

# CONGRESS' POWER TO AFFIRM INDIAN CITIZENSHIP THROUGH LEGISLATION PROTECTING NATIVE AMERICAN VOTING RIGHTS

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## ABSTRACT

*American Indians' path to citizenship and the franchise has not been straightforward nor simple. The legacy of this complicated path bears out today in the myriad of ways that Native Americans lack equitable access to voting in state and federal elections and otherwise face barriers to participating in the body politic that non-Indians do not. Congress has yet to legislate in a manner that protects the right of Native Americans to vote on reservation or addresses the legal complexities of administering elections on Tribal lands. By tracing the history of Indian Citizenship, the role Congress has played in conveying citizenship to American Indians, this article argues that Congress has the ability to pass comprehensive legislation protecting the rights of Native Americans to vote in state and federal elections under its combined election powers and Indian Affairs powers. This article further argues that Congress is obligated to do so as part of its trust responsibility to American Indians.*

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## I. INTRODUCTION

During a meeting of the Lewis and Clark County Republican Central Committee in Montana, a Republican staffer to a state representative (with political aspirations of his own), Drew Zinecker said, “If the reservations want to say they are independent countries . . . but they want a lot of handouts, why are we counting their ballots?”<sup>1</sup> The staffer, when asked to expand on his perspective on tribal sovereignty and the right to vote after the meeting doubled down and said, “It’s a very consensus opinion among conservatives that if the tribes want to continue to assert their sovereignty, that draws into serious question whether they should be allowed to vote or not.”<sup>2</sup> He later clarified that his comments pertained to state elections, not federal, because, “we can only deal with the state,”<sup>3</sup> adding, “I just want them to go ahead and be Montanans.”<sup>4</sup> Implying that Indians can have their sovereignty, or be Montanans, but not both.

Zinecker’s comments reflect a centuries-old perspective: tribal sovereignty, tribal citizenship, and the intertwined rights thereof are incompatible with American citizenship, state citizenship, and American suffrage. Although most of

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1. Arren Kimbel-Sannit, *HD 80 Hopeful Questions Whether Reservation Votes Should Count*, MONTANA FREE PRESS (Dec. 21, 2022), <https://montanafreepress.org/2022/12/21/montana-house-district-80-hopeful-questions-why-votes-on-reservations-are-counted/>.

2. *Id.*

3. *Id.*

4. *Id.*

the public no longer see American citizenship and Indian status as fundamentally at odds, this view is deeply rooted in American law and endures into this post-Indian citizenship period. Consequently, it has bled into the administration of state and federal elections and contributes to the modern disenfranchisement of Native American<sup>5</sup> peoples. This is done through the targeted disenfranchisement of tribal communities or intentional neglect thereof. State political subdivisions regularly deny the ability, or responsibility, to serve reservation-based voters due to tribal territorial sovereignty. States also fail to contribute to on-reservation physical infrastructure on par with off-reservation infrastructure.<sup>6</sup> This lack of investment further alienates Native American voters on reservations lacking equitable access to roads, public transportation, mail, internet, and other basic services.<sup>7</sup>

This disenfranchisement renders the promises of the Indian Citizenship Act, and other laws and treaties conferring citizenship, painfully hollow. Despite Congress' ability to act, Congress has not done so. Adding to the already existing disenfranchisement, the Supreme Court's wounding of the Voting Rights Act in *Shelby County v. Holder*<sup>8</sup> and *Brnovich v. Democratic National Committee*<sup>9</sup> have added significant barriers to Tribes succeeding in litigation.

This article argues that Congress not only has the power to pass comprehensive legislation that protects the rights of Native Americans to vote in state and federal elections based on history and law, but that Congress' trust responsibility also requires Congress to do so. This theory rests on the history of Indian naturalization and the role Congress has played in managing the political boundaries between Indians and states. More acutely, this article posits that Congress' longstanding history of granting Indian citizenship, the role that Congress has played in making Indians state citizens, and Congress' authority to manage the boundaries between Indians and states justifies Congress intruding on state

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5. Terms such as "Native American," "Indian," "American Indian," "Tribal member," and "Indigenous person" are distinct terms that overlap to varying degrees. This article uses the terms interchangeably to describe those holding Tribal membership, belonging to a Tribal community, holding Indian or Alaskan Native status under United States' law, are ethnically Native American, and/or Indigenous to the continental United States. To be sure, people outside of these descriptions (or those qualifying for some but not all) are impacted by these issues. Additionally, "Native American" is intended to include "Alaskan Native" as Alaskan Natives are disenfranchised for many of the same reasons as lower forty-eight American Indians.

6. See Matthew Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 327 (2017); see also *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

7. Fletcher, *supra* note 6.

8. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

9. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

sovereignty to protect the rights of Indian voters in state and local elections as well as federal elections.

Section I discusses the background of early conceptions of citizenship, Indian citizenship, and Indian suffrage. Section II discusses the current state of the Indian franchise. Section III discusses the contemporary relevance of distinctions between federal and state citizenship in voting. Section IV discusses the current doctrine on the right to vote. Section V discusses Congress' trust obligation to Indian Tribes and how issues of the Indian franchise fall under Congress' trust obligation. Section VI discusses Congress' positive grants of authority to pass legislation protecting the Native American right to vote. Finally, section VII attempts to predict likely challenges to such legislation and address each in kind.

## II. BACKGROUND

Suffrage is one of the most common rights associated with American citizenship. Frequently, at naturalization ceremonies, new citizens are registered to vote. U.S. Citizen and Immigration Services states that "[v]oting in elections is a responsibility that comes with U.S. citizenship. As a U.S. citizen you have the right to vote."<sup>10</sup>

Since the time of Aristotle, the right to political participation has been considered a factor distinguishing citizens from non-citizens.<sup>11</sup> In early America, the gap between citizenship and suffrage was considerable whereby poor white men and white women were citizens but denied suffrage.<sup>12</sup> Despite the gap existing in law, there was a cultural association between citizenship and suffrage that was made prominent in the debates expanding suffrage for women and citizenship for minorities.<sup>13</sup>

Citizenship in the American tradition has been associated with political belonging, and suffrage has been a symbol of that belonging.<sup>14</sup> Conceptions of suffrage, citizenship, and an individual's political belonging have converged and

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10. *New U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/citizenship-resource-center/new-us-citizens> (last updated Sept. 24, 2021).

11. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1333–34 (2011).

12. *Id.* at 1339.

13. *Id.* at 1343–45.

14. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

become increasingly associated with each other in the modern era.<sup>15</sup> Today, voters registering for federal elections must attest they are citizens.<sup>16</sup> Because Native Americans did not gain the right to vote until passing the hurdle of citizenship, the two concepts are intertwined and worth discussing in tandem when discussing Native Americans' political belonging and their right to vote.

#### A. Citizenship in the Early Ages of the Republic

At the time the Declaration of Independence was signed, the signatories were effectively renouncing their status as British subjects<sup>17</sup> and instead identifying with their membership in their respective colonies.<sup>18</sup> The American Revolution brought the concept of "citizenship" to relevance in America.<sup>19</sup> At that time, the dominant understanding was that citizenship was a freely chosen political association, though that choice was only available to those belonging to the racial, ethnic, and gender in-group (white property-owning men).<sup>20</sup> Post-Revolution, the Articles of Confederation did not provide a singular standard of citizenship. Rather, because the Articles did not provide for a strong central government, the document structured the nation to work through state legislatures and state citizenship being its chief political unit of the population.<sup>21</sup> This system resulted in highly varied standards of citizenship.

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15. "Discrimination against any group or class of citizens in the exercise of these constitutional protected rights of citizenship deprives the electoral process of integrity. The protection which the Constitution gives to voting rights covers not only the general election but also extends to every integral part of the electoral process." *MacDougall v. Green*, 335 U.S. 281 (1948) (Douglas, J., dissenting). See also *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

16. 52 U.S.C. § 20504(c)(2)(C)(i).

17. At the time of the founding, "citizen" was a political status denoting allegiance and belonging in a political community whereas "subject" denoted allegiance to the Crown, which encompassed Indians as well as colonists. Gregory Ablavsky, "*With the Indian Tribes*": Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025, 1056 (2018).

18. John S. Wise, *A Treatise on American Citizenship* 7 (1906).

19. Ablavsky, *supra* note 17, at 1058.

20. *Id.* at 1059.

21. See Wise, *supra* note 18, at 8.

According to James Madison, this variance described as “dissimilarity in the rules of naturalization” was a serious fault in the Articles of Confederation.<sup>22</sup> Madison describes the naturalization system under the Articles:

The very improper power would still be retained by each State, of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped.<sup>23</sup>

Madison describes other scenarios under which exclusively state-based naturalization and affiliated rights fail the federal interest and concludes that the proposed Constitution cures this defect “by authorizing the general government to establish a uniform rule of naturalization.”<sup>24</sup> The original Constitution gave Congress the ability to set rules of naturalization, established a firmer standard of national citizenship than the Articles of Confederation, but textually maintained the distinction between state and federal citizenship.<sup>25</sup>

At the founding, Indians were in part defined by their status as noncitizens, owing their allegiance to another sovereign, mainly Indian polities.<sup>26</sup> Indian status thus “hinged on membership in an Indian polity.”<sup>27</sup> Being an Indian was contrary to being a citizen.

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22. The Federalist No. 42 (James Madison).

23. *Id.*

24. *Id.*; U.S. CONST. art. I, § 8, cl. 4.

25. See U.S. CONST. art. I, § 2, cl. 2 (establishing the qualification that Representatives must be a citizen of the United States for at least seven years); U.S. CONST. art. I, § 3, cl. 3 (establishing the qualification that Senators must be a citizen of the United States for at least nine years); U.S. CONST. art. II, § 1, cl. 5 (establishing the qualification that Presidents must be a natural born citizen of the United States); U.S. CONST. art. III, § 2, cl. 1 (giving the judiciary jurisdiction over suits between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between state citizens and foreign states, citizens, or subjects); U.S. CONST. art. IV, § 2, cl. 1 (guaranteeing citizens of each state all the privileges and immunities of citizens in the several states).

26. See Ablavsky, *supra* note 17, at 1049. As Professor Ablavsky discusses, Indians were distinguished additionally on conceptions of race. *Id.*

27. *Id.* at 1057.

Before the Civil War, the Supreme Court said, in dicta, that Indians were not citizens in a constitutional sense but could be naturalized by an act of Congress.<sup>28</sup> After the Civil War, the federal government turned a new eye to the question of citizenship. Congress in 1866 enacted birthright citizenship, overriding President Johnson's veto, through the Civil Rights Act of 1866.<sup>29</sup> The Act granted citizenship to all persons born in the United States and not subject to any foreign power, excluding Indians not taxed.<sup>30</sup> President Johnson's veto carried objections to Indians gaining federal citizenship in part due to an idea of unworthiness:

By the first section of the bill all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, people of color . . . the policy of the Government from its origin to the present time seems to have been that persons who are strangers to and unfamiliar with our institutions and our laws should pass through a certain probation, at the end of which, before attaining the coveted prize, they must give evidence of their fitness to receive and to exercise the rights of citizens as contemplated by the Constitution of the United States.<sup>31</sup>

President Johnson believed that the statute would only convey federal citizenship and not state citizenship:

It does not purport to give these classes of persons any status as citizens of States, except that which may result from their status as citizens of the United States. The power to confer the right of

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28. *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1857) (“[Indian Tribes] may without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.”).

29. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (the relevant language of birthright citizenship provides, “[t]hat all persons born in the United States and are not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

30. *Id.*

31. Gerhard Peters & John T. Woolley, *Andrew Johnson Veto Message*, THE AM. PRESIDENCY PROJECT: UC SANTA BARBARA, <https://www.presidency.ucsb.edu/documents/veto-message-438> (last visited Feb. 16, 2023) (providing an online transcription of Andrew Johnson's Veto Message from March 27, 1866).

State citizenship is just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress.<sup>32</sup>

Nonetheless, Congress overrode the veto to pass the Civil Rights Act of 1866 but even with a super-majority sufficient to overcome a veto, there was vocal dismay in Congress at the possibility of a universal franchise including taxed Indians present.<sup>33</sup> Democratic Representative James Johnson of California warned that if the “wild Indian,” among other racial minorities, were to become the ruling political class “then . . . convert your churches into dens and brothels, wherein our young may receive fatal lessons to end in rotting bones, decaying and putrid flesh, poisoned blood, leprous bodies, and leprous souls.”<sup>34</sup> The thought of an Indian citizen population struck true moral and political terror.

Concerns about the enforceability of reconstruction statutes against the states prompted Congress to pass the birthright citizenship provisions via a constitutional amendment.<sup>35</sup> In the debate regarding the constitutional amendment, the Indian issue resurfaced.<sup>36</sup> Senator James Doolittle of Wisconsin proposed to add the language into the constitutional amendment excluding Indians because he took offense to Indian citizenship:

And yet, by a constitutional amendment, you propose to declare the Utes, the Tabhuaches, and all of those wild Indians to be citizens of the United States, the Great Republic of the world, whose citizenship should be a title as proud as that of king, and whose danger is that you may degrade that citizenship.<sup>37</sup>

Despite vocal dissenters, birthright citizenship made its way into the United States Constitution. The Fourteenth Amendment to the United States Constitution was ratified; the amendment extends federal and state citizenship by declaring, “[a]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>38</sup> Thus, citizenship in the United States became a product of birth and state citizenship became a product of state residency as a United States citizen, thereby tying the

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32. *Id.*

33. Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016).

34. CONG. GLOBE, 41st Cong., 2d Sess. 756 (1870).

35. DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 3* (Cambridge Univ. Press 2007).

36. *Id.* The specific language at the time of the debate was declaring that “all persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside.” CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).

37. CONG. GLOBE, 39th Cong., 1st Sess. 2892–93 (1866).

38. U.S. CONST. amend. XIV, § 1.



two statuses together. However, legally state and federal citizenship remained distinct.<sup>39</sup>

Shortly after the Fourteenth Amendment's ratification, Congress investigated whether Indians were "subject to the jurisdiction of the United States" such that they were citizens under the amendment.<sup>40</sup> The Senate concluded no, "Indians, in the Tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term jurisdiction is employed in the Fourteenth Amendment to the Constitution."<sup>41</sup> Thus, Congress took the view that Tribal sovereignty and its jurisdiction was contrary to the United States' jurisdiction such that the citizenship provisions did not extend to Indians.

The Supreme Court took a similar position when presented with the same question in 1880. John Elk, a member of the Winnebago Tribe, was living in Omaha, Nebraska, for over a year and attempted to register to vote.<sup>42</sup> Elk was denied.<sup>43</sup> He then brought suit to argue that the Fourteenth Amendment, his abandonment of Tribal relations, and him living under the full jurisdiction of the United States supported his claim to citizenship and the ability to register to vote.<sup>44</sup> Ultimately, the Supreme Court ruled that the Fourteenth Amendment did not make Elk a citizen because he was not born "subject to the jurisdiction" of the United States by virtue of being born an Indian subject to a Tribal sovereign's jurisdiction.<sup>45</sup> As a result of the Court's decision, the Fourteenth Amendment's impact on Indians was limited to protecting the rights of Indians that were already citizens, as opposed to extending citizenship rights to a new class of Indians.<sup>46</sup>

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39. *United States v. Cruikshank*, 92 U.S. 542, 549 (1876) ("We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.").

40. S. REP. NO. 41-268 (1870).

41. *Id.*

42. Stephen D. Bodayla, "Can an Indian Vote?" *Elk v. Wilkins, a Setback for Indian Citizenship*, NEB. HIST. 372-80 (1986), <https://ne-test-site8.cdc.nicusa.com/sites/ne-test-site8.cdc.nicusa.com/files/doc/publications/NH1986IndianVote.pdf>.

43. *Id.*

44. *Id.*

45. *Elk v. Wilkins*, 112 U.S. 94, 101-03 (1884).

46. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.01(3) (Nell Jessup Newton et al. eds., 2019).

In the dissent, Justice Harlan along with Justice Woods argued that Elk was a citizen.<sup>47</sup> Part of what Harlan found compelling was that the Court was eager to find Indian Tribes under the jurisdiction of the United States in *Cherokee Nation v. Georgia*;<sup>48</sup> there, pupillage and ward status subjected the Cherokee Nation to the sovereignty of the United States, but the Court declined to find Indian people under the jurisdiction of the United States sufficient to confer citizenship under the Fourteenth Amendment.<sup>49</sup> Despite the analysis of jurisdiction and wardship, Harlan still took the view that Indians must abandon Tribal relations, and Tribal jurisdiction, in order to achieve citizenship under the Fourteenth Amendment:

If [Elk] did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.<sup>50</sup>

The post-Civil War debates around birthright citizenship express tension around the ideas of citizenship and who was worthy of it. With respect to Indians, what continually blocked Indians out of citizenship were ideas of allegiance, civilized habits, and merit, built upon the foundational assumption that Tribal identity and affiliation were incompatible with these virtues that make one worthy of citizenship.

## B. Indian Naturalization

Prior to the Indian Citizenship Act, Indians became naturalized as state citizens and federal citizens largely through treaties and then later statutes. In many instances, Indian Tribes were securing methods of naturalization for Tribal members decades before the Fourteenth Amendment moved to birthright citizenship.

### i. Indians and State Naturalization

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47. *Elk*, 112 U.S. at 110 (Harlan, J., dissenting).

48. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831).

49. *Elk*, 112 U.S. at 121–22 (Harlan, J., dissenting).

50. *Id.* at 122–23.

While there are fewer instances of Indians being naturalized as state citizens, they did occur, and Congress took the authority—via treaty ratification—to guarantee Indians the rights of state citizenship in at least two instances. In the Southeast, the Treaty of Dancing Rabbit Creek provided that Choctaws that chose to remain in the homelands would become citizens of the States where they remained.<sup>51</sup> These Choctaws that would become state citizens would maintain their rights and status as Choctaw citizens.<sup>52</sup> Similarly, but more specifically, the Cherokee Nation in the Treaty of New Echota guaranteed that Cherokees that remained in the homelands within North Carolina, Tennessee, and Alabama would be entitled to citizenship and a reservation of lands.<sup>53</sup> These treaties should be read as a recognition of the Tribes acknowledging the legal weight of state citizenship and its legal distinctness from federal citizenship because each Tribe, in prior

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51. Treaty of Dancing Rabbit Creek, Art. XIV, Choctaw-U.S., Sept. 27, 1830, 7 Stat. 333 (“Each Choctaw head of a family being desirous to remain *and become a citizen of the States*, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not entitled to any portion of the Choctaw annuity.”) (emphasis added).

52. *Id.*

53. Treaty of New Echota, Art. 12, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478 (“Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi and are desirous to *become citizens of the States* where they reside and such as are qualified to take care of themselves and their property shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements and per capita; as soon as an appropriation is made for this treaty. Such heads of Cherokee families as are desirous to reside within the States of No. Carolina Tennessee and Alabama subject to the laws of the same; and who are qualified or calculated to become useful citizens shall be entitled, on the certificate of the commissioners to a preemption right to one hundred and sixty acres of land or one quarter section at the minimum Congress price . . . .”) (emphasis added).

Treaties, makes reference to federal citizenship.<sup>54</sup> Further, these treaties should be read as issues of state citizenship being within Congress' power to grant unto Indians, at least from Congress' perspective.

In the southeast, when states extended state citizenship to Indians via statute, they extended citizenship to small groups of Indians rather than large classes of Indians.<sup>55</sup> For example, Georgia designated named Indians as citizens, Tennessee extended jurisdiction over the Cherokees on the basis that some were citizens and more would be made citizens in the future, Alabama declared certain Indians to be citizens, and Mississippi's constitution gave the legislature the authority to admit Choctaw and Chickasaw Indians that remained in the state as citizens subject to terms set by the legislature.<sup>56</sup> Those grants were not an exercise of state sovereignty and states' decisions to bring Indians into the body politic; rather, they were consistent with the terms of removal treaties executed by the Federal government.<sup>57</sup>

Despite these laws, the southern states denied Indian citizenship or the political weight of the citizenship. In Alabama, the Supreme Court held that Article 14 of the Treaty of Dancing Rabbit Creek contained the word "citizen" in error.<sup>58</sup> Rather than being citizens of the state, the Indians were "inhabitants" because Indians could not be citizens of Alabama consistent with the laws of Alabama.<sup>59</sup> In

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54. See Treaty of Doaks Stand, Art. 4, Choctaw-U.S., Oct. 18, 1820, 7 Stat. 210 ("The boundaries hereby established between the Choctaw Indians and the United States, on this side of the Mississippi river, shall remain without alteration until the period at which said nation shall become so civilized and enlightened as to be *made citizens of the United States*, and Congress shall lay off a limited parcel of land for the benefit of each family or individual in the nation.") (emphasis added); Treaty of 1817, Art. 8, Cherokee-U.S., July 8, 1817, 7 Stat. 156 ("And to each and every head of any Indian family residing on the east side of the Mississippi river, on the lands that are now or may hereafter be, surrendered to the United States, who may wish to *become citizens of the United States*, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, to include their improvements, which are to be as near the centre thereof as practicable, in which they will have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filled in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty.") (emphasis added); Treaty of 1819, Art. 2, Cherokee-U.S., Feb. 27, 1819, 7 Stat. 195 ("The United States agree to pay, according to the stipulations contained in the treaty of the eighth of July, eighteen hundred and seventeen, for all improvements on land lying within the country ceded by the Cherokees, which add real value to the land, and do agree to allow a reservation of six hundred and forty acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansaw excepted, *who choose to become citizens of the United States*, in the manner stipulated in said treaty.") (referring to the Treaty of 1817, *see id.*).

55. DEBORAH ROSEN, *AMERICAN INDIANS AND STATE LAW* 157 (Univ. of Neb. Press 2007).

56. *Id.*

57. *Id.*

58. *Wall v. Williams*, 11 Ala. 826, 837 (1847).

59. *Id.*

part, the court concluded that Choctaws that remained in Alabama subject to the treaty “does not make them citizens; a grant to an Indian, or a foreigner, does not change his political or civil condition.”<sup>60</sup> Because these Indians retained Choctaw citizenship, the Supreme Court of Alabama concluded they could not be state citizens.<sup>61</sup>

The Supreme Court of Tennessee similarly denied Indian citizenship in a case about whether a black man enjoyed rights in Tennessee under the privileges and immunities clause of the Constitution as a citizen of Kentucky.<sup>62</sup> According to the judiciary, free persons of color, by their exclusion in the right of suffrage and absence in the establishment of the state itself, are not citizens.<sup>63</sup> The court relied on a definition of citizenship as “a number of people inhabiting the same place and living under the same law. Here equality of civil rights is made the test of citizenship . . . participating in the mutual covenants by which society was incorporated is made the test of social membership.”<sup>64</sup> Mutual covenant and equality were not available to free persons of color nor Indians but remained available to white immigrants.<sup>65</sup> Rather than citizens, they were “‘sojourners in the land,’ inmates, allowed usually by tacit consent, sometimes by legislative enactment, certain specific rights. Their status and that of the citizen is not the same.”<sup>66</sup> Even citizens “in name” could not be citizens entitled to the privileges and immunities of citizenship in law, because they lacked the requisite equality to whites.<sup>67</sup> Because there was no Cherokee Indian at the center of the case, the Treaty of New Echota was not at issue nor discussed in the opinion but the opinion by its logic extended to Indians.

On occasion, acting on their own volition in some instances, states afforded state citizenship to Indians but only to Indians deemed “civilized” – essentially those that no longer carried the stigmas of Indian-ness.<sup>68</sup> In Minnesota, Indians could become citizens and gain the right to vote by adopting the “language, customs, and habits of civilization in order to vote.”<sup>69</sup>

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60. *Id.*

61. *Id.*

62. *State v. Claiborne*, 19 Tenn. 331, 332 (1838).

63. *Id.* at 334.

64. *Id.*

65. *Id.* at 335.

66. *Id.*

67. *Id.* at 336.

68. Matthew Fletcher, *States and their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 327 (2017)

69. *Id.*

The examples from the Southeast demonstrate the common sentiment that citizenship and suffrage were rights associated with political belonging. And that states saw Indian status as fundamentally at odds with that belonging. Yet, when Tribes sought citizenship and its associated political rights that federal treaty negotiators saw it within the federal government's authority to make Indians citizens of the states while retaining their unique rights as Indians. And the Senate saw this as within its power to ratify.

## ii. Indians and Federal Naturalization

Without birthright citizenship, many Indians gained United States citizenship either by treaty, by statute, by birth to an Indian with citizenship, by military service, or by marriage.<sup>70</sup> Several Treaties provided Indians with the opportunity, or at least contemplated the opportunity, to become federal citizens prior to the ratification of the Fourteenth Amendment.<sup>71</sup> Many of these treaty provisions pre-date statehood where the Tribes were located or were executed in step with the territories being admitted to the Union.<sup>72</sup> It is unclear whether or not, had statehood predated some of these treaties, if those Tribes would have sought state citizenship.

On the basis of these treaties, some states passed laws extending rights such as suffrage to those Indians. For example, The Treaty with the Stockbridge Tribe in 1848 provided that Indians desiring citizenship could receive federal citizenship

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70. H.R. REP. NO. 68-222, at 2–3 (1924).

71. Treaty with The Ottawa of Blanchard's Fork and Roche De Boeuf art. I, Ottawa-U.S., June 24, 1862, 12 Stat. 1237 ("The Ottawa Indians of the united bands of Blanchard's Fork and of Roche de Boeuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States, it is hereby agreed and stipulated that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated at the expiration of five years from the ratification of this treaty; and from and after that time the said Ottawas, and each and every one of them, shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall, in all respects, be subject to the laws of the United States, and of the State or States thereof in which they may reside."); Treaty with the Sioux art. IIX, Sioux-U.S., June 19, 1858, 12 Stat. 1037 ("Any members of said Sisseton and Wahpaton bands who may be desirous of dissolving their tribal connection and obligations, and locating beyond the limits of the reservation provided for said bands, shall have the privilege of doing, by notifying the United States agent of such intention, and making an actual settlement beyond the limits of said reservation; shall be vested with all the rights, privileges, and immunities, and be subject to all the laws, obligations, and duties, of citizens of the United States; but such procedure shall work no forfeiture on their part of the right to share in the annuities of said bands."); Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., Seneca, Mixed Seneca and Shawnee, Quapaw-U.S., Feb. 23, 1867, 15 Stat. 513; Treaty with the Sioux (Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee) and Arapahoe, Sioux-U.S., Apr. 29, 1868, 15 Stat. 635.

72. I did this by comparing the dates of the treaties to the dates of states being admitted to the union based on state government websites— I can create a spreadsheet of this if that would help.

from Congress and be issued an allotment.<sup>73</sup> This treaty was executed on November 24, 1848, and on the heels of Wisconsin gaining statehood.<sup>74</sup> During the Wisconsin constitutional convention in 1846, the convention agreed to extend suffrage to all male Indians that Congress had declared citizens.<sup>75</sup> Thus making Indian state citizenship co-extensive with Indian federal citizenship.

Indians in the Territory of Kansas, and later during statehood, were similarly given avenues to United States citizenship. In the 1855 Treaty with the Wyandot extended federal citizenship and subjected the Wyandot to the jurisdiction of the Territory of Kansas.<sup>76</sup> However, territorial citizenship, when extended to Indians in Kansas through treaty, did not automatically parlay into state citizenship nor the right to vote.<sup>77</sup> Post statehood, as railroad companies sought to expand into Kansas, Congress executed treaties with the Kickapoo and the Delaware to secure the land

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73. See Treaty with the Stockbridge Tribe art. IV, Stockbridge-U.S., Nov. 24, 1848, 9 Stat. 955 (Congress had passed an act in 1846 whereby Indians desiring citizenship could receive an allotment and citizenship, the Act was difficult to enforce without the Tribes assent and the Treaty addressed the issue and provided that "said lands as were allotted by said commissioners to members of said tribe who have become citizens of the United States (a schedule of which is hereunto annexed) are hereby confirmed to such individuals respectively, and patents therefor shall be issued by the United States").

74. *WI Constitution: History & Revisions*, MARQUETTE UNIVERSITY LAW SCHOOL, <https://law.marquette.edu/law-library/wi-constitution-history-revisions> (last updated Jan. 2010).

75. R. Lawrence Hacey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485, 496 (1979).

76. Treaty with the Wyandot, Art. I, Wyandott-U.S., Jan. 31, 1855, 10 Stat. 1159 ("The Wyandott Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the said Wyandott Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared, to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges, and immunities of such citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas in the same manner as other citizens of said Territory; and the jurisdiction of the United States and of said Territory, shall be extended over the Wyandott country in the same manner as over other parts of said Territory.").

77. *Laurent v. State*, 1 Kan. 313, 315 (1863).

for the railroad. These treaties included mechanisms for Tribal members to become citizens of the United States.<sup>78</sup>

Apart from treaties, two principal statutes that naturalized large populations of Indians were the General Allotment Act and the Burke Act. The General Allotment Act of 1887 extended federal citizenship to Indians that were sufficiently “civilized.”<sup>79</sup> The Burke Act of 1906 amended the General Allotment Act, by which the method of naturalizing allottees at the end of a 25-year trust period — or after the “habits of civilized life” were adopted — was extended to the Indians of the Cherokee Nation, Chickasaw Nation, Choctaw Nation, Seminole Nation, and Muscogee Creek Nation.<sup>80</sup> Indian women who married citizens of the United States between August 9, 1888 and September 22, 1922 became citizens by marrying a citizen.<sup>81</sup> Similarly, minor children born to Indian parents that had obtained citizenship were citizens themselves as well as all children extending from that lineage.<sup>82</sup> Soldiers that had returned from World War I, that were honorably discharged, could receive citizenship through courts of competent jurisdiction.<sup>83</sup> All members of the Osage Nation received citizenship by statute, passed on March 3, 1921.<sup>84</sup>

During this era of piecemeal Indian citizenship, the idea of citizenship and what it meant for Indians was diverse. In 1905 in the case of *In re Heff*, the Supreme Court took the position that an allottee that had received citizenship was beyond

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78. See Treaty with the Kickapoo, Kickapoo-U.S., June 28, 1862, 13 Stats. 623 (“And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: Provided, That, before making any such application to the President, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.”); Treaty with the Delawares art. III, Delaware-U.S., July 4, 1866, 14 Stats. 793 (“It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for.”).

79. The Indian General Allotment Act of 1887 (or Dawes Act), Pub. L. No. 49–105, 24 Stat. 388 (codified as 25 U.S.C. ch. 9).

80. Burke Act of 1906, Pub. L. No. 59–149, 34 Stat. 182.

81. Indian Marriages, 25 Stat. L. 392 (1888) (current version at 25 U.S.C. § 182).

82. H.R. REP. NO. 68-222, at 2–3 (1924).

83. *Id.*

84. 41 Stat. 1249, 66 Cong. Ch. 120 (1921).



Congress' police powers as an Indian and was beyond Federal jurisdiction in a manner that "cannot be set aside at the instance of the Government without the consent of the individual Indian and the State."<sup>85</sup> The rationale being that citizenship is fundamentally incompatible with federal guardianship over Indians and that once Indians became citizens they were subject to state jurisdiction.<sup>86</sup> Although the decision was expressly overruled eleven years later by *United States v. Nice*, holding that the General Allotment Act did not intend to sever Tribal ties or Federal Jurisdiction over Indians, it reflects the questions around Indian status' interplay with citizenship that existed at the time.<sup>87</sup> It additionally reflects the intellectual position that there's an inherent conflict between Indian status and state citizenship as well as the conflict between federal and state jurisdiction over Indians.

Contemporaneously, Indians in Indian Territory, staring down the prospect of non-Indian statehood on Indian land and prospective termination of Indian governments, organized a constitutional convention for the State of Sequoyah.<sup>88</sup> These Indians had become citizens by the thrust of allotment and despite wanting to maintain independence, saw the forthcoming march of Tribal termination as inevitable.<sup>89</sup> Sequoyah presented an opportunity for Tribal leaders to maintain political power under the American legal system that sought to swallow their Nations whole and for Tribal people to define statehood and state citizenship in ways that preserved Tribal ways of being.<sup>90</sup>

It is estimated that before 1924, about two-thirds of the Indians in the United States became citizens through one of the aforementioned methods.<sup>91</sup> During this era of citizenship, Congress, through treaty and statute, regularly outlined the boundaries between Indians and citizenship. These laws also defined the steps individual Indians would have to take to gain citizenship, often involving some degree of assimilation. This history demonstrates that Congress had a history of acting in this area and in many instances addressed "competing" values of Indian behavior and rights against American citizenship.

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85. *In re Heff*, 197 U.S. 488, 509 (1905).

86. *Id.*

87. *United States v. Nice*, 241 U.S. 591, 601 (1916).

88. Stacy Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 6 (2007).

89. *Id.*

90. *Id.* at 7–9.

91. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 46, at § 14.01[3] n. 52.

## C. The Shift Towards Universal Indian Citizenship

World War I was a turning point for the United States' understanding of Indian belonging in American society. During the war, more than 12,000 Indian soldiers served in the military and more joined the war effort in non-military or volunteer capacities.<sup>92</sup> Although derided as racially inferior and the subject of intense assimilation efforts in boarding schools, Indians became integral to the success of the war effort by using their native languages as code talkers.<sup>93</sup> The Choctaw Nation Indians in the 142 Infantry Regiment, 36th Division, became the first code talkers using their language as a code that was unbreakable in the European war theater.<sup>94</sup> However, from the perspective of the federal government, military service served as a method of assimilation that moved Indians towards being worthy of citizenship.<sup>95</sup> Cato Sells, the Commissioner of Indian Affairs, supported the military's policy of not segregating Indian soldiers from white soldiers because segregation "does not afford the associational contact he needs and is unfavorable to his preparation for citizenship."<sup>96</sup>

Some individual Indians were committed to military service and others were fully aware of the irony of their service. For example, Sam Thundercloud (Winnebago) stated, "I am fighting for the rights of a country that had not done right by my people."<sup>97</sup> Other Indians protested the imposition of the draft and others refused to register for it altogether.<sup>98</sup>

Despite the emotional and political complexities of Indians serving in World War I, the post-war period saw an organization in calls for full citizenship for American Indians and service in the war became a galvanizing point around which such actions could root themselves to overcome questions of allegiance.<sup>99</sup> A limited grant of citizenship to veterans that could prove competency in court was granted,

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92. Olivia B. Waxman, "We Became Warriors Again": Why World War I Was a Surprisingly Pivotal Moment for American Indian History, TIME (Nov. 23, 2018, 11:00 AM), <https://time.com/5459439/american-indians-wwi/>.

93. Code Talkers, THE U.S. NAT'L ARCHIVES & RECS. ADMIN. (Oct. 4, 2016), <https://www.archives.gov/research/native-americans/military/code-talkers.html>.

94. *Id.*

95. See *A Brief History of Civil Rights in the United States: The Allotment and Assimilation Era (1887-1934)*, HOWARD UNIV. SCH. OF L., <https://library.law.howard.edu/civilrightshistory/indigenous/allotment> (last updated Jan. 6, 2023 12:25 PM).

96. Christopher Capozzola, *Legacies for Citizenship: Pinpointing Americans During and After World War I*, 38 DIPLOMATIC HIST. 713-26 (2014).

97. *Id.* at 724.

98. *Id.*

99. *Id.* at 725.

but calls for full citizenship continued among some sections of the Indian population.<sup>100</sup>

The Society of American Indians (SAI), an organization founded in 1911 with boarding-school educated Native Americans at the helm, sought to advance the interests of Indians and organized around various Indian issues, including citizenship, with the perspective that Indian people needed to organize because “[p]ersonal freedom and personal advancement are dependent upon racial rights and racial advancement.”<sup>101</sup> SAI published the “American Indian Magazine” to express ideas about contemporary political issues and during World War I published editorials about citizenship and patriotism.<sup>102</sup> The organization's public appeals for citizenship during the war sought to draw comparisons between Indians and European immigrants to encourage citizenship, but in the immediate post-war period shifted to a simpler call for basic rights: “The Indian . . . is entitled to his human rights. . . . This is not the democracy for which our soldiers fought and died!”<sup>103</sup>

This history demonstrates some of the complex sentiments and positions among American Indians at the time. Military conscription into a nation's military that had historically oppressed Native American people, combined with children that were forced into assimilationist boarding schools becoming adults, created a moment where American Indians were in contact with American society and equipped with the language to call out its hypocrisies loudly and publicly. Further, they were using the language of patriotism, democracy, and other elements of the American ethos to achieve their aims. Suffrage was a critical element and concept in SAI's advocacy for citizenship.<sup>104</sup>

Then, came the Indian Citizenship Act. While popular understanding of the Indian Citizenship Act most commonly associates citizenship with the right to vote, this wasn't the principal point of conversation in Congress. The Indian Citizenship

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100. Indian Citizenship Act, 68 Pub. L. No. 175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

101. Philip J. Deloria, *American Master Narratives and the Problems of Indian Citizenship in the Gilded Age and Progressive Era*, 14 J. GILDED AGE & PROGRESSIVE ERA 3, 4 (2015).

102. Christina Stanicu, *Americanization on Native Terms: The Society of American Indians, Citizenship Debates, and Tropes of “Racial Difference”*, 6 NATIVE AM. & INDIGENOUS STUD., 111, 115–18 (2019).

103. *Id.* at 135.

104. SOC'Y OF INDIAN AMS., CONST. § 2, cl. 1 (on file with author).

Act<sup>105</sup> was introduced to “bridge the . . . gap and provide means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of residence.”<sup>106</sup> Congress was, at best, indifferent to meaningful Indian participation in the electorate, which is evidenced in the Congressional Record.

In a hearing of the House Committee on Indian Affairs on May 19, 1924, Representative Carl Hayden of Arizona stated that the effect of the bill “will give them a right to vote if they comply with the State laws. In my State if they can read and write and understand the constitution, they can vote.”<sup>107</sup> On the floor of the house during debate on May 23, 1924, bill sponsor Representative Homer Snyder of New York was asked by Representative Finis James Garrett of Tennessee, “I would like very much to have the gentleman’s construction of the meaning of this matter as applied to State laws that will be affected by this act; that is, the question of suffrage,” to which Representative Snyder responded:

I would be glad to tell the gentleman that, in the investigation of this matter, that the question was thoroughly looked into and the laws were examined, and it is not the intention of this law to have any effect upon suffrage qualifications in any State. In other words, in the State of New Mexico, my understanding is that in order to vote a person must be a taxpayer, and it is in no way intended to affect any Indian in that country who would be unable to vote unless qualified under the State suffrage act. That is the understanding. . . . [it] simply makes him an American citizen, subject to all restrictions to which any other American citizen is subject, in the state.<sup>108</sup>

These comments evidence that the idea of worthiness continued in conversations around Indian Citizenship and that Congress saw states as a safe stopgap to prevent unworthy Indians from voting. Rather than suffrage being a point of contention, the greatest point of controversy around the Indian Citizenship Act was less about voting and political power, and more so about the potential impact on Tribal property and Federal-Indian relations. Representative Snyder was adamant that nothing in the bill would change the status of Indian property.<sup>109</sup>

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105. The statute provides “[t]hat all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.” Indian Citizenship Act of 1924, 43 Stat. 253 (amended 1972).

106. See H.R. REP. NO. 68-222 (1924) (House Report accompanying the Indian Citizenship Act); Indian Citizenship Act of 1924, Pub. Law No. 68-175, 43 Stat. 253 (codified as 8 U.S.C. § 1401(b)).

107. *Hearing on H.R. 6355 and H.R. 6541 before the Comm. On Indian Affs*, 68th Cong. 13 (1924) (statement of Rep. Carl Hayden).

108. 65 CONG. REC. H9303 (daily ed. May 23, 1924) (statement of Rep. Finis James Garrett).

109. See *id.*

Although the bill sponsor did not intend for the act to impact suffrage, that does not mean Indian advocates shared that perspective.

The Indian response to the bill was rightfully mixed. Representative Snyder even remarked to the committee that “The New York Indians are very much opposed to this, but I am perfectly willing to take responsibility if the committee sees fit to agree to this.”<sup>110</sup> After the Act was passed the Grand Council of the Haudenosaunee Confederacy sent a letter to the President and Congress declining citizenship and stating that the act was written and passed without their knowledge or consent.<sup>111</sup>

Given Snyder’s apathy toward Indian franchise and vagueness about Indian citizenship generally, some Native people were simply confused by what vested citizenship meant. In 1930, W. David Owl (Cherokee) answered the question “what the Indians want from government” with “[t]he Indian . . . wants to know where he legally belongs . . . where his duties and rights begin and end.”<sup>112</sup>

Shortly after the Indian Citizenship Act was passed, the Institute for Government Research at the request of the Secretary of the Interior, commissioned a study on the general welfare of Indians known as the Meriam Commission and later published a report entitled “Problem of Indian Administration.”<sup>113</sup> The report described that the right of citizenship did not necessarily carry the right to vote for Indians, “[w]ith respect to [the Indian’s] right to vote he is subject to the state law and must satisfy the requirements of that law before securing the franchise.”<sup>114</sup> The report describes that in some states, Indians were voting and the Indian voting bloc “is an important factor in closely contested primaries and general elections, and party leaders organize them.”<sup>115</sup>

Unfortunately, other states continued to categorically disenfranchise Native Americans, such as Arizona, New Mexico, and Utah. The report specifically

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110. *Hearing on H.R. 6355 and H.R. 6541 before the Comm. On Indian Affs*, 68th Cong. 13 (1924) (statement of Rep. Homer Snyder).

111. Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 127 (1999).

112. Karen M. Tani, *States’ Rights, Welfare Rights, and the “Indian Problem”: Negotiating Citizenship and Sovereignty, 1935-1954*, 33 L. & HIST. REV., Feb. 2015, at 1, 13.

113. Donald L. Parman & Lewis Meriam, *Lewis Meriam’s Letters During the Survey of Indian Affairs 1926-1927 (Part 1)*, 24 ARIZ. & THE W. 253, 253 (1982).

114. LEWIS MERIAM ET AL., INST. FOR GOV’T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION 756 (1928) [hereinafter MERIAM REPORT].

115. *Id.*

identifies New Mexico, a state that categorically barred untaxed Indians from voting, as a state with constitutionally suspect voter qualifications in light of the Indian Citizenship Act and the Fifteenth Amendment.<sup>116</sup>

In Arizona, several county attorneys rebuffed the idea of the Indian Citizenship Act requiring Indians be enfranchised in the State of Arizona, arguing that Indians did not meet the state's residency requirements because they inhabited federal reservations or lacked the mental capacity.<sup>117</sup> Governor George Hunt feared that the Republican Party would seek to register Navajo Indians to gain political power and was advised to systematically challenge Indians seeking to participate in elections.<sup>118</sup>

While Congress was complacent with respect to the ability of Indians to exercise the right to vote, Indians themselves continued to push. In 1928, the case of *Porter v. Hall* went to the Arizona Supreme Court.<sup>119</sup> Peter Porter and Rudolph Johnson were both residents and members of the Gila River Indian Community in central Arizona who tried to register to vote in Pinal County but were denied.<sup>120</sup> Porter and Johnson challenged the denial, but the Arizona Supreme Court ruled that the state's constitution excluding people under guardianship from the franchise extended to Porter and Johnson because they were Indians and Indians are under the guardianship of the United States, per *Cherokee Nation v. Georgia*.<sup>121</sup>

Nationally, Indian disenfranchisement was ironic. While significant populations of Indians were being systemically disenfranchised, Charles Curtis<sup>122</sup> served as Vice President of the United States. Gertrude Simmons Bonnin (Dakota name Zitkala-Sa "Red Bird"), an Indian boarding school survivor, early leader in the Society for American Indians, and co-founder of the National Council of American Indians, called out this irony with precision: "[I]f our Vice-President-elect, Hon. Charles Curtis, an Indian, had lived as a member of a tribe on a reservation in Arizona he would be disenfranchised. He could not vote, much less run for the Vice-Presidency of the United States."<sup>123</sup>

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116. *Id.* at 752.

117. Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1106 (2015).

118. *Id.* at 1107.

119. *Porter v. Hall*, 271 P. 411 (Ariz. 1928).

120. *Id.*

121. *Id.* at 411; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

122. Charles Curtis, a member of the Kaw Nation, served as Vice President of the United States from 1929 to 1933. Matthew Costello, *From Indian Village to Vice Presidency*, THE WHITE HOUSE HISTORICAL ASSOC., <https://www.whitehousehistory.org/from-indian-village-to-vice-presidency-the-life-and-legacy-of-charles-curtis> (last visited Apr. 4, 2023).

123. "HELP THE INDIANS HELP THEMSELVES": THE LATER WRITINGS OF GERTRUDE SIMMONS BONNIN (ZITKALA-SA) 153 (P. Jane Hafen, ed., 2020).

It took the state of Arizona twenty-eight years to change its position that Native Americans could not vote. Frank Harrison and Harry Austin, members of the Fort McDowell Yavapai Nation, brought the suit that ultimately overturned *Porter v. Hall*.<sup>124</sup> Harrison and Austin attempted to register to vote but were stopped by the Maricopa County Recorder.<sup>125</sup> In the proceedings, plaintiffs raised facts that Harrison was an honorably discharged military veteran of World War II and that both owned property outside the reservation, paid taxes to the state of Arizona, and were subject to the civil and criminal laws of Arizona.<sup>126</sup> By raising these facts, Harrison and Austin were appealing to the ideas of citizenship associated with tax status, military service, and civility that were dominant factors prior to the passage of the Indian Citizenship Act.<sup>127</sup> The court held that those facts were not determinative, instead, what was at issue was the same question of guardianship before the court in *Porter*.<sup>128</sup> The court reversed based on the reason that no other jurisdiction had found Indian status to mean guardianship in other common law contexts and that Arizona had found Indians competent enough to serve on juries and to appear in judicial proceedings.<sup>129</sup> However, Indians would still have to overcome the literacy tests to join the Arizona electorate.<sup>130</sup> The opinion reads as almost reluctantly progressive. The court even mentioned that whether or not Indians should be allowed to vote was a question of “public policy” but also that the court ultimately refused “to be drawn into the controversy as to the wisdom of granting suffrage to the Indians, our sole concern being whether the constitution, fairly interpreted, denies them the franchise.”<sup>131</sup>

New Mexico similarly had denied “Indians not taxed” the right to vote altogether. The same year as *Harrison v. Laveen*, New Mexico’s prohibition on the right of Native Americans to vote was struck down by the court in an unreported opinion.<sup>132</sup> Miguel Trujillo, a veteran and member of the Isleta Pueblo, was denied

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124. *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

125. *Id.* at 457.

126. *Id.* at 458.

127. See H.R. REP. NO. 68-222 (1924) (House Report accompanying the Indian Citizenship Act); Indian Citizenship Act of 1924, Pub. Law No. 68-175, 43 Stat. 253 (codified as 8 U.S.C. § 1401(b)).

128. *Harrison*, 196 P.2d at 458.

129. *Id.* at 461–62.

130. *Id.* at 463.

131. *Id.* at 460.

132. Native American Voting Rights: Exploring Barriers and Solutions: Hearing Before the Subcommittee on Elections of the Committee on House Administration House of Representatives, 116th Cong. (2020) (transcription available at <https://www.govinfo.gov/content/pkg/CHRG-116hhrg41319/html/CHRG-116hhrg41319.htm>) (statement of Hon. Ben Ray Lujan, Representative in Congress from the State of New Mexico) (citing *Trujillo v. Garley* (1948)).

the right to vote by *the* county registrar on the basis that Mr. Trujillo lived on Tribal lands and was an “Indian . . . not taxed.”<sup>133</sup> In 1962, the court struck down the portion of the New Mexico constitution that prevented Indians from voting, finding that it was in violation of the Fourteenth Amendment of the U.S. Constitution.<sup>134</sup>

Despite the decline of declaring Indians per se ineligible to vote in state and federal elections, states continued disenfranchising Native Americans based on voter qualifications such as residency or literacy.<sup>135</sup> The tide began to turn with the Voting Rights Act. Passed in 1965, the Act prohibits the abridgment or the denial of the right to vote on the basis of race.<sup>136</sup> Section 5 preclearance required states with an established history of discrimination in voting to obtain approval from federal officials before they change election laws.<sup>137</sup> Significantly, Arizona and Alaska were both covered under Section 5 of the Voting Rights Act in addition to two political subdivisions in South Dakota that covered Tribal land.<sup>138</sup>

Although the Indian Citizenship Act did not guarantee Indian suffrage that does not mean citizenship and suffrage are not closely associated rights, especially given how closely associated Indians at the time viewed those rights. Because Indians could not be eligible to vote, but for Indian citizenship, the rights should be viewed as related despite not being coextensive. Nonetheless, the history of Indian citizenship and the post-Fourteenth Amendment history of Indian citizenship demonstrates the uniqueness of Indian political status and the role that Congress plays in defining the extent of that status.

### III. THE STATE OF THE INDIAN FRANCHISE

Barriers to voting for Native Americans continue to exist and evolve. Often facially benign requirements exploit systemic inequality that Native Americans face when living on reservation. “Native Americans experience higher rates of poverty

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133. *Id.*

134. *Montoya v. Bolack*, 372 P.2d 387, 390 (N.M. 1962).

135. See *Allen v. Merrell*, 305 P.2d 490 (Utah 1956); *Montoya*, 372 P.2d at 389–90; Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 *Ariz. St. L.J.* 1099, 1106 (2015).

136. 52 U.S.C. § 10301.

137. 52 U.S.C. § 10304. *But see* *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (holding the preclearance requirement unconstitutional); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)). Section 5 is at 42 U.S.C. § 1973c.

138. *Jurisdictions Previously Covered by Section 5*, DEP’T OF JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (updated Nov. 29, 2021).



than white individuals.”<sup>139</sup> Nearly one in six Native American families lives below the poverty line.<sup>140</sup> Native Americans also experience higher rates of homelessness or near homelessness due to extreme poverty and lack of affordable, or readily available, housing on reservation.<sup>141</sup> These realities impact the ability of Native Americans to travel to register to vote, or vote, and additionally impact their ability to maintain stable housing for the purposes of voter registration.

The lack of on-reservation infrastructure also impacts voting. Many reservations lack roadway infrastructure or rely on networks of unpaved dirt roads that become impassible in instances of inclement weather.<sup>142</sup> Tribal communities are digitally isolated compared to non-Tribal communities in America, where Tribal lands lag by 20 percentage points compared to urban areas.<sup>143</sup> In Arizona, approximately 95% of residents living on Tribal lands have unserved or underserved telecommunication infrastructure needs.<sup>144</sup> During the height of the COVID-19 pandemic in 2020, Tribal communities were especially impacted by the digital divide because the lack of access to in-person voting registration opportunities, and lack of internet to register online, contributed to the state’s decline in voter registration rates between 2016 and 2020.<sup>145</sup>

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139. Chairman Don Beyer, Joint Econ. Comm. Democrats, Native American Communities Continue to Face Barriers to Opportunity that Stifle Economic Mobility 4 (2022), [https://www.jec.senate.gov/public/\\_cache/files/9a6bd201-d9ed-4615-bc32-9b899faf5627/nativeamericanscontinuetofacepervasiveeconomicdisparities-final.pdf](https://www.jec.senate.gov/public/_cache/files/9a6bd201-d9ed-4615-bc32-9b899faf5627/nativeamericanscontinuetofacepervasiveeconomicdisparities-final.pdf).

140. *Id.*

141. Native American Voting Rights: Exploring Barriers and Solutions: Hearing Before the Subcomm. on Elections of the Comm. on House Admin., 116th Cong. (2020) (testimony of Patty Ferguson Bohnee); SUBSTANCE ABUSE & MENTAL HEALTH SRVCS. ADMIN., EXPERT PANEL ON HOMELESSNESS AMONG AMERICAN INDIANS, ALASKA NATIVES, AND NATIVE HAWAIIANS 5–6 (Sept. 27, 2012), [https://www.usich.gov/resources/uploads/asset\\_library/Expert\\_Panel\\_on\\_Homelessness\\_among\\_American\\_Indians%2C\\_Alaska\\_Natives%2C\\_and\\_Native\\_Hawaiians.pdf](https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf).

142. *Id.*

143. STEPHANIE HENNING & ANTHONY “MORGAN” RODMAN, DEPT. OF THE INTERIOR, NATIONAL TRIBAL BROADBAND STRATEGY 3 (2021), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/doc/2020.%20December.%20National%20Tribal%20Broadband%20Strategy%20FINAL-cover%20change.pdf>.

144. Ariz. Dep’t of Admin., Arizona Statewide Broadband Strategic Plan 16 (2018), [https://azlibrary.gov/sites/default/files/erate\\_2018\\_az\\_broadbandstrategicplan\\_final.PDF](https://azlibrary.gov/sites/default/files/erate_2018_az_broadbandstrategicplan_final.PDF).

145. *Mi. Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 987 (D. Ariz. 2020).

Many Native Americans living on Tribal lands lack access to at-home mail delivery and lack a standard address.<sup>146</sup> Consequently, Native Americans rely on post office boxes to receive and send mail which can be over a hundred miles away from the person's residence.<sup>147</sup> These conditions literally and electorally isolate Native Americans in a country where voting by mail has been on the rise and practically deprive them of what is the most popular method of voting in the West.<sup>148</sup> As legislators and election administrators increasingly come to rely on standardized addresses to prove residency, for databases that manage the voter rolls, and in its geolocation technology to assign voters to polling places, Native Americans are increasingly left behind because databases rarely accommodate nonstandard addresses.<sup>149</sup>

Most egregiously, states exploit these existing inequalities to legislatively isolate Native Americans from the electorate. Many political subdivisions further isolate Tribal communities by failing to provide on reservation voters with equitable access to voter registration or voting opportunities. Take Montana as an example. Approximately 6.5% of Montana's population is Native American, which is over 78,000 people.<sup>150</sup> In Montana, Native Americans have the power to be a decisive voting bloc as evidenced by Senator Jon Tester's narrow 2018 victory where he beat the Republican candidate by 17,913 votes with indispensable support from Tribal voters.<sup>151</sup> In that same election, Montana voted on a referred law from the legislature called the "Ballot Interference Prevention Act" (BIPA).<sup>152</sup> The law imposed severe restrictions on ballot collection campaigns in a manner that disproportionately harmed Native communities that used third-party ballot

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146. Brief for National Congress of the American Indian as Amici Curiae Supporting Respondents at 19, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

147. *Id.* at 20.

148. See Charles Stewart III, MIT Election Data Sci. Lab, *How We Voted in 2020: A First Look at the Survey of the Performance of American Elections* (2020), <https://electionlab.mit.edu/sites/default/files/2020-12/How-we-voted-in-2020-v01.pdf>.

149. Calah Schlabach, *System Could Help Tribal Members Past – One – Voter Registration Hurdle*, CRONKITE NEWS ARIZ. PBS (Sept. 14, 2020), <https://cronkitenews.azpbs.org/2020/09/14/system-could-help-tribal-members-past-one-voter-registration-hurdle/>.

150. Div. of Indian Educ., Montana Off. of Pub. Instruction, *Montana Indians: Their History and Location 2*, <https://tinyurl.com/5ez3ybjy> (last visited Mar. 8, 2023).

151. MONT. SEC'Y OF STATE, 2018 STATEWIDE GENERAL ELECTION CANVAS 2 (2018), <https://sosmt.gov/wp-content/uploads/2018GeneralReportStateCanvass.pdf>; see also Acee Agoyo, *Native Vote Once Again Propels Jon Tester to Victory in Close Senate Race*, INDIAN Z (Nov. 7, 2018), <https://www.indianz.com/News/2018/11/07/native-vote-once-again-propels-jon-teste.asp>.

152. *Montana Ballot Interference Prevention Act (BIPA)*, MONTANA.GOV COMM'R OF POL. PRACS., <https://politicalpractices.mt.gov/Featured-Online-Services/Montana-Ballot-Interference-Prevention-Act> (last visited Mar. 8, 2023).

collection to cope with barriers in access to mail.<sup>153</sup> In September of 2020, a Montana court struck down the law (along with a bill that eliminated same-day voter registration) as unconstitutional in a suit brought by Indigenous groups: Western Native Voice, Montana Native Vote, the Blackfeet Nation, the Confederated Salish and Kootenai Tribes, and the Fort Belknap Indian Community.<sup>154</sup> In 2021, the state of Montana passed a law making it unlawful for a person to be paid for the purposes of delivering or returning ballots.<sup>155</sup> This law effectively re-engineered BIPA in a manner that would harm Native voters, but also attempted to survive judicial scrutiny. State legislators' hellbent intent on targeting third-party ballot collection cannot be divorced from the reality of life on the reservation. In light of Native Voters successfully striking down the law's predecessor, Native advocates have characterized the move as a targeted attack to disenfranchise Indigenous voters in Montana.<sup>156</sup>

Like Montana, approximately 6.3% of Arizona's population is Native American.<sup>157</sup> This equates to approximately 319,001 people.<sup>158</sup> Like Montana, Native Americans in Arizona are a powerful voting bloc without whom recent Senate and Presidential candidates would not have won.<sup>159</sup> Native voters were likely critical to these victories. Arizona races continue to be incredibly competitive. In 2022, the margin between the Democrat and Republican candidates for Attorney General was razor thin; after a statutorily mandated recount the Democratic

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153. *Tribes File Legal Challenge to Montana Law that Restricts Native American Voting Rights*, ACLU (Mar. 12, 2020, 10:45 AM), <https://www.aclu.org/press-releases/tribes-file-legal-challenge-montana-law-restricts-native-american-voting-rights>.

154. *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020); *see also Order – Western Native Voice v. Stapleton*, ACLU (Sept. 25, 2020), <https://www.aclu.org/cases/western-native-voice-v-stapleton?document=order-western-native-voice-v-stapleton-decision>.

155. 2021 Mont. Laws 2152.

156. *2021 Montana Laws that Limit Native Voter Participation (Western Native Voice v. Jacobsen)*, NATIVE AM. RIGHTS FUND, <https://narf.org/cases/2021-montana-voter-laws/> (last visited Mar. 8, 2023).

157. Adriana Rezal, *Where Most Native Americans Live*, U.S. NEWS (Nov. 26, 2021, 7:30 AM), <https://www.usnews.com/news/best-states/articles/the-states-where-the-most-native-americans-live>.

158. *Ranking by Number of People (American Indian or Alaska Native)*, DATA COMMONS PLACE RANKINGS, <https://tinyurl.com/a4ex4av7> (last visited Mar. 8, 2023).

159. For example, Senator Krysten Sinema won by 55,900 votes in 2018. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVAS: 2018 GENERAL ELECTION – NOV 06, 2018, at 1, <https://tinyurl.com/5xs86r9w> (last visited March 8, 2023). In 2020, President Joe Biden won by 10,457 votes. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVAS: 2020 GENERAL ELECTION – NOV 03, 2020, at 1, <https://tinyurl.com/2s3twa3v> (last visited Mar. 8, 2023).

candidate won by only 280 votes.<sup>160</sup> With such close elections, Native Americans not only have the power to decide elections but additionally have the power to be an indispensable voting bloc in a candidates' campaign strategy. Also similar to Montana, Arizona includes many large reservations that lack standardized addresses, at home mail delivery, and require voters to travel significant distances to access mail via a post office box.<sup>161</sup>

In 2016, Arizona passed House Bill 2023 which made it unlawful for anyone that is not the caretaker of a voter, immediate family member (defined by the Western standard), or household member to carry a voter's completed ballot.<sup>162</sup> This law not only imposed a burden on Native Americans in Arizona that already had trouble returning a ballot, but the law was written in a way that did not reflect the Tribal kinship systems (such as clan or village relationships), which are not considered "extended" family in the American sense but are considered family in the Tribal tradition.<sup>163</sup> Given these circumstances, third-party ballot returns that had become a "standard practice" in Native communities became a felony.<sup>164</sup> This ban had a chilling effect on Tribal communities.

HB 2023 was not Arizona's first attempt at targeting this popular method of returning ballots. In fact, Arizona initially passed its ban on third-party ballot collection in 2011.<sup>165</sup> The law was prevented from going into place because Section 5 of the Voting Rights Act required that Arizona have new voting laws precleared by the Department of Justice ("DOJ") or by a three-judge federal district court.<sup>166</sup> The bill was submitted to the DOJ but DOJ did not have enough information to determine whether the ban would have the effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group;

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160. May Phan, *Arizona 2022 Election: Abe Hamadeh Seeks New Trial Over Recount Results*, Fox 10 PHX. (Jan. 4, 2023, 12:18 PM), <https://www.fox10phoenix.com/news/abe-hamadeh-files-another-lawsuit-over-arizonas-2022-election-after-recount-results-released>.

161. See *Voting Matters in Native Communities: Hearing on H.R. 1688 Before the S. Comm. on Indian Affs.*, 117th Cong. (2021) [hereinafter *Hearing*] (testimony of Patty Ferguson-Bohnee), [https://www.indian.senate.gov/sites/default/files/PFB\\_SCIA%20Voting%20Testimony%2010.27.21.pdf](https://www.indian.senate.gov/sites/default/files/PFB_SCIA%20Voting%20Testimony%2010.27.21.pdf)

162. Ariz. Rev. Stat. § 16-1005(I) (2022).

163. See *Voting Rights and Elections Administration in Arizona: Hearing Before Subcomm. on Elections of the H. Comm. on H. Admin.*, 116th Cong. 6–17 (2019) (testimony and statement of Hon. Jonathan Nez, President of the Navajo Nation), <https://www.congress.gov/event/116th-congress/house-event/LC64450/text>; see *id.* at 17–38 (testimony and statement of Hon. Steven R. Lewis, Governor, Gila River Indian Community).

164. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 870 (D. Ariz. 2018), *rev'd en banc sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *rev'd sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). After *Brnovich* was remanded, the Ninth Circuit affirmed the federal district court for the District of Arizona's 2018 order. *Democratic Nat'l Comm. v. Hobbs*, 9 F.4th 1218 (9th Cir. 2021).

165. *Hobbs*, 948 F.3d at 1008.

166. *Id.*

DOJ informed the Arizona Attorney General it would object if more information was not received within 60 days.<sup>167</sup> Rather than responding to DOJ, Arizona withdrew the preclearance request, resulting in the bill not going into effect.<sup>168</sup> Between Arizona's first attempt at implementing a ban on third-party ballot collection and its successful attempt in 2016, the United States Supreme Court struck down the preclearance formula in the Voting Rights Act.<sup>169</sup> At the forefront of the Court's rationale was the assumption that the preclearance formula was responsive to the problems facing minority voters in the 1960's and 1970's and not necessarily reflective of the modern reality of voting.<sup>170</sup>

Arizona, once liberated from federal oversight, had no interest in proving the Court right and that the formula "no longer met the current needs" of disenfranchisement. HB 2023 was a prime example of that. The bill's sponsor, Senator Michelle Ugenti-Rita, testified before a Congressional subcommittee that Arizona had made voting by mail easy, and in defense of the ban on third-party ballot collection, stated that "If you are not voting it is because you do not want to."<sup>171</sup> Senator Ugenti-Rita also stated, "that only outside forces and special interest groups have a vested interest in protecting the practice of ballot harvesting."<sup>172</sup> During the hearing before she gave her remarks, the President of the Navajo Nation, Jonathan Nez, and the Governor of the Gila River Indian Community, Stephen Lewis, testified directly to the harm the ban had on their communities. Ugenti-Rita was asked whether she was aware of Tribal opposition to her bill prior to their testimony, she said yes.<sup>173</sup> When Ugenti-Rita was asked candidly if she continued to consider the impact on the Tribes "de-minimis," she said yes.<sup>174</sup> At various points during the hearing when asked if she had reached out to Tribal leaders or solicited their input she consistently responded by talking about how the legislature's processes were "open to the public" or how the bill went through the normal committee process thus implying that Tribes could have commented then.<sup>175</sup>

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167. *Id.*

168. *Id.*

169. See *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

170. *Id.*

171. See *Voting Rights and Elections Administration in Arizona: Hearing Before Subcomm. on Elections of the H. Comm. on H. Admin.*, 117th Cong. (2019) (testimony and statement of Sen. Michelle Ugenti-Rita), <https://docs.house.gov/meetings/HA/HA08/20191001/110040/HHRG-116-HA08-Wstate-Ugenti-RitaM-20191001-U1.pdf>.

172. *Id.*

173. *Hearing, supra* note 161 (testimony of Patty Ferguson-Bohnee).

174. *Id.* (testimony of Sen. Michelle Ugenti-Rita).

175. *Id.* (testimony of Sen. Michelle Ugenti-Rita).

Tribes cannot depend on state legislatures to safeguard their rights, nor can they exclusively depend on the judicial process. In *Brnovich v. Democratic National Committee*, the Supreme Court took up a challenge to Arizona's ban on third-party ballot collection as violative of Section 2 of the Voting Rights Act for having racially disparate effect and as violative of the Fifteenth Amendment to the United States Constitution for being passed with racially discriminatory intent.<sup>176</sup> The Court ultimately upheld Arizona's ban on third-party ballot collection.<sup>177</sup> The Court, in analyzing the ban on third-party ballot drives, made no mention of Native Americans save footnotes 19 and 21.<sup>178</sup> In footnote 21, the Court concludes that the barriers in access to mail that Native Americans living on reservation experience is not a basis for invalidating HB 2023.<sup>179</sup> The rationale, in part, being that the United States' Postal Service is statutorily obligated to provide effective and regular postal service to rural areas, thus any failure in access to mail service cannot not support over turning a voting rule that applies statewide because federal law already contemplates a remedy to lack of access to mail.<sup>180</sup> The opinion is painfully, if not willfully, ignorant of the reality of life on reservation and generally dismissive of the rights of Native American voters.

Senator Michelle Ugenti-Rita's disdain for Tribal communities and their franchise was not limited to 2016. In 2021 she went on to sponsor SB 1003, a bill that directly undermined the terms of a settlement reached by the Navajo Nation, Arizona's Secretary of State, and three counties in 2019.<sup>181</sup> When the Senator introduced the bill before the Arizona House Committee on Government, she testified that the bill was brought in response to a lawsuit.<sup>182</sup> When pressed about the details she responded, "I believe it was some of the Tribal nations and . . . there was an agreement reached with the Secretary of State's office. . . . There was some litigation behind it, there was an issue. That's exactly why I want to address it in law . . . ."<sup>183</sup> The issue was that Navajo voters were not receiving translated instructions

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176. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). The Court also considered a challenge to Arizona's out-of-precinct policy that discarded the entire ballots of those voters that vote at the wrong polling location, despite them being eligible to vote for multiple races on the ballot issued at the incorrect polling location. *Id.* at 2344–48. Arizona's out-of-precinct policy is another policy that disadvantages Native Americans, due to lack of addresses, whereby Native Americans are regularly placed in the wrong precinct. Under this policy, 1 in 100 Native American ballots are discarded as compared to 1 in 200 white voters. *Testimony Before the Senate Committee on Indian Affairs Hearing on Voting Matters in Native Communities: Hearing on H.R. 1688 Before S. Comm. of Indian Affairs*, 117th Cong. 16, 21–22 (2021) (statement of Patty Ferguson-Bohnee, Director, Indian Legal Clinic, Arizona State University) [hereinafter *Ferguson-Bohnee*]; see also *Brnovich*, 141 S. Ct. at 2368 (Kagan, J., dissenting).

177. *Brnovich*, 141 S. Ct. at 2350.

178. *Id.* at 2347 n.19, 2348 n.21.

179. *Id.* at 2348 n.21.

180. *Id.*

181. *Ferguson-Bohnee*, *supra* note 176, at 18.

182. *Id.*

183. *Id.*

telling them that they had to sign the back of their mail-in ballot, thus leading to some Navajo voters returning unsigned ballots.<sup>184</sup> In Arizona, voters that return ballots with mismatched signatures can correct the error for the ballot to count up to five business days after the election.<sup>185</sup> At the time that the Navajo Nation filed its suit, the law was silent with respect to unsigned ballots. Hence, through the settlement the counties agreed to treat unsigned ballots on par with mismatched signature ballots.<sup>186</sup> SB 1003 sought to not only undermine the settlement agreements reached by the Navajo Nation, but, by consequence, set an arbitrarily stricter deadline for ballot curing intended to punish mono-lingual Navajo voters that lack English literacy.<sup>187</sup> Arizona passed the bill, it was signed by the Governor, and codified into law.<sup>188</sup>

Hostility towards the electoral power of Tribal communities also exists in state political processes outside of legislatures. In 2021, Arizona's Independent Redistricting Commission diluted the power of Native communities when it was no longer subject to DOJ preclearance.<sup>189</sup> After ten years of legislative maps that gave Native American voters the power to elect candidates of choice for the state legislature and be significantly influential in Congressional elections, the gains that Tribal communities had made were swiftly lost.<sup>190</sup> The Chairwoman of the commission, Erika Neuburg, stated, "We are the first commission that didn't have preclearance. So, our approach to the Voting Rights Act was entirely our interpretation of what that law means. I did not believe that on the congressional level, that it was the right thing to do to have the Native Americans drive the shape of the rest of the map."<sup>191</sup> Thus, even with an Independent Redistricting Commission, with partisan balance and even a Native American commissioner,

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184. First Amended Verified Complaint for Injunctive & Declaratory Relief at 2, *Navajo Nation v. Reagan*, No. CV18-08329-PCT-DWL (Dist. Ct. Ariz. Dec. 11, 2018).

185. Ariz. Rev. Stat. § 16-550.

186. *Navajo Nation v. Michele Reagan*, No. CV-18-08329-PCT-DWL at 7–8 (D. Ariz. Oct. 11, 2019) (order dismissing claims and granting settlement agreement).

187. See *Early Voting; Signature Required; Notice: Hearing on S.B. 1003 Before the H. Comm. on Gov't and Elections*, 55th Leg., 1st Reg. Sess. (Az. 2021) (statements of Sen. Michelle Ugenti-Rita); see also Press Release, Navajo Nation Off. of the President and Vice President, Navajo Nation Leaders Urge Arizona Governor to Veto Voter Suppression Bill (Apr. 30, 2021).

188. *Ducey Signs Bill Limiting Post-Election Ballot Signature Fix*, ASSOCIATED PRESS (May 7, 2021), <https://apnews.com/article/az-state-wire-elections-government-and-politics-a4d2f7a1d980c4b01547a4b895bf39f9> (last visited Apr. 29, 2023).

189. Evan Wyloge, *Redrawn Arizona Congressional Map Drains Native American Voting Power*, THE GUARDIAN (May 23, 2022, 08:00 AM), <https://www.theguardian.com/us-news/2022/may/23/native-americans-arizona-redistricting-congressional-map>.

190. *Id.*

191. *Id.*

disdain towards Tribal communities resulted in a deprivation of Tribal electoral power in federal elections—arguably, the elections in which Tribes have the greatest interest, because of the special relationship between Tribal Nations and the Federal Government.

At the hands of states and their political subdivisions, many Native Americans lack equal access to on-reservation voter registration opportunities, to in-person voting opportunities, to early voting, and to voting by mail.<sup>192</sup> In jurisdictions where early voting locations and opportunities are left to the discretion of local election administrators, often Native Americans do not benefit from those discretionary decisions.<sup>193</sup> Stories of widespread inequalities for Native Americans in elections can be found throughout states with large Native populations such as Arizona, South Dakota, North Dakota, Utah, New Mexico, and Montana, among others.<sup>194</sup>

Tribal governments and Native organizations spend considerable time and money encouraging community members to vote for candidates that are responsive to Tribal needs.<sup>195</sup> In the face of disenfranchisement or inequality in election systems, many Tribes are forced to engage in litigation to defend the right to vote of Tribal members. Tribal governments that do not have the resources to litigate and have no standing under state law to remedy these barriers are left with little recourse.

The extension of the franchise to Indians represented another evolution in the relationship between Indian Tribes, the federal government, and state government. For their efforts in voting, when Tribal communities decide elections, elected officials respond in kind. After President Joe Biden won his election, owed in part to Native Americans in Arizona,<sup>196</sup> he signed an executive order to promote voting which included establishing an interagency “[s]teering [g]roup on Native American

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192. See JAMES THOMAS TUCKER ET AL., NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 5 (2020), [https://vote.narf.org/wp-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf).

193. *Id.* at 79.

194. See generally *id.*

195. Christopher Lomahquahu, *Salt River Looks to Increase Votership Among Community Members Ahead of Election Day*, O’ODHAM (July 8, 2022), <https://oan.srpmic-nsn.gov/salt-river-looks-to-increase-votership-among-community-members-ahead-of-election-day/>; Arlyssa D. Becenti, *CNN Called Native Voters ‘Something Else.’ Tribal Leaders Say Those Voters Can Sway Elections*, ARIZ. REPUBLIC (Oct. 14, 2022, 6:15 AM), <https://www.azcentral.com/story/news/politics/elections/2022/10/14/tribal-leaders-say-native-voters-can-sway-elections/10466781002/>; Sarah Volpenhein, *Wisconsin Tribal Communities Make Final Push to get out the Native American Vote*, MILWAUKEE J. SENTINEL (Nov. 5, 2022, 3:06 PM), <https://www.jsonline.com/story/news/2022/11/05/wisconsin-tribal-leaders-make-final-push-to-get-native-americans-to-vote/69622574007/>.

196. Felicia Fonseca & Angeliki Kastanis, *Native American Votes Helped Secure Biden’s Win in Arizona*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/election-2020-joe-biden-flagstaff-arizona-voting-rights-fa452fbd546fa00535679d78ac40b890>.



Voting Rights.”<sup>197</sup> The group engaged in Tribal consultations and listening sessions after which they produced a report on Native American voting rights.<sup>198</sup> President Biden also nominated Deb Haaland (Laguna Pueblo) to be the Secretary of the Interior, making her the first Native American cabinet secretary and the first Native American to serve as the Secretary of the Interior.<sup>199</sup> President Biden also resumed the Tribal Nations summit, a gathering of Tribal leaders and government officials that was paused during the prior administration.<sup>200</sup>

Senator Jon Tester, owing his 2018 victory to Native Americans in Montana, shepherded the federal recognition of the Little Shell Tribe of Chippewa Indians through the United States Senate.<sup>201</sup> This recognition of the Little Shell Tribe’s sovereignty is not only critical to the survival of the Tribal government, but it ensures that Little Shell Tribal members are eligible for programs reserved for Indians from federally recognized Tribes. Both president Biden’s and Senator Tester’s policies towards Native Americans indicated a recognition of indebtedness to Native American voters. Which serves as a testament to Native American electoral power.

The current state of Native Voting rights is fraught. There is undeniably fierce state suppression of Tribal communities and their voters that has only grown worse due to judicial blows to the Voting Rights Act. However, Native voters as a voting block are increasing their power, deciding critical elections, and gaining national recognition in the process. Tribal governments are unfairly forced to expend time and resources to mobilize against disenfranchisement, but their ability to do so is often a critical force in protecting the right to vote. The seemingly conflicting realities that the Native Vote is suppressed yet powerful, reflects the truth that we are only seeing a fraction of Native electoral potential.

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197. 86 Fed. Reg. 13623 (2021–2022).

198. The White House, Report of the Interagency Steering Group on Native American Voting Rights (March 2022).

199. *Secretary Deb Haaland*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited Mar. 11, 2023).

200. Fatima Hussein & Felicia Fonseca, *Biden will Headline Tribal Nations Summit for Native American Leaders*, KSDK-TV, <https://www.ksdk.com/article/news/nation-world/biden-tribal-nations-summit/507-d538d88a-e7f1-41e5-b2a3-3602d510f9ad> (last updated Nov. 30, 2022, 9:48 AM).

201. *Breaking: Senate Sends Little Shell Recognition To President’s Desk After Tester, Daines Efforts*, OFF. OF SENATOR JON TESTER (Dec. 17, 2019), <https://www.testersenate.gov/newsroom/press-releases/pr-7156/>; Lailani Upham, *Native American Voters Heavily Influence Election Results*, CHAR-KOOSTA NEWS (Nov. 15, 2018), [http://www.charkoosta.com/news/native-american-voters-heavily-influence-election-results/article\\_4d66ccc8-e852-11e8-8b79-5bac5470260c.html](http://www.charkoosta.com/news/native-american-voters-heavily-influence-election-results/article_4d66ccc8-e852-11e8-8b79-5bac5470260c.html) (last visited Apr. 29, 2023).

Despite being 99 years past the Indian Citizenship Act, the Indian franchise has yet to be realized in full. Without federal legislation to detail the rights of Tribal governments in the administration of elections on Tribal lands and protect individual Native voters, the cycle of progress-suppression-progress will only continue. Without federal legislation, many reservation-based voters are unable to exercise their rights as citizens of the state and the United States.

#### IV. RELEVANCE OF THE DISTINCTIONS BETWEEN FEDERAL AND STATE CITIZENSHIP

Today, Indians are citizens of the states in which they reside.<sup>202</sup> While the major distinctions between state and federal citizenship are rarely present in day-to-day life, federal and state citizenship remain legally distinct as a product of federalism inherent in the constitutional structure.<sup>203</sup> The distinctions, however, do occasionally become present in elections.

“The right to vote in federal elections is a privilege of national citizenship [that is] derived from the Constitution.”<sup>204</sup> However, such privilege does not extend to a “federal constitutional right to vote for electors for the President of the United States, unless” empowered by a citizen’s state legislature.<sup>205</sup> States retain the ability to define their “political community” pursuant to the Tenth Amendment through regulating elections, prescribing the qualifications of voters, and placing requirements on the qualifications to hold offices involved in the “formulation, execution, or review” of public policy at the “heart of representative government.”<sup>206</sup>

In *Inter Tribal Council v. Arizona*, the Supreme Court held that the National Voter Registration Act required states to accept and use the federal voter registration form and thus preempted states voter qualifications with respect to registering for federal office when a voter registered using the federal form.<sup>207</sup> However, the Court iterated that states maintain the power to set their own voter qualifications for state elections.<sup>208</sup> This decision led to Arizona building a bifurcated voter registration system whereby some voters meeting the federal voter registration requirements, but not the state requirement of providing documentary proof of citizenship, become “federal only” voters.<sup>209</sup> Until those voters provide the

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202. Fletcher, *supra* note 69, at 319.

203. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37 (1872).

204. U.S. by Katzenbach v. Original Knights of Ku Klux Klan, 250 F. Supp. 330, 353 (E.D. La. 1965).

205. Bush v. Gore, 531 U.S. 98, 104 (2000).

206. Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

207. Arizona v. Inter Tribal Council of Ariz. Inc., 570 U.S. 1, 5 (2013).

208. *Id.* at 16–17.

209. ARIZ. SEC’Y OF STATE’S OFF. ELECTIONS SERV. DIV., 2019 ELECTIONS PROC. MANUAL 3, [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

documentary proof of citizenship (“DPOC”)<sup>210</sup> required under Arizona law, they receive a ballot that only contains candidates for federal office.<sup>211</sup> Voters that meet all of Arizona’s voter registration requirements at the outset become “full ballot voters” and receive ballots that include federal, state, and local offices.<sup>212</sup> Starting in 2024, federal only ballots will no longer carry candidates for President.<sup>213</sup>

While the Court did not base its decision on the concept of varying rights dependent on state citizenship versus federal citizenship, that is the decision’s practical effect. Or, at least, its practical effect allows states like Arizona to undermine the right to vote of its own qualified state citizens. Arizonans defaulted to the federal-only ballot are only done so because the Court’s holding empowers Arizona to set its own evidentiary requirement for state elections, not because they lack citizenship or are otherwise ineligible to vote. Arizonans defaulted to the federal-only ballot are only done so because Arizona has been empowered to set its own evidentiary requirement,<sup>214</sup> not because they are not citizens or ineligible to vote. Arizona is able to do this despite federal law allowing that voter to be registered based on an attestation of citizenship and thereby being allowed to

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210. Registrants in Arizona can prove documentary proof of citizenship by including on the form the number of an applicant’s driver’s license or non-operating identification number, a Tribal identification number, or an alien registration or naturalization number. ARIZ. REV. STAT. § 16-1666 (1998). Voters that do not have such a number to include on the voter registration form must provide a copy of the applicant’s birth certificate, a photocopy of a passport, must present naturalization documents that later must be verified against the United States immigration and naturalization services by the recorder, other documents accepted by the immigration reform and control act of 1986, or a legible copy of a Tribal certificate of Indian Blood or a Bureau of Indian affairs affidavit of birth. *Id.*

211. *Id.* at 8.

212. *Id.* at 6.

213. Garrett Archer, *Governor Signs Bill Putting Further Restrictions on Federal-Only Voters*, ABC 15, <https://www.abc15.com/news/local-news/governor-signs-bill-putting-further-restrictions-on-federal-only-voters> (last updated 5:39 PM, Mar. 30, 2022) (this legislation is subject to ongoing litigation).

214. In 2022, Arizona passed a law adding new evidentiary requirements when registering to vote. Among them include a requirement that registrants provide a “proof of location of residence.” ARIZ. REV. STAT. § 16-123 (2022). Among the evidence that can satisfy “proof of location of residence” include forms of identification that include a registrant’s name and address. ARIZ. REV. STAT. § 16-579 (2022). This voter qualification will disproportionately burden Native American voters due to the lack of standardized addresses on reservation. Like the documentary proof of citizenship, this evidentiary requirement adds a needless barrier to voting because voters were already required to provide an address or a physical description of their address.

vote.<sup>215</sup> Between the two most populous counties in the state, there are approximately 27,194 federal only voters.<sup>216</sup> A population of voters that could decide statewide elections. These are citizens of the United States, and of the state, registered to vote but denied the right to vote in state elections. Kansas attempted to implement a similar law, but it was struck down as unconstitutional.<sup>217</sup>

Outside of Indian Country, some jurisdictions and municipalities are using this power and concepts of local citizenship to expand the franchise to non-federal citizens in certain local elections.<sup>218</sup> Most of this movement towards non-citizen voting is occurring at the municipal level.<sup>219</sup> These jurisdictions include two cities in Vermont, nine cities in Maryland, and San Francisco.<sup>220</sup> New York City sought to extend voting in local elections to non-citizens, but it was struck down by the state Supreme Court as violative of the State Constitution.<sup>221</sup>

Distinct from voting, Native Americans continue to be deprived of other rights and privileges of state citizenship. These can range from states denying reservation residents with emergency services, depriving Tribal members access to critical social services, and denying Tribal communities the benefit of taxes levied on reservation.<sup>222</sup> In South Carolina, the Catawba Indian Nation has been forced to pay fees for children living on the reservation to attend the local public schools.<sup>223</sup>

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215. See U.S. ELECTION COMM'N, REGISTER TO VOTE IN YOUR STATE BY USING THIS POSTCARD FORM AND GUIDE 3 (2022), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Federal\\_Voter\\_Registration\\_ENG.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf).

216. *General Election Federal Only Voters*, PIMA CNTY. RECORDER, <https://www.recorder.pima.gov/voterstats/GeneralElectionFedVoters> (last visited Mar. 24, 2023); *Historical Registration Totals:2020*, MARICOPA CNTY. ELECTIONS, <https://recorder.maricopa.gov/Elections/VoterRegistration/> (last visited Mar. 24, 2023).

217. Sherman Smith, *U.S. Supreme Court Won't Consider Appeal of Kobach's Unconstitutional Voter Restriction*, KAN. REFLECTOR (Dec. 14, 2020, 2:14 PM), <https://kansasreflector.com/2020/12/14/u-s-supreme-court-wont-consider-appeal-of-kobachs-unconstitutional-voter-restriction/>.

218. Zaidee Stavely, *Non-citizen Parents Hesitant to Register for San Francisco's School Board Elections*, EDSOURCE.ORG (Oct. 25, 2018), <https://edsource.org/2018/non-citizen-parents-hesitant-to-register-for-san-franciscos-school-board-elections/604016>.

219. Matt Vasilogambros, *Noncitizens Are Slowly Gaining Voting Rights*, PEW (Jul. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/01/noncitizens-are-slowly-gaining-voting-rights>.

220. *Id.*

221. Matt Vasilogambros, *Judge Strikes Down New York City Law Allowing Noncitizen Voters*, PEW (Jun. 8, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/28/judge-strikes-down-new-york-city-law-allowing-noncitizen-voters>.

222. Fletcher, *supra* note 69, at 321, 339.

223. Gwendolyn Glenn, *Catawbass, Rock Hill School Officials at Stalemate Over \$4.5 Million Debt*, WFAE (Feb. 23, 2017, 11:17 AM), <https://www.wfae.org/local-news/2017-02-23/catawbass-rock-hill-school-officials-at-stalemate-over-4-5-million-debt>.

States have been the principal perpetrators of disenfranchisement in the history of the United States and that is why the Fourteenth Amendment divested states of the authority to define their citizens.<sup>224</sup> If citizenship is still a matter of political belonging exercised through the franchise, the Supreme Court's decision in *Inter Tribal Council of Arizona* opens the door to allow states to continue to carve certain people out of the state body politic despite their clear belonging to the United States' body politic.<sup>225</sup> Given the ways in which Native Americans continue to be denied many benefits and rights flowing from state citizenship, including the right to vote, Congress has an obligation to affirm Indian state and federal citizenship through appropriate legislation.

## V. THE RIGHT TO VOTE

The right to vote is not only facing de facto degradation through disenfranchisement and suppression but it is being degraded as a matter of law. The right to vote is a fundamental right.<sup>226</sup> It sits at the heart of representative government and is core to the function of a democratic society.<sup>227</sup> The Court has held that given the serious nature of the right to vote "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."<sup>228</sup> However, despite being regarded as a fundamental right, infringement on that right is not always subject to a strict scrutiny standard.<sup>229</sup>

In most instances where a state election law is being challenged under the First and/or Fourteenth Amendments, a court considers a challenge to state election law and engages in a balancing test whereby the magnitude of the injury is weighed against the interest of the state and the extent it is necessary to burden

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224. See U.S. CONST. amend. XIV, § 1, cl. 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."); See *generally* *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (J. Kagan, dissenting).

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

226. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.").

227. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

228. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

229. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

the Plaintiff's right.<sup>230</sup> "Severe" restrictions must be narrowly tailored, but "reasonable, nondiscriminatory restrictions" tied to the states regulatory interests will generally be upheld.<sup>231</sup> The right to vote is also afforded statutory protections, most notably under the Voting Rights Act.<sup>232</sup> But too often these statutory promises have been the subject of degradation.

Despite these precedents about the fundamental nature of the right to vote, this right has been less than revered in the Court's recent history. In fact, the judiciary has become increasingly hostile to the right to vote and more deferential to states. One such challenge to plaintiffs has been the emergence of the *Purcell* principle.<sup>233</sup> This principle holds "that courts should not issue orders which change election results in the period just before an election."<sup>234</sup> There is no bright line rule about what is too close to an election. Under the Constitution, a general election occurs at least every two years and most states have primary elections (usually) in between those two years.<sup>235</sup> This is a relatively narrow window for a system as time-intensive and slow as the judicial system. Add to the timeline state legislatures passing new laws, state executives issuing policy directives, and local administrators setting their own policies, and the timeline to file to without implicating *Purcell* can be very slim. For plaintiffs attempting to resolve an issue outside of court, the *Purcell* principle can be near fatal to securing relief.<sup>236</sup> "By privileging the status quo and preventing courts from issuing remedies close to Election Day, it downgrades the right to vote – long described as 'preservative of all rights' – into a second class right, which inevitably harms the marginalized and less powerful."<sup>237</sup> Joshua A. Douglas has criticized the *Purcell* Principle as unduly deferential to states in a manner that devalues the right to vote.<sup>238</sup> The extent of the harm of the *Purcell* principle was on full display in 2020 when many voters, in light of the COVID-19 pandemic, sought relief from various state laws and restrictions on the right to vote but regularly failed due to *Purcell*.<sup>239</sup> Rather than considering the state's

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230. *Id.* at 433–34.

231. *Id.* at 434.

232. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

233. *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006).

234. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. STATE U. L. REV. 427, 428 (2016).

235. See, e.g., U.S. CONST. art. I, § 3, cl. 2; U.S. CONST. art. I, § 4, cl. 1; see also *Congressional, State, and Local Elections*, USA.GOV, <https://www.usa.gov/midterm-state-and-local-elections> (last visited Apr. 5, 2023); U.S. FED. ELECTION COMM'N, 2022 CONGRESSIONAL PRIMARY DATES AND CANDIDATE FILING DEADLINES FOR BALLOT ACCESS (2022), <https://www.fec.gov/resources/cms-content/documents/2022pdates.pdf>.

236. See *Pascua Yaqui Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020).

237. David Gans, Am. Const. Soc'y Issue Brief, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies* 4 (2020).

238. Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 62 (2021).

239. *Id.* at 88–89.

justifications on restricting a fundamental right with healthy skepticism, *Purcell* seemingly becomes a presumption against emergency relief.

The courts have further eroded the right to vote through decisions limiting the Voting Rights Act. As mentioned, in *Shelby County v. Holder*, the Supreme Court struck down the Section 5 preclearance formula that prevented laws with racially discriminatory impact from going into effect.<sup>240</sup> The Court's rationale in *Shelby County* was extremely state friendly. The Court found that states retain "equal sovereignty" under the constitution and that comes with being "equal in power, dignity, and authority."<sup>241</sup> Thus, the Voting Rights Act departed from the principles of "equal sovereignty" in a manner that was justified at the time the legislation was passed but could no longer stand because "current burdens . . . must be justified by current needs."<sup>242</sup> The Court's decision had a dramatic outcome insofar as it struck down the preclearance system that had been in effect for decades. But the decision also reflected an alarming attitudinal shift from the Court away from concern about individual voters towards a position more deferential towards states. Defenders of the decision pointed to the remedies available to voters in Section 2 of the Voting Rights Act as a failsafe against the worst of *Shelby County's* fallout, but that promise was short lived.<sup>243</sup>

Section 2 of the Voting Rights Act was dealt its own blow in 2021. In *Brnovich v. Democratic National Committee*, the Court handed down a decision eroding the protections of Section 2.<sup>244</sup> As mentioned, the case involved challenges to Arizona law that had been found to disproportionately burden racial minorities.<sup>245</sup> The decision was based on an idea that Section 2(b) required elections to be "equally open" to minority and majority voters.<sup>246</sup> Ultimately, equally open did not require that the state provide every voter with an equal opportunity to vote by each available method, rather that each voter had *an* opportunity to vote in the election.<sup>247</sup> The Court also added a series of factors to be considered along with the

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240. *Shelby Cnty. v. Holder*, 570 U.S. 529, 559 (2013).

241. *Id.* at 544.

242. *Id.* at 550 (internal quotations omitted).

243. Hans A. Von Spakovsky, Testimony on "The Voting Rights Act after the Supreme Courts's Decision in *Shelby County*," 14 THE FEDERALIST SOCIETY 2 (2013).

244. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

245. *Id.*

246. *Id.* at 2337–38.

247. *Id.*

1982 Senate Factors.<sup>248</sup> While the 1982 factors leaned in favor of voters<sup>249</sup> the Court's added factors lean in favor of states. These include: the size of the burden, the degree to which a voting rule departs from a standard practice when Section 2 was amended in 1982, the size of any disparities in a rule's impact on members of different racial or ethnic groups, the opportunities provided by a State's entire system of voting, and the strength of the state's interest.<sup>250</sup>

The addition of the state favorable factors in *Brnovich* deeply hurt Tribal litigants for multiple reasons. Perhaps the most damaging factors for Tribes are the size of the disparity in a rule's impact on members of different racial or ethnic groups, the opportunities provided by the State's entire system of voting, and the strength of the state's interest. The size of the disparity factor severely weighs against the interests of Native Americans because Native Americans already make up some of the smallest portions of many states populations, only exceeding 10% of the population in Alaska, New Mexico, Oklahoma, and South Dakota.<sup>251</sup> Coupled with the fact that up to 87% of American Indians or Alaskan Natives live outside of Tribal statistical areas<sup>252</sup> it could be very difficult for this factor to weigh in favor of the plaintiffs filing on behalf of on-reservation voters. While 1,000 Native Americans may be impacted by a rule or policy, compared to 20,000 Tribal members, the size of that disparity might not be a significant enough of a disparity under that factor to weigh in favor of a Tribal plaintiff.

The factor considering all available methods of voting in a state will weigh against Tribes because some methods of voting are available in theory, despite being scarcely available in reality. Take for example in-person early voting opportunities. While a state makes it theoretically available, many states do not

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248. *Id.* at 2338.

249. The factors include: 1. The history and official discrimination in the jurisdiction that affects the right to vote; 2. The degree to which voting in the jurisdiction is racially polarized; 3. The extent of the jurisdiction's use of majority vote requirements, unusually large electoral districts, prohibitions on bullet voting, and other devices that tend to enhance the opportunity for voting discrimination; 4. Whether minority candidates are denied access to the jurisdiction's candidate slating processes, if any; 5. The extent to which the jurisdiction's minorities are discriminated against in socioeconomic areas, such as education, employment, and health; 6. Whether overt or subtle racial appeals in campaigns exist; 7. The extent to which minority candidates have won elections; 8. The degree that elected officials are unresponsive to the concerns off the minority group; and 9. Whether the policy justification for the law is tenuous. S. REP. NO. 97-417, at 28–29 (1982).

250. *Brnovich*, 141 S. Ct. at 2238–340.

251. Adriana Rezal, *Where Most Native Americans Live*, U.S. NEWS (Nov. 26, 2021 7:30 AM), <https://www.usnews.com/news/best-states/articles/the-states-where-the-most-native-americans-live>.

252. *Profile: American Indian/Alaska Native*, U.S. DEPT. OF HEALTH AND HUM. SERV. OFF. OF MINORITY HEALTH (Feb. 24, 2023), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62#:~:text=As%20of%202022%2C%20there%20are,reservations%20or%20other%20trust%20lands>.



make it practically available for Tribal communities.<sup>253</sup> Lastly, the strength of the state's interest poses a threat to Native American interest. Like *Purcell* and *Shelby County*, undue deference to a state's interest disfavors plaintiffs by adding to the plaintiff's burden of rebutting a presumption of legitimate state interest. Post-hoc rationalizations such as preventing fraud, providing for security, uniformity, or clear election administration all can be offered ahead of litigation to justify a burdensome law or practice. In the case of Tribal communities, states may rely on a lack of control or authority on tribal lands to justify a rule or practice that disproportionately burdens Native Americans. The more likely outcome of these factors however is that it will discourage Tribal communities from bringing litigation in the first place given the cost and decreased likelihood of success.

Given the slow erosion of the right to vote as a fundamental right, the *Purcell* principle, and the chipping away of the Voting Rights Act, Tribal communities cannot rely solely on the judiciary to vindicate the right to vote. Even in the best of judicial circumstances, states continue to pass burdensome legislation with alarming frequency.<sup>254</sup> In light of these realities, Congressional intervention becomes more necessary.

## VI. CONGRESS' OBLIGATION TO INDIAN TRIBES

Congress, through its obligation to Indian Tribes, must legislate to protect Native American voting rights. The United States has a trust responsibility to Indian Tribes.<sup>255</sup> Arising out of the unique political relationship between the United States and Tribes, the trust relationship is rooted in treaties, statutes, and Congress' plenary authority over Indian affairs.<sup>256</sup> The Trust responsibility "defies categorical definition."<sup>257</sup> This relationship includes "a mixture of legal duties, moral obligations, understandings and expectancies that have arisen from the entire

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253. JAMES THOMAS TUCKER ET AL., NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 79 (2020), [https://vote.narf.org/wp-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf).

254. *Voting Laws Roundup: December 2022*, BRENNAN CTR. FOR JUST. (Feb. 1, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022>.

255. Restatement of the Law of American Indians § 4 (Am. L. Inst. 2021).

256. *Id.*

257. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, "We Need Protection from Our Protector": *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 399 (2017).

course of dealing” between the United States and Tribal governments.<sup>258</sup> As articulated by the Supreme Court in 1942:

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct should therefore be judged by the most exacting fiduciary standards.<sup>259</sup>

Not exactly existing in terms of a strict classical trust, the federal trust responsibility borrows elements of history and law from a variety of sources. Daniel Rey-Bear and Matthew Fletcher describe the trust responsibility as encompassing the duties of good faith, loyalty, and protection through a combination of basic principles present in contract law, property law, trusts, foreign relations, and pre-constitutional/constitutional law.<sup>260</sup> However, it also exists in extraconstitutional contexts:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued the legislative and executive usage and unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders.<sup>261</sup>

While commonly seen in cases of land and asset management, the responsibility has been described to include “the duty of furnishing that protection, and with it the authority . . . to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the... body politic.”<sup>262</sup> The responsibility encompasses the protection of Tribal self-governance.<sup>263</sup> This duty of protection includes protecting Indian Tribes from the states in which they are located.<sup>264</sup>

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258. WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 35 (6th ed. 2015).

259. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

260. Rey-Bear, *supra* note 257, at 399–400.

261. *United States v. Sandoval*, 231 U.S. 28, 45–46 (1913).

262. *Bd. of Cnty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943).

263. *Restatement of the Law of American Indians* § 4 (Am. L. Inst. 2022).

264. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

The trust responsibility has been invoked as part of justifying broad sweeping legislation that would otherwise be unconstitutional in other areas of law.<sup>265</sup> While many cases espouse the high moral and fiduciary obligations under the trust responsibility such a responsibility is only enforceable to the extent that the federal government assumes those responsibilities by statute.<sup>266</sup> Courts will not apply common law trust principles to the relationship between the federal government and Indian Tribes unless Congress has indicated that it is appropriate to do so.<sup>267</sup>

States are hostile to the rights of their American Indian citizens.<sup>268</sup> Because of this hostility, the federal government owes a duty of protection to Indian Tribes against states.<sup>269</sup> The Court has said Tribes are dependent on the United States for their “political rights.”<sup>270</sup> The right to vote is a prime example of a political right that states are hostile towards because states are the biggest force in suppressing the Native vote.

The Indian franchise is an issue well within Congress’ trust obligation for multiple reasons. First, the right to vote is a fundamental right.<sup>271</sup> Second, the right to vote is core to Indians “tak[ing] their place” in the “body politic” of the nation and the states which has been recognized as within Congress’ trust obligation.<sup>272</sup> Third, states are the principal forces of disenfranchisement and voter suppression and, when doing so, stand diametrically opposed to Indian interests, thus placing the issue within Congress’ sphere of protection.<sup>273</sup> And, fourth, Congress itself has conveyed the right of citizenship and thereby is empowered to vindicate citizenship’s closely associated right of voting.

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265. 1 COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 5.04[3][a] (2012); See *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

266. 41 AM. JUR. 2d *Indians; Native Americans* § 6 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007). The government’s general trust duty only requires its compliance with generally applicable statutes and regulations unless a specific duty is imposed. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 807 (9th Cir. 2006).

267. 41 AM. JUR.2d, *supra* note 266.

268. See *Fletcher*, *supra* note 202, at 319.

269. *Kagama*, 118 U.S. at 384.

270. *Id.*

271. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

272. *Bd. of Comm’rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943).

273. See *generally* Substance Abuse & Mental Health Svcs. Admin., Expert Panel on Homelessness Among American Indians, Alaska Natives, and Native Hawaiians 5–6 (2012), [https://www.usich.gov/resources/uploads/asset\\_library/Expert\\_Panel\\_on\\_Homelessness\\_among\\_American\\_Indians%2C\\_Alaska\\_Natives%2C\\_and\\_Native\\_Hawaiians.pdf](https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf).

Further, Congress' right to protecting Indian voters is necessarily an obligation to Indian Tribes as well as individual Indians. Many tribes secured opportunities for Tribal members to become citizens via treaty.<sup>274</sup> Tribes continue to expend significant resources to promote voting among Tribal members.<sup>275</sup> Tribal governments are critical to the administration of elections on Tribal lands, often held in polling locations that belong to the Tribe, yet without legal recognition as an interested party to the administration of elections.<sup>276</sup> For these reasons, the individual Indian's franchise is heavily intertwined with the government-to-government relationship between Tribes and the United States. Given the nature of the right, the Indian franchise must fall within Congress' trust obligation to individual Indians and Indian Tribes and within Congress' duty of protection.

## VII. CONGRESS' AUTHORITY TO LEGISLATE

Congress can rely on multiple points of authority to legislate and affirm the rights of Native voters. Although Congress has not yet passed such legislation, solutions have been proposed in the Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act.<sup>277</sup> The legislation included many provisions that would bind the states and local election administrators.<sup>278</sup> The legislation includes obligations on states, such as designating a state officer to engage in consultation with Indian Tribes, mailing ballots to on-reservation voters at the request of the Tribe, and requiring states allow reservation-based voters an opportunity to cure defects in an absentee ballot.<sup>279</sup> The legislation also sets days and hours for early voting and eliminates the practice of discarding out of precinct ballots.<sup>280</sup> The legislation is broad, ambitious, and sweeping. It is also within Congress' authority to pass.

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274. See discussion *supra* Section I.B.

275. Arylssa D. Becenti, *CNN Called Native Voters 'Something Else.' Tribal Leaders Say Those Voters Can Sway Elections*, ARIZONA CENTRAL (Nov. 8, 2022 12:44 PM), <https://www.azcentral.com/story/news/politics/elections/2022/10/14/tribal-leaders-say-native-voters-can-sway-elections/10466781002/>; Noel Lyn Smith, *On Tohono O'odham Nation, Voters Turn Out Over COVID-19, Abortion Rights*, ARIZONA CENTRAL (Nov. 9, 2022 2:02 AM), <https://www.azcentral.com/story/news/politics/elections/2022/11/09/tohono-oodham-nation-voters-turn-out-over-covid-19-abortion/8313195001/>.

276. ARIZONA NATIVE VOTE ELECTION PROTECTION PROJECT, 2018 ELECTION REPORT 12–14 (2021), <https://law.asu.edu/sites/default/files/2022-08/2018%20Election%20Report.pdf>. This is an issue of Tribal territorial sovereignty as Tribes have the inherent right of exclusion. See *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 805 (9th Cir. 2011).

277. H.R. 5008, 117th Cong. (2021).

278. *Id.*

279. *Id.*

280. *Id.*

Congress can rely on its well-established authority under the Elections clause, the Fourteenth Amendment, and the Fifteenth Amendment to pass legislation addressing the rights of Native American voters. Less established, Congress can rely on its Indian law powers. This section seeks to explore how Congress can rely on such legislative authority to pass voting rights legislation protecting the rights of Native Americans.

#### A. Time, Place and Manner

Under the United States Constitution, Congress has the power to override state laws governing “time, place, and manner” regulations for federal congressional elections.<sup>281</sup> In *Inter Tribal Council of Arizona v. Arizona* the court described the role of Congress in regulating elections under the Elections clause, Art. I, § 4 cl. 1, as “the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”<sup>282</sup> The inclusion of the words “times, places, and manner” are “comprehensive words” which “embrace authority to provide a complete code for congressional elections.”<sup>283</sup> This clause empowers Congress to pre-empt state regulations governing the “times, places, and manner” of holding Congressional elections.<sup>284</sup> States have the ability to regulate Congressional elections insofar as Congress has not preempted such State regulation.<sup>285</sup> States when administering federal elections are exercising a delegated power.<sup>286</sup> However, by its text the Elections clause does not empower Congress to regulate purely state elections outside of circumstances implicating the Fourteenth and Fifteenth Amendments.<sup>287</sup>

In order for proposed legislation to meet the full needs of Native Voters, Congress cannot rely on the elections clause alone. Arizona’s bifurcated voter registration system and federal only ballots are an example of why Congress should not rely on the elections clause alone, lest they only seek to remedy barriers to voting in federal elections. Such a remedy would fall short of Congress’ duty to protect the rights of Native voters and ensure they can take their place in the body politic.

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281. U.S. CONST. art. I, § 4, cl. 1.

282. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

283. *Id.* at 1.

284. *Id.* at 8.

285. *Id.*

286. *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

287. *Lackey v. United States*, 107 F. 114, 117–18 (6th Cir. 1901).

### B. Fourteenth Amendment and Fifteenth Amendment

The right to vote is protected by the equal protection clause of the Fourteenth Amendment.<sup>288</sup> Section 5 of the Fourteenth Amendment provides a positive grant of legislative power.<sup>289</sup> Legislation that deters or remedies constitutional violations can fall within Congress' power under section 5 and Congress can lawfully intrude on the states' legislative authority.<sup>290</sup> Congress may act under the Fourteenth Amendment in ways it could not act under other provisions of the Constitution.<sup>291</sup> Section 2 of the Fifteenth Amendment empowers Congress to pass legislation "to effectuate the constitutional prohibition against racial discrimination in voting."<sup>292</sup> This is also a positive grant of legislative power.<sup>293</sup>

The Fourteenth Amendment's grant of legislative power has been affirmed by the courts when Congress' banned the use of literacy tests among other voter qualifications and election practices.<sup>294</sup> Albeit, this authority is remedial and "there must be a congruence between the means used and the ends to be achieved" whereby the remedy is considered against the evil presented.<sup>295</sup> To satisfy the court's test, Congress must identify the constitutional right at issue and a history of violation of that constitutional right.<sup>296</sup> The Court has identified the Voting Rights Act as an example of a law that fits the congruent and proportional test and a lawful exercise of Congressional authority under Section 5.<sup>297</sup> Under section 2 of the Fifteenth Amendment, Congress can legislate when the power is within the scope of the Constitution, the end is legitimate, the means are appropriate and plainly adapted to the ends, are not prohibited, and are consistent with the letter and spirit of the Constitution.<sup>298</sup>

In the case of American Indians, the evil of equal protection violations, disenfranchisement, and the diminishment of Native American voting power are

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288. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969).

289. *Katzenback v. Morgan*, 384 U.S. 641, 651 (1966).

290. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

291. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 n. 17 (1976).

292. *South Carolina v. Katzenback*, 383 U.S. 301, 326 (1996).

293. *Id.*

294. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

295. *Id.* at 530.

296. *City of Boerne*, 521 U.S. 507.

297. *Id.*

298. *South Carolina*, 383 U.S. 301.

well documented. Through litigation<sup>299</sup>, Congressional testimony<sup>300</sup>, Tribal government efforts to educate the public<sup>301</sup>, non-governmental groups producing reports on barriers that Native Americans face<sup>302</sup>, government reports<sup>303</sup>, and news media continuing to cover the stories of barriers<sup>304</sup> – the evils of Indian disenfranchisement remain on display.

Congress can utilize Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to pass remedial legislation to protect the right of Native American voters and remedy violations of the Equal Protection Clause. As an advantage, relying on Section 5 of the Fourteenth Amendment to pass such legislation would allow Congress to abrogate state sovereign immunity as a

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299. JAMES THOMAS TUCKER ET AL., NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 69–70 (2020).

300. House Subcommittee on Election Administration 2019, House Subcommittee on Election Administration February 2020, House Subcommittee on Election Administration June 2021, Senate Committee on Indian affairs October 2021.

301. Mamta Popat, *Pascua Yaqui Tribal Council: We Need Early Voting Site on the Reservation, Especially Amid COVID-19*, ARIZONA DAILY STAR (July 17, 2020), [https://tucson.com/opinion/local/pascua-yaqui-tribal-council-we-need-early-voting-site-on-the-reservation-especially-amid-covid/article\\_90b1b034-a9e6-5cf1-826b-9c323d69a4c7.html](https://tucson.com/opinion/local/pascua-yaqui-tribal-council-we-need-early-voting-site-on-the-reservation-especially-amid-covid/article_90b1b034-a9e6-5cf1-826b-9c323d69a4c7.html); Arlyssa D. Becenti, *Native Advocates Say Voter ID Rules in Proposition 309 Could Disenfranchise Arizona Indigenous Voters*, ARIZONA REPUBLIC (Oct. 27, 2022), <https://pulitzercenter.org/stories/native-advocates-say-voter-id-rules-proposition-309-could-disenfranchise-arizona-indigenous>.

302. JAMES THOMAS TUCKER ET AL., NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 79 (2020); Katie Friel, *How Voter Suppression Laws Target Native Americans*, BRENNAN CTR. FOR JUST. (May 23, 2022) <https://www.brennancenter.org/our-work/research-reports/how-voter-suppression-laws-target-native-americans>.

303. Interagency Steering Group, Report on Native American Voting Rights (Mar. 2022); Memorandum from the Montana Advisory Comm. on voting access for Native Americans in Montana to the U.S. Comm'n on Civ. Rts. (June 2021); Memorandum from the Alaska Advisory Comm. on voting access for Native Americans in Alaska to the U.S. Comm'n on Civ. Rts.; Memorandum from the Arizona Advisory Comm. on voting access for Native Americans in Arizona to the U.S. Comm'n on Civ. Rts., <https://www.usccr.gov/files/pubs/2018/07-25-AZ-Voting-Rights.pdf>

304. Sue Halpern, *The Political Attack on the Native American Vote*, THE NEW YORKER (Nov. 4, 2022) <https://www.newyorker.com/news/dispatch/the-political-attack-on-the-native-american-vote>.

remedy.<sup>305</sup> Whereas, Congress cannot abrogate state sovereign immunity under the Indian Commerce Clause.<sup>306</sup>

### C. Congress' Plenary Power in Indian Affairs

Less explored in election scholarship, Congress can rely on its power in Indian affairs to pass election legislation. Congress' authority over Indians stems from the text and structure of the constitution.<sup>307</sup> This power "comprehend[s] all that is required for the regulation of our intercourse with the Indians."<sup>308</sup> "Intercourse" was used in the late eighteenth century to describe a variety of points of contact between the settlers and Indian Tribes including social, cultural, political, and diplomatic obligations.<sup>309</sup> In text, this power rests in the Treaty Clause and the Indian Commerce Clause.<sup>310</sup>

The Treaty Clause<sup>311</sup> authorizes Congress to deal in matters that Congress otherwise could not.<sup>312</sup> It also empowers Congress to enact subsequent legislation to fulfill its obligations under existing treaties.<sup>313</sup> And treaties can have preemptive effect.<sup>314</sup> Congress' role in extending citizenship to Indians – be it by treaty or by the Indian Citizenship Act – is an exercise of Congress' broad power in Indian affairs. Further, insofar as citizenship is tied to various treaties, Congress can pass legislation in support of those treaty terms and affirm the right to vote which is closely held with citizenship.

In *Washington State Department of Licensing v. Cougar Den, Inc.*, the Court was faced with the question of whether the Yakama Treaty of 1855, securing "the right, in common with citizens of the United States, to travel upon all public highways" creates a right for tribal members to avoid state taxes on off-reservation

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305. *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

306. *Id.* at 47.

307. *United States v. Lara*, 541 U.S. 193, 200–07 (2004) (discussing Congress' plenary authority in Indian affairs deriving from the combined legislative authority under the Indian Commerce Clause and its implied authority via the Treaty Clause).

308. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

309. Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal Defendants at 10, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (No. 21-376).

310. *Lara*, 541 U.S. at 200–02.

311. U.S. CONST. art. II, § 2, cl. 2.

312. *Lara*, 541 U.S. at 201 (citing *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

313. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196–97 (1876) (concluding that Congress' authority in Indian Affairs and its treaty-making authority includes the authority to regulate commerce with Indians both inside Indian Country and outside of Indian Country) ).

314. *See, e.g., Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1013 (2019).



commercial activities that make use of public highways.<sup>315</sup> The Court held that when state law burdens a treaty-protected right that state law is preempted by the treaty.<sup>316</sup> Core to the Court's analysis was the Yakamas understanding of the treaty provision at issue.<sup>317</sup> When exploring the tension between state regulation and a vested treaty right, states are not entirely preempted but states are limited. The inference from the Court's opinion is that a state may regulate if there is an important interest (such as regulating fishing for the sake of conservation) and if the manner of the regulation cannot be accomplished by another means and that regulation is necessary to the important interest.<sup>318</sup>

In the context of citizenship and its associated right of suffrage, Congress can legislate to enforce the associated rights of citizenship. For example, the Ottawa Tribe of Oklahoma (the successor in interest to the Treaty with the Ottawa of Blanchard's Fork and Roche de Boeuf) guarantees unto the citizen Ottawa Indians an entitlement "to all the rights, privileges, and immunities<sup>319</sup> of such citizens, and shall, in all respects, be subject to the laws of the United States, and of the State or States thereof in which they may reside."<sup>320</sup> Taking the reading that the treaty guarantees the Ottawa the right to vote as a privilege of citizenship, Congress would have the authority to pass legislation in furtherance of that right and the state regulation infringing on that right would necessarily be curtailed. Other Tribes with treaty provisions related to citizenship and similar rights could be subject to similar legislation.<sup>321</sup>

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315. *Id.* at 1021.

316. *Id.*

317. *Id.*

318. *Id.* at 1015.

319. While the Supreme Court held in the Slaughter-House cases that the Privileges and Immunities Clause in the Fourteenth Amendment does not infringe on a state's ability to define its rights and privileges of state citizens, that decision does not per se exclude Congress from taking a more expansive reading of "privileges and immunities" in a treaty. Slaughter-House Cases, 83 U.S. 36, 55 (1872). Take, for example, how "commerce" in the context of Congress' ability to regulate "interstate commerce" under Article I has been read as more narrow than Congress' "power to regulate Commerce . . . with the Indian Tribes." *United States v. Lomayaoma*, 86 F.3d 142, 145 (9th Cir. 1996).

320. Treaty with the Ottawa of Blanchards Fork and Roche De Boeuf, U.S.- Ottawa, July 28, 1862.

321. See Treaty of Fort Laramie (Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, San Arcs, And Santee-And Arapaho), U.S.- Sioux, April 29, 1868 ("And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.").

Without specific treaties, Congress can exercise its plenary authority to protect Native voting rights. The Indian Commerce Clause has become “the linchpin in the more general power over Indian affairs recognized by Congress and the courts.”<sup>322</sup> Congress’ power in Indian affairs is “plenary and exclusive.”<sup>323</sup> It encompasses the ability of Congress to engage with Indian Tribes, individual Indians, and regulate Indians outside of Indian Country.<sup>324</sup> This authority has been deemed “plenary and exclusive.”<sup>325</sup> Under its Indian affairs powers, Congress has the ability to preempt state law because states have little authority to legislate in the area of Indian affairs.<sup>326</sup> This power is so extensive, the Court has only struck down one statute enacted pursuant to Congress’ plenary power as an unconstitutional intrusion on state sovereignty, specifically finding that Congress could not waive a state’s Eleventh Amendment sovereign immunity under the Indian commerce clause.<sup>327</sup> Given the rarity of courts striking down a law passed to pursuant to Congress’ plenary power, a bill protecting Native American voting rights on-reservation would likely pass constitutional muster.

#### VIII. CONGRESS’ ABILITY TO ALTER OR DISPLACE STATE ELECTION LAW

While Congress has the authority to pass legislation affirming the Indian franchise, it is critical to address the most likely challenges to such legislation. Opponents of any Indian voting rights legislation are likely to argue that the principles of federalism limit the power Congress can have in state elections. First, this section will address the issue of limited state sovereignty in Indian affairs, generally. Second, this section will address the anticipated argument that any legislation (short of creating an entirely new election apparatus) would necessarily rely on state actors raising arguments based on the anticommandeering principle. Lastly, this section will address Congress’ authority to preempt state election law as it applies to reservations.

##### A. States Have Limited Sovereignty in Indian Affairs

Some scholars hold that the rights that strike to the “heart” of a state’s representative government are core to its sovereignty, such that they are even

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322. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[3] (2019).

323. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979).

324. COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 5.01[3] (2012).

325. *United States v. Lara*, 541 U.S. 193, 200 (2004).

326. *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996).

327. *See id.*

secure from Congress' exercise of its constitutional authority.<sup>328</sup> However, power over Indian affairs has never been core to state sovereignty.<sup>329</sup> The Supreme Court recently found that Indian Country "is part of the State, not separate from the State."<sup>330</sup> But, that opinion has no bearing on the ability of Congress to preempt the state in other areas that impact state sovereignty when legislating in the realm of Indian affairs. The court acknowledged that "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they have only restricted application to Indian wards" thus acknowledging the limitations of state sovereignty over Indians.<sup>331</sup>

At the point of ratifying the Constitution, the power over Indian affairs was reserved to Congress.<sup>332</sup> Early in the republic, when states attempted to subvert federal law and interfere in Indian affairs the federal government was quick to remind states of the federal governments' primacy in Indian affairs.<sup>333</sup> And further reminding states of their obligations to comply with federal law.<sup>334</sup> Congress has at times delegated some of the federal government's authority over Indians to states.<sup>335</sup> In admitting states into the Union, Congress has done so on the condition that states disclaim certain rights and powers over Indian lands and people.<sup>336</sup> All to say that Congress has reinforced its primary authority in Indian affairs. Congress' primary authority displaces state authority. States "have been divested of virtually all authority over Indian commerce and Indian Tribes."<sup>337</sup>

This exclusion of state power in Indian affairs, taken with the Court's holding in *Elk v. Wilkins* that Indians cannot be made citizens without the "assent" of

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328. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 892 (2015).

329. Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal *Defendants*, *Haaland, Secretary of the Interior v. Brackeen; Cherokee Nation*, (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648346.

330. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

331. *Id.* at 2493.

332. *Id.*; Ablavsky, *supra* note 17,

333. Ablavsky, *supra* note 17; *Castro-Huerta*, 142 S. Ct. at 2494.

334. Ablavsky, *supra* note 17; *Castro-Huerta*, 142 S. Ct. at 2494.

335. See Indian Child Welfare Act, 25 U.S.C §§ 1901-1963; Pub.L. 280, No. 83-280 (codified at 18 U.S.C.A §1162); Indian Gaming Regulatory Act (codified at 29 U.S.C.A §2701 et seq.); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[2] (2019).

336. OKLAHOMA ENABLING ACT, June 16 1906, c. 3335, 34 Stat. 267; MONTANA ENABLING ACT, Feb. 22, 1889 25 Stat. 676; NORTH DAKOTA ENABLING ACT, Feb 22, 1889 c. 180 25 Stat. 676.

337. *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996).

Congress<sup>338</sup> and Congress' aforementioned history of extending state and federal citizenship to Indians, demonstrates that Congress has established its primary right to define Indians as citizens and contour the political rights of Indians within those states. Regardless, if such rights are held by Indians as states citizens, Congress can necessarily intervene and alter such rights as a matter of its authority in Indian affairs. In fact, Congress has legislated in a manner that alters the rights of Indians as citizens of a state and set the boundary between states and their Indian citizens. For example, such statutes include Public Law 280 (extending state criminal jurisdiction over Indian lands in certain states)<sup>339</sup>, the Indian Child Welfare Act (assuring certain rights for Indian parents and children in removal proceedings in state court),<sup>340</sup> the Indian Gaming Regulatory Act (displacing state law to regulate gaming in Indian Country),<sup>341</sup> establishing evidentiary standards in property trials including an Indian litigant in any court,<sup>342</sup> among others. Thus, taking the Court's conclusions that Congress must assent to a change in the citizenship status of Indians, Congress' ability to alter the political rights of Indians as state citizens, and a history of Congress' managing the legal relationship between Indians and States, we can conclude that Congress has the authority to legislate to promote the Indian voting rights in state and federal elections.

A natural criticism of federal intervention in Indians exercising the right to vote is that it infringes on a state's sovereignty under the Tenth Amendment. Yet, the text of the Tenth Amendment – the textual recognition of states' inherent sovereignty – cannot support such a conclusion. As stated, Indian affairs is not an inherent part of state sovereignty nor does the court's recent precedent support a conclusion that the Tenth Amendment applies to Indians in Indian Country. The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>343</sup> The Constitution clearly delegates to the United States power over commerce with Indian Tribes.<sup>344</sup> Early conceptions of Congress' role in Indian affairs include social, cultural, political, and diplomatic dealings between the United States and Indian Tribes.<sup>345</sup> Congress' power in Indian affairs is "plenary and exclusive".<sup>346</sup> As such, the first clause of the Tenth Amendment

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338. *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).

339. Pub. L. No. 83-280, 677 Stat. 588 (codified at 18 U.S.C.A §1162). State acceptance of the jurisdiction was not necessary. *Anderson v. Gladden*, 188 F. Supp. 666, 679 (D. Oregon 1960).

340. 25 U.S.C. § 1901 et seq.

341. 25 U.S.C. § 2701 et seq.

342. 25 U.S.C. § 194.

343. U.S. CONST. amend. X.

344. U.S. CONST. art. I, § 8, cl. 3.

345. Brief of Amicus Curiae Professor Gregory Ablavsky in Supporting Federal Parties and Tribal Defendants, *Haaland v. Brackeen*, Nos. 21-376, 21-377, 21-378, 21-380, 2022 WL 3648346.

346. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979).

provides that Indian affairs are outside of the realm of states reserved powers because such authority is delegated directly to the United States.

B. The Anti-Commandeering Doctrine Does Not Prevent Congress from  
Passing Legislation to Protect the Indian Franchise

The anti-commandeering doctrine is a principle tied to the structure of federalism.<sup>347</sup> Based in the Tenth Amendment, the doctrine seeks to maintain the boundaries between the United States as a sovereign and the rights of the states.<sup>348</sup> Under the doctrine, Congress lacks the power to compel states to legislate.<sup>349</sup> Nor can Congress force a state and its political subdivisions to administer or enforce a federal regulatory program.<sup>350</sup> As general exceptions, Congress can issue commands that regulate state and private actors equally and Congress can command state courts to apply federal law.<sup>351</sup>

Anticipated criticism that legislation protecting Native American voting rights would necessarily violate common law principles of anti-commandeering fails. This is because the Tenth Amendment, as the textual anchor for the anticommandeering doctrine, only protects rights that are reserved to the states from commandeering.<sup>352</sup> Indian affairs is not a reserved power. The court acknowledged this textual foundation of the anticommandeering doctrine in *Murphy v. National*

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347. *Murphy v. Nat'l Collegiate Athletics Ass'n*, 138 S. Ct. 1461, 1475 (2018).

348. In *New York v. United States*, the Court stated that the effect of the Tenth Amendment is determined by the power vested in Congress in Article I. "Congress exercises its conferred powers subject to the limitations contained in the Constitution. . . . The Tenth Amendment likewise retains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States* 505 U.S. 144, 156–57 (1992). The fact that the court would be inquiring into Congress' power under Article I in the same instance, without depending on the Tenth Amendment, does not displace the fact that the Tenth Amendment is the textual basis for the anticommandeering doctrine.

349. *Id.* at 166.

350. *Printz v. United States*, 521 U.S. 898, 935 (1997).

351. Matthew L.M. Fletcher & Randall F. Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev. 1199, 1210 (2022).

352. U.S. CONST. amend. X.

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The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the government of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.<sup>353</sup>

Given this, because power over Indian affairs—where Indian Citizenship is an express issue of Indian affairs—has been vested in Congress it is not an issue that is subject to the anti-commandeering doctrine.<sup>354</sup> Further, legislation implemented pursuant to the Fourteenth and Fifteenth Amendments does not run afoul of the Tenth Amendment.<sup>355</sup> Because the Tenth Amendment is the constitutional anchor for the anti-commandeering doctrine, legislation that seeks to eliminating barriers Indians face when voting is consistent with Congress' vested authority in Indian affairs and under the reconstruction amendments, such legislation is beyond the limitations of the anti-commandeering doctrine.

If the prefatory clause does not place Indian affairs outside of the doctrine, Congress can still pass legislation that affirms Indian voting rights without offending the anti-commandeering doctrine by carefully drafting the statute to avoid forcing states to enact legislation, ensuring that the law to the extent practicable regulate public and private actors evenly, and ensuring that it conveys individual rights.

### C. Congress can Preempt State Election Law

The principle of preemption is rooted in the Supremacy Clause of the Constitution.<sup>356</sup> Rather than being an independent grant of legislative authority to

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353. *Murphy*, 138 S. Ct. at 1476.

354. Although textually this seems straightforward, the interplay between the Tenth Amendment and Congress' authority in Indian affairs is currently before the Supreme Court. *See Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205, (2022). At the point of authoring this article, no decision in the case has been issued.

355. *See ex parte Virginia*, 100 U.S. 339, 346 (1879); *Condon v. Reno*, 913 F. Supp. 946, 964 (D.S.C. 1995) ("Legislation under the enforcement clauses of the Fourteenth and Fifteenth Amendment is not subject to the Tenth Amendment constraints that are applicable to legislation adopted under other provisions of the constitution such as the Commerce Clause."); *Ass'n of Cmty. Org. for Reform Now (ACORN) v. Edgar*, 880 F. Supp. 1215 (N.D. Ill. 1995) *aff'd as modified*, 56 F.3d 791 (7th Cir. 1995).

356. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479–81 (2018).

Congress, the clause serves to resolve conflicts between federal and state law.<sup>357</sup> The preemption test seeks to resolve questions of when the federal law successfully displaces state law under the clause and when state law must give way. Or, when Congress has failed to do so, and state law stands.<sup>358</sup> Federal law successfully preempts state law when the law is a one that Congress may validly enact and the law regulates individuals, not states.<sup>359</sup> When Congress confers individual rights under federal law and federal law preempts state law, it is not commandeering.<sup>360</sup> Preemption is distinguishable from commandeering because preemption does not command states to take action, rather, it applies in instances where a person or entity cannot comply with the federal law and state law at the same time.

Preemption is regularly broken down into categories. Express preemption occurs when in its text a federal law announces its intent to preempt state law.<sup>361</sup> Field preemption occurs when a federal law regulates “so comprehensively that it has left no room for supplementary state legislation” thus occupying the “field” of

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357. *Id.*

358. *Id.*

359. Fletcher & Khalil, *supra* note 351, at 1211; It is important to note that the Court cites *New York v. United States* for the proposition that Congress can regulate individuals and not States. *New York v. United States*, 505 U.S. 144, 166 (1992). It is beyond the scope of this article to address in full why I do not think that principle is applicable to Congress in the context of Indian affairs. However, in short, *New York v. United States* was principally about Congress’ authority under the Interstate Commerce Clause which is inherently limited, “[t]he allocation of power contained in the Commerce clause, for example, authorizes Congress’ to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” *Id.* Unlike the Interstate Commerce Clause, Congress’ authority in Indian affairs is plenary and not subject to restrictions on par with the Interstate Commerce Clause. *United States v. Lomayaoma*, 86 F.3d 142, 146 (9th Cir. 1996); *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816 (S.D. Iowa 2004). Further, Congress can regulate Tribes. At least one court has recognized that issues relating to the possessor rights of Indian Tribes in Tribal land are “so inherently federal that they are subject to complete preemption.” *New York v. Shinnecock Indian Nation*, 274 F.Supp.2d 268, 270 (E.D.N.Y. 2003). In fact, in some states through state enabling acts, Congress has reserved its authority to legislate in the area of Indian affairs and this reservation of authority has justified federal regulation of intrastate commerce and that included the authority to regulate individuals attempting to sell liquor to Indians. *Ex Parte Webb*, 225 U.S. 663, 674 (1912). When case law is considered alongside with history and tradition of binding states to Congress’ decisions in Indian affairs, it is arguable that Congress retains the authority to regulate states on matters of Indian affairs and that the second element of the preemption test is inapplicable.

360. Fletcher & Khalil, *supra* note 351, at 1210.

361. *Murphy*, 138 S. Ct. at 1479.

regulation.<sup>362</sup> Conflict preemption occurs when federal law requires behavior inconsistent with state law.<sup>363</sup> Field preemption and conflict preemption are left to a court to find as a matter of law. Should Congress seek to preempt state election law, it should express its intent to do so.

Under the standard test for preemption, Congress can pass legislation to effectively preempt state law to protect Native American voting rights. As established, Congress' extensive history of conveying Indian citizenship and managing the boundaries between Indians and the states in which they are citizens demonstrates that Congress is within its power to pass legislation protecting the Indian franchise. This ability to legislate is further bolstered by Congress' enforcement authority to pass remedial legislation under the reconstruction amendments. And Congress' is near required to pass such legislation as part of its trust obligation to protect Indians from their "deadliest enemy" —the states.<sup>364</sup>

In the context of Indian affairs, given states' divestment of authority, the Court has articulated its own test for preemption of state authority in Indian Country.<sup>365</sup> The test asks: has state authority been preempted by federal law and does the state action infringe on the right of "reservation Indians to make their own laws and be ruled by them."<sup>366</sup> When it comes to the preemption of state authority over nonmembers in Indian Country the court engages in a balancing test of federal, state, and Tribal interest.<sup>367</sup>

The *Williams* infringement test presumes a lack of state authority and presumes Congressional authority.<sup>368</sup> In the context of elections, Congress can point to the *Williams* test as a confirmation of its ability to preempt state law on Tribal lands.<sup>369</sup> With respect to the second prong, many election laws infringe on Tribal sovereignty and a Tribe's ability to regulate internal behaviors by criminalizing interactions between fellow Tribal members.<sup>370</sup> As an example, despite Arizona lacking jurisdiction over on-reservation interactions between Tribal members, its ban on third-party ballot collection had a chilling effect on Tribal behavior.<sup>371</sup> The

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362. *Id.*

363. *Id.*

364. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

365. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

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

367. *White Mtn. Apache Tribe*, 448 U.S. at 143.

368. *Williams*, 358 U.S. at 220.

369. *Id.*

370. *Id.*

371. Bret Jaspers, *Native American Voters in Arizona Prep for 2020*, FRONTERAS (Sept. 25, 2019), <https://fronterasdesk.org/content/1188686/native-american-voters-arizona-prep-2020>.



trend of increasingly criminalizing behavior around elections certainly interferes with the ability of Tribes to regulate their internal relations.<sup>372</sup>

Congress can legislate in this area to not only preempt state law with respect to elections, thereby decreasing barriers that Native Americans face, but also by restoring the ability of Tribes' to regulate internal relations when registering voters, returning ballots, and assisting each other in elections without fear of criminal prosecution.<sup>373</sup>

Congress can expressly preempt state election law as it applies to state elections administered on reservation by expressing its intent to do so. Under the Court's standard of preemption in *Williams*, the court would likely view legislation impacting Native American voting rights through a lens that at least presumes state authority to preempt state law. When combined with Congress' remedial authority under the construction amendments, Congress has a strong case for being able to preempt state election law to protect the right of Native Americans to vote in state and federal elections.

## IX. CONCLUSION

Congress' long history of conveying citizenship to Indian, both state and federal citizenship, and managing the boundaries between states and Indians demonstrates that Congress has always been integral to determining the belonging of Indians in the American body politic. While this power left American Indians excluded from the benefit of American citizenship for centuries, the 1924 Indian Citizenship Act reflects a significant shift in the role in Indian politics and belonging. Yet states continue to undermine the rights of American Indians as state and federal citizens through systemic and ongoing disenfranchisement. In light of the historic role that Congress has played in bringing Indians into the body politic, Congress is obligated under the trust responsibility to protect the right to vote of Native Americans through appropriate legislation. Congress has such authority under its traditional elections powers combined with its authority in Indian affairs. These combined powers give Congress the power to not only affirmatively legislate to

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372. Ese Olumhense, *New US state voting laws present most intense voter suppression threat in decades*, THE GUARDIAN (Oct. 28, 2022), <https://www.theguardian.com/us-news/2022/oct/28/state-voting-rights-election-laws-police-suppression>.

373. Given that the United States would be the prosecuting government acting pursuant to the Assimilative Crimes Act, the Executive Branch can alleviate this concern for Tribal communities by issuing a memorandum articulating its policies. 18 U.S.C. § 13; *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019).

protect the Native vote, but empowers Congress to protect the right of Native voters to exercise their rights as state and federal citizens by preempting state election law.