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"ONE PERSON, ONE VOTE": NAVAJO NATION V. SAN JUAN COUNTY AND VOTER SUPPRESSION OF NATIVE AMERICANS

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"ONE PERSON, ONE VOTE": *NAVAJO NATION V. SAN JUAN COUNTY* AND VOTER SUPPRESSION OF NATIVE AMERICANS

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I. INTRODUCTION

In an 1871 cartoon for Harper's Weekly, Theodore Nast caricatured the failure of the United States to enfranchise Native Americans.[2] Titled "Move on!" and captioned "Has the Native American no rights that the naturalized American is bound to respect?," the cartoon depicts a policeman ordering a Native American man to "move on" away from a voting booth while stereotypical naturalized Americans participate in an election.[3] Nast's critique largely fell on deaf ears, and tribal citizens would not even be considered American citizens for another fifty years.

In June 1924, Congress granted American citizenship to tribal members who were born in the United States.[4] Thus, ever since, American Indians have been entitled to the full enjoyment of constitutional rights and privileges—not least among them the right to vote and participate in the democratic process. After the passage of the federal law, it still took over fifty years for all of the states to comply with the law.[5] Mr. Henry Mitchell, a tribal member, and resident of Maine spoke about the disenfranchisement of Indians in the late 1930s:

> "...[T]he Indians aren't allowed to have a voice in state affairs because they aren't voters. .... Just why the Indians shouldn't vote is something I can't understand. One of the Indians went over to Old Town once to see some official in the city hall about voting. I don't know just what position that official had over there, but he said to the Indian, 'We don't want you people over here. You have your own elections over on the island, and if you want to vote, go over there.'"[6]

Even in states where Indians were legally enfranchised, tribal members faced practical challenges to voting through the obstacles of poll taxes, literacy tests, and outright fraud and intimidation.[7]

In 1965, Congress extended protections to Native Americans when it enacted the landmark Voting Rights Act (hereinafter "VRA"), which prohibits racial discrimination in the voting booth.[8]

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[2] 

Theodore Nast, *Move On!*, HARPER'S WEEKLY, (April 22, 1871).

[3] *Id.*

[4] Snyder Act of 1924, Pub. L. No. 68-175, 43 Stat. 253.

[5] *See Voting Rights for Native Americans*, LIBRARY OF CONGRESS, (last visited February 12, 2020), https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/voting-rights-native-americans.html [https://perma.cc/H4NZ-N5RS].

[6] *Id.*

[7] *Id.*

[8] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

Specifically, for this note, section 2 of the VRA applies to local and state governments and prohibits them from imposing any voting law that results in racial discrimination.[9] The VRA has been amended several times in its history, and in 1982, Congress removed the plaintiff burden of showing discriminatory intent.[10]

Native American voting rights are also strengthened by the Equal Protection Clause of the Fourteenth Amendment.[11] The Supreme Court has interpreted this clause to mean that every citizen's vote is afforded equal weight in its representation,[12] and it has held that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—*one person, one vote.*"[13]

Part II of this note explores the extent to which the VRA protects Native American tribes by analyzing a recent Tenth Circuit case, *Navajo Nation v. San Juan County*.[14] In that case, the court was asked to apply both the Equal Protection Clause of the Fourteenth Amendment and section 2 of the VRA to determine whether or not a Utah county's school board districts and county commissioner districts were unconstitutionally violating the rights of tribal citizens.[15]

Part III of this Note looks at voter suppression of Native Americans broadly, and it posits how the ruling and analysis of *Navajo Nation* can be used in other voter suppression cases to effectively neutralize efforts to keep tribal members from the polling booth. This part will discuss recent cases in North Dakota and explain why the state actions of North Dakota are analogous to the county actions of San Juan.

II. *NAVAJO NATION V. SAN JUAN COUNTY* PROVIDES A FRAMEWORK FOR ANALYZING CLAIMS OF RACIAL GERRYMANDERING AND VOTER SUPPRESSION OF NATIVE AMERICANS

Shortly after San Juan County redistricted its County Commissioner lines in 2011, the Navajo Nation and individual tribal members sued the county on four voting-related claims.[16] Those claims were that the County Commissioner districts and the school board districts each violated the Equal Protection Clause of the Fourteenth Amendment and section 2 of the VRA. After lengthy litigation, the district court ruled in favor of the Nation and was affirmed "in all respects" by the Tenth Circuit.[17]

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[9] *Id.*
[10] *See Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1166 (D. Utah February 19, 2016).
[11] U.S. CONST., amend. XIV, § 1 (stating ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*") (emphasis added).
[12] *See Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1261 (D. Utah December 9, 2015).
[13] *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 558 (1963)) (emphasis added).
[14] *See Navajo Nation v. San Juan Cty.*, 929 F.3d 1270 (10th Cir. 2019).
[15] *Id.*
[16] *See Navajo Nation v. San Juan Cty.*, 150 F. Supp. 1253, 1258 (D. Utah December 9, 2015).
[17] *Navajo Nation*, 929 F.3d at 1294. Because the District Court determined that the school board district lines violated the Equal Protection clause, it did not reach the merits of the Navajo Nation's VRA claim. Additionally, the Navajo Nation limited its motion for summary judgment regarding the County Commissioner districts to the

A. Historical Context of the Navajo Nation Litigation

San Juan is the largest county by area in the state of Utah and is located in the southeastern portion of the state.[18] Fifty-two percent of the county population is Native American, and the vast majority of Native American residents live in the southern part of the county on the Navajo Nation Reservation.[19] On the flip side, the vast majority of whites in the county reside in the northern part of San Juan County.[20]

The county is governed by a three-member county commission, and historically, commissioners were elected in an at-large election.[21] But, there were problems with this election method, and, as the district court observed, "[t]he county . . . seemed never to elect Native American representatives."[22] In 1983, the United States Department of Justice intervened and sued San Juan County for denying Native American citizens "an equal opportunity to participate in the county political process and to elect candidates of their choice to the San Juan County Board of Commissioners."[23] The DOJ brought its suit under the amended section 2 of the VRA, which "prohibits legislation that results in the dilution of a minority group's voting strength, regardless of the legislature's intent."[24] As discussed above, the amended section 2 lowered the plaintiff's burden from showing discriminatory intent to merely showing that the challenged action resulted in racial discrimination. This, in turn, "spawned a torrent of litigation that has dramatically reshaped the American electoral landscape."[25] In this regard, the DOJ litigation against San Juan County was not unique and in line with the time period.[26]

The DOJ also pursued claims against San Juan County under the Fourteenth and Fifteenth Amendments and argued that at-large voting "impaired the ability of a Native American minority population to elect representatives of their choosing."[27] The DOJ's goal in litigating was "to compel the county to move away from at-large voting and toward the establishment of single-member districts—the classic § 2 remedy."[28]

Ultimately, the DOJ and San Juan County settled, and the court entered a consent decree and an agreed settlement and order.[29] These documents stated that the county would move from an at-large system to single-member districts and that the redistricting plans could involve either

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Equal Protection Clause, and thus, the District Court did not reach a decision on the merits of the Navajo Nation's VRA claim.

[18] *See id.* at 1274.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Navajo Nation*, 162 F. Supp. 3d at 1166.

[23] *Id.*

[24] *Id.*

[25] *Id.* (quoting from SAMUEL ISAACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 758 (4th ed. 2012)).

[26] *Id.*

[27] *Navajo Nation*, 162 F. Supp. 3d at 1166.

[28] *Id.*

[29] *Id.* at 1167.

three or five single-member county commissioner districts, but they were silent as to the boundaries of the districts and did not establish any districts.[30]

On November 6, 1984, San Juan County voters approved a single-member plan with three election districts, and later that month, the incumbent county commissioners approved the plan.[31]

The Navajo Indian Reservation was used as a boundary line for Districts 2 and 3, and Native Americans comprised 88.77 percent of the population in District 3.[32] The court stated that "[t]he Department of Justice appears to have received and approved the districting plan."[33] In 1986, the new districts were used for elections, and District 3 elected the first Native American San Juan County Commissioner.[34] Districts 1 and 2 elected white commissioners.[35] Since that time, an equilibrium was established where "District 3 invariably returned a native American commissioner, and Districts 1 and 2 invariably returned a white commissioner."[36] Federal monitors were involved in county elections as recently as 2002 to address "longstanding concerns about ballot access and election administration."[37]

San Juan County did not redistrict after the 1990 census, the 2000 census, or initially after the 2010 census, even though redistricting after a decennial census is a default expectation.[38] But the county did redistrict in 2011 when it was worried about malapportionment in Districts 1 and 2.[39] Yet, during this redistricting process, the county refused to change any boundaries for District 3 because they believed that only a judge could change District 3 lines under the consent decree.[40]

After moving two voting precincts from District 1 to District 2, San Juan County otherwise left the boundaries of those districts intact and made no changes whatsoever to District 3.[41] The redrawn 2011 election districts are the subject of the Navajo Nation litigation.[42]

The Navajo Nation also brought Equal Protection and Section 2 claims against San Juan County regarding school board election boundary lines.[43] Utah law stipulates that San Juan County must have a five person board of education,[44] that board members must be registered voters who reside and have resided in the district they represent for at least one year,[45] that counties "divide the school district so that the local school board districts are substantially equal in population and

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[30] *Id.*
[31] *Id.*
[32] *Navajo Nation*, 162 F. Supp. 3d at 1168.
[33] *Id.* The Navajo Nation disputes this for lacking evidentiary foundation but the court determined that DOJ approval was a reasonable inference drawn from the record.
[34] *Id.*
[35] *Id.* at 1169.
[36] *Id.* at 1168–69.
[37] *Navajo Nation*, 162 F. Supp. 3d at 1169.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1170.
[41] *Id.* at 1171.
[42] *Navajo Nation*, 162 F. Supp. 3d at 1169.
[43] *See Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1256 (D. Utah December 9, 2015).
[44] *Id.* at 1257; Utah Code Ann. § 20A-14-202(1)(a), (h).
[45] *Id.*; Utah Code Ann. § 20A-14-202(2)-(3).

are as contiguous and compact as practicable,"[46] and that those boundaries must be reapportioned at least once every ten years.[47] San Juan County established the districts in 1992 and had never redrawn them.[48]

B. The County Commissioner District Lines Violated the Equal Protection Clause because San Juan County's Districting Decisions Concerning District Three Were Racially-Based and could not Withstand Strict Scrutiny

Before the district court determined that San Juan County's actions did not withstand strict scrutiny, the court first clarified the type of claim the Navajo Nation was asserting and determined the appropriate level of scrutiny to be applied to the county's districting decisions.

There are two types of Equal Protection challenges: a claim of vote dilution or a traditional Equal Protection claim.[49] Today, the most common type of vote dilution claim is a challenge to election districts involving the principle of one-person, one-vote.[50] A related claim is a challenge to at-large or multimember districts where the "potential impairment of minority voting strength could rise to the level of a constitutional injury" by showing discriminatory purpose.[51] With the advent of the section 2 amendment to the VRA removing the necessity of showing discriminatory intent, this type of voter dilution claim has become significantly less common—though still cognizable.[52]

A traditional Equal Protection claim is much more straightforward and is applied in "a wide variety of non-voting contexts."[53] To prevail, a plaintiff must show that the challenged action is based on race, and that the challenged action cannot withstand strict scrutiny.[54] This is the exact type of claim that the Navajo Nation brought; "[s]pecifically, [the] Navajo Nation argues that District 3 is drawn based on a racial classification."[55]

San Juan County essentially conceded that District 3 was drawn based on a racial classification, but it argued that it had no other choice but to do so under the 1984 Consent Agreement.[56] In the briefing, the county argued that "to now characterize this remedial purpose by virtue of which a Navajo commissioner has been elected in each succeeding election as 'racial discrimination' would expose virtually every remedial plan implemented pursuant to the Constitution or the Voting Rights Act subject to attack as 'racial discrimination."[57] Their argument is essentially that because we used to keep Navajo voters from having *any* say in elections, and now we give them *some* say in elections, then we should not be susceptible to constitutional

[46] *Id.*; Utah Code Ann. § 20A-14-201(1)(b).
[47] *Id.*; Utah Code Ann. § 20A-14-201(2)(a)(i).
[48] *Navajo Nation*, 150 F. Supp. 3d at 1257.
[49] *Navajo Nation*, 162 F. Supp. 3d at 1172.
[50] *Id.*
[51] *Id.* at 1173.
[52] *Id.*
[53] *Id.*
[54] *Navajo Nation*, 162 F. Supp. 3d at 1173.
[55] *Id.*
[56] *Id.* at 1174.
[57] *Id.*

challenges. The district court stated that San Juan County had "ignored controlling case law," and that "[t]he county's obligations to address vote dilution do not permit it to disregard other constitutional considerations unrelated to vote dilution."[58]

The district court next determined what level of scrutiny was applicable in reviewing San Juan County's districting decisions. While-"a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect" regardless of whether the "reason for racial classification is benign or . . . remedial,"[59] in order to apply strict scrutiny a plaintiff must "prove the race-based motive" of the state actor.[60]

Thus, the court looked at the record to determine whether the Navajo Nation had met its burden that race "was the dominant and controlling consideration."[61] The Supreme Court has held that plaintiffs may prove their case through either circumstantial evidence or direct evidence of legislative purpose.[62] For the district court, this was a fairly easy decision because San Juan County admitted that "District 3 was intentionally created by the commission to have a heavy concentration of American Indians."[63] The court did not stop though with direct evidence; it also reviewed circumstantial demographic evidence, and it determined that by drawing District 3 to include around three-fifths of the Native American population of San Juan County, and its composition of over ninety percent Native American, "that the county realized its goal of concentrating Native American voters."[64] But the court did not automatically determine at this point that San Juan County's districting decisions should be analyzed with strict scrutiny. Instead, it gave the county an opportunity to show that its districting decisions were controlled using traditional districting criteria.[65] However, the county never made any argument that its decisions were traditional—instead, it argued that its districting decisions were a result of complying with the Consent Decree and Settlement and Order.[66] The county did make a showing that "concerns of contiguity may have affected the drawing of the districts," but according to the court, "strict scrutiny still applies even where traditional districting criteria were not entirely neglected if those criteria nonetheless were subordinated to race."[67] Such traditional districting criteria include compactness, contiguity, and respect for political subdivisions.[68] Here, where the clear intent was to draw District 3 in a way to concentrate Native American voters, traditional districting criteria were subordinated to race, and thus, the court determined that it must analyze the county's districting decisions through the lenses of strict scrutiny.[69]

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[58] *Id.*
[59] *Navajo Nation*, 162 F. Supp. 3d at 1174 (quoting *Shaw v. Hunt*, 517 U.S. 899, 904 (1996)).
[60] *Id.* at 1175 (quoting *Shaw*, 517 U.S. at 905).
[61] *Id.* (quoting *Shaw*, 517 U.S. at 904–05).
[62] *Id.*
[63] *Navajo Nation*, 162 F. Supp. 3d at 1175.
[64] *Id.*
[65] *Id.* at 1176.
[66] *Id.*
[67] *Id.* at 1176–77.
[68] *See Shaw v. Reno*, 509 US 630, 647 (1993).
[69] *Navajo Nation*, 162 F. Supp. 3d at 1177.

For a challenged action to withstand strict scrutiny, the challenged action must be "in pursuit of a compelling government interest" and the challenged action must be "narrowly tailored to achieve that compelling interest."[70] San Juan County only presented one possible interest in support of its districting decisions—that it was bound by the 1983 Consent Decree and Settlement and Order.[71]

Before making a determination as to whether compliance with the 1983 Consent Decree was a sufficiently compelling governmental interest, the court clarified its role and its jurisdiction as it related to the decree.[72] The court noted 1) that the 1983 Consent Decree and Settlement and Order had the weight of a final judgment and 2) that the court which had jurisdiction over those documents still had jurisdiction over disputes arising under the terms.[73] However, the district court continued its analysis because it determined that the nature of the present litigation—the Equal Protection Challenge—did not fall under the purview of the earlier litigation.[74]

The district court next determined whether, as a threshold matter, compliance with a consent decree or a court order could ever be considered a compelling interest.[75] The court noted that "the Supreme Court has expressed serious concerns about recognizing the Department of Justice's determinations as binding on judicial constitutional analysis."[76] In *Miller,* the Supreme Court recognized that such a finding would subordinate the Judicial Branch to the Executive Branch "in enforcing the constitutional limits on race-based official action."[77]

The court also explained that in *Miller,* the Supreme Court refused to accept compliance with the Department of Justice's preclearance mandates—which had much stricter requirements for the parties involved than the 1983 Consent Decree and Settlement and Order—and that it was doubtful that compliance with a consent decree from the same department would categorically be given more deference.[78] Nevertheless, the district court observed that in some cases compliance with a consent decree could constitute a compelling state interest.[79] However, it determined that the compelling state interest must be evident on the face of the documents rather than simply based upon the county's subjective belief that it could not redistrict under the decree.[80]

Satisfied that compliance could be a compelling state interest in some situations, the district court next analyzed the documents and determined that neither the Consent Decree, nor the Settlement and Order contained unambiguous language supporting the county's contention.[81] In making this determination, the court used principles of contract interpretation, and it looked to the

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[70] *Id.*
[71] *Id.*
[72] *Id.* at 1178–79.
[73] *Id.*
[74] *Id.* at 1166.
[75] *Id.* at 1177.
[76] *Id.* at 1179.
[77] *Id.* (quoting *Miller v. Johnson,* 515 U.S. 900, 922 (1995)).
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1179-80.
[81] *Id.* at 1180.

"four corners" of the documents for ambiguity.[82] Finding none, the court looked to the "plain meaning" of the language contained in the documents for any evidence supporting the county's contentions.[83]

The court presented two primary reasons why the language of the documents did not provide a compelling governmental interest for the county to violate the VRA. First, it noted that the documents did not establish district lines, and instead were mere procedural vehicles for the transition from an at-large system to single-member election districts.[84] Second, the documents did not propose or fix existing districts because the districts did not exist at the time, and the documents contemplated the possibility that districts may have never been adopted.[85] Because the county's subjectively held belief was not supported by the documents, the court held that compliance with the 1983 Consent Decree and Settlement and Order was not a compelling governmental interest.[86]

The court concluded by holding: 1) that the Navajo Nation demonstrates that the boundaries of District Three were race-based; 2) that the county did not have a compelling governmental interest in such a race-based boundary line; and 3) that District Three violated the Equal Protection Clause and must be redrawn.[87]

C. The San Juan County Board of Education District Lines Violated the Equal Protection Clause because the Navajo Nation Established a Prima Facie Violation and San Juan County did not Show that the Unequal Distribution Served Legitimate Governmental Interests

The Navajo Nation also pursued claims that the county's school board districts were racially gerrymandered.[88] In addition to claims of racial discrimination, the Navajo Nation also alleged a violation of the Equal Protection Clause's guarantee of "one-person, one-vote" as a result of the unequal distribution of population in the school board election districts.[89] The district court reached the merits of the Equal Protection argument, and it noted that the claim stood out from the other racial discrimination allegation because the one-person, one-vote rule is not directly related to the racial composition of election districts.[90] Nevertheless, one-person, one-vote claims "bear the unmistakable historical imprint of struggles to secure voting rights for racial minorities" and "are not blind to the issue of race."[91]

"The Equal Protection Clause requires that election districts afford voters equal weight in their representation,"[92] and it is uncontroversial that "citizens have a fundamental right to vote for

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1181.
[86] *Id.*
[87] *Id.*
[88] *Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1256 (D. Utah December 9, 2015).
[89] *Id.*
[90] *Id.* at 1258.
[91] *Id.*
[92] *Id.* at 1261.

public officials on equal terms with one another."[93] The one-person, one-vote principle "is comprehensive, extending beyond statewide legislative bodies to county and municipal offices, and even to smaller entities such as school boards and college trustees."[94]

In addition, while the Equal Protection Clause does not require elections for every political office, once the vote is granted to the electorate, the governmental entity must comply with the Equal Protection Clause.[95] However, state and local governments have some leeway in fashioning districts that deviate from "exact population equality."[96] The Supreme Court has clarified that the safe harbor to avoid constitutional scrutiny is 10% deviation from population equality and that plans with larger deviations are prima facie discriminatory and require justification from the governmental entity.[97]

Essentially, an ideal district plan would be exact population equality.[98] However, because this is not feasible in practice, the court has created a scheme which shifts the burden of proof from the plaintiff to the government depending on the size of the deviation.[99] If the deviation is less than 10%, then the plaintiff must show additional evidence to prevail.[100] And if the deviation is above 10%, the government must bear the burden to justify the deviation.[101]

Under Utah law, San Juan County has five school board districts to support a five member school board.[102] Based upon the results of the 2010 census, District 1 had a population of 3,285, District 2 had a population of 2,820, District 3 had a population of 2,899, District 4 had a population of 3,060, and District 5 had a population 2,195.[103] Based upon the total population of San Juan County, the ideally populated district would have 2,852 persons.[104]

The parties agreed that the county school board districts were not equally distributed but disagreed on the deviation.[105] The Navajo Nation contended the deviation was 37.69%, while the county found the deviation to be 38.22%.[106] The district court did not address this minor discrepancy because under either formulation, the county was outside the 10% safe harbor.[107] Due to this, the district court determined that the Navajo Nation presented a prima facie case that the county violated the one-person, one-vote principle of the Equal Protection Clause.[108]

Once the court established a prima facie violation, it had to determine the level of scrutiny it would apply to the county's justifications for the deviations. Generally, the Supreme Court relies

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 1262.
[97] *Id.*
[98] *Id.* at 1258.
[99] *Id.* at 1262.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1257.
[103] *Id.*
[104] *Id.* at 1258
[105] *Id.* at 1267.
[106] *Id.*
[107] *Id.*
[108] *Id.*

on two levels of scrutiny when analyzing Constitutional claims—rational basis and strict scrutiny.[109] Strict scrutiny is a significantly higher burden on the state entity and requires that the challenged action promote a "compelling state interest" and that the challenged is "narrowly tailored" in promoting that interest.[110] On the other hand, rational basis is less onerous and merely requires that the challenged action be rationally related to a legitimate governmental purpose.[111]

The Supreme Court has articulated different standards— sometimes within the same case— that should be applied when analyzing challenges to the one-person, one-vote principle. As a starting point, the Court has long held that the right to vote is fundamental.[112] "Generally, when evaluating Equal Protection claims involving infringement on a fundamental right, courts apply a strict level of scrutiny and look for a compelling state interest."[113] And "the Supreme Court's fundamental rights jurisprudence seems to dictate a strict scrutiny review when considering offered justifications for population deviations" for cases involving the one-person, one-vote principle.[114]

However, when addressing this issue in *Reynolds*, "the language employed by the Supreme Court in the Reynolds 'test' allows divergences from a strict population standard when the deviations 'are based on legitimate considerations incident to the effectuation of a rational state policy."[115] Furthermore, the Court has recognized that state and local governments should retain some flexibility in complying with the Equal Protection Clause.[116] This has led to some confusion regarding how to analyze these issues, and the county insisted that rational basis review was appropriate, while the Navajo Nation urged the court to apply strict scrutiny.[117]

Perhaps because of the uncertainty arising from the lack of clarity surrounding the appropriate level of judicial scrutiny regarding Equal Protection challenges regarding voting rights, a newer intermediate balancing test "has emerged and gained acceptance in the context of most . . . voting rights cases."[118] Under this approach, the *Anderson-Burdick* test, a court must balance "character and magnitude" of the Equal Protection Clause burden on the plaintiffs with the "precise" governmental justifications for the burden.[119] Further, the court must "tak[e] into consideration the extent to which those interests make it necessary to burden the plaintiff's rights."[120]

Although the *Anderson-Burdick* standard had not expressly been applied to one-person, one-vote challenges, "persuasive authority on voting rights jurisprudence . . . suggests that *Anderson-Burdick* applies to any Equal Protection Clause challenge to a government action burdening the right to vote, 'creating a single standard for evaluating challenges to voting

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[109] *Id.* at 1263.
[110] *Navajo Nation*, 162 F. Supp. 3d at 1177.
[111] *Navajo Nation*, 150 F. Supp. 3d at 1263.
[112] *Id.* at 1262.
[113] *Id.* at 1263.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 1265.
[119] *Id.*
[120] *Id.*

restrictions.'"[121] Ultimately, the district court determined that the *Anderson-Burdick* test applied to the dispute between the Navajo Nation and San Juan County, and it turned to each of the county's proposed justifications for the deviation for legitimate governmental interests.[122]

Finally, before addressing the county's justifications, the district noted two guiding principles for its analysis. First, that there is a certain level of deviation that is so extreme that no justification is warranted,[123] which the Supreme Court has indicated that such a maximum limit is around 16.4% deviation from ideal distribution.[124] Second, the district court observed that the districts existed for over twenty years, yet never complied with the one-person, one-vote principle, had never been redistricted for compliance, and had a deviation of 18.7% at the time they were first drawn.[125] The court indicated that the first principle increased "the character and magnitude of the asserted injury," while the failure to redistrict in accordance with the second principle "strongly suggests an arbitrary abdication of constitutional responsibilities."[126]

Nevertheless, the county presented five separate justifications for the deviation.[127] Those justifications were (1) that the large size, uneven topography, and the fact that 25% of the population lacked a physical address made it hard to move persons from one district to another[128]; (2) that the district lines were drawn along survey section lines, and to change the boundaries would make it harder for citizens to travel to polling places[129]; (3) that the county had a longstanding belief and objective that the school board districts should align with specific school district lines so that elected members represented schools located within the election district[130]; (4) that the small population among other factors made redistricting within a 10% deviation impossible[131]; and (5) that Navajo citizens were primarily located in District 5, which was "over-represented" in comparison to District 1 which was "under-represented" and predominantly white.[132]

The district court found that none of the justifications were convincing, and were not legitimate governmental justifications that would permit the county to violate the one-person, one-vote principle.[133] Regarding the argument that the large size and spread out population, the court noted that "sparse population is not a legitimate basis for a departure from the goal of equality."[134] Regarding the proposed survey line justification, the court stated that it was not sufficient to maintain the district lines "in the face of a long-standing and significant constitutional

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[121] *Id.* at 1266.
[122] *Id.* at 1267.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1268.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1269.
[130] *Id.* at 1270.
[131] *Id.* at 1271.
[132] *Id.*
[133] *Id.* at 1272.
[134] *Id.* at 1268.

violation,"[135] and that the locations of the polling places were not particularly relevant because the county conducted its elections using a vote-by-mail system.[136] The county's objective and belief argument was similarly unconvincing because there is no legitimate governmental interest in the violation of state law.[137] Essentially, breaking the law is not legitimate. Rebutting the county argument that to redistrict would be impossible, the court held that clearly redistricting was possible because the county had redistricted its county commissioner lines—even if those redistricted lines still violated the Equal Protection Clause.[138] And finally, the court noted that the county's fifth argument was likely not a justification, but instead simply describing how deviations are calculated—it is not particularly relevant that some districts may be close to equal if there is a significant deviation between the largest and smallest districts.[139]

Ultimately, the district court concluded that the Navajo Nation established a prima facie violation of the one-person, one-vote principle.[140] Because the county did not carry its burden to provide legitimate governmental interests as justifications for the deviation, the district court concluded that the school board districts had to be redrawn in order to comply with the Equal Protection Clause.[141]

D. The Tenth Circuit Affirmed the District Court in All Respects

The County appealed the district court rulings regarding the County Commissioner elections and the school board election districts.[142] Specifically, it raised five arguments to the Tenth Circuit Court of Appeals of which three are important to this Note: that the district court erred in denying its motion to dismiss the Navajo Nation claims regarding the County Commissioner elections; that the district court erred when it ruled that the county did not have a compelling interest to justify the racially drawn boundaries of District 3; and that the district court erred in rejecting the county's justifications for the population deviation regarding the school board election districts.[143] The remaining two challenges dealt with actions the district court took after granting summary judgment in favor of the Navajo Nation.[144]

The County's motion to dismiss was largely based upon similar arguments it brought up in its summary judgment briefing— that the district court did not have jurisdiction to hear the dispute because another court retained jurisdiction pursuant to the 1984 Consent Decree and Settlement

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[135] *Id.* at 1269.
[136] *Id.* at 1270.
[137] Utah law stipulated that the boundaries must be substantially equal in population. *See* Utah Code Ann. § 20A-14-201(1)(b).
[138] *Navajo Nation*, 150 F. Supp. at 1271.
[139] *Id.* at 1271-72.
[140] *Id.* at 1272.
[141] *Id.*
[142] *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1275 (10th Cir. 2019).
[143] The remaining two challenges related to actions the district court took after granting summary judgment in favor of the Navajo Nation. The County challenged the district court's finding that the proposed remedial districts were still unlawfully based upon race and that the district court erred in ordering the County to adopt a special master's remedial redistricting plan. *See id.* at 1277.
[144] *Id.*

and Order.[145] In addition, it contended that the Navajo Nation could not collaterally attack the 1984 documents.[146] The district court reasoned that the Navajo Nation could not collaterally attack the 1984 documents because it was not a party to the Consent Decree or Settlement and Order, and it held that the Navajo Nation lawsuit was unrelated to the 1984 documents.[147]

The County challenged both rationales on appeal, and the Tenth Circuit reviewed the decision de novo.[148] Regarding the collateral attack issue, the County argued before the appellate court that the Navajo Nation was a party under the 1984 documents as a result of the unique relationship between the federal government and Indian tribes.[149] The County relied upon a reading of the 1984 documents suggesting that the litigation by the Department of Justice was brought on behalf of the Navajo Nation and on a federal statute that provides that Native American litigants can have the US Attorney's Office represent their interests in court.[150]

However, the statute cited is not mandatory and is an example of the trust doctrine, which exists as a result of the longstanding relationship between the federal government and Indian tribes. [I]ts purpose is no more than to [e]nsure [Native Americans] adequate representation in suits to which they might be parties." *Oviatt v. Reynolds,* 733 F. App'x 929, 931 (10th Cir. 2018).

The court brushed aside the assertion that the litigation leading to the Consent Decree was brought on behalf of the Navajo Nation because the plain language of the 1983 Complaint stated that it was brought on behalf of the United States.[151] Further, the court was unconcerned by the County's § 175 argument because the county provided no authority that litigation which simply cites to the law is enough to make the Navajo Nation a party to the lawsuit.[152] In addition, the complaint was clear that the nature of the litigation arose from a violation of the Voting Rights Act, which explicitly provides for the federal government to initiate lawsuits against entities that violate the law.[153] Thus, the court held that the district court did not err in denying the county's motion to dismiss.[154]

The County's argument that the district court erred in determining the county lacked a compelling interest to justify the racially drawn District 3 also failed. The County again urged to court to accept its subjective belief that the 1984 Consent Decree and Settlement and Order required it to maintain District 3's racially drawn boundaries.[155] In addition, instead of explaining why the district court erred in ruling that the county's other proposed justifications discussed above were not compelling interests, the county instead attempted to provide a new compelling interest

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[145] *Id.* at 1277–78.
[146] *Id.*
[147] *Id.* at 1278.
[148] *Id.*
[149] *Id.*
[150] *See* 25 U.S.C. § 175
[151] *Navajo Nation,* 929 F.3d at 1278.
[152] *Id.* at 1279.
[153] *Id.*
[154] The court additionally ruled that an inference that the 1984 Consent Decree determined the boundaries of District 3 was not reasonable under the facts presented to the district court.
[155] *Navajo Nation,* 929 F.3d at 1280.

justification to the appellate court: that District 3 was racially drawn in order to comply with the Voting Rights Act.[156]

The court rejected the subjective belief argument on its face because the County failed to properly brief the issue. The appellate court accepted that compliance with the Voting Rights Act was a compelling interest[157] but still rejected the County's new argument because the County failed to show "that District 3's race-based boundaries were narrowly tailored to further that interest."[158]

"Narrow tailoring in the context of VRA compliance means that the [C]ounty must show "it had 'a strong basis in evidence' for concluding that the [VRA] required its action,' or . . . that it had 'good reasons' to think that it would transgress the [VRA] if it did not draw race-based district lines."[159] The County argued that the 1984 documents provided the requisite "strong evidence" and "good reasons" for the racially-drawn District 3.[160] The court again noted that the 1984 Consent Decree and Settlement and Order did not require single-member districts, did not set the boundaries of such districts, and merely sought to remedy potential Voting Rights Act violations resulting from at-large voting.[161] Furthermore, the court found that the County never sought clarification on what was required to comply with the Voting Rights Act and that its "mistaken understanding" of the 1984 documents is not sufficient evidenceto demonstrate a narrowly tailored deprivation of a fundamental right as a result of a compelling interest.[162]As a result, the appellate court ruled that the district court did not err in granting summary judgment in favor of the Navajo Nation on its claim that the racially-drawn District 3 violated the Equal Protection Clause.[163]

The County's final challenge relevant to this Note was that the district court erred in rejecting the County's justifications for the population deviation regarding school board election districts.[164] Here, the County conceded that the Navajo Nation established a prima facie case, but it disputed the proper standard of Constitutional scrutiny.[165] The appellate court determined that it had no need to resolve the dispute over the appropriate scrutiny because it found that the County failed to carry its burden even under the less restrictive *Anderson-Burdick* test.[166]

The County presented near identical justifications to the appellate court as it did to the district court. The County offered that its philosophy, in which school board districts mirror school district lines so that elected school board members represent voters within specific school district boundaries combined with the County's sparse population and geography justified the 38%

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[156] *Id.* at 1284.
[157] *Id.*
[158] *Id.*
[159] *Id.* at 1281.
[160] *Id.*
[161] *Id.* at 1281–82.
[162] *Id.* at 1282.
[163] *Id.*
[164] *Id.*.
[165] Interestingly, here the County requested the appellate court apply the *Anderson-Burdick* test, while at the district court level, it requested the court apply rational basis review. The Navajo Nation consistently requested the court apply strict scrutiny.
[166] *Navajo Nation*, 929 F.3d at 1283.

deviation.[167] However, "sparse population is not a legitimate basis for a departure from the goal of equality."[168] In fact, the Supreme Court has determined that sparse population "actually cuts the other way because 'in a [s]tate with a small population, each individual vote may be more important to the result of an election than in a highly populated [s]tate.'"[169] In addition, the County's vote-by-mail system diminished the County's argument that geography presented a legitimate justification for the deviation.[170]

Regarding the County philosophy relating to elected school board members, the appellate court agreed with the district court that the philosophy, in some circumstances, could be a justification for a deviation.[171] However, because the philosophy, as implemented by the County, violated state law, it could not be a legitimate justification for the 38% deviation.[172] Agreeing with the district court's reasoning, the appellate court rejected the County's challenge that the district court erred in granting summary judgment regarding the school board member election districts.[173] Ultimately, the appellate court affirmed the district court in all regards.[174]

III. VOTER SUPPRESSION OF NATIVE AMERICANS IS A SIGNIFICANT CHALLENGE TO AMERICAN DEMOCRACY AND THE ANALYSIS OF *NAVAJO NATION V. SAN JUAN COUNTY* CAN PROVIDE A FRAMEWORK FOR ALLEVIATING VOTER SUPPRESSION IN OTHER JURISDICTIONS

A. North Dakota's Restrictive Voter ID Law Has Come Under Recent Scrutiny for Unduly Burdening Native North Dakotans Ability to Vote

North Dakota has become the most recent battleground regarding voter suppression of Native Americans.[175] As a brief primer, North Dakota does not require residents to register to vote before voting.[176] However, the state requires voters to show proof of residency by showing a state or tribal-issued ID which includes a valid street address in order to vote.[177] While the law is intended to prevent voter fraud, it hampers the ability of Native North Dakotans to vote because many of the reservations in the state are located in rural areas without street signage or addresses.[178] In addition, some tribal members affected by the law have proper residential addresses but struggled to obtain the proper type of identification accepted by the state.

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[167] *Id.* at 1284.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 1284.
[172] *Id.*
[173] *Id.* at 1285.
[174] *Id.* at 1293.
[175] *See Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).
[176] Erik Ortiz, *North Dakota, Native Tribes Agree to Settle Voter ID Lawsuit to Combat Voter Suppression*, NBC, (Feb. 14, 2020, 2:31 P.M.), https://www.nbcnews.com/news/us-news/north-dakota-native-tribes-settle-voter-id-lawsuit-combat-voter-n1137141 [https://perma.cc/8WL8-X9JR].
[177] *Id.*
[178] *Id.*

The legal battle surrounding the "home address rule" began in 2014 when members of the Turtle Band of Chippewa Indians filed a lawsuit in 2016 alleging they were disenfranchised in 2014 as a result of the strict voter ID law.[179] The North Dakota legislature amended their Voter ID law in 2017, and the plaintiffs modified their suit to enjoin the newer law.[180] When a North Dakota district court enjoined North Dakota from implementing the new law without also accepting an alternative form of identification which could include a P.O. box, North Dakota appealed to the Eighth Circuit Court of Appeals.[181]

In 2018, the Eighth Circuit ruled in favor of the state, and it reversed the district court's statewide injunction.[182] The court was primarily concerned with implementing a statewide injunction regarding election laws for a relatively small number of affected individuals, and it noted that because all of the plaintiffs had current residential addresses they would not be statutorily disenfranchised.[183] Nevertheless, the court seemed to concede that a certain class of individuals could be disenfranchised by the law— residents who have no current residential address— and it concluded its opinion by stating that the "courthouse doors remain open" for those particular plaintiffs.[184]

On emergency appeal to the Supreme Court, the justices voted 6-2 in favor of the state.[185] Nevertheless, Justice Ginsburg in dissent stated that the many conflicting court orders regarding the applicability of the voter ID law would "result in voter confusion and consequent incentive to remain away from the polls."[186] This stems from the fact that the district court injunction was in place for the 2018 primaries, but the Eighth Circuit reversal applied to the 2018 general election.[187]

In February 2019, the Spirit Lake Tribe and Standing Rock Sioux Tribe filed a new lawsuit along with six other named plaintiffs.[188] This new lawsuit purported to represent the interests of the plaintiffs who the Eighth Circuit indicated still could challenge the Voter ID law and was eventually consolidated with the 2016 case.[189]

A year later, in February 2020, the affected tribes and North Dakota came to a proposed settlement agreement regarding the voter ID law.[190] In April, the Spirit Lake Tribe and Standing Rock Sioux Tribe filed a binding agreement with North Dakota.[191] "Once approved by the court, the agreement will be enforceable by court order and will provide essential safeguards to protect Native Americans' right to vote, easing the financial and logistical burdens that North Dakota's

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[179] *Id.*
[180] *Id.*
[181] *Brakebill v. Jaeger,* 905 F.3d 553 (8th Cir. 2018).
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Brakebill v. Jaeger,* 202 L. Ed. 2d 212 (October 9, 2018) (Ginsburg, J., dissent).
[186] *Id.*
[187] *Id.*
[188] *Spirit Lake Tribe v. Jaeger,* Civil No. 1:18-cv-00222, (D.N.D February 28, 2019) (complaint).
[189] *Id.*
[190] Ortiz, *supra* note 176
[191] *North Dakota Agrees to Court-Ordered Relief Easing Voter ID Laws for Native Americans On Reservations*, NARF, (April 24, 2020), https://www.narf.org/nd-voting-rights/ [https://perma.cc/54R8-DDT9].

voter ID law placed on tribes."[192] The parties hope that the new consent decree will be in effect in time for North Dakota's statewide primary election on June 9, 2020.[193]

Under the agreement, North Dakota bears the burden to assign and verify street addresses before an election, and the Secretary of State will work with the Department of Transportation and the Governor's office to ensure that the agency travels to reservations located within North Dakota at least thirty days before an election to help Native North Dakotans obtain free non-driver IDs.[194] Yet, the strongest victory for Native voters is likely the concessions North Dakota made regarding voting procedures on election day.[195] If Native voters do not know or are unsure of their current street address, they can locate their residence on maps at the polls or when obtaining an absentee ballot, or they can obtain their address from county officials.[196] In addition, Native voter ballots who comply with the consent decree will be counted.[197] Finally, the agreement ensures that tribally issued IDs and tribally designated addresses will be accepted, and it formalizes a concession from North Dakota that it will reimburse tribes for the additional expense to comply with the voter ID law.[198]

B. Navajo Nation and the North Dakota Litigation Can Provide Guidance to Future Courts Regarding Voter Suppression of Native Americans

Both the Navajo Nation litigation and the North Dakota litigation are significant victories for Native voting rights. However, a comparison of the two can provide a framework for future courts to rely on in resolving voter suppression cases involving tribes. First and foremost, both cases took roughly four years to resolve. While the complexities of the *Navajo Nation* case likely dictated a more prolonged discovery process, the North Dakota case had a singular issue that should be been easier for a court to analyze and resolve. Because of the unique nature of the voting right in American democracy, when faced with issues of voter suppression, courts should proceed to address the issues involved as expeditiously as possible.

Similarly, both cases relied upon the *Anderson-Burdick* test to determine whether the burdens imposed upon tribal members were justified by legitimate governmental interests.[199] Nevertheless, the *Navajo Nation* court was more receptive to burdens on the voting right,[200] while the Eighth Circuit determined that had the case been decided on the merits, North Dakota "established a likelihood of success."[201] Perhaps the answer lies with the nature of the litigation: whereas *Navajo Nation* dealt with racial gerrymandering and violations of state election law within

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[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1267 (D. Utah December 9, 2015).
[200] *Id.*
[201] *See generally Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

a county,[202] the North Dakota litigation involved statewide elections.[203] Ultimately, courts should require justifications that are significant enough to overcome the burden on Native American voting rights, and should follow the *Navajo Nation* framework of using the prima facie violation to determine how compelling such a justification should be.

Interestingly, both San Juan County and North Dakota have relatively small populations, but where the *Navajo Nation* court found that sparse populations heightened the significance of Constitutional violations to the voting right, the Eighth Circuit essentially came to the opposite conclusion when it determined that enjoining a state election law as a result of an undue burden to a small group of people is not justified when applied to the whole state.[204] While perhaps a generally acceptable principle, when applied to North Dakota—a state where a few thousand votes can swing an election— it seems unreasonable to accept disenfranchisement of an important bloc of voters, Native Americans.[205] When faced with a dispute involving a small population, courts should find the Constitutional violation to the voting right to be more serious because one vote carries more significant weight in the election than in a jurisdiction with a large population. Overall, Courts should proceed expeditiously, be willing to balance the seriousness of the voting right violation with the proposed justification, and consider the size of the population when evaluating the significance of the constitutional injury.

C. Montana is the Newest State to Face Scrutiny for Suppressing the Native American Vote

In 2018, the Montana Ballot Interference Prevention Act (BIPA) was passed.[206] As the state is mostly rural, the majority of the vote in Montana is conducted by mail, and ballots are typically collected by organizers who transport them to election offices that may otherwise be inaccessible to voters.[207] BIPA severely hampers, and likely eliminates most ballot collection initiatives by reducing the number of ballots an organizer can collect from one-hundred to six.[208] "Compliance with BIPA is complicated by unclear definitions about who exactly can collect a ballot. Organizers may or may not fit into its provisions, depending on which interpretation law enforcement officials adopt."[209]

Together, these two issues significantly chill the Native American vote because many tribal member vote as a result of "get out the vote" campaigns by voting rights organizations who under BIPA likely will be unable to collect ballots.[210] Further, even if voting rights organizations are

[202] *See generally Navajo Nation*, 150 F. Supp. 3d 1253.
[203] *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).
[204] *Id.*
[205] *See generally Navajo Nation*, 150 F. Supp. 3d 1253.
[206] Alora Thomas-Lundberg & Lilian Alvernaz, *This Law Makes Voting Nearly Impossible for Native Americans in Montana*, ACLU, (Mar. 12, 2020), https://www.aclu.org/news/voting-rights/this-law-makes-voting-nearly-impossible-for-native-americans-in-montana/ [https://perma.cc/MA5J-PSYY].
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*

allowed to collect ballots, the unclear language of the statute will likely chill ballot collection efforts until the legislature provides clarification.[211]

In response to the bill, the Native American Rights Fund (NARF), the ACLU, and several Montana tribes collectively sued the state of Montana seeking to invalidate BIPA in March, 2020. This case will likely proceed similarly to the North Dakota litigation, as the two states both share large Native American populations, are largely rural, and the challenged laws are generally applicable to the whole state. However, while every voter was required to show an ID with a street address in North Dakota, the Montana law targets a specific class of individuals—ballot collectors.[212]

As this case proceeds, the Montana court should first recognize that legislation targeting groups that help individuals across the state vote and then collect their ballots will create an undue burden on Native Americans in the state who live on reservations in rural areas. Furthermore, BIPA unduly burdens a racial class, and as discussed above in the analysis of *Navajo Nation,* Section 2 of the Voting Rights Act has been amended to remove the requirement of showing discriminatory intent.[213] Additionally, because voting rights disputes are resolved through the *Anderson-Burdick* test, the court should balance the constitutional injury with the proposed legitimate governmental interests.

In this case, the court should find that the injury is more severe as a result of Montana's small population.[214] Furthermore, unless Montana can show an influx of ballot fraud, the court should also conclude that BIPA is a more arbitrary violation of the voting right.[215] Next, the court should listen to the proposed governmental interests—likely reducing voter fraud, controlling state elections, etc., and it should carefully scrutinize whether they are legitimate. In this case, because the court should find that the injury is significant, the court should require a much more thorough justification.

Ultimately, the court should conclude that BIPA is an unconstitutional violation of voting rights and should strike down the law. At the same time, the parties should work towards resolving the dispute through settlement akin to the North Dakota settlement. A settlement would likely be more palatable to the state as it would not have an entire law invalidated. If carve-outs could be created for protecting voting rights for Native Americans, the tribes may be willing to discuss settlement. In the current climate, BIPA is likely to be unpalatable to tribes without serious modification and cooperation between the affected parties could be more fruitful than long and costly litigation.

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[211] Thomas-Lundberg & Alvernaz, *supra* note 176.
[212] *Id.*
[213] *See Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1166 (D. Utah February 19, 2016).
[214] *See Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1284 (10th Cir. 2019).
[215] *Id.*

IV. CONCLUSION

Voter suppression of Native Americans is a significant issue that has plagued the United States since the country's founding. Yet today, courts may be finally taking steps to provide some level of protection to tribes and tribal members.

In *Navajo Nation v. San Juan County,* the Navajo Nation resolved a voting rights dispute that has gone one since at least the 1980s. There, the district court and the Tenth Circuit Court of Appeals recognized that the County could not withstand strict scrutiny regarding a racially-drawn county commissioner district, nor could the County provide a legitimate governmental justification for a 38% deviation in school board election districts. Ultimately, the court ordered the County to redraw both district lines, and approved a special master's remediation plan when the County failed to adequately do so.

In a dispute over North Dakota's strict voter ID laws, a settlement was ultimately reached which made significant concessions to North Dakota tribes. The agreement allowed tribal members to find their address on maps at polling locations, obtain addresses from county officials, and have their ballots counted. It further provided for reimbursement to tribes for the extra expense resulting from the law.

However, voter suppression continues, and Montana is facing a new lawsuit alleging that BIPA unduly burdens tribal members. By applying the lessons of *Navajo Nation* and the North Dakota litigation, the court should likely find that Montana's law is unconstitutional and should be invalidated. However, the tribes should try to negotiate and come to an agreement akin to the North Dakota consent decree.

While the United States has moved closer to equality since the days of Thomas Nash, the vote is still not secured for all Americans, and it is important that work continue in illuminating these serious issues and in finding ways to incorporate tribal members more fully into the democratic process by securing the right to vote without undue burdens.