

NOTE

AMERICA'S QUIET LEGACY OF NATIVE AMERICAN VOTER DISENFRANCHISEMENT: PROSPECTS FOR CHANGE IN NORTH DAKOTA AFTER *BRAKEBILL V. JAEGER*

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In 2013, North Dakota passed one of the country's most restrictive voter ID laws. This law requires voters to present a photo ID containing a residential street address to vote and does not contain any fail-safe mechanisms to allow voting without a qualifying ID. The North Dakota law was part of a wave of new, restrictive voter ID laws passed throughout the country in the wake of Shelby County v. Holder, a 2013 Supreme Court decision that eliminated the heart of the 1965 Voting Rights Act—the preclearance regime of sections 4(b) and 5, which required certain jurisdictions with histories of voting discrimination to obtain federal preclearance for any changes to their voting laws. North Dakota is home to over 31,000 Native Americans, many of whom live in rural areas where residential street addresses are not required and where the U.S. Postal Service does not deliver. These individuals typically send and receive mail by P.O. box, which does not qualify as a residential street address under the 2013 voter ID law. This law immediately disenfranchised thousands of North Dakotans, with a disproportionate impact on Native Americans. In 2016, Native American litigants challenged the law in Brakebill v. Jaeger on

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equal protection and Voting Rights Act section 2 grounds. Reversing the District of North Dakota, the Eighth Circuit Court of Appeals upheld the law, and the Supreme Court affirmed the decision on the eve of the 2018 midterm elections.

*North Dakota's voter ID law is a modern iteration of Native American voter disenfranchisement that has been occurring systematically since the nation's founding. This Note details this history and explains the modern methods that states use to disenfranchise Native Americans. Considering this history and context, this Note argues that the Eighth Circuit's equal protection analysis in *Brakebill* was flawed in that the court failed to adequately address the law's disproportionate burden on Native Americans, overplayed a hypothetical risk of voter fraud, and skirted the constitutional issues posed by fees for obtaining qualifying IDs. It then argues that future litigants should raise a Voting Rights Act section 2 claim to challenge the law, an issue that *Brakebill* did not reach on the merits. Finally, it proposes that Congress adopt the 2019 Native American Voting Rights Act.*

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INTRODUCTION

North Dakota's voter ID law made national headlines in the weeks leading to the 2018 midterm elections.¹ Heidi Heitkamp, incumbent U.S. Senator and moderate Democrat from North Dakota, was fighting for her Senate seat in a largely Republican state where many of her former supporters had abandoned her after she voted against Justice Kavanaugh's confirmation to the U.S. Supreme Court.² Native Americans, who constitute five percent of North Dakota's population, formed a critical part of Heitkamp's base in the 2012 elections.³ In 2013, within a year of Senator Heitkamp's reelection, and shortly after a Supreme Court decision gutted the heart of the 1965 Voting Rights Act, the North Dakota legislature enacted one of the strictest voter ID laws in the country.⁴

1. See, e.g., Jamie Azure, *North Dakota's Voter-ID Law Aimed to Silence Native American Voters. Instead, It Rallied My Tribe.*, WASH. POST (Nov. 1, 2018), <https://www.washingtonpost.com/outlook/2018/11/01/north-dakotas-voter-id-law-aimed-silence-native-american-voters-instead-it-rallied-my-tribe> [https://perma.cc/8HUU-WYT5]; Pema Levy, *After Heidi Heitkamp Won a Senate Seat, North Dakota Republicans Made it Harder for Native Americans to Vote*, MOTHER JONES (Oct. 19, 2018), <https://www.motherjones.com/politics/2018/10/heidi-heitkamp-native-americans-vote-north-dakota> [https://perma.cc/M8X8-CUW7]; *Tribes Scramble to Meet Voter ID Requirements in North Dakota*, CBS NEWS (Oct. 26, 2018), <https://www.cbsnews.com/news/tribes-scramble-to-meet-voter-id-requirements-in-north-dakota> [https://perma.cc/85DH-JVNR].

2. Levy, *supra* note 1.

3. *Id.* The 2010 Census found that just over 36,000 Native Americans lived in North Dakota, approximately half of whom resided on a reservation. *Statistics*, N.D. INDIAN AFF. COMMISSION, <http://indianaffairs.nd.gov/statistics> [https://perma.cc/8F4Y-F5ZF]. Five Native American reservations are located within North Dakota's borders: Fort Berthold with the Three Affiliated Tribes, Lake Traverse with the Sisseton-Wahpeton Oyate, Spirit Lake with the Sioux, Standing Rock with the Sioux, and Turtle Mountain with the Chippewa. N.D. CENSUS OFF., *Growing ND by the Numbers 1* (Dec. 2015), <https://www.commerce.nd.gov/uploads/8/CensusNewsletterDec2015.pdf> [https://perma.cc/HA3E-ZEM9].

4. Brakebill, et al. v. Jaeger (*ND Voter ID Law*), NATIVE AM. RIGHTS FUND [hereinafter NARF], <https://www.narf.org/cases/nd-voter-id> [https://perma.cc/6ZK3-3PQH] (last updated July 31, 2019) (noting that the law "put North Dakota beyond the norms of voter ID laws and violat[ed] the constitutional rights of [North Dakota's] citizens").

Under North Dakota's 2013 law and its 2017 modification, a voter must present one of four forms of ID with a residential street address to vote.⁵ The state does not provide any fail-safe mechanisms, such as allowing voters to cast provisional ballots, to permit otherwise-qualified individuals without a street address to vote.⁶ The law immediately disenfranchised thousands of Native American voters.⁷ In several rural portions of the state, including parts of five reservations, the U.S. Postal Service does not deliver to homes, and many residents do not have formal residential street addresses.⁸ Residents of these rural areas typically use P.O. boxes to send and receive mail, and P.O. box addresses are not acceptable under the new law.⁹ North Dakota is one of only a handful of states without any fail-safe mechanisms that would permit voters without qualifying IDs to cast a provisional ballot.¹⁰ These voters must return within a short specified time period, with the appropriate ID in hand, to cast a vote.¹¹

North Dakota's law is a modern iteration of Native American voter disenfranchisement that has been occurring since our nation's founding. This Note's background will begin by outlining this history, starting with Native Americans' long exclusion from U.S. citizenship.¹² Next, this section will address the impact of the Fourteenth and Fifteenth Amendments, the Indian Citizenship Act of 1924, and the Voting Rights Act of 1965.¹³ It will describe methods that states have used to deny Native Americans the right to vote, with impunity, for decades following the Indian Citizenship Act.¹⁴ The background will also describe modern barriers to voting faced by Native Americans and outline the history of Native American voting rights litigation.¹⁵

This Note's analysis will focus on the North Dakota situation through the lens of the recent *Brakebill v. Jaeger* litigation, which ended when the Supreme Court allowed the voter ID law to stand on the eve of the

5. *Id.*

6. *Id.*

7. *Id.*

8. Camille Domonoske, *Many Native IDs Won't Be Accepted at North Dakota Polling Places*, NPR (Oct. 13, 2018, 1:18 PM), <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places> [<http://perma.cc/WF9P-SQL3>].

9. *Id.*

10. See NARF, *supra* note 4.

11. *Id.*

12. *Infra* Sections I.A.1–2.

13. *Infra* Sections I.A.2–3, 5.

14. *Infra* Section I.A.4.

15. *Infra* Sections I.B–C.

2018 midterms.¹⁶ This section will begin with a detailed analysis of *Brakebill*.¹⁷ It will then critique the Eighth Circuit's constitutional analysis by explaining that the court failed to adequately address the disproportionate burdens of the law on Native Americans, overplayed a hypothetical risk of voter fraud, and did not address the constitutional issues posed by fees for obtaining all-qualifying IDs.¹⁸ Next, this section will examine prospects for a Voting Rights Act section 2 claim in future litigation, which *Brakebill* did not reach on the merits.¹⁹ Finally, this section will propose that Congress adopt the 2019 Native American Voting Rights Act.²⁰

I. BACKGROUND

A. *The Path to Native American Voting Rights*

1. *From the founding to the Indian Citizenship Act*

At the United States' founding, Native Americans' citizenship status under the U.S. Constitution was ambiguous, and for several decades, the question remained unresolved. Native Americans occupied an "extra-constitutional political status" due to their pseudo-political independence from the United States.²¹ The Constitution only references Native Americans twice: once in the Commerce Clause,²² delegating to Congress the power "[t]o regulate commerce . . . with the Indian Tribes,"²³ and once in Article I's Three-Fifths Clause,²⁴ providing that "Indians not taxed" are excluded from Congressional apportionment.²⁵

Early caselaw stressed the guardian-ward relationship between the federal government and Native American tribes. In *Cherokee Nation v. Georgia*,²⁶ the Supreme Court held that the Cherokee Nation was not a foreign nation, but that

16. *Infra* Section II.A.1.

17. *Infra* Section II.A.1-3.

18. *Infra* Section II.B.1.

19. *Infra* Section II.B.2.

20. *Infra* Section II.C.

21. Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 272-73 (2004).

22. U.S. CONST. art. I, § 8.

23. *Id.*

24. U.S. CONST. art. I, § 2.

25. *Id.*

26. 30 U.S. (5 Pet.) 1, 17-18 (1831) (determining that Native American tribes, like the Cherokees, are "domestic dependent nations" and lacked standing to sue the United States).

[t]hey occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.²⁷

The Civil Rights Act of 1866,²⁸ passed one year after the end of the Civil War, freed slaves and granted them citizenship, but again excluded “Indians not taxed.”²⁹ The ambiguity persisted through the passage of the Fourteenth and Fifteenth Amendments in 1868 and 1870, respectively.³⁰ The Fourteenth Amendment conferred citizenship on “persons born or naturalized in the United States, and subject to the jurisdiction thereof,” but again excludes “Indians not taxed.”³¹ The Fifteenth Amendment, which prohibits the denial or abridgement of the right to vote on account of “race, color, or previous condition of servitude,” does not mention Native Americans.³²

Fourteen years after the passage of the Fifteenth Amendment, the Supreme Court at last spoke on the issue of Native American citizenship in *Elk v. Wilkins*.³³ In *Elk*, the Court expressly found that Native Americans were “not . . . citizen[s] of the United States under the Fourteenth Amendment,” officially barring them from exercising any voting rights.³⁴ Nearly half a century later, Congress changed course with the passage of the Indian Citizenship Act (ICA) of 1924.³⁵ By this point, two-thirds of the states had already passed legislation conferring citizenship to Native Americans, and the ICA filled the gaps.³⁶ Nevertheless, negotiations leading to the ICA show that at least to some Senators, it was not designed to confer voting rights.³⁷ During Congressional debate, Representative Homer Snyder (R-NY) asserted that the Act was not intended “to have any effect upon the suffrage qualifications in any state.”³⁸ This statement would

27. *Id.* at 17.

28. ch. 31, 14 Stat. 27 (1866).

29. *Id.* § 1.

30. *Developments in the Law—Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1733 (2016) [hereinafter *Securing Indian Voting Rights*].

31. U.S. CONST. amend. XIV.

32. *Id.* amend. XV.

33. 112 U.S. 94 (1884) (finding that tribal allegiance precluded United States citizenship).

34. *Id.* at 109.

35. Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

36. Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 102 (2018) (citing Indian Citizenship Act, 43 Stat. at 253).

37. *Id.*

38. 65 CONG. REC. 9303 (1924) (statement of Rep. Snyder).

prove prophetic, as it would ultimately take several more decades before Native Americans obtained nationwide suffrage.

2. *Poor enforcement and ongoing barriers*

Decades after the passage of the ICA, many states, with impunity, persisted in depriving Native Americans of the right to vote. States used four key tactics to deny the vote: constitutionally or statutorily excluding “Indians not taxed” from the class of eligible voters; conditioning voting on severing tribal ties; excluding reservations from statutory definitions of residency; and relying on federal “guardianship.”³⁹ Each of these methods had a clear undercurrent of distrust of Native Americans’ loyalty to the United States.

Many states excluded “Indians not taxed” from the class of eligible voters,⁴⁰ mirroring the language in the Constitution’s Three-Fifths Clause.⁴¹ This strategy was based on the converse of the political theory of “no taxation without representation.”⁴² As late as the mid-1940s, six states still prohibited Native Americans from voting on taxation grounds: Idaho, Maine, Mississippi, New Mexico, Rhode Island, and Washington.⁴³

Other states denied the vote to Native Americans who refused to sever tribal ties. In some states, this was built directly into the state constitution.⁴⁴ For example, until 1958, the North Dakota Constitution restricted voting rights to “civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election.”⁴⁵ Similarly, the Minnesota Supreme Court required that Native Americans be “civilized” before voting.⁴⁶ This requirement of loyalty to the United States was grounded in paternalistic assumptions that Native Americans were inherently uncivilized. Correspondingly,

39. Robinson & Nelson, *supra* note 36, at 104–06; see Jackson, *supra* note 21, at 272–74.

40. Robinson & Nelson, *supra* note 36, at 106.

41. U.S. CONST. art. I, § 2.

42. Robinson & Nelson, *supra* note 36, at 106.

43. *Id.*

44. *Id.* at 104.

45. *Id.* (citing N.D. CONST. art. V, § 121 (amended 1958)).

46. *Opsahl v. Johnson*, 163 N.W. 988, 989 (Minn. 1917) (interpreting a state constitutional provision restricting the vote to “[p]ersons of Indian blood [residing in this state] who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state”).

Native Americans were often pushed to assimilate and anglicize in order to exercise the rights and privileges of citizenship.⁴⁷

Requiring severance of tribal ties went hand in hand with a range of other “civilizing” practices that dominated the government’s Native American policies of the nineteenth and twentieth centuries. For example, from 1860 through the passage of the 1978 Indian Child Welfare Act, the federal government commonly forced Native American youth to attend federally-operated “Indian boarding schools.”⁴⁸ These schools existed to assimilate Native American youth to the “American way of life.”⁴⁹ Government programs extracted youths from their homes; gave them new names, clothes, and haircuts; taught them English and Christianity and a range of other assimilation tactics.⁵⁰ Many of these schools still exist today, although they have shifted away from the “civilizing” mission and attendance is no longer mandatory as of 1978.⁵¹

The two other strategies were also based on paternalistic notions of U.S.-Native American relations. First, several states denied the vote to Native Americans based on the concept of federal guardianship—an outmoded theory that Native American tribes are a sub-sovereign beneath, and dependent on, the guiding hand of the federal government.⁵² This continued in several states through the 1940s.⁵³ Second, several states excluded reservations from definitions of

47. *See id.* at 989 (assuming American Indians must affirmatively adopt the “customs and habits of civilization” to be afforded the right to vote). *See generally* Katherine Ellinghaus, *Indigenous Assimilation and Absorption in the United States and Australia*, 75 PAC. HIST. REV. 563 (describing the larger goals and methods of assimilation policy in the United States).

48. *History and Culture: Boarding Schools*, NORTHERN PLAINS RESERVATION AID, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools [<https://perma.cc/L9QS-AT2U>].

49. *Id.*

50. *Id.*

51. *Id.*; *American Indian School a Far Cry from the Past*, NPR (May 13, 2008) <https://www.npr.org/templates/story/story.php?storyId=17645287> [<https://perma.cc/H2V2-MZCJ>] (describing life in an off-reservation boarding school and noting the focus on preserving Native American history and culture).

52. *See generally* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law* 119 HARV. L. REV. 433, 437–43 (2005) (recounting the Supreme Court’s characterization of the tribal-federal relationship as “that of a ward to its guardian” (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)); Jackson, *supra* note 21, at 272–74; Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 279 (2015).

53. Robinson & Nelson, *supra* note 36, at 106.

“residency.”⁵⁴ This practice persisted remarkably late into the twentieth century. South Dakota excluded three restricted “unorganized counties” with majority Native American populations from voting until 1975, asserting in litigation that Native Americans living on reservations “[did] not share the same interest in county government as the residents of the organized counties.”⁵⁵ Utah denied the vote to Native Americans living on reservations on this ground until 1956, and Colorado asserted—without consequence—that Native Americans on reservations were not citizens for over a decade after passage of the ICA.⁵⁶

3. *The Voting Rights Act and its amendments*

Congress passed the 1965 Voting Rights Act⁵⁷ (VRA) at the height of the Civil Rights Movement to enforce and add teeth to the Fifteenth Amendment—specifically in the former Confederate states where racial discrimination was most severe.⁵⁸ Before the VRA, the U.S. Department of Justice (DOJ) enforced the Fifteenth Amendment in a piecemeal fashion through individual lawsuits against the offending states.⁵⁹

The VRA has been the most important tool in securing Native American voting rights⁶⁰—even after the Supreme Court ruled in 2005 that the heart of the Act—the preclearance regime in sections 4(b) and 5—was unconstitutional on federalism grounds.⁶¹

This preclearance regime required certain covered jurisdictions with a history of discrimination against minority voters to submit any changes to the Justice Department or a three-judge panel in Washington, D.C. for

54. *Id.* at 105–06.

55. *Little Thunder v. South Dakota*, 518 F.2d. 1253, 1255 (8th Cir. 1975) (striking South Dakota law preventing residents of unorganized counties in South Dakota from voting in local elections).

56. Jackson, *supra* note 21, at 274.

57. Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

58. *Voting Rights Act of 1965*, HISTORY (Nov. 9, 2009), <https://www.history.com/topics/black-history/voting-rights-act> [<https://perma.cc/5HA3-5GX6>] (last updated June 6, 2019).

59. See *Introduction to Federal Voting Rights: Before the Voting Rights Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> [<https://perma.cc/3UAQ-MBQE>] (last updated Aug. 16, 2018) (noting that the case-by-case litigation strategy “did not prompt voluntary compliance among jurisdictions that had not been sued”).

60. Robinson & Nelson, *supra* note 36, at 115.

61. See *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

approval.⁶² The jurisdiction had the burden of demonstrating that the change would not deny or abridge the right to vote on account of race.⁶³ In addition to many southern states, sections 4(b) and 5 covered all of Alaska and Arizona and portions of South Dakota, all of which have substantial Native American populations.⁶⁴ Post-*Shelby County*, jurisdictions across the nation quickly enacted new, discriminatory voting restrictions and procedures, including Arizona, Texas, North Carolina, North Dakota, and South Dakota.⁶⁵

The most relevant provisions of the VRA are presently sections 2, 3, and 203. Section 2 claims have become the primary causes of action in litigation defending Native American voting rights.⁶⁶ Section 2 broadly prohibits any “qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race,” color, or language minority status.⁶⁷ The Supreme Court held in 1980 that like a Fifteenth Amendment claim, a plaintiff had the burden of proving discriminatory *intent*.⁶⁸ However, in 1982, Congress amended section 2 to contain an *effects* standard, meaning that plaintiffs now have the lighter burden of showing that a given practice resulted in discrimination.⁶⁹

Litigants have also occasionally relied successfully on section 3 of the VRA.⁷⁰ This section provides that on a finding that a jurisdiction has violated the Fourteenth or Fifteenth Amendment, the court may

62. See 52 U.S.C. § 10303 (Supp. V 2018) (formerly codified at 42 U.S.C. § 1973b(b) (2012)) (VRA section 4(b)), *invalidated by* *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); 52 U.S.C. § 10304 (formerly codified at 42 U.S.C. § 1973c(a) (2012)) (VRA section 5).

63. 52 U.S.C. §§ 10303–10304.

64. *Securing Indian Voting Rights*, *supra* note 30, at 1742–43; Wolfley, *supra* note 52, at 268–69.

65. See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder> [<https://perma.cc/CS6G-BZVQ>] (stating that “*Shelby County* opened the floodgates to laws restricting voting throughout the United States” and “states previously covered by the preclearance requirement have engaged in recent, significant efforts to disenfranchise voters”).

66. Robinson & Nelson, *supra* note 36, at 115–16.

67. 52 U.S.C. § 10301 (Supp.V 2018) (formerly codified at 42 U.S.C. § 1973(a) (2012)).

68. See *City of Mobile v. Bolden*, 446 U.S. 55, 67–68, 73–74 (1980) (plurality opinion) (stating that past decisions do not support the view that “disproportionate effects alone may establish a claim of unconstitutional racial voter dilution”), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

69. Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, § 2, 96 Stat. 131 (1982) (codified as amended at 52 U.S.C. § 10301 (Supp. V 2018)).

70. *Securing Indian Voting Rights*, *supra* note 30, at 1745.

mandate that the jurisdiction abide by a preclearance regime similar to now-extinct sections 4(b) and 5.⁷¹ Unlike section 2, however, a plaintiff has the burden of proving discriminatory intent, and section 3 is thus not the obvious choice in modern voting rights litigation.⁷²

Finally, litigants frequently rely on section 203 of the VRA. Section 203 requires jurisdictions with sizeable language minorities (set by a coverage formula) to provide written voting materials in those languages in addition to English.⁷³ The 1982 VRA amendments, however, undermined section 203 by raising the triggering percentage of language minorities in a jurisdiction to five percent, or more than 10,000 individuals.⁷⁴ This had a staggering impact on the breadth of coverage in states with sizeable Native American populations: it eliminated 203 coverage for two formerly-covered counties in New Mexico, six of eight in South Dakota, twenty-four of twenty-five in Oklahoma, four of five in North Dakota, and six of seven in Montana.⁷⁵

B. *Modern-Day Barriers to Native American Voting Rights*

Native Americans have faced many of the same barriers that black and Latino voters face in securing full voting rights, including centuries of socioeconomic and political disenfranchisement, poll taxes, literacy tests, at-large election schemes, redistricting schemes designed to dilute the minority vote, and strict voter ID requirements.⁷⁶ But they also face a series of distinct obstacles, including extreme poverty, poor infrastructure, comparatively low access to polling places, and language barriers.

1. *Poverty, infrastructure, and poll access*

Native Americans experience poverty at significantly higher rates than the general population, especially on reservations. In 2016, the Census Bureau found that 26% of Native Americans (designated in the Census as “American Indians and Alaskan Natives”) were living below the poverty line—almost double the 14% rate of the general

71. *Id.*

72. *Id.* at 1745–46.

73. 52 U.S.C. § 10503 (Supp. V 2018) (formerly codified at 42 U.S.C. §§ 1973aa–1a (2012)).

74. *Id.*; see Jackson, *supra* note 21, at 278.

75. Jackson, *supra* note 21, at n.69.

76. See *id.* at 279–80.

population and the highest rate of any race.⁷⁷ Native Americans' median household income was less than \$40,000, compared to \$57,617 in the general population.⁷⁸ The unemployment rate was 8.9%, compared to 4.9% in the general population.⁷⁹ Further, poverty rates on reservations, where almost one-quarter of Native Americans live, dwarf the rates faced by Native Americans nationwide.⁸⁰ In 2010, the Navajo Nation, the country's largest reservation, had a poverty rate of 38%—more than twice as high as the state of Arizona, where most of the reservation is located.⁸¹ In the Standing Rock Sioux Reservation in North Dakota, home to the now-famous Dakota Access Pipeline protests,⁸² 43% of the population lives below the poverty line—over three times the national average.⁸³

This poverty—felt at both a community and individual level—has a slew of cascading effects on Native Americans' ability and desire to vote. For example, poor digital infrastructure and inferior educational opportunities impair access to information about the political process, and low rates of car ownership and poor public transportation can

77. U.S. CENSUS BUREAU, AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2017 at 5 (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> [<https://perma.cc/58JB-XSCU>].

78. *Id.*

79. Shelly Hagan, *Where U.S. Unemployment is Still Sky-High: Indian Reservations*, BLOOMBERG (Apr. 5, 2018), <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations> [<http://perma.cc/6F8A-AJCF>].

80. *Id.*

81. UNIV. OF ARIZ., RDI NATIVE PEOPLES TECH. ASSISTANCE OFFICE, NAVAJO NATION COMMUNITY PROFILE 1–2 (Feb. 2016), http://nptao.arizona.edu/sites/nptao/files/navajo_nation_2016_community_profile.pdf [<https://perma.cc/T9Q9-SXF4>] (citing data from the 2010 American Community Survey and 2010 Decennial Census); see *Poverty: How the Census Bureau Measures Poverty*, U.S. Census Bureau, <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html> [<https://perma.cc/N4BP-NMF4>] (defining poverty rate measurements as the percent of a population under a defined poverty threshold set by the Census Bureau and explaining that the thresholds vary based on family size, composition, and income).

82. See generally Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux> [<https://perma.cc/8FLN-CL95>] (discussing the protests and background of the pipeline).

83. Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <https://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty> [<https://perma.cc/3CPL-RESH>].

make it nearly impossible to access far-away polls.⁸⁴ Additionally, there is a demonstrated link between poverty, broader disenfranchisement, and political apathy⁸⁵ (though perhaps “resignation” is a more fitting term). As the Supreme Court has observed,⁸⁶ “political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”⁸⁷

Pervasive poverty leads to broad limitations in infrastructure for many Native Americans. Compared to only 6% of housing in the United States as a whole, 40% of housing on reservations is considered substandard.⁸⁸ Less than half of reservation homes have access to public sewer systems, 16% do not have indoor plumbing, and half do not have phone service—let alone Internet.⁸⁹ This limited telecommunications infrastructure prevents many Native Americans from basic voting tasks like downloading and printing registration forms and broadly diminishes access to information about voting, candidates, issues on the ballot, and the broader political process.⁹⁰

Limited access to public transportation also reduces Native American access to polling places. Only 6% of tribal governments provide public transportation,⁹¹ and many Native Americans do not have access to a vehicle to travel the often exceptionally long distances to polling places.⁹²

Polling places are regularly located inaccessible distances from Native Americans’ homes. As of 2010, 36% of Native Americans lived

84. *See infra* Section II.B.2.

85. Wolfley, *supra* note 52, at 283.

86. *Thornburg v. Gingles*, 478 U.S. 30 (1986) (holding that a North Carolina multi-member districting scheme that impaired black voters’ ability to participate equally in the political process violated VRA § 2).

87. *Id.* at 69.

88. *Housing & Infrastructure*, NAT’L CONGRESS OF AM. INDIANS, <http://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure> [<https://perma.cc/G72L-ZT3T>].

89. *Id.*

90. *See* Wolfley, *supra* note 52, at 281–82.

91. *Id.* at 281 (citing BUREAU OF INDIAN AFFAIRS, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003)).

92. *Id.* (stating that county seats where Indian community members must travel to vote or register to vote are often 40 to 150 miles from reservations); *see also Securing Indian Voting Rights*, *supra* note 30, at 1731 (noting that in Jackson County, South Dakota, approximately “22% of Indian households . . . do not have access to a car” to travel sixty miles round-trip to the county seat).

in rural areas, about two times the rate of the population at large.⁹³ Polling places are frequently placed in inconvenient locations as a mechanism to deter voting.⁹⁴

For example, members of the Oglala Sioux Tribe on the Pine Ridge Reservation in South Dakota must travel over sixty miles to vote.⁹⁵ Residents of the Duck Valley Reservation in Nevada must travel 104 miles.⁹⁶ Residents of the Goshute Reservation in Utah must travel 163.⁹⁷ Compounding the distance, low vehicle ownership, and minimal public transportation, several jurisdictions do not allow early voting and/or set the vote for a weekday when many cannot take the day off from work.⁹⁸ In states like North Dakota with photo ID laws, many Native Americans must travel equally long distances to obtain an appropriate ID.⁹⁹ For example, members of the North Dakotan portion of the Standing Rock Sioux Tribe travel a mean distance of sixty-one miles to obtain a driver's license or other acceptable identification.¹⁰⁰

93. 2010 Census Urban and Rural Classification and Urban Area Criteria, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html> [<https://perma.cc/A85G-2TJF>] (last updated Nov. 26, 2018).

94. See Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, GUARDIAN (June 10, 2015), <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights> [<https://perma.cc/2DGC-TC8B>]. A 2019 report from the Leadership Conference Education Fund also discusses strategic closing of polling places as a method of voter suppression. THE LEADERSHIP CONFERENCE EDUC. FUND, *DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE* (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/V2NZ-LA3H>]. It notes that before *Shelby*, localities with records of voter discrimination were required to show a poll closure would not adversely affect minority voters and provide notice to affected voters before consolidating polling places, while today, these localities are not required to take these precautionary steps. See *id.* at 8–9 (explaining that localities may legitimately close polling places because of a population decrease or because early or mail-in voting options reduced demand for Election-Day in-person voting facilities). The Report finds that despite a substantial increase in voter turnout, 1173 polling places closed between 2014 and 2018 in jurisdictions formerly covered by section 5. *Id.* at 10.

95. *Securing Indian Voting Rights*, *supra* note 30, at 1731.

96. Landreth, *supra* note 94.

97. *Id.*

98. See *id.*

99. Carrie Levine, *What Stands in the Way of Native American Voters?*, CTR. FOR PUB. INTEGRITY (Oct. 12, 2018), <https://apps.publicintegrity.org/abandoned-in-america/ballot-box-barriers> [<https://perma.cc/2FRK-NW3D>].

100. *Id.*

2. *Tribal languages and the limits of VRA section 203*

Over twenty percent of Native Americans have limited English proficiency.¹⁰¹ Even in jurisdictions that are still covered by the watered-down 1982 version of section 203—the VRA provision concerning minority language—there are several barriers to its effectiveness. For example, section 203 only applies to written materials, and several Tribal languages, like Navajo and Zuni, are largely spoken languages.¹⁰² In these cases, translated written materials may be of low utility. Additionally, Congress created section 203 before the digital age and compliance has lagged with respect to online materials like online voter registration.¹⁰³ About half of the states with section 203 coverage offer online voter registration, and of these, only half provide instructions in the required minority language.¹⁰⁴ There are also compliance issues at the voting booth.¹⁰⁵ Overall, enforcement of these issues is spotty, and DOJ prioritization seems to be focused elsewhere.¹⁰⁶

C. *Litigation on Behalf of Native American Voting Rights*

Over ninety Native American voting rights cases have been litigated under the VRA, the National Voter Registration Act, and the Fourteenth and Fifteenth Amendments.¹⁰⁷ The VRA has been the most utilized, and most successful, tool in these lawsuits.¹⁰⁸ South Dakota, New Mexico, Arizona, and Montana have seen the most litigation, all of which have sizeable Native American populations.¹⁰⁹ Since *Shelby County*, VRA litigation has largely shifted to sections 2 and 203 claims.¹¹⁰ The most common cases involve vote dilution through redistricting

101. Brief of Amici Curiae for Navajo Nation, et al. in Support of Respondents and Respondent-Intervenors at 26, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12–96) (citing 2000 Census data).

102. *Securing Indian Voting Rights*, *supra* note 30, at 1740.

103. Morgan E. Saunders, Note, *Digital-Age Discrimination: The Voting Rights Act, Language-Minorities, and Online Voter Registration*, 50 COLUM. J.L. & SOC. PROBS. 449, 453 (2017).

104. *Id.* at 454.

105. *Id.* at 453 (citing a 2007 study that found only 40% of surveyed locations followed section 203 and noting that many polling places still fail to provide voter information materials in the requisite minority languages, perhaps in part because some locations do not understand what section 203 requires them to do).

106. *See id.* (noting that “DOJ involvement varies under each presidential administration”).

107. Robinson & Nelson, *supra* note 36, at 116.

108. *Id.* at 115–16.

109. *Id.* at 133–34.

110. *Id.* at 145.

schemes, or gerrymandering, which are outside the scope of this Note.¹¹¹ The second most common cases challenge discriminatory election practices like providing insufficient polling places,¹¹² while several cases have involved denial of access to the ballot.¹¹³ In the last ten years, there has been an uptick in discriminatory election procedures cases, particularly in light of the restrictive voting laws that were passed throughout the country after *Shelby County*.¹¹⁴ This Note's analysis will examine one of these cases, *Brakebill v. Jaeger*.

II. ANALYSIS

Keeping in mind the unique challenges that Native American voters face nationwide, this analysis will focus on the North Dakota voter ID law in depth through an examination of *Brakebill v. Jaeger*.¹¹⁵ *Brakebill* began in 2016 as a challenge to North Dakota's voter ID law that requires individuals to present a photo ID containing a North Dakota residential street address to vote.¹¹⁶ After extensive litigation, the case made its way to the Supreme Court shortly before the 2018 midterm elections.¹¹⁷ The Supreme Court declined to stay a 2017 iteration of the voter ID law and did not issue an opinion on the merits, and the North Dakota midterm elections proceeded with the restrictive law in place.¹¹⁸

A. *Brakebill v. Jaeger*

1. 2016 preliminary injunction

The *Brakebill* litigation began three years after North Dakota passed its 2013 voter ID law.¹¹⁹ The state's prior voter ID law, passed in 2004, also required voters to show one of various forms of ID containing a residential address and birth date, but it contained two fail-safes: the individual could vote (1) if he signed an affidavit under penalty of perjury stating that he was an eligible voter or (2) if a poll worker

111. *Id.* at 140.

112. *Id.*

113. *Id.* at 144.

114. *Id.* at 144–45.

115. 139 S. Ct. 10 (2018) (mem.).

116. Order Granting Plaintiffs' Motion for Preliminary Injunction, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016).

117. NARF, *supra* note 4.

118. *Brakebill*, 139 S. Ct. at 10; *see also* NARF, *supra* note 4.

119. NARF, *supra* note 4.

vouched for him.¹²⁰ The 2013 law implemented two major changes: it eliminated both fail-safes and reduced the acceptable forms of ID to a driver's license, a North Dakota non-driver ID, a tribal ID, or IDs prescribed by the Secretary of State—all requiring a residential street address.¹²¹ The plaintiffs, seven Native American voters, sued in 2016 under the Equal Protection Clause of the Fourteenth Amendment and VRA section 2 to enjoin the law on the grounds that it disenfranchised thousands of Native American North Dakotans who lacked qualifying IDs.¹²² Most North Dakotan tribal IDs, which were technically acceptable (with a residential street address) by the new law, did not have a street address because the U.S. Postal Service does not deliver to many rural Native American communities.¹²³ Many Native American voters must use a P.O. box instead of a residential street address.¹²⁴ The complaint also cited the various barriers that Native Americans face in obtaining other qualifying IDs, like long distances to a county Department of Motor Vehicles (DMV), lack of transportation options, the effects of poverty, and fees associated with obtaining qualifying IDs.¹²⁵

Judge Daniel Hovland of the U.S. District Court for the District of North Dakota granted the preliminary injunction, finding that the plaintiffs were likely to succeed on the merits of their Fourteenth Amendment claim.¹²⁶ Judge Hovland did not address the VRA claim.¹²⁷

The court applied the *Crawford v. Marion County Election Board*¹²⁸ standard that in constitutional challenges to election regulations, courts should apply “hard judgment” in weighing “the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.”¹²⁹ The state's

120. *Id.*

121. Complaint for Declaratory and Injunctive Relief at 9–10, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Jan. 20, 2016).

122. *Id.* at 2.

123. NARF, *supra* note 4.

124. *Id.*

125. Complaint, *supra* note 121, at 26, 39.

126. See Order Granting Plaintiffs' Motion for Preliminary Injunction, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *10 (D.N.D. Aug. 1, 2016) (finding that North Dakota's failure to provide a compelling state interest justifying its decision not to provide “fail-safe” voting mechanisms meant that the plaintiffs' suit was likely to succeed).

127. *Id.* (finding that because the plaintiffs were likely to succeed on their 14th Amendment claim, the Court did not need to address the VRA issue).

128. 553 U.S. 181 (2008) (plurality opinion) (upholding an Indiana photo ID law under the state's interest in preventing voter fraud).

129. *Brakebill*, 2016 WL 7118548, at *3–4 (quoting *Crawford*, 553 U.S. at 190) (internal quotation marks omitted).

interest must be “relevant and legitimate” and “sufficiently weighty to justify the limitation.”¹³⁰

The court found that the North Dakota law imposed “substantial and disproportionate” burdens on Native Americans.¹³¹ Specifically, the court identified unique financial, logistical, geographical, and economic barriers faced by Native American North Dakotans in exercising their right to vote under the new law.¹³² Roughly twenty-three percent of Native American residents, or double the amount of non-Native American residents, lacked qualifying IDs.¹³³ About half of those lacking qualifying ID’s also did not possess the underlying documents, like passports, birth certificates, or W2 forms, that they would need to obtain a qualifying ID.¹³⁴ One barrier to obtaining IDs was cost: it cost money to obtain a new birth certificate, a passport could cost over \$10, and a new driver’s license could cost about \$25.¹³⁵ Additionally, individuals without documents evidencing a residential address, or about 21.6% of Native American voters, would face the same issues in obtaining one of the qualifying IDs that they would face to exercise their vote.¹³⁶

The court also discussed the geographical and logistical barriers that Native Americans faced under the new law. Only 73.9% of those without qualifying ID’s had a vehicle, and Native Americans had to travel twice as far, on average, than non-Native Americans to obtain or update a driver’s license.¹³⁷ Native Americans had to travel an average of twenty miles to a DMV, and North Dakota only had one DMV per 2600 square miles.¹³⁸ To make matters worse, twelve of twenty-seven of these sites were only open for less than six hours one day of the month.¹³⁹

Finally, the court addressed the high poverty rate in Native American communities. It discussed the digital divide and poor technology infrastructure limiting many Native Americans’ ability to renew a

130. *Id.* at *3 (quoting *Crawford*, 553 U.S. at 191).

131. *Id.* at *5.

132. *See id.* (discussing barriers to voting, including fees associated with obtaining approved ID and lack of access to internet, credit cards, or transportation, as well as voters’ inability to secure the time off of work necessary to vote).

133. *Id.* at *4.

134. *Id.*

135. *Id.* at *5, *7.

136. *Id.* at *5.

137. *Id.* at *6.

138. *Id.*

139. *Id.*

driver's license online.¹⁴⁰ It discussed the disproportionate effects of poverty on Native Americans' ability to obtain an ID, pay for an ID, and obtain information about the voting process.¹⁴¹ For these reasons, the court rejected the state's contention that the burdens on Native Americans were no greater than the burdens on other rural North Dakotans.¹⁴²

Next, the court assessed the state's interest in preventing voter fraud and ensuring that all votes were properly counted. The court accepted the state's reliance on *Crawford*, where the Supreme Court found interests legitimate,¹⁴³ but it concluded that the North Dakota law was not tailored to serve these purported goals.¹⁴⁴ It contrasted the *Crawford* facts, where the upheld photo ID law allowed voters to cast a provisional ballot with an affidavit if they did not possess qualifying IDs, while in this case, North Dakota had fully eliminated any fail-safes.¹⁴⁵ The court observed that the state had "not offered any purported compelling state interest as to why North Dakota no longer provides any 'fail-safe' mechanisms" or shown that these fail-safes "resulted in any voter fraud in the past, or are particularly susceptible to voter fraud in the future. To the contrary . . . the Secretary of State acknowledged in 2006 that he was unaware of any voter fraud in North Dakota."¹⁴⁶ Judge Hovland enjoined the North Dakota government from enforcing the law without adequate fail-safe mechanisms.¹⁴⁷

2. 2017 law and 2018 second preliminary injunction

In April 2017, North Dakota passed H.B. 1369, a new version of the 2013 law.¹⁴⁸ It was virtually identical to the prior version except that it allowed casting a provisional ballot without a qualifying ID if the voter returned within six days and presented a qualifying ID to an election official.¹⁴⁹ The plaintiffs amended their suit on the grounds that the new law made no meaningful changes and ignored the court's direction on the necessity of a fail-safe mechanism.¹⁵⁰

140. *Id.* at *7.

141. *Id.* at *8.

142. *Id.* at *9.

143. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194–95 (2008)).

144. *Id.*

145. *Id.*

146. *Id.* at *10.

147. *Id.* at *13.

148. NARF, *supra* note 4.

149. *Id.* (noting that legislators supporting the bill believed it was a "cure [to] the problems identified by the federal court").

150. *Id.*

Judge Howland began his decision by excoriating the parties' "last minute heroics" of waiting nine months after the initial injunction and seeking an expedited review within one month of the June 2018 statewide election.¹⁵¹ The plaintiffs had presented updated statistical data, consistent with the uncontested data in the initial suit, to show that the situation for Native Americans had not changed.¹⁵² The court explained that the new law required the same IDs to vote that were "previously found to impose a discriminatory and burdensome impact on Native Americans."¹⁵³

The court rejected the defendants' new reliance on *Lee v. Virginia Board of Elections*,¹⁵⁴ a Fourth Circuit case upholding a Virginia photo ID law decided several months after the first *Brakebill* preliminary injunction.¹⁵⁵ Although the statute in *Lee* required voters to present a photo ID, Virginia accepted a broader range of IDs than those accepted in North Dakota, including a free state ID that could be obtained without presenting any documentation.¹⁵⁶

The court identified a series of issues with the new law, including (1) almost 5000 Native Americans in the state (and over 60,000 other state citizens, including the homeless) did not possess a qualifying ID; (2) individuals lacking residential street addresses would *never* be able to vote and were "completely disenfranchise[ed]"; (3) the new "set aside" provisions did not help a voter lacking a qualifying ID; and (4) even those who were able to secure a qualifying ID within six days would not "have a clue as to where and to whom they need to report to present a valid ID."¹⁵⁷ The court noted that the government had still failed to provide any evidence of voter fraud to justify the law.¹⁵⁸

The court also identified a series of methods that could alleviate the severity of the law and, for each, concluded that the government had failed to provide any reason for avoiding these strategies. For example, the state could accept a broader range of IDs, including other tribal documents.¹⁵⁹ It could implement voter registration and a "state-wide

151. Order Granting Plaintiffs' Motion for Second Preliminary Injunction in Part, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190, at *2 (D.N.D. Apr. 03, 2018).

152. *Id.* at *2-3.

153. *Id.* at *2.

154. 843 F.3d 592 (4th Cir. 2016).

155. *Id.* at 594; *Brakebill*, 2018 WL 1612190, at *4.

156. *Brakebill*, 2018 WL 1612190, at *4.

157. *Id.* at *4-6.

158. *Id.* at *6.

159. *Id.* at *7.

pre-election campaign informing all voters of the ID requirements . . . *before* the election rather than after.”¹⁶⁰ It could also eliminate the \$8 fee for non-driver State IDs.¹⁶¹

Accordingly, the court granted the second preliminary injunction, enjoining the state from enforcing the residential street address requirement, and requiring the Secretary to accept IDs with any mailing address (including a P.O. box or other address); accept a broader range of IDs issued by tribal entities and the Bureau of Indian Affairs; and clarify when, where, and to whom a voter should return to present an ID if his ballot was set aside.¹⁶²

3. *Eighth Circuit reverses on eve of midterm elections and Supreme Court allows stay*

After initially denying the state’s request to stay the portion of the second preliminary injunction requiring accepting documentation with any *mailing* address, a divided panel on the Eighth Circuit Court of Appeals granted the state’s request for a stay on September 24, 2018—on the eve of the midterm elections.¹⁶³

On the equal protection claim, the court cited *Crawford*: “[e]ven assuming that a plaintiff can show that an election statute imposes ‘excessively burdensome requirements’ on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters.”¹⁶⁴ The court reasoned that “even assuming that some [Native American] communities lack residential street addresses, that fact does not justify a statewide injunction.”¹⁶⁵ The court rejected the plaintiffs’ contention that the statute was facially invidious through dictating that every voter have “an interest in property” to vote because a voter with a residential street address does not necessarily have a legal property interest in that address—for example, a homeless individual may live at a shelter with a residential address without having a property interest in that shelter.¹⁶⁶

160. *Id.* at *6. North Dakota is the only state in the country that does not require individuals to register before voting. *Id.*

161. *Id.*

162. *Id.* at *7.

163. *See* Brakebill v. Jaeger, 905 F.3d 553, 559 (8th Cir. 2018) (highlighting that North Dakota “would be irreparably harmed without a stay”).

164. *Id.* at 558 (quoting Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202 (2008)).

165. *Id.*

166. *Id.* at 559.

The court found that even though the state had not presented any evidence of voter fraud, it would likely suffer irreparable harm absent a stay because opening up voting to those with any mailing address could allow individuals to vote from precincts where they do not live.¹⁶⁷ Finally, the court dismissed the plaintiffs' concerns regarding the proximity to the election, concluding that voters still had approximately one month before election day to familiarize themselves with the requirement of the new law.¹⁶⁸

The U.S. Supreme Court denied the plaintiffs' emergency application to vacate the stay, allowing the law to stand, even though early voting had already commenced in North Dakota.¹⁶⁹ The Court did not reach the merits, but Justices Ginsburg and Kagan observed that "[t]he risk of voter confusion appears severe here because the injunction against requiring residential-address identification was in force during the primary election and because the Secretary of State's website announced for months the ID requirements as they existed under that injunction."¹⁷⁰

B. Prospects for Success in Future Suits

Although the *Brakebill* plaintiffs were unsuccessful, the case set a foundation for future suits challenging North Dakota's voter ID law. A new lawsuit, *Spirit Lake Tribe v. Jaeger*,¹⁷¹ was immediately filed in late October 2018 after the Supreme Court's *Brakebill* decision, but the court denied the injunction to avoid further chaos and confusion before the midterms.¹⁷² Now that the midterms have passed, litigants have an opportunity to take on this law again. This Section will assess avenues for success on the merits in future suits. It will briefly address the shortcomings of the Eighth Circuit's constitutional analysis in *Brakebill* and will focus on VRA section 2, which the courts never reached.

167. *Id.* at 559–60.

168. *Id.* at 560.

169. *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018) (mem.).

170. *Id.* (Ginsburg, J., dissenting).

171. Order Denying Plaintiffs' Motion for Temporary Restraining Order, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).

172. *Id.* at *1; NARF, *supra* note 4. In February 2019, the plaintiffs filed an amended complaint on VRA section 2 and First, Fourteenth, and Fifteenth Amendment grounds. First Amended Complaint for Declaratory and Injunctive Relief, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222 (D.N.D. Feb. 28, 2019).

1. *The Eighth Circuit's constitutional analysis was flawed*

The Eighth Circuit underplayed the burdens on Native American voters, gave undue weight to the state's claims of fraud, and did not address the constitutional issues posed by fees associated with obtaining qualifying IDs.

First, the court failed to address the severe and disparate impact of the law on otherwise eligible Native American voters. While the majority included a few sentences on the percentages of Native American voters who lack qualifying IDs and who are unable to obtain them, the decision was cursory and confined to a few statistics.¹⁷³ It did not address the specific barriers raised by the district court, such as geographic isolation, distance to DMV's and polling places, poverty, and costs of obtaining IDs. The court erred in not giving these burdens a more thorough analysis given that one of the factors it was required to weigh in determining whether to issue a stay pending appeal, under Federal Rule of Appellate Procedure 8(a), was "whether issuance of the stay [would] substantially injure the other parties interested in the proceeding."¹⁷⁴

Instead, the court emphasized another factor, "whether the applicant will be irreparably injured absent a stay."¹⁷⁵ Here, the court stressed the purely hypothetical risk of voter fraud, even though the state had not provided any evidence of fraud.¹⁷⁶ Additionally, the court failed to adequately respond to the dissent's commentary on the near impossibility of fraud by non-state residents:

It seems unlikely that the injunction would enable voter fraud by someone who resides outside North Dakota but maintains a P.O. Box within the state. In order to vote, such a person would still need either a tribal identification "issued by a tribal government to a tribal member residing in [the] state," or an identification issued by the state itself. Neither of these documents could be issued to a non-North Dakota resident.¹⁷⁷

Finally, the majority failed to address the constitutional issues posed by the fees for obtaining or updating qualifying IDs. *All* state-issued IDs in North Dakota came with a fee.¹⁷⁸ These fees run afoul of the Twenty-

173. *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (citing the district court's statement that 19% of Native Americans "lacked qualifying identifications" and 48.7% of those lacking such identifications also lacked the needed supplemental documentation, "such that 2305 Native Americans would not be able to vote in 2018 under the North Dakota statute").

174. *Id.* (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

175. *See id.* at 557, 559–60.

176. *Id.* at 560.

177. *Id.* at 564 (Kelly, J., dissenting).

178. *Id.* at 562.

Fourth Amendment, prohibiting poll taxes and fees.¹⁷⁹ Elections practices that make the right to vote contingent on payment of any fees violate the Equal Protection Clause: fees and poll taxes are a source of invidious discrimination, and wealth is a suspect classification that cannot constitutionally qualify one's ability to exercise the fundamental right to vote.¹⁸⁰ While North Dakota has begun to distribute free state IDs, this came after the Eighth Circuit's decision.¹⁸¹

2. VRA section 2

Plaintiffs in future suits should raise VRA section 2 claims. To prevail, a plaintiff must demonstrate that “based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁸² The Supreme Court provided guidance on this test in *Thornburg v. Gingles*,¹⁸³ where it listed non-exhaustive factors that go into the totality of the circumstances:

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;

179. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (“[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

180. See *id.* at 670.

181. Blake Nicholson, *Thousands of Native Voters in North Dakota Getting Free IDs*, ASSOCIATED PRESS (Oct. 31, 2018), <https://www.apnews.com/16c11874f3cb4ac6b4ffca30ff5fdb3e> [<https://perma.cc/ZQ4A-LR9R>].

182. 52 U.S.C. § 10301(b) (Supp. V 2018) (formerly codified at 42 U.S.C. § 1973(a) (2012)).

183. 478 U.S. 30 (1986).

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, 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.¹⁸⁴

Several of these factors weigh in favor of a section 2 violation in North Dakota. First is the state's history of official discrimination against Native Americans' ability to register, vote, and otherwise participate in the democratic process. The most obvious example of this official discrimination was the former state constitutional provision that fully disenfranchised otherwise qualified Native American voters who refused to sever their tribal ties.¹⁸⁵ The state constitution restricted the vote to "[c]ivilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election."¹⁸⁶ This remained good law until 1958, over three decades after the passage of the ICA.¹⁸⁷

Second, Native Americans are underrepresented in North Dakota public office. Despite constituting 6.5% of the state population, only two of 141 (1.4%) of state representatives and senators are Native American.¹⁸⁸ According to North Dakota Representative Ruth Buffalo (D-Fargo) (one of the two Native American state representatives), speaking in Standing Rock at an April 16, 2019 congressional field

184. *Id.* at 36–37. Note that several of these factors will not be addressed as they are tailored towards vote dilution, rather than vote denial, claims that are outside the scope of this Note. They may, indeed, be satisfied in North Dakota as well, but this author did not consider them.

185. N.D. CONST. art. V, § 121 (amended 1920).

186. *Id.*

187. *Id.* (amended 1958); Pub. L. No. 68–175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

188. See *66th Legislative Assembly Members*, N.D. LEGIS. BRANCH, <https://www.legis.nd.gov/assembly/66-2019/members> [<https://perma.cc/5K6Z-9NLw>]; Natasha Rausch, 'We Are a Voice': Native Americans Diving into Local Politics amid National Momentum, BISMARCK TRIB. (June 10, 2019), https://bismarcktribune.com/news/state-and-regional/we-are-a-voice-native-americans-diving-into-local-politics/article_c191eb95-e2fa-55dc-bcf6-6590ef1d9e48.html [<https://perma.cc/TX5A-CDQE>].

hearing on the North Dakota voter ID law, this underrepresentation results from districting designed to ensure that Native Americans do not reach a majority in any legislative district.¹⁸⁹ U.S. House Rep. G.K. Butterfield (D–N.C.) has also noted the disparity between the quantity of Native American and non-Native American state representatives, and has “questioned whether tribes are required to be consulted when state legislative boundaries are drawn.”¹⁹⁰

Third, and most strikingly, Native Americans in North Dakota bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. As is the trend throughout the United States, Native Americans experience substantially higher poverty rates than the state population as a whole, particularly on reservations.¹⁹¹ In 2010, 39.8% of Native Americans lived below the poverty line, compared to 13% of the state population as a whole.¹⁹² The Native American infant mortality rate was 15.8%, compared to 6.3% in North Dakota’s overall population.¹⁹³ Native Americans suffer from high rates of health ailments including diabetes and substance abuse.¹⁹⁴ Reservation housing is in short supply.¹⁹⁵ In 2017, the graduation rate for white students was 23% higher than for Native American students.¹⁹⁶ As

189. Lisa Kaczke, *Tribal Leaders: Discrimination, Suppression of Native American Voters Occurring in Dakotas*, ARGUS LEADER (Apr. 16, 2019), <https://www.argusleader.com/story/news/politics/2019/04/16/tribal-leaders-discrimination-suppression-native-american-voters-occurring-dakotas/3482620002> [<https://perma.cc/F4R4-CCEW>].

190. *Id.*; see also Matt Vasilogambros, *Faced With Discrimination, Native Americans Work Hard to Gain Voting Power*, CHRISTIAN SCI. MONITOR (Oct. 1, 2018), <https://www.csmonitor.com/USA/Politics/2018/1001/Faced-with-discrimination-Native-Americans-work-hard-to-gain-voting-power> [<https://perma.cc/58LV-ZR46>] (asserting that “[g]errymandering, voter ID laws, and intimidation methods have historically prevented Native Americans from participating in politics. But that’s starting to change as government officials, nonprofits, and Native American leaders push back”).

191. See N.D. DEP’T OF HEALTH, *North Dakota American Indian Health Profile*, www.ndhealth.gov/healthdata/communityhealthprofiles/american%20indian%20community%20profile.pdf [<https://perma.cc/B6BB-KGWB>] (last updated July 18, 2014) (drawing upon 2010 census and survey data).

192. *Id.*

193. *Id.* (calculating the infant death rate with the “[n]umber of infant deaths divided by the total resident live births x 1000”).

194. Levine, *supra* note 99.

195. *Id.*

196. Blair Emerson, *High School Graduation Rate for ND Native Americans Ticks Up, but Gap Still Persists*, GRAND FORKS HERALD (Oct. 10, 2018), <https://www.grandforksherald.com/news/education/4511911-high-school-graduation-rate-nd-native-americans-ticks-gap-still-persists> [<https://perma.cc/4NGW-X9PF>].

described in the background of this paper, poverty and broader socioeconomic inequality hinders political participation.¹⁹⁷

As a whole, these factors demonstrate that under the totality of the circumstances, Native Americans' ability to vote has been denied on account of race in violation of section 2.

C. *Moving Forward*

Congress considered landmark legislation in 2015 that would have targeted many of the unique barriers that Native Americans voters face. The Native American Voting Rights Act of 2015 would have re-introduced a preclearance regime, similar to VRA sections 4(b) and 5, for any changes in voter registration sites, early voting locations, and election-day polling stations on all reservations; would have required consultation with tribes on the locations of these sites; and would have required accepting most forms of tribal identification for voter ID.¹⁹⁸ In October 2018, Senator Tom Udall (D-NM) introduced a new version of this bill.¹⁹⁹ In addition to its prior contents, this new legislation would establish a Native American Voting Rights Taskforce, which would “authorize funding for tribal-state consortiums to bolster Native voter registration, education and election participation efforts in tribal communities.”²⁰⁰ Senator Udall and Representative Ben Ray Luján (D-N.M) reintroduced the bill in March 2019 with broad bicameral support,²⁰¹ and it has since moved to Committee. The bill has ninety-one co-sponsors; however, support is polarized. Only one Republican, Representative Tom Cole of Oklahoma, cosponsors the bill.²⁰²

Congress should enact this legislation. In the wake of *Shelby County*, a large statutory gap allows state legislatures to continue to enact discriminatory laws. Voting is a fundamental right of U.S. citizenship, and the federal government should take a stronger stance in protecting this right for all Americans.

197. See *supra* Section I.B.

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

199. Native American Voting Rights Act of 2018, S. 3543, 115th Cong. (2018).

200. Press Release, Office of U.S. Senator Dianne Feinstein, Senate Democrats Introduce Native American Voting Rights Act (Oct. 3, 2018), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=EC52E676-54F5-43DA-B04B-04869E251F5B> [<https://perma.cc/UDN8-S8SB>].

201. Press Release, U.S. Senate Comm. on Indian Affairs, Udall, Luján Introduce Bicameral Native American Voting Rights Act (Mar. 12, 2019), <https://www.indian.senate.gov/news/press-release/udall-luj-n-introduce-bicameral-native-american-voting-rights-act> [<https://perma.cc/ER2Y-K5SG>].

202. *Cosponsors: H.R. 1694—116th Congress (2019–2020)*, CONGRESS.GOV, [https://www.congress.gov/bill/116th-congress/house-bill/1694/cosponsors?](https://www.congress.gov/bill/116th-congress/house-bill/1694/cosponsors) [<https://perma.cc/L2ZE-M4RA>].

CONCLUSION: THE 2018 MIDTERMS—A VOTING RIGHTS
GROUNDSWELL?

Despite many state legislatures' best efforts to repress voting rights through enacting discriminatory laws like North Dakota's, voter suppression faces growing backlash across the country. Voters spoke up in the 2018 midterms, leading to the election of the most diverse freshman class in Congressional history—including forty-two women, twenty-two people of color, and the first two Native American women.²⁰³

Outside of North Dakota, Florida overwhelmingly voted to re-enfranchise 1.4 million former felons.²⁰⁴ Kris Kobach, the former Kansas Secretary of State, notorious for his voter suppression tactics and outspoken fight against alleged "voter fraud," lost the Kansas governor's race.²⁰⁵ Maryland passed a constitutional amendment allowing election-day registration.²⁰⁶ Nevada enacted automatic voter registration through the DMV.²⁰⁷ Michigan enacted a series of changes including election-day registration and no-reason absentee voting.²⁰⁸ Colorado and Michigan created independent redistricting commissions to handle districting instead of lawmakers.²⁰⁹ North Carolina Republicans, infamous for gerrymandering, lost their supermajority in the state legislature.²¹⁰

Similarly, North Dakota saw historic Native American turnout in the 2018 midterms, despite the Supreme Court allowing North Dakota's voter ID law to stand. This turnout was in large part due to rapid, large-scale collective action by tribal leaders and community organizers

203. See Catie Edmondson & Jasmine C. Lee, *Meet the New Freshman in Congress: More Democrats, Diversity and Women*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/interactive/2018/11/28/us/politics/congress-freshman-class.html> [https://perma.cc/F6XF-YCHJ].

The two Native American women elected in 2018 are Sharice Davids (D-KS) and Debra Haaland (D-N.M.). *Id.*

204. Jeffrey Toobin, *How Voting Rights Fared in the Midterms*, NEW YORKER (Nov. 26, 2018), <https://www.newyorker.com/magazine/2018/11/26/how-voting-rights-fared-in-the-midterms> [https://perma.cc/782H-7QBK].

205. See *id.*

206. Khorri Atkinson, *These Midterm Victories Will Expand Voting Rights, Curb Gerrymandering*, AXIOS (Nov. 7, 2018), <https://www.axios.com/2018-midterm-elections-voting-rights-gerrymandering-53d4e533-0684-4218-b79a-a86b0c1c90b1.html> [https://perma.cc/GB22-K7VC].

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (cautioning that North Carolina Republicans, without a supermajority, "will now decide what forms of ID will be accepted" after voters approved a constitutional amendment requiring photo ID at the polls).

working to mobilize voters in the wake of the national attention drawn by *Brakebill*.²¹¹ Tribes took immediate action after the Supreme Court decision, rushing to print thousands of new free IDs that included physical addresses.²¹² Nevertheless, thousands of Native Americans remain disenfranchised while the law stands, and despite high turnouts, tribal leaders assert that illegal and unfair voter suppression persists.²¹³

The new Congress is paying attention. This April, a U.S. House elections subcommittee conducted a field hearing on the Standing Rock Sioux Reservation in North Dakota—part of a series of field hearings on voting rights issues across the country.²¹⁴ Here, House members listened to tribe members and local representatives describe ongoing voter discrimination.²¹⁵

Hopefully, shifting public opinion across the country, new members of Congress, and the judiciary will together make progress on Native American voting rights as the 2020 election approaches.

211. Katie Reilly, *A New North Dakota Law Threatened Native American Votes. They Responded by Turning Out in Historic Numbers*, TIME (Nov. 7, 2018), <http://time.com/5446971/north-dakota-native-american-turnout> [<https://perma.cc/LX5N-QQMB>].

212. April Baumgarten, *'So We Can Be Heard': After Supreme Court Ruling, ND Tribes Work to Ensure Native Americans Can Vote*, BILLINGS GAZETTE (Oct. 25, 2018), <https://billingsgazette.com/news/state-and-regional/so-we-can-be-heard-after-supreme-court-ruling-nd> [<https://perma.cc/5BPN-2WHH>] (reporting that—in just three days—the Spirit Lake enrollment office printed triple the number of IDs it typically prints in a month).

213. Blake Nicholson, *Tribes Denounce North Dakota ID Law in Congressional Hearing*, PBS NEWSHOUR (Apr. 16, 2019), <https://www.pbs.org/newshour/politics/tribes-denounce-north-dakota-id-law-in-congressional-hearing> [<https://perma.cc/RGL4-RPHX>].

214. *Id.*

215. *Id.*