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VOTER ID: COMBATING VOTER FRAUD OR DISENFRANCHISING? A COMPREHENSIVE ANALYSIS OF VOTER ID LAWS, NATIVE AMERICAN DISENFRANCHISEMENT, AND THEIR INTERSECTION

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ABSTRACT

This note discusses the contentious issue of voter ID laws and their ability to disproportionately affect various racial and ethnic groups, with specific attention paid to such laws' effects on Native Americans. Since the 2000 election catastrophe and subsequent changes to our election system, voter ID laws have become a hot-button issue. Many states have enacted voter ID laws in the years since, some of which have resulted in restrictive voting requirements that may result in disproportionately discriminatory voter disenfranchisement. This note willa first give a general overview of the complicated and convoluted recent development voter ID laws, a history of Native American disenfranchisement, and then compare the stories of voter ID laws used in the states of North Dakota and Washington, two states which both have high populations of indigenous citizens living both on reservations and on non-tribal lands. While North Dakota's voter ID law requirements have worked in practice to discriminate many Native American citizens living on reservations, Washington's recently amended voter ID law and other changes to its election laws have attempted to address these concerns efficiently and inexpensively, though more time is needed to see their true effect. The note will conclude by arguing that, while courts can help to eradicate these laws, a shift in the mindset of policymakers is the most effective and efficient way to eliminate targeted discrimination in our voting laws.

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1. INTRODUCTION

In 2018, weeks before the midterm elections in North Dakota, hundreds of Native American voters from the Spirit Lake Tribe discovered that they may have been disenfranchised. In complying with recent decision regarding the state's voter identification law, Native Americans who planned to vote had to obtain residential addresses to place on their IDs.[1] However, without their knowledge,

[1] Danielle McLean, *New North Dakota ID Restriction Threatens Native Americans' Ability to Vote*, THINKPROGRESS (Nov. 2, 2018, 7:26 PM), https://archive.thinkprogress.org/exclusive-new-voter-id-restriction-in-north-dakota-threatens-hundreds-of-natives-ability-to-vote-49937a379793/.

local emergency services changed their addresses in the state's central voter database.[2] Some absentee ballots were rejected, and subsequently, an election advocate discovered that county officials were requiring addresses on ID cards to match the addresses in the database.[3] Native Americans living on reservations often do not have residential mailing addresses,[4] so there is a heightened danger that the addresses they have on their IDs could be changed in the voter database by the government, as seen when another tribal member discovered that his residential address was assigned to a nearby bar, meaning he would be committing fraud if he had voted under that address.[5] If these massive mistakes had not been discovered, it is likely that hundreds of Native American voters would have shown up to the polls, only to have their right to vote taken away from them because of an action unilaterally taken by the government of which they had no knowledge.[6] While the actual legitimacy of the North Dakota voter ID law will be discussed later on, it is not a good sign that the North Dakota government is even capable of disenfranchising those who are attempting to following the law's strict requirements.

Who has right to vote? It is a question that has been asked over and over again since our inception as a country. Our Constitution provides some answers, protecting the right to vote in federal elections in its original form[7] and applying that protection to the states seventy-nine years later with the adoption of the Fourteenth and Fifteenth Amendments.[8] Additionally, the Voting Rights Act ("VRA"), first enacted in 1965 and currently reauthorized through 2032, the seminal piece of federal legislation protecting against voter disenfranchisement, is in place to protect against discriminatory

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[2] *Id*.
[3] *Id.*
[4] Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, AMERICAN BAR ASSOCIATION (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/.
[5] *Id*.
[6] McLean, *supra* note 1.
[7] U.S. CONST. art. I, § 2, cl. 1.
[8] U.S. CONST. amend. XIV.

voting laws.[9] However, even with all of these protections, states and political subdivisions have continued to find new ways to disenfranchise their populations, often couching that rationale beneath a neutral, nondiscriminatory reason for enacting certain laws.

Voter ID laws, laws requiring prospective voters to show an acceptable form of identification prior to registering or voting, have been one example of this recent trend, and they have been a contentious issue since their popularization began shortly after the 2000 election. While there may be some legitimate reasons for these laws to exist, and while some states adhere mostly to those legitimate reasons in passing and enforcing their voter ID laws, other states have taken advantage of such laws and have used them as pretexts for discriminatory disenfranchisement. One particularly appalling example of this trend is the state of North Dakota, which passed a voter ID law that is still in effect today[10] and had a clear discriminatory effect on Native Americans living on reservations until a consent decree entered into last year ameliorated most of those effects. In comparison, the state of Washington, in response to the controversy surrounding North Dakota's voter ID law, amended its own voter ID law as part of a recently enacted Native American Voting Rights Act.[11] The law is able to maintain an acceptable rationale behind having voter ID laws in the first place while directly seeking to expunge any discriminatory effects on Native Americans living in the state. States with a large Native American population should follow Washington's approach and ensure protection of the right to vote without placing a serious burden on otherwise eligible Native American voters. State legislatures should also follow Washington's approach of actively protecting the civil rights of its citizens instead of prioritizing their own political power.

Part II of this paper will discuss the recent history that led to the recent explosion of voter ID laws and will define the four different broad categories of voter ID laws that have been employed by different states. Part III will summarize the historical practice of Native American disenfranchisement and emphasize why it is so important

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[9] 52 U.S.C. §§ 10101–10702.
[10] *See* N.D. Cent. Code §§ 16.1-01-04.1, 16.1-05-07.
[11] *See* Native American Voting Rights Act, S.B. 5079, 66th Leg., (Wash. 2019).

to make sure that Native Americans will be truly enfranchised in every election in which they desire to exercise their right to vote, a fundamental right. Part IV will discuss North Dakota's voter ID law saga and where it stands today, while also briefly mentioning Washington's recent voter ID law change and how it should be a harbinger of a major shift towards greater protection against Native American disenfranchisement on a statewide level. Part V will emphasize the importance of these issues and propose a solution as to how these discriminatory voter ID laws can be eliminated in an efficient manner.

I. HISTORY AND GENERAL OVERVIEW OF VOTER ID LAWS

The state of elections in the United States changed dramatically after the 2000 presidential election. The events that occurred in the state of Florida live in infamy, and in response to that widely recognized debacle, election law was slowly overhauled on both the federal and state levels. While both sides of the political spectrum acknowledged that there was a problem that needed to be addressed, they did not agree about what the problem was. The Florida Election Report, an investigation and conducted by the United States Commission on Civil Rights, served both as a microcosm of the ideological split between parties and as an informative look at what problem would ultimately be addressed by the Department of Justice in the future.[12]

A. The Florida Election Report and "Voter Fraud"

The events that transpired in Florida leading up to, during, and after election day in 2000 shocked the country. While many most strongly remember the recount issue that eventually ended up in the Supreme Court,[13] Florida was plagued with a number of other serious problems as well, including accusations of widespread and disproportionate voter disenfranchisement due to a number of

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[12] U.S. COMM. ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING 2000 PRESIDENTIAL ELECTION (2001), https://www.usccr.gov/pubs/vote2000/report/main.htm.

[13] *See* Bush v. Gore, 531 U.S. 98 (2000).

actions.[14] A thorough investigation was needed to discern how and why the election disaster happened, and the answers would eventually be found in the Florida Election Report, conducted by the United States Commission of Civil Rights. The Commission, composed at the time of eight appointed members (four Democrat, three independent, one Republican),[15] investigated the veracity of numerous practices and policies that allegedly contributed to voter disenfranchisement and who was responsible for the decisions that eventually brought about these claims.[16] It held a number of public hearings and heard from hundreds of witnesses across the spectrum, including the governor of Florida, state officials, experts on election law and reform, and Florida citizens and registered voters.[17]

After many months of investigation, the Commission concluded that Florida had indeed violated the Voting Rights Act. In so finding, the Commission uncovered a number of actions leading up to and during election day that resulted in the disenfranchisement of African American and minority voters, with African American voters having had a ten times greater chance of having their ballots rejected as compared to white voters.[18] The Commission attributed this discrepancy in ballot rejection frequency was attributed to a number of factors.[19] One of these factors was the use of antiquated voting systems in counties with large minority populations, which resulted in more votes being spoiled in these counties as compared to wealthier counties with a greater percentage of white voters.[20] Another factor was the use of purge lists. Used to remove ineligible voters from registration rolls, including all convicted felons (who at this time were

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[14] *See* Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, THE NATION (Jul. 28, 2015), https://www.thenation.com/article/archive/how-the-2000-election-in-florida-led-to-a-new-wave-of-voter-disenfranchisement/.

[15] *Florida Election Bias 'Exposed in Report'*, THE GUARDIAN (June 5, 2001), https://www.theguardian.com/world/2001/jun/05/uselections2000.usa.

[16] U.S. COMM. ON CIVIL RIGHTS, *supra* note 12, at introduction, https://www.usccr.gov/pubs/vote2000/report/intro.htm.

[17] *Id*.

[18] *Id.* at Ch. 9.

[19] *Id*.

[20] *Id*.

not allowed to vote in Florida for the rest of their lives unless the governor granted them clemency),[21] deceased, duplicate, and mentally incompetent voters, these lists were poorly maintained by election officials in the leadup to the 2000 election.[22] The Commission emphasized this point by discussing Miami-Dade County, where about one out of every seven names on the county's purge list was erroneous, and while some of these voters were able to appeal and remain on the rolls, other voters either did not know they were on the list or were not successful in their appeals.[23] Additionally, the Committee found that the purge lists had a disparate impact on Florida's African American population, as they were more likely to be found on the purge lists than persons of other races, increasing the likelihood of discriminatory disenfranchisement.[24] The Committee concluded that these factual findings showed a violation of section 2 of the Voting Rights Act and that litigation should be pursued against those responsible, including state and local election officials, the secretary of state, and governor Jeb Bush to ensure compliance with the VRA in future Florida elections.[25]

While the majority of the Civil Rights Commission signed onto the report, two dissenters had a markedly different view of the situation. Commissioners Abigail Thernstrom and Russell G. Redenbaugh, both noted for holding more conservative viewpoints at this time,[26] attacked the conclusions drawn by the majority of the Committee in the Report. They argued that the Committee of relying on a flawed statistical analysis for its claim of disenfranchisement and accused the Committee of allowing partisan interests to jeopardize the

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[21] *See* FLA. CONST. of 1968 art. VI, § 4(a); *see* FLA. STAT. § 940.01(1) (2021); *see Voting Rights Restoration Efforts in Florida*, BRENNAN CENTER (Sept. 11, 2020), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida.

[22] U.S. COMM. ON CIVIL RIGHTS, *supra* note 12, at Ch. 1.

[23] *Id*.

[24] *Id*.

[25] *Id.* at Ch. 9.

[26] *See* Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, BOSTON GLOBE (Nov. 6, 2007), http://archive.boston.com/news/nation/articles/2007/11/06/maneuver_gave_bush_a_conservative_rights_panel/?page=full.

public's belief in a bedrock concept of American democracy.[27] In addition to questioning the Committee for what they did investigate and conclude, the dissenters criticized the majority for what they failed to investigate.[28] With specific reference to the aforementioned purge lists, the dissenters stated that there was no proof of eligible voters being denied the right to vote and that, in reality, the greater issue that required investigation was the reports of ineligible felons (and other ineligible voters) having their votes counted because they were not on the lists.[29] Thernstrom and Redenbaugh disagreed with the majority's conclusion that this "voter fraud" issue was "beyond the scope" of the investigation and not a major factor in the election, stating that it was "unconscionable" that the Commission made no effort to investigate these "widely-publicized allegations of fraud."[30] Given that the dissent's report was more aligned with the Executive's viewpoints at this time[31] and much less critical of the President's brother,[32] it is unsurprising that the new administration's focus in addressing the concerns raised by the 2000 election followed that report's lead (calling for investigation into "voter fraud") instead of the majority report (calling for investigations into voter disenfranchisement).[33]

The "voter fraud" terminology has been used long before this report, however. In its simplest form, voter fraud is "when individuals

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[27] ABIGAIL THERNSTROM & RUSSELL G. REDENBAUGH, THE FLORIDA ELECTION REPORT: DISSENTING STATEMENT 1 (July 19, 2001), https://media4.manhattan-institute.org/pdf/final_dissent.pdf.

[28] *Id*. at 8.

[29] *Id*.

[30] *Id*. at 49.

[31] *See, e.g., id.* at 9, 28, 49, 51.

[32] *Compare* U.S. COMM. ON CIVIL RIGHTS, *supra* note 12, at Ch. 9, https://www.usccr.gov/pubs/vote2000/report/ch3.htm ("The U.S. Department of Justice should initiate the litigation process against the governor regarding his failure to appoint special officers to investigate alleged election law violations that discriminated against people of color. Appropriate enforcement action should be initiated to ensure compliance with the Voting Rights Act of 1965.") *with* THERNSTROM AND REDENBAUGH, *supra* note 27, at 2, 5, 7–8, 43 (arguing that the Committee had a vendetta against the governor, blamed him for occurrences he was not responsible for, and treated him unfairly when he was called in as a witness).

[33] Berman, *supra* note 14.

cast ballots despite knowing that they are ineligible to vote,"[34] i.e., voter impersonation. However, the term has been morphed over the years to be the "go-to" reason for any form of election irregularity that takes place.[35] This mislabeling, often borne out of a politically strategic fear-mongering mentality, distracts attention from real issues and excuses the policy of passing unnecessary and discriminatory legislation that both suppress otherwise legitimate voters and serve no actual purpose.[36] And while actual in-person voter fraud has occurred in the past, the Brennan Center's thorough report studying numerous found incident rates between .0003 percent and .0025 percent, meaning there is a higher chance of a person being struck by lightning than a person committing in-person voter fraud.[37] The Thernstrom dissent foreshadowed what was coming in the next decade: the voter ID law revolution. And as discussed in Part IV *infra*, the "voter fraud" justification in this area can have dire consequences for otherwise eligible voters.

B. HAVA, Voter ID Popularization, & Nuts and Bolts of Voter ID Laws

Before the 2000 election, fourteen states had already enacted some form of voter ID law.[38] South Carolina was the earliest to the party, enacting the first voter ID law in 1950, while the second state to do so, Hawaii, did so twenty years later.[39] These early state laws were adopted with little uproar, and at this point, there was no clear

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[34] Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENTER FOR JUSTICE 1, 4 (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.
[35] *Id*.
[36] *Id*. at 4, 6.
[37] *Debunking the Voter Fraud Myth*, BRENNAN CENTER FOR JUSTICE 1, https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf (last visited Feb. 12, 2021). [hereinafter Voter Fraud Myth]. This document contains scores of more studies illustrating the rarity of voter fraud.
[38] *Voter ID History*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 31, 2017), https://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx [hereinafter NCSL ID History].
[39] *Id*.

evidence of political ideology impacting their adoptions.[40] Importantly, in all of these fourteen states, if voters failed to abide by the identification requirement, provisions remained in place so that they could still cast a regular ballot on election day.[41]

In 1993, Congress passed the National Voter Registration Act[42] ("NVRA"), also commonly known as the "Motor Voter Act,"[43] which sought to simplify the registration process and make voting easier for Americans.[44] In expanding voter registration and abridging the ways in which states could remove voters from their registration lists,[45] the NVRA caused strife among some state legislatures, who complained that it would be now more difficult than ever to prevent "voter fraud."[46] The fervor of these fraud concerns was catalyzed by the razor-thin Florida results in 2000 and the controversy surrounding the purge lists, though it is plausible that lackadaisical maintenance of voter registration rolls was an equal if not greater causal factor.[47]

Nonetheless, the passage of the Help America Vote Act[48] ("HAVA") in 2002 was an important step in addressing concerns over the electoral system stemming from 2000. Much of the Act was focused on modernizing election technology and creating more federal

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[40] *Id*.
[41] *Id*.
[42] National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (originally codified at 42 U.S.C. §§ 1973gg–1973gg-10, currently codified at 52 U.S.C. §§ 20501–20511).
[43] *See id.* at § 20504 (allows citizens to register to vote and apply for a driver's license simultaneously).
[44] *See About the National Voter Registration Act*, THE UNITED STATES DEPARTMENT OF JUSTICE (May 21, 2019), https://www.justice.gov/crt/about-national-voter-registration-act.
[45] *See id.* at § 20507.
[46] Eugene D. Mazo, *Finding Common Ground on Voter ID Laws*, 49 U. MEM. L. REV. 1233, 1237 (2019) (citing LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 321–22 (1996)).
[47] *See* U.S. COMM. ON CIVIL RIGHTS, *supra* note 12, at Ch. 1.
[48] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (originally codified at 42 U.S.C. §§ 15301–15545, currently codified at 52 U.S.C. §§ 20901–21145).

oversight in the organization and administration of federal elections.[49] The Act also addressed the registration problem, requiring states to create computerized voter registration lists and procedures for accurately maintaining them, which includes verifying voter information contained in a registration application through an applicant's driver's license, social security number, or, if the applicant has neither, an assigned voter identification number.[50] And most pertinently, HAVA imposed certain, limited identification requirements for states to impose.[51] First, if a voter's name does not appear on the registration lists or their eligibility is otherwise challenged at the polls, HAVA mandates that the voter has a right to cast a provisional ballot,[52] a ballot which can be set aside on election day and either counted or discarded after an investigation into the voter's uncertain eligibility.[53] Additionally, first-time voters in a State who registered for a federal election by mail were now required to present valid photo identification before casting their ballot, whether they decided to vote in-person or by mail.[54] If photo ID is unavailable, HAVA does allow for other enumerated forms of identification to suffice.[55] These requirements are the bare minimum, and the Act makes sure to note that states are free to impose more stringent voter ID laws if they so desire.[56]

To satisfy the requirements of HAVA, many states were forced to pass new legislation. With regard to the voter ID requirement, forty-four states were not in compliance at the time the Act became law in late 2002, and legislative action on this issue thus became mandatory

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[49] 52 U.S.C. §§ 20901–21072.
[50] 52 U.S.C. § 21083(a).
[51] 52 U.S.C. § 21083(b).
[52] 52 U.S.C. § 21802.
[53] *Provisional Ballots*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx [hereinafter NCSL Provisional].
[54] 52 U.S.C. § 21083(b)(1-2).
[55] 52 U.S.C. § 21083(b)(2)(A)(i-ii)(II) (requiring "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" if the voter lacks valid photo identification).
[56] 52 U.S.C. § 21084.

and imminent.[57] Even though HAVA's identification requirements were only for federal elections, states often decided to apply its requirements to their own state elections as well, as the systems for running each kind of election are so intertwined that, for overall convenience, a change to one will most often lead to a change in the other.[58] States also took notice of the express HAVA provision allowing them to enact stricter requirements, and this provision gave legislators who may already have been interested in enacting voter ID provisions an opening to put their ideas into action.[59] By 2007, thirty-four states had passed voter ID legislation with stricter requirements than HAVA's minimum standards.[60]

Presently, thirty-five states have voter ID laws that are operational.[61] While they all are generally aimed at attacking the same issues of election integrity, there is variability among states as to the type of requirements they see as achieving that goal in the present landscape. While some of the schemes may overlap, the National Conference of State Legislatures ("NCSL") has grouped state voter ID laws generally into four categories: strict photo ID, non-strict photo ID, strict non-photo ID, and non-strict non-photo ID.[62] Each of these categories has different impacts on voter participation, as the more restrictive laws tend to disenfranchise more voters due to their restrictive requirements, while the less restrictive laws tend to make it easier for a voter to have their vote counted even if they do not show the required identification.[63]

Among these four different categories, there are two significant differences. First, there is the more easily discernible

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[57] Mazo, *supra* note 46, at 1239.

[58] Samuel P. Langholz, *Fashinoning a Constitutional Voter Identification Requirement*, 93 IOWA L. REV. 731, 747 n. 84 (citing Robert S. Montjoy, *HAVA and the States*, *in* ELECTION REFORM: POLITICS AND POLICY 16, 33 n. 1 (Daniel J. Palazzolo & James W. Ceaser eds., 2005)).

[59] Mazo, *supra* note 46, at 1239–40.

[60] *Id*. at 1240.

[61] *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 25, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [hereinafter NCSL Voter ID].

[62] *Id*.

[63] *Id*.

distinction between states who require photo identification and states who do not. For this requirement, the thirty-five states are split nearly evenly, as eighteen require some form of photo identification while seventeen do not, accepting other documents, such as bank statements, birth certificates, utility bills or passports which verify a voter's identity.[64] Some states may find numerous forms of identification acceptable,[65] while others may limit acceptable forms to a small number of documents.[66]

The second, more complex distinction is between strict and non-strict laws. Strict voter ID laws make it more difficult for a voter to have their vote counted when they show up to the polls without the proper identification.[67] For example, a state may require a voter to fill out a provisional ballot and then require the voter to take extra steps to guarantee that ballot is counted, such as going back to the election office within a certain time period after the election with the proper identification.[68] Conversely, non-strict voter ID laws allow for more flexibility if the voter lacks the proper identification at the polls.[69] For example, a state may allow the vote to count without additional action required from the voter, such as by requiring the voter to sign an affidavit at the polls affirming that he or she is the person who is listed on the election record,[70] allowing election officials to waive the ID requirement if they know the voter's identity,[71] or allowing the voter to submit a provisional ballot and having election officials, after closing of the polls, unilaterally determine whether the voter was otherwise eligible and registered to vote. This latter option can be achieved through different verification methods. Most states use a signature match with records from the voter's registration record,[72]

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[64] *Id*.
[65] *See, e.g.,* FLA. STAT. § 101.043(1)(a) (2021).
[66] *See, e.g.,* S.D. CODIFIED LAWS § 12-18-6.1 (2021).
[67] NCSL Voter ID, *supra* note 61.
[68] *Id*.
[69] *Id*.
[70] *See, e.g.,* DEL. CODE ANN. tit. 15 § 4937(a) (2021).
[71] *See, e.g.,* ALASKA STAT. § 15.15.225(b) (2021).
[72] *See, e.g.,* FLA. STAT. § 101.043(1)(b) (2021); *see also* MONT. CODE ANN. § 13-15-107(2) (2021).

through some states require additional information to be matched with the registration database.[73]

C. Constitutional Challenges to Voter ID Laws

There has been a plethora of legal challenges to voter ID laws in the last twenty years, at both the federal and state levels. Challenges to these laws are usually brought either on constitutional grounds or under the VRA. The most notable challenge, and the only voter ID case to ever reach the Supreme Court,[74] has been to Indiana's voter ID law, which was passed in 2005 and is still one of the most restrictive in the nation. Named Senate Election Law 483 ("SEA 483"), this strict photo ID law requires in-person voters to present a photo ID before voting on election day.[75] While Indiana does not provide an enumerated list of acceptable forms of identification, it does provide a list of four requirements for the identification document to be accepted at the polls.[76] If voters are unable to meet the identification requirement on election day, they may vote on a provisional ballot.[77] For this provisional ballot to be counted, the voter must appear before the circuit court clerk or county election board within ten days of the election.[78] While there, the voter must produce the proper identification or execute an affidavit stating that they are not able to obtain the proper identification due to indigence or a religious objection to being photographed.[79] If the voter was asked to vote provisionally for an additional reason, the validity of that reason will

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[73] *See* OKLA. STAT. tit. 26 § 7-114(B)(2) (2021) (requiring the affidavit signed when casting the provisional ballot to contain a matching name, residence address, date of birth, and driver's license or SSN number to the voter registration database for the provisional ballot to be counted).
[74] Mazo, *supra* note 46, at 1247.
[75] *See* IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2021).
[76] *Id*. § 3-5-2-40.5 (The ID must contain: (1) the name of the individual, which must conform to the name in the voter's registration record; (2) a photograph of the voter; (3) an expiration date, which must not be expired or, if expired, must have expired after the most recent general election; and (4) must have been issued by the state of Indiana or the United States).
[77] *Id*. § 3-10-1-7.2(d).
[78] *Id*. § 3-11.7-5-2.5(a).
[79] *Id*. § 3-11.7-5-2.5(b-c).

have to also be determined and resolved before the ballot can be counted.[80]

Almost immediately after this law was enacted, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit in federal court, arguing that the law was facially unconstitutional, substantially burdening the right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.[81] *Crawford v. Marion County Election Board* reached the Supreme Court, and in a fractured plurality opinion authored by Justice Stevens, who was joined only by Justice Kennedy and Chief Justice Roberts,[82] the Court affirmed the lower court rulings and upheld the law.[83] The Court began by summarizing the legal precedent to determine the standard of review.[84] It concluded that, to determine this law's constitutionality, a balancing test must be employed which weighs the burden the law places on voters, however slight, against "relevant and legitimate state interests sufficiently weighty to justify the limitation."[85] This standard, 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,"[86] is known as the *Anderson/Burdick* balancing standard. It is unique to voting regulations, which are not subject to strict scrutiny if they are deemed to not impose a "severe" burden on the right to vote.[87]

The Court first held that Indiana had several legitimate interests behind the statute, including protecting election integrity through the maintenance of accurate voter registration lists in compliance with NVRA and HAVA, combating voter fraud, and

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[80] *Id*. § 3-11.7-5-2.5(e).

[81] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 186–87 (2008).

[82] A separate concurrence, only in the judgment itself, was authored by Justice Scalia, who was joined by Justice Thomas and Justice Alito. Thus, the law was upheld 6-3, but the rationale for upholding it was split down the middle. Stevens' opinion is the controlling opinion, however.

[83] *Id*. at 188–89.

[84] *Crawford*, 553 U.S. at 190–91.

[85] *Id*. at 191 (quoting Norman v. Reed., 502 U.S. 279, 288-89 (1992)).

[86] *Id*. at 190 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

[87] *See generally* Mazo, *supra* note 46, at 1250 n.97 (describing the development of the *Anderson/Burdick* standard of review); Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983).

protecting public confidence in the integrity of the democratic process.[88] Concerning voter fraud in particular, the Court held that, although the record contained no evidence of any in-person fraud occurring in Indiana in the entire history of the state, historical instances of such fraud in other areas of the country and the need for accurate recordkeeping and orderly administration of elections are enough to overcome the wanting evidence of actual fraud.[89] Turning to the other side of the scale, the Court held that the petitioners failed to present enough evidence of the voter ID law excessively burdening any class of voters to a degree great enough to outweigh Indiana's legitimate interests, and thus, the facial challenge to the statute was insufficient.[90] The Court explained that the record lacked concrete evidence of difficulties faced by elderly, indigent, or religious voters as a result of the statute, and it held that the small number of examples provided by the petitioners were only enough to show a "limited burden on voters' rights."[91] To some, the plurality's analysis did seemingly leave the door open for future "as-applied" constitutional challenges (where a law is challenged for how it is applied by the state, not on its face) if the plaintiffs could show the illegitimate application of the law on the record.[92]

In dissent, Justice Souter, joined by Justice Ginsburg, attacked the plurality's improper use of the *Burdick* standard, noting that a State must do more than invoke abstract interests; it also must "make a particular factual showing that the threats to its interests outweigh the particular impediments it has imposed."[93] In first analyzing the impediments, Souter and Ginsburg find there to be a considerable

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[88] *Crawford*, 553 U.S. at 191–97.
[89] *Id*. at 194–97.
[90] *Id*. at 202–03.
[91] *Id*. at 203.
[92] *See* L. Paige Whitaker, *Legal and Constitutional Issues Regarding Photo ID Laws*, *in* State Voter Identification Requirements: Analysis, Legal Issues, and Policy Considerations 12 (2016), https://digital.library.unt.edu/ark:/67531/metadc944762/m2/1/high_res_d/R42806_2016Oct21.pdf.
[93] *Crawford*, 553 U.S. at 209 (Souter, J., dissenting). Justice Breyer also wrote a separate opinion in dissent.

number, including the burden of travel costs in obtaining the ID,[94] the inadequate provisional ballot exception,[95] and the District Court's finding that approximately 43,000 Indiana residents lack the proper identification and thus will bear these burdens, with a large proportion of that group likely struggling economically.[96] The dissent stated that the impediments resulting from the voter ID law would likely discourage a significant group of poor and disabled people from voting, and therefore, a much more thorough examination of the State's interests was required (as compared to the examination conducted by the plurality).[97]

The dissent discredited all of Indiana's asserted interests. Dealing first with voter fraud, Souter and Ginsburg described the fictitiousness of this interest and its relation to the Indiana voter ID law. They did so by first showing that this law only combats in-person voter fraud, which there is no evidence of in Indiana's history and very little evidence nationwide.[98] While the State argued this dearth of evidence was due to impersonation fraud being hard to detect, Souter and Ginsburg provided the much more rational explanation: that it would likely be the easiest type of fraud to detect because the fraud would be occurring out in the open.[99] Additionally, the incentives for doing it are almost non-existent, as it was a felony offense in Indiana, and a single fraudulent vote would never change an election in any meaningful way; moreover, while an organized group of fraudulent

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[94] *Id*. at 211–216 (explaining that voters need to travel to the Bureau of Motor Vehicles ("BMV") to obtain the ID, a trip which is complicated due to a small number of BMVs per precinct, limited public transportation, and the requirement to pay at least one fee for corresponding documents needed for the ID to be issued).

[95] *Id*. at 216–18 (explaining the ten-day requirement, demonstrating that an indigent person or religious objector will have to go through the process every time they want to vote, and showing empirical data from a prior municipal election where only ~5% of provisional voters were able to follow the steps to have their votes counted).

[96] *Id*. at 218–21.

[97] *Id*. at 222–23.

[98] *Id*. at 226–27.

[99] *Id*. at 227.

voters could have a slightly greater impact, such a plan would be much more difficult to conceal.[100]

Souter and Ginsburg quickly dismissed Indiana's remaining asserted interests. First, they described the interest in fixing bloated voter rolls as nothing more than Indiana attempting to benefit from negligent maintenance of its own registration lists.[101] The dissenters found this to weaken the State's fraud argument even more, as Indiana is seemingly more interested in correcting a potential symptom of the bloated lists (impersonation) by restricting the right to vote, when in reality, it could achieve the same result by competently managing the lists.[102] Finally, Indiana's interest in safeguarding voter confidence also failed scrutiny, as the State showed nothing to suggest that its voters doubted the integrity of their electoral process.[103] On this record, Souter and Ginsburg concluded that the serious burdens placed on certain groups as a result of this voter ID law greatly outweigh the State's asserted interests behind its enactment.[104]

Crawford has continued to be a controversial decision to this day, namely because it has allowed states to use the abstract interest of "preventing voter fraud" to pass strict voter ID laws and thus has made it challenging to facially attack the constitutionality of these laws.[105] Justice Stevens has come to regret writing this decision, stating in 2014 that while he believes it was the "correct" outcome given the poor record established by the plaintiffs in the case, he also believes that, in general, voter ID laws are unnecessary and "not a good idea."[106] The famous Judge Richard Posner, who wrote the 2-1 majority decision at the appellate level, went even further, stating in 2013 that at the time of the decision, he did not realize these identification laws would be used to disenfranchise otherwise-qualified voters and referred to Indiana's voter ID law as "a type of law now widely

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[100] *Id*. at 227–29.
[101] *Id*. at 234.
[102] *Id*.
[103] *Id*. at 235.
[104] *Id*. at 236.
[105] Mazo, *supra* note 46, at 1252; Berman, *supra* note 14.
[106] Mazo, *supra* note 46, at 1251 (quoting FORA.tv, *John Paul Stevens Regrets Marijuana & Voter IDs Rulings*, YOUTUBE (May 2, 2014), https://www.youtube.com/watch?v=fPfApKU7KbY (at 1:52-minute mark)).

regarded as a means of voter suppression rather than of fraud prevention."[107] The difficulties created by *Crawford* have led some attorneys to seek new legal strategies to attack restrictive voter ID laws, the most notable of which has been challenges brought under Section 2 of the VRA.

D. Section 2 Challenges to Voter ID Laws

The original section 2 was very similar to the Fifteenth Amendment[108] but with the ability of better enforcement of those principles. In the 1982 reauthorization of the VRA, in response to a restrictive Supreme Court decision interpreting section 2,[109] Congress amended it to also proscribe laws that are "facially neutral" but have discriminatory effects on protected groups.[110] The barring of laws with a discriminatory effect, also known as a "disparate impact," was an exercise of Congress' power to enforce the Fifteenth Amendment through legislation.[111] Historically, many of the cases arising under section 2 and using the "effects" framework tend to be challenges to "vote dilution" practices, which involve at-large schemes such as redistricting, that work to lessen the impact of a protected group's vote.[112] But the section's reach has also reached "vote denial" practices, or those practices that work to disenfranchise certain groups altogether.[113] This latter category contains many historically attacked practices, such as poll taxes, literacy tests, and language or color-

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[107] Mazo, *supra* note 46, at 1251 (quoting RICHARD A. POSNER, REFLECTIONS OF JUDGING 84–85 (2013)).
[108] Voting Rights Act, § 2, 79 Stat. 437 (1965).
[109] *See* City of Mobile v. Bolden, 446 U.S. 55, 61 (1980) (The Court held that a "discriminatory purpose" on the part of lawmakers was required to establish a violation under section 2).
[110] 52 U.S.C. § 10301(a) ("no voting qualification or prerequisite for voting, or standard, practice, or procedure shall be imposed or applied . . . *in a manner which results in* a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .") (emphasis added).
[111] U.S. CONST. amend. XV, § 2.
[112] *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE (Sept. 11, 2020), https://www.justice.gov/crt/section-2-voting-rights-act.
[113] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

specific requirements for voting, though all of these specific practices were barred from use when effects claims became pursuable in 1982.[114] Voter ID laws have been a relatively new addition to this "vote denial" category, and while on the whole, they are not as blatantly discriminatory as those Jim Crow era voting laws, they can be used to achieve results similar to those despicable historical practices. Because the use of section 2 to attack voter ID laws specifically is in its legal infancy, the case law in this area is somewhat divergent and sparse, especially on the discriminatory effects front.[115] However, some courts have found section 2 violations stemming from voter ID laws in recent years.[116]

One such case challenged Texas' voter identification law, known as Senate Bill 14 ("SB 14"), and the Fifth Circuit thoroughly outlined the modern section 2 approach to vote denial challenges. The Texas law was similarly restrictive to Indiana's and fell into the strict photo ID category, becoming effective in 2013 and being challenged on multiple grounds, including both discriminatory purpose and discriminatory effect section 2 claims.[117] After an arduous litigation process which spawned one appellate opinion,[118] the Fifth Circuit reheard the case *en banc* a year later.[119] While the Court remanded on the discriminatory intent claim for a reweighing of the evidence,[120] it affirmed the district court's finding on the discriminatory effect claim, holding that such an effect was present and remanded for a determination of the appropriate remedy.[121]

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[114] *Id*.
[115] *See* Christopher S. Elmendorf & Douglas S. Spencer, *Administering Section 2 of the Voting Rights Act after Shelby County*, 115 COLUM. L. REV. 2143, 2183 (2015), https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1470&context=law_papers.
[116] *See, e.g.,* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), cert. denied, 137 S. Ct. 1399 (2017).
[117] *See* Veasey v. Abbott, 796 F.3d 487, 496 (5th Cir. 2015) (the first appellate opinion).
[118] *Id*. at 487.
[119] Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016).
[120] *Id*. at 230.
[121] *Id*. at 264–65.

In conducting the discriminatory purpose analysis, the Fifth Circuit applied the well-known intent test articulated by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp*[122] and commonly used in traditional Fourteenth and Fifteenth Amendment analyses to determine whether direct or circumstantial evidence support a finding that "a particular decision was made with any discriminatory purpose, whether it was the primary purpose or not."[123] The test consists of five, non-exhaustive factors: "(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body."[124] Challengers making this claim bear the original burden of showing that "racial discrimination was a 'substantial' or 'motivating' factor behind the enactment of the law."[125] If this burden is met, the burden of proof is shifted to the defenders of the law, who must show that the law would have been enacted anyway, even without the discrimination factor.[126]

While the discriminatory intent/purpose framework for section 2 claims uses the same analytical framework as well-established constitutional claims, there is no such consensus for the "discriminatory effect"/"disparate impact" framework.[127] The 1982 amendment to section 2 was in the midst of a period where section 2 was used mainly for vote dilution claims.[128] So, there has been much debate and uncertainty as to what type of analysis to use for vote denial claims, the category under which challenges to voter ID laws would fall.[129]

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[122] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).
[123] *Veasey*, 830 F.3d at 230.
[124] *Id.* at 231 (citing Arlington Heights, 429 U.S. at 267–68).
[125] *Id*.
[126] *Id*.
[127] *See id*. at 243.
[128] *See* Tokaji, *supra* note 113, at 691.
[129] *See, e.g.,* Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014) ("A clear test for section 2 vote denial claims . . . has yet to emerge.")

In 1986, a section 2 case reached the Supreme Court,[130] and while the case dealt with vote dilution, its principles have been viewed as the benchmark for proving any section 2 effects claim. The Supreme Court held that a plaintiff pursuing a section 2 disparate impact theory must not only show that there was a disparate impact as a result of the challenged practice, but that the impact resulted from that practice "interact[ing] with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives."[131] To determine whether the impact is a product of this interaction, the Court adopted a set of factors, now known as the "*Gingles* factors," which were originally enumerated by Congress in a Senate Committee report accompanying the bill amending section 2.[132] The factors are not exclusive, and not all of them will be relevant in every case.[133] In *Veasey*, the Fifth Circuit chose to adopt a newly minted two-part framework already adopted by the Fourth and Sixth Circuits and inspired by both the language of section 2 itself[134] and the Supreme Court's guidance in *Gingles*.[135] The two elements of this framework are:

> 1. "The challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; [and]
> 2. That burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class."[136]

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[130] Thornburg v. Gingles, 478 U.S. 30 (1986).
[131] *Id*. at 47.
[132] *Id.* at 36–37.
[133] *Veasey*, 830 F.3d at 246.
[134] *See* 52 U.S.C. § 10301(a).
[135] *Veasey*, 830 F.3d at 245.
[136] *Id*. at 245–46.

Additionally, the Fifth Circuit agreed with the Fourth and Sixth Circuits in deciding that the *Gingles* factors, and an overall totality of the circumstances approach, should be used for the second step, stating that they are effective in evaluating the causal link between the disparate effects of the current law and the effects of past and current discrimination.[137] In applying this framework and conducting the fact-intensive analysis required, the Fifth Circuit held that the Texas voter ID law violated section 2 and had a discriminatory effect on the voting rights of minorities in the state.[138] It remanded the remedy consideration to the district court, instructing the lower court to create a remedy that ameliorated the violation while also respecting the intent of the state legislature to combat voter fraud.[139]

II. HISTORY OF NATIVE AMERICAN DISENFRANCHISEMENT

Before moving to the analysis of North Dakota's voter ID law, it is important to highlight the historical underpinning of its detrimental effect: the disenfranchisement of Native Americans. While Native Americans have been the group on this continent the longest, they have hardly been given the respect they deserve. Thanks largely to the now-vilified actions of settlers, soldiers, and politicians who continually drove them further west,[140] spread disease,[141] and fought wars with them over land,[142] Native Americans are not as numerous as they once were. However, Native Americans still make up a sizeable portion of the population in many states,[143] and the national

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[137] *Id*. at 246.
[138] *Id*. at 265.
[139] *Id*. at 272.
[140] *See* Elizabeth Prine Pauls, *Trail of Tears*, ENCYCLOPEDIA BRITANNICA (Jan. 16, 2008), https://www.britannica.com/event/Trail-of-Tears.
[141] *See* Michael S. Rosenwald, *Columbus Brought Measles to the New World. It Was a Disaster for Native Americans*, WASH. POST (May 5, 2019, 7:00 AM), https://www.washingtonpost.com/history/2019/05/05/columbus-brought-measles-new-world-it-was-disaster-native-americans/.
[142] *See American-Indian Wars*, HISTORY (Nov. 17, 2019), https://www.history.com/topics/native-american-history/american-indian-wars.
[143] *See Native Americans and the US Census: How the Count Has Changed*, USA FACTS (Jan. 20, 2020, 11:12 AM), https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/.

population is projected to continue trending upwards.[144] Thus, for fairness to both Native Americans as citizens of the United States and to the integrity of elections conducted in this country, it is imperative that states protect against discrimination, ensuring that Native Americans not only have the opportunity to have their voices heard but also making sure their voices count.

A. Native American Disenfranchisement pre-VRA

For the first 136 years of America's existence under the Constitution, most Native Americans were denied the right to vote.[145] Initially, Native Americans never wanted to be a part of this country and had no desire to participate in the American political system; during the earliest history of the United States, the country was confined to the east of the Appalachian Mountains, and more than eighty percent of the present-day country was occupied by self-governing Native Americans.[146] However, three decisions made by Justice Marshall, in what later became known as the Marshall trilogy, set in motion the ultimate goal of robbing Tribal Nations of their autonomy. In *Johnson v. M'Intosh*, the first case, the Court held that private citizens were not permitted to purchase native lands,[147] while the second and third cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, established both the status of Native American tribes as non-foreign nations, in the former (meaning Native American tribes lacked original jurisdiction to file suit in the Supreme Court), and the federal government's exclusive relationship with the "sovereign" tribes in the latter (meaning that state laws were unenforceable against tribes).[148]

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[144] *See Indian Country Demographics*, NAT'L CONG. OF AM. INDIANS (June 1, 2020), https://www.ncai.org/about-tribes/demographics.

[145] Becky Little, *Native Americans Weren't Guaranteed the Right to Vote in Every State Until 1962*, HISTORY, https://www.history.com/news/native-american-voting-rights-citizenship (last visited Aug. 20, 2019).

[146] Judith Nies, *Native American History: A Chronology of a Culture's Vast Achievements and Their Links to World Events* 361 (The Random House Publishing Group) (1996).

[147] Johnson v. M'Intosh, 21 U.S. 543 (1823).

[148] Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

The one survivor of true Native American autonomy after the Marshall trilogy was continuing the traditional British practice of purchasing desired Native land through treaties allowing tribes to exercise self-governance over the land they still occupied.[149] However, as the "manifest destiny" concept permeated the political zeitgeist of the time and the industrial revolution continued, Native Americans were seen as an impediment to the economic development of the burgeoning country.[150] Thus, over time, the treaties based on the principles established by the Marshall trilogy were ignored or willfully violated, and Native Americans were driven further and further west, both through governmental removal policies that forced them from their home states and through bloody wars fought by the United States against numerous tribes for their land and its resources.[151] And in 1871, with the passage of the Appropriations Act, the federal government ended the treaty relationship altogether, instead establishing dominant power over Native American tribes through statutes or executive orders.[152] By 1900, Native Americans had lost 95 percent of the land they once held in 1800, and nearly all Native American tribes were sequestered onto reservations.[153] And in 1903, the Supreme Court held that Congress could unilaterally disregard treaties made with Native American tribes prior to 1871 through its "plenary power" over Native lands.[154]

Now that Native Americans were deprived of their autonomy and forced to develop a relationship with the United States federal government, the question of citizenship eventually arose. The Fourteenth and Fifteenth Amendments, passed shortly after the conclusion of the Civil War, purported to guarantee to all citizens, regardless of race, color, or previous condition of servitude, due process and equal protection under the laws, and the right to vote,[155] though, of course, those guarantees were not actually realized until

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[149] Nies, *supra* note 146, at 361.
[150] *Id.* at 362–63.
[151] *Id*.
[152] Indian Appropriations Act, ch. 120 § 1, 16 Stat. 566 (1871) (current version at 25 U.S.C. § 71).
[153] Nies, *supra* note 146, at 364–65.
[154] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[155] U.S. CONST. amends. XIV, XV.

much later. Nevertheless, the citizenship question, and the question of whether Native Americans had the right to vote, were debated after those Amendments were enacted.

The contemporaneous answers to those questions can be found in *Elk v. Wilkins*,[156] decided in 1884 by the Supreme Court. In interpreting the Citizenship Clause of the Fourteenth Amendment,[157] The Court first held that members of Native American tribes, even though they were born within the geographic confines of the United States, were not actually born in the country of the United States and thus were not subject to its jurisdiction, as their allegiance was to their tribe.[158] Accordingly, those born within a tribe could not claim birthright citizenship, likening this situation to that of a foreign ambassador whose child is born within the United States.[159] It further held that, to become a naturalized citizen, a tribe member would have to renounce his old allegiance to his tribe and become part of through a formal means of naturalization, either by statute or under a treaty adopted for the purpose of naturalization.[160] In deciding the case on its facts, the Court held that the plaintiff, a Nebraska man who was born in a tribal nation but later abandoned his tribe to "adopt the habits and manners of civilized people,"[161] was not a citizen and therefore could not vote in a Nebraska election because he had not been formally naturalized by the United States government, even though he met all other requirements to vote in Nebraska elections.[162]

The first large wave of Native American citizenship via naturalization came by way of the Dawes Act.[163] Enacted in 1887, the Act's result was the fractionation Native American tribal reservation lands into smaller parcels, granted by the Government to individual

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[156] Elk v. Wilkins, 112 U.S. 94 (1884).
[157] U.S. CONST. amend. XIV, § 1 ("All 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.") (emphasis added).
[158] *Elk*, 112 U.S. at 102.
[159] *Id*.
[160] *Id*. at 101, 103.
[161] *Id*. at 109.
[162] *Id*.
[163] Dawes Act, ch. 119, 24 Stat. 388 (1887) (repealed 1934).

Native Americans in what was known as "allotment."[164] Native Americans held the allotments as individual property owners while the leftover surplus land was sold to white settlers or corporations who were hungry for western expansion.[165] While the Dawes Act gave hundreds of thousands of Native Americans United States citizenship,[166] its enforcement was often coerced, as pressure was applied by the government through monetary payment and deception.[167] The Act also caused wide-ranging damage to Native American tribal culture and tribal independence.[168] Finally, much of the allotted land was poor in agricultural quality, and many Native Americans found it difficult to subsist off the land and were eventually forced to sell or lease their interests to survive.[169] The eventual failure of the Dawes Act and "allotment" as a policy measure led to changes in the government's policy towards Native Americans in the early twentieth century.[170]

Citizenship for all Native Americans would not be granted until 1924, when Congress, shortly after World War I (where tens of thousands of Native Americans fought, citizens and non-citizens alike) and the expansion of the franchise to women,[171] passed the Indian

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[164] Nies, *supra* note 146, at 224–25.

[165] Daniel McGrath, Note, *The Model Tribal Probate Code: An Opportunity to Correct the Problems of Fractionation and the Legacy of the Dawes Act*, 20 J. GENDER, RACE & JUST. 403, 410 (2017).

[166] Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West*, *1830-1965*, 5 NEV. L. J. 126, 134 (2004).

[167] *See* BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2–3 (1999).

[168] *See, e.g.*, Emily Kubota, *Indigenous Peoples' Voting Rights*, LYNCHBURG MUSEUM (Apr. 28, 2020), https://www.lynchburgmuseum.org/blog/2020/4/28/indigenous-peoples-voting-rights (many Native American children were sent to residential boarding schools in an attempt to conform them to the ideals and principles of the Western World, and they were forbidden from associating with their tribal identities).

[169] McGrath, *supra* note 165, at 408, 410.

[170] *See Voting Rights for Native Americans*, LIBRARY OF CONG., https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/#:~:text=For%20example%2C%20Maine%20was%20one,its%20original%201819%20state%20constitution.

[171] U.S. CONST. amend. XIX.

Citizenship Act.[172] While all Native Americans born in or naturalized by the United States should have now had the full array of benefits that go along with citizenship, including the right to vote, that was not the case. No matter what action was taken on the federal level at this point in history to protect civil rights for discriminated groups, states were still in nearly full control of which people voted in their elections.[173] And much like the tactics used by southern states to disenfranchise African Americans during this time period, states with a large Native American population began to do the same shortly after all Native Americans became citizens. These states had success with similar disenfranchisement techniques used in the South, such as literacy tests, poll taxes, English language tests, and polling place restrictions.[174] These states also developed disenfranchisement methods that were unique to Native American citizens, denying the right to vote on the basis of a failure to sever tribal relations,[175] a lack of state taxing power,[176] the classification of Native Americans as "wards of the federal government" and disenfranchising them on the same basis as the mentally insane,[177] and failure to meet residency requirements due to living on reservation land.[178]

B. Native American Disenfranchisement post-VRA

Though these laws worked to deny the full nature of their citizenship, Native Americans fought back with a vengeance, and in a state-by-state approach, such laws were slowly struck down by federal and state courts. By 1960, all of these discriminatory laws had been struck down by courts or repealed by state legislatures, the last of which being the Utah legislature abandoning its statute previously

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[172] Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (current version at 8 U.S.C. § 1401(b)).
[173] *See* U.S. CONST. art. 1, § 2, cl. 1.
[174] Rollings, *supra* note 166, at 135.
[175] *See* MINN. CONST. art. VII, § 1, cl. 4 (repealed 1960).
[176] *See* Opsahl v. Johnson, 163 N.W. 988, 989-90 (Minn. 1917).
[177] *See* Porter v. Hall, 34 Ariz. 308, 324-25 (Ariz. 1928).
[178] *See* Allen v. Merrell, 305 P.2d 490, 491 (Utah 1956).

upheld residency statute in 1957.[179] And the expansive VRA, enacted in 1965, became a crucial buffer to guarantee that facially and forcibly denying Native Americans (and all other vulnerable groups) the right to actually cast a vote would never again be upheld in a court of law. The VRA protected against the prevention of the franchise from Native Americans in many ways. To start, the amended section 2 has greatly helped all plaintiffs to establish dilution violations of the VRA, and it has specifically helped Native Americans challenge many schemes that would have been unassailable previously.[180] Additionally, in the 1975 reauthorization, Congress adopted section 203, a provision which requires states to provide all election information available in English in another language if the jurisdiction in question meets the coverage requirements.[181] Notably for Native Americans, many of whom speak languages that are historically unwritten, section 203 further provides that the state or subdivision is also required to have oral instruction and assistance for all registration and voting matters.[182] Finally, and arguably the most significant, section 5 of the VRA is a "preclearance" provision, which requires state governments and political subdivisions with a history of discrimination (determined by a coverage formula)[183] to obtain the approval of the federal government before introducing any laws that changed state electoral procedures.[184] This section has been maintained for every subsequent reauthorization

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[179] *See* Windy Boy v. Big Horn County, 647 F. Supp. 1002, 1019, 1022 (D. Mont. 1986) (An at-large voting system that was not facially discriminatory but had the effect of preventing Native Americans, who made up 46.2% of the county, from serving on a County Board of Commissioners and a School Board in the county violated section 2 of the VRA).

[180] *See* Windy Boy v. Big Horn County, 647 F. Supp. 1002 (D. Mont. 1986) (An at-large voting system that was not facially discriminatory but had the effect of preventing Native Americans, who made up 46.2% of the county, from serving on a County Board of Commissioners and a School Board in the county violated section 2 of the VRA).

[181] 52 U.S.C. § 10503(c).

[182] *Id*.

[183] 52 U.S.C. § 10303(b-c).

[184] 52 U.S.C. §10304(a).

of the VRA, with the last reauthorization in 2006 extending it through 2032.[185]

While the VRA has helped to prevent disenfranchisement historically, its impact has been dampened in recent years thanks to the Supreme Court's 2013 decision *Shelby County v. Holder*.[186] This case saw five members of the Court, led by Chief Justice Roberts, declare that the coverage formula used to determine which states and political subdivisions were subject to section 5 was unconstitutional as presently constructed, thus rendering the preclearance requirement unenforceable.[187] Congress had made no changes to the coverage formula since 1975, even though they reauthorized the VRA again in 1982 and 2006, and for Justice Roberts and the majority, the formula, based on data from over forty years ago, was not representative of the present day nature of the country, and heavily burdened the states subjected to it.[188] The Court claimed that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[189] However, to no surprise, this statement has proven to be a fiction.[190]

This gutting of the VRA allowed many states and counties in the South to escape federal preclearance before passing new election laws, and it also did the same for states with a history of discrimination against Native Americans, which includes the states of Alaska and Arizona, and Oglala Lakota County and Todd County in South Dakota, both of which contain a Native American reservation.[191] For example, in 2016, Arizona passed a law, known as HB 2023, which made it a felony offense for a person other than a family member or

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[185] *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE (Sept. 11, 2020), https://www.justice.gov/crt/about-section-5-voting-rights-act.
[186] 570 U.S. 529 (2013).
[187] *Id*. at 550–51.
[188] *Id*.
[189] *Id*. at 534.
[190] *See* Myrna Pérez, *7 Years of Gutting Voting Rights*, BRENNAN CTR. FOR JUSTICE: ANALYSIS & OPINION (June 25, 2020), https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights.
[191] Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CTR. FOR JUSTICE: ANALYSIS & OPINION (Mar. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights.

caregiver to collect and deliver a voter's ballot, colloquially known as "ballot harvesting."[192] This change is one that clearly would have required preclearance in a world without *Shelby County*. As the Ninth Circuit noted in its decision overturning the law for violating section 2 of the VRA, Native American voters (and other vulnerable groups of voters) are disproportionately affected by this law.[193] In relaying the factual findings of the lower court, it noted that residents living on reservations were less likely to have accessible transportation, more likely to have issues with mail-in voting and access to outgoing mail services, and more likely to work multiple jobs and/or lack childcare services to prevent travel to the polls, all of which place a substantial adverse impact on voters in these communities and cause them to resort more often to third-parties to turn in their ballots.[194] Unfortunately, and somewhat unsurprisingly, the Supreme Court reversed the Ninth Circuit's decision in July 2021.[195]

The history of the fight for Native American enfranchisement has gone on for hundreds of years, has arisen in various forms, and has spawned numerous pieces of legislation to correct past wrongs. While so much has changed over this time, one constant has remained: the discriminatory disenfranchisement still exists. Even after the granting of citizenship, the outlawing of Jim Crow-esque laws, and the enactment and enforcement of the VRA, states and political subdivisions continue to find new ways to disenfranchise Native Americans. *Shelby County* has also made it much easier for previously covered jurisdictions to pass discriminatory voting laws. Therefore, ensuring that Native Americans receive a meaningful right to vote in every election in which they desire to exercise one of their most fundamental rights as citizens of the United States is of the utmost importance. An achievable step in that goal is fighting against restrictive voter ID laws that work in effect to weaken the access of Native Americans to the franchise.

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[192] ARIZ. REV. STAT. ANN. § 16-1005(H) (2016).
[193] *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020).
[194] *Id*. at 1006.
[195] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

III. ANALYSIS OF NORTH DAKOTA AND WASHINGTON VOTER ID LAWS

In melding these two unfortunate realities together, it is clear that voter ID laws have the potential to be yet another way for states to disenfranchise their indigenous populations. Voter ID laws especially affect Native Americans living on reservations. Depending on the state, such laws may require residential addresses, which Native Americans living on reservations often lack, or may not accept tribal IDs (ID cards issued by a Tribal Government or a Federal agency working with such governments) as valid forms of identification, and Native Americans living on reservations may be less likely to have a valid state ID to use at the polls for a number of reasons, including impediments to travelling long distances, economic hardships, and lesser or no access to the internet.[196] Additionally, even if a Native American has obtained a voter ID that does not require a residential address and allows, for example, a P.O. Box address, it may not match the address in the county database system, often because such non-traditional addresses may create confusion, resulting in counties reassigning a new address in the county system and placing the voter in a new precinct without ever informing the voter of the change.[197]

As seen in the opening paragraph, this scenario played out in parts of North Dakota prior to the 2018 election.[198] While it is disturbing that such events happen, the far more disturbing concern is the laws that allow them to happen in the first place. North Dakota's voter ID law created this problem and many others, problems that Washington's voter ID law, amended in response to the events that have occurred in North Dakota, has attempted to eliminate. More states should follow Washington's lead in working closely with their Native American populations and attempting to ensure that they have meaningful access to the franchise.

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[196] Ferguson-Bohnee, *supra* note 4.
[197] *Id*.
[198] McLean, *supra* note 1.

A. North Dakota's Voter ID Law: A Troublesome Tale

Before discussing the specifics of North Dakota's voter ID law, it is important to accentuate the context surrounding the state's history through different iterations of its voter ID law, and the events leading up to the push toward its current form. During the 2012 elections, Heidi Heitkamp, a Democratic candidate and a former state attorney, surprisingly won a Senate seat in North Dakota, a traditional Republican stronghold.[199] The margin between Heitkamp and her competitor was razor thin, with Heitkamp only winning by 3,000 votes.[200] An increase in turnout by Native American voters helped contribute to Heitkamp's upset victory.[201] Months later, however, the State Legislative Assembly, controlled by Republicans, would take action.[202]

The prior version of the voter ID law, passed in 2004, still required voters to have a residential address on their identification cards, but there were "fail-safe" mechanisms in place which allowed voters to cast their votes even if they failed to meet the ID requirements.[203] In 2013, these mechanisms were completely eliminated when the Legislative Assembly amended the voter ID law.[204] Under HAVA, states are usually not entitled to completely remove completely the option of offering provisional ballots or a

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[199] Ken Belson, *Election 2012 North Dakota State Highlights*, N.Y. TIMES, https://www.nytimes.com/elections/2012/results/states/north-dakota.html (last visited Feb. 7, 2021).
[200] *Id*.
[201] *2012: Native Voters Tip the Balance in North Dakota*, FOUR DIRECTIONS, https://www.fourdirectionsvote.com/empowerment/2012-native-voters-tip-the-balance-in-north-dakota/ (last visited Feb. 7, 2021).
[202] *See* Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html.
[203] *North Dakota Voter ID Law (Brakebill, et. al. v. Jaeger)*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/nd-voter-id/ (last visited Feb. 8, 2021) [hereinafter NARF] (noting that if someone showed up to vote without an ID, she could still cast a ballot if either a poll worker could vouch for her identity as a qualified voter or she signed an affidavit under penalty of perjury stating that she was qualified to vote).
[204] *See* H.B. 1332, 63rd Leg. Sess., Reg. Sess. (N.D. 2013).

similar equivalent.[205] However, because North Dakota is the only state that does not require voter registration, and has not required it since 1951,[206] it is exempt from the provisional ballot requirement and only uses them if a court order has dictated that poll hours be extended.[207] As a result, if a North Dakota voter showed up to the polls without proper identification, she would be turned away and sent home, unable to vote in any capacity.[208] The amendment also reduced the acceptable forms of ID to the narrowest of degrees, accepting only state-issued or tribal government-issued ID cards, all of which must provide the voter's residential address.[209] As previously mentioned, this restriction has a much greater effect on Native Americans than on other groups; voters living on reservations often lack residential addresses and use PO boxes, which now failed to satisfy the new voter ID law.[210] The law was amended further in 2015, imposing further restrictions which solidified the changes made two years prior.[211] The move to eliminate "fail-safe" provisions was unprecedented, as the NCSL confirmed that no other state had enacted such a restrictive voter ID law.[212] While the state legislature insisted that these changes were necessary to curb "voter fraud" in the state,[213] it is hard to see these changes as anything other than targeted disenfranchisement by a politically-motivated (and potentially racially-motivated)

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[205] 52 U.S.C. § 21082(a); *see also* NCSL Provisional, *supra* note 53 (explaining how the provisional ballot requirement is enforced and when it can be invoked).
[206] *See* Logan Carpenter, Note, *Voter Suppression or Election Integrity? The Future of Voter Identification in North Dakota*, 94 N.D. L. REV. 571, 574–77 (2019).
[207] NCSL Provisional, *supra* note 53.
[208] Carpenter, *supra* note 206.
[209] *See* Brakebill v. Jaeger (Brakebill I), No. 1:16–cv–008, 2016 WL 7118548, at *2 (D.N.D. Aug. 1, 2016) (order granting plaintiffs' motion for preliminary injunction); HB 1332, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013).
[210] NARF, *supra* note 195.
[211] *Brakebill*, 2016 WL 7118548, at *2; HB 1333, 64th Leg. Assemb., Reg. Sess. (N.D. 2015) (specifying the limited forms of acceptable ID and clarifying that they must be current).
[212] *Brakebill*, 2016 WL 7118548, at *2.
[213] *Id*.

legislature, especially since there had only been one document case of "voter fraud" in the history of North Dakota prior to their actions.[214]

Native American voters seemed to think so as well. Seven Native Americans, all members of the Turtle Mountain Band of Chippewa Indians Tribe, subsequently filed a lawsuit in United States District Court for the District of North Dakota against Secretary of State Al Jaeger, in his official capacity, in 2016, challenging the voter ID law's state and federal constitutionality as well as its failure to comply with the VRA, though the Court never ruled on this claim.[215] Richard Brakebill and Elvis Norquay, two of the seven plaintiffs and both veterans, were denied the right to vote in 2014 solely because they failed to have a suitable residential address on their IDs.[216] Lucille Vivier and Dorothy Herman, two more plaintiffs, were also denied the right to vote in 2014 for not having a proper residential address on their tribal IDs.[217] Brakebill and Herman in particular knew they needed a new form of identification, but were unable to obtain a copy of their birth certificates, and thus were barred from even receiving a new state ID before the election.[218] The plaintiffs were represented by the Native American Rights Fund ("NARF"), an organization which has provided legal assistance to tribes since 1970.[219] For the upcoming 2016 General Election, the plaintiffs requested that a preliminary injunction be entered against the amended law and that the prior law, with its "fail-safe" provisions, be reinstated.[220] They argued that the needless, substantial, and disproportionate burdens placed on Native Americans by the amended voter ID law would lead to thousands of Native Americans being disenfranchised.[221]

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[214] *See Election Fraud Cases North Dakota*, THE HERITAGE FOUNDATION, https://www.heritage.org/voterfraud/search?state=ND (last visited Feb. 11, 2021).
[215] Hannah Stambaugh, *America's Quiet Legacy of Native American Voter Disenfranchisement: Prospects for Change in North Dakota After Brakebill v. Jaeger*, 69 AM. UNIV. L. REV. 295, 311 (2019).
[216] NARF, *supra* note 203.
[217] *Brakebill*, 2016 WL 7118548, at *8.
[218] *Id*.
[219] *About Us,* NATIVE AMERICAN RIGHTS FUND, https://www.narf.org/about-us/ (last visited Feb. 11, 2021).
[220] *Brakebill*, 2016 WL 7118548, at *2.
[221] *Id*.

The burden of establishing the need for the preliminary injunction is on the plaintiffs, and in following binding Eighth Circuit case law, Judge Daniel Hovland determined whether that burden was met by weighing the *Dataphase* factors, which include "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest."[222] No single factor can be dispositive, and all factors will be weighed to determine, on balance, whether the injunction should be granted.[223] To begin this analysis, the Court first analyzed factor three, the "most significant factor" in the analysis.[224] In doing so, the Court applied the balancing standard laid out by Justice Stevens in *Crawford* for evaluating the voter ID law's constitutionality.[225]

First looking to the burdens if the ID requirements were not enjoined, the Court held that the thorough record developed by the plaintiffs, be given considerable weight.[226] The Court specifically noted statistical data from a survey of North Dakota voters and expert witness testimony, both of which examined the disparate living conditions for Native Americans as compared to non-Native Americans, including lower average household incomes, higher unemployment, a higher percentage of eligible voters not possessing a qualifying voter ID and being unable to update them, substantial travel and time burdens, and, of course, the residential address requirement and lack of "fail-safe" provisions.[227] All of these statistical truths showed that a disproportionate burden was placed on Native Americans, who would have a much harder time obtaining a qualifying ID as compared to other groups.

Furthermore, the defendant did not refute any of these findings, instead relying on *Crawford* and arguing both that the

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[222] *Id*. at *3 (quoting Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)).
[223] *Id*.
[224] *Id.* (quoting S&M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).
[225] *Id*.
[226] *Id*. at *4–5.
[227] *See id.* at *4–9.

changes are necessary to combat voter fraud and that the burden of making a trip and gathering appropriate documents to obtain a new ID is not a substantial burden on the right to vote.[228] However, in *Crawford*, the Indiana law at least still allowed voters to cast provisional ballots, and the outcome of that case has largely been attributed to a poorly developed record.[229] Here, conversely, the Court notes that the record is replete with information of the excessively burdensome requirements on Native American voters, and there are no "fail-safe" provisions.[230] And because there was virtually no record of past or potential voter fraud in North Dakota, nor any other compelling interest which supported the removal of the provisions, the Court held that the burdens on Native American voters clearly outweighed the State's interests, and subsequently that the voter ID law would violate the Fourteenth Amendment Equal Protection Clause.[231] The rest of the *Dataphase* factors were also met, as the irreparable harm of being disenfranchised was clear and not compensable through damages, the right to vote for voting-age Native Americans outweighs any of North Dakota's purported interests, and North Dakota produced no evidence suggesting that public confidence in elections would be undermined by allowing votes under "fail-safe" provisions.[232] Accordingly, the plaintiff's motion for a preliminary injunction was granted,[233] and, at least for the 2016 election, thousands of Native Americans would not be disenfranchised by North Dakota's voter ID law, as "fail-safe" options would be available for those without proper identification.

But the story unfortunately does not end there. While the 2016 election went off without a hitch, the Legislative Assembly once again amended the voter ID law in 2017.[234] While state legislators claimed this change to the law addressed the problems raised in *Brakebill*, the law was essentially unchanged from the 2013 and 2015 iterations, except for the allowance of voters without a qualifying ID to cast a

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[228] *Id*. at *9.
[229] *Id*. at *9–10.
[230] *Id*.
[231] *Id*. at *10.
[232] *See id*. at *10–13.
[233] *Id*.
[234] HB 1369, 64th Leg. Assemb., Reg. Sess. (N.D. 2017).

provisional ballot and have that ballot counted if they showed up within six days with the proper identification.[235] The *Brakebill* plaintiffs were rightfully angry, as this bill had done nothing to actually address the issues raised by Judge Hovland and arguably ignored them to continue suppressing otherwise qualified voters from exercising that right. Thus, the plaintiffs amended their complaint to facially challenge this newly amended version of the voter ID law.[236] This time, the District Court granted a limited preliminary injunction to bar the state from implementing certain provisions.[237] The Court held that this new iteration still required voters to have the same forms of qualifying ID's that was earlier found to have a "discriminatory and burdensome impact on Native Americans," and with updated statistical data, the plaintiffs showed that these burdens had not disappeared.[238] Additionally, the State had still failed to present evidence of actual voter fraud; therefore, the Court reiterated that "protecting the most cherished right to vote for thousands of Native Americans who currently lack a qualifying ID and cannot obtain one, outweighs the purported interest and arguments of the State."[239] In granting the partial injunction, the Court ordered the State to not enforce the residential address requirement and accept all mailing addresses (including P.O. boxes), expand the acceptable list of qualifying IDs and supplemental documentation issued by tribal governments, and clarify the procedure to have a provisional ballot counted.[240]

While the preliminary injunction was in force during the 2018 primaries, it would not survive in its full form to the midterm elections. The State requested to stay the portion of the injunction requiring its acceptance of any mailing address, and a divided panel of the Eighth Circuit Court of Appeals granted the request on September 24, 2018, approximately six weeks before election day and

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[235] *Id*.
[236] NARF, *supra* note 203.
[237] Brakebill v. Jaeger (Brakebill II), No. 1:16–cv–008, 2018 WL 1612190, at *7 (D.N.D. Apr. 3, 2018) (order granting plaintiffs' motion for second preliminary injunction in part).
[238] *Id*. at *2.
[239] *Id*. at *6–7.
[240] *Id*. at *7.

after early voting had already began.[241] To determine whether to issue the stay, the Court applied a four-factor test that is nearly identical to the *Dataphase* factors.[242] The appellate court presented a different calculation of the merits analysis, applying *Crawford*'s proposition that a showing of excessively burdensome requirements on some voters "does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters."[243] Additionally, even though the State failed to prevent any evidence of voter fraud, the Court still held that the State would suffer irreparable harm if the residence requirement was expanded, as the potential for scores of voters to vote in the wrong precinct could lead to a dilutive effect that could affect the outcomes of different elections.[244]

The Eighth Circuit's focus was narrow, discussing only residential addresses and omitting most of the statistics presented at the lower court level which established the disproportionate burdens placed on Native American voters in even obtaining a qualifying ID in the first place. Additionally, the only "irreparable" harm the Court sought to protect the State against was hypothetical voter fraud.[245] The real burdens placed on thousands of Native Americans deserved a more thorough analysis from the Court, and its failure to conduct one allowed it to give undeserved weight to non-existent concerns.[246] After

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[241] Brakebill v. Jaeger (Brakebill III), 905 F.3d 553 (8th Cir. 2018); *see also* NARF, *supra* note 203.

[242] *Id*. at 557 (quoting Hilton v. Brunskill, 481 U.S. 770 (1987); ("(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies").

[243] *Id*. at 558 (quoting Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008)).

[244] *See id.* at 559–60.

[245] *Id*.

[246] *See* The Heritage Foundation, *supra* note 214 (showing that there have only been *three* prosecuted cases of voter fraud in North Dakota's history, two of which were instances of duplicate voting by individual actors); *see also* Alvin A. Jaeger, *North Dakota: The Only State Without Voter Registration*, SECRETARY OF STATE (Jan. 2004), http://www.library.nd.gov/statedocs/SecretaryState/votereg-2.pdf (noting that, through January 2004, *zero* cases of voter fraud had been prosecuted in North Dakota's history).

the issuance of this ruling, the plaintiffs filed an emergency appeal to the Supreme Court to vacate the stay;[247] however, their application was denied 6-2, with Justices Kagan and Ginsburg dissenting from the denial.[248] The finalization of this decision came so close to election day, and the risk of thousands of disenfranchised Native American voters being unable to participate in the 2018 election was a real concern. However, thanks to the united effort of NARF, four different Native American tribes located in North Dakota,[249] and two community organizations to provide qualifying IDs free of charge,[250] and despite an instance of aforementioned bureaucratic incompetence nearly getting in the way,[251] Native American voter turnout hit record highs.[252]

The Eighth Circuit eventually heard the appeal to the preliminary injunction in 2019, where it officially overturned the second preliminary injunction and held again that the plaintiffs were not likely to succeed on the merits of their facial challenge to both the residential address requirement and the requirement to present one of the statutorily enumerated IDs.[253] It seemed like the battle was far from over, and that the risk of Native American disenfranchisement would once again rear its ugly head at the 2020 general election. However, with a denial of the State's motion to dismiss and an upcoming trial date,[254] North Dakota reached out to the parties to settle, and a binding

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[247] NARF, *supra* note 203.
[248] *See* Brakebill v. Jaeger, 139 S. Ct. 10 (2018) (memorandum).
[249] *Voting in North Dakota's 2018 Election*, NATIVE AMERICAN RIGHTS FUND, https://www.narf.org/north-dakota-2018-election/ (last visited Feb. 11, 2021) (The Spirit Lake Tribe, the Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa Indians, and the Three Affiliated Tribes ("MHA")).
[250] *Id*. (Four Directions and Western Native Voice).
[251] *See* McLean, *supra* note 1.
[252] *See* Roey Hadar, *North Dakota Reservations See Record Voter Turnout amid Fears of Suppression*, ABC NEWS (Nov. 7, 2018, 5:19 PM), https://abcnews.go.com/Politics/north-dakota-res-ervations-record-voter-turnout-amid-fears/story?id=59038845.
[253] Brakebill v. Jaeger (Brakebill IV), 932 F.3d 671 (8th Cir. 2019).
[254] *See* Spirit Lake Tribe v. Jaeger, No. 1:18–cv–222, 2020 WL 625279, at *1 (D.N.D. Feb. 10, 2020) (order denying defendant's motion to dismiss). Brakebill was consolidated with this separate case brought in 2018 by the Spirit Lake and Standing Rock Sioux Tribes.

consent decree was entered thereafter.[255] And as a result, safeguards were put into place to protect the right to vote of Native Americans in the state. One of the provisions of the decree requires the state to accept as valid, for the purposes of voting, the designation of a voter's residential street address made by the Tribal Government, if the address is within the Tribal Government's jurisdiction.[256] Some others involve making sure that voters living on reservations have easy access to free qualifying IDs.[257] Finally, the decree allows voters using a tribal ID to mark their residence on a map instead of using a numbered street address for purposes of the residency requirement, whereby the county 911 coordinator will then be required to assign a residential street address to that location; thus, all the voter must do is show up to vote with their residence marked on a map, and the onus is then on the state to verify the official address of that location and ensure the vote is counted.[258] This unilateral process, deviating from the provisional ballot procedure enacted in 2017, eliminates the need to return to the polling place to verify a ballot that is set-aside, which is very important for voters who live on reservations, as many of them live far from polling sites or lack access to a regular form transportation, which made these return trips challenging.[259] Thus, after seven long years, Native American voters in North Dakota will finally be ensured equitable participation in the electoral process.

B. Washington's Voter ID Law: A Quicker, Easier and More Just Potential Solution

The journey to ensuring equitable voting rights for Native Americans in North Dakota was arduous, costly, and resulted in actual

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[255] Daniel L. Hovland, *Order, Consent Decree, and Judgment: Brakebill v. Jaeger and Spirit Lake Tribe v. Jaeger*, SECRETARY OF STATE 1 (Apr. 27, 2020), https://vip.sos.nd.gov/pdfs/Spirit%20Lake/Doc.%2097%20-%20Ordered%20Consent%20Decree.pdf.

[256] *Id*. at 4.

[257] *See id.* at 5–6.

[258] *Id*. at 6–8.

[259] Blake Nicholson, *Federal Judge Signs Settlement in North Dakota Voter ID Lawsuits*, BISMARCK TRIB. (Apr. 29, 2020), https://bismarcktribune.com/news/state-and-regional/govt-and-politics/federal-judge-signs-settlement-in-north-dakota-voter-id-lawsuits/article_3dd58275-c9a3-56ea-9f71-58806bee95a8.html.

disenfranchisement of some voters in two separate elections.[260] Conversely, Washington's solution to the potential problem was quick, efficient, and relatively inexpensive. As part of its mission to improve voting access, the state legislature enacted a Native American Voting Rights Act, which took effect in July of 2019.[261] The Bill addressed many concerns in protecting the right to vote for Native American citizens, and it was passed in response to the backlash surrounding the 2018 North Dakota voter ID law.[262] The Bill's protections include permitting Native Americans living on reservations to submit a "non-traditional" address, such as a PO box, on their voter registration applications, allowing a federally recognized tribe to use a tribal government building as the residential/mailing address for people living on the reservation, permitting the use of tribal identification cards for submission of an electronic registration application and not requiring a residential address to be on a tribal identification card when presenting identification at a voting center, allowing a federally recognized tribe to designate a state facility located on the reservation to serve as a voting registration center, and allowing a federally recognized tribe to request and receive a ballot drop box and establish a pick up location on the reservation.[263] All of these protections make it easier for Native Americans to both register to vote and to actually vote in elections, and the allowance of non-residential addresses to count for Native American voters greatly increases their ability to participate in elections. Additionally, the placing of drop boxes on reservation land attacks the noted travel burden.[264]

It is worth noting that the election landscape in Washington is markedly different than in North Dakota. As just mentioned,

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[260] *See* NARF, *supra* note 203; *see also* Nicholson, *supra* note 259 (explaining the costs, including millions in attorney's fees, mediation costs, and the continued costs to the state to adhere to the consent decree for all future elections).

[261] Native American Voting Rights Act of Washington, S.B. 5079, 66th Leg. (Wash. 2019).

[262] Manola Secaira, *New WA Law Helps Native Voters This Election. Is It Enough?*, CROSSCUT. (Sept. 24, 2020), https://crosscut.com/equity/2020/09/new-wa-law-helps-native-voters-election-it-enough.

[263] S.B. 5079, §§ 1–7; *see also* WASH REV. CODE § 29A.40.160(9)(b) (2021).

[264] Secaira, *supra* note 262.

Washington, like every state except for North Dakota, requires its voters to register before voting.[265] Additionally, most voting in Washington takes place by mail,[266] so the expansion of in-person voter ID requirements specifically may not have much of an actual effect. Thus, the specific changes made by Washington may not work for every state, and it still remains to be seen how the changes themselves will affect Native American turnout. However, it is clear that actions by state legislatures are the quickest and most efficient way to attempt to address the problem of discriminatory disenfranchisement, and on the whole, they should be more interested in protecting the fundamental rights of their citizens than in furthering their own partisan interests.

IV. CONCLUSION

Native American disenfranchisement, a practice that began in the nineteenth century, is still an ongoing problem today. Yet Native American voters are not alone in this reality. States and political subdivisions continue to devise new ways to restrict the right to vote. Voter ID laws have become yet another example of one such method that can be used to disenfranchise not just Native Americans, but other groups as well. Since the turn of this century, we have seen the number of voter ID laws jump from fourteen to thirty-five, nine of which are characterized as strict. For nearly all of these laws, the term "voter fraud" is used as a defense and justification to severe restrictions on the fundamental right to vote. The prevalence of this term, including in areas that are not even correctly classified as "voter fraud," would make an ill-informed person believe that our election system is rampant with liars and cheaters who are committing voter fraud to "rig" elections. But in reality, actual voter fraud is rarer than a Florida panther. This country has a long and ugly history of justifying suppressive voting restrictions with combating "voter fraud": poll

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[265] *See Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 5, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx.

[266] *See Washington State Vote by Mail Fact Sheet*, WASHINGTON OFFICE OF THE SECRETARY OF STATE ELECTIONS DIVISION, https://www.sos.wa.gov/_assets/elections/wa_vbm.pdf (last visited Feb. 11, 2021).

taxes and white primaries are two such examples.[267] However, that ugly chapter has not closed yet, and now the causal chain, beginning with the Thernstrom dissent and HAVA and leading through present day, has led some states to use voter ID laws to become part of another chapter in that story.[268]

While courts may be able to provide relief against these laws, such lawsuits are exorbitant in cost, often span multiple years, and require mountains of evidence to prove a claim. The Supreme Court has done no favors on the constitutional front. By applying the *Anderson-Burdick* standard instead of strict scrutiny in *Crawford*, it has opened the door for far too much judicial deference, leading to results like *Brakebill III*, where the Eighth Circuit was able to overturn the injunction against North Dakota's voter ID law simply by placing more emphasis on preventing "voter fraud" and less emphasis on how the law burdened Native Americans, achieved by omitting numerous statistical data relied on by the lower court. It was crystal clear from that data that this law was anything but a "minor burden" placed on Native American voters. Perhaps an "as-applied" challenge would have fared better, but regardless, the balancing standard, as shown in this case is far too amenable and can be abused.

Voter ID laws challenged under Section 2 of the VRA are not much easier and may even be more expensive.[269] Discriminatory purpose claims can often be "slam-dunk" cases if the intent can be shown.[270] But proving intent can often be a difficult task, as it requires

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[267] Voter Fraud Myth, *supra* note 37, at 4.

[268] *See* Levitt, *supra* note 34, at 6 (showing a quotation from a 2007 Houston Chronicle article, noting remarks made by the head of the Republican Party in Texas: "Among Republicans it is an 'article of religious faith that voter fraud is causing us to lose elections,' Masset said. He doesn't believe that, but does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add three percent to the Republican vote").

[269] *See The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND 1, https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf (last visited Feb. 12, 2021).

[270] *See* North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (enjoining North Carolina's Voter ID Law on a § 2 discriminatory intent claim. The law was targeted at African American voters, and the process

a very thorough analysis which raises the costs of the litigation,[271] and the hard evidence of legislative intent may not even exist. Effects claims brought under Section 2 may not be any easier, as pursuing a disparate impact theory in vote denial cases is still in its infancy.[272] Thus, challenging a voter ID law in this way would be both costly and risky. So, what then is the most effective avenue to overturn these discriminatory laws?

The answer is state legislatures. These representatives need to begin working closely with their electorates to ensure that the right to vote, one of the most fundamental rights of United States citizens, is not "denied or abridged . . . on account of race, color, or previous condition of servitude."[273] In North Dakota's case, the changes made in its voter ID law went against this principle and could have disenfranchised thousands of Native Americans in three separate elections, though the actions of a wise judge and the united effort of Native American Rights advocates and Tribal Nations nearly eliminated that reality in the 2016 and 2018 elections, respectively. In a country that portrays itself as a beacon of democracy, fundamental civil rights like the right to vote should never be discriminatorily sacrificed for political power plays. An example of a state legislature who understands its responsibility in upholding these democratic values is Washington's, which went out of its way to listen to and address the real concerns of its Native American citizens. The rest of the states should soon follow in Washington's path and amend or remove restrictive voter ID laws and other voting laws that do nothing to combat the mythical "voter fraud" and only serve to disenfranchise otherwise eligible voters. Native Americans, Black Americans, and all other vulnerable groups deserve more from a country that has constantly taken from them. They deserve a meaningful, valuable, and equitable right to vote.

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for enacting the law began one day after the Supreme Court's decision in *Shelby County*).

[271] *See, e.g., id.* at 214 (noting the massive record of the case).

[272] Elmendorf & Spencer, *supra* note 115, at 2150.

[273] U.S. CONST. amend. XV, § 1.