

TRIBAL OPT-IN TO THE VOTING RIGHTS ACT: STRENGTHENING SOVEREIGNTY TO RESIST NATIVE VOTER SUPPRESSION

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I. INTRODUCTION

In the spring of 2017 North Dakota made a seemingly minor modification to its voter ID law that required any valid identification to list a residential address.¹ Despite its benign appearance on paper, the residential address requirement disproportionately impacted thousands of tribal members living on reservations because they used P.O. boxes instead of physical addresses.² It is likely not a coincidence that the Republican-dominated state government imposed a targeted address requirement on the eve of the 2018 midterm elections where North Dakota senator Heidi Heitkamp, the state’s lone Democratic senator, was facing a hotly contested re-election battle.³ Heitkamp had been elected in 2012 by a narrow margin of several thousand votes, largely attributed to tribal voters.⁴ Perhaps because of the gravity of the race—Heitkamp was one of the most vulnerable Democratic senators in an election cycle that could have flipped the senate to the

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1. N.D. CENT. CODE § 16.1-01-04.1 (2017) (enacted as H.B. 1369 on April 25, 2017).

2. Vincent Schilling, *In Wake of New Voter ID Law: Mad Rush to Repair Native Voting Woes in N. Dakota*, INDIAN COUNTRY TODAY (Oct. 15, 2018), <https://newsmaven.io/indiancountrytoday/news/in-wake-of-new-voter-id-law-mad-rush-to-repair-native-voting-woes-in-n-dakota-OE6zHfTozku1PP-w16esWQ/>.

3. Maggie Astor, *In North Dakota, Native Americans Try to Turn an ID Law to Their Advantage*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/north-dakota-voter-id.html>.

4. *Id.*

Democrats—this voter suppression effort, and the tribes’ powerful resistance to it, garnered national media attention.⁵

However, the North Dakota Legislature’s disdain for Native voting rights is not an isolated phenomenon and state governments around the country have erected barriers to the franchise.⁶ Many of these restrictions exploit the often remote and rural nature of reservations, requiring tribal members to supply residential addresses that may not exist, moving polling places off reservations and so necessitating hours-long drives to vote, and restricting access to early and absentee voting. Indeed, Idaho is no stranger to restricting the Native vote as its original state constitution prohibited “Indians . . . who have not severed their tribal relations and adopted the habits of civilization” to vote, serve as jurors, or hold public office.⁷ This restriction on tribal members voting was not lifted until a constitutional amendment in 1950.⁸ And, as recently as the 1980s, redistricting efforts in Idaho have targeted on-reservation tribal communities.⁹

Using the framework for an “opt-in” approach to the Voting Rights Act (“VRA”) proposed by Professor Heather Gerken,¹⁰ this paper argues that the VRA should be amended to allow tribal governments to opt-in to Department of Justice (“DOJ”) review of state and local laws that infringe on tribal members’ voting rights. This approach would not only directly address the problems of Native voter suppression but would also be consistent with the federal government’s trust responsibilities and national policy goal of tribal self-determination.

First, this paper gives an overview of the mechanics of the opt-in approach and the scholarly criticisms of its limitations including the difficulty in identifying the appropriate body to represent minority interests under the approach.

Next, this paper argues that tribal governments are uniquely situated to effectively deploy the opt-in approach to the VRA because they have the sovereign authority to represent the interests of tribal members. Indeed, the opt-in approach would also serve the federal government’s trust responsibilities to the tribes and advance the federal policy of tribal self-determination.

II. THE OPT-IN APPROACH

During the run-up to the 2006 reauthorization of section 5 of the VRA both legislators and the academic community fractured over how, or if, section 5 should

5. See, e.g., *Id.*; Schilling, *supra* note 2; Camila Domonoske, *Many Native IDs Won’t be Accepted at North Dakota Polling Places*, NAT’L PUB. RADIO (Oct. 13, 2018), <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places>.

6. *E.g.*, *Navajo Nation v. San Juan County*, 162 F. Supp. 3d 1162 (D. Utah 2016) (holding that a county redistricting decision packing Native voters into one district was unconstitutional under the equal protection clause); *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012) (challenge to lack of satellite offices on reservation to provide voter registration and in-person absentee voting); *Toyukak v. Mallott*, No. 3:13-CV-00137-SLG, 2015 WL 11120474 (D. Alaska Sept. 30, 2015) (ordering state of Alaska to provide election materials in native languages).

7. IDAHO CONST. art. VI, § 3 (repealed 1950).

8. *Idaho Constitutional Amendment History*, IDAHO SECRETARY ST. ELECTION DIVISION, https://sos.idaho.gov/elect/inits/hst40_50.htm (last visited June 1, 2020).

9. See, e.g., *Hellar v. Cenarussa*, 664 P.2d 765, 104 Idaho 858 (1983).

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

be reauthorized.¹¹ Section 5 of the VRA, one of the most successful pieces of civil rights law ever enacted, was intended to frustrate southern intransigence by subjecting certain covered jurisdictions to preclearance requirements for electoral changes.¹² By requiring southern states to preclear proposed election changes, federal regulators were able to stay one step ahead of jurisdictions intent on finding new, creative ways to disenfranchise minority voters. Imposing preclearance requirements under section 5 of the VRA hinged on application of a formula to determine which jurisdictions were covered.¹³

The original coverage formula in section 4(b) of the VRA required preclearance for election changes in any jurisdiction that had maintained a voting test or device as of November 1, 1964, and in which less than 50 percent of voters were registered or turned out for the 1964 presidential election.¹⁴ Congress felt that this combination of factors served as a useful proxy for jurisdictions that may be discriminating against minority voters.¹⁵ As originally enacted, Congress determined that seven states—Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—as well as 37 counties would be subject to preclearance.¹⁶ The preclearance regime, as enacted in 1965, was set to practically expire within five years.¹⁷ Congress extended the preclearance requirements in 1970, 1975, and 1982.¹⁸ All of the reauthorizations of the VRA tethered their extensions to election data from the relevant time period, but the 1982 Congress

11. See, e.g., Jocelyn Benson, *Preparing for 2007: Legal and Legislative Issues Surrounding Reauthorization of Section 5 of the Voting Rights Act*, 67 U. PITT. L. REV. 125 (2004) (discussing legislative and scholarly disputes in the run-up to section 5 reauthorization). Also see James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007) for an interesting retrospective on how the legislative sausage was made during the reauthorization process.

12. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(b), 5, 79 Stat. 437, 438–39.

13. *E.g.* *Shelby Cty. v. Holder*, 570 U.S. 529, 537 (2013).

14. Voting Rights Act of 1965, *supra* note 12, § 4(b).

15. H.R. REP. NO. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2444–45.

16. *Id.* Interestingly enough, although the original VRA makes no explicit reference to Native voters, one of the first covered counties was Apache County, Arizona, which is almost two-thirds tribal reservation lands of the Navajo Nation, Zuni Reservation, and White Mountain Apache Reservation. APACHE CTY. PLANNING & ZONING DEP'T, APACHE COUNTY COMPREHENSIVE PLAN 7 (2004). As of 2018 an estimated 74.9 % of the Apache County population is indigenous. *Quick Facts: Apache County, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/apachecountyarizona/RHI325218#RHI325218> (last visited June 1, 2020).

17. See § 4, 79 Stat. at 438–39. While the sunset provision in section 4 was not express, the function of the act itself would prevent further enforcement after five years had elapsed from the date of enactment. See *id.*

18. Voting Rights Acts Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 201, 89 Stat. 400, 400-01; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133.

departed from this trend and inserted an explicit sunset clause calling for expiration after twenty-five years without updating the formula.¹⁹

While it is impossible to know just what the 97th Congress was thinking in 1982 when it kicked the VRA reauthorization can down the road, it is not difficult to judge that when that can came tumbling into the 109th Congress it was filled with partisan dynamite. Historically speaking, the 109th Congress was one of the most bitterly divided congresses, so legislators understandably approached reauthorization of the VRA with caution.²⁰ Symbolically, Republican legislators who controlled the House did not want to be remembered for dismantling one of the most successful civil rights statutes of all time.²¹ Yet, division among Republicans, many of whom believed the strong voter protections of the VRA disproportionately benefited Democrats, threatened to derail the reauthorization process.²² Keeping with the partisan times, the issue of VRA reauthorization became a binary one: either reauthorize with few changes or let it expire.²³

With this partisan battle as a backdrop, Prof. Heather Gerken suggested a “third way” for VRA reauthorization.²⁴ Prof. Gerken’s suggestion, which she calls the “opt-in approach,” was designed to be a middle ground between letting section 5 expire and reauthorizing it without amendment.²⁵ Relying on well-established administrative law concepts, the goal of the opt-in approach is to create a nationwide regulatory apparatus that is not unduly burdensome to either the DOJ or state and local governments and put the power in the hands of minority communities to determine which laws are worth investigation.²⁶

The framework of the opt-in approach is relatively straightforward. First, it would require sunshine provisions for state and local election changes akin to notice and comment rulemaking under the Administrative Procedures Act (“APA”).²⁷ Covered jurisdictions²⁸ would need to publish proposed election changes and open them for comment for a set time period before they could become effective.²⁹ Minority groups could then use the comment process as a tool for

19. See § 2(b)(8), 96 Stat. 131, 133.

20. See Clio Andris et. al, *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS ONE 10(4) (2015), <https://doi.org/10.1371/journal.pone.0123507>; see generally Tucker, *supra* note 11.

21. See Benson, *supra* note 11, at 146–48 (discussing the symbolic issues bound up in the reauthorizations process).

22. Tucker, *supra* note 11, at 207; see also Peter Wallsten and Johanna Neuman, *Voting Rights Act Renewal Divides GOP*, L.A. TIMES (July 12, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-jul-12-na-voting12-story.html>.

23. See Gerken, *supra* note 10, at 709.

24. *Id.*

25. *Id.*

26. Heather Gerken, *Opting into the Voting Rights Act*, REUTERS (Jan. 30, 2013), <http://blogs.reuters.com/great-debate/2013/01/30/opting-into-the-voting-rights-act/>.

27. Gerken, *supra* note 10, at 717.

28. Since an opt-in approach would involve nationwide regulation, “covered jurisdiction” is a descriptive term that refers the types of governmental bodies covered (e.g. state and county governments) and not particular jurisdictions that satisfy a formula like the term is used in section 4 of the VRA.

29. Gerken, *supra* note 10, at 717; see also 5 U.S.C. § 553(d) (2018) (requiring agencies to publish notice of a proposed rule and accept comments on that rule no later than thirty days before its effective date).

negotiating with governmental bodies over the proposed election changes and suggesting reasonable alternatives.³⁰

However, unlike the APA, where notice and comment is sometimes cynically viewed as a record-building process instead of a meaningful search for public input,³¹ opt-in would give minority organizations a powerful tool to compel meaningful negotiations.³² Specifically, the second part of the opt-in approach would involve creating a mechanism for minority groups impacted by a proposed election change to invoke the investigation and enforcement powers of the DOJ under the VRA.³³ This could be a simple one-page civil rights complaint submitted to the DOJ by a representative of an impacted minority group after the negotiation process with state or local government breaks down.³⁴ Once submitted, the proposed change would be stayed pending DOJ review and the DOJ would be able to utilize the full range of remedies currently available to it under the VRA.³⁵ This approach would allow the DOJ to review proposed changes both large and small from redistricting plans to isolated changes to polling places or office closures.

Importantly, the third element of the opt-in approach would be a judicial review provision for DOJ decisions approving proposed changes, permitting minority groups to “police the policer[s].”³⁶ This provision would place the DOJ on the same footing as other agencies with respect to reviewability of their decisions in the VRA context, which would likely be increasingly important given how partisanship can infect DOJ enforcement of the VRA.³⁷

Finally, a statutory authorization of the opt-in approach could also give the DOJ the authority to promulgate regulations for “safe harbors.” Under a safe harbor regulation, the DOJ could outline certain procedures which, if maintained by state or local government with respect to proposed election changes, would give the covered jurisdiction a presumption of validity.³⁸ On the state-wide level, an example of a safe harbor could be an independent redistricting commission, use of which would entitle a state to a presumption of validity with respect to districting plans.³⁹ Similarly, states could set up independent commissions for any number of proposed election issues which the DOJ may recognize under a safe harbor regulation.

30. Gerken, *supra* note 10, at 717.

31. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) (“Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”).

32. Gerken, *supra* note 26.

33. Gerken, *supra* note 10, at 717.

34. *Id.* at 717–18.

35. *Id.* at 718.

36. *Id.*

37. *Id.*; see generally Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL’Y REV. 415 (2012).

38. Gerken, *supra* note 10, at 729.

39. *Id.* at 735–36.

The benefits of an opt-in approach are legion. For instance, the opt-in approach would benefit minority groups, state and local governments, and the DOJ in terms of cost and efficiency. After the Supreme Court's ruling in *Shelby County v. Holder*⁴⁰ eviscerated the VRA's preclearance regime, minority groups must now engage in expensive and time-consuming section 2 litigation to challenge discriminatory election changes.⁴¹ For large changes, like redistricting, such litigation is routine, but the logistics and expenses of section 2 litigation would likely be impracticable for small changes like moving polling places.⁴² Allowing for groups to opt-in to DOJ review of small changes with a one page complaint would save immeasurable amounts of time and money for minority groups seeking to protect their voting rights.

Similarly, an opt-in approach would benefit the DOJ because it would only need to review the election changes that minority groups themselves would like to challenge instead of having to look through a haystack of thousands of proposed changes to find a needle of discrimination.⁴³ Before *Shelby County*, the DOJ was reviewing between 14,000 and 20,000 proposed election changes per year.⁴⁴ Switching to an opt-in approach would likely dramatically decrease the amount of changes the DOJ needs to review and also allow it to only review changes that minority groups believe impact their interests.⁴⁵

Finally, a corollary of less DOJ review would be a benefit to state and local governments needing to wage fewer and less costly battles over proposed election changes. The goal of the opt-in approach is to avoid DOJ review by incentivizing state and local negotiation with minority communities.⁴⁶ Presumably not every proposed election change would be protested by minority groups, and some may avoid challenges through a successful negotiation process. As a result, only a fraction of proposed changes would need to be stayed and reviewed by the DOJ. Furthermore, the costs of defending against a section 2 challenge under the VRA can be immense for local governments.⁴⁷ It is routine for governments to spend in the six or seven figure range to defend against a section 2 claim, while the average cost to file the paperwork necessary for preclearance review before *Shelby County*

40. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013). *Shelby County* ruled that section 4 of the VRA was no longer constitutional because the formula-imposed burdens on jurisdictions that were not justified by data about "current needs." *Id.* at 550–51. While not explicitly ruling section 5 unconstitutional, the holding in *Shelby County* effectively rendered section 5 a ship without a sail.

41. See, e.g., Kiefer Cox, *The Voting Rights Act Under Review: Shelby County v. Holder and the Consequences of Change*, 60 WAYNE L. REV. 493, 509–10 (2014).

42. Shane Grannum, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After Shelby County v. Holder*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 95, 111–12 (2018); see also NAACP LDF, *COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION*, <https://perma.cc/6TPN-E7HH> (last visited June 1, 2020).

43. See Gerken, *supra* note 26.

44. *About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Dec. 4, 2017).

45. See Gerken, *supra* note 26.

46. *Id.*

47. See NAACP LDF, *supra* note 42.

was \$500.⁴⁸ Ultimately, given the state of VRA litigation in a post *Shelby County* world, an opt-in system would not only be a cost saving measure for minority groups and the DOJ, but also for covered jurisdictions.

Furthermore, an opt-in approach would satisfy the most pressing constitutional concerns raised in *Shelby County* while simultaneously preserving the robust and efficient minority voter protections under preclearance. A central concern of the *Shelby County* court was that section 4 of the VRA singled out specific jurisdictions for preclearance review.⁴⁹ Such a radical departure from the principle of equal state sovereignty would need to be “justified by current needs.”⁵⁰ Yet, since the coverage formula in section 4 of the VRA had not been updated since the 1970s, it no longer justified the current burdens of preclearance.⁵¹

Opt-in, however, avoids the Court’s constitutional concerns in *Shelby County* two ways. First, the opt-in approach would apply a nationwide regulatory scheme,⁵² alleviating constitutional concerns that targeted preclearance violates principles of equal sovereignty between the states. Second, the opt-in approach does not hang an albatross around the neck of covered jurisdictions for their past discrimination. Instead, opt-in is focused on present bad actors, satisfying the Court’s current burdens/current needs paradigm. Quite literally, the current burden of preclearance under an opt-in approach would be based exclusively on the current needs of minority groups in the jurisdiction.

Despite its numerous advantages, the opt-in approach also has significant flaws. For example, the greatest weakness of the approach is determining which organizations or people can speak for minority communities impacted by a proposed election change. Although the simplicity and the advantages of the opt-in approach are compelling, the practical reality of choosing which group or groups get to have a voice in the process is messy at best.⁵³ Scholars like Jason Rathod have critiqued Prof. Gerken’s opt-in approach because it could result in “a troubling entrenchment” of racial balkanization as well as ceding “incredible bargaining power” to unaccountable members of civil rights organizations.⁵⁴ One of the most troubling aspects of the opt-in system as proposed by Prof. Gerken is the state

48. NAACP LDF, *supra* note 42. For instance, in Georgia the Fayette County Board of Commissioners and Board of Education spent \$1.11 million defending the county’s at-large voting system from a section 2 challenge, in South Carolina Charleston County spent \$2 million defending against a section 2 claim, and in Washington the city of Yakima spent almost \$3 million in defense and attorney’s fees associated with a section 2 challenge. *Id.* This is not to mention the enormous costs in time and money spent litigating state-wide election changes like redistricting and voter ID laws.

49. *Shelby Cty. v. Holder*, 570 U.S. 529, 542 (2013).

50. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)) (internal quotation marks omitted).

51. *Id.* at 557.

52. Gerken, *supra* note 26.

53. See Gerken, *supra* note 10, at 741–42.

54. Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 139, 212–13 (2011).

authorization of “select individuals acting as though they speak for the ‘African-American’ or ‘Latino-American’ community.”⁵⁵ Finally, although the intent of the opt-in approach is to foster more collaboration between covered jurisdictions and minority groups, using the DOJ as a “Sword of Damocles” is an unlikely way to reduce animosity or resentment from local election officials.⁵⁶

In sum, opt-in can be an enticing approach to all impacted parties. Adopting opt-in would preserve federal resources, keep in place strong protections for minority voters, incentivize community representation, and save resources in covered jurisdictions. However, the approach has significant concerns, especially with issues of minority representation. In the following section, this paper argues that adopting the opt-in approach for tribal governments would best address the most prevalent forms of voter discrimination facing tribal members, preserve the advantages of the opt-in system, and evade the serious representational concerns of opt-in.

III. OPT-IN FOR TRIBAL GOVERNMENTS

Indian Country is no stranger to voter suppression, discrimination, and disenfranchisement. Well into the twentieth century, many states, including Idaho, expressly disenfranchised Native voters through statutory and constitutional provisions.⁵⁷ Utah, the last jurisdiction in the country to expressly disenfranchise Native voters, did not allow Native suffrage until 1957, and only under pressure from an impending Supreme Court case.⁵⁸ Long after formal disenfranchisement ended, however, state and local governments around the country continue to suppress the Native vote in a variety of ways.⁵⁹

While tribal communities frequently get bound up in high-profile election issues like redistricting,⁶⁰ state and local governments often suppress Native voters with smaller more insidious changes that target the rural and remote nature of many reservations. For instance, state and local laws have suppressed Native voters

55. *Id.* at 212.

56. *Id.* at 213.

57. Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CTR. FOR JUST. (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights>.

58. *Allen v. Merrell*, 353 U.S. 932 (1957) (vacating as moot a challenge to Utah’s statute which denied Native Americans living on reservations the right to vote because the Utah legislature removed the restriction).

59. See *Case Studies*, FOUR DIRECTIONS, <http://www.fourdirectionsvote.com/case-studies/> (last visited Apr. 15, 2020), for examples of recent efforts to restrict tribal members voting and advocacy efforts aimed at stopping Native voter suppression.

60. See, e.g., *Hellar v. Cenarussa*, 664 P.2d 765, 766, 104 Idaho 858, 859 (1983) (challenging, among other things, an Idaho state redistricting plan that split the Coeur d’Alene Reservation into four separate districts); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270 (10th Cir. 2019) (challenging a Utah plan for county commissioner and school board districts which packed Native voters predominately into one district); *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (challenging a South Dakota state legislative redistricting plan that packed Native voters into two districts); *Frank v. Forest Cty.*, 336 F.3d 570 (7th Cir. 2003) (challenging a Wisconsin county’s redistricting plan for county commissioner districts because its districts deviated in population up to 18%, disadvantaging Native voters).

through the refusal to open satellite election offices,⁶¹ closing polling places on reservations,⁶² and requiring residential addresses for voter identification.⁶³ In response to this crisis in Native voter suppression, this paper argues that the VRA should be amended to grant federally recognized tribes the right to opt-in to DOJ review of proposed election changes in their jurisdiction that impact tribal members. Adopting an opt-in approach for tribal governments would be a sound choice because it would avoid the representational pitfalls of a generalized opt-in,⁶⁴ be consistent with the federal government's trust responsibility, and advance the national policy of tribal self-determination.

- A. Tribal governments are sovereign entities, accountable to their members, and capable of representing tribal interests in an opt-in system.

As noted above, one of the most powerful critiques of the opt-in approach is the difficulty, both logistically and philosophically, of determining which groups are capable of speaking for minority interests.⁶⁵ Under a generalist opt-in approach, either Congress or the DOJ would be in the unenviable and untenable position of picking and choosing which minority groups would have the authority to file a civil rights complaint under the statute. Or, if any group could file a complaint under an opt-in approach, the DOJ may also find itself in the tricky position of having to sort out contradictory or conflicting complaints filed by separate organizations purporting to represent the same minority group. This is a troubling scenario because it would place the DOJ in the position of deciding which groups get political power rather than merely judging the electoral process itself.⁶⁶ Indeed, as mentioned above, vesting discretion in the DOJ to pick and choose which groups are given greater weight in the complaint process under an opt-in approach is also concerning because the partisan lean of a particular administration could have profound effects on how the DOJ exercises this discretion from election cycle to election cycle.⁶⁷

61. *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012) (failed to open satellite offices forced Tribal members to drive more than 100 miles to cast early ballots or register to vote late).

62. *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136 (D. Utah 2017) (county switched to a mail-in only ballot system, closing every county polling place on the Navajo Nation).

63. *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (change in state law requiring a residential address on qualifying ID disqualified thousands of Tribal members from voting where Tribal members used P.O. boxes).

64. See *supra* notes 53–56 and accompanying text.

65. See *supra* text accompanying notes 45–48.

66. See Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213, 1226 (2007) (discussing the Supreme Court's reticence to quantify the amount of political power groups are entitled to).

67. See *supra* note 34 and accompanying text.

Adopting the opt-in approach for tribal governments, however, avoids the most glaring concerns about representational legitimacy and DOJ discretion raised above. To begin with, tribes are self-governing entities with the sovereign authority to represent their members that does not derive from any state or federal law.⁶⁸ Instead, tribal governments derive their representational authority from their membership, which chooses the tribal government.⁶⁹ Giving opt-in authority to tribal governments would avoid top-down DOJ control over which groups have the authority to represent minority voting interests. Further, since tribal governments are elected bodies, they are accountable to their membership,⁷⁰ avoiding the concern of having an organization advocate for positions that are at odds with the interest group it ostensibly represents.

Finally, while some critics of the opt-in approach question whether the approach would legitimize and entrench divisive racial politics, opt-in for tribes avoids this pitfall because tribes are “distinct, independent political communities.”⁷¹ Indeed, the Supreme Court has rejected challenges to tribal preference statutes on the basis of invidious racial discrimination because such statutes are not racially preferential and are instead designed to further tribal self-government.⁷² Accordingly, adopting an opt-in approach for tribal governments, while not devoid of potential conflict, is more about the sovereignty of the tribes than it is about entrenching racial politics.⁷³

Amending the VRA to allow tribal governments to opt-in to DOJ review of proposed election changes has the practical benefits of keeping the upside of the opt-in approach as proposed without the downsides. This is not the end of the analysis, though, as tribal opt-in is not only internally consistent with the goals of opt-in, but externally consistent with the federal government’s trust responsibilities and policy of tribal self-determination.

68. *E.g.* *Montana v. United States*, 450 U.S. 544, 564–65 (1981).

69. *Tribal Constitutions and Voting*, YOUR VOTE YOUR VOICE, <https://www.yourvoteyourvoicemn.org/present/communities/american-indians-present/tribal-governance-and-voting/tribal-constitutions-and>, (last visited June 1, 2020). This is not to say that tribal governments are perfect advocates for the interests of every tribal member. Like any community, tribal members represent diverse and complex ideological perspectives, which may or not be in accord with the policy positions taken by tribal governments. A full discussion on the diversity of democratic representation in tribal governments is outside the scope of this paper.

70. *See, e.g., Tribal Governance*, NAT’L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance> (last visited Mar. 4, 2020).

71. *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

72. *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

73. This is only to say that the roots of an opt-in amendment to the VRA for tribal governments would be primarily aimed at affirming tribal inherent sovereignty, not that non-Native people would gain sudden clarity and stop racializing people with indigenous identity in the face of such an amendment. For an informative read on the subject see Hilary N. Weaver, *Indigenous Identity: What Is It and Who Really Has It?*, 25 AM. INDIAN Q. 240 (2001).

B. Opt-in would be consistent with the federal trust responsibility because it defends tribal interests and rights against state and local intrusion

At its core, the federal trust responsibility is an aspirational concept that the federal government must act in the best interests of the tribes, including acting to protect tribal property, sovereignty, and political rights.⁷⁴ The trust responsibility has grown, in part, out of the historical mistreatment of the tribes by state and federal government.⁷⁵ The federal government's special duty of protection under the trust responsibility extends both to federal interactions with the tribes and to federal protection of the tribes from state interference.⁷⁶ Indeed, in this context the Supreme Court has noted that tribes "owe no allegiance to the states, and receive from them no protection[, b]ecause of local ill feeling, the people of the states . . . are often [the tribes'] deadliest enemies."⁷⁷

While the Supreme Court has historically used the trust responsibility to justify expansive and paternalistic federal authority over tribes, modern articulations of the trust responsibility have shifted (at least rhetorically) towards a conception of the trust responsibility as a fiduciary responsibility.⁷⁸

In this light, adopting opt-in for tribal governments would be entirely consistent with the federal government's trust responsibility as it is currently conceived. Presently, many state laws and election policies threaten Native voting rights.⁷⁹ Opt-in would give tribal governments a powerful bargaining chip in negotiation processes and, in the event negotiations fail, literally give the federal government the ability to defend tribal members' political rights from state deprivations.

In addition, to the extent the opt-in approach borrows agency law concepts for its structure, opt-in for tribal governments would parallel extant agency law

74. See *Worcester*, 31 U.S. at 552 (speaking about the Cherokee's retention of internal sovereignty Chief Justice Marshall said, "The Cherokees acknowledge themselves to be under the protection of the United States . . . [but] protection does not imply the destruction of the protected"); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (noting that the "Indian tribes are wards of the nation. They are communities dependent on the United States . . . for their political rights.").

75. See *Kagama*, 118 U.S. at 384.

76. *Id.*

77. *Id.* However, the "deadliest enemies" model of state-tribal relations has waned over time as states and tribal governments are increasingly interacting on a government-to-government basis that mirrors that of the federal relationship with tribes. Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

78. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3) (Nell Jessup Newton ed., 2017) [hereinafter COHEN'S HANDBOOK]. For an in-depth discussion on the evolution of the trust responsibility see Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, "We Need Protection from Our Protectors": *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397 (2017).

79. See *supra* notes 1–9, 49–55 and accompanying text.

mandating tribal consultations that is deeply rooted in the trust responsibility.⁸⁰ A host of statutes and executive orders already require consultation with federally recognized tribes for agency action that may impact tribal rights or interests.⁸¹ Thus, adopting the opt-in approach would not be an unprecedented leap, rather it would be a small step to extend existing consultation and trust principles (although this time with teeth) to the election law field.

While the trust responsibility informs how the federal government must act with respect to tribes, the national policy of tribal self-determination informs how the federal government facilitates and respects tribal actions. This policy, which values the increasing exercise of sovereign authority by the tribes, is likewise consistent with amending the VRA to allow tribal government opt-in.

C. Opt-in is consistent with the national policy of tribal self-determination because it gives power to community interests and knowledge while simultaneously providing federal backing to tribal negotiation efforts

The current national policy towards Indian affairs is one of tribal self-determination, which is aimed at facilitating tribal exercise of inherent sovereignty.⁸² Coinciding with the civil rights movement, the national policy of self-determination was precipitated by the resistance efforts of tribal communities to what was then the federal policy of terminating tribal recognition.⁸³ By the late 1960s and into the early 1970s both President Johnson and President Nixon articulated a national policy position that would increasingly allow for tribal control over tribal affairs with limited federal intervention.⁸⁴ The policy is encapsulated by President Nixon's statement that self-determination means "that Indians can become independent of Federal control without being cut off from Federal concern and Federal support."⁸⁵

In accordance with this policy, both Congress and the Executive began to act to effectuate greater tribal control over federal programs on reservation as well as

80. See, e.g., Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) ("The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship . . . executive departments and agencies . . . are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.").

81. See generally White House–Indian Affairs Exec. Working Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance (2009), <https://projects.ecr.gov/mrbir/pdfs/List%20of%20Fed%20Tribal%20Consultation%20Statutes%20Orders%20Regs%20Rules.pdf>.

82. COHEN'S HANDBOOK, *supra* note 78, § 1.07.

83. See, e.g., *Mission and History*, NAT'L CONGRESS AM. INDIANS, <http://www.ncai.org/about-ncai/mission-history> (last visited Feb. 26, 2020); see also Duane Champagne, *Self-Determination and Activism Among American Indians in the United States 1972-1997*, CULTURAL SURVIVAL (June 1997), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/self-determination-and-activism-among-american-indians>.

84. See President Lyndon B. Johnson, Special Message to Congress on the Problems of the American Indian: "The Forgotten American," 1 Pub. Papers 335 (Mar. 6, 1968); President Richard M. Nixon, Special Message to Congress on Indian Affairs, Pub. Papers 564 (July 8, 1970).

85. Nixon, *supra* note 844, at 566–67.

greater tribal input into activities off reservation that impacted tribal interests or rights.⁸⁶ The growing strength of tribal self-determination and tribal governments was accompanied by a familiar backlash from states and nonnative communities near reservation boundaries.⁸⁷ Court battles and actual physical violence typified state and local responses to the increased role of tribal governments.⁸⁸ However, in time, some states and local governments have increasingly recognized tribal sovereignty and are willing, at least on paper, to engage in government-to-government relationships with tribes.⁸⁹

All this is to say that tribal opt-in would fit nicely into the current paradigm. As Prof. Gerken notes, the opt-in approach “privilege[s] local knowledge and community involvement” instead of treating minority communities as “passive wards of the DOJ” with respect to VRA enforcement.⁹⁰ This goes hand in hand with the national policy of tribal self-determination which explicitly promotes tribal solutions to tribal problems with federal backing.⁹¹ Opt-in would place a powerful bargaining chip in the hands of tribal governments, allowing them to negotiate for the plan that best represents tribal interests. However, if the process breaks down and the state insists on ignoring tribal input and concerns, then the federal government, through the DOJ, can step in to support the tribe through preclearance review.⁹² Finally, tribal-state negotiations and agreements are not a foreign concept, so an opt-in approach is not breaking any new ground in terms of how tribes are able to relate to state governments. In short, opt-in would bolster tribal negotiations with state governments, while simultaneously providing for a federal back-stop should negotiations break down.

IV. CONCLUSION

Native voter suppression is a pressing and often overlooked issue. Historically, many state governments prohibited Native suffrage outright, and in the present-day states and local governments continue to target tribal communities for voter suppression efforts. Often these discriminatory policies are small changes that exploit the remote and rural nature of many reservations. In a post-Shelby County world without effective section 5 preclearance requirements, many of these changes evade challenge because of the time and expense of litigation under section 2 of the VRA.

86. See generally COHEN'S HANDBOOK, *supra* note 78, § 1.07 (collecting statutes and executive orders promulgated pursuant to the national policy of tribal self-determination).

87. Tassie Hanna, Sam Deloria & Charles E. Trimble, The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship, 47 TULSA L. REV. 553, 568–71 (2012).

88. *Id.*

89. See Fletcher, *supra* note 777, at 74.

90. Gerken, *supra* note 10, at 727.

91. Nixon, *supra* note 84, at 566–67.

92. See *supra* notes 31–35 and accompanying text.

In light of this current predicament, adopting VRA opt-in for tribal governments would be the right choice. Opt-in is a community-first approach to voting right enforcement, placing power in the hands of the tribes to negotiate for their policies of choice while still retaining the benefits of federal preclearance review. Consistent with both the trust responsibility and the national policy of self-determination, opt-in is not only a practical method of voting rights enforcement, but also a sound choice as a matter of national values. At the end of the day, it is fitting that under the opt-in approach the battle to halt Native voter suppression would begin with the strengthening of tribal sovereignty.