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Native Voting Power: Enhancing Tribal Sovereignty in Federal Elections

ABSTRACT. Members of tribal nations are disproportionately burdened by barriers to voting, from strict voter identification and registration requirements to inadequate language assistance and inaccessible polling locations. Restrictive voting laws are on the rise, while the avenues for challenging them under the prevailing model of voting rights are narrowing. This Note advocates for a different approach to conceptualizing and combatting Native American voter suppression.

First, it advances a new jurisprudential theory centered on tribal sovereignty: suppressing the Native vote not only denies rights to individual citizens but also denies sovereign power to tribes. Historically, states required Native American people to renounce tribal membership, culture, and lands to vote. Today, states and localities continue to denigrate tribal sovereignty in the administration of elections, such as by rejecting tribal-issued IDs and interfering with tribes' organization of their own political communities. Apart from securing the fundamental rights of individual Native citizens, Congress has a substantive duty to secure tribal sovereignty in federal election administration that is rooted in its trust obligation to tribes.

Second, this Note proposes a new legal framework for enhancing Native voting power: Congress should require states and local election officials to negotiate with federally recognized tribes toward the formation of tribal-state compacts governing federal election administration in Indian Country. This framework would relieve tribes of the burdens that they currently carry to initiate collaboration with local election officials, fill gaps in voter assistance, and challenge unlawful voting restrictions in court. Meanwhile, it would involve tribes in the process of lawmaking and regulation, enabling them to exert a measure of sovereign power over federal elections in Indian Country.

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INTRODUCTION

The trajectory of voting rights in the United States displays both “the best of America” and “the worst of America.”¹ In the second half of the twentieth century, following the passage of the Voting Rights Act of 1965 (VRA), voting steadily became more accessible and gaps in racial turnout dwindled.² Now, restrictive voting laws are proliferating in what some have termed “Jim Crow 2.0,”³ while the avenues for challenging them are narrowing.⁴

Native American communities have always struggled for full democratic participation. Historically, many states outright barred tribal members from voting, often explicitly on the premise that they were not competent to participate in the political process.⁵ Facial discrimination and categorical exclusion persisted well past the Fifteenth Amendment’s enactment, and in some states until the late 1950s.⁶

Today, exercising the right to vote requires some Native citizens living on reservations to travel hundreds of miles to the nearest polling place.⁷ With elections held in November, the journey can be a treacherous one over long and icy roads. Given the persistent poverty afflicting many Native communities, putting aside gas money and accessing a working vehicle is not always an easy solution.⁸

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1. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).
 2. Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, BRENNAN CTR. JUST. (Aug. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault> [<https://perma.cc/QWJ6-QB4F>].
 3. President Biden (@POTUS), TWITTER (Jan. 18, 2022, 9:21 AM), <https://twitter.com/potus/status/1483444483140329479> [<https://perma.cc/9VME-JPLN>]; Charles M. Blow, *Opinion, Welcome to Jim Crow 2.0*, N.Y. TIMES, July 14, 2021, <https://www.nytimes.com/2021/07/14/opinion/jim-crow-voter-suppression.html> [<https://perma.cc/242T-X2VT>].
 4. Michael Wines, *As Republicans Take Aim at Voting, Democrats Search for a Response*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/12/us/republicans-voting-rights-democrats.html> [<https://perma.cc/VKF9-MBNC>].
 5. See *infra* notes 138-145 and accompanying text; *Elk v. Wilkins*, 112 U.S. 94, 104 (1884).
 6. See *infra* note 145 and accompanying text.
 7. Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, A.B.A. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed [<https://perma.cc/LFL9-JYSN>].
 8. *Report of the Interagency Steering Group on Native American Voting Rights*, WHITE HOUSE 18-19 (Mar. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/03/Tribal-Voting-Report-FINAL.pdf> [<https://perma.cc/EV2L-2DUS>].

Sometimes, driving is not even possible: some Alaska Natives have needed to travel by plane in order to cast a ballot.⁹

The simple solution, one would think, is locating more polling places on reservations, or at least establishing satellite sites for registration and voting. But persuading local election officials to do so can be an even greater challenge—either because the officials are hostile or apathetic, or because they simply lack the resources to make voting more accessible.

For example, Native Americans living on reservations in Montana are often located great distances away from their county courthouses, where citizens are expected to vote.¹⁰ Registering to vote or casting a ballot can require traveling over one hundred miles round-trip.¹¹ Montana permits counties to establish satellite election offices with in-person absentee voting and late voter registration, but historically, counties refused when tribes requested satellite offices.¹² Refusals sometimes took explicitly discriminatory forms, but more typically, counties responded that they lacked the time and resources to establish and run satellite offices.¹³

For a variety of reasons, Montana county officials repeatedly told tribes that they would not establish satellite offices unless a court ordered them to do so.¹⁴ So in 2012, three tribes sued Montana.¹⁵ After two years of litigation, the case settled on terms favorable to the tribes, and the following year, Montana's Secretary of State issued an election directive requiring every county with a reservation to establish satellite offices and to "work with Tribal government[s]" to determine the offices' locations, days, and hours of operation.¹⁶ Though the

9. Ferguson-Bohnee, *supra* note 7.

10. *Wandering Medicine v. Montana Secretary of State*, ACLU MONT., <https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state> [https://perma.cc/B2KW-ZFSG]; *Voting Access for Native Americans in Montana*, MONT. ADVISORY COMM. TO THE U.S. COMM'N ON C.R. 7-10 (June 2021), <https://www.usccr.gov/files/2021/07-15-Native-American-Voting-Rights-Advisory-Memo.pdf> [https://perma.cc/E9XZ-RAQK]; Memorandum in Support on Motion for Preliminary Injunction at 3-4, *Wandering Med. v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012) (No. 12-135), 2012 WL 13049955.

11. *Voting Access for Native Americans in Montana*, *supra* note 10, at 9.

12. Plaintiffs' Statement of Undisputed Facts at 3-10 (¶¶ 4-20, 21-37), *Wandering Med.*, No. 12-135 (D. Mont. July 11, 2014), ECF No. 160; Defendant Secretary of State's Statement of Disputed Facts at 2-3, *Wandering Med.*, No. 12-135 (D. Mont. July 11, 2014), ECF No. 193-1.

13. Plaintiffs' Statement of Undisputed Facts, *supra* note 12, at 9 (¶ 33); Defendant Secretary of State's Statement of Disputed Facts, *supra* note 12, at 3.

14. Plaintiffs' Statement of Undisputed Facts, *supra* note 12, at 11 (¶ 41).

15. See *Wandering Med.*, No. 12-135, 2014 WL 12588302, at *1 (D. Mont. Mar. 26, 2014).

16. Mark *Wandering Medicine et al.*, *Private Settlement Agreement and Release*, MONT. STATE LEGISLATURE (June 10, 2014), <https://leg.mt.gov/content/Committees/Interim/2021-2022/State->

outcome is a step forward for Native voters in Montana, it is also a story of the immense efforts and expenses required for tribes to secure the most basic rights for their members.

Native American communities are not only burdened by inaccessible polling locations but also by restrictive voter ID laws, strict registration requirements, and myriad other barriers.¹⁷ Numerous states will not accept tribal-issued IDs or tribal-designated street addresses for purposes of registering or casting votes,¹⁸ even when a concealed-carry permit would suffice.¹⁹

Advocacy around Native American voter suppression typically occurs within or parallel to broader conversations about voting rights and discrimination. Native people are recognized as one of several demographic groups disproportionately affected by efforts to deny and dilute political power. Seldom highlighted, however, is the fact that Native voter suppression amounts to more than denying and diluting the rights of individual Native Americans. It also denies and dilutes the sovereign power of Native Nations.

This Note proposes a new framework for combatting the specific harms inflicted by Native voter suppression. Building on decades of critical race and critical legal theory,²⁰ recent scholarship has increasingly recognized that rights-based paradigms are not a panacea for addressing minority suppression.²¹ The prevailing civil-rights model—challenging subordination by asserting traditional legal rights in court—has proven valuable, but it falls short of remedying the underlying economic and political conditions that cause subordination in the

Tribal-Relations/meetings/april-2022/wandering-medicine-settlement-agreement.pdf [https://perma.cc/D7MB-T4R7]; see *Election Directive #01-2015*, MONT. SEC'Y OF STATE 2 (Oct. 15, 2015), https://sosmt.gov/Portals/142/Elections/Documents/Officials/DIR-1-15.pdf [https://perma.cc/49LA-P7D6].

17. See *infra* Part I.

18. See, e.g., Caroline Sullivan, *The Native American Voting Rights Act Unpacked*, DEMOCRACY DOCKET (Sept. 30, 2021), https://www.democracymarket.com/news/the-native-american-voting-rights-act-unpacked [https://perma.cc/U7X3-FHF].

19. Nat'l Cong. of Am. Indians, *Addressing Barriers to Native American Voting Rights: A Tribal-Federal Roundtable Discussion*, at 35:40, YOUTUBE (Oct. 7, 2021) [hereinafter *Addressing Barriers*], https://youtu.be/JhoITcYBQ3M [https://perma.cc/9FYV-5DY2].

20. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

21. See, e.g., Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 554 (2021); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1847 (2019).

first place.²² Power, not just rights, is often necessary to combat subordination.²³ Framing Native voter suppression as a matter of individual rights alone also obscures how it denigrates tribal sovereignty. Historically, the promise of enfranchisement was used to pressure Native Americans to renounce their tribal membership, culture, and lands.²⁴ Today, voting restrictions continue to threaten tribal sovereignty, such as when states and localities reject tribal-issued IDs and interfere with tribes' organization of their own political communities.²⁵

Practical considerations about the state of voting-rights law also support moving beyond an individual-rights framework. The VRA altered the course of American history and political life and remains one of the greatest achievements of the civil-rights movement. But doctrinal developments in the past decade have blunted the VRA's force, prompting scholars and activists to acknowledge that the traditional antidiscrimination model no longer adequately safeguards the vote.²⁶ Although voting-rights advocates have pushed Congress to pass new legislation such as the John Lewis Voting Rights Advancement Act and the For the People Act,²⁷ most meaningful voting-rights reform has slim prospects of making it through today's divided Congress.²⁸ And even if Congress were to successfully enact additional voter protections based on a civil-rights paradigm, it remains uncertain if and how courts would enforce them.²⁹ In sum, new legislation

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22. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512-13 (1976) (“[C]ivil rights litigation remains an unpredictable vehicle for gaining benefits”); Andrias & Sachs, *supra* note 21, at 554.
 23. See Blackhawk, *supra* note 21, at 1849.
 24. See *infra* Part I and Section II.A.1.
 25. See *infra* Part I and Section II.A.2.
 26. See *infra* Section I.A.
 27. John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020); For the People Act of 2021, H.R. 1, 117th Cong. (2021).
 28. See Wines, *supra* note 4; Jacob Pramuk, *Senate Republicans Block Democrats' Sweeping Voting, Ethics Bill*, CNBC (June 22, 2021, 7:45 PM EDT), <https://www.cnbc.com/2021/06/22/senate-to-vote-on-s1-for-the-people-act-bill.html> [<https://perma.cc/YS77-NTKV>]; Li Zhou, *Democrats' Failure on Filibuster Reform Will Haunt Them*, VOX (Jan. 19, 2022, 10:34 PM EST), <https://www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-kyrsten-sinema> [<https://perma.cc/5MRC-PKY8>].
 29. Compare William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31, 33, 61-62 (arguing that it will be difficult for Congress to design a new coverage formula because today's “second-generation barriers are not as amenable to description by formula”), with Max Feldman, *A Chance to Revive the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Dec. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/chance-revive-voting-rights-act> [<https://perma.cc/E6Y8-HEXD>] (arguing that the John Lewis Voting Rights Act's preclearance formula “is an appropriate and effective exercise of congressional power to combat ongoing discrimination in voting” in the wake of *Shelby County*).

modeled on the VRA seems unlikely to surmount the inevitable political obstacles and constitutional challenges in today's political and judicial climate.

This Note proposes new legislation – and, more fundamentally, a new jurisprudential theory – to empower Native Nations in federal elections. The federal government has long recognized that it has a trust relationship with tribes, which includes a substantive responsibility to protect tribal sovereignty.³⁰ To fulfill that obligation, Congress should require state and local election officials to negotiate with tribes toward the formation of tribal-state compacts governing federal election administration in Indian Country. Like the county commissioners in Montana, election officials would have a legal obligation to work with tribal governments in administering elections. Congress could set aside funds to subsidize the cost of these efforts, and it could provide an administrative avenue for enforcement to save tribes from further litigation. This framework would significantly reduce the administrative burden that tribes currently endure when seeking collaboration with counties, filling gaps left by delinquent or under-resourced election officials, and challenging unlawful voting restrictions in court.³¹ While tribes could waive participation, the proposed legislation would give them the opportunity to exercise more power and expend fewer resources in facilitating elections with enormous implications for tribal lands, services, and governmental status.

Part I provides background on the antidiscrimination model underlying voting-rights advocacy and its growing inadequacy for confronting voter suppression. Part II analyzes Native American disenfranchisement from a sovereignty lens, framing election administration as an exercise of tribal self-government and disenfranchisement as a denial of not only individual rights but also sovereign power. From this perspective, the federal government has a duty to enhance tribal sovereign power in federal election administration as part of its trust obligation to tribes. Finally, Part III proposes a legislative scheme for actualizing Native voting power through tribal-state compacts.

I. THE ANTIDISCRIMINATION MODEL OF VOTING RIGHTS

The predominant antidiscrimination model underlying voter-protection efforts took off with enormous success during the civil-rights era and has steadily eroded in the decade since *Shelby County v. Holder*.³² After detailing the model's rise and decline, this Part describes ongoing efforts to reinvigorate voting rights and the practical and normative barriers facing rights-based reform.

30. See *infra* Section II.B.

31. See *infra* Section II.A and Part III.

32. 570 U.S. 529 (2013).

A. *The Rise and Decline of the VRA*

The antidiscrimination model of voting rights is aimed at eradicating racial discrimination from the political process.³³ This model, embodied by the VRA, has long been the dominant framework for combatting voter suppression.³⁴ For most of its life, the VRA succeeded in its mission to increase voter access and curb racial violence and discrimination. As Justice Ginsburg put it, efforts to challenge voter discrimination prior to the 1960s “resembled battling the Hydra”: “Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place.”³⁵ The VRA changed that by offering a new model for counteracting discriminatory electoral practices. Rather than relying solely on case-by-case litigation, Sections 4 and 5 of the Act required states and counties with a history of voter discrimination to obtain approval from the Department of Justice (DOJ) or seek a declaratory judgment in the U.S. District Court for the District of Columbia before enacting laws that would impact voting procedures.³⁶

Eulogized as “the crown jewel of the civil rights era,”³⁷ “the most successful civil rights statute ever enacted by Congress,”³⁸ and “a sacred symbol of American democracy,”³⁹ the VRA’s impact cannot be overstated. In a matter of decades, the statute dismantled much of Jim Crow and fundamentally realigned partisan politics.⁴⁰ Though disenfranchised Black voters in the Jim Crow South were the VRA’s principal target, the statute has been pivotal for securing voting rights for other marginalized groups, including Native Americans.⁴¹ The history of successful voting-rights advocacy under the VRA has also generated positive effects

33. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1432 (2015).

34. See, e.g., *The Future of Voting Rights*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 637, 661 (2014) (remarks of Samuel Issacharoff). The dominance of the antidiscrimination paradigm extends beyond the realm of voting rights. See, e.g., Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1980-81 (2017).

35. *Shelby Cnty.*, 570 U.S. at 560 (Ginsburg, J., dissenting).

36. Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304 (2018).

37. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 95 (2013).

38. Charles & Fuentes-Rohwer, *supra* note 33, at 1390.

39. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 744 (2006).

40. Issacharoff, *supra* note 37, at 95.

41. *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1742 (2016).

for Native communities beyond the right to vote, including improved government services and greater access to government within political subdivisions.⁴²

But the VRA is no longer the powerful statute that it once was.⁴³ The most decisive blow came in 2013, when the Supreme Court invalidated the VRA's preclearance regime in *Shelby County v. Holder*.⁴⁴ Though the *Shelby County* Court did not determine whether preclearance is inherently unconstitutional, it invalidated the specific coverage formula the VRA used for determining which jurisdictions were subject to preclearance.⁴⁵

The impact of *Shelby County* was immediate and sweeping. States previously covered by the preclearance requirement promptly enacted voting restrictions that would have failed (and in some cases had failed) preclearance,⁴⁶ causing a drop in minority-voter turnout sharper than any in decades.⁴⁷ The wave of new voting restrictions hit Native Americans hard in states like Arizona, which closed 320 polling sites in the six years following the decision.⁴⁸ For example, one month before the 2018 primary election, the Pima County Recorder decided to close the only in-person early voting site on the Pascua Yaqui Pueblo Reservation⁴⁹ – a change that previously would have required preclearance. As a result,

42. Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 146-48 (2018).

43. See Charles & Fuentes-Rohwer, *supra* note 33, at 1389 (“It is likely the case that the superstatute we once knew as the VRA is no more and is never to return.”); Heather K. Gerken, *An Academic Elegy: Comment on The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 109, 111 (2015).

44. 570 U.S. 529 (2013).

45. *Id.* at 556-57.

46. Anissa Paredes, *Shelby County v. Holder: Out with the Old & In with the New, Time for a New Formula*, 44 OKLA. CITY U. L. REV. 183, 209-11 (2019); Brief of the North Carolina, Memphis, Central Virginia and Miami-Dade Chapters of the A. Philip Randolph Institute as Amici Curiae in Support of Respondents at 6-16, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258), 2021 WL 260643.

47. *Impacts of the Voting Rights Act and the Supreme Court’s Shelby Ruling*, HARV. KENNEDY SCH. (Oct. 26, 2018), <https://www.hks.harvard.edu/faculty-research/policy-topics/politics/impacts-voting-rights-act-and-supreme-courts-shelby-ruling> [<https://perma.cc/PW2F-44WJ>] (citing Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act* (Harv. Kennedy Sch. Fac. Rsch. Working Paper, No. RWP18-033, 2018), <https://www.hks.harvard.edu/publications/do-40-year-old-facts-still-matter-long-run-effects-federal-oversight-under-voting> [<https://perma.cc/GW4G-X5DS>]).

48. *Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. EDUC. FUND 12 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/5Q5U-6NSK>].

49. See Complaint for Declaratory and Injunctive Relief ¶ 31, *Pascua Yaqui Tribe v. Rodriguez*, No. 20-CV-00432 (D. Ariz. Oct. 22, 2020), 2020 WL 6054430.

tribal residents had to make a two- to three-hour round trip to vote early in person.⁵⁰ The Pascua Yaqui Chairman remarked that the county's decision reminded him of when Native Americans legally lacked the right to vote.⁵¹

After *Shelby County*, the VRA's most powerful surviving provision was Section 2,⁵² which prohibits voting restrictions that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."⁵³ Section 2 targets two broad categories of restrictions: vote denial and vote dilution.⁵⁴ Historical examples of vote denial include poll taxes, literacy tests, and English-only ballots.⁵⁵ Racial gerrymandering and at-large elections exemplify vote dilution.⁵⁶

Over time, attention has shifted between these two modes of voter suppression. Whereas the first wave of VRA enforcement efforts under Section 2 centered primarily on combatting vote denial, a second wave beginning in the 1980s shifted its focus to vote dilution.⁵⁷ In the wake of the 2000 presidential election, legislators, litigants, and academics began paying more attention to what Professor Daniel P. Tokaji termed "the new vote denial" — practices including strict voter-ID laws and felon disenfranchisement.⁵⁸ But when the Court handed down *Shelby County*, the majority of Section 2 litigation still occurred in the context of vote dilution, requiring voting-rights litigants to innovate fresh legal strategies to challenge the flood of new vote-denial restrictions.⁵⁹

From the outset, vindicating voting rights through Section 2 litigation was a poor substitute for Section 5 preclearance. Because Section 5 operated prophylactically and placed the burden on covered jurisdictions to seek preclearance, it

50. *Id.* ¶ 33.

51. Rob Arthur & Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls*, VICE NEWS (Oct. 16, 2018), https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls [<https://perma.cc/6JW7-3FQT>].

52. See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 800 (2018).

53. Voting Rights Act § 2, 52 U.S.C. § 10301 (2018).

54. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 691-92.

59. Ho, *supra* note 52, at 800-01.

was “information–forcing,” incentivizing jurisdictions to gather data on the potential impacts of desired policy changes and address them *ex ante*.⁶⁰ The preclearance regime therefore enabled civil-rights advocates to obstruct discriminatory voting laws without shelling out enormous sums on expert witnesses and other legal fees.⁶¹

In contrast, Section 2 places the burden on litigants to challenge voting restrictions *ex post*. Section 2 challenges are “expensive, cumbersome, and almost wholly ineffective at blocking changes before they take effect.”⁶² Therefore, regardless of how courts resolve any given claim, the costs of enforcing Section 2 functionally limit its scope of protection.⁶³ Instances of vote denial and vote dilution below a certain flagrancy threshold are simply too costly and time-consuming to litigate. In practice, this means that Section 2 frequently fails to prevent or remedy the disenfranchisement of “less populous and more dispersed” communities, including many Native communities.⁶⁴

Nevertheless, the Democratic legal establishment hoped that Section 2 doctrine could evolve to fill the shoes of Section 5.⁶⁵ Voting-rights advocates clung to Section 2 to challenge voting restrictions after *Shelby County*, sometimes succeeding in court or through favorable settlements. Returning to the example of the Pascua Yaqui Tribe, the Tribe sued the Pima County Recorder under Section 2 after the Tribe’s numerous requests to reopen the early voting site were rebuffed.⁶⁶ Though the federal district court denied the request for a preliminary injunction,⁶⁷ the Tribe reached a settlement with Pima County that guarantees an early voting site on the Pascua Yaqui Pueblo Reservation for statewide elections through the end of 2024.⁶⁸

60. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2154 (2015).

61. *Id.*

62. *Id.* at 2143.

63. *Securing Indian Voting Rights*, *supra* note 41, at 1744.

64. *Id.* at 1745.

65. See Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 28–29 (2021).

66. See Complaint for Declaratory and Injunctive Relief, *supra* note 49, at 1–3, 20–21, 23–24.

67. *Pascua Yaqui Tribe v. Rodriguez*, No. 20-CV-00432, 2020 WL 6054430, at *1 (D. Ariz. Oct. 22, 2020).

68. See Emma Gibson, *Pascua Yaqui Tribe to Receive Early Voting Site Till 2024*, ARIZ. PUB. MEDIA (Aug. 13, 2021), <https://news.azpm.org/p/news-splash/2021/8/13/198822-pascua-yaqui-tribe-to-receive-early-voting-site-till-2024> [<https://perma.cc/ELZ2-9N93>].

But last year in *Brnovich v. Democratic National Committee*,⁶⁹ the Supreme Court took away much of Section 2's bite. The suit challenged two Arizona voting restrictions: (1) a state policy of "wholly discarding" ballots cast outside a voter's assigned precinct, and (2) a state statute "criminalizing the collection and delivery of another person's ballot."⁷⁰ The Ninth Circuit held that both practices constituted impermissible vote denial under Section 2. First, empirical evidence revealed that the out-of-precinct policy had a significant disparate impact on minority voters.⁷¹ Second, the court found that the criminalization of third-party ballot collection not only had a substantial disparate impact on minority communities but also may have been enacted with discriminatory intent.⁷²

The Supreme Court reversed, holding that neither restriction violated the VRA. Writing for the majority, Justice Alito reasoned that the Ninth Circuit had "misunderstood and misapplied" Section 2.⁷³ The new set of "guideposts" the Court prescribed for evaluating Section 2 claims⁷⁴ signaled that the provision "will have little relevance to laws the Court frames as innocuous 'time, place, and manner' regulations for casting a ballot."⁷⁵

The Court made clear that the VRA we have today is but a shadow of the superstatute that it once was. As one election-law scholar opined, "One more arrow has been taken out of the quiver of voting-rights plaintiffs And it's not like they had all that many arrows in the quiver to begin with."⁷⁶ In *Brnovich*, the Supreme Court sent yet another signal to lower courts that the judiciary should play a diminished role in monitoring states' election administration.⁷⁷ Some interpret *Brnovich* more broadly as not only foreclosing hope for a robust voting-rights enforcement regime but also portending a wider collapse of anti-discrimination provisions across various substantive areas of law.⁷⁸ In any case, the result in *Brnovich* is a strong indication that the barriers to bringing and prevailing in Section 2 challenges will not diminish any time soon.

69. 141 S. Ct. 2321 (2021).

70. See *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

71. *Hobbs*, 948 F.3d at 1004-07.

72. *Id.* at 1006, 1037, 1042.

73. *Brnovich*, 141 S. Ct. at 2330.

74. *Id.* at 2336.

75. Rodríguez, *supra* note 65, at 30.

76. Wines, *supra* note 4 (quoting Stanford Law School Professor Nathaniel Persily).

77. Derek T. Muller, *Brnovich v. DNC: Election Litigation Migrates from Federal Courts to the Political Process*, 2021 CATO SUP. CT. REV. 217, 236.

78. See, e.g., *Voting Rights Act of 1965—Section Two—Disparate Impact—Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481, 490 (2021).

B. Efforts to Revive Voting Rights

Despite the success that Native American plaintiffs, among others, once had challenging voting restrictions in court, there is widespread recognition that courts are no longer enough.⁷⁹ Following *Shelby County* and *Brnovich*, advocates have called on Congress to enact new civil-rights-style legislation to strengthen voter protections – both in general and specifically to address Native voter suppression.⁸⁰

One proposal to strengthen protections is the Native American Voting Rights Act (NAVRA), which would address many of the barriers to voting that Native Americans experience.⁸¹ NAVRA would require states to accept tribal IDs and a designated on-reservation address for registration, establish more locations for voting and registration on tribal lands, adopt uniform guidelines for early voting, and expand language assistance.⁸² It would also create federally funded “Native American voting task forces” to address additional on-the-ground issues.⁸³ To enforce the statute, tribes, private individuals, or the U.S. Attorney General would be able to seek declaratory or injunctive relief in court.⁸⁴

Unfortunately, any proposals aimed at addressing barriers to voting will confront significant political and legal obstacles. As Professor Heather K. Gerken describes, “Election law scholars . . . are trying to come up with a regulatory scheme at the intersection of what Congress can pass and what the Court can accept, and it may well be a null set.”⁸⁵ Professors Guy-Uriel E. Charles and Luis Fuentes-Rohwer posit that the VRA’s superstatute status “depended upon a consensus with respect to the need to eradicate state-sponsored racial discrimination in voting.”⁸⁶ Once that consensus dissolved – in politics, jurisprudence, and even

79. See, e.g., Milan Kumar, *American Indians and the Right to Vote: Why the Courts Are Not Enough*, 61 B.C. L. REV. 1111, 1143-46 (2020); Ryan D. Dreveskracht, *Enfranchising Native Americans After Shelby County v. Holder: Congress’s Duty to Act*, 70 NAT’L LAWS. GUILD REV. 193, 214 (2013).

80. *Securing Indian Voting Rights*, *supra* note 41, at 1747 & n.150 (citing Dreveskracht, *supra* note 79); Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 280-81 (2015).

81. See, e.g., S. 1912, 114th Cong. (2015); S. 3543, 115th Cong. (2018); H.R. 1694, 116th Cong. (2019); *Securing Indian Voting Rights*, *supra* note 41, at 1748; Ferguson-Bohnee, *supra* note 7.

82. *Native American Voting Rights Act of 2021 (NAVRA)*, NATIVE AM. RTS. FUND (2021), <https://vote.narf.org/wp-content/uploads/2021/08/NAVRA-flyer.pdf> [<https://perma.cc/KU85-GKQC>].

83. *Id.*

84. *Id.*

85. Gerken, *supra* note 43, at 111.

86. Charles & Fuentes-Rohwer, *supra* note 33, at 1420.

the academy—so did a necessary precondition for such a sweeping remedial regime.⁸⁷

A lack of political willpower presents a threshold barrier to passing new voting-rights legislation.⁸⁸ While the VRA was reauthorized by multiple Republican presidents, today it is regarded as a “liberal” bill.⁸⁹ To be sure, issues of federal Indian law and policy do not always divide along conventional party lines.⁹⁰ Indeed, NAVRA has garnered some bipartisan support.⁹¹ But apparently not enough, as it has been introduced in Congress every year since 2014 without success.⁹² Advocates recognize that “Congress may be more likely to act on protecting Indian voting rights because *Indian* rights are involved,” and yet “*Indian voting* rights may be an exception to the exception: voting-related disputes have become highly partisan in nature, and legislation like NAVRA is likely to be perceived as having partisan effects.”⁹³ Perhaps part of the difficulty is that NAVRA has been tied to broader voting-rights legislation like the John Lewis Voting Rights Advancement Act—a bill that would restore and strengthen the VRA, and which garnered vehement opposition from Senate Republicans.⁹⁴

Even if Congress could successfully enact legislation like NAVRA, the courts could limit its scope or efficacy. Taking a page from past VRA litigation, voting-rights opponents might challenge such legislation as an unconstitutional exercise of congressional authority.⁹⁵ In the context of Native voting rights, some scholars have considered how Congress might draw on its plenary power to legislate against voter suppression. However, this scholarship has remained grounded in an individual-rights framework, aimed toward the passage of

87. *Id.* at 1422.

88. *See supra* note 28 and accompanying text.

89. *Protect the Voting Rights Act and Keep Democracy Safe*, LEAGUE WOMEN VOTERS (May 23, 2022), <https://www.lwv.org/blog/protect-voting-rights-act-keep-democracy-safe> [<https://perma.cc/CK9Z-VZR2>].

90. *See* Maria Givens, *The 5 Million Americans that 2020 Candidates Refuse to Talk About*, VOX (Mar. 13, 2020, 9:10 AM EDT), <https://www.vox.com/first-person/2020/3/13/21176957/native-american-vote-2020> [<https://perma.cc/P4T4-DRUX>].

91. *See* Maggie Astor, *There's a Bipartisan Voting Rights Bill. Yes, Really.*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/native-american-voting-rights.html> [<https://perma.cc/ZK42-LX5K>].

92. *See* Sullivan, *supra* note 18.

93. *Securing Indian Voting Rights*, *supra* note 41, at 1748.

94. *Native American Voting Rights Act (NAVRA) as Part of the VRAA*, NATIVE AM. RTS. FUND, <https://vote.narf.org/native-american-voting-rights-act-navra> [<https://perma.cc/XV65-ZLWJ>]; Carle Hulse, *After a Day of Debate, the Voting Rights Bill Is Blocked in the Senate*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> [<https://perma.cc/QBN9-KHN3>].

95. *Securing Indian Voting Rights*, *supra* note 41, at 1748-49.

rights-based legislation like NAVRA.⁹⁶ Invocations of the plenary power could face challenges to the extent that the legislation is “oriented at protecting the voting rights of individual Indians . . . rather than legislating with respect to tribes.”⁹⁷

In light of the increasing political and judicial hostility to claims of discrimination, finding a new model for challenging restrictive voting laws – and other subordinating practices – may eventually be the only viable path forward.

C. *Beyond Rights-Based Reform*

Activists and scholars since *Shelby County* have begun to look beyond the antidiscrimination framework and consider other models, including universalist approaches to civil-rights laws. A universalist model “either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws.”⁹⁸ While some scholars maintain that voting-rights advocates should not divert much energy to universalist approaches,⁹⁹ others have offered persuasive reasons to embrace a paradigm shift.

Professors Charles and Fuentes-Rohwer, reading *Shelby County* as a message that “the voting rights era – and maybe much more broadly, the civil rights era – as we have known it, is over,” caution that continuing to pursue race-based voting-rights claims could “jeopardize the remaining provisions of the VRA and the rest of the civil rights agenda.”¹⁰⁰ Professor Samuel Issacharoff has argued that there is an “increasing mismatch between the narrow civil rights model and the nature of contemporary threats to the right to vote,” as well as “between election flare-ups in battleground or contested jurisdictions and a geographically bound domain based centrally on electoral activity in 1964.”¹⁰¹ It is not that pernicious

96. See *id.* at 1752-54; cf. Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 734-35 (2019); Dreveskracht, *supra* note 79, at 212-14.

97. See *Securing Indian Voting Rights*, *supra* note 41, at 1752.

98. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842 (2014) (analyzing universalist approaches to voting-rights legislation).

99. *Id.* at 2875.

100. Charles & Fuentes-Rohwer, *supra* note 33, at 1391, 1430.

101. Issacharoff, *supra* note 37, at 120. For a middle ground, see Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 31 (2013), which argues that “Professor Issacharoff’s ‘be-

voting restrictions no longer exist. To the contrary, they abound. But the barriers to voting that cause the most harm today look different than the forms of vote denial around which the VRA was molded. Efforts to suppress voting used to be “deliberate, premeditated and obvious,” whereas “[t]oday’s problems are more subtle.”¹⁰²

Traditional rights-centered antidiscrimination reform is losing support even beyond the realm of voting. For decades, critical race and critical legal theorists have brought to light the inadequacies of rights-based paradigms,¹⁰³ and recent scholarship recognizes the inability of rights-based agendas to address all forms and depths of suppression.¹⁰⁴ While civil-rights reforms built on antidiscrimination have been momentarily successful for many legally disadvantaged groups, they do not reach everyone.¹⁰⁵ Further, reform agendas that challenge discrimination on an individual level without accounting for structural disadvantages will not meaningfully combat inequality in the long term.¹⁰⁶

Perhaps most importantly, at critical junctures throughout U.S. history, rights-based models have failed to protect and empower Native Nations and people. Rather, the government has used the promise of rights to advance colonialism. For instance, during the Reservation Era, the national government used rights as leverage over tribes to gain control of ancestral lands while promising to end violence.¹⁰⁷ As Professor Maggie Blackhawk argues, “bestowing power, not rights, through the recognition of inherent tribal sovereignty” is a more effective way to protect Native Nations and people.¹⁰⁸ The distinction between power and rights is at times nuanced, as rights can be sought collectively and the conferral of rights can itself be empowering. But where rights “appeal to a moral or legal principle, often embodied in the ability to make a claim to a government,”¹⁰⁹ power “does not require permission.”¹¹⁰ And whereas rights-based models rely on the courts for redress—thereby making people “objects of judicial

yond discrimination’ approach is incomplete,” and “[w]e need not choose between the Fifteenth Amendment and the Elections Clause [but] can work simultaneously both to prevent racial discrimination in voting and to improve access to the franchise for all Americans.”

102. *Wandering Medicine v. Montana Secretary of State*, *supra* note 10.

103. *See supra* note 20.

104. *See supra* note 21.

105. Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1736 (2012).

106. *See id.*

107. Blackhawk, *supra* note 21, at 1860.

108. *Id.* at 1798.

109. *Id.* at 1867.

110. *Id.* at 1868; *see also id.* at 1867 (“[T]he exercise of rights and the exercise of sovereignty are wholly different practices . . . whether the rights are held by an individual or by a group.”).

solicitude”¹¹¹ – sovereign power enables tribes to “define their own laws, their own systems of governance, and their own rights.”¹¹² The political branches, unlike the courts, can involve Native people in the process of lawmaking through collaborative practices like petitioning and lobbying.¹¹³

II. THE SOVEREIGNTY MODEL OF VOTING POWER

Looking beyond the rights-based framework embodied by the VRA and its progeny, this Part examines voting restrictions through the lens of power and contemplates the federal government’s interest in promoting tribal sovereignty as the basis for enfranchisement. After providing a brief conceptual overview of tribal sovereignty, Section II.A reframes Native American voter suppression as not only a denial of rights to individual citizens but also a denial of sovereign power to tribes. Section II.B then argues that enhancing tribal sovereign power in federal election administration falls within the federal government’s trust obligation to tribes.

A. Voter Suppression from a Sovereignty Lens

Understanding how voter suppression operates as an affront to tribal sovereign power first requires a definition of tribal sovereignty. Federalism scholars define sovereignty as consisting of two related concepts: “freedom from interference” and the “affirmative ability to serve as a source of law and policy.”¹¹⁴ At a basic level, tribal sovereignty refers to the inherent power of tribes to self-govern.¹¹⁵ Like federal or state sovereignty, it is the power of a political community

111. *Id.* at 1858 (quoting Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 *YALE L.J.* 1329, 1332 (2005)).

112. *Id.* at 1857.

113. *See id.* at 1874-75; *see also* Kirsten Matoy Carlson, *Congress and Indians*, 86 *U. COLO. L. REV.* 77, 81 (2015) (“[M]any scholars, tribal leaders, and advocates have recently suggested that Congress may be more responsive than the courts to Indian interests and have turned to legislative strategies for pursuing and protecting tribal interests, especially tribal self-determination and jurisdiction.”).

114. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 12 n.11 (2010); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L. REV.* 1, 53-63 (2004).

115. *See generally* 1 *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* § 4.01 (2019) (explaining tribal governments “in terms of inherent sovereign powers, federally imposed limitations on those powers, and congressional acts that delegate or affirm those powers”).

“to make [its] own laws and be ruled by them.”¹¹⁶ But tribal sovereignty also has a unique legal status.¹¹⁷

Chief Justice Marshall set forth the legal concept of tribal sovereignty in a series of seminal cases known as the Marshall Trilogy. In *Cherokee Nation v. Georgia*, he described tribes’ unique sovereign status as one of “domestic dependent nations.”¹¹⁸ In *Worcester v. Georgia*, he explained that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power.”¹¹⁹ In other words, prior to colonization, tribes were fully independent and self-governing political communities.¹²⁰ After contact with European colonizers, though tribes no longer “possessed . . . the full attributes of sovereignty,” they remained “a separate people, with the power of regulating their internal and social relations,” subject only to limitation by the federal government.¹²¹

Throughout the years, Congress and the Executive have placed limits on tribal sovereignty, typically limiting tribes’ “external political relations” while leaving “internal tribal government” intact.¹²² The judiciary has also policed the boundaries of tribal sovereignty. While the Supreme Court has retained *Worcester*’s core doctrine, it has diluted the conception of tribes’ retained sovereign power.¹²³ The Court has evolved to view tribes as “implicitly divested of their sovereignty in certain respects by virtue of their dependent status” and to allow states under certain circumstances to “validly assert authority over the activities of nonmembers on a reservation.”¹²⁴

The contours of sovereignty continue to be contested. But at minimum, tribal sovereignty requires some base level of self-determination and self-governance. Starting from this baseline, it is apparent how historical and modern-day restrictions on the Native vote are inconsistent with Native Nations’ retained sovereign power.

116. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

117. See Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 *CAP. U. L. REV.* 535, 566 (2009).

118. 30 U.S. (5 Pet.) 1, 17 (1831).

119. 31 U.S. (6 Pet.) 515, 519 (1832).

120. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

121. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

122. 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 115, § 4.01[1][a].

123. See *Williams v. Lee*, 358 U.S. 217, 219 (1959).

124. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (embracing a more limited articulation of tribal sovereignty).

1. *Historical Tribal-Abandonment Requirements*

Native Americans have been disenfranchised for most of the United States's existence.¹²⁵ From the start, disenfranchisement not only restricted the ability of individuals to vote but also served as a mechanism to attack the power and control of tribes themselves.

The Fifteenth Amendment, enacted in 1870, provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹²⁶ But for many years, the Reconstruction Amendments did little for Native people. In 1884, the Supreme Court ruled in *Elk v. Wilkins* that despite being born in the United States, Native Americans were not citizens within the meaning of the Fourteenth Amendment.¹²⁷ As noncitizens, Native people were not protected by the Fifteenth Amendment. According to the Court, the plaintiff John Elk—a taxpaying, English-speaking resident of Omaha, Nebraska—had no constitutional right to vote simply because his parents were members of the Winnebago Nation.¹²⁸

Shortly thereafter, Congress enacted the Dawes Act of 1887, which gave Native Americans a pathway to federal citizenship—but at a price.¹²⁹ The Dawes Act was the centerpiece of the allotment and assimilation period of federal Indian policy, during which the U.S. government reduced Native landholdings by two-thirds and sanctioned forcible assimilation.¹³⁰ Described by President Theodore Roosevelt as “a mighty pulverizing engine to break up the tribal mass,”¹³¹ the Act empowered the President to dissolve tribal lands into small parcels, allot parcels

125. *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, NATIVE AM. RTS. FUND 1 (2020) [hereinafter *NARF Report*], https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf [<https://perma.cc/7XEJ-TJ5P>].

126. U.S. CONST. amend. XV, § 1.

127. 112 U.S. 94, 109 (1884).

128. *Id.*; see also Scott Bomboy, *On This Day: Supreme Court Says Tax-Paying American Indians Can't Vote*, NAT'L CONST. CTR. (Nov. 3, 2021), <https://constitutioncenter.org/blog/on-this-day-supreme-court-says-tax-paying-indians-cant-vote> [<https://perma.cc/Q7KB-UXG3>] (discussing the *Elk* decision).

129. Dawes Act of 1887, ch. 119, 24 Stat. 388.

130. See *History and Culture: Allotment Act—1887*, P'SHIP WITH NATIVE AMs., http://www.native-partnership.org/site/PageServer?pagename=airc_hist_allotmentact [<https://perma.cc/PS5E-45SL>]; L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 811-12 (1996).

131. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 55 (2002) (quoting Theodore Roosevelt's First Annual Message (Dec. 3, 1901), in 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2047 (Fred L. Israel ed., 1966)).

to individual tribal members, and open the “surplus” to white settlers.¹³² Alongside its many sticks, the Act contained a carrot: it declared that “every Indian born within the territorial limits of the United States who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is . . . a citizen of the United States.”¹³³ With the Dawes Act overriding the holding in *Elk*, individual Native Americans could now become citizens, but only by agreeing to have their tribal lands allotted, repudiating their culture and ancestry, and assimilating to “civilized life.”¹³⁴ Put differently, “Indians became citizens, but only by ceasing to be Indians.”¹³⁵

By the 1920s, a half century after the Fifteenth Amendment’s enactment, approximately one-third of Native Americans had yet to acquire U.S. citizenship.¹³⁶ The Indian Citizenship Act of 1924, also known as the Snyder Act, finally granted citizenship to all Native Americans born in the United States.¹³⁷

Yet disenfranchisement, in many cases blanket and explicit, continued beyond the formal grant of citizenship. Some states, such as Montana, Wyoming, and South Dakota, sought to nullify the Native vote through redistricting and suppressive tactics; others such as Utah, Arizona, and New Mexico outright barred Native people from voting.¹³⁸ The courts upheld disenfranchisement on the premise that, despite Native citizens’ entitlement to constitutional protections, the state could place “reasonable qualifications” on the right to vote.¹³⁹ States made, and courts accepted, an assortment of arguments for why vote denial was “reasonable,” many of which were imprecise, pretextual, and based on denigrating assumptions about Indigenous people.¹⁴⁰ For instance, a frequent

132. §§ 1-5, 24 Stat. at 388-90; see Cleveland, *supra* note 131, at 55; Renalia Du Bose, *Voter Suppression: A Recent Phenomenon or an American Legacy?*, 50 U. BALT. L. REV. 245, 270 (2021); Mary K. Nagle, *Nothing to Trust: The Unconstitutional Origins of the Post-Dawes Act Trust Doctrine*, 48 TULSA L. REV. 63, 73 (2012).

133. § 6, 24 Stat. at 390.

134. *Id.*

135. See Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1427 (2011) (quoting LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* 16 (2010)).

136. *Securing Indian Voting Rights*, *supra* note 41, at 1733.

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

138. See Dreveskracht, *supra* note 79, at 194. Some states specifically disenfranchised “Indians not taxed” or those living on reservation land. See *NARF Report*, *supra* note 125, at 11.

139. *Allen v. Merrell*, 305 P.2d 490, 491 (Utah 1956), *vacated*, 353 U.S. 932 (1957).

140. See, e.g., *NARF Report*, *supra* note 125, at 11 (outlining state constitutional prohibitions and residency requirements that barred Native voting); *Securing Indian Voting Rights*, *supra* note 41, at 1734 (similar).

justification was that Native Americans did not pay taxes,¹⁴¹ an inaccurate generalization¹⁴² that failed to explain why non-taxpaying white citizens could still vote.¹⁴³ Several other common excuses – such as illiteracy and incompetence – were even more plainly derogatory. For instance, the Supreme Court of Arizona accepted the state’s argument for denying voting privileges to Native citizens on the basis that “Indians [are] not capable of handling their own affairs in competition with the whites, if left free to do so.”¹⁴⁴ Blatant exclusion continued in many states well into the mid-twentieth century. It was not until 1957, perhaps fearing an adverse ruling from the U.S. Supreme Court, that Utah repealed the last categorical bar on Native voting.¹⁴⁵

In addition to these unique barriers, states suppressed the Native vote through many of the same facially neutral exclusionary practices used against Black citizens in the Jim Crow South and Latino citizens in the Southwest, such as poll taxes and literacy tests.¹⁴⁶ For instance, even after the Supreme Court of Arizona reversed its earlier decision denying Native citizens voting rights, literacy tests kept many Native Americans in Arizona from voting until 1970, when the U.S. Supreme Court upheld Congress’s authority to ban literacy tests nationwide.¹⁴⁷

This history reveals how the exclusion of Native Americans from voting has always been interwoven with efforts to undermine tribal sovereignty, as Native people’s ability to vote has been premised on the abandonment of tribal interests

141. See, e.g., *Allen*, 305 P.2d at 492.

142. See, e.g., *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 600-01 (1943).

143. See *NARF Report*, *supra* note 125, at 12; Karlan, *supra* note 135, at 1430-31 (“Many states formally disenfranchised ‘Indians not taxed,’ by which they meant Indians living on reservations or other federal land that was not subject to property taxes. The ostensible justification for this exclusion was ‘no representation without taxation’: individuals who did not contribute to the government’s revenue should not be entitled to influence how that revenue was spent. Even on its own terms, the bar was overbroad: Indians had no exemption from a wide range of state and local taxes, most notably state and local sales taxes for off-reservation purchases and real estate taxes for land held in fee simple. Moreover, the disqualification was expressly racial in character: none of these states disqualified whites who were not subject to property taxes.” (internal citations omitted)).

144. *Porter v. Hall*, 271 P. 411, 417, 419 (Ariz. 1928), *overruled by* *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948).

145. *NARF Report*, *supra* note 125, at 12.

146. Karlan, *supra* note 135, at 1422, 1430; *Securing Indian Voting Rights*, *supra* note 41, at 1734.

147. *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970); see *Ferguson-Bohnee*, *supra* note 7.

and allegiance.¹⁴⁸ Enfranchisement requiring that an individual exit a tribal political community—or, as *Elk* implied, the dissolution of that community—was baked into various state and federal policies in the nineteenth and twentieth centuries.¹⁴⁹

State laws also positioned tribal abandonment as a requirement for voting. Minnesota constitutionalized a “cultural purity test,”¹⁵⁰ prohibiting Native people from voting unless they could prove, upon an examination by a district court, that they had “adopted the language, customs, and habits of civilization.”¹⁵¹ A 1903 South Dakota law barred Native people “maintaining tribal relations” from voting.¹⁵² A 1920 North Dakota Supreme Court case instituted a culture test allowing Native people to vote if they “live the same as white people; they are law-abiding; do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians; that they have severed their tribal relations.”¹⁵³ Off-reservation residence requirements functioned in much the same way. For instance, in order to vote in Utah through the late 1950s, Native people were required to move off reservations to “forgo[] the paternalistic favors there conferred” and “remove[] the detachment and lack of interest in the affairs of the state which surrounds [them] on the reservation.”¹⁵⁴

The motivation behind these policies was far from hidden. One court approvingly stated that there was “[n]o doubt the right of suffrage was by [the] state held out as an inducement to the Indians to sever their tribal relations and adopt in all respects the habits and customs of civilization.”¹⁵⁵ Tribal-abandonment voting requirements embodied a particular type of cultural imperialism aimed at not only subordinating but altogether extinguishing tribal sovereignty. The end goal was—again borrowing from *Elk*—to arrive at a time

148. See *Elk v. Wilkins*, 112 U.S. 94, 120 (1884) (“When . . . the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and . . . it would seem that his right to protection, in person, property and privilege, must be as complete . . . as that of any other native-born inhabitant.” (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1933 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 1873))).

149. See Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 390; *supra* notes 129–135 and accompanying text.

150. *NARF Report*, *supra* note 125, at 11.

151. *Id.* (quoting MINN. CONST. art. VII, § 1(4) (1858)).

152. *Id.* at 12 (quoting S.D. CODIFIED LAWS § 26 (1903)).

153. *Id.* (quoting *Swift v. Leach*, 178 N.W. 437, 439 (N.D. 1920)).

154. *Allen v. Merrell*, 305 P.2d 490, 495 (Utah 1956).

155. *In re Liquor Election*, 163 N.W. 988, 991 (Minn. 1917).

“[w]hen . . . tribal relations are dissolved, when . . . the authority of the tribe is no longer recognized.”¹⁵⁶

2. *Voter Suppression and Tribal Sovereignty Today*

Today, states and localities continue to enact voting restrictions that neglect or intentionally target Native Americans.¹⁵⁷ In 2020, the Native American Rights Fund (NARF) published a comprehensive report on the obstacles that Native Americans face to full political participation.¹⁵⁸ The report found that barriers to registering and casting a ballot remain widespread. Prominent barriers include a lack of polling places on or near reservation lands; unequal access to in-person voting, early voting, and voter registration; restrictions on voting by mail, third-party ballot collection, and out-of-precinct voting; inadequate voter education and language assistance; a lack of Native election workers; voter-ID requirements that exclude tribal-issued IDs; and registration requirements that discriminate against nontraditional mailing addresses and homelessness.¹⁵⁹

Despite historical and ongoing barriers to voting, the Native vote has been a decisive force in recent elections. According to the NARF report, Native American voters are “regularly determinative” in South Dakota, North Dakota, Alaska, and some Southwestern states.¹⁶⁰ In the words of U.S. Secretary of the Interior Deb Haaland, Native voters in the 2020 election “shocked the nation.”¹⁶¹ But upswings in turnout do not mean that the voting process is easy or fair.¹⁶² As Jacqueline De León, an attorney for NARF and a member of the Isleta Pueblo, has described, “Overcoming barriers doesn’t mean that those barriers are justified in the first place.”¹⁶³ In many Native communities, voting in federal and state elections requires an affirmative display of resilience, not just the routine performance of a citizenship right.

156. *Elk v. Wilkins*, 112 U.S. 94, 120 (1884).

157. See Ferguson-Bohnee, *supra* note 7.

158. *NARF Report*, *supra* note 125.

159. *Id.* at 2.

160. *Id.* at 1.

161. Four Directions, *Congresswoman Deb Haaland and Four Directions Vote Town Hall*, at 10:21, YOUTUBE (Dec. 22, 2020), <https://youtu.be/uQneRaFvWS0?t=613> [<https://perma.cc/HU4T-UBDX>].

162. See generally Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws’ Effects Teaches About Asking the Right Questions*, UCLA L. REV. (forthcoming 2023), <https://ssrn.com/abstract=3942940> [<https://perma.cc/PG43-EMMZ>] (arguing that social scientists and legal scholars should look to more than ultimate turnout rates to analyze the suppressive effects of voting restrictions).

163. *Addressing Barriers*, *supra* note 19, at 40:55.

Though states no longer have tribal-abandonment requirements, laws and practices that restrict the Native vote continue to threaten tribal sovereignty. States can condition individual Native participation in national politics on the political subordination and assimilation of Native Nations vis-à-vis states.

First, some restrictive voting laws denigrate tribal sovereignty in a straightforward sense by questioning the legitimacy of tribes' sovereign authority. The rejection of tribal IDs and reservation addresses is an especially glaring example. In questioning the legitimacy of the IDs and addresses, states question the source of sovereign power that issued them. For tribal members to vote under such restrictions, tribes must conform their IDs and addresses to look like the state's. If they do not or cannot,¹⁶⁴ a tribe's members must literally and figuratively identify with another sovereign in order to vote – a change that is eerily reminiscent of the tribal-abandonment requirements of the nineteenth and twentieth centuries.¹⁶⁵

For example, when Arizona enacted its voter-ID law in 2004, the Navajo Nation did not issue tribal IDs to its members. Professor Patty Ferguson-Bohnee, an advocate who has assisted tribes in complex voting-rights litigation, explains that “[u]nder the Navajo belief system, identity is confirmed through the traditional kinship system,” so Navajo citizens did not need a tribal ID to vote in tribal elections or receive services on their reservation.¹⁶⁶ The Navajo Nation requested monetary assistance from the Arizona legislature to help develop a tribal-ID program, but the legislature declined.¹⁶⁷

Second, on a broader level, state control over the federal election process denies Native Nations the sovereign authority to set the conditions under which their own citizens vote on their own land. Granted, some federalism scholars contest whether states' administration of federal elections is actually an exercise of their own state sovereignty. For example, Professor Franita Tolson argues that because “[t]he Elections Clause gives states the ability to choose the ‘time, place, and manner’ of elections but reserves to Congress the power to veto state elec-

164. *NARF Report*, *supra* note 125, at 76 (“[M]any tribal IDs do not contain expiration dates since ‘we don’t quit being Indian at some particular point’ and laws that require an expiration date on an ID would exclude otherwise qualifying IDs. Updating tribal IDs to contain specialized information or security features is expensive and may be unattainable to impoverished tribes.” (footnotes omitted)).

165. *See Securing Indian Voting Rights*, *supra* note 41, at 1741.

166. Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1125-26 (2015).

167. *Id.* at 1125.

toral schemes,” states merely have qualified autonomy, not sovereignty, over election administration.¹⁶⁸ Further, traditional federalism scholarship more typically contemplates how the administration of federal policies and programs might *inhibit* state sovereignty, rather than constitute an exercise of state sovereignty.¹⁶⁹

But the ability to structure elections is undoubtedly a source of power. And however one wishes to characterize that power, states at least exercise a sovereign-like function in determining the conditions of their citizens’ participation in federal elections. Native Nations, on the other hand, cannot maintain the same pipeline between their political community and the federal government. The internal sovereign authority of Native Nations over their members is thereby undermined by an inability to protect them from discrimination and guarantee free and fair voting conditions.

Third, states’ control over federal elections, when abused, forces Native communities to further integrate into and rely on colonial power to vindicate the Native vote.¹⁷⁰ If Native Nations want their citizens to have the same voice in our democracy as other U.S. citizens, they must allow state laws and actions to influence how they structure their own communities. For instance, Native Nations must plan their own elections around state and federal ones because failure to coordinate the different elections can make it challenging for Native voters to participate in both.¹⁷¹ Moreover, when states reject tribal IDs or reservation addresses, Native Nations must choose the path of assimilation (making their addresses and IDs more like those of states) or the path of litigation (challenging the state laws in court). While litigation may be preferable, it still requires tribes to litigate in the courts of and under the laws of another sovereign, and to use their own resources to secure the ability of tribal members to vote.

168. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1197 (2012). This characterization seems most persuasive if one equates sovereignty with “final policymaking authority,” as Professor Franita Tolson does in the Elections Clause context. See *id.* at 1242-47.

169. See, e.g., Gerken, *supra* note 114, at 12-13 (discussing states’ administration of federal programs as complicating various conceptions of state sovereignty); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 702-03 (2001) (similar).

170. Cf. Blackhawk, *supra* note 21, at 1872 (discussing how “imposing rights defined by the colonial power” on colonized communities “causes harm and furthers the colonial project” by both “undermining the sovereignty of the colonized community” and “forcing the colonized community to integrate into the polity of colonial power in order to have a say in the definition of their rights”).

171. See *Securing Indian Voting Rights*, *supra* note 41, at 1741.

3. *Tribal Interests in Federal Elections*

It is worth considering why it would be desirable for Native Nations to enhance their power in an external sovereign's political processes. The simple answer is that federal policy has enormous implications for tribes, and elections directly determine that policy. As a member of the Pueblo of Isleta testified, "The impact that the federal government has on tribal communities and tribal people is more than any other member of U.S. society."¹⁷² Presidential and congressional elections impact tribal lands, resources, social services, economic health, governmental status, and jurisdiction. Moreover, voting can empower representatives who will prioritize the unique challenges plaguing Native communities. Asked why she chose to run for Congress, then-Representative Deb Haaland, a member of the Pueblo of Laguna, explained that "the issues that [Native citizens] cared about needed to be mainstream issues."¹⁷³

Further, whereas a rights-based framework requires Native citizens or organizations to challenge suppression through the courts of another sovereign, a power-based framework could grant Native Nations a governing stake in the administration of elections that impact their self-determination and self-governance. Voting power could shift more power to tribes by increasing their bargaining position with local election officials. And by seeing their tribal governments exercise that power, Native citizens might gain more faith in the federal elections process. Eventually, eliminating barriers to voting could shape the political power of Native Nations through the election of federal representatives that respect tribal sovereignty and forward tribal interests.

A voting-power framework could also be designed to place administrative burdens on the states rather than tribes and to allow tribes to waive participation. Tribes frequently undertake resource-intensive efforts to provide voters with assistance and information when election officials fail to do so.¹⁷⁴ While such efforts are successful in increasing voter registration and turnout,¹⁷⁵ they place unfair burdens on tribes. "[T]ribes should not be forced to engage in self-help to provide the language assistance that non-tribal governments covered by [the Voting Rights Act] are required to offer," one Native community organizer noted, when their members "are citizens of the United States of America in addition to being citizens of . . . tribes."¹⁷⁶ Further, it can be difficult for tribes and

172. *NARF Report*, *supra* note 125, at 62 (quoting testimony from Helen Padilla, Isleta Pueblo, 42-44, 57, 59).

173. *Four Directions*, *supra* note 161, at 16:39.

174. *See, e.g., infra* notes 210-212 and accompanying text.

175. *NARF Report*, *supra* note 125, at 62.

176. *Id.* (referencing testimony from Laurie Weahkee, Isleta Pueblo, 215-16) (cleaned up).

tribal organizations to assist voters when states and localities do not consult with tribes about voting procedures or notify them of changes.¹⁷⁷ Implementing a voting-power framework would better equip tribes to perform the role they already fill in assisting Native voters, but on their own terms and with much of the administrative burden lifted.

B. Voting Power as a Federal Trust Responsibility

Congress should consider it a trust obligation to intervene in the denial of voting power to tribes. A distinct and foundational aspect of federal Indian law is the trust relationship between the federal government and federally recognized tribes. For centuries,¹⁷⁸ the United States has recognized that it carries certain fiduciary responsibilities to tribes, such as providing services and safeguarding tribal autonomy.¹⁷⁹

The trust relationship has troubled origins, as it derives from the subordinating and culturally imperialist notion that tribes are “in a state of pupillage” and their “relations to the United States resemble that of a ward to his guardian.”¹⁸⁰ Historically, it has been used as “the source of federal authority to wreak all manner of harm on tribal communities”¹⁸¹ – justifying, for instance, the federal government’s plenary power to abrogate treaty terms.¹⁸² But since the beginning of the self-determination period of federal Indian policy – as Congress and the Executive have moved toward enhancing, rather than undermining,

177. *Id.* at 88-89.

178. *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that the relation of tribes to the United States “resembles that of a ward to his guardian”).

179. See generally Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, CAL. WATER LIBR. (2009), <https://cawaterlibrary.net/wp-content/uploads/2017/05/The-Federal-Tribal-Trust-Relationship.pdf> [<https://perma.cc/SJ5Y-M995>] (discussing the trust relationship between the United States and Native Nations).

180. *Cherokee Nation*, 30 U.S. at 17; cf. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (“[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self government, by associating with a stronger, and taking its protection.”).

181. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 318 (2006).

182. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The historical relationship between the federal trust responsibility and congressional plenary power remains contested. See, e.g., Nagle, *supra* note 132, at 71 (“[T]he initial trust relationship was not the result of any congressional plenary power because prior to 1886, the Supreme Court had not yet recognized any such power.”).

tribal sovereignty, albeit with some judicial backlash¹⁸³ – the trust responsibility has evolved. The modern trust responsibility “imposes certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., health care and education), the duty to protect tribal sovereignty, and the duty to protect tribal resources.”¹⁸⁴ Congress has codified these duties into law,¹⁸⁵ and the executive branch has recognized them in orders and memoranda.¹⁸⁶

Given that the current state of federal election administration threatens tribal sovereignty, Congress has a substantive duty based on its trust responsibility to enhance tribal sovereign power in the election process. Indeed, advocates have invoked the federal trust responsibility when calling on Congress to pass legislation like NAVRA to safeguard the voting rights of Native citizens.¹⁸⁷ Reframing Native voter suppression as a sovereignty issue, not just as an individual-rights issue, strengthens the case: while the federal government acknowledges

183. See generally Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001) (describing the self-determination period in executive and legislative policy, as well as judicial backlash).

184. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 418-19 (2013).

185. E.g., Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. § 3601) (recognizing that “the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government”); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8101, 122 Stat. 923, 1287 (codified at 25 U.S.C. § 3051) (recognizing “the policy of the United States to promote tribal sovereignty and self-determination”); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 3, 88 Stat. 2203, 2203-04 (codified at 25 U.S.C. § 450a) (recognizing “the obligation of the United States to respond to the strong expression of the Indian people for self-determination”).

186. E.g., Exec. Order No. 13,175, 3 C.F.R. 304 (2001), *reprinted as amended in* 25 U.S.C. § 5301 (2018) (recognizing “the right of Indian tribes to self-government and support[ing] tribal sovereignty and self-determination”); *Order No. 3335: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries*, U.S. DEP’T OF THE INTERIOR (Aug. 20, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> [<https://perma.cc/2QU4-CGRF>] (emphasizing “the importance of honoring the United States’ trust responsibility to federally recognized tribes and individual Indian beneficiaries”); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021), <https://www.govinfo.gov/content/pkg/DCPD-202100091/pdf/DCPD-202100091.pdf> [<https://perma.cc/CUF8-WPF2>] (prioritizing “respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations [as] cornerstones of Federal Indian policy”).

187. E.g., *Addressing Barriers*, *supra* note 19, at 5:39, 24:00, 56:36, 58:00.

its trust responsibility extends “to all federally recognized Indian tribes and individual Indian beneficiaries,”¹⁸⁸ a threat to tribal sovereignty provides an additional – and arguably the most fundamental – basis for invoking the trust duty.

To be sure, Congress would likely consider the countervailing state interests implicated in transferring more voting power to tribes. Even in federal elections, citizens vote for officials to represent their state. One might argue that the power to regulate elections should belong fully with the state, rather than be shared with a separate sovereign. While this argument is weaker with respect to presidential elections, it carries more weight in the context of congressional elections, where candidates are running for a given state’s seats. Residents of the Pascua Yaqui Pueblo, for instance, do not vote for their Pueblo as a political unit but rather vote for U.S. Senators to represent Arizona and a U.S. Representative to represent their district.

At its core, this counterargument speaks to the deeper issue of Native Nations lacking their own delegates in Congress. Over the years, advocates have sought to change this, citing historical precedent for doing so.¹⁸⁹ However, in a political world that remains hostile even to D.C. statehood, the likelihood of the federal government appointing delegates to represent tribes as voting members

188. *Order No. 3335: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries*, *supra* note 186, § 2.

189. Mark Trahan, Opinion, *Congress Should Appoint Delegates to Represent Tribal Nations*, HIGH COUNTRY NEWS, Aug. 5, 2015, <https://www.hcn.org/articles/tribal-affairs-indigenous-voices-are-needed-to-make-us-a-better-democracy> [<https://perma.cc/STL9-SWNF>] (“[I]f Indian Country sent delegates to Congress, we would have representatives whose only job would be to represent Indian Country. That’s no different than what James White did in 1830. He was a delegate charged with advocating for the territory of Ohio. That’s exactly the type of representation that treaty tribes and their citizens deserve.”). *But see* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 27 (2019) (arguing that “the prospect of statehood has always represented a Faustian bargain for Native peoples: it promised to place Native sovereignty and self-government on a clearer constitutional footing, but at the cost of those aspects of Native governance that make Native nations indigenous”).

The Cherokee Nation has also argued for a congressional delegate based on the 1835 Treaty of New Echota – the treaty the federal government used to forcibly displace the Nation from its ancestral lands and move them westward along the Trail of Tears. The treaty expressly gives the Nation a right to appoint a delegate to the House of Representatives, though it does not specify whether the delegate would be a voting member. Recently, Congress held its first-ever hearing on establishing a Cherokee Nation seat, though for a nonvoting delegate. *See* Giulia Heyward, *Congress Holds First Ever Hearing on a Congressional Seat for the Cherokee Nation*, WAMU 88.5 (Nov. 18, 2022), <https://wamu.org/story/22/11/18/congress-holds-first-ever-hearing-on-a-congressional-seat-for-the-chokeee-nation> [<https://perma.cc/V376-WU37>]; Harmeet Kaur, *The Cherokee Nation Wants a Representative in Congress, Taking the US Government Up on a Promise It Made Nearly 200 Years Ago*, CNN (Aug. 25, 2019, 2:40 AM EDT), <https://www.cnn.com/2019/08/25/politics/chokeee-nation-congressional-delegate-treaty/index.html> [<https://perma.cc/QGT4-YJ2A>].

of Congress is slim.¹⁹⁰ The fact that Native Nations lack a direct voice in Congress—and instead must speak through the votes cast for state representatives by their members, which may be diluted across district or state lines—provides more reason to enhance their voting power, not less.

On a broader level, the lack of tribal representation in Washington suggests that traditional theories of federalism do not translate neatly into the tribal context: tribes, unlike states, lack the “political safeguards of federalism.”¹⁹¹ This distinction has historically impaired tribal interests. As the Indian Removal Act and ensuing Trail of Tears illustrate, “states often got the federal government to back their claims against Native Nations by flexing their political and electoral power.”¹⁹² With the rise of the federal administrative state and strategic tribal lobbying, “tribes can sometimes get a sympathetic administration to back their interests against those of the states,” but those outcomes are “tenuous, fragile, and dependent on partisan politics.”¹⁹³

Ultimately, transferring some measure of voting power to tribes implicates the same prickly question of balancing state and tribal power that permeates federal Indian law and policy. Courts and policymakers have long had to “reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.”¹⁹⁴ In the domain of federal election administration, state power has prevailed over tribal sovereignty. For too long, and in too many places, state and local election officials have abused that power, undermining tribes’ authority and self-governance. While states should remain primarily empowered to administer federal elections within their borders, tribes’ sovereign status should entitle them to share in that power when states regulate political participation in Indian Country.

III. A LEGISLATIVE PROPOSAL: TRIBAL-STATE COMPACTS

The antidiscrimination model of voting rights has been the predominant framework for theorizing and combatting the suppression of Native American

190. Maya Efrati, *DC Statehood Explained*, BRENNAN CTR. FOR JUST. (Mar. 18, 2022), <https://www.brennancenter.org/our-work/research-reports/dc-statehood-explained> [https://perma.cc/TJG7-RTXN].

191. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954); see Ablavsky, *supra* note 189, at 25 (“Because the many proposals for Native representation in Congress came to naught, Native nations have never enjoyed the benefit of the ‘political safeguards of federalism’ . . .”).

192. Ablavsky, *supra* note 189, at 25.

193. *Id.*

194. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 165 (1973).

voters and other demographic groups. Current reform efforts, therefore, typically speak in the language of rights, not power. After all, it is the Voting Rights Act that transformed the fabric of American democracy. But rights-based reform efforts run up against both practical and normative limitations while failing to strengthen tribes' power to govern their own political communities.

This Part proposes a specific legislative framework for challenging Native voter suppression by enhancing tribal sovereign power in federal election administration. Whereas voting-rights laws have required individuals or groups to challenge violations in court, a voting-power framework could instead involve Native Nations in the process of lawmaking and regulating, enabling tribes to exert a measure of sovereign power over federal elections in Indian Country.

While Congress could prescribe what tribal participation would look like or delegate the task to a federal regulatory body like the Bureau of Indian Affairs or even the Federal Election Commission, one generic model of tribal participation is unlikely to suit the needs and desires of all Native Nations across all states. A better approach would directly empower federally recognized tribes to play a role in determining if and how they will participate in federal election administration.¹⁹⁵ In particular, Congress should require states to negotiate with tribes on the mechanics of federal election administration in Indian Country.

This Part elaborates on this proposed approach. Section III.A provides background on the existing landscape of tribal-state cooperation. Section III.B lays out a framework for instituting tribal-state compacts in federal election administration, envisioning the statutory obligations Congress could impose and the available mechanisms for enforcement. Section III.C addresses Congress's constitutional authority to enact and enforce such legislation. Finally, Section III.D discusses the proposal's pragmatic advantages.

A. *Background on Tribal-State Cooperation*

Tribes and states negotiate, collaborate, and form agreements over numerous issues, from law enforcement and taxation to environmental management and

195. The trust relationship generally exists only between Congress and federally recognized tribes; therefore, Congress does not have the same fiduciary duties to nonrecognized tribes. See Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 489-90 & n.22 (2006) (reviewing RENÉE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT* (2005)); and MARK EDWIN MILLER, *FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS* (2004)); Taino J. Palermo, *Returning Home and Restoring Trust: A Legal Framework for Federally Non-Recognized Tribal Nations to Acquire Ancestral Lands in Fee Simple*, 27 ROGER WILLIAMS U. L. REV. 305, 320 (2022). The complicated politics of federal recognition is outside the scope of this Note.

education.¹⁹⁶ Agreements range from informal memoranda of understanding – clarifying the roles of each sovereign – to more formal tribal-state compacts.

In some areas, the federal government has created a framework for tribal-state cooperation. Under the Indian Gaming Regulatory Act (IGRA), which governs the operation and regulation of Indian gaming, tribes that wish to conduct casino-style gaming in Indian Country must create a valid compact with the state.¹⁹⁷ The Indian Child Welfare Act, a statute enacted in response to the large-scale forced removal of Native children from their families,¹⁹⁸ authorizes tribes and states to form agreements over the custody of Native children.¹⁹⁹

Tribes and states also form agreements by their own accord.²⁰⁰ Though they cannot alter jurisdiction in Indian Country without the federal government's approval, they can enter cooperative agreements over other matters if both tribal and state law authorize them to do so.²⁰¹ Many tribes and states have enabling statutes that authorize compacts either broadly or in specific policy areas.²⁰²

Depending on the context, tribal-state agreements can be empowering or disempowering for tribes. On the one hand, tribal-state compacts may diminish tribal sovereignty, as has been the case with gaming. In 1987, the Supreme Court held that California could not regulate tribal bingo enterprises without express consent by Congress, because doing so infringed on tribes' inherent sovereign power within Indian Country.²⁰³ A year later, Congress overrode the decision with the passage of IGRA, over general opposition from tribes.²⁰⁴ By requiring tribes to negotiate with states to conduct casino-style gaming, IGRA transferred

196. See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 115, § 6.05; cf. Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 266 (1991) (empirically surveying tribal-state agreements); Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045, 1060-67 (2011) (similar).

197. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2018).

198. Indian Child Welfare Act, 25 U.S.C. § 1901-63 (2018).

199. *Id.* § 1919.

200. See NAT'L CONF. OF STATE LEGISLATURES & NAT'L CONG. OF AM. INDIANS, GOVERNMENT TO GOVERNMENT, MODELS OF COOPERATION BETWEEN STATES AND TRIBES 16-57 (Apr. 2009) [hereinafter GOVERNMENT TO GOVERNMENT], https://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Models_of_Cooperation_Between_States_and_Tribes_2002.pdf [<https://perma.cc/275Z-38JR>] (documenting examples).

201. See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 115, § 6.05.

202. *Id.*

203. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987).

204. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794-95 (2014) (acknowledging the override); S. REP. NO. 100-446, at 4 (1988), *reprinted in* 1998 U.S.C.C.A.N. 3071, 3073-74 ("Tribes generally opposed any effort by the Congress to unilaterally confer jurisdiction over gaming activities on Indian lands to States . . .").

to states a portion of the sovereign power that tribes previously exercised over gaming in Indian Country. And in such compacts, tribes may lack the economic, political, or legal bargaining power to reach advantageous terms.²⁰⁵

On the other hand, cooperation with states can materially benefit tribes and reinforce their sovereign status. Over the past several decades, the National Congress of American Indians has promoted intergovernmental cooperation between tribes and states.²⁰⁶ In a report it published with the National Conference of State Legislatures, it explained that “[e]xercising tribal self-determination by interacting with state governments on the basis of inherent governmental authority also can serve to reinforce tribal sovereignty, rather than to diminish it.”²⁰⁷ For instance, states may contract with tribes to administer state or federal programs in Indian Country, reinforcing tribes’ authority over government services in their own lands.²⁰⁸

Tribal-state collaboration has also existed in the realm of elections, though in a largely patchwork fashion and often at tribes’ expense. Certain states and counties have been willing, though they are not required, to work actively with tribes in preparation for elections. For example, leading up to the 2016 election, three of Arizona’s nine counties collaborated with tribes to ensure voters would have adequate language assistance. Navajo County and the Navajo Nation Election Administration worked together to prepare translations of key election information for voters, including audio guides and a glossary of terms.²⁰⁹

But not all states and counties are eager to collaborate with tribes. In Montana, for example, the governor failed to consult with tribes before launching a new vote-by-mail program, causing tribes to scramble to provide Native voters with the updated information they needed to properly cast ballots.²¹⁰ Unfortunately, this outcome represents a common pattern. At present, many Native Nations must expend resources and energy on providing assistance to Native voters when election officials fail to do so. Tribes frequently must resort to preparing their own language assistance and voter information guides.²¹¹ For instance, the

205. See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 115, § 6.05.

206. See *State/Tribal Relations*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations> [<https://perma.cc/BWC8-J5VV>].

207. GOVERNMENT TO GOVERNMENT, *supra* note 200, at 3.

208. *Id.* at 4, 73-77.

209. *NARF Report*, *supra* note 125, at 61.

210. *Id.* at 89.

211. *Id.* at 57-64, 89.

nineteen Pueblos in New Mexico created a “Pueblo Platform” that informed voters about candidate positions on key issues and found interpreters to translate the guide into Pueblo languages.²¹²

When collaboration does occur, it is often the product of litigation. That is, states and tribes will bargain over the conditions of elections when they settle lawsuits. The settlement over satellite offices in Montana²¹³ and the Pascua Yaqui Tribe’s settlement with Pima County over on-reservation early voting sites²¹⁴ are just two of numerous examples. In testimony to Congress, Jonathan M. Nez, then-President of the Navajo Nation, explained that many problems the Tribe faces “due to [its] largely rural and expansive nature . . . could be solved with increased polling locations per precinct[] and adding voter registration centers across the Nation,” but “local opposition to these measures has prevented solutions that have often only been rectified by bringing challenges to court.”²¹⁵

In 2014, after San Juan County, Utah closed eight of its nine physical polling places over opposition from the Navajo Nation, the Nation brought suit alleging VRA and equal-protection violations.²¹⁶ They settled in 2018, with the County agreeing to continue providing certain polling locations and in-person voting-assistance services.²¹⁷ Though the settlement provided a temporary fix, it required four years of litigation and left the Navajo Nation with the knowledge, in Nez’s words, that “when the current settlement expires, [the Navajo Nation] may be forced to go to court once again unless Congress acts.”²¹⁸ Janet Davis, Chairwoman of the Pyramid Lake Paiute Tribe, shared a similar story of having to file a federal lawsuit in order to obtain a polling location and early voting on the Tribe’s reservation. She noted that litigation “takes time and money that tribes don’t have” and called for congressional action.²¹⁹

Scholars and activists have recognized the advantages of tribal-state cooperation in elections. For instance, Professor Jeanette Wolfley has argued that implementing cooperative agreements would help address voting issues, as tribal

212. *Id.* at 62.

213. *See supra* notes 10-16 and accompanying text.

214. *See supra* note 68 and accompanying text.

215. *Restoring the Voting Rights Act: Protecting the Native American and Alaska Native Vote: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (written testimony of Jonathan M. Nez, President, Navajo Nation) [hereinafter Nez Testimony].

216. *Navajo Nation Hum. Rts. Comm’n v. San Juan Cnty.*, 281 F. Supp. 3d 1136, 1142 (D. Utah 2017).

217. Nez Testimony, *supra* note 215, at 3.

218. *Id.*

219. *Oversight Hearing on Voting Matters in Native Communities: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 1 (2021) (testimony of Janet Davis, Chairwoman, Pyramid Lake Paiute Tribe).

election committees are best positioned to establish polling places, provide interpreters, and ensure the fair and efficient administration of elections in Indian Country.²²⁰ However, the full advantages of tribal-state cooperation in elections cannot be realized so long as states retain the prerogative to ignore tribes.²²¹ Under the status quo, states can choose to exclude tribes from election administration, and when they are included, tribes may lack sufficient bargaining power.

Federal intervention to restore tribes' sovereign power in these negotiations is overdue. As Nez testified, when "states are not being responsive to the needs of their citizens" and voting is at stake, "it is appropriate for the federal government to step in."²²² Crucially, the federal voting-power framework this Note proposes would impose a *duty* of negotiation on states, subject to waiver by tribes. This structure would lessen tribes' burden to seek out collaboration, fill in for delinquent election officials, and challenge unlawful voting restrictions in court. It would empower Native Nations as cosovereigns in the administration of federal elections, rather than requiring them to combat disempowerment through the vulnerable and limited rights-based model of bringing VRA suits. The following Sections detail the requirements federal legislation should impose and address questions of enforcement.

B. *The Framework*

Congress should require states to negotiate with tribes over the administration of federal elections in Indian Country. The first step would occur at the local level: leading up to each federal election, each county with a reservation within its borders would work with the relevant tribe to set the parameters of election administration. A federal administrative body would oversee the second step: distributing grants to counties that successfully form a compact with tribes to subsidize the cost of increasing voter access. Finally, the same administrative body would oversee enforcement of the bargaining requirements should negotiations break down.

1. *Compact Formation*

Federal legislation could require that states administer federal elections in Indian Country through a valid compact with the governing tribes. Elections are typically administered at the local level – mostly by counties and sometimes by

220. Wolfley, *supra* note 80, at 296-300 (2015).

221. Professor Jeanette Wolfley acknowledges that "states must be motivated to address the voting issues" and that willingness to cooperate with tribes will differ among jurisdictions. *Id.* at 299.

222. Nez Testimony, *supra* note 215, at 3.

cities or townships.²²³ But state-level officials also have election-related duties, such as managing and assisting the local officials and providing certain programming and equipment.²²⁴ Therefore, the negotiations would often occur between tribal governments and the relevant local election officials, who would consult with the state-level officials as needed.

The compacts would set forth the mechanisms of federal election administration in Indian Country within the overlapping borders of each given county or locality. This could include, but would not be limited to:

- Designating on-reservation polling locations, early voting sites, and/or satellite offices;
- Designating ballot pickup and collection centers;
- Establishing accepted IDs and addresses for registration and voting;
- Establishing budgets and parameters for voter education, voter assistance, and advertising programs; and
- Establishing the details of language assistance, such as the provision of interpreters and translated materials at polling sites and the posting of translated ballots on county websites.

The likely outcome would not only decrease individual barriers to voting but also increase tribal governments' control and knowledge of federal election administration.

The proposed legislation would not rely on states' or localities' desire to cooperate with tribes, given many jurisdictions' histories of resisting cooperation. Instead, Congress could incentivize states and localities in several ways. First, Congress could reward cooperation. With IGRA, states have a strong incentive to negotiate with tribes to form gaming compacts because they can secure for themselves a share of the gaming revenue.²²⁵ In the election context, federal subsidies for the cost of election administration in Indian Country would ease negotiations and lessen potential objections from states. Second, the legislation would incentivize states to cooperate by creating an effective enforcement mechanism for tribes to wield against uncooperative jurisdictions. The following Sections discuss federal funding and enforcement.

223. *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 1, 2022), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/B2HZ-CGWS>].

224. *Id.*

225. See Paul C. Alexander II, *Money Is for Nothing: The Inherent Want of Consideration Found in Substantial Exclusivity Terms Within Tribal-State Compacts*, 5 AM. INDIAN L.J. 167, 169 (2017).

2. Federal Funding

While state and local governments primarily cover the costs of election administration,²²⁶ Congress has established grant programs that provide limited federal funding. In response to issues with the administration of the 2000 elections, Congress enacted the Help America Vote Act of 2002 (HAVA).²²⁷ HAVA created the U.S. Election Assistance Commission (EAC), which is responsible for administering grant programs.²²⁸ These grant programs have allowed the federal government to “encourage or help states and localities to adopt, reject, implement, or maintain election administration policies or practices.”²²⁹ For instance, one program awarded grants for making polling places accessible to individuals with disabilities.²³⁰

To help a tribal-state compact program succeed, Congress should dedicate federal funds to subsidize the cost of increased voter access and designate an administrative body to oversee the distribution process. Once tribes and counties successfully enter a compact, the agency would distribute a nondiscretionary grant to the counties to subsidize the cost of increasing the accessibility of voting.

As for which administrative body to entrust with the program, one option would be to rely on the EAC, given that it already has experience and infrastructure for administering grants. Establishing a new office within DOJ may be an even better choice, given DOJ’s experience in the voting-rights arena and its increasing involvement in tribal affairs.²³¹

A federal grant system to award the formation of tribal-state compacts would benefit both tribes and states. Local election officials often point to a lack of resources when refusing to establish additional voting sites or denying other requests to make voting more accessible.²³² The availability of federal funds would

226. See Katy Owens Hubler & Wendy Underhill, *Election Costs: Who Pays and with Which Funds?*, NAT’L CONF. STATE LEGISLATURES (Mar. 2018), <https://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx> [https://perma.cc/L65A-N8A9].

227. KAREN L. SHANTON, CONG. RSCH. SERV., R46646, ELECTION ADMINISTRATION: FEDERAL GRANT FUNDING FOR STATES AND LOCALITIES 2 (2022).

228. *Id.*

229. *Id.* at 1.

230. *Id.* at 11.

231. See Off. of Tribal Just., *DOJ Resources*, U.S. DEP’T JUST. (Sept. 4, 2022), <https://www.justice.gov/otj/doj-resources> [https://perma.cc/9S3S-W5HV].

232. See, e.g., *supra* note 13 and accompanying text; *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 976 (D. Nev. 2016) (“Washoe County does not provide cost estimates, but argues generally that its resources are currently stretched to their limits and an injunction requiring them to plan

address the legitimate budgetary constraints that many counties face in facilitating Native voting, while also making it more difficult for counties to use a lack of resources as a pretext. An attorney for a tribe in Montana who works with local election officials noted that “cost is a big thing,” and federal stipends would “go a long way towards eliminating county resistance.”²³³ As she explained, “Part of the reason we’re picking up a lot of [the work advertising election information] is that [counties] say they don’t have the budget.”²³⁴ A requirement to negotiate, “if paired with a federal budget, that could make a big difference.”²³⁵

3. *Administrative Enforcement*

Finally, Congress must provide a mechanism for monitoring and enforcing compliance should other incentives fail to motivate states or counties to cooperate. Congress should offer a direct administrative remedy: if a jurisdiction does not engage in the required good-faith bargaining with a tribe, or if they cannot reach an agreement, the tribe could appeal to the regulatory body tasked with overseeing the program. As noted in the previous Section, the DOJ would be a particularly apt choice given its experience enforcing voting-rights statutes like the VRA. The office could attempt to mediate between the tribe and the state or county, and if that fails, then prescribe the procedures for federal election administration in that portion of Indian Country.

Enabling tribes to look directly to agencies for enforcement would avoid many of the disadvantages built into litigation and sidestep sovereign-immunity issues.²³⁶ Further, it would better align with an empowerment model of combating Native voter suppression. As Professor Blackhawk documents, “[I]t has often been Congress and the Executive . . . rather than the courts, that have provided sanctuary” to tribes.²³⁷ For instance, “[w]hen the treaty process broke

and staff an additional voting site would be unfair.”); *Bear v. County of Jackson*, No. 14-CV-5059, 2015 WL 1969760, at *2 (D.S.D. 2015) (“On June 20, 2014, the Board of Jackson County Commissioners voted not to approve a satellite office in Jackson County because it believed funding was not available and the satellite office would be an additional expense to the county.”).

233. Zoom Interview (Oct. 4, 2022) (notes on file with author).

234. *Id.*

235. *Id.*

236. States have sovereign immunity in administrative proceedings only if they are “the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.” *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 744 (2002). If a regulatory body considered and imposed compacts without subjecting states to the type of administrative adjudication that resembles an Article III proceeding, sovereign-immunity issues would not arise.

237. Blackhawk, *supra* note 21, at 1799.

down or states failed to honor treaty conditions, Native Nations could petition Congress and the Executive for intervention and redress,” which “offered Native Nations a tool to engage with the colonial government without submitting to its jurisdiction.”²³⁸ Executive enforcement in the voting-power context would similarly provide a tool to Native Nations without subordinating them to state or local governments.

4. *An Alternative Model*

Another option would be to impose courts as an intermediary. This option would be more complicated, but it would still present a viable avenue for enforcement and represent a normative improvement over the status quo. As with IGRA, Congress could impose a duty on states to negotiate in “good faith” with tribes toward the formation of the compact.²³⁹ In the election context, legislation could require that courts consider factors related to the state’s regulatory interests in elections or the feasibility of the tribe’s requested conditions.

A judicial-enforcement model could loosely follow IGRA’s remedial scheme but with modifications to avoid IGRA’s sovereign-immunity problems. In enacting IGRA, Congress sought to ensure that tribes and states eventually reach a compromise through “an elaborate remedial scheme”: if states failed to negotiate in good faith and would not consent to a compact proposed by a court-appointed mediator, the Secretary of the Interior would prescribe the procedures for conducting gaming activities.²⁴⁰ However, state sovereign immunity has thwarted actual enforcement of IGRA’s remedial scheme. In *Seminole Tribe of Florida v. Florida*, the Court held that the Eleventh Amendment barred tribes from directly suing uncooperative states in order to enforce IGRA.²⁴¹ Though Florida allegedly refused to enter the negotiations that IGRA required, the Seminole Tribe of Florida had no recourse.

²³⁸ *Id.* at 1875.

²³⁹ The Indian Gaming Regulatory Act (IGRA) does not define good-faith bargaining but dictates that in determining whether it occurred, courts “may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.” 25 U.S.C. § 2710(d)(7)(B)(iii)(I) (2018). Additionally, courts “shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.” *Id.* § 2710(d)(7)(B)(iii)(II).

²⁴⁰ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47-50 (1996) (citing miscellaneous provisions of IGRA).

²⁴¹ *Id.* at 47.

Congress could design legislation to surmount the sovereign-immunity issue. First, tribes could bring *Ex parte Young* suits against state officials.²⁴² In *Seminole Tribe*, the Court interpreted IGRA's inclusion of a separate remedial scheme as an indication that "Congress had no wish" to authorize officer suits, leaving open the possibility that Congress might do so.²⁴³ The proposed legislation could avoid this fate by explicitly authorizing *Ex parte Young* suits.

Additionally, tribes could bring § 1983 actions against local or state election officials.²⁴⁴ Professor Daniel J. Meltzer has criticized the *Seminole* Court for "fail[ing] even to advert to the pertinence of § 1983," noting that "the tribe had a good argument that Congress, in enacting § 1983, expressly created a private right of action (permitting, inter alia, declaratory and injunctive relief) against [Florida] Governor Chiles for violation of IGRA's duty to bargain in good faith."²⁴⁵ Finally, the U.S. Attorney General could sue states on the tribes' behalf.²⁴⁶

If Congress enacted the framework under its Elections Clause power, as discussed in the next Section, tribes might also argue for a new sovereign-immunity exception—that Congress may subject states to suit by private citizens when legislating under the Elections Clause. In general, Congress may only abrogate state sovereign immunity when legislating under the Fourteenth Amendment²⁴⁷—not under the Commerce Clause or its other Article I powers.²⁴⁸ But Congress may also subject states to suit if "the structure of the original Constitution" indicates

242. 209 U.S. 123 (1908).

243. *Seminole Tribe*, 517 U.S. at 76; see also Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1715-16 (1997) (analyzing the *Seminole* Court's treatment of the *Ex parte Young* question); cf. Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 297 (2010) ("Allowing tribes to sue under *Ex parte Young* . . . is by far the simplest solution since it does not change anything in the substantive law.").

244. 42 U.S.C. § 1983 (2018).

245. Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 40.

246. See Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 162 (1997).

247. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976).

248. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 (1999).

that States “agreed their sovereignty would yield as part of the ‘plan of the Convention.’”²⁴⁹ The Court “put[s] the Elections Clause on a higher rung of full federal power than even the Commerce Clause,”²⁵⁰ and has held that “[w]hen Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States.”²⁵¹ Further, “the Elections Clause implicates federal rights protected by both Article I, Section 2 and the Equal Protection Clause that do not predate the existence of the Union such that the states have some preexisting claim to state sovereignty.”²⁵² Therefore, state consent to suit in the context of election regulation is arguably “inherent in the constitutional plan,” meriting recognition of another carveout to state sovereign immunity.²⁵³

To the extent that tribes still need to resort to courts for enforcement, a voting-power framework would still represent a significant shift toward enhancing tribal sovereignty. Under rights-based models, lawsuits are the primary line of attack: post-*Shelby County*, ad hoc litigation is the core mechanism for invoking the VRA.²⁵⁴ In contrast, a law requiring tribal-state compacts would empower tribes in collaborative lawmaking, enabling them to “use the political arena to negotiate a balance of power” with states “responsive to their respective needs and authority.”²⁵⁵ As with IGRA, litigation would be a “last resort” reserved for correcting bad-faith conduct.²⁵⁶

Crucially, even in those instances when tribes and states end up in court, the good-faith standard would represent a marked improvement over the current legal framework for challenging laws that burden the fundamental right to vote. The Court typically evaluates challenges to election administration with the deferential *Anderson-Burdick* balancing test: to determine whether an election regulation is constitutional, courts weigh the state’s legitimate interest in election

249. *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022) (first quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2259 (2021); and then quoting *Alden v. Maine*, 527 U.S. 706, 728 (1999)).

250. Issacharoff, *supra* note 37, at 111.

251. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013).

252. Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 323-24, 324 n.19 (2019).

253. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2262 (2021) (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).

254. *Native American Voting Rights: Exploring Barriers and Solutions: Hearing Before the H. Subcomm. on Elections of the Comm. on H. Admin.*, 116th Cong. 16 (2020) (written statement of Jacqueline De León, Staff Att’y for the Native Am. Rts. Fund).

255. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 28 (1997).

256. *Id.* at 67.

administration against the burdens the regulation imposes on an individual's First and Fourteenth Amendment rights.²⁵⁷ A court reviewing good-faith bargaining, in contrast, would look not only to election regulations but also to the process by which states engaged tribes. Further, instead of requiring judges to make the final call on what constitutes a fair balance between state and tribal interests, most disputed compacts would still end up in the hands of agency officials. As with IGRA, Congress could designate an agency to prescribe the procedures for administering federal elections when states and tribes cannot compromise.

C. Congressional Authority

1. Elections Clause Power and Plenary Power

To enact legislation requiring tribal-state compacts in federal elections, Congress could draw on its Elections Clause power and plenary power to legislate with respect to tribes.

The Elections Clause dictates that state legislatures shall prescribe the time, place, and manner of congressional elections but confers upon Congress a veto power to "at any time by Law make or alter such Regulations."²⁵⁸ The Court has interpreted the Clause broadly,²⁵⁹ allowing Congress to create or supplant a "complete code for congressional elections," including but not limited to registration, voter protection, fraud prevention, and vote counting.²⁶⁰ Congress may exercise this regulatory power "at any time" and "to any extent which it deems expedient."²⁶¹

257. *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

258. U.S. CONST. art. I, § 4, cl. 1.

259. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 776 (2016) (surveying the case law and describing Congress's "unusually far-reaching authority"); cf. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) ("The power of Congress over the 'Times, Places and Manner' of congressional elections is paramount, and may be exercised at any time, and to any extent which it deems expedient . . ." (citation omitted)); Issacharoff, *supra* note 37, at 100 (explaining that "the Court in *Arizona v. Inter Tribal Council of Arizona* reaffirmed expansive congressional powers under the Elections Clause").

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

261. *Inter Tribal Council*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

To be sure, congressional authority under the Elections Clause is not limitless. The Court has held that it does not extend to the regulation of voter qualifications, a power which the Constitution expressly grants to the states.²⁶² Thus, Congress generally cannot usurp states' authority to set qualification standards based on citizenship or felon status, for example. Doctrinal gray areas exist, however, where regulations implicate both the manner of elections and voter-qualification standards.²⁶³ The case law suggests that in such circumstances, Congress can impose regulations that *impact* voter qualifications, though precluding a state from enforcing its qualification standards would pose serious constitutional questions.²⁶⁴

In the case of a voting-power framework requiring tribal-state compacts, Congress could carefully draft the legislation to ensure it falls safely within the domain of time, place, and manner regulations. In particular, Congress could specify a limited universe of items that would be on the bargaining table: the designation of polling locations, early voting sites, satellite offices, and ballot pickup and collection centers; voter ID and address requirements; and the details of language-assistance, voter-education, and advertising programs. The legislation could also maintain that states are *not* required to compact with tribes over qualification standards, such as felon or citizenship status. Presumably, sub-

262. *Id.* at 17. Article I, § 2 and the Seventeenth Amendment both empower states to regulate voter qualifications.

263. Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 177 (2019) (describing the doctrinal gray areas resulting from the overlap between regulating voter qualifications and regulating the manner of elections).

264. At issue in *Inter Tribal Council* was whether the National Voter Registration Act (NVRA) — federal legislation enacted to encourage voter registration — preempted an Arizona law regulating citizenship qualifications. Whereas the Arizona law required documentary evidence of citizenship for registration, NVRA directed states to register voters for federal elections using a federal form that merely required applicants to attest to their citizenship under oath. *Inter Tribal Council*, 570 U.S. at 4-5. On the one hand, regulating registration procedures falls within Congress's power to dictate the manner of elections. Yet Arizona's proof-of-citizenship requirement sought to enforce a voter-qualification standard, and as the Court put it, "[T]he power to establish voting requirements is of little value without the power to enforce those requirements." *Id.* at 17. However, while the Court agreed with Arizona that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications," it determined that NVRA posed no such difficulties since it provided another way for Arizona to obtain the necessary information for enforcing its citizenship-qualification standards. *Id.* at 17-18. The fact that the Court ultimately upheld the NVRA provision, even while acknowledging its relevance to the enforcement of citizenship requirements, suggests that Congress may under limited circumstances impose regulations that impact voter-qualification standards. *Cf.* Tolson, *supra* note 263, at 176-77 (describing the distinction between voter-qualification standards and manner regulations as "[u]nworkable").

jecting issues like voter IDs and voter addresses to compacts would be a permissible “manner” regulation as long as states maintained a way to enforce their citizenship and residency qualification standards.

Moreover, the Elections Clause would not provide the only source of congressional authority to enact this Note’s proposed voting-power framework. In legislating at the intersection of elections and tribal policy, Congress would also enjoy the broad deference afforded to exercises of its plenary power over tribes.²⁶⁵

2. *Overcoming Anticommandeering Concerns*

Opponents might still challenge a voting-power framework on anticommandeering grounds. When IGRA’s tribal-state compact was brought before the Court in *Seminole Tribe*, Florida argued in its brief that the negotiation requirement violated the Tenth Amendment by “treat[ing] the States as an administrative subdivision of the federal government.”²⁶⁶ The Court declined to address the anticommandeering argument because it fell outside the question presented,²⁶⁷ but it seems likely that it would have failed on the merits. IGRA “requires only negotiation; agreement cannot be compelled, and no federal substantive policy must be enforced” – much like federal statutory directives upheld in the past.²⁶⁸ Lower courts, for their part, have rejected anticommandeering challenges to IGRA.²⁶⁹

265. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 681-82 (2016) (“[T]he legacy of a default rule of judicial deference to Congress – resting on the principles of plenary power and, explicitly or not, on the political question doctrine – disappointingly continues. To date, the limits on plenary power over Indian affairs exist more in theory than in fact.”); *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.”).

266. Brief of Respondents at 10, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (No. 94-12), 1995 WL 271443 (citing *New York v. United States*, 505 U.S. 144 (1992)).

267. *Seminole Tribe*, 517 U.S. at 61 n.10.

268. Meltzer, *supra* note 245, at 45 n.204.

269. See Zachery Roth, *Maverick Gaming LLC Mounts Legal Challenge to Washington’s Sports Betting Framework, Indian Gaming Regulatory Act*, JD SUPRA (Jan. 21, 2022), <https://www.jdsupra.com/legalnews/maverick-gaming-llc-mounts-legal-2067888> [https://perma.cc/E4YR-FC7Z] (discussing a current challenge and citing to past failed challenges).

Moreover, anticommandeering challenges face particularly high barriers in the election-law context. To begin, the Constitution itself commandeers the states to provide for federal elections,²⁷⁰ so the application of anticommandeering principles in election administration requires, at minimum, some interpretive gymnastics. Further, existing case law indicates that Congress could enact election laws compelling states to take actions without violating the anticommandeering doctrine.²⁷¹ Because anticommandeering cases have examined statutes enacted under the Commerce Clause, the same limitations may not apply to the exercise of Congress's Elections Clause power,²⁷² which may be "impervious to the federalism concerns that have constrained congressional action under the Reconstruction Amendments."²⁷³

Finally, Congress could enact a modified version of this legislation under the Spending Clause, based on the administration of funding grants for tribal-state compacts. If states could opt in, Congress could impose conditions that might otherwise raise commandeering concerns.²⁷⁴ The executive branch could also play a sizeable role in implementing such a conditional spending scheme.²⁷⁵ However, enacting legislation under the Elections Clause would be preferable because it would enable Congress to circumvent an opt-in model.

D. Pragmatic Advantages

A voting-power framework enjoys several pragmatic benefits over the anti-discrimination model of voting rights. By avoiding reliance on antidiscrimination claims and better aligning with existing election-law doctrine, the framework would have a better chance than rights-based proposals at surviving both legal and political challenges.

1. Avoiding Reliance on Discrimination Claims

Moving from a rights-based model to one that centers tribal sovereign power could benefit both Native Nations and their members by avoiding reliance on discrimination claims. Under rights-based frameworks, Native American voter

270. U.S. CONST. art. I, § 4, cl. 1.

271. Weinstein-Tull, *supra* note 259, at 782 (describing the case law).

272. *Id.*

273. Tolson, *supra* note 252, at 323.

274. See *South Dakota v. Dole*, 483 U.S. 203, 210-12 (1987).

275. See Douglas M. Spencer, *Sanctuary Cities and the Power of the Purse: An Executive Dole Test*, 106 IOWA L. REV. 1209, 1215-16 (2021).

suppression can only be addressed as a form of racial discrimination. And as discussed in Part I, there is increasing political and judicial hostility to antidiscrimination claims. Further, the sovereign status of tribes as political entities comprises a power that individual citizens lack. As Professor Gerald Torres put it, “The question for Indians and other indigenous people is whether they will have access to the power that attaches to their being a *nation* and not just another ‘race’ or ethnicity.”²⁷⁶ Importantly, distinguishing between voting power and voting rights does not pivot on whether tribal membership should be framed as a political or racial category (or both) – a related but separate question which has generated extensive debate.²⁷⁷ Rather than concerning how to classify individual rights, this Note’s proposal looks beyond the individual-rights framework entirely.

Avoiding reliance on discrimination claims will not insulate a voting-power framework from all political obstacles. Any measure that sways the outcome of federal elections will encounter resistance from elected officials who stand to lose in the short term. But legislation rooted in the federal government’s trust responsibility to safeguard tribal sovereignty could be less polarizing and garner broader political support than proposals seeking to revive the VRA. Even in today’s hostile congressional climate, policies promoting tribal interests have garnered bipartisan support.²⁷⁸ Further, framing the legislation as closer in kind to HAVA than the VRA could help distance it from more controversial election-law policy.

276. Gerald Torres, *American Blood: Who Is Counting and for What?*, 58 ST. LOUIS U. L.J. 1017, 1018 (2014).

277. See, e.g., Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1044-45 (2011); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1059 (2012).

278. See, e.g., Brief for 87 Members of Congress as Amici Curiae in Support of Federal and Tribal Defendants, *Haaland v. Brackeen*, No. 21-376 (Aug. 19, 2022) (a bipartisan group of 87 members of Congress defending the constitutionality of the Indian Child Welfare Act); Press Release, U.S. Senate Comm. on Indian Affs., Schatz, Murkowski Lead Committee Passage of Bipartisan Bill to Advance Native American Housing Programs (Feb. 17, 2022), <https://www.indian.senate.gov/news/press-release/schatz-murkowski-lead-committee-passage-bipartisan-bill-advance-native-american> [https://perma.cc/BQR7-FKTC]; Press Release, U.S. Senate Comm. on Indian Affs., Schatz, Murkowski Introduce Bipartisan Violence Against Women Act Reauthorization (Feb. 10, 2022), <https://www.indian.senate.gov/news/press-release/schatz-murkowski-introduce-bipartisan-violence-against-women-act-reauthorization> [https://perma.cc/XH92-5UFM].

2. *Harmonizing with Election-Law Doctrine*

A voting-power framework would also strike a better harmony with existing judicial doctrine on election law – and thereby have a better prospect of surviving constitutional scrutiny. Indeed, a legal argument for granting tribes voting power already exists, ironically, in *Shelby County* itself. The VRA preclearance regime’s “labeling of part of the country as being unremedied from its past” was an “extraordinary feature.”²⁷⁹ Leading up to *Shelby County*, many had criticized the regime as “troubling” on federalism grounds.²⁸⁰ Sure enough, the *Shelby County* Court described Section 5 (the preclearance requirement) as “a drastic departure from basic principles of federalism” and Section 4 (the coverage formula) as “an equally dramatic departure from the principle that all States enjoy equal sovereignty.”²⁸¹ Reasoning that “the fundamental principle of equal sovereignty remains highly pertinent in assessing . . . disparate treatment of States,” the Court found that Congress could not offend this equal sovereignty on the basis of state behavior forty years in the past.²⁸²

Shelby County’s equal-sovereignty principle has received no shortage of criticism.²⁸³ But the doctrine could be repurposed to the benefit of tribal sovereignty. Professor Leah M. Litman has argued that the *Shelby County* Court’s conception of equal sovereignty stems from state dignity concerns.²⁸⁴ The Court’s uneasiness with the requirement that states “seek permission” suggests that “states’ dignity entitles them to a kind of unaccountability.”²⁸⁵ This logic can be turned on its head: just as federal election law implicates states’ dignitary interests, so too does it implicate the dignitary interests of tribes. Of course, in the tribal context, the concern is not about forgiving and forgetting “past wrongful behavior,” as with the once-covered states and counties.²⁸⁶ But the current system of federal election administration injures tribes’ dignity as sovereigns in a parallel sense: to ensure that the needs and interests of their political communities are met, tribes

279. Issacharoff, *supra* note 37, at 101.

280. Tolson, *supra* note 168, at 1254-55 (quoting *City of Rome v. United States*, 446 U.S. 156, 201 (1980) (Powell, J., dissenting)) (collecting cases).

281. *Shelby Cnty. v. Holder*, 570 U.S. 529, 534-35 (2013).

282. *Id.* at 544, 556.

283. Jeffrey M. Schmitt, *In Defense of Shelby County’s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 209 (2016) (“Legal scholars have exhaustively attacked [the] principle with a surprising degree of unanimity and contempt.”).

284. Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1255-58 (2016).

285. *Id.* at 1255.

286. *Id.* at 1253.

must seek out collaboration from election officials or legal relief from courts. Requiring sovereigns to seek external permission to shape the conditions of their own people's political participation, on their own sovereign soil, violates the dignitary interests of tribes as much as it would states.

Finally, a voting-power framework could represent a happy medium between the prophylactic preclearance regime in Section 5 of the VRA (helpful, but unlawful as applied) and the enforcement model embodied by Section 2 (lawful, but expensive and frequently ineffective). Leading up to the VRA's scheduled sunset in 2007, Professor Gerken proposed an "opt-in" approach to VRA enforcement, framed as a middle ground between reauthorizing the Act's existing regulatory structure and allowing it to expire.²⁸⁷ Under her model, covered jurisdictions would provide advance notice of election-law changes, giving advocates who objected an opportunity to negotiate with the state or locality.²⁸⁸ Should negotiations fail, then the advocates, if supported by a sufficient number of community members, could "opt in to VRA coverage" by filing a formal complaint.²⁸⁹ One of the advantages of the opt-in approach, Gerken argued, was its greater likelihood of passing constitutional muster than Section 5, which was already predicted to face an "inevitable constitutional challenge."²⁹⁰ Though we now know that Congress reauthorized the VRA's old regulatory scheme and the Court struck down the coverage formula, the scholarship that foretold this downfall remains instructive. A voting-power framework, though specific to tribes and materially different from the opt-in model, enjoys many of the features that would have made the opt-in model more likely to survive constitutional scrutiny: it would be flexible and locally informed, and federal authorities would not interfere unless the bargaining process between states and tribes broke down.²⁹¹

CONCLUSION

The voting-rights movement of the twentieth century played a momentous role in remedying the political subordination of nonwhite citizens and brought the United States closer to realizing democratic ideals. The country would benefit from legislation reinvigorating the VRA and searching for creative solutions

287. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 708 (2006).

288. *Id.* at 709-10.

289. *Id.* at 709.

290. *Id.* at 743.

291. *Id.* at 745.

after *Shelby County*. This Note's call to look beyond rights is not a call to overlook them.

But the self-determination and self-governance of Native Nations is also at stake in federal elections. Respecting tribal sovereign power calls for measures that rights-based legislation like the VRA cannot provide. Voting rights are insufficient to solve the subordination of Native American voters because more than individual interests are concerned: voting restrictions have long threatened the sovereignty of Native Nations and do so to this day. Consistent with its trust obligation, which includes a substantive duty to protect tribal interests, Congress should create a mechanism for enhancing tribal sovereignty in federal elections. A voting-power framework instituting tribal-state compacts would do just that, enabling Native Nations to participate in the administration of democratic processes as a hallmark of their sovereignty.

A voting-power framework does not address all barriers to political participation, and different solutions are needed for other demographic groups. Additionally, the political power and autonomy of tribes is implicated in more than just the administration of federal elections. Future work should consider how other aspects of election law – such as redistricting and vote dilution – may also infringe on tribal sovereignty. But greater voting power could alleviate many of the barriers facing Native American citizens, all while centering and strengthening tribal sovereignty in the process.