

NATIVE AMERICAN REPRESENTATION WHAT THE FUTURE HOLDS

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I. INTRODUCTION

In the face of ultra-partisan polarization, it is unsurprising that much of public concern and scholarly attention on distortions in political representation should be spent on those relating to partisan fairness. Notably, recent unsuccessful attempts to persuade the Supreme Court to set out manageable standards for adjudicating partisan gerrymandering claims in federal courts are a good example of the contemporary interest and demand for judicial solutions to partisan problems in our representative democracy.¹ These attempts are surely laudable and their failure is surely regrettable.² But reiteration from the Supreme Court that it will not involve federal courts in contestation over partisan gerrymandering also reminds us that the primary legal protections for the right to vote, both in the Reconstruction Amendments and in the Voting Rights act, concern racial equality in voting.

This reminder is a timely one. On the cusp of a new redistricting cycle, we must ask what progress can and should be made towards the goal of racial equality in representation. And this question should be asked specifically of Native voters. In tracing the empirical progress that our laws have facilitated in racial equality in redistricting, Native American voters are rarely the focus of either policy or scholarly discussions. Put simply, it is especially important that the twin questions posed by the symposium—“where are we now, and where might we be”—be asked of Native representation.

Seizing the opportunity presented by this Symposium, this Article considers the ongoing threats to dilution of Native votes and the prospect that the legal system will adequately protect against them in the upcoming round of redistricting. As redistricting happens only once every decade, missed opportunities to make progress towards racial equity in political representation are especially frustrating.

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1. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018); Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019).

2. For full disclosure, I worked on the partisan gerrymandering challenge to Ohio’s congressional map. Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978 (S.D. Ohio 2019) (vacated).

This Article considers what opportunities might be presented, and the barriers faced in taking full advantage of them.

II. REDISTRICTING MATH

To explore the representational opportunities for Native voters, I begin with redistricting math: how many Native persons there are, and where do they reside? To be sure, whether redistricting can achieve representational goals depends on far more than population size and dispersion. But redistricting math is a good place to start from. At its core, redistricting is drawing lines to divide population across space. For Native voters, both of the central variables in redistricting math, population and space, also characterize the most dire consequences resulting from the arrival of white inhabitants on the continent. The decimation of Native communities, along with the influx of white inhabitants, is perhaps the most extreme instance of population dilution. Condemnation of America's first inhabitants to not only a numerical minority, but an ultra-numerical minority, is reflected in land mass as well as population size, as evidenced by scattered fragments of tribal land, concentrated largely in the Mountain West.

The scarcity and dispersion of a minority community provide the mathematical foundation for whether and how much representation can be achieved through redistricting. And these factors also determine at which level of government representation can and should be expected. Numerical size and concentration matter in redistricting because representation is typically achieved through obtaining a numerical majority at the district level. Thus, the more numerous and more concentrated the community, the easier it is to attain majority in the various districts drawn in the area. As districts are drawn at various state and local levels (school district, county commission, state upper and lower houses, and the U.S. House of Representatives), even very small minority communities could obtain representation through some (very small) districts if such communities constitute a near majority within the boundaries of those districts.

So what is the state of redistricting math for Native communities? In order to properly contextualize reality, first consider some extreme hypotheticals of Native population dispersion. In doing so, we assume, as is true of 2010 census figures, that Native persons constitute less than 2% of the total US population.³ But as alluded to above, numerical minority does not, by itself, doom representation in redistricting. Much depends on how that population is spread out. First, consider how the voting strength of the little over 5 million Native persons might be maximized for national representation.⁴ Five million persons can constitute a bare majority in the eleven least populous states in the Union (excluding D.C.).⁵ Thus, in this hypothetical, Native persons could elect their desired senators and several of the states' representatives as well.

At the other end of the spectrum, imagine that Native persons were spread out across the nation's eleven most populous states such that they constituted 1.5%

3. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 3 (2012).

4. *See id.*

5. *See* PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION. DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 (2011) (for total population figures of all states).

or less of each state's population. The possibility of electing representatives of choice at the national or even statewide level is foreclosed. To be sure, representatives of choice could be elected at the local level, but that would depend additionally on how the population is dispersed within states.

What these two extremes demonstrate is that voting strength, at least at the national level, is maximized when minority communities are concentrated in otherwise not highly populated place. Reality, perhaps predictably, is somewhere in between the extremes. Concentrated settlement in the otherwise relatively sparsely populated Mountain West aids voting strength. Putting aside Hawaii and Alaska, Native persons constitute upwards of 10% of the population of South Dakota, New Mexico, and Oklahoma.⁶ Many other Western states house more than the national average of Native persons: Wyoming, North Dakota, Montana, Idaho, Nevada, Kansas, Oregon, Colorado, Arizona, and Washington.⁷ To be sure, the numbers of Native persons in none of these states are sufficient to constitute a majority. Thus, redistricting math does not promote the election of candidates of choice at the national level. But in state legislative bodies, election of candidates of choice is possible in several Western states if population is sufficiently concentrated and not cracked by district lines.

However, relative concentration in the West only half describes where Native persons reside. Dispersion is also true of the Native community. Only 41% of the Native population live in the West.⁸ Many live in populous states and cities in the Northeast.⁹ And even within the West, Native persons are not maximally positioned for voting strength as they are concentrated in highly populous states. For instance, almost 14% of the Native population live in California, where it constitutes a little less than 2% of the total population there.¹⁰ The same is true to a lesser extent in Arizona and Texas, too.¹¹

Moreover, state boundaries crack Native land—and population—within the West and elsewhere. The most prominent example of this is the Navajo Nation, the largest land-based Native reservation and the second most populous tribe.¹² Its population is essentially cracked by the state boundaries of Arizona and New Mexico (and to a lesser extent, of Utah).¹³ Another example is how the boundary between North and South Dakota split the Standing Rock Indian Reservation.¹⁴ Thus,

6. See NORRIS ET AL., *supra* note 3, at 7.

7. *Id.*

8. *Supra* NORRIS ET AL., *supra* note 3, at 5 (41% of the American Indian and Alaska Native population lived in the West).

9. *Id.* at 7, 11.

10. *Id.* at 6, 8.

11. *Id.*

12. NAVAJO DIV. OF HEALTH & NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE: 2010 U.S. CENSUS 41 (2013), <https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf>.

13. *Id.*

14. *Statistics*, STANDING ROCK SIOUX TRIBE, <https://www.standingrock.org/content/statistics> (last visited May 20, 2020).

even in the Mountain West, where Native population is concentrated, it is also dispersed.

III. FROM REDISTRICTING MATH TO REPRESENTATION

What does redistricting math for the Native community, characterized by both concentration and dispersal, mean for prospects of Native representation? Based purely on the redistricting math of small population numbers and relative dispersal across states, national representation would appear to be exceedingly difficult. Statewide offices would also appear to be far out of reach. In states where Native voters constitute a concentrated minority, state legislative offices could be won. And of course, localized concentration should give rise to many opportunities for local elected offices elected from sufficiently small districts in which Native voters constitute a majority. And yet as redistricting math is only one determinant of representation, these expectations do not map neatly onto reality. In this section, I consider the uneasy relationship between redistricting math and representation at each of these levels in turn.

A. National and Statewide

Native representation at the national level perhaps most aptly demonstrates how redistricting math, while sometimes a powerful determinant of representation, is not universally applicable. Native communities' position as an ultra-numerical minority, at least nationally, puts them at a severe disadvantage in redistricting math at the national level. And yet Native representatives have historically been elected both to the Senate and the House of Representatives.¹⁵ Indeed, many Native representatives have been elected to national offices even before Native persons were given the right to vote pursuant to the Indian Citizenship Act of 1924,¹⁶ and before the 1975 extension to the Voting Rights Act that helped Native eligible voters actually register to vote and vote.¹⁷

To be sure, the list of Native members of congress is not a long one. The point here is not to cast judgment on the sufficiency of Native representation at the national level. It is simply to observe that representational benchmarks cannot be cast purely based on redistricting math. And here I group statewide office along with national ones because statewide offices can be just as hard—if not harder—to win than certain national-level offices. Like with U.S. senators, many state offices, for instance governor, lieutenant governor, or secretary of state, are elected statewide. By contrast, congressional representatives only need to win the votes of a majority of a congressional district. Thus, to set representational goals purely

15. See CONGR. RESEARCH SERV., MEMORANDUM: MEMBERS OF CONGRESS OF AMERICAN INDIAN DESCENT (2013) (congressional librarians advised that as this list was last compiled in 2013, it does not include Representatives Sharice Davids (D, Kansas Third District) and Deb Haaland (D, New Mexico First District) who were elected to the House of Representatives in 2019) (on file with author).

16. See DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 8 (2007). The passage of the Act did not mean that Native voters were eligible to vote in all states. *Id.* The road from the Act to actual enfranchisement of Native persons was long as states continued to deny Native persons the right to vote through other means. *Id.*; LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 19 (2010).

17. See MCCOOL ET AL., *supra* note 16; see also McDONALD, *supra* note 16, at 26.

based on redistricting math for statewide offices would be as—if not more—fallacious than doing the same for national offices. Regardless, considering statewide offices in states with prominent percentages of Native persons, representation is very limited.

Looking forward to progress that can be made, quality of the representation reflected should count as much as quantity: Native representation at the national level itself could be more representative of Native persons. The election of Representatives Davids and Haaland in 2018 not only doubled the number of Native representatives in Congress,¹⁸ but it also brought Native women to Congress for the first time¹⁹ as a part of a broader wave of increased female representation at all levels of government.

Representational progress should also be made towards more geographic diversity. There remain several states with significant Native population that have never elected a Native representative to Congress (including but not limited to Alaska)—or statewide office.²⁰

Given the significant numerical hurdles that Native representation faces at both the state and national level, progress should be measured not only in victories, but also in attempts. That each election brings record numbers of Native Americans running for office²¹ is progress in and of itself. And just as elected representatives are more and more reflecting the diversity of the Native community, aspiring office-holders are, too.²² Regardless of eventual electoral success, Native candidates seize the opportunity presented by elections to educate the electorate on Native concerns, challenge stereotypes, and galvanize the Native community to participate electorally.²³ While these gains are harder to put in numbers and figures, they are no less important.

B. State Legislative

The growing corps of Native candidates for high-level state and national offices reflect the fruition of decades-long work to enhance Native representation at the state legislative level. The political significance of ensuring representation at all levels of government, including local and state legislative offices, is obvious given

18. Leila Fadel & Talia Weiner, *Record Number of Native Americans Running for Office in Midterms*, NPR (July 4, 2018, 7:30 AM), <https://www.npr.org/2018/07/04/625425037/record-number-of-native-americans-running-for-office-in-midterms>.

19. *Id.*

20. See CONG. RESEARCH SERV., *supra* note 15, for a list of elected Native national representatives. See, e.g., Joe Heim, *Native American Women Candidates Seek Historic Wins in November*, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/politics/native-american-women-candidates-seek-historic-wins-in-november/2018/10/12/7df3064c-c10e-11e8-9005-5104e9616c21_story.html (noting that Idaho has never elected a Native governor).

21. Fadel & Weiner, *supra* note 19.

22. *Id.*

23. *Id.*

the importance of political experience in office-seeking.²⁴ And while redistricting can do little to aid national and statewide representation of Native communities, it has been central to achieving Native representation in state legislatures.

Redistricting math is vital at the state legislative level. Legal protections provide opportunities to elect representatives that must be enforced through vigorous litigation. The legal provision protecting Native communities from having their votes diluted in the redistricting process is Section 2 of the Voting Rights Act.²⁵ In the state legislative redistricting process, this provision protects Native communities from being cracked. Cracking refers to the “dispersal of [protected minority voters] into districts in which they constitute an ineffective minority of voters.”²⁶

Note that cracking includes both mechanical and behavioral elements. At a purely mechanical level, cracking involves dividing a minority group across several districts so that it cannot constitute a majority in any. But for the mechanical cracking to be successful in preventing a minority group from electing their candidates of choice, a behavioral component—of racial polarized voting—must also be present. Racially polarized voting occurs when voters of different races cohesively vote for different candidates. To see why racially polarized voting matters for minority ability to elect, consider if it were not present. Thus, if non-Native voters are willing to vote in sufficient numbers for the Native candidate of choice, then Native voters do not need to constitute a majority in order to elect their candidate of choice. But when voting is polarized, i.e., when Native voters vote cohesively for a candidate of choice and when non-Native voters vote cohesively for their (different) candidate of choice, mechanical cracking accomplishes dilution of voting strength.

Unsurprisingly, the threshold factors for Section 2 claims involve both the mechanical and behavioral underpinnings of cracking.²⁷ To challenge a districting scheme for vote dilution under Section 2, the protected minority group must demonstrate that it is “sufficiently large and geographically compact to constitute a majority in a single-member district.”²⁸ This fact ensures that a remedy for cracking is possible: that a majority-minority district can be drawn. Then, the touchstone of a Section 2 claim is proving racially polarized voting: that non-Native voters are “usually [] able to defeat candidates supported by [] politically cohesive, geographically insular” Native voters.²⁹

Section 2 has played a transformative role in safeguarding Native voting strength at the state legislative level, where both mechanical and behavioral underpinnings of cracking were amply present. The stakes of enforcing Section 2 at the state legislative level are high: in states with sizeable Native populations, the state legislative level is often the highest level of representation that redistricting math supports through the creation of majority-minority districts. And even with clear statutory protections for Native voting rights under Section 2, states have

24. *See, e.g., id.*

25. The 1975 amendment to the Voting Rights Act put minorities, including Native persons, under the protection of the Act. McDONALD, *supra* note 16, at 34–36.

26. Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986).

27. *Id.* at 49.

28. *Id.* at 50.

29. *Id.* at 49.

fought hard against the creation of Native-majority districts. In Montana, a Section 2 challenge to create and maintain Native-majority districts spanned eight years and both the 1990 and 2000 redistricting cycle.³⁰ In South Dakota, while a blatant mid-decade redistricting plan to eliminate a majority-Native district was eventually struck down on state constitutional grounds, it was also clearly violative of Section 2.³¹

Success of Section 2 in protecting Native communities from vote dilution should be measured not only in litigation brought pursuant to the Act, but also in actions taken to avoid litigation. Section 2 is not self-enforcing: actionable claims must be enforced through litigation. But knowledge that Section 2 claims could have been brought if Native communities were cracked in a state legislative plan likely deterred line drawers from doing so.

Empirically, the success of Section 2 is also hard to disentangle from that of Section 5 of the same Act, known as the preclearance regime, in preventing vote dilution in localities subject to Section 5. While Section 2 applies nationwide, Section 5 was applicable only to localities included in the coverage formula under Section 4 of the Act.³² Preclearance required covered jurisdictions to submit changes in voting laws or practices for federal approval before they could be implemented.³³ And redistricting was certainly the kind of change in voting law or practice that was subject to preclearance. The 1975 amendment to the Voting Rights Act not only brought Native persons under the protection of the Act, but also put the states of Alaska, Arizona, and Texas under the preclearance regime, along with many smaller jurisdictions within states (for our purposes, the notable ones include Todd and Shannon Counties in South Dakota).³⁴ To be sure, as Section 5 is no longer operative following the Supreme Court's decision in *Shelby County v. Holder*,³⁵ it is of no help to protecting Native communities from vote dilution in the upcoming cycle. But looking back, the historic requirement of preclearance for Alaska and Arizona's redistricting plans likely did much to prevent vote dilution of Native communities there.

Regardless of the precise mechanism by which the Voting Rights Act, either through Section 2 or Section 5, by deterrence or actual enforcement, protected Native voters from vote dilution, its influence on how state legislative districts were drawn was more than clear by the 2010 redistricting cycle. In many of the states with significant Native voters, Native representatives were elected to state legislatures, almost exclusively elected through majority-Native districts. And the role that the Act has played in ensuring that redistricting math gives rise to

30. McDONALD, *supra* note 16, at 99–116.

31. *Id.* at 130.

32. *Shelby County v. Holder*, 570 U.S. 529, 537 (2013).

33. *Id.*

34. McDONALD, *supra* note 16, at 35.

35. *See Shelby County*, 570 U.S. at 557.

representation is clearly evident in the many firsts in Native representation that the provision produced.³⁶

In the next round of redistricting, Native voters face a different kind of vote dilution threat. It is packing, not cracking, that threatens Native representation. Recall that cracking involves spreading Native persons across several districts to ensure that they cannot constitute a majority in a single district. Packing is the opposite: it concentrates Native persons in a single district, often far exceeding a majority. As such, packing is a way of cabining Native voting strength and confining it to certain districts, depriving Native persons of potentially influencing or even constituting a majority in another district. Indeed, Native communities are well acquainted with packing as a vote dilution strategy. An example of its application can be found in the 2000 round of redistricting in South Dakota.³⁷ The prior redistricting cycle resulted in the creation of one Native-majority district. Growth in the Native population in the decade since then improved the redistricting math, giving rise to an opportunity to create another Native-majority district.³⁸ But instead, Native persons were packed into the existing majority-minority district.³⁹

In some places, a similar scenario is likely to be presented in the upcoming redistricting cycle. The Native population has been,⁴⁰ and is growing at a faster rate than that of the general population.⁴¹ And as the population is likely to grow either in or around existing majority-minority districts, more tightly packing Native persons in existing majority-minority districts, initially drawn to increase Native voting strength, is likely to be the dominant vote dilution strategy. Many of the Native-majority state legislative districts already have landslide majorities (many exceeding or approaching 70% in Native VAP).⁴² New districts that maintain similar levels of VAP or even increase VAP will attract litigation.

In cases where packed districts deprive Native voters of an additional majority-minority district, like in South Dakota in 2000, a Section 2 claim is

36. See, e.g., McDONALD, *supra* note 16, at 116 (largest number of Native representatives elected to Montana House and Senate); *id.* at 133 (District 28A in South Dakota electing first Native representative from Cheyenne River Sioux Indian Reservation).

37. McDONALD, *supra* note 16, at 133–34.

38. *Id.*

39. *Id.*

40. Between the 2000 and 2010 census, the Native American population increased by 26.7%, significantly higher than the general population growth rate of 9.7%.

U.S. CENSUS BUREAU, AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2012, CB12-FF.22, at 2 (2012).

41. Projected population growth rates in the Native American population also exceeds that of general population growth in the immediate (2020) and distant (2060) future. JONATHAN VESPA, LAUREN MEDINA & DAVID M. ARMSTRONG, U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 7 (2020).

42. See, e.g., Alaska Senate Districts (“SD”) S & T, and House Districts (“HD”) 38-40; Arizona SD 7, and HD 7; Montana SD 16, and HD 32; New Mexico SD 3, 4, & 22, and HD 4-7, 9, 65, 69; North Dakota SD 9, HD 9; South Dakota SD 27; HD 26A, 27; Wyoming HD 33. These figures are based on 2010 census data, available at CENSUS REPORTER, <http://censusreporter.org> (last visited May 20, 2020). I do not mean to suggest that the existing districts are packed, or that if Native VAP increases in those districts they will be packed. To make that determination, one would have to conduct a full Section 2 statistical analysis of previous election results and registration rates. My point is simply that if line-drawers further increase the Native VAP of already heavily Native-majority districts, especially in ways that result in odd-looking districts, those districts would be suggestive of racial gerrymanders and attract litigation.

available.⁴³ But there will be many instances in which the Section 2 pre-condition that the minority community be sufficiently numerous to constitute a majority cannot be met. Thus, even if another district with a sizeable Native minority, say between 10% and 40%, could be drawn, that would not be sufficient to make out a Section 2 claim. Such districts are known as minority-influence districts, as they are districts in which the minority population is large enough to influence political outcomes. Even with racially polarized voting, a cohesive and large enough minority can exercise significant influence in who gets elected from the district (along with political influence in countless other aspects as well; for instance, over the issues candidates must campaign on, or who can prevail in primary elections).

In addressing these instances of vote dilution of Native voting strength, plaintiffs must turn to a different legal claim to vindicate their rights: racial gerrymandering.⁴⁴ Racial gerrymandering claims arise when race is the “predominant factor motivating the legislature’s decision to place a significant number of voters within . . . a particular district.”⁴⁵ Whether these claims are likely to succeed depend, of course, on how the packing on racial lines is accomplished. Generally, contorted district lines drawn to achieve packing enhance the merits of the claim. Whether contorted districts, for instance those with “a finger-like extension,”⁴⁶ “snakelike shape,”⁴⁷ or resemble a “Rorschach ink-blot test,”⁴⁸ will have to be drawn to pack Native voters will largely depend on where Native populations are and where they will grow.

While the facts of the likely racial gerrymandering claims against packed Native districts are to be determined, the law is relatively clear. Racial gerrymandering presents an active area of litigation, and many of the Supreme Court’s recent cases are relevant. Packing strategies have already faced judicial scrutiny, and the legal defense adopted to defend them as necessary to comply with the Voting Rights Act has been tested in the last decade. In redistricting plan after redistricting plan that the Supreme Court has reviewed in recent years, plaintiffs alleged that majority-minority districts drawn in prior decades to protect minority voting strength had their minority populations kept stagnant or even increased in an effort to pack minority voters.⁴⁹ Often, the state’s legal defense is that drawing

43. *Shelby County* struck down the coverage formula in Section 4 of the Voting Rights Act, which applies to the pre-clearance regime set out in Section 5 of the Act. *Shelby County v. Holder* 570 U.S. 529, 557 (2013). Section 2, which applies nationwide, remains in effect. *Id.* at 529.

44. For background on racial gerrymandering claims, see SAMUEL ISSACHAROFF, PAMELA KARLAN, RICHARD PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2016).

45. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

46. *Id.* at 1466.

47. *Easley v. Cromartie*, 532 U.S. 234, 238 (2001).

48. *Shaw v. Reno*, 509 U.S. 630, 635 (1993).

49. See, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (linedrawers mandated that majority-minority districts maintain the same percentage of Black persons as in the past, claiming that doing so was necessary to comply with the Voting Rights Act); *Wittman v. Personhuballah*, 136 S. Ct.

districts with a particular percentage of minority voting age population (“VAP”; the relevant population for redistricting purposes) is required by the Voting Rights Act. And what the Court made clear, especially in *ALBC* and *Cooper*, is that compliance with the Voting Rights Act is not based on meeting simplistic numerical targets for minority voting age population.

These decisions will help litigants challenging packed Native majority-minority districts drawn in the upcoming redistricting cycle. Linedrawers cannot simply claim that a certain numerical target for Native VAP is necessary to comply with Section 2 of the Voting Rights Act. Rather, actual compliance with Section 2 requires that linedrawers conduct a fact-based inquiry into the voting and registration patterns of Native and non-Native voters in the relevant parts of the state.

The actual percentage of Native VAP necessary for Native voters to elect their candidates of choice depends on many factors. For one, if Native voters are less likely than non-Native voters to be registered to vote, they face additional hurdles in electing their candidates of choice. Also recall that racially-polarized voting is the behavioral underpinning for vote dilution strategies. If racially-polarized voting has diminished in force, then a district does not need as many Native persons in order for the Native candidate-of-choice to be elected. Perhaps by removing the state’s ability to rely on bad excuses for packing minority voters, *ALBC* and *Cooper* will also nudge more linedrawers to conduct important statistical analysis during the redistricting process that inform how Section 2 might be complied with. That such analysis is conducted during the redistricting process is valuable because not only could it be incorporated into legitimate redistricting decisions to protect minority voting strength, but also because if it is ignored, litigation can be easily brought (and is more likely to be successful).

C. Local Governments

As we move to the lowest level of redistricting, redistricting math should be at its strongest. Given population concentration at the local level, this is theoretically the level of government where representation should be most prevalent. And yet actual Native representation at the local level most severely underperforms vis-à-vis redistricting math. Indeed, as an initial matter, it is hard to even know what the scope of Native representation is at the local level, as national summary statistics on office-holding at the local level are rare. In Congress, by contrast, there is ample staff maintaining records on office-holders. And at the state legislative level, there are groups like the National Caucus of Native American State Legislators that compile information on its members (affiliated with the National Conference of State Legislatures).⁵⁰ Given the importance of local governments for

1732 (2016) (while the case was dismissed on jurisdictional grounds, *id.* at 1737, the facts of the case involved a majority-Black congressional district that had its Black voting age population increased in the 2010 redistricting cycle. *Page v. Virginia State Bd. of Elections*, 58 F. Supp. 3d 533, 539 (E.D. Va. 2014)); *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (involving two congressional districts that had consistently elected Black representatives of choice but nevertheless had their Black voting age population increased in ways that resulted in odd district shapes).

50. *National Caucus of Native American State Legislators*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/state-tribal-institute/national-caucus-native-american-state-legislators.aspx> (last visited May 20, 2020).

Native representation, it is regrettable that basic data on Native officeholding at the local level is not available.

To be sure, the same Section 2 that has been transformative in translating redistricting math into Native representation in state legislatures is also operative for local governments. However, the particular mechanism for change is not identical. Section 2 claims are directed at the way in which state legislative districts are drawn. That districts are drawn to elect representatives is practically a foregone conclusion at the state legislative level. But at the local level, many representatives are elected at large, and not from districts. At-large voting occurs when all voters in the jurisdiction vote for all the candidates. For instance, a five-member city council elected at-large consists of the five candidates who received the most votes in the city-wide election.

At-large voting has a long and ugly history of diluting minority voting strength.⁵¹ As long as whites vote cohesively, they can defeat minority candidates of choice. This can result in certain jurisdictions electing all-white representatives even when minority voters constitute a sizeable minority. Indeed, such outcomes can be secured even if the number of minority voters in a jurisdiction is only one less than majority.

As such, at-large voting schemes at the local level have been the target of much of the Native voting rights litigation over the years. In Dan McCool, Susan Olson, and Jennifer Robinson's exhaustive book on Native voting rights litigation, the largest category of Native voting rights cases they found involved challenges to vote dilution through at-large electoral systems.⁵² Many of these cases are described by the lawyer who brought them, Laughlin McDonald, in his book summarizing a career of defending Native voting rights.⁵³

Whether Native voting rights at the local level are fully vindicated in local redistricting is hard to know. But the factors presenting opportunities for representation could arise in the next decade are relatively easy to identify. The next redistricting cycle could bring opportunities to challenge at-large voting schemes that dilute Native voting strength. Even though at-large voting schemes are not affected by a new redistricting cycle, updated census data could bring in fresh facts that give rise to a viable Section 2 claim. For a Section 2 challenge to prevail against an at-large voting scheme, plaintiffs must demonstrate the same preconditions as discussed above in the context of challenging a redistricting scheme.⁵⁴ Thus, plaintiffs must demonstrate that the Native community is sufficiently numerous and geographically compact to constitute a majority in a

51. See generally Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 24–27 (Bernard N. Grofman & Chandler Davidson eds., 1992). For a discussion of the application of at-large voting to dilute Native votes, see *MCCOOL ET AL.*, *supra* 17.

52. *MCCOOL ET AL.*, *supra* note 1716, at 45.

53. *MCDONALD*, *supra* note 16.

54. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

demonstrative district. Updated population figures from the 2020 census reflecting population growth such that Native persons could constitute a majority in a demonstrative district would give rise to a viable Section 2 challenge to an at-large scheme.

IV. When Redistricting Math Fails

But opportunities presented by population growth should not be overstated. Even where meritorious legal claims exist, a variety of practical reasons might conspire to prevent legal rights from being vindicated. And in Native voting rights cases specifically, the practical costs of vindicating voting rights are high. Without the preclearance regime, it is those seeking to protect Native voting rights who bear the burden of proof—and the burdens of litigation. Underperformance of Native voting strength in local governments is not due to redistricting math, but litigation math: there are too many potential defendants, and too few lawyers to bring meritorious cases. And what is especially frustrating about the high costs of litigation in the context of protecting Native voting rights is that as expensive as litigation is, it is often the only way to achieve meaningful change.⁵⁵

And change, even with the help of a court of law, is painstakingly hard to achieve. The decades-long attempts by the Navajos to be represented in San Juan County, Utah, demonstrates this point all too well. Long a numerical majority in San Juan County, the Navajos could not elect a majority of the commissioners through single-member districts to the San Juan County Commission until 2018. The recent electoral success of Navajo representatives is not a straightforward or satisfying success story for Native American representation. The experience there is emblematic not only of hard-won change achieved so far, but also of the many struggles still ahead for protecting Native voting rights in the redistricting process.

The fight for Native voting rights in San Juan County, like those elsewhere, is nothing new. San Juan County now elects its county commissioners and school board members⁵⁶ through single-member districts only because of prior Section 2 litigation by the Department of Justice.⁵⁷ As the tale so often goes, the county previously elected its elected officials through at-large voting, and though Native Americans constituted a substantial portion of the county's population, no Native representatives were ever elected.⁵⁸ In 1983, the Department of Justice sued over the at-large electoral scheme under Section 2, and the case ultimately settled.⁵⁹

As a part of the consent decree to the DOJ-brought litigation, single-member districts were drawn.⁶⁰ One district (out of three total districts) was almost 89% in Native population, and in 1986, elected the first Native representative in San Juan

55. Whatever the merits of John Hart Ely's process theory, it is simply factually the case that dilution of Native voting strength is accomplished through the political process, and thus the judicial branch is the only branch of government that can provide recourse.

56. While both the county commissioner and school board districts are heavily contested, I focus on the county commissioner districts in this piece for sake of brevity.

57. *Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1166 (2016).

58. *Id.*

59. *Id.* at 1167.

60. *Id.* at 1167–68.

County.⁶¹ Indeed, the district continued to elect only Native representatives.⁶² But reform of the electoral structure was only one among many reforms needed to fully ensure Native voting rights. Even as representation reached a new equilibrium (two white and one Native commissioners), federal monitors had to be deployed in San Juan County to ensure that election administration was fair and that Native voters had equal access to the ballot.⁶³

As will become clear again and again as the story of San Juan County unfolds, one-time gains made towards securing Native voting rights can easily backslide. “If you don’t move forward, sooner or later you begin to move backward.”⁶⁴ And in San Juan County, between 1986 and 2011, the system was literally stuck in place—even as the world kept spinning. The county did not redraw their districts, even as three decades of updated census data came and went.⁶⁵ While there is no legal requirement that the county redistrict after every decennial census, redistricting following each decennial census is presumed.⁶⁶ The *raison d’être* of redistricting is to update districting lines based on demographic changes (not simply changes in total population, but also of residential patterns). But such updating did not occur in San Juan County.⁶⁷

Calcified district lines from three decades ago failed to adapt to changing population trends in the county. As each census came and went, the 1986 districts became increasingly malapportioned, meaning that the population totals in the districts became more and more imbalanced, deviating more and more from the principle of one-person, one-vote.⁶⁸ Native Americans had also become exceedingly packed into the predominantly Native district, constituting over 92% of the district.⁶⁹ With Native Americans constituting around 30% in the other two districts,⁷⁰ it was becoming all too clear that the old district lines were accomplishing both packing and cracking of increasing Native voting strength.

Of course, the Navajo community lobbied the Commission throughout the years to revisit the district boundaries, but to no avail. Finally, under severe community pressure, the County altered its districts for the first time since 1986.⁷¹ But the changes made were *de minimus*: two voting precincts were moved from

61. *Id.* at 1168.

62. *Id.*

63. *Navajo Nation*, 162 F. Supp. 3d at 1169.

64. *If You Don’t Move Forward-You Begin to Move Backward*, HARV. MAG. (Dec. 5, 2007), <https://harvardmagazine.com/breaking-news/if-you-dont-move-forward-you-begin-move-backward>. This quote is courtesy of Gorbachev, who made these remarks when he visited Harvard in 2007.

65. *Navajo Nation*, 162 F. Supp. 3d at 1169.

66. *Id.*

67. *Id.*

68. *Id.* at 1169–70. The one-person, one-vote principle comes from the seminal case of *Reynolds v. Sims*, 377 U.S. 533 (1964).

69. *Navajo Nation*, 162 F. Supp. 3d at 1171.

70. *Id.*

71. *Id.* at 1170–71.

one predominantly white district to the other predominantly white district.⁷² Faced with decades-long intransigence and little more than token responsiveness, the Navajo Nation brought suit challenging the 2011 districts.⁷³

Five years after the suit was first brought, the district court decided in favor of the plaintiff, and ordered that new districts be drawn by a special master after rejecting the proposed remedial maps from both plaintiffs and defendants for both legal and prudential reasons.⁷⁴ The court also ordered that the county hold special elections under the map drawn by the special master in November 2018. The special master, Bernard Grofman, a professor of political science at the University of California, Irvine, drew the remedial plan by, *inter alia*, “focus[ing] on keeping census places and cities whole” and “aim[ing] for contiguity and compactness.”⁷⁵ For county commissioner, his map produced two districts that are majority Native, although he cautioned that given empirical data on Native registration and turnout, a 65% Native district was, in fact, a “true swing district.”⁷⁶

The 2018 special election delivered a Native majority on the County Commission: two out of three.⁷⁷ But it would be naïve—and misleading—to end the telling of the San Juan County saga on November 3, 2018. As an initial matter, the election results belie the enormous efforts undertaken to protect Native voting rights in that election. In 2014, amidst the ongoing heat of the litigation over county commission and school board districts, the county decided to alter the way it conducted elections from in-person voting on Election Day to predominantly vote-by-mail (with a single physical polling location remaining open).⁷⁸ As we have seen in many other contexts, this facially neutral change in election administration has a severe racially disproportionate effect. In this case, there was concern over the accessibility of mail-in voting for rural Navajo voters.⁷⁹ There were also concerns over sufficient language assistance for Navajo voters.⁸⁰ These concerns and others lead the Department of Justice, the ACLU of Utah, and state elections officials to send election monitors to ensure that everyone who wanted to vote could cast a ballot.⁸¹

72. *Id.* at 1171.

73. *Id.*

74. *Navajo Nation v. San Juan Cty.*, 266 F. Supp. 3d 1341, 1367 (D. Utah 2017), *aff'd*, 929 F.3d 1270 (10th Cir. 2019).

75. *Navajo Nation*, 929 F.3d at 1290. For more information on how Special Master Grofman drew his districts, see *Navajo Nation v. San Juan Cty.*, No. 2:12-cv-00039, 2017 WL 6547635 (D. Utah. Dec. 21, 2017).

76. *Navajo Nation*, 929 F.3d at 1290.

77. Matt Vasilogambros, *Native Americans Win Crucial Races in Utah County*, GOVERNING (Nov. 13, 2018), <https://www.governing.com/topics/politics/sl-native-americans-utah-midterms.html>.

78. *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1142 (D. Utah 2017).

79. *Id.* at 1142, 1152.

80. The language and ballot access issues were litigated, *see id.*, and eventually settled. *Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU UTAH (Feb. 21 2018), <https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county>.

81. Courtney Tanner, *In San Juan County, It Appears History Has Been Made With a Majority American Indian Commission and Conservative Firebrand Phil Lyman Wins a House Seat*, SALT LAKE TRIB. (Nov. 7, 2018), <https://www.sltrib.com/news/politics/2018/11/07/lyman-wins-house-seat-san/>.

Election administration was not the only avenue by which the County sought to resist potential changes that a new redistricting plan might bring. After it became clear that the special master's map would go into effect and Native candidates were getting ready to campaign, the eligibility of one of the candidates, William Grayeyes, was challenged by county officials.⁸² They alleged that he was not qualified to run because he did not reside in the Utah portion of the Navajo reservation.⁸³ As a court later ruled, the claim was not a meritorious one.⁸⁴

Since the election, efforts have also been made to neuter the new redistrict boundaries. Most prominently, a proposition was put on the ballot to consider expanding the size of the three-member San Juan County Commission.⁸⁵ While the proponents of the measure claim that the racial make-up of the commissioners did not inspire the proposition, it is clear that the measure expresses strong displeasure over the districts drawn by the special master.⁸⁶ The proposition was ultimately defeated by just 153 votes.⁸⁷ More recently, those who opposed the remedial map supported a bill that would make it easier to divide counties in Utah.⁸⁸

The almost four-decade and ongoing saga in San Juan County encapsulates the broader struggle to protect Native voting rights. Its experience typifies the early efforts to protect Native voting rights by enforcing newly available federal laws. Without diminishing the importance of those efforts, they are clearly inadequate given the significant opposition that more muscular Native voting strength faces. The experience also demonstrates the entanglement of representational goals and voter suppression efforts. We are entering the next redistricting cycle at a time when manipulations of the electoral process for political gain are becoming more frequent.⁸⁹ Native voters are already familiar with how the developing Voting Wars affect them. Recognizing that the newly enacted voter identification requirement for voting in North Dakota would disproportionately affect Native voters, many of whom did not possess valid ID for voting under the law, the Native American Rights Fund challenged the law.⁹⁰

How prolonged—and bitter—the fight for Native representation in San Juan County is signals the hard work that lays ahead there and elsewhere. Math is by no

82. *Id.*

83. *Id.*

84. *Id.*

85. Zak Podmore, *San Juan County Heads into Another Controversial Special Election—and Possibly the First Step to a New Form of Government*, SALT LAKE TRIB. (Oct. 14, 2019), <https://www.sltrib.com/news/2019/10/14/san-juan-county-heads/>.

86. *Id.*

87. Kate Groetzinger, *Proposition to Change San Juan County Government Fails by Close Margin*, KUER (Nov. 8, 2019), <https://www.kuer.org/post/proposition-change-san-juan-county-government-fails-close-margin>.

88. Zak Podmore, *San Juan County May Be Vulnerable to County-Splitting Bill*, SALT LAKE TRIB. (Nov. 22, 2019), <https://www.sltrib.com/news/2019/11/22/san-juan-county-may-be/>.

89. See RICHARD L. HASEN, *THE VOTING WARS* (2012); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

90. *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1., 2016).

means the most formidable barrier in the way of greater Native representation. Deeply entrenched behavioral and attitudinal barriers, along with institutional insularity and personal prejudice, all conspire to make the work of enhancing Native representation challenging.

But while San Juan County typifies much of what makes enhancing Native representation hard, it also offers a glimpse of why it matters. While the commission used to hold its meetings exclusively in the county seat of Monticello, about an hour away from the Navajo Nation, the newly elected commissioners elected to hold every third meeting outside the county seat. And in July, 2019, the commission met in Navajo Nation for the first time.⁹¹ In the work session prior to the meeting, the commissioners devoted their time to an issue of grave concern to the Navajo community: the poor condition of the roads.⁹² It is the promise of a government more responsive and attentive to the needs of its Native constituents that is at stake in the next redistricting cycle.

91. Kate Groetzinger, *San Juan County Holds Meeting on Navajo Nation and Discusses Worsening Road Conditions*, KUER (July 3, 2019), <https://www.kuer.org/post/san-juan-county-holds-meeting-navajo-nation-and-discusses-worsening-road-conditions>.

92. *Id.*; see also Jim Carlton, *After 150 Years, Navajo Win Back Political Power in Utah*, WALL STREET J. (Nov. 4, 2019), <https://www.wsj.com/articles/after-150-years-navajo-win-back-political-power-in-utah-11572863402>.