is discriminatory”; and (10) “voter turnout and participation among Indians remain[ed] low, despite recent and successful efforts to register.” [FN188]

In *Large v. Fremont County*, [FN189] the tribal plaintiffs challenged the elections for the County Commission on the basis that the elections “dilut[ed] Indian voting strength in violation of Section 2.” [FN190] In analyzing the plaintiffs' claim, the court first noted the numerous “instances of racial discrimination” that witnesses had testified about:

The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable. The Court rejects any attempt to characterize this discrimination as being politically, rather than racially, motivated. It is unnecessary at this point for the Court to draft a treatise on federal Indian policy or the historical experience of American Indians in the
west. Suffice it to say that the record is replete with expressions of anti-Indian sentiment, both historical and current. [FN191]

Current instances of “anti-Indian sentiment” included: (1) “racial tension and conflicts in the public schools”; (2) “signs on local businesses saying ‘No Dogs Or Indians Allowed’”; (3) “racial slurs by both white students and adults”; (4) bail being “routinely denied to Indian defendants but granted to white defendants”; (5) a County Commissioner publicly referring to Indians as “‘prairie niggers’”; and (6) an annual County event called the “One--Shot Antelope Hunt,” which is “derogatory in its portrayal of Indian women.” [FN192] The Court held that at-large elections diluted Indian voting strength in violation of Section 2. [FN193]

In U.S. v. Blaine County, [FN194] the United States brought a section 2 action against Blaine County, Montana, alleging that “the County's at-large voting system for electing members to the County Commission prevents American Indians from participating equally in the County's political process.” [FN195] The Court held that “Montana laws repeatedly discriminated against American Indians' exercise of the franchise,” in violation of Article 2. [FN196]

In Brooks v. Gant, tribal plaintiffs argued that residents of Shannon County, South Dakota, “a county that is almost entirely comprised of Native Americans,” were forced to travel roughly three hours to exercise their right to vote—a requirement that “was substantially different from the voting opportunities afforded to the residents of other counties in South Dakota and to the majority of white voters.” [FN198] The Court found for the plaintiffs, holding that, “‘based on their race,’” the plaintiffs “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” in violation of Section 2. [FN199]

In Spirit Lake Tribe v. Benson County, [FN200] the Tribe brought an action against Benson County, North Dakota, seeking an injunction that would require the *210 County to keep a particular voting place open. The Tribe argued that the County's plan to close the nearest voting place would violate Section 2 because “[t]he poverty rate on the Spirit Lake Reservation is higher than that in the predominately white communities located in Benson County,” and, thus, “[m]any members of the tribe do not have adequate transportation to travel” to any other polling place. [FN201] The Court agreed with the Tribe and granted the injunction, finding that (1) “pervasive discrimination is ... a significant factor contributing to the entrenched problems of poverty, alcoholism, illiteracy, and homelessness”; (2) “closure of the voting places on the reservation will have a disparate impact on members of the Spirit Lake Tribe”; and (3) “Native Americans are more likely to have not received a ballot application, which when coupled with a decreased ability to vote in person, creates a disparate impact.” [FN202]

Although these cases are by no means an exhaustive list of all successful Section 2 litigation, [FN203] they do exemplify the suits filed in covered jurisdictions where relief from discriminatory voting practices has been obtained. Notably, again, American Indians make up a mere 1.7 percent of the total U.S. population—even if the above cases were the only successful Section 2 cases brought by Native Americans, it is clear that a “pattern of discrimination” exists. [FN204]

What should also be clear at this point is that voting rights litigation brought on behalf of Native Americans is not the kind of “consolidating and preserving of the gains achieved over four decades” that other minorities seek to achieve. [FN205] Rather, it seeks relief from the kind of blatant and transparent discrimination that the original VRA and its Section 4(b) coverage formula sought to prevent.

In sum, the litigation that is taking place more closely resembles the “initial vote dilution suits in which
black and Latino voters faced ‘exclusion, plain and simple.’” [FN207] Indian communities, in other words, have not even gotten to the point of raising challenges to the complex contemporary vote dilution cases brought in significant numbers by other minorities—rather, “they are still facing the antecedent ones about their ability to elect representatives at all.” [FN208]

Federal Observations of Native American Discrimination

Federal Observers have been utilized to make cases against the offending state jurisdictions in a majority of the suits discussed above. In the U.S. v. Sandoval litigation, for instance, the court reviewed at least ninety Federal Observer Reports to draw its conclusion that the State was not in compliance with the VRA. [FN209]

Congressional Findings

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, noted “instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation” against Native Americans. [FN210] Rep. Robert Drinan also noted “evidence that American Indians do suffer from extensive infringement of their voting rights,” and that the Department of Justice “has been involved in thirty-three cases involving discrimination against Indians since 1970.” [FN211] During debate in the Senate, Senator William Scott read into the record a report prepared by the Library of Congress, which concluded that:

Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores … As late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society. [FN212]

Congress's most recent findings echo those of 1975. Joe Rodgers, Commissioner of the National Commission of the Voting Rights Act, testified that “the persistence of practices of discrimination in jurisdictions throughout the Nation” can be stymied by Section 5, noting that because of Section 5 “elderly Indian voters were able to vote for the first time because they were able to receive assistance in the language that they speak.” [FN213] Prof. Nadine Strossen of the New York Law School testified that Section 5 was necessary to prevent “packing Native American … voters to dilute their influence, … voter intimidation, investigations of newly-registered voters, failure to provide polling places on reservations, discriminatory redistricting, and a failure to provide language assistance at the polls.” [FN214] The Senate and House Reports on the 2007 VRA amendments noted the following:

• Congress expressly reaffirmed its commitment to assist Native Americans, particularly those who live on reservations, as intended beneficiaries of the language assistance provisions.
• Sections 4(f) and 203 [of the VRA] were enacted in response to substantial evidence received by Congress documenting the discrimination and unequal educational opportunities experienced by … Native American … and Native Alaskans compared to white citizens.
• [T]he number of Native American voter registration drives has increased substantially such that [there is] a direct correlation between focused localized commitments to increasing participation rates in Native communities and the actual increases that result.
• Many Native communities have seen steady, even significant, increases in registration. … In recent years, there has been a steady increase in the number of Native American candidates who are being
elected to local school boards, county commissions and State legislatures, including the election of seven new Alaskan Natives to the Alaska State legislature.

• The candidacies of ... Native Americans and Native Alaskans have rarely garnered the support of white voters, resulting in a disparity between the number of white elected officials and the number of language minority officials elected to office, including statewide offices.

• As of 2000, neither Hispanic nor Native American candidates have been elected to office from a majority white district.

*212 • [A] lack of enforcement enabled South Dakota to defy Federal oversight requirements and to continue enforcing changes which negatively impacted Native American citizens and their ability to vote.

• Alaskan Natives and Native Americans continue to suffer from discrimination in voting.

• Native Americans ... and Native Alaskans continue to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates.

• [M]any Native people speak English only as a second language, with many Native Alaskans and Native Americans continuing to speak in their native tongue, particularly among the elderly. [FN215]

Applicability of Shelby County to Indian Country

In light of the above, it is crystal clear that Indian Country is still in need of preclearance legislation. What is more, as discussed above, Section 4(b) unquestionably still applies to the problem targeted by the original VRA. In Indian Country, complex voter dilution schemes are not so much at issue-- Indian Country is still faced with the straight-up voter discrimination of yesteryear. [FN216] As noted by the Navajo Nation's amicus brief in Shelby County:

While passage of the Voting Rights Act in 1965 ended certain means of discrimination, Indians continued to be denied the right to vote through a variety of new strategies. As part of the 2006 reauthorization process, Congress obtained evidence that Indians continued to be disenfranchised by voting schemes, polling place discrimination and ineffective language assistance. The 2006 reauthorization was a legitimate Congressional response to [Indian] disenfranchisement. Protected by the Section 5 preclearance, voter registration and turnout have increased, but new challenges have arisen that require continued vigilance. Section 5 preclearance remains a key component to protecting the fundamental right to vote. [FN217]

Indian Country-specific preclearance legislation will pass judicial constitutional muster, Shelby County notwithstanding. Even in light of Shelby County, Congress is required to enact Indian Country-specific voting legislation.

The Federal Trust Obligation

The trust obligation is defined by the federal government's special duty to protect Indians and tribal interests, largely in exchange for land cessions that occurred throughout the eighteenth and nineteenth centuries. [FN218] This “self-imposed policy ... has found expression in many acts of Congress and numerous decisions” of the Supreme Court and imposes the “moral obligations of the highest responsibility and trust.” [FN219] The obligation arose specifically in order to protect tribes and their members from state discrimination [FN220] and “ascribes to the government both a political duty and a moral commitment to the Indians.” [FN221] Federal agencies may not “abrogate or extinguish the trust relationship, ... [a]bsent a direct conflict between an applicable statutory provision and the trust responsibility.” [FN222] The trust obligation to ensure that states and
their legislators do not trample tribal members' civil rights—an obligation that is separate and distinct from, and heightened when compared to, the federal government's general obligations under the Constitution and its amendments—is well engrained in United States jurisprudence. [FN223]

The case of *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* [FN224] provides just one example of how this federal mandate is enforced. In *Joint Tribal Council*, the Passamaquoddy Tribe had voiced to the federal government the following grievances against the state of Maine: the state had divested the tribe of most of its aboriginal territory in a treaty negotiated in 1794; the state had wrongfully diverted 6,000 of the 23,000 acres reserved to the tribe in that treaty; the state had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and “taken away the right of members to vote.” [FN225] In determining whether the federal government had an affirmative duty to take action to protect the tribe's interests against the state, the court held that “when the federal government enters into a treaty with an Indian tribe ... the Government commits itself to a guardian-ward relationship with that tribe.” [FN226] And by entering into this relationship, the court held, “a corresponding federal duty to investigate and take such action as may be warranted” arose as well. [FN227] The trust obligation required the federal government to, among other things, protect the “right of members to vote” [FN228] and to take action “in their behalf” [FN229] if that right is infringed upon by neighboring states.

**The Plenary Power Doctrine**

When the United States obtained Great Britain's “right of dominion”—based on Christian “discovery” of so-called “non-Christian lands”—it obtained “absolute governmental authority, over all the lands and inhabitants within the geographical limits claimed.” [FN230] As described by Robert Coulter:

> The doctrine of discovery gave the “discovering” nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The “doctrine of discovery” gave the “discovering” nation no legal right as against the Native nations or peoples. [FN231]

This concept of “territorial dominion” was then used in subsequent Supreme Court decisions to establish that “the United States has an absolute legislative authority over Indian nations and peoples.” [FN232] In *Worcester v. Georgia*, [FN233] the most famous of these decisions, [FN234] Chief Justice John Marshall held that Indian tribes (1) have limited sovereignty to manage their own affairs, (2) are nations in which state laws have no force, and (3) over which Congress has sole power. The third holding, commonly referred to as the “plenary power doctrine,” [FN235] stands for the premise that “Indian relations [are] the exclusive province of federal law” [FN236] and “courts ‘have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under’” this power. [FN237] The Tenth Amendment, in other words, cannot supersede Congress's plenary power over Indian affairs. [FN238]

**Indian Country-Specific Preclearance Legislation**

To recapitulate:

- Blatant and outright voting discrimination in Indian Country—not merely the dilution of the Native American vote—is rampant, and has yet to be reduced by the VRA. [FN239]
- The trust obligation requires the federal government to protect Native Americans' right to vote and
to ensure that that right is not infringed upon by neighboring states.

• Congress's power over Indian affairs is plenary, and cannot be trumped by Tenth Amendment constraints.

Taking these factors together, Indian Country's answer to Shelby County is evident. The nebulous “equal sovereignty” test employed by the Supreme Court is inapplicable when the inequality is between federal and state interests--the sovereigns are not equal. The power of Congress to legislate in Indian affairs is plenary, and its trust obligation requires the federal government to protect the “right of [tribal] members to vote” [FN240] and to take action “in their behalf” [FN241] if a state infringes on that right. Thus, no justice could legitimately conclude that an Indian Country-specific Section 4(b) does not pass constitutional muster--indeed, the federal trust obligation mandates that Congress take action. [FN242] Both President Obama [FN243] and the bulk of Congress have, as a matter of fact, recently taken an interest in passing Indian-specific legislation when a trust duty unfulfilled has been brought to their attention. [FN244] Here, too, Congress must act. [FN245]

Conclusion

The full impact of reforms contemplated by the Voting Rights Act, and at least partially achieved elsewhere, has yet to be felt in Indian communities. As noted by Professor Karlan, an “account of the Voting Rights Act's impacts in Indian country during [1965-1990] would have been a slim pamphlet .... It was not until 1983, long after litigation had begun to transform the deep south and Hispanic Southwest, that the ACLU Voting Rights Project brought its first vote dilution suit in Indian country.” [FN246] It is only recently that positive results have been reached through litigation to ensure the rights of American Indians to vote and to have a fair opportunity to elect candidates of their choice. This successful election of Indian candidates has also brought about positive shifts to laws, services, and policies provided by counties to their Indian residents. There have also been adjustments to electoral structures, resulting in the successful election of Indian candidates and affecting positively the perceptions and the willingness of Indians to participate in the democratic process. [FN247]

*215 As demonstrated above, Section 5 of the VRA does not exceed the limitations placed by the Supreme Court upon Congress's Fifteenth Amendment powers, at least as to Native Americans. “Times” have not changed in Indian Country. Native Americans are still trying to tackle the issues raised in the “‘initial vote dilution suits’ in the 1960s as they face ‘exclusion, plain and simple.” [FN248] Section 5 was both an appropriate and necessary measure to prevent ongoing voting discrimination against affected citizens in covered jurisdictions. The non-Indian majorities in certain jurisdictions of Montana, Utah, and South Dakota have very recently made clear their intent to disenfranchise their Native neighbors. Section 4(b) was a crucial component to protecting the Indian right to vote. The minimal burden placed upon covered jurisdictions--merely passing nondiscriminatory voting laws, submitting them to the Attorney General, and waiting sixty days or less--was absolutely justified to protect Indian voters.

Whether Congress decides to breath life into the now defunct Section 5, it is absolutely clear that Indian-specific preclearance legislation is justified, necessary, and indispensable to the protection of the Native vote. [FN249] This is particularly true considering “Congress' plenary and exclusive authority over Indian affairs, including relations between states and ... tribes.” [FN250] Indeed, if there is any area where limitations placed upon Congress by the Fifteenth Amendment would not prevent preclearance legislation, it is in Indian Country, where Congress has an affirmative trust and fiduciary obligation to ensure that Native American voters are fully enfranchised.
Ryan Dreveskracht is an associate at Galanda Broadman PLLC, of Seattle, an American Indian majority-owned law firm. His practice focuses on representing tribal governments and businesses in complex litigation. He can be reached at ryan@galandabroadman.com.

[FN1]. Minor v. Happersett, 88 U.S. 162, 170-78 (1874); see also Pope v. Williams, 193 U.S. 621, 632 (1904) (“The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments.”).


[FN4]. U.S. CONST., amend. 15, § 1; see also Rice v. Cayetano, 528 U.S. 495, 523 (2000) (“Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.”).

[FN5]. U.S. CONST., amend. 19.


[FN7]. Orth, supra note 2, at 1053.

[FN8]. See e.g. Smith v. Allwright 321 U.S. 649, 667 (1944) (Texas state law providing that “white Democrats, and no other, should be allowed to participate in the party's primaries.”)


[FN11]. The term “Indian” is a legal term defined as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.” 25 U.S.C. § 479, 109.

[FN12]. Id. at 109.

[FN13]. 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)). “Prior to this time, some Indians were naturalized to U.S. citizenship by specific laws, such as those admitting veterans of the U.S. armed services to citizenship and those allowing Indian women who married non-Indian citizens to take the status of their husbands.” Rebecca Tsoie, Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights, 87 WASH. L. REV. 1133, 1168 n. 226 (2012). Most, Native Americans, however, remained non-citizens until 1924. Id.


[FN15]. DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 194 (2002); see e.g. Large v. Fremont County, Wyo., 709 F.Supp.2d 1176 (D. Wyo. 2010); Spirit


[FN23]. Orth, supra note 2, at 1054.

[FN24]. McGee v. City of Warrensville Heights, 16 F.Supp.2d 837, 845 (D.Ohio 1998) (quotation omitted); see also Harris v. Siegelman, 695 F.Supp. 517 (M.D.Ala.1988) (“[T]o put it another way, the claim is established, if as a result of the practice, minority voters cannot participate in the electoral process on the same terms and to the same extent as non-minority voters.”).


[FN27]. Shelby County, 679 F.3d at 852-53.

[FN28]. Thernstrom, supra note 19, at 42 (citing STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE (1997) for “an extended examination of the changing status of blacks and changing racial attitudes” and noting that “the picture drawn has only gotten
better in the years since the book was published.”) Glenn Kunkes has recently made a similar argument:

[The legislative record consists of scattered and anecdotal allegations of intentional discrimination occurring in covered jurisdictions since 1982. This “scant” showing is a far cry from the persistent and insidious discrimination found in 1965 .... A sweeping prophylactic remedy like Section 5 cannot be sustained on sporadic incidents of intentional discrimination in covered jurisdictions. Instead, the first generation barriers of intentional discrimination relied on by Congress in 1965 to justify Section 5 are the main evidence needed to warrant the retention of the preclearance obligation. Statistical evidence of registration data, voter turnout, and the election of minority officials amply demonstrate the dramatic changes that have occurred in covered jurisdictions over the last half-century .... The racial registration gap has essentially disappeared .... In sum, things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare, and minority candidates hold office at unprecedented levels.


[FN31]. The term “Indian Country” is a legal term of art defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.” 18 U.S.C. § 1151.

[FN32]. U.S. CONST., amend. 15, § 1.

[FN33]. Id. at § 2.


[FN35]. Id. at 512.

[FN36]. U.S. CONST., amend. 15, § 2.


[FN38]. Id. at 642 (Rep. Elridge).

[FN39]. Id. at 697 (Rep. Burr).

[FN40]. Id. at 989 (Sen. Hendricks).

[FN41]. Id. at 1626 (Sen. Edmunds).

[FN42]. Elk, 112 U.S. 94.

[FN43]. Colliflower v. Garland, 342 F.2d 369, 375 (9th Cir. 1965) (citing 8 U.S.C. § 1401(a)(2)).


[FN45]. Id. at 375-76 (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); citation omitted).
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 140-50 (1999); see also United States v. Rogers, 45 U.S. 567, 571-72 (1846) (“The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations .... On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.”)

Wilkins, supra note 16, at 527-28


New York v. Shinnecock Indian Nation, 701 F.3d 101, 103 (2nd Cir. 2012)


Id. at 810-11. The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960, 74 Stat. 86, permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964, 42 U.S.C. § 1971, expedited the hearing of voting cases before three-judge courts and specifically outlawed some of the tactics used to disqualify minorities from voting in federal elections.

Katzenbach, 383 U.S. at 314.


Katzenbach, 383 U.S. at 309. The bill was with passed with ““bipartisan majorities of both houses.” Robert McDuff, The Voting Rights Act and Mississippi: 1965-2006, REV. L. & SOC. JUST. 475, 477 (2008). This is not to say, though, that everyone, especially those in the south, agreed with the law. See, e.g. Lyle Wilson, Today Marks End of Political Era in United States, LEBANON DAILY NEWS, Nov. 1, 1965, at 15 (noting that under the VRA, “substandard, ignorant citizens would qualify for political office and, equally, to vote in state and local elections with respect to public finance, bond issues, and expenditures!”).

Katzenbach, 383 U.S. at 308. As noted above, Section 2, for instance, created a private cause of action when any “voting qualification or prerequisite to voting, or standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color.” Id. at 328.

[FN58]. A current list of covered jurisdictions is available at 28 C.F.R. § 51.

[FN59]. 79 Stat. at 439. This is described in more detail below.

[FN60]. Id. at 438-39.


[FN62]. Beer, 425 U.S. at 140 (quotation omitted).


[FN65]. Id. In all, the DOJ has objected to about one percent of the voting rules changes that have been submitted to the agency. U.S. Dep't of Justice, Section 5 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 1, 2013).

[FN66]. Id.


[FN70]. U.S. Dep't of Justice, supra note 65.


[FN75]. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 [hereinafter “2006 VRA”]. The burdens imposed by the preclearance provisions were not changed, nor was Section 4(b)'s coverage formula. Id. Congress determined that although some progress had been made since 1975, “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.” Id. at § 2(b)(2); see also generally id. at § 2(b)(3)-(9).


[FN78]. Id. (quoting 42 U.S.C. § 1973b(a)(1)(F)).


[FN80]. Shelby County, 679 F.3d at 853.

[FN81]. Id.


Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters. Understanding the preeminent constitutional role of Congress under the Fifteenth Amendment to determine the legislation needed to enforce it, and the caution required of the federal courts when undertaking the “grave” and “delicate” responsibility of judging the constitutionality of such legislation--particularly where the right to vote and racial discrimination intersect--this Court declines to overturn Congress' carefully considered judgment. Id. at 508.


[FN84]. Shelby County, 679 F.3d at 858; see also City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

[FN85]. Shelby County, 679 F.3d at 858 (quoting Katzenbach, 383 U.S. at 330).

[FN86]. Id. at 858-61. In determining whether or not to use the heightened “congruent and proportional” test, the Court noted, “[i]n any event, if section 5 survives the arguably more rigorous ‘congruent and proportional’ standard, it would also survive Katzenbach’s ‘rationality’ review.” Id. at 859. Under this test, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

[FN87]. Shelby County, 811 F.Supp.2d at 435 (quotation omitted).

[FN88]. Shelby County, 679 F.3d at 865 (quoting City of Boerne, 521 U.S. at 530).

[FN89]. Id. at 865.

[FN90]. Id. at 866

[FN91]. Id.

[FN92]. Id.

[FN93]. Id. The Attorney General interposed over 626 objections from 1982 to 2004 (an average of 28.5 each year), compared to 490 interposed from 1965 to 1982 (an average of 28.8 each year). Id.
[FN94]. Id. at 867 (quotation omitted).


[FN97]. Shelby County, 679 F.3d at 868.

[FN98]. 2006 VRA, at § 2(b)(5).

[FN99]. Shelby County, 679 F.3d at 868.


[FN101]. Shelby County, 679 F.3d at 868.


[FN105]. Shelby County, 679 F.3d at 870-71.


[FN107]. Shelby County, 679 F.3d at 871 (quotation, citation, and modification omitted).

[FN108]. Id. at 873.

[FN109]. Id. at 874.

[FN110]. Id. at 883.

[FN111]. Id. at 875

[FN112]. Id. at 884

[FN113]. Shelby County, 133 S.Ct. at 2619.


[FN115]. Shelby County, 133 S.Ct. at 2621 (quotation omitted).

[FN116]. Id. at 2619. The Court did not explain what exactly the parameters of this test are. In City of Boerne v. Flores, the Court described it as follows: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” City of Boerne v. Flores, 521 U.S. 507, 508 (1997). At least one Court has held that the Northwest Austin test was dicta, refused to employ it, and instead “adhere[d] to the long standing rational basis standard.” National Collegiate Athletic Ass'n v. Christie, 926 F.Supp.2d 551, 573 n.23 (D.N.J. 2013). On first blush, it appears that the Shelby County Count also used the

rational basis test. See Shelby County, 133 S.Ct. at 2628 (noting that “the coverage formula [i]s relevant to the problem”) (quotation omitted). In all, it is not clear what standard the Court applied. The “equal sovereignty” test is an unusual one, rarely (if ever) used outside of the VRA context. See National Collegiate Athletic Ass'n v. Governor of New Jersey, Nos. 13-1713, 13-1714, 13-1715, 2013 WL 5184139, at *23 (3rd. Cir. Sept. 17, 2013). (“[T]here is nothing ... to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of sensitive areas of state and local policymaking.”) (quotation omitted); see also generally Joseph Fishkin, The Dignity of the South, 123 YALE L.J. ONLINE 175 (2013) (discussing the “equal sovereignty” rule).

[FN117]. Shelby County, 133 S.Ct. at 2627-68, 2629.

[FN118]. Id. at 2629; see also id. (“[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping [Section 4(b)].”).

[FN119]. See Hall v. Louisiana, No. 12-0657, 2013 WL 5405656, at *4 (M.D. La. Sept. 27, 2013) (“[A]s a result of the Court's opinion, the Voting Rights Act no longer has a formula by which federal authorities may determine which jurisdictions are subject to preclearance under Section 5.”).

[FN120]. “The suggestion [of the Shelby County majority] seems to be that the Constitution required Congress to revise rather than maintain the coverage formula no matter what evidence it documented.” Ellen D. Katz, What Was Wrong With the Record, 12 ELECTION L.J. 329, 330 (2013).

[FN121]. This is essentially the chicken-or-the-egg question. As noted Professor Schultz:

    The political changes that the VRA sought to secure will not be permanent until the South wants them to be permanent. The VRA and Section 5 alone cannot secure that. That is the final dilemma of Shelby County. If the social attitudes needed to make the VRA goals permanent were in place, then preclearance would not be necessary. But lacking this change in the South, the VRA is still needed, even though it may never be able to effect the cultural changes required to render the law unnecessary. David Schultz, William Faulkner and the Dilemmas of Shelby County, 12 ELECTION L.J. 341, 342 (2013).

[FN122]. Id. at 2627-68 (“Racial disparity ... was compelling evidence justifying the preclearance remedy and the coverage formula [in 1965]. There is no longer such a disparity.”) (citation omitted); id. at 2628 (“[D]isparities in voter registration and turnout due to race [have been] erased, and African--Americans [have] attained political office in record numbers.”).

[FN123]. Id. at 2629.


[FN132]. Rodriguez v. Harris County, Tex., No. 11-2907, 2013 WL 3980651, at 73, 90 (S.D. Tex. Aug. 1, 2013) . The court went on: “While some members of the Supreme Court imagine that barriers to voting have been eradicated, the record here is replete with evidence to the contrary … [I]t is clear that more can be done to ensure that all citizens have a full and fair opportunity to participate in the political process.” Id. at 90 (quotation omitted).

[FN133]. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

[FN134]. Shelby County, 679 F.3d at 865-71. Much of this proof was collected and prepared by counsel for Amici Curiae in the Brief for Navajo Nation, et al., as Amici Curiae Supporting Respondent-Interveners, Shelby County v. Holder, 2013 WL 432965 (U.S. Feb. 1, 2013) (No. 12-96) [hereinafter Navajo Amicus Brief].


[FN138]. Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948). The practice continued until 1948, when Arizona's supreme court ruled that the state constitution referred to a judicially established type of guardianship and had no application to the status of Indians. Id. at 463.

[FN139]. Act of Feb. 14, 1957, Utah Laws 89-90. The Utah Supreme Court upheld the law, but the legislature repealed it in 1957, when the U.S. Supreme Court, at the request of the state attorney general, agreed to review the decision. See Allen v. Merrell, 353 U.S. 932 (1957) (vacating a state court decision as moot).
When a U.S. Commission on Civil Rights report confirmed that South Dakota has violated the civil rights of Native Americans, Janklow called the report “garbage.” ACLU Voting Rights Project, Voting Rights in Indian Country 37 (2009) (citation omitted). In further evidence of discrimination, before the 2002 Congressional election, Janklow announced a voter fraud initiative that would entail the questioning of almost 2,000 newly registered Native American voters, while failing to investigate new registrants in counties without significant Native American populations. See generally Laughlin McDonald, The New Poll Tax, 13 AM. PROSPECT 23, 26 (2002).


South Dakota Advisory Committee to the U.S. Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System 6-7 (2000).

See McDonald, supra note 143, at 51 (noting that “[n]umerous appellate and trial court decisions, including those from Indian country” have held that “[t]he link between depressed socioeconomic status and reduced political participation is direct”). The Supreme Court has noted that, “political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.” Thornburg v. Gingles, 478 U.S. 30, 69 (1986). In Buckanaga v. Sisseton Independent School Dist., the Eighth Circuit Court of Appeals held that, “Low political participation is one of the effects of past discrimination.” 804 F.2d 469, 475 (8th Cir. 1986); see also Stabler v. County of...
Thurston, 129 F.3d 1015, 1023 (8th Cir. 1997) (holding that “disparate socio-economic status is causally connected to Native Americans’ depressed level of political participation.”). Likewise, in Old Person v. Cooney, Court of Appeals for the Ninth Circuit held that “lower ... social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.” 230 F.3d 1113, 1129 (9th Cir. 2000); see also Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1016-017 (D. Mont. 1986) (“Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors ... but the lingering effects of past discrimination is certainly one of those factors.”).


[FN155]. Emery, 615 N.W.2d at 599 n.4 (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)).

[FN156]. Id. (quoting Miller, 515 U.S. at 928).

[FN157]. See, e.g., Little Thunder v. South Dakota, 518 F.2d 1253, 1255-56 (8th Cir. 1975) (holding that any claim that a particular class of voters lack a substantial interest in local elections should be viewed with “skepticism,” because “[a]ll too often, lack of a substantial interest might mean no more than a different interest” and concluding that “Indians residing on the reservation have a substantial interest in the choice of county officials”) (quotation omitted); United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1980) (holding that the State's “presumption” that Indians lacked a substantial interest in county elections “is not a reasonable one”); McMillan v. Escambia County, 748 F.2d 1037, 1045 (11th Cir. 1984) (holding that the lack of minority candidates “is a likely result of a racially discriminatory system”); Hendrix v. McKinney, 460 F. Supp. 626, 632 (M.D. Ala. 1978) (white bloc voting “undoubtedly discourages [minority] candidates because they face the certain prospect of defeat.”).


[FN159]. See ACLU Voting Rights Project, supra note 142, at 28 (noting that the Department of Justice has “turned a blind eye to the state's failure to comply” with the VRA in Indian Country).

[FN160]. McDonald, supra note 143, at 53.

[FN161]. See, e.g., Mike Wensel, Defend Alaskans' Right to Vote, INDIAN COUNTRY TODAY, Mar. 23, 2013, available at http:// indiancountrytodaymedianetwork.com/opinion/defendalaskans-right-vote-148311 (noting that Alaska State officials have recently attempted to close polling places and early voting from Alaska Native villages, tried to remove Native Alaskans from the list of Alaska registrars, failed to provide bilingual voting assistance, and have been actively gerrymandering against the Indian vote); H.R. Rep. No. 109-478, at 6 (2006) (“Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same.”).

[FN162]. In South Dakota, for instance, there have been nineteen Indian voting rights cases brought against the state and its subordinate governments; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs. Voting Rights Act: Section 203--Bilingual Election


[FN165]. Id.

[FN166]. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Nov. 28, 2007), ECF No. 211 at 3.


[FN168]. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Jul. 6, 2011), ECF No. 235 at 10. The Court went on to chide the County’s continued defiance of law with threats of holding its officials in contempt should they fail to comply with the VRA again:

The parties are forewarned ... that the time for Sandoval County to come into compliance with the VRA is now. We will grant no further extension of the consent decree in this case absent an extended evidentiary hearing, at which all named Defendants will appear, to determine the precise extent to which Sandoval County has complied with its legal obligations under the VRA. In the absence of substantial compliance, we will further order Sandoval County, or more precisely its duly elected officials, to show cause why they should not be held in contempt of court for failure to abide by our decree and comply with the VRA.

Id. at 3 (emphasis in original) (citing United States v. McKinley Cnty., 941 F. Supp. 1062, 1065 (D.N.M. 1996)).


[FN170]. Letter from Grace C. Becker, Acting Assistant Attorney General, U.S. Dep't of Justice, to Sara Frankenstein, attorney for Charles Mix County, South Dakota (Feb. 11, 2008) (on file with author) [hereinafter Becker Letter].


[FN173]. Id.

[FN174]. No. 05-4017 (D.S.D.).

[FN175]. Becker Letter, supra note 170, at 3.


[FN182]. See generally Deborah F. Buckman, Application of Voting Rights Act to Native Americans, 40 A.L.R. Fed. 2d 1, §7 (2009) (discussing many, if not all, of the Section 2 VRA cases involving Native Americans up to 2009).


[FN184]. Id. at 1009-1009.

[FN185]. Id.


[FN187]. Id. at 980.

[FN188]. Id. at 1032-1051.


[FN190]. Id. at 1182.

[FN191]. Id. at 1184.

[FN192]. Id. at 1186-88.

[FN193]. Id. at 1231.

[FN194]. 363 F.3d 897 (9th Cir. 2004).

[FN195]. Id. at 900.

[FN196]. Id. at 912-13.


[FN198]. Id. at 16.

[FN199]. Id.


[FN201]. Id. at 2.
[FN202]. Id. at 5-6.

[FN203]. See, e.g., Old Person v. Cooney, 230 F. 3d 1113 (9th Cir. 2000); Navajo Nation v. Brewer, No. 06-1575 (D. Ariz. May 27, 2008); Cuthair, 7 F. Supp. 2d 1152.

[FN204]. Shelby County, 679 F.3d at 868.


[FN207]. Karlan, supra note 205, at 1441 (quoting Samuel Issacharoff, Groups and the Right to Vote, 44 EMORY L.J. 869, 880 (1995)).

[FN208]. Id. at 1442.

[FN209]. See, e.g., U.S. v. Sandoval County, No. 88-1457 (D.N.M.), ECF Nos. 186-89, 212-13, 224, 228, 240


[FN214]. Id. (statement of Nadine Strossen).


[FN216]. Karlan, supra note 205, at 1442.


[FN218]. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 26 (2d ed. 1992); see also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1976) (“The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian a status accompanied by fiduciary obligations.”) (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942); United States v. Kagama, 118 U.S. 375 (1886); Beecher v. Wetherly, 95 U.S. 517, 525 (1877); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831)); United States v. Nice, 241 U.S. 591 (1916) (An individual Indians' land is protected against state taxation by virtue of the trust relationship). As explained by the Supreme Court in 1942:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and
to prepare the Indians to take their place as independent, qualified members of the modern body politic.


[FN220]. See Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976) (“[A]ntagonism between reservation Indians and the surrounding populations does persist. History, broken promises, cultural differences and neglect all contribute to it. Reluctance on the part of the States to accord to the Indians rights guaranteed to them by treaties still exists.”); see also Claire R. Newman, Note, Creating an Environmental No-Man's Land: The Tenth Circuit's Departure From Environmental and Indian Law Protecting a Tribal Community's Health and Environment, 1 WASH. J. ENVTL. L. & POL'Y 352, 393 (2011) (“The federal trust responsibility [i]s a safeguard against state aggression towards Indian tribes.”); Kelly Stoner & Richard A. Orona, Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders, 34 N.M. L. REV. 381, 387 n.52 (2004) (“The federal government's reason for establishing a trust relation with the Indian tribes was based upon the notion that the states were often the tribe's deadliest enemies.”); Peter D. Lepsch, A Wolf in Sheep's Clothing: Is New York's Move to Cleanup the Akwesasne Reservation an Endeavor to Assert Authority over Indian Tribes?, 8 ALB. L. ENVTL. OUTLOOK. 65, 107 (2002) (noting that the “Trust Doctrine” is “a shield against the states' gentleman's sword”); Stephen M. Feldman, The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Towards Ending State Adjudication of Indian Water Rights, 18 HARV. ENVTL. L. REV. 433, 444 (1994) (“Shielding important federal interests from the potential biases of state court is not a novel concept. In fact, it was apprehension regarding states' attitudes toward the Indians which comprised the very foundation of the federal-Indian trust relationship.”)

[FN221]. Dewakuku v. Martinez, 271 F.3d 1031, 1040 (Fed. Cir. 2001); see also Kimberly T. Ellwanger, Money Damages for Breach of the Federal-Indian Trust Relationship After Mitchell II, 59 WASH. LREV. 675, 675 (1984) (“Courts have cited the federal-Indian ‘trust’ relationship as authority ... to place an affirmative duty on the government to act on behalf of Indians.”); Sharon O'Brien, Tribes and Indians: With Whom does the United States Maintain a Relationship?, 66 NOTRE DAME L. REV. 1461, 1493 n.163 (1991) (noting that the trust and fiduciary duty’s “broad purposes, as revealed through thoughtful reading of the various legal sources, is to protect and enhance the people, property and self-government of Indian tribes.”).

[FN222]. Woods, supra note 218, at 744.

[FN223]. See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974) (a court may order the BIA to expend funds to ensure that the trust obligation is fulfilled); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980) (“If ... the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence vel non of the relationship can be inferred from the nature of the transaction or activity.”); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 256-257 (D.D.C. 1973) (federal government has trust duty to minimize adverse impact on Indian Reservations); see also generally United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Klamath Indians, 304 U.S. 119; United States v. Shoshone Tribe, 304 U.S. 111


[FN224]. 528 F.2d 370 (1st Cir. 1975)

[FN225]. Id. at 372.

[FN226]. Id. at 379.


[FN228]. Joint Tribal Council, 528 F.2d at 372.


[FN231]. ROBERT T. COULTER, NATIVE LAND LAW § 1:2 (2012); it is from this relationship where the trust obligation arises. See Jana L. Walker, et al., A Closer Look at Environmental Injustice in Indian Country, 1 SEATTLE J. FOR SOC. JUST. 379, 383-84 (2002) (“From this guardian-ward relationship, as well as federal laws and the promises made in Indian treaties, a trust responsibility flows from the federal government to the Tribes and Indians. It is this unique trust responsibility that imposes obligations on the federal government to protect, defend, and provide services to Tribes and Indians.”).

[FN232]. Newcomb, supra note 230, at 327 (citing United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 533 (1903)).

[FN233]. 31 U.S. (6 Pet.) 515 (1832); see also Rebecca Tsosie, Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights, 87 WASH. L. REV. 1133, 1144 (2012) (“The Doctrine of Discovery may have originated in the international law authorizing European colonialism, but it was ultimately incorporated into domestic law.”) (citing McIntosh, 21 U.S. (8 Wheat.) 543).

[FN234]. See Michael C. Blumm, Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country, 28 VT. L. REV. 713, 717 (2004) (noting that the doctrine of discovery’s “implications on native sovereignty were evident almost immediately after the Court handed down the most famous of its decisions, Worcester v. Georgia, in 1832”).


WL 2171652, at *12 (9th Cir. Jul. 9, 2013) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985)); see also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to modify ... tribal rights.”); Blumm, supra note 234, at 776 (“The discovery doctrine's limit on the sovereign authority of Indians to deal with governments other than the discovering government laid the foundation for buffering tribes from state laws, while authorizing federal plenary power.”).


[FN239]. See generally Karlan, supra note 205, at 1440-43.

[FN240]. Joint Tribal Council, 528 F.2d at 372.


[FN242]. See L. Scott Gould, Mixing Bodies and Beliefs: The Predicament of Tribes, 101 COLUM. L. REV. 702, 717 (2001) (“Congress [has been vested], through the trust responsibility, with specialized power concerning Indians akin to those Congress exercised respecting all minorities in the civil rights legislation of the 1960s--the power to prefer racial distinctions as the means by which to erase the inequities caused by such distinctions.”).


[FN245]. Although I will not opine as to what, exactly, this legislation should look like, I would propose some formula whereby jurisdictions will be subject to preclearance if: (a)(1) they have been found to have violated Section 4 of the VRA in some point in time; or (2) were previously subject to preclearance; and (b) there exists Indian country situated within such jurisdiction.


[FN249]. Another idea is a “trust agreement” that promises preclearance. As Sharon O’Brien has noted: The federal government also has a trust relationship with tribes. Tribes could guarantee more equality in their relationship by negotiating a trust agreement with the federal government. I think this is a very appropriate solution because the problem is that the federal government simply redescribes and redefines trust relationship whenever it wants to, just as it redefines tribal status. That would be one avenue of recognizing the group rights of the tribe and building on the political status as well as the needs status. O’Brien, *supra* note 221, at 1502-1503.