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978-0-521-54871-7 - *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*

Daniel McCool, Susan M. Olson, and Jennifer L. Robinson

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## Native Vote

*American Indians, the Voting Rights Act,  
and the Right to Vote*

The right to vote is the foundation of democratic government; all other policies are derived from it. The history of voting rights in America has been characterized by a gradual expansion of the franchise. American Indians are an important part of that story, but they have faced a prolonged battle to gain the franchise. One of the most important tools wielded by advocates of minority voting rights has been the Voting Rights Act. This book explains the history and expansion of Indian voting rights, with an emphasis on more than seventy cases based on the Voting Rights Act and/or the Equal Protection Clause. The authors describe the struggle to obtain Indian citizenship and the basic right to vote and then analyze the cases brought under the Voting Rights Act, including three case studies. The final two chapters assess the political impact of these cases and the role of American Indians in contemporary politics.

Daniel McCool is a professor of Political Science at the University of Utah and the director of the American West Center and the Environmental Studies program at the University of Utah. He is the author, co-author, or editor of six other books, including: *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (2002); *Staking Out the Terrain: Power and Performance Among Natural Resource Agencies* (1996, second ed., with Jeanne Clarke); and *Contested Landscape: The Politics of Wilderness in Utah and the West* (1999). He has appeared as an expert witness in Indian voting rights cases and has served as a consultant for the National Oceanic and Atmospheric Administration, the U.S. Justice Department, and the Southwest Center for Environmental Research and Policy.

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*University of Utah*



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*Miguel Trujillo, Isleta Pueblo*

*Frank Harrison, Mohave Tribe*

– DCM

*Paul and Olivia*

– SMO

*My parents, Scott and Valerie*

– JLR

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## Preface

When the Founding Fathers designed our government at the Constitutional Convention, their concept of “democracy” was quite different from what that term means to most people today. They held the view that the “consent of the governed” came from only a small fraction of the populace – propertied white males. Article I, Section 4, of the U.S. Constitution gave states the power to prescribe rules for the “times, places, and manner of holding elections,” but it also gave Congress the right to “make or alter such regulations.” This split control over election laws led to dramatic conflicts between the states and the federal government regarding who is entitled to vote. Eventually this conflict led to the Fifteenth Amendment to the Constitution and ultimately to the Voting Rights Act of 1965 (VRA) and its amendments. This book examines the impact that landmark legislation has had on the voting rights of American Indians.

The right to vote is the foundation of democratic government; all other policies are derived from it. Yet there is an “astounding lack of research” on Indian politics, especially Indian voting (Wilkins 2002, 188). Many textbooks on Indian law and Indian policy hardly mention it, and when Indian voting is discussed, the focus is almost always on tribal elections. There is virtually no coverage of the role of Indian voting in federal, state, and local elections. Voting studies usually ignore Indians, and national data sets often lump Indians into an “other” category. As a result, there has been very little systematic study of Indian voting, and there is a “dangerous paucity of data and analysis of actual participation” (Lehman and Macy 2004). Jacqueline Johnson, executive director of the National Congress of American Indians, recently referred to this problem: “Indian people have

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never been a regularly documented population in voter demographics, exit polls or in the mind of the American public as a population that can help determine election results. There has never been a nation-wide study of Native American voters . . ." (Johnson 2004a).

Due to this lack of attention in the literature, one might get the impression that, after Indians gained citizenship in 1924, their voting rights suddenly equaled those of non-Indians. But the truth is far less ideal; Indians have faced a prolonged battle to gain the franchise on a footing equal to that of whites. Much like the struggle for black voting rights in the South, this conflict has been long, arduous, and often bitter. There are many facets to the conflict, but without doubt one of the most important tools wielded by advocates of minority voting rights has been the VRA. It has literally changed the face of America's electorate and eventually brought to office a much more diverse set of people – a process that continues today.

In Indian Country there have been at least seventy-four voting rights cases based on the VRA and/or the Equal Protection Clause since the law was passed. Most of these cases have been fairly recent, and thus the impact of this act is still evolving. But in just a few short years, it has enabled a significant number of Indian people, and candidates of their choice, to get elected to federal, state, and local governments. The history of voting rights in America has been characterized by a gradual but persistent expansion of the franchise; American Indians are an important part of that story.

Chapter 1 of this book describes how Indians achieved citizenship and the right to vote. It traces the long history of Indian–white relations from the earliest attempts to define the political relationship between tribes and the new American nation to the granting of the right to vote to Indians through a series of court cases and statutes. The VRA refers to attempts to deny or abridge the right to vote. Chapter 1 deals with the former; the remainder of the book is primarily about the latter, although even recently there have been efforts to deny Indians the right to vote.

Chapter 2 explains the evolution of the VRA and its amendments. The VRA has been amended several times to expand its coverage and effectiveness. After the passage of the original act in 1965, some political jurisdictions found ways to limit or abrogate the impact of minority voters; the U.S. Congress responded by closing loopholes, extending and strengthening certain aspects of the act, and expanding its provisions into new areas. Chapter 2 explains how these successive amendments have changed the nature of VRA cases, especially as they apply to American

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Indians. The chapter also introduces the organizations principally responsible for bringing the lawsuits under the act.

Chapter 3 presents a broad summary of the seventy-four cases in Indian Country and explains how they fit together as a body of law. Given the volume and complexity of the litigation, this chapter presents only an overview of the case law and points out important trends and developing legal constructs.

The book then turns to three case studies illustrating how VRA cases are litigated or settled. The first case study, in Chapter 4, focuses on two of the earliest VRA cases in Indian Country, both brought by the U.S. Justice Department against San Juan County, Utah. One of those cases, a challenge to at-large elections for county commission, was settled and resulted in the election of a Navajo to the commission. The other case, dealing with information and assistance for Navajo-speaking voters, was also settled and resulted in changes to election procedures.

Chapter 5 tells the story of a VRA case in Montana that pitted Indians on the Fort Belknap Reservation against Blaine County. *United States v. Blaine County* concerned an at-large election system in which all three county commissioners were elected by the entire county – a county that included a substantial Indian minority that had never elected one of its members to the commission. This case went to trial in the U.S. district court and was appealed to the Ninth Circuit Court of Appeals, with the county losing at both levels. The county appealed to the U.S. Supreme Court but was denied certiorari in 2005.

Chapter 6 describes the litigation in *Bone Shirt v. Hazeltine*, which involved Lakota Sioux voters in two legislative districts in South Dakota. The principal issue concerned how the relative number of Indian voters in these adjoining districts affected the ability of Indians to elect a candidate of their choice. The Indian plaintiffs won this case, and the state of South Dakota appealed. In August 2006, the Eighth Circuit ruled in favor of the Indian plaintiffs.

Each of these case studies reveals a different facet of VRA litigation, and each clearly illustrates the complexity and difficulty of winning such a claim. The various sections of the act produce different sets of cases; the facts of the cases vary across tribes, states, and jurisdictions. In addition, the issues change with the development of new case law. We chose our three case studies to illustrate this diversity in legal issues, levels of government, and means of resolution.

The final two chapters focus on results. Chapter 7 examines the impact of VRA cases after the judges have issued their decisions, when the voters



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and candidates begin their odyssey through the election process. Chapter 8 looks at Indian political participation on a national scale, with an emphasis on the 2004 elections. In that election, an unprecedented effort was made to get Indians to the polls. A nationwide campaign by the National Congress of American Indians produced thousands of bumper stickers and lapel pins proudly announcing “I’m Indian and I Vote” and “Native Vote.” The latter slogan provided the title for this book.

When we began our research for this book, we knew there had been quite a few VRA cases in Indian Country, but as we delved more deeply into the issue, we were surprised that the total number eventually climbed to seventy-four. With so many cases, it is clear that the time has come to analyze them and assess their impact. Indeed, there is so much material on these cases that we experienced considerable difficulty controlling the length of this book; VRA cases are so complex that an entire book could be written on most of them. Thus, this book is an overview of what has grown into a voluminous body of case law and election policy. A significant number of these cases involve the sections of the Voting Rights Act that were reauthorized in 2006, just months before this book went to press (see McDonald 2004; Hasen 2005; National Commission on the Voting Rights Act 2005).

In surveying the literature on VRA cases in Indian Country, we found that no one had assembled all of these cases into a single accessible file. We consulted many sources just to put together the case list. Such an effort, of course, requires assistance from a diverse group of attorneys, scholars, and colleagues. We must begin our expression of appreciation by thanking two groups of individuals who went far beyond the call of duty in assisting us. The staff of the Voting Section of the U.S. Department of Justice, particularly Peyton McCrary, Christopher Coates, and Gaye Tenoso, provided incalculable assistance. The same can be said of Laughlin McDonald and Bryan Sells of the American Civil Liberties Union’s Voting Rights Project. Together, these two organizations brought most of the cases examined in this book. We could not have completed it without their assistance, cooperation, and generosity.

Our colleague, Professor Pei-te Lien, provided useful and insightful comments on an early draft of the manuscript. Another colleague, Professor Matthew Burbank, also gave us invaluable advice and insights. Jason Hardy, of the American West Center at the University of Utah, assisted us greatly in our research for Chapter 7. The American West Center provided release time for both Jason and Jennifer Robinson to work on the book. We also owe our appreciation to John Bevan and Lee Warthen,

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