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Lightning in the Hand: Indians and Voting Rights

American Indians and the Fight for Equal Voting Rights

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In the interests of full disclosure, I note that I know, have worked with, and have long admired Laughlin McDonald, the author of the book that I am reviewing. One of the distinctive aspects of the voting rights bar is the relationship among practicing lawyers, law professors, and various social scientists. *See infra* text accompanying notes 58-67. To my mind, there is no field of public law in which practice and scholarship—and practicing lawyers and full-time scholars—more inform one another.

I take the title of this review from an Apache proverb that “it is better to have less thunder in the mouth and more lightning in the hand.” *See* John J. Lumpkin, *Native American Veterans Honored*, ALBUQUERQUE J., Nov. 12, 1998, at D1 (quoting Assistant Secretary of Defense Charles L. Cragin).



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In *Northwest Austin Municipal Utility District No. One v. Holder*,¹ the Supreme Court expressed its faith that, because of the Voting Rights Act, “we are now a very different Nation.”² Few lawyers are more responsible for that transformation than Laughlin McDonald, the longtime director of the American Civil Liberties Union’s voting rights project. In his most recent book, *American Indians and the Fight for Equal Voting Rights*,³ McDonald shows us, however, that we are not quite as different as the Supreme Court might think. In nearly every respect, full enfranchisement has come late to the descendants of America’s first inhabitants.⁴

When Congress amended section 2 of the Voting Rights Act in 1982 to forbid practices that result in a denial or dilution of minority voting strength regardless of the motivation behind them,⁵ it directed courts to conduct “a searching practical evaluation of the ‘past and present reality,’”⁶ taking into account “the context of all the circumstances in the jurisdiction in question.”⁷ McDonald’s book, based on a series of section 2 cases that he and his colleagues at the ACLU have litigated on behalf of Indian plaintiffs,⁸ takes a similar approach, offering detailed descriptions of the barriers to full political equality faced by Indians in communities in five Western states.⁹

In many important respects, those barriers resemble the ones confronted by blacks in the South and Latinos in the Southwest. Thus, many of McDonald’s individual chapters are organized around the presence of the “Senate factors” — nine aspects of political and socioeconomic life that Congress distilled from

1. 129 S. Ct. 2504 (2009).

2. *Id.* at 2516.

3. LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2010) [hereinafter *McDONALD, AMERICAN INDIANS*]. McDonald is also the author of an exhaustive study of the battle for voting equality in Georgia, LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* (2003), as well as several book chapters and scholarly articles.

4. See *McDONALD, AMERICAN INDIANS*, *supra* note 3, at 45.

5. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2006)).

6. S. REP. NO. 97-417, at 30 (1982) (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)).

7. *Id.* at 27.

8. *McDONALD, AMERICAN INDIANS*, *supra* note 3, at vii-viii.

9. McDonald’s book thus complements another recent study of Indian voting rights, DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* (2007), which contains several case studies—some overlapping with McDonald’s—as well as a systematic canvass of voting rights cases involving Indians. See *id.* at 48-67 tbl.3.1, 68 tbl.3.2.

those voting rights cases as “probative” of section 2 violations.¹⁰ In particular, McDonald describes, in detail both painstaking and painful to read, a history of exclusion and a level of ongoing polarization that rivals Mississippi or the Rio Grande Valley. If anything, South Carolina seems further along the path to political equality than South Dakota.¹¹

McDonald and his colleagues brought to their voting cases involving Indian plaintiffs a doctrinal framework and a set of litigation techniques honed in cases involving African-Americans. But, as McDonald explains, Indians occupy a distinctive status within the American political order.¹² Indians are citizens not only of the United States and the state where they reside but often also (and particularly in those regions where they are most likely to bring voting rights claims) of a separate sovereign as well—their tribe. This fact has inflected both the history of Indian disenfranchisement and the course of litigation under the Voting Rights Act.

Indian tribes, as the Supreme Court has repeatedly observed, “are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.”¹³ Thus, like all political communities, they confront questions of membership, allocation of power, and political structure.

This Review explores these questions of disenfranchisement, dilution, and constitutional design. Part I describes the history of Indian disenfranchisement in light of their distinctive status. Indians’ exclusion from the political process reflected profound racism as pernicious and pervasive as the discrimination facing blacks in the South and Latinos in the Southwest. But it also involved complex constitutional and conceptual issues unique to Indians. Part II then turns to the relatively recent vote dilution litigation that forms the heart of McDonald’s book. Indian voting rights cases have followed a clear path blazed

10. S. REP. NO. 97-417, at 28-29; see *infra* note 63 (listing the nine factors).

11. McDONALD, AMERICAN INDIANS, *supra* note 3, at 140 (stating that although many covered jurisdictions in the South did not comply with section 5, “in none was the failure as deliberate and prolonged as in South Dakota”); see *id.* at 122-47 (discussing South Dakota’s continued resistance to the Voting Rights Act). For examples of McDonald’s work in South Carolina, see *McCain v. Lybrand*, 465 U.S. 236 (1984) (holding that jurisdictions seeking preclearance of election-related changes under section 5 of the Voting Rights Act must make unambiguous submissions of the changes involved); and *United States v. Charleston Cty.*, 365 F.3d 341 (4th Cir. 2004) (finding a section 2 violation with respect to the county’s use of at-large elections).

12. McDONALD, AMERICAN INDIANS, *supra* note 3, at 3-29 (describing the volatile and contradictory nature of the United States’s approach to the political status of Indians and tribes).

13. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

by earlier cases involving blacks and Latinos. Nevertheless, themes related to Indians' distinctive political status crop up within the litigation at various points. Finally, Part III looks beyond Indians' claims under the Voting Rights Act to discuss issues related to internal tribal elections. Like other elections, these contests involve fundamental questions about enfranchisement and electoral design. Tribal answers to these questions sometimes depart dramatically from the rules governing federal, state, and local elections in ways that tie into ongoing debates extending far beyond Indian law.

I. INDIAN CITIZENSHIP AND THE FIGHT FOR ENFRANCHISEMENT

On April 6, 1880, the city of Omaha, Nebraska, was set to hold elections for its city council. John Elk, a city resident, showed up shortly before Election Day at the registrar's office seeking to have his name placed on the voting rolls. The registrar, Charles Wilkins, refused Elk's request on the grounds that Elk was an Indian. Elk sued Wilkins in federal district court, seeking \$6000 in damages for violation of his constitutional right to vote.

The Supreme Court held, however, that Elk could not invoke the Fifteenth Amendment's protection against racial discrimination in voting¹⁴ because that protection extended to "citizens of the United States," and Elk was not a citizen. The case turned on the Citizenship Clause in section 1 of the Fourteenth Amendment. That clause—so much in the news these days with anti-immigrant hysteria over purported "anchor babies"¹⁵—provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁶ Elk's position was that, having "severed his tribal relation" by moving off the reservation into white society and having thus "fully and completely surrendered himself to the jurisdiction of the United States,"¹⁷ he was a citizen.

The Court disagreed. Noting that "Indians not taxed"—essentially, Indians living on tribal lands—had been excluded from the population base for

14. U.S. CONST. amend. XV, § 1 ("The 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.").

15. See Editorial, *Xenophobia: Fear-Mongering for American Votes*, N.Y. TIMES, Aug. 6, 2010, at A22, available at <http://www.nytimes.com/2010/08/06/opinion/06fri1.html>.

16. U.S. CONST. amend. XIV, § 1, cl. 1.

17. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) (quoting from Elk's complaint). McDonald discusses Elk's case in his chapter on Nebraska. See MCDONALD, AMERICAN INDIANS, *supra* note 3, at 177-78.

apportioning seats in the House of Representatives under the original Constitution,¹⁸ the Court reiterated the longstanding view that Indians were members of “distinct political communities,” owing “immediate allegiance to their several tribes, and were not part of the people of the United States.”¹⁹

The Court then concluded that the Citizenship Clause of the Fourteenth Amendment did not change that essential fact. The Civil Rights Act of 1866, which became the basis for the Fourteenth Amendment, had defined as citizens “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed.”²⁰ The Court saw no significance to the omission of that exclusionary language from the Citizenship Clause, particularly given the continued exclusion of Indians not taxed from the basis for apportionment in section 2 of the Amendment.²¹ Since Indians living on tribal lands thus did not become U.S. citizens at birth, they could obtain citizenship only through naturalization. Naturalization could be accomplished only with the consent of the federal government, and not by the unilateral act of an individual Indian who decided to separate himself from his tribe.²² Elk had not been naturalized; he had simply moved to Omaha. The Court thus concluded that Elk, “not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment.”²³

Justice Harlan’s dissent did not dispute the proposition that Indians who remained affiliated with their tribe were not citizens of the United States unless the United States conferred citizenship on them wholesale.²⁴ Rather, he argued

18. U.S. CONST. art. I, § 2, cl. 3. That Clause also required that direct taxes be apportioned among the several states on the same basis and contained the infamous Three-Fifths Clause.

19. *Elk*, 112 U.S. at 99.

20. 14 Stat. 27 (1866).

21. U.S. CONST. amend. XIV, § 2. Since the ratification of the Sixteenth Amendment, there has been no constitutional requirement that direct taxes be apportioned. The other remaining provision in the Constitution that deals expressly with Indians is the Indian Commerce Clause. *Id.* art. I, § 8, cl. 3 (conferring power on Congress “[t]o regulate Commerce . . . with the Indian Tribes”).

22. *See Elk*, 112 U.S. at 106-07 (stating that “whether any Indian tribes, or any members thereof” should be “admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself”).

23. *Id.* at 109.

24. *Id.* at 116 (Harlan, J., dissenting). As the majority pointed out, contemporaneous with the ratification of the Fourteenth Amendment, the federal government had entered into treaties with a number of tribes, naturalizing their members. *See id.* at 103-05 (majority opinion)

only that the two prerequisites for citizenship in section 1—first, that the person be either born or naturalized in the United States and, second, that he be “subject to the jurisdiction thereof”—did not have to be fulfilled simultaneously. The Citizenship Clause, he argued, “implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States.”²⁵ Quoting Judge Thomas Cooley’s edition of Joseph Story’s *Commentaries on the Constitution of the United States*, he noted that 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 [under the Fourteenth Amendment] is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic²⁶

Indians were entitled to national citizenship when they “abandon[ed]” their tribe and became residents of one of the states. Otherwise,

the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory . . . are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.²⁷

Even under Justice Harlan’s view, then, Indians would be entitled to invoke the Fifteenth Amendment’s protection of their right to vote only if they severed their ties with the Indian community.²⁸

(describing treaties with the Delaware, the Pottawatomie, the Sioux, the Ottawa, the Miami, the Peoria, the Winnebago in Minnesota, and the Stockbridge and Munsee in Wisconsin).

25. *Id.* at 121 (Harlan, J., dissenting).

26. *Id.* at 120 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1933, at 655 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 1873)).

27. *Id.* at 122–23.

28. Congress took a similar position. For example, the 1889 Enabling Act under which Washington, Montana, North Dakota, and South Dakota gained admission to the Union, provided that the states’ constitutions “shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed.” Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676–77.

That general view prevailed as a matter of federal law for the next forty years. The Dawes and Burke Acts conferred citizenship on the majority of Indians,²⁹ but only because they agreed to the division of their lands (“allotment”), left the reservation, or cut their ties to their tribes. As McDonald trenchantly observes, “Indians became citizens, but only by ceasing to be Indians.”³⁰

After a series of additional partial measures,³¹ Congress enacted the Indian Citizenship Act of 1924, unconditionally conferring U.S. citizenship on all Indians.³² Thus, as a formal matter, the Fourteenth and Fifteenth Amendments’ protections of voting rights finally were extended to Indians.

But as with African-Americans, whose formal right to vote had been recognized a half-century earlier by those same Amendments, disenfranchisement remained pervasive. States with large Indian populations used a variety of devices to keep Indians off the rolls. Some of these devices found their parallels in the techniques used to disenfranchise blacks and Latinos.³³ For example, the literacy tests that black and Latino citizens failed

29. See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 15.

30. *Id.* at 16. More precisely, Indians could achieve citizenship only to the extent that they appeared to nonnative eyes to have abandoned their identity. Many Indians continued to observe their traditions in private even once they had moved into nonnative society.

31. For example, in 1919, Congress conferred eligibility for citizenship on Indians who had served honorably in World War I. *Id.* at 18. For discussion of the relationship between military service and citizenship, see Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345 (2003). See also MCCOOL ET AL., *supra* note 9, at 17 (noting that, in its 1948 brief attacking Arizona’s law denying on-reservation Indians the right to vote, the United States argued that Indians who had served in the military during World War II “rightly resented a situation where they are allowed to participate in upholding democratic principles as soldiers, but are considered unprepared to share in protecting those principles in peace time” (quoting Brief Amicus Curiae of the United States of America at 7, *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (No. 5065))).

32. See Indian Citizenship Act of 1924, 43 Stat. 253 (“*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”). The current version is codified at 8 U.S.C. § 1401 (2006), which provides that persons “born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” shall be “nationals and citizens of the United States at birth.” This unilateral declaration was controversial among some Indian populations who feared that it was yet another measure designed to force their assimilation. See *infra* note 102.

33. Compare *Lane v. Wilson*, 307 U.S. 268 (1939) (striking down a restrictive Oklahoma re-registration requirement designed to perpetuate disenfranchisement of blacks after the Supreme Court had struck down the state’s grandfather clause), with MCDONALD,

often barred Indians too.³⁴ In the course of explaining why Congress had the power to suspend Arizona's literacy test,³⁵ Justice Brennan's opinion described

AMERICAN INDIANS, *supra* note 3, at 272 n.87 (referring to a Montana re-registration requirement that blunted the impact of the Indian Citizenship Act). Compare *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987) (holding that Mississippi's dual registration requirement, which necessitated that aspiring voters travel to the county courthouse to register, violated the Voting Rights Act because of its disparate impact on black citizens), *aff'd sub nom. Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991), with *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 123 (describing South Dakota's restrictive registration practices, including its requirement that voters register in person at the office of the county auditor).

34. See *MCCOOL ET AL.*, *supra* note 9, at 18-19 (discussing the impact of literacy tests on Indians); see also *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 36-37 (discussing congressional references to this history).
35. In 1965, Congress suspended literacy tests for five years in jurisdictions with depressed levels of political participation. The coverage formula that Congress used to designate the jurisdictions swept in most of the states in the Deep South, Alaska, and a few jurisdictions elsewhere. See *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 31. Three counties in Arizona with large Indian populations were covered by this initial ban. See *Apache Cnty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966).

Congress permitted jurisdictions to "bail out" from under the Act's coverage if they could show that for the preceding five years their test had been administered without a discriminatory purpose or effect. See *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 31. Arizona sought to bail out and, over the objection of Navajo voters who sought unsuccessfully to intervene, a three-judge court entered an order permitting the counties to bail out. See *Apache Cnty.*, 256 F. Supp. at 913. Although the court took note of "past and present inadequacies of facilities" for registering and for voting on reservations, *id.* at 910, it found that the state was making appropriate efforts to remedy the problems. And the court described the Arizona literacy test as "bona fide." *Id.* Ironically, one piece of evidence on which the court relied to refute the Navajos' challenge was the fact that the test had been adopted during the period in which Indians were disenfranchised because they were not citizens. *Id.* at 910-11 & n.11. Even more ironically, the court downplayed the efforts of the Tribe's voting chairman to persuade the federal government to send registrars to the reservation under a provision of the 1965 Act that permitted such registrars in cases where significant complaints were made:

[Lloyd House, Deputy Registrar and Voting Chairman of the Tribe,] wrote to Attorney General Katzenbach on August 27, 1965, asking for Federal registrars, explaining the failure to supply 20 letters from Navajos denied registration as follows: "Our people are not capable in many instances of writing letters and because voting rights have been so meaningless for the past two (2) or three (3) decades, the people are not aware of the importance of this freedom of the American people." The inability to file 20 letters is plainly consistent with plaintiff's allegations [that there was no discrimination against Indian voters], if indeed it does not affirmatively support them.

Id. at 912 n.15.

In 1970, Congress amended the Voting Rights Act to extend the suspension of literacy tests for another five years and to impose the ban nationwide. Arizona refused to abandon

the high level of illiteracy among Indians as “the consequence of a previous, governmentally sponsored denial of equal educational opportunity,” pointing to the state’s admission that “many older Indians in the State were ‘never privileged to attend a formal school.’”³⁶ Justice Douglas went further, describing literacy tests as “a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians.”³⁷ In 1975, recognizing the barriers to full participation that Indians continued to confront, Congress not only permanently prohibited literacy tests throughout the United States but also expressly included Indians within the Voting Rights Act’s special protections for minority groups.³⁸

its test, and the United States sued a number of states, including Arizona, whose literacy test it sought to enjoin. *Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970) (opinion of Black, J.).

36. *Oregon*, 400 U.S. at 234 (Brennan, J., dissenting in part and concurring in part) (quoting *Hearings on Amendments to the Voting Rights Act of 1965 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong., 1st and 2d Sess. (1969-1970) (statement of Att’y Gen. of Ariz.)). Because the case involved so many issues, there was no opinion for the Court. See also *id.* at 132 (opinion of Black, J.) (pointing to the discriminatory impact of Arizona’s test on Latinos and Indians).
37. *Id.* at 147 (Douglas, J., dissenting in part and concurring in part). Literacy tests were racially discriminatory not only because they perpetuated the effects of prior discrimination in the educational system but also because they were often administered in a discriminatory fashion. See David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL’Y 732, 738-39 (2000) (quoting the Cherokee Indian superintendent’s observation with respect to North Carolina’s literacy test, which required that aspiring voters show, “to the satisfaction of the registrar,” that they were able to read and write a section of the U.S. Constitution, that “[w]e have had Indian graduates of Carlisle, Haskell and other schools in instances much better educated than the registrar himself, turned down because they did not read or write to his *satisfaction*”).

The literacy test ban was made permanent in 1975. See 42 U.S.C. § 1973aa(a)-(b) (2006) (providing that citizens cannot be denied the right to vote because of “failure to comply with any test or device” and defining “test or device” to include, among other things, “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, [or] (2) demonstrate any educational achievement or his knowledge of any particular subject”).

38. Indians and Alaskan Natives – as well as Latinos and Asian-Americans – are protected by the Voting Rights Act as language minorities, rather than as racial groups. The Act uses the terms “language minorities” and “language minority group” to mean “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” *id.* § 1973l(c)(3), regardless of whether those persons actually speak a language other than English. Section 4(f)(2) of the Act provides that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.” *Id.* § 1973b(f)(2).

Section 2 of the Voting Rights Act prohibits a state or political subdivision from using a voting practice “which results in a denial or abridgement of the right of any citizen of the

But in addition to confronting the same exclusionary practices that black and Latino citizens faced, Indians encountered unique barriers, as states used Indians' distinctive status to defeat their right to vote. Many states formally disenfranchised "Indians not taxed,"³⁹ by which they meant Indians living on reservations or other federal land that was not subject to property taxes.⁴⁰ The ostensible justification for this exclusion was "no representation without taxation"⁴¹: 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

United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)." *Id.* § 1973(a). Similarly, section 5 of the Voting Rights Act—which applies only to specified jurisdictions, including several with large Indian populations (most notably, the states of Alaska and Arizona and two counties in South Dakota, *see* 28 C.F.R. pt. 51 app. (2009))—contains a similar prohibition on those jurisdictions' making any change to their election laws unless they can show that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title." 42 U.S.C. § 1973c(a).

In addition to these provisions, many jurisdictions with significant Indian populations are covered by section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a, which requires the provision of bilingual ballot materials in jurisdictions with a significant number of citizens of voting age with limited English proficiency. For a list of jurisdictions required to provide minority-language voting assistance to Indian populations, *see* McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 46.

39. *Id.* at 19 (noting that Idaho, Maine, Mississippi, New Mexico, and Washington used this formulation).
40. The poll tax was a major disenfranchising device in the South. *See, e.g.,* Harman v. Forssenius, 380 U.S. 528 (1965) (striking down Virginia's poll tax for federal elections because it was enacted and maintained for racially discriminatory reasons); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE RISE OF THE ONE-PARTY SOUTH, 1880-1910*, at 63-72 (1974) (discussing the poll tax). The rationale for disenfranchising Indians was a bit different: it was not their failure to pay a tax that was owed but rather their exemption from certain taxation to begin with. In fact, states made no real effort to collect the poll tax, as opposed to taxes on income or property; the point of the poll tax was to make it harder to vote, and not really to raise revenue. *See, e.g.,* VIRGINIA FOSTER DURR, *OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR 176-78* (Hollinger F. Barnard ed., 1985) (describing her difficulties in attempting to pay Virginia's poll tax).
41. *See* Prince v. Bd. of Educ., 543 P.2d 1176, 1178 (N.M. 1975) (describing this argument in the context of a suit in which non-Indian plaintiffs sought to invalidate a school district bond election on the grounds that on-reservation Navajo should not have voted because they did not pay the property taxes used to repay the bonds); *see also* *In re Liquor Election*, 163 N.W. 988, 990 (Minn. 1917) (stating that it would be "repugnant to our form of government" for "those who do not come within the operation of the laws of the state" to "have the power to make and impose laws upon others" and charging that "[t]he tribal Indian contributes nothing to the state").

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.⁴²

Sometimes, the argument was offered at one remove, taking the form that on-reservation Indians were not really residents of the state or any political subdivisions within which the reservation was located. In *Allen v. Merell*,⁴³ for example, the Utah Supreme Court upheld the state's treatment of on-reservation Indians as nonresidents⁴⁴ on the theory that they were both potentially subject to disproportionate "influence and control" by federal officials—a justification reminiscent of pauper disqualification provisions⁴⁵—and "much less concerned with paying taxes and otherwise being involved with state government and its local units" than other citizens.⁴⁶ The Utah court

42. McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 19. In 1938, the Solicitor of the Department of the Interior issued an opinion that "the Fifteenth Amendment clearly prohibits any denial of the right to vote to Indians under circumstances in which non-Indians would be permitted to vote." Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 *AM. INDIAN L. REV.* 167, 185 (1991) (quoting the opinion). Nevertheless it took several decades to vindicate this principle. For example, in 1948, a three-judge district court struck down New Mexico's disenfranchisement of on-reservation Indians as a violation of the Equal Protection Clause and the Fifteenth Amendment:

Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications to vote must have paid a tax. How you can escape the conclusion that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any race is beyond me.

Id. at 185-86 (quoting from the unpublished district court opinion in *Trujillo v. Garley*, No. 1353 (D.N.M. 1948)).

43. 305 P.2d 490 (Utah 1956).

44. The provision of the Utah election code at issue declared that "[a]ny person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation." *Id.* at 491 (quoting the now-repealed provision). The U.S. Supreme Court struck down such provisions with respect to military personnel in *Carrington v. Rash*, 380 U.S. 89 (1965). For a wonderful discussion of *Carrington*, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 8-13 (1969).

45. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 21-22 (3d ed. 2007) (discussing the pauper exclusions and the idea that individuals receiving government assistance might be subject to undue influence).

46. *Allen*, 305 P.2d at 492.

unselfconsciously expressed its alarm at the prospect that Indians might actually influence election outcomes:

[I]n a county where the Indian population would amount to a substantial proportion of the citizenery [sic], or may even outnumber the other inhabitants, allowing them to vote might place substantial control of the county government and the expenditures of its funds in a group of citizens who, as a class, had an extremely limited interest in its functions and very little responsibility in providing the financial support thereof.⁴⁷

Arizona adopted perhaps the most ingeniously disingenuous explanation for its disenfranchisement of on-reservation Indians. The state acknowledged that Indians living within its boundaries were residents.⁴⁸ But Arizona's constitution (like the constitutions of many other states both then and now) denied the right to vote to resident citizens who were "under guardianship, non compos mentis, or insane."⁴⁹ Exploiting Chief Justice John Marshall's description of the relationship between Indian tribes and the Federal Government as "resembl[ing] that of a ward to his guardian,"⁵⁰ the state supreme court declared that individual Indians were therefore "persons under guardianship" and ineligible to vote.⁵¹ It took a generation for the Arizona courts to repudiate that view, acknowledge that individual Indians were entirely competent to manage their own affairs, and admit that Chief Justice Marshall's metaphor should never have been taken literally.⁵²

47. *Id.* at 495. This statement echoes V.O. Key's famous backlash hypothesis that resistance to black enfranchisement increases as the black share of the population goes up. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 315-16 (1949); James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 351, 359-60, 370-71 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *QUIET REVOLUTION*] (offering more recent empirical support).

The Utah legislature repealed the provision while the case was on appeal to the U.S. Supreme Court. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 20. On the other hand, as late as 1966, Colorado's legislature took the position that Indians living on reservations were not residents of the state for purposes of voting. *Id.* at 149.

48. *Porter v. Hall*, 271 P. 411, 415 (Ariz. 1928). For a contemporaneous analysis of the opinion, see N.D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CALIF. L. REV. 507 (1931).

49. ARIZ. CONST. art. VII, § 2.

50. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

51. *Porter*, 271 P. at 415-18.

52. See *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948) (overruling *Porter*).

Even after states repealed—or were forced by federal law to abandon—outright disenfranchisement of Indians, Indian registration and voting rates remained low. The repeal of literacy tests nonetheless left in place the use of monolingual election materials that posed difficulties to Indians who communicated primarily in their native tongues and had only limited English proficiency.⁵³ Jurisdictions’ indifference or hostility resulted in restrictive registration practices,⁵⁴ a lack of accessible polling places,⁵⁵ harassment of Indian voters,⁵⁶ and depressed participation. Even beyond these first-generation problems,⁵⁷ Indians faced significant difficulties in electing the

53. See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 62-63 (discussing language usage among Crows and Northern Cheyennes in Montana). One indication of the depth and breadth of the problem: the federal government subsequently required eighty jurisdictions with substantial Indian populations to provide bilingual (or multilingual) ballot materials under a provision requiring such materials for political subdivisions that contain “all or any part of an Indian reservation,” where more than five percent of the voting age population “are members of a single language minority and are limited-English proficient,” and where the illiteracy rate among Indians is above the national illiteracy rate. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2006). See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 46 (listing these jurisdictions).

54. For example, South Dakota required aspiring voters who did not pay property taxes to register in person at the county auditor’s office. (Property taxpayers were automatically registered.) The in-person requirement posed two difficulties. First, getting to the county seat from the reservation was difficult for Indians who lacked transportation. Second, South Dakota classified three counties in which a majority of the residents were Indian as “unorganized” counties. Aspiring voters in these counties had to travel to the next county to register. See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 123.

Along the same lines, Montana restricted eligibility to serve as a deputy registrar of voters to “taxpaying” residents of a precinct. *Id.* at 61. The state did not repeal this provision, which had the effect of denying Indians “access to voter registration in their own precincts on the reservation,” until 1975. *Id.*

55. See MCCOOL ET AL., *supra* note 9, at 72-73 (discussing cases involving the number or location of polling places); MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 127 (residents of the Cheyenne River Sioux Reservation had to travel up to 150 miles roundtrip to vote until a federal court ordered the establishment of polling places on the reservation in 1986).

56. See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 82-83 (discussing problems in Big Horn County, Montana).

57. Voting rights scholars have identified three generations of voting rights claims. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 32-33, 49 (1994); Chandler Davidson & Bernard Grofman, *Editors’ Introduction to QUIET REVOLUTION*, *supra* note 47, at 3, 14-15; Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273, 1274-76 (1995); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-19 (1993). The first generation involves challenges to outright denial of access, either to registration rolls or voting booths. The second generation involves claims of vote dilution. The third involves questions of governance and the allocation of power among elected officials.

candidates of their choice. Those second-generation claims, and the operation of section 2 of the Voting Rights Act, form the heart of McDonald's book.

II. INDIAN VOTERS AND THE FIGHT FOR REPRESENTATION

One striking feature of voting rights law is the way in which scholarship and practice contribute to one another. The leading empirical study of the Voting Rights Act, *Quiet Revolution in the South*,⁵⁸ contains a series of state-level studies jointly written by lawyers who litigated many of the most significant cases and various social scientists, many of whom participated in cases as expert witnesses.⁵⁹ Despite Judge Harry Edwards' much-discussed complaint that scholars are no longer writing for practitioners and that courts are no longer reading what scholars write,⁶⁰ that is not true with respect to voting rights.⁶¹

Moreover, Indian citizens continue to face first-generation problems. For one recent example, see *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (granting a preliminary injunction preventing a county from closing polling places on a reservation given the problems that Indian voters would then face in casting their ballots).

In jurisdictions covered by the Voting Rights Act's special preclearance requirement, see *supra* note 38, the prohibition on administering any change to voting-related laws without first satisfying federal authorities that the change has neither a discriminatory purpose nor a discriminatory effect can serve as an important safeguard against new forms of disenfranchisement.

58. QUIET REVOLUTION, *supra* note 47.

59. McDonald, along with political scientist Michael B. Binford and Ken Johnson (the deputy director of the Southern Regional Council), contributed the chapter on Georgia. Laughlin McDonald, Michael B. Binford & Ken Johnson, *Georgia*, in QUIET REVOLUTION, *supra* note 47, at 67.

60. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

61. The Supreme Court has cited work by law professors in several voting-related cases. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (2007)); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1242 (2009) (citing Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 (2002)); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 515 (2007) (Souter, J., dissenting) (quoting Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999)); *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 886 (2d ed. 2002)).

Perhaps the most striking example of this close relationship is the framework that the Supreme Court imposed on section 2 vote dilution cases. When Congress amended section 2, it directed courts to engage in a totality-of-the-circumstances inquiry.⁶² And it provided a list of nine factors probative of a section 2 violation.⁶³ In its first case interpreting the amended section 2,

For examples, in addition to McDonald's work, of important voting rights scholarship written by practicing lawyers, see FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990); James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 *HOW. L.J.* 633 (1996); James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 *HASTINGS L.J.* 1 (1982); Armand Derfner, *Racial Discrimination and the Right To Vote*, 26 *VAND. L. REV.* 523, 525-44 (1973); and Edward Still, *Alternatives to Single-Member Districts*, in *MINORITY VOTE DILUTION* 249 (Chandler Davidson ed., 1984).

Law school faculty with extensive litigation experience have produced important work explicitly based on prior litigation. See, e.g., LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* (1998); BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

Finally, and not surprisingly, social scientists who serve as expert witnesses in voting rights cases have also produced extensive scholarship, sometimes based in part on their litigation experience. See, e.g., J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); MCCOOL ET AL., *supra* note 9; *QUIET REVOLUTION*, *supra* note 47; Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 *SOC. SCI. Q.* 388 (1991); Richard L. Engstrom, Delbert A. Taebel & Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 *J.L. & POL.* 469 (1989).

62. 42 U.S.C. § 1973(b) (2006) (providing that a violation of section 2 “is established if, based on the totality of circumstances, it is shown that” minority citizens “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”).

63. The nine factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

Thornburg v. Gingles,⁶⁴ the Supreme Court substituted a relatively objective three-prong test for the more fluid totality-of-the-circumstances inquiry:

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. . . . First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority’s preferred candidate.⁶⁵

The *Gingles* test was lifted, almost verbatim, from an article by two veteran voting rights lawyers, Jim Blacksher and Larry Menefee,⁶⁶ who had litigated the case that prompted the amendment of section 2, *City of Mobile v. Bolden*.⁶⁷

employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction. . . .

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 97-417, at 28-29 (1982). The factors were derived from the Supreme Court’s decision in *White v. Regester*, 412 U.S. 755 (1973), as analyzed in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

64. 478 U.S. 30 (1986).

65. *Id.* at 48-51 (footnotes omitted).

66. See Blacksher & Menefee, *supra* note 61, at 51 (arguing that dilution occurs “when jurisdiction-wide elections permit a bloc-voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically cohesive, geographically insular racial or ethnic minority group” (emphasis

The vote dilution cases on which McDonald focuses were all litigated within the doctrinal framework established in *Gingles*. Courts first determine whether plaintiffs can establish the three *Gingles* preconditions and only then consider the remaining Senate Report factors.⁶⁸ Over time, as courts have grown increasingly skeptical of vote dilution claims—largely, I believe, on normative grounds having to do with a distaste for discussions of racial justice, rather than on empirical grounds—the *Gingles* prongs have become more restrictive. For example, the Supreme Court recently held that plaintiffs must prove that they constitute “more than 50 percent of the *voting-age* population in the relevant geographic area,”⁶⁹ and several circuits have gone further by requiring that plaintiffs prove the possibility of a single-member district in which members of the minority group would be a majority of the *citizens* of voting age.⁷⁰ Courts also seem more amenable to accepting defendants’

omitted)). In the following pages of their article, Blacksher and Menefee tease out the various strands of this requirement. Justice Brennan’s opinion in *Gingles* cites the article a dozen times.

67. 446 U.S. 55 (1980).

68. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1241 (2009) (plurality opinion) (“In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.”). The second Senate factor—“the extent to which voting in the elections of the state or political subdivision is racially polarized”—is in many ways a shorthand for the second and third prongs of the *Gingles* test. S. REP. NO. 97-417, at 29.

McDonald and I worked together, along with several colleagues, on an amicus brief in *Bartlett*. See Motion for Leave To File Brief of Amici Curiae NAACP et al. in Support of Petitioners, *Bartlett*, 129 S. Ct. 1231 (No. 07-689). McDonald volunteered to take on the daunting task of summarizing all of the voting rights litigation in North Carolina since 1982, along with reviewing all of the Department of Justice’s North Carolina objection letters.

69. *Bartlett*, 129 S. Ct. at 1245 (emphasis added).

70. See *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1568-69 (11th Cir. 1997) (directing courts to consider the citizen voting-age population in evaluating the first prong of the *Gingles* test); *Campos v. City of Hous.*, 113 F.3d 544, 548 (5th Cir. 1997) (same); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (same). The “CVAP” requirement has its biggest bite in cases involving Latinos, whose population is both younger and more likely to contain recent noncitizen immigrants than other groups. Cf. *Garza v. Cnty. of L.A.*, 918 F.2d 763, 773 nn.4-5 (9th Cir. 1990) (showing that in Los Angeles County, the most heavily Latino supervisory district had roughly thirty percent fewer citizens of voting age than the most heavily Anglo district, even though the most heavily Anglo district had a slightly smaller population).

The defendants in one of the cases that McDonald discusses—*Stabler v. County of Thurston*, which involved a section 2 challenge to a county commission election system in Nebraska—actually went still further: they argued that because Indian turnout was depressed, Indians would need a population supermajority of around seventy-five percent in order to be an effective voting majority and contended that the plaintiffs’ inability to draw

alternative explanations for differences in voting patterns.⁷¹ For example, in one of the cases that McDonald discusses—*Cottier v. City of Martin*⁷²—the en banc Eighth Circuit recently held that, despite the fact that Indians had never been able to elect a representative from the Indian community to the city council,⁷³ the plaintiffs had failed to satisfy the third *Gingles* precondition. To reach this conclusion, the court looked to exogenous elections⁷⁴—in this case, elections for offices other than the Martin City Council—and to elections in which no Indian candidates had run.⁷⁵ The court acknowledged that *Indian*

such a district should be a defense to liability. The district court rejected that argument. See MCDONALD, AMERICAN INDIANS, *supra* note 3, at 193.

71. One of the primary arguments that courts have accepted is that the minority group is unable to elect its candidates for political, rather than racial, reasons. I have explained elsewhere why I think that this position is incorrect both theoretically and empirically. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996). Perhaps exploiting the Supreme Court's statement in *Morton v. Mancari*, 417 U.S. 535 (1974), that a Bureau of Indian Affairs' hiring preference for Indians was political rather than "racial," *id.* at 553-54, defendants are apparently beginning to argue in Indian cases that Indians are losing elections for political reasons. For a discussion of this issue, see Carole Goldberg, *Not So Simple: Voting Rights for American Indians in State Elections*, 7 ELECTION L.J. 355, 359 (2008) (reviewing MCCOOL ET AL., *supra* note 9).

But precisely because tribes are political entities, intertribal political conflict can occur. See, e.g., *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992) (discussing the decision to place Navajo and Hopi populations in Arizona in separate congressional districts), *aff'd*, 507 U.S. 981 (1993); cf. Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1211 (1993) (discussing councilmanic redistricting in New York and the conflict between Dominicans and Puerto Ricans in upper Manhattan and between American-born and Caribbean-born blacks in Brooklyn).

72. 604 F.3d 553 (8th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 598 (Nov. 15, 2010). The case involved a challenge to the three districts used to elect the Martin City Council. Although nearly forty-five percent of the city's population was Native American, the Indian community was "fragmented" among the three districts, each of which had a white majority. MCDONALD, AMERICAN INDIANS, *supra* note 3, at 141-42.
73. *Id.* at 142.
74. "Exogenous' elections are any elections other than the elections for the offices at issue." *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997). "Endogenous' elections are elections for the offices that are at issue in the litigation." *Id.*

Courts look at exogenous elections when there are not enough endogenous elections—that is, elections for the office at issue—to get a reliable sense of whether there is racially polarized voting. In looking at the exogenous elections, courts ask how the candidates fared within the jurisdiction under review. For example, a court might ask how Indian and non-Indian candidates for countywide office or state legislative office performed within Martin.

75. See *Cottier*, 604 F.3d at 560.

candidates generally lost⁷⁶ but concluded that, when the white-on-white contests were added to the ledger, the results “taken as a whole show almost equal numbers of victories for Indian-preferred candidates and non-Indian-preferred candidates. They do not compel a finding that a white majority in Martin votes sufficiently as a bloc usually to defeat the Indian-preferred candidate.”⁷⁷ To paraphrase McDonald’s observation that Indians became citizens only by ceasing to be Indians,⁷⁸ it seems that they can now elect the candidates of their choice, but only as long as Indians don’t run.

But the more depressing conclusion comes not from the cases that Indians are losing, but from the cases that they are winning. The picture that emerges from McDonald’s accounts of litigation in Montana, South Dakota, Colorado, Nebraska, and Wyoming is that usually it is all too straightforward to establish liability in the relatively few communities that have significant Indian populations.⁷⁹

76. See *id.* The plaintiffs in *Cottier* were somewhat hamstrung in analyzing the city council elections because the city used only three precincts, each coterminous with one of the councilmanic districts. Thus, the usual statistical techniques for determining voting behavior were unavailable. The plaintiffs did present testimony suggesting that the Indian-preferred candidate had lost in all seven contests conducted under the challenged plan. See Petition for a Writ of Certiorari at 5, *Cottier*, No. 10-335 (filed Sept. 1, 2010), *cert. denied*, 131 S. Ct. 598 (2010).

77. *Cottier*, 604 F.3d at 560 (citing *Johnson v. Hamrick*, 296 F.3d 1065, 1078 (11th Cir. 2002) (stating that while courts “may give more weight to elections involving [minority] candidates than those involving all white contestants, there is no requirement that a district court *must* do so” (alteration in original))).

78. See *supra* text accompanying note 30.

79. In the 2000 census, nationwide roughly 4.1 million people identified themselves as American Indians or Alaska Natives. See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 1 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>. Nationwide, Indians and Alaska Natives make up approximately one and a half percent of the population.

A group’s political power is, of course, substantially a function of its size. At the statewide level, there are only three states—Alaska (nineteen percent), Oklahoma (eleven percent), and New Mexico (ten percent)—where Indians or Alaska Natives make up at least ten percent of the population. At the county level, Indians or Alaska Natives constitute a majority of the population in fourteen counties within Alaska, Arizona, Montana, and Utah and in twelve counties within South Dakota, Wisconsin, North Dakota, and Nebraska. See *id.* at 4. (For a wonderful map illustrating population proportions by county, see *id.* at 7.)

Many of the cases that McDonald discusses come from those jurisdictions where Indians constitute a substantial (and sometimes a majority) share of the population. See, e.g., McDONALD, AMERICAN INDIANS, *supra* note 3, at 143-44 (discussing litigation in eighty-three percent Indian Buffalo County, South Dakota); *id.* at 179-94 (discussing litigation in Thurston County, Nebraska, where Winnebago and Omaha reservations “officially comprise the entire land area” of the county).

The first prong of the *Gingles* test seldom poses an obstacle; the fact that most of the cases involve on-reservation Indians or Indians who continue to live close to reservations means that the plaintiffs can easily establish that they constitute a sufficiently large, geographically compact community. What is dispiriting is how often those communities have been “cracked” among several districts so that they form an ineffectual minority in each, “packed” into one or only a few districts so that the remaining districts are easier for white voters to control, or “stacked” into at-large systems when districted systems would yield majority-Indian constituencies.⁸⁰

Turning to the second and third prongs of the *Gingles* inquiry—which operate as the flip sides of an inquiry into racially polarized voting—McDonald paints pictures of highly polarized societies. He describes stunning levels of bloc voting⁸¹ easily comparable to figures from early cases in the Deep South.

80. For a discussion of all three techniques, see Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249-50 (1993).

For examples of the cracking of Indian communities, see *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972), which discusses an Arizona state legislative reapportionment in which the Navajo Indian Reservation was divided among three legislative districts at the insistence of an incumbent who might otherwise have lost his seat and concludes that “[t]here is ample basis to suspect that ‘the Indians were done in,’” *id.* (quoting *Ely v. Klahr*, 403 U.S. 108, 119 (1971) (Douglas, J., concurring)); MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 104, which discusses how the 1992 Montana state legislature assigned the Rocky Boy’s and Fort Belknap reservations to different districts, in both of which Indians were unable to elect a representative of their choice; and *id.* at 142, which discusses *Cottier*.

For examples of packing, see *id.* at 133, which discusses how the Cheyenne River Sioux were packed into an overpopulated, ninety-percent Indian state legislative district, thereby depriving them of the ability to form a majority in an adjacent district as well; *id.* at 143, which discusses Buffalo County, South Dakota, where whites, although only seventeen percent of the population, controlled two of three districts; and Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo Country*, 15 AM. INDIAN CULTURE & RES. J. 63, 77-79 (1991), which discusses the packing of the Navajo in Arizona.

For examples of stacking—which involves the use of at-large elections to submerge concentrations of minority voters who could form a majority if districts were used instead—see MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 87-89, which discusses Big Horn County, Montana.

The prevalence of cracking and packing in redistricting plans illustrates one of the reasons that section 5 of the Voting Rights Act is so important: it requires federal preclearance before decennial redrawing of district lines goes into effect.

81. For example, the expert testimony in *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986), a challenge to at-large elections in a Montana county, established that in general elections, about ninety percent of Indian voters preferred Indian candidates while eighty-seven percent of non-Indian voters voted for non-Indian candidates. MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 87-88; see also *id.* at 131 (in legislative races in South Dakota House District 28, eighty-one percent of Indians favored the Indian candidates while

And when he turns to evidence regarding the Senate factors, the facts are equally stark.⁸² Indians in all five jurisdictions endured a history of discrimination both inside and outside the political process.⁸³ They continue to suffer from marked socioeconomic deprivations that make it more difficult for them to participate effectively in the electoral process.⁸⁴ They are subject to racial appeals in campaigns⁸⁵ and to unresponsive governments afterwards.⁸⁶ Virtually no Indians are elected from constituencies that are not majority Indian.

The litigation that McDonald describes more closely resembles the initial vote dilution suits in which black and Latino plaintiffs faced “exclusion, plain and simple,”⁸⁷ than the contemporary cases involving black and Latino voters. It was possible to publish (and for McDonald to contribute to) a study entitled *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*.⁸⁸ By contrast, an account of the Voting Rights Act’s impact in Indian country during that period would have been a slim pamphlet with a far less triumphant title. It was not until 1983, long after litigation had begun to transform the

ninety-three percent of white voters favored other candidates); *id.* at 191 (in Thurston County, Nebraska, the average level of support for Indian candidates was eighty-six percent among Indians, but only eleven percent among non-Indians).

82. *See, e.g., id.* at 88-89 (summarizing the district court’s findings with respect to the Senate Report factors in *Windy Boy*); *id.* at 92 (summarizing the district court’s findings with respect to the Senate Report factors in *United States v. Blaine County*, a section 2 challenge to at-large elections for a county commission in Montana); *id.* at 168-69 (summarizing the district court’s findings with respect to the Senate Report factors in *Cuthair v. Montezuma-Cortez School District No. RE-1*, a challenge to at-large school board elections in a Colorado community).
83. *See, e.g., id.* at 58-71 (discussing the history of discrimination in Montana); *id.* at 123-24 (doing the same for South Dakota); *id.* at 158-68 (doing the same for Montezuma County, Colorado); *id.* at 184-88 (doing the same for Thurston County, Nebraska); *id.* at 206-12, 216-25 (doing the same for Fremont County, Wyoming).
84. *See, e.g., id.* at 110 (discussing socioeconomic disparities in Montana); *id.* at 125 (doing the same for South Dakota); *id.* at 189-90 (doing the same for Thurston County, Nebraska); *id.* at 227-29 (doing the same for Fremont County, Wyoming).
85. *See id.* at 89 (reporting such findings by the district court in *Windy Boy*).
86. *See, e.g., id.* at 80 (discussing the failure to employ Indians in county government and the exclusion of Indians from juries in Big Horn County, Montana); *id.* at 136-37 (describing discriminatory law enforcement in Bennett County, South Dakota); *id.* at 188-89 (describing the lack of responsiveness to Indians’ concerns in Thurston County, Nebraska).
87. Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 880 (1995).
88. QUIET REVOLUTION, *supra* note 47.

Deep South and Hispanic Southwest, that the ACLU Voting Rights Project brought its first vote dilution suit in Indian country.⁸⁹

While Indians still struggle to elect candidates at all, the central issue for African-American communities often involves consolidating and preserving the gains achieved over four decades of vigorous litigation by the voting rights bar and administrative enforcement by the Department of Justice.⁹⁰ Contemporary vote dilution cases often raise complex questions. Are black voters better off under an electoral structure that allows them to elect a few representatives who are accountable only to them, or is a plan in which they exercise influence, but not outright control, over a larger number of representatives superior? Is there a tradeoff between “descriptive representation”—black voters’ ability to elect black candidates—and “substantive representation”—their ability to obtain public policies that they prefer? Should support from black elected officials for a challenged plan influence judicial analysis under the Voting Rights Act?⁹¹ Has the minority community in some sense been too successful—that is, has the system taken race into account too much in drawing minority districts?⁹² Indian communities have not yet had to face these hard questions because they are still facing the antecedent ones about their ability to elect representatives at all. They face a real risk during the upcoming redistricting following release of

89. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 48 (discussing *Windy Boy*). The ACLU’s involvement was a happy accident. One of the two local tribal attorneys involved in planning the lawsuit “was married to the director of the Montana ACLU affiliate, who was aware of the ACLU’s national projects and called the Voting Rights Project in Atlanta.” MCCOOL ET AL., *supra* note 9, at 41. Last year, when a kitchen fire at a civil rights conference forced McDonald and me out into a pasture to eat our lunches, he recalled his introduction to Indian voting rights issues in *Windy Boy* and brought me up to date concerning the lead plaintiff, Janine Windy Boy (now Janine Pease). He described with genuine delight how she later received her doctorate in education, founded Little Big Horn College, and received a MacArthur Foundation fellowship.

90. Michael Pitts refers to the current situation as one of “maintenance.” Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903 (2008).

Latino communities are in a somewhat intermediate position. On the one hand, they have achieved tremendous gains in representation since the early 1970s and, like the black community, are seeking to preserve those gains. On the other hand, burgeoning Latino populations, both in jurisdictions with longtime communities, such as Texas or California, and in jurisdictions where Latino populations were previously small or nonexistent, are creating new potential opportunities to draw districts from which they can elect candidates of their choice.

91. For discussion of these issues, see *Georgia v. Ashcroft*, 539 U.S. 461 (2003); and ISSACHAROFF ET AL., *supra* note 45, at 778-89.

92. This is the so-called *Shaw* question, named after the Supreme Court’s decision in *Shaw v. Reno*, 509 U.S. 630 (1993). For a comprehensive discussion of the *Shaw* cases, see ISSACHAROFF ET AL., *supra* note 45, at 724-60.

the 2010 census data. Not only may hostile jurisdictions try to take back Indians' gains over the past decade—a battle in which section 5's preclearance requirement provides some protection to Indians in Arizona and parts of South Dakota, but not in Nebraska or Wyoming—but the Supreme Court also seems poised to relax some of section 2's protections against vote dilution on the grounds that they are no longer needed, failing to recognize that Indian voters are a generation behind in their quest for effective political power.

Moreover, Indian voters face some complexities that black and Latino voting rights plaintiffs have been spared. Just as non-Indians offered distinctive arguments for disenfranchising Indians, they have tried to offer distinctive defenses to vote dilution claims brought by Indian plaintiffs. For example, Gros Ventre and Assiniboine voters living on the Fort Belknap Reservation in Blaine County, Montana, brought a section 2 suit challenging the use of at-large elections for the county commission. Although Indians constituted roughly forty-five percent of the total population, and thirty-nine percent of the voting-age population, no Indian had ever been elected to the commission.⁹³ The county advanced two unusual arguments against the district court's finding that the plaintiffs had satisfied *Gingles's* requirement of political cohesiveness.⁹⁴ First, it argued that despite overwhelming evidence of racial bloc voting—the county's own expert witness “conceded that American Indians voted cohesively in one hundred percent of County Commissioner elections and ninety-five percent of exogenous elections for county, state, and national offices”⁹⁵—the plaintiffs lacked any distinctive political concerns.⁹⁶ Second, it argued that the relatively low turnout among the Indian community undercut any finding of political cohesion.

93. See *United States v. Blaine Cnty.*, 363 F.3d 897, 900 (9th Cir. 2004).

94. The county also challenged the constitutionality of the Voting Rights Act's use of disparate impact standards. See *MCCOOL ET AL.*, *supra* note 9, at 122-23 (referring to the county's motion for summary judgment arguing that section 2 could not apply to Blaine County or Montana because Congress had virtually no “evidence”—and the brief put that word in quotation marks—of discrimination against Indians). The Ninth Circuit rejected that challenge. See *Blaine Cnty.*, 363 F.3d at 900, 903-09.

95. *Id.* at 910.

96. See Brief for Appellants at 30-34, *Blaine Cnty.*, 363 F.3d 897 (No. 02-35691); see also *MCCOOL ET AL.*, *supra* note 9, at 125 (describing the county's position before the district court that “American Indians are not and cannot be politically cohesive for want of distinct political interests that could be furthered by the Blaine County Board of Commissioners” in light of the fact that “the Tribe provides all the services that might normally be provided by county government”).

The Ninth Circuit rejected both arguments. It refused to “second guess voters’ understanding of their own best interests.”⁹⁷ The county’s suggestion that the Indians’ identified interests were “unfounded . . . essentially asks us to deny the validity of American Indian voters’ self-professed interests. Were we to do so, we would be answering what is inherently a political question, best left to the voters and their elected representatives.”⁹⁸ Blaine County’s argument, then, was reminiscent of the discredited position taken by the Arizona Supreme Court in *Porter*⁹⁹ that Indians were incapable of self-government. The Ninth Circuit pointed out that the county’s arguments regarding low turnout

would undermine section 2’s effectiveness. After all, “[l]ow voter registration and turnout have often been considered evidence of minority voters’ lack of ability to participate effectively in the political process.” Thus, if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on.¹⁰⁰

McDonald explores a related form of this argument, which he terms the “reservation defense”: low turnout among on-reservation Indians is a function of their focus on tribal elections instead.¹⁰¹ To be sure, there has been debate within the Indian community over whether on-reservation Indians should participate in U.S. elections.¹⁰² But that debate should not eclipse the fact that

97. *Blaine Cnty.*, 363 F.3d at 910.

98. *Id.*

99. See *supra* text accompanying notes 48–52.

100. *Blaine Cnty.*, 363 F.3d at 911 (alteration in original) (citation omitted) (quoting *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 n.4 (9th Cir. 1988)).

101. See MCDONALD, AMERICAN INDIANS, *supra* note 3, at 255 (describing South Dakota’s reliance on this argument in *Emery v. Hunt*, a challenge to the state’s 1996 interim legislative redistricting plan).

102. Compare, e.g., Goldberg, *supra* note 71, at 359 (describing arguments that Indians “should be full players in [state and local] elections”), and John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533 (2000) (arguing that political participation is vital to protecting Indians’ interests), with Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1577 (1998) (claiming that while “[n]on-Indian Americans generally consider citizenship a blessing,” the Indian perspective “is radically different” and quoting a Mohawk woman stating that “my

Indians do seek to participate in U.S. elections and that electoral structures that deny them a realistic opportunity to elect representatives of their choice may deter them from voting. McDonald comes down strongly in the camp of those who believe that depressed levels of political participation among Indians are a product of past discrimination, rather than present separatist sentiment.¹⁰³

The reservation defense does, however, raise one intriguing question that ranges beyond the scope of McDonald's book.¹⁰⁴ What about voting rights and electoral structure on the reservation – that is, in tribal elections?

III. INDIAN ELECTIONS AND THE FIGHT OVER SELF-GOVERNMENT

Sophisticated tribal governments existed long before Europeans arrived in North America. The Iroquois, for example, claim theirs is the world's "oldest

parents always taught us that once you vote, you stop being an Indian"), Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 799-801 (2010) (suggesting that "reservation citizens are embracing the demise of tribal governments if they continue to participate in federal and state elections without taking steps to avoid the sovereign conflict that results" and arguing that while tribal participation in federal elections may be beneficial, tribal participation in local elections is not), and Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 152-54 (1999) (arguing against recent efforts to increase Indian participation in state and local elections).

For a general discussion of Indian participation in off-reservation politics, see Wilkins, *supra* note 37. For a historical account of the argument and Indians' dual citizenship status, see Christopher K. Riggs, *Dual Citizenship and the Struggle for American Indian Voting Rights in the Southwest in the 1940s* (Apr. 19, 2006) (unpublished manuscript) (on file with author).

103. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 255-58. In an earlier article, McDonald contended that the reservation defense

overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in *Bone Shirt*, "the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process."

Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, a Case Study*, 29 AM. INDIAN L. REV. 43, 66 (2004) (quoting *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1022 (D.S.D. 2004)).

104. McDonald does describe, in relatively brief terms, some aspects of tribal self-government, but he does so in the context of discussing federal policy and thus treats the internal operation of tribal governments as essentially opaque. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 3-29.

continuously functioning democratic constitution,”¹⁰⁵ and there is a rich scholarly literature on the intellectual contributions that Indian practices made to the Founders’ democratic theory.¹⁰⁶

There remains a staggering diversity of governmental forms among tribes.¹⁰⁷ But, to the extent that tribes embrace democratic principles, they, like other polities, confront questions about who should participate and how votes should be aggregated to determine electoral outcomes. While a comprehensive analysis of these questions is obviously beyond the scope of this Review, the ways in which tribal governments have addressed these questions illustrate some important themes that dovetail with questions about Indian participation in federal, state, and local elections.

The question of who should be entitled to vote in tribal elections has at least two important dimensions: citizenship and residence. There is no ironclad rule that the franchise must be limited to citizens or to residents: in U.S. history, we have examples of voters who are not citizens¹⁰⁸ and voters who are

105. Donald A. Grinde Jr., *Native Americans and the Founding of the United States*, in *NATIVE AMERICANS* 3, 4 (Donald A. Grinde Jr. ed., 2002).

106. See, e.g., BRUCE E. JOHANSEN, *THE FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 18 (1981); Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 227 (Oren Lyons et al. eds., 1992).

107. See NELL JESSUP NEWTON & ROBERT ANDERSON, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* § 4.06[1] (2005 ed.) (stating that although most tribes now elect at least some tribal officials, many continue also to use traditional consensus-based systems to make important decisions); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 *CALIF. L. REV.* 799, 844-45 (2007) (noting that “Nations such as the Pueblos, the Hopi, the Onondaga and the Meskwaki, for example, organize tribal government theologically” and “religion plays a dominant role in the selection of leaders,” including those who exercise political leadership); Paul W. Shagen, *Safeguarding the Integrity of Tribal Elections Through Campaign Finance Regulation*, 8 *CARDOZO PUB. L. POL’Y & ETHICS J.* 103, 165-73 (2009) (listing a variety of electoral forms for tribal governments); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 *HARV. L. REV.* 1343, 1358 (1969) (discussing governmental structures among various tribes).

108. See *Minor v. Happersett*, 88 U.S. 162, 177 (1875) (noting that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage” and that in nine states “persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote”); ISSACHAROFF ET AL., *supra* note 45, at 55-56 (discussing contemporary noncitizen voting in the United States and elsewhere); André Blais, Louis Massicotte & Antoine Yoshinaka, *Deciding Who Has the Right To Vote: A Comparative Analysis of Election Laws*, 20 *ELECTORAL STUD.* 41, 52-54 (2001) (discussing the surprisingly widespread enfranchisement of noncitizens).

not residents¹⁰⁹ (although no examples, as far as I know, of someone who was neither a citizen nor a resident being entitled to vote). Nor, of course, is there any rule that all citizens must be permitted to vote.¹¹⁰ Even leaving aside controversial restrictions on the franchise—such as the disenfranchisement of persons convicted of a crime¹¹¹ or persons suffering from various cognitive impairments¹¹²—the disenfranchisement of children, for example, occasions no real debate.

There is extensive literature on the controversial question of tribal citizenship.¹¹³ Rather than wading into it, I want to highlight the narrower question whether nonresident, “off-reservation” citizens of a tribe should participate in its elections.¹¹⁴

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109. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§ 1973ff-1 to 1973ff-6 (2006), allows U.S. citizens who have moved overseas to continue voting in federal elections by casting an absentee ballot in the jurisdiction where they were last domiciled. See also ISSACHAROFF ET AL., *supra* note 45, at 57-65 (discussing residency as a requirement for voting and giving examples of nonresident voting); Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 211 (2006) (stating that “[b]lanket franchise ineligibility for nonresident citizens appears to be increasingly the minority practice”).
110. See *Minor*, 88 U.S. at 170-78 (holding that the right to vote is not a privilege or immunity of citizenship protected by the Fourteenth Amendment).
111. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding offender disenfranchisement as consistent with the Equal Protection Clause). For more extensive discussion of offender disenfranchisement provisions, see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).
112. See Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917 (2007) (discussing this issue); Charles P. Sabatino & Edward D. Spurgeon, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 MCGEORGE L. REV. 843 (2007).
113. See Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 107, 107 (Eric D. Lemont ed., 2006) (noting that “Indian nations’ constitutional reform efforts encounter some of their most paralyzing conflicts over criteria for membership”); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 721 (2001) (describing the range of criteria that federally recognized tribes use for determining membership). The citizenship status of descendants of the Cherokee Freedmen—the black slaves held by Cherokee members prior to Emancipation—is perhaps the most visible current controversy. See *Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09, slip op. at 8 (Okla. Trib. 2006) (holding that Freedmen could be citizens); see also *Vann v. Kempthorne*, 534 F.3d 741, 744 (D.C. Cir. 2008) (permitting a suit by disenfranchised Freedmen descendants to proceed against federal and tribal officials for recognizing the results of a Cherokee election from which they were excluded); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 652-53 (2009) (discussing the issue).
114. Federal law governs the right to vote in tribal elections involving ratification or amendment of tribal constitutions. See 25 U.S.C. § 476(a)(1) (2006) (providing that “[a]ny Indian tribe

This question has great practical and theoretical significance. Many tribes are, to borrow Kim Barry's phrase, "emigration states"¹¹⁵: a significant proportion of their citizens—in many cases, a majority—lives outside their territorial boundaries.¹¹⁶ The potential participation of off-reservation citizens in tribal self-government raises a number of issues.¹¹⁷ On the one hand, participation can solidify an individual's sense of identity and strengthen her bonds to the tribe. Enfranchisement thus performs an important expressive function.¹¹⁸ On the other hand, on-reservation and off-reservation citizens may have different policy preferences. For example, in tribes now receiving substantial revenue from natural resource development or Indian gaming, on-reservation members may want those funds to be spent on infrastructure and economic development, while off-reservation members may prefer that revenues be distributed directly to tribal members on a per capita basis.¹¹⁹ At the same time, arguments of on-reservation citizens to restrict the franchise to residents because they have more of a stake run the risk of recapitulating some of the historic justifications used to disenfranchise on-reservation Indians, particularly to the extent that tribal elections determine more than geographically based policies. And there is some irony in denying tribal citizens the right to vote to the extent that a lack of opportunity in Indian country was one factor impelling them to move off the reservation.

shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when . . . ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe"). In some cases, "[a]ny duly registered adult member regardless of residence shall be entitled to vote on the adoption of a constitution and bylaws" and nonresident members can vote absentee. 25 C.F.R. § 81.6(a) (2010) (providing for such rules if a tribe "is acting to effect reorganization under a Federal Statute for the first time"). In other cases only "adult duly registered member[s] physically residing on the reservation shall be entitled to vote." *Id.* § 81.6(b)(1).

115. Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 12 (2006).
116. See Goldberg, *supra* note 71, at 358 n.14 (stating that approximately two-thirds of all Indians live outside Indian country, "though many of these individuals maintain ties to their homelands").
117. See Goldberg, *supra* note 113, at 108-10 (describing the tension in one tribe between members who had remained on the reservation and those who had left to pursue economic security).
118. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing the expressive functions that law can play).
119. See Goldberg, *supra* note 113, at 111.

Tribes have sought to accommodate these tensions in innovative ways. Some tribes simply restrict voting to members who reside on the reservation.¹²⁰ But if tribes do choose to enfranchise off-reservation voters, they have, broadly speaking, two possible ways to do so. “Assimilated representation” assigns voters to their “last place of in-country residence” and thus simply incorporates nonresident voters into a preexisting system of geographically based representation.¹²¹ By contrast, “discrete representation” creates separate electoral constituencies for nonresidents.¹²² To the extent that the United States permits nonresident citizens to vote,¹²³ it uses an assimilated approach. But nations as diverse as France, Colombia, and the Cape Verde Islands use discrete systems where émigré voters choose their own representatives.¹²⁴ One advantage that discrete representation can have is the ability to calibrate the level of political power to be accorded nonresidents.¹²⁵

To see how these practices play out, consider the approach taken by the Cherokee Nation. Under its 1992 Code, the Tribal Council—the Cherokee Nation’s legislative body—consisted of fifteen members elected from nine “representative districts within the historical boundaries/jurisdiction of the Cherokee Nation.”¹²⁶ Representation among the districts was based on the

120. See *Daly v. United States*, 483 F.2d 700, 707 (8th Cir. 1973) (noting that, under the Crow Creek Sioux Constitution, voting rights are limited to “those residing on the Reservation at the time of the election”).

121. Spiro, *supra* note 109, at 226. If one were voting for a single-member office, nonresident voting would be assimilated almost by definition.

The desire to avoid dealing with how to handle the allocation of nonresident voters to territorial electoral districts may explain why some nations permit nonresident voters to cast ballots in the presidential election but not in legislative elections. For a discussion of the Mexican experience in this regard, see Robert Courtney Smith, *Contradictions of Diasporic Institutionalization in Mexican Politics: The 2006 Migrant Vote and Other Forms of Inclusion and Control*, 31 ETHNIC & RACIAL STUD. 708 (2008).

122. See Spiro, *supra* note 109, at 226.

123. See *supra* note 109 (discussing UOCAVA).

124. See Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393, 2432-33 (2007) (surveying the range of practices); Spiro, *supra* note 109, at 214-15 (same).

And beyond the question whether off-reservation members should be enfranchised lies the question of how they should cast their ballots. A system that requires them to return to tribal land to vote has corresponding advantages (requiring some level of commitment) and disadvantages (making it harder to vote). The Navajo, for example, permit absentee voting, see 11 NAVAJO NATION CODE ANN. tit. 11, § 121 (1995), but some tribes do not.

125. See Bauböck, *supra* note 124, at 2433 (stating that discrete representation “can be used to give either greater or smaller weight to the expatriate vote”).

126. CHEROKEE NATION CODE ANN. tit. 26, § 4 (1993).

total population of tribal members.¹²⁷ Tribal members who lived within the national boundaries were required to register “in the district of their residence.”¹²⁸ But tribal members who lived outside the Nation’s boundaries could “choose any district in which to register to vote.”¹²⁹ The Cherokee subsequently amended their election code to provide instead for a seventeen-member Council, with fifteen members elected as before and two members elected at large to represent the forty percent of Cherokee citizens “who live outside the boundaries of the Cherokee Nation.”¹³⁰ The choice to adopt discrete representation of off-reservation citizens avoids the risk that the voters in a particular representative district could have their preferences swamped by off-reservation voters, as could easily happen given the relatively large number of nonresident citizens. And it also allows the tribe to give greater weight to the ballots of on-reservation voters: with sixty percent of the population, they control eighty-eight percent of the legislative seats.

Obviously, then, the Cherokee have relaxed one fundamental principle of contemporary U.S. democracy: one person, one vote. In *Wesberry v. Sanders*,¹³¹ the Supreme Court held that the Constitution requires that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”¹³² Thus, “[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.”¹³³

The question whether and how one person, one vote applies to tribal elections offers a final insight into the distinctive constitutional status of Indians. Tribal governments are not bound directly by the protections in the Bill of Rights.¹³⁴ They are, however, bound by the provisions of the Indian Civil Rights Act (ICRA), which provides, in pertinent part, that “[n]o Indian

127. *Id.*

128. *Id.* § 5.

129. *Id.*

130. *Cherokee Nation Tribal Government*, CHEROKEE NATION, <http://www.cherokee.org/Government/Default.aspx> (last visited Jan. 25, 2011); see also Goldberg, *supra* note 113, at 129 (noting that forty percent of Cherokee live off-reservation).

131. 376 U.S. 1 (1964).

132. *Id.* at 7-8.

133. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

134. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2724 (2008); see *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896) (refusing to apply the Due Process Clause to Cherokee proceedings); see also *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 530 (8th Cir. 1967) (refusing to find subject-matter jurisdiction over a challenge by enrolled off-reservation members of a tribe to the voting rolls and conduct of a tribal election).

tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.”¹³⁵ Notably, the ICRA deliberately omitted the Fifteenth Amendment’s prohibition on denying the right to vote on account of race.¹³⁶

Potential arguments for giving different weight to the votes of on-reservation and off-reservation citizens are essentially extensions of the arguments for disenfranchising nonresidents altogether.¹³⁷ The question of whether a tribal election system can discriminate among on-reservation citizens, though, is harder to answer.

In the years immediately following ICRA’s passage, tribal elections were a frequent source of litigation.¹³⁸ In *White Eagle v. One Feather*¹³⁹ and *Daly v. United States*,¹⁴⁰ the Eighth Circuit held that the requirement of one person, one vote applied to tribal elections, at least when the tribe “has established voting procedures precisely paralleling those commonly found in our culture, if not taken verbatim therefrom.”¹⁴¹ In *Daly*, however, the court offered an intriguing qualification: while requiring that tribal apportionments be “based on the population of the Tribe and not solely those eligible to vote,”¹⁴² it

135. 25 U.S.C. § 1302(8) (2006).

136. See *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (pointing out this omission). There was, as far as I am aware, no real discussion of Fourteenth Amendment-based constraints on tribal electoral processes.

137. *But cf.* *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam) (declaring that although “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States,” once a state chooses to select its electors by popular election, “the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another”). Even here, however, the word “arbitrary” leaves open the possibility that there might be nonarbitrary reasons for valuing votes differently.

138. Gary D. Kennedy, *Tribal Elections: An Appraisal After the Indian Civil Rights Act*, 3 AM. INDIAN L. REV. 497, 497 (1975).

139. 478 F.2d 1311 (8th Cir. 1973) (per curiam).

140. 483 F.2d 700 (8th Cir. 1973).

141. *White Eagle*, 478 F.2d at 1314. *But see* *Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation*, 507 F.2d 1079, 1083 (8th Cir. 1975) (refusing to require that a tribe permit eighteen to twenty-one-year-olds to vote because, although “it is not a significant interference with any important tribal values to require that a tribe treat equally votes cast by members of the tribe already enfranchised by the tribe itself . . . employing the ICRA to require a tribe to enfranchise a new class of the tribal population would present a real question of whether, to some extent, this court was ‘forcing an alien culture . . . on this tribe’”).

142. *Daly*, 483 F.2d at 706.

“express[ed] no opinion” on how to deal with off-reservation members: “That is a purely internal decision which must be made by the Tribe itself.”¹⁴³

Since the Supreme Court’s decision in *Santa Clara Pueblo v. Martinez*,¹⁴⁴ Indian apportionment challenges in federal court have essentially been foreclosed; ICRA claims must instead be litigated in tribal fora.¹⁴⁵ But the substantive question remains exactly how the ICRA’s equal protection clause should apply in tribal elections. Neither the language nor the legislative history of the ICRA definitively answers the question whether the rationality (or the compelling nature) of a tribe’s reason for structuring its electoral arrangements in a particular way “is to be tested by Indian or non-Indian cultural standards.”¹⁴⁶ But because one of the purposes behind the ICRA was “furthering Indian self-government,”¹⁴⁷ it would be ironic if the Act were used to foreclose tribes from selecting the electoral form that best accommodates their distinctive interests. The Supreme Court has directed that terms in a treaty between the federal government and an Indian tribe should be construed “in the sense in which they would naturally be understood by the Indians.”¹⁴⁸ Perhaps the same principle should inform construction of the equal protection clause of the ICRA. Under such a framework, a tribe might well be able to show that its decision to deviate from pure population equality in apportioning representatives serves sufficiently substantial reasons to survive judicial scrutiny.

CONCLUSION

One of the most famous passages ever written in a law review came from the pen of Felix Cohen, the great scholar of Indian law: “Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of

143. *Id.* at 707.

144. 436 U.S. 49 (1978).

145. In *Santa Clara Pueblo*, the Court held that ICRA claims can be brought in federal court only under the Act’s habeas provision, *see id.* at 65, which is unavailable for voting rights claims. *But cf.* Riley, *supra* note 107, at 814-16 (noting that challenges to disenrollment from a tribe or banishment of tribal members could be litigated under the ICRA’s habeas provision).

146. Note, *supra* note 107, at 1360.

147. *Santa Clara Pueblo*, 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

148. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Mehan*, 175 U.S. 1, 11 (1899)).

other minorities, reflects the rise and fall in our democratic faith.”¹⁴⁹ Laughlin McDonald’s pathbreaking work—in the field litigating Indian voting rights cases and in this book describing them—reminds us that Cohen was right as well as poetic. The ongoing resistance to Indians’ claims for full political equality shows that the work of the Second Reconstruction remains incomplete.

149. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 390 (1953).