AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 15:2 (1991) 63–92

Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo Country

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American political history regularly has been punctuated by bitter struggles over the right to vote. Those who already have the franchise usually have been reluctant to extend it to others, especially when those others are different somehow from the dominant culture: a different race, or a different gender, or a different economic class. Moreover, voting rights claims reach to the core of the political order, often engendering conflicts whose resolution is possible only through extraordinary political actions like amending the Constitution. Indeed, since 1870, six of the twelve amendments to the federal Constitution have addressed voting issues.[1]

Why have voting rights conflicts so often been characterized by passionate rhetoric and even violence? Clearly, the stakes for both those advocating and those opposing an expansion of the suffrage have been high. For those seeking to obtain the right to vote there has been a common belief that, in the words of the Supreme Court, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[2] Liberal democratic theory assumes that with the right to vote comes representation in government and, consequently, the ability to protect oneself and one's people against the abuses of power that majorities often evince. Conversely, any group that can attain effective control of elections and the instruments of

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government will have a nearly unfettered opportunity to insulate its interests and traditional privileges against the claims of newcomers. For example, many southern whites opposed Black voting rights in part because change would "unbalance local political alignments and would result in a massive redistribution of economic and political resources to the black community."[3]

The struggles of Blacks and Indians to obtain full voting rights in America are parallel in many ways. Both groups share several circumstances that make them "insular" minorities.[4] Both Blacks and Indians are, as people of color, highly visible (or, to put it more bluntly, unlike white ethnic minorities, Blacks and Indians cannot dissolve into the dominant white culture). They are also very often geographically concentrated. That is, Blacks and Indians are not randomly distributed throughout the United States. Partly by choice, but mostly by official and unofficial acts of discrimination by whites, many Blacks and Indians are segregated by place—Blacks in urban areas and the "Black Belt" of the Old South, Indians on reservations established by force or treaty.[5] For much of the nation's history, both were excluded by law from political participation. And finally, each group needed intervention by the federal government to advance its voting rights claims substantially. The Fifteenth Amendment and the Voting Rights Act of 1965 (VRA) became the legal buttresses for Black voting rights. Indians asserting their franchise found legal support first in the Citizenship Act of 1924 and then, more dramatically, in the 1975 amendments to the VRA.

Despite these similarities, many of the controversies surrounding Indian suffrage raise issues substantially different from those raised by the Black civil rights movement. The most significant distinctions rest in (1) the vestigial sovereignty claimed by Indians as indigenous people (by this criterion, the status of Blacks is actually more like that of white immigrants to the New World) and (2) the legal status of many Indians living within and having political sovereignty over something called Indian Country.

Indians existed as politically sovereign peoples prior to European settlement in America. Some of their political institutions, notably the Iroquois Confederacy, were sophisticated even by European standards. More to the point, the sovereignty and independence of the Indian nations were recognized as a matter of law by American colonial administrations. Land could not lawfully be taken from the Indians except by treaty or other sovereign-

to-sovereign agreements.[6] When a new federal government was established by the 1787 Constitution, it maintained this understanding by sending ambassadors and envoys regularly to meet with tribal leaders to negotiate treaties. Indeed, the very use of the word *treaty* to describe the agreements between federal and tribal officials implied that the accords were between sovereigns.

When the United States Supreme Court considered the constitutional status of the Indian nations in the swirl of expansionist sentiment in the early nineteenth century, it consistently maintained that most (though perhaps not all) of this sovereignty was retained.[7] Later in that century, however, the case of *United States v. Kagama* signalled a change in constitutional doctrine regarding Indian sovereignty. The Court suggested that Indian tribes were "wards of the nation," dependent on the federal government for their material existence. In light of this, and noting the power of Congress to legislate for the territories of the United States, the Court asserted that Congress held plenary power over all Indian affairs. Congress might choose to delegate some of that jurisdiction back to the tribal governments or to the states, but the judgment would rest entirely with the federal government as "trustee" of Indian Country.[8] Recent cases before the federal courts have been alternately supportive, then restrictive, of tribal sovereignty in a wide range of policy arenas (e.g., water rights, land claims, criminal jurisdiction), but the *Kagama* precedent has never been overruled. Thus, while many tribes continue to exercise sovereign power over a wide range of internal matters, constitutional challenges to tribal sovereignty continue to surface, and the whole matter of federal-tribal relations remains in a kind of legal limbo.[9]

The constitutional relationship between tribal nations and the states is, at first glance, a bit less ambiguous. The sovereign power of a state does not extend to Indian Country, even when tribal lands are fully contained within the state's borders. Indian Country includes all lands within the limits of any established reservation, whether the land is under title to Indians or not. As the Supreme Court has noted, "[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[10] The basis for this exclusion of state jurisdiction in Indian Country is less clear. Some assert that it is grounded in tribal sovereignty; others claim that states have been removed from the field by federal preemption via *Kagama* and its progeny.

However, while Congress has granted jurisdiction over certain Indian matters to the states (as it did, for example, with Public Law 280), it is settled doctrine that no state may interpose its own sovereign authority into Indian Country without specific congressional or tribal approval.[11]

Thus, Indian reservations and the Indians who live on them introduce unique ingredients into the political mix surrounding voting rights. Reservation Indians are unlike any other oppressed political or cultural minority in America. They represent a legal anomaly—citizens who claim voting rights in states whose sovereignty over their lives and traditions they deny. This anomaly continues to generate conflicts over Indian voting rights that raise issues that are not only unique, but also, if not successfully addressed, threaten both the sovereignty of the Indian nations and the political rights of Indians.

A BRIEF HISTORY OF INDIAN SUFFRAGE

The Constitution grants no one the right to vote. Rather it stipulates that certain factors (e.g., race, gender, age) cannot be used to disenfranchise anyone. In all other respects, voter eligibility is a matter reserved to the states. A common requirement in every state is that the voter be a citizen. Liberal political theory has long assumed that only those who are members of a body politic are entitled to choose those who will govern them. For much of American history, Indians were denied the right to vote because they were not citizens of the United States. There were a few exceptions. For example, citizenship could be attained by marrying a white male (it appears that male Indians could not become citizens by marrying white females!), or by military service, or by treaty right, or by the acceptance of allotment. But most Indians were not permitted to vote. The two most common arguments against United States citizenship for Indians were (1) that Indians owed their political allegiance to sovereign Indian nations (an irony in light of federal transgressions on that sovereignty) and (2) that Indians were members of an inferior race incapable of exercising the responsibilities of citizenship.

For many years, the question of whether Indians, particularly those living on reservations, were United States citizens was

moot, because the right to vote in elections was determined by *state* law. A few states granted citizenship and suffrage to "Indians taxed" (essentially nonreservation, property-owning Indians), but most followed the lead of the federal government in denying citizenship.

The distinction between United States citizenship and state citizenship changed dramatically with the adoption of the Fourteenth Amendment. From then on, "all persons born or naturalized in the United States [were] citizens of the United States *and* of the State wherein they reside." The Fifteenth Amendment underscored the significance of this linkage of state and national citizenship: "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of race, color, or previous condition of servitude." The significance of these changes in the federal system in relation to Indian voting rights did not become clear until the Citizenship Act of 1924 extended United States citizenship to all American Indians. By implication, this act obligated the states, through the Fourteenth and Fifteenth Amendments, to extend to every Indian the privileges of state citizenship, including the right to vote.

Despite this constitutionally grounded protection, few Indians actually voted. Many states, especially those in the West, prohibited reservation Indians (ostensibly citizens of the United States and, therefore, also citizens of the state) from voting, because they were perceived as wards of the federal government and thus "under guardianship."[12] Most states gradually relaxed these prohibitions, so that by 1948, Arizona and New Mexico stood alone in legally denying Indians the right to vote. That finally changed when Arizona's Supreme Court overturned its *Porter* ruling by recognizing that the guardianship doctrine urged by the court in that case was a legal fiction born more out of racist sentiments than out of law.[13]

Notwithstanding these judicial victories, the promise of effective voting rights remained, for most Indians, more illusory than real. Any Indian wishing to vote was confronted by a battery of devices and practices dedicated to frustrating his franchise. Arizona and many other states assessed poll taxes. These taxes, on their face, generally discriminated only against the poor. But since Indians were disproportionately poor, they were especially

impacted by the poll tax.[14] Another common obstacle was the literacy test. This obstacle was especially effective against reservation Indians, many of whom lived on reservations specifically to preserve traditional ways of life, including their native languages. Large numbers of Indians thus either knew no English at all or could speak some English but could not read it well enough to pass the test. At any rate, literacy tests were discriminatory in the discretion they granted to local registrars. Tests were rarely given to "safe" voters (e.g., whites) but were regularly administered to Indians and Hispanics. Moreover, registrars were usually free to decide what was a passing grade on a literacy test. Other barriers included the unwillingness of registrars to enroll eligible Indian voters (made most obvious by the lack of Indian deputy registrars); the physical inconvenience of voter registration for Indians (most of whom had to travel great distances to the county seat to register); and the equally inconvenient placement of voting places (few of which were easily accessible for Indians). Finally, when representation was apportioned, it was often done in such a way as to minimize any possible impact of the Indian vote.

The Voting Rights Act of 1965 (VRA) promised to remove all those barriers, though initially not for Indians. The act was intended to put teeth into the Fifteenth Amendment and gave to the United States Department of Justice and to the federal courts substantial enforcement authority to bring about equal voting rights. At the outset, though, the act applied only to Blacks, and enforcement was focused almost entirely on the states of the old Confederacy. Through the efforts of Indian rights activists, Congress became informed about barriers to Indian voting that were every bit as oppressive as those endured by Blacks. Thus, in 1975 the VRA was amended to include protection of language minorities in states (such as Arizona) where there was a history of deprivation of voting rights.[15]

The impact of the VRA on Indian voting rights was swift and dramatic. The law abolished literacy tests in areas where they had been used to discriminate against Indians. Moreover, the VRA noted that many Indians did not have a written language; it allowed those voters to have assistants who could accompany them into the voting booths. This was the Indian equivalent of the bilingual ballot provision in the VRA, in that these assistants could translate the ballot for any non-English-speaking Indian.

The law also provided for a cadre of federal voting registrars whose responsibility was to oversee the efforts of local registrars. These federal registrars could step in and actively seek out Indian voters, making sure that no new obstacles were thrown up by reluctant local officials.

The VRA included one other remedy so unique that it merits special comment. Section 5 of the act stipulated that no jurisdiction covered by the law could hinder the effectiveness of the minority (Indian) vote. Sometimes referred to as the "anti-dilution clause," section 5 stated that any "changes" in voting arrangements (e.g., changes in registration procedures, creation of new political units, changes in voting booth locations, limitations on who may run for office, or reapportionment) were subject to preclearance with the United States Justice Department. State and local governments were required to submit any such proposed changes to the Justice Department's Civil Rights Division prior to their enforcement. The CRD could nullify any proposal if it deemed that the change had the effect of discriminating against a legislatively protected group.[16]

INDIAN SUFFRAGE AND THE UNIQUE STATUS OF INDIAN COUNTRY

There is little question that the Voting Rights Act has been remarkably effective in opening up the electoral process for Blacks and Hispanics. They have been voting in numbers that would astound anyone who had retired for a twenty-year snooze in 1965. Not only are they voting without the veil of fear; they are becoming increasingly successful in electing Blacks and Hispanics to political office, especially at the local level.

The impact of the VRA on Indian voting is murkier. Indians are certainly voting in greater numbers than ever before. And a few Indians have won elections to state and local offices. But Indian voter turnout remains abysmally low. Populations are often so dispersed that even well-intentioned federal registrars have trouble locating and registering all eligible Indians. In many areas the Indian population is simply too small, even with aggressive registration, to have any dramatic impact on local politics.

But there are a few places where the effect of the new voting laws is readily apparent—places where Indians are not the

minority group but are, in fact, the majority. In these regions (principally within certain counties in Arizona, New Mexico, Utah, and South Dakota), Indians have been so effective in flexing their electoral muscle that non-Indians in these areas have raised two new, much more constitutionally sophisticated objections to Indian suffrage. First, they argue that the vote should be extended only to those with a stake in the community where they wish to vote. Second, they argue that only those subject to the laws of the community should be entitled to vote in that community.

Why should these objections raise important constitutional claims? Again, the answer lies with the unique status of Indian Country. Indians living within Indian Country are immune from state and local taxes and are largely immune from state and local laws. Yet they claim the right to vote for representatives who can levy taxes and make rules and regulations for non-Indians—taxes and rules from which reservation Indians themselves are immune. Not surprisingly, non-Indians find this arrangement a violation of a fundamental element of the rule of law—that the rulers also be the ruled and that they be subject to the laws they make.

There unquestionably is an element of sour grapes to the argument. The history of white-Indian relations in America and in the Southwest is too heavily layered with racism to accept these new criticisms at face value. Nevertheless, the non-Indian objections point out once again the unique status of Indians in our constitutional system. For example, while many whites bitterly resisted the extension of voting rights to Blacks, there was no principled basis for that resistance. No one could claim that Blacks were not subject to the same laws and taxes as others in the community. If Black voters or representatives levied a tax, they levied it upon themselves. If they passed a law, they were as much within its reach as anyone else in the community.

This white resentment has led to several attempts to find new ways to minimize the impact of the Indian vote. It is to these episodes we now turn.

THE STRANGE CASE OF THE "ALL-INDIAN" COUNTY

Northeastern Arizona has become a focal point for these new conflicts. Apache County has the second largest (next to Los Angeles County, California) Indian population in the nation. Nearly

75 percent of the county's residents are Indians. Most are reservation Navajos, but the total includes a portion of the Fort Apache Reservation as well as some off-reservation Indians.[17] (See fig. 1.) Non-Indians in Apache County are a distinct and, in their own perception, highly vulnerable minority. They believe that if political issues in the county are determined by racially polarized voting, then their minority status will become permanent.

In the "old" Apache County, non-Indians controlled the political institutions. Despite their status as the numerical minority, they were able to utilize all of the instruments noted earlier to prevent Indians from voting, or to minimize the impact when Indians did vote. The Voting Rights Act changed all that. As barriers to Indian suffrage vanished, Indians wielded their newly forged electoral sword aggressively. They currently elect two of three members of the County Board of Supervisors. Through control of that board they have also extended their influence to the many appointive boards and councils in the county.

In short, Indians recently have come to dominate the politics of Apache County. This electoral dominance has encouraged Indians to use county resources to improve conditions on the Navajo Reservation. One result has been that resentment among non-Indians has become more pronounced, and their criticisms of Indian suffrage have generated a wider audience. Their ire was specifically aroused by three incidents. First, two bond issues, one for $3 million and one for $21 million, were approved by Apache County voters. The reservation precincts overwhelmingly voted in favor of the bond issues; nonreservation precincts overwhelmingly opposed them. What embittered many non-Indian voters was that much of this spending was earmarked for the Navajo Reservation—country over which the federal government, not the state, supposedly exercised a trustee responsibility. Moreover, these bonds were to be paid by property taxes assessed on county property owners—taxes that would not fall at all on the reservation Indians who voted overwhelmingly for the increases. A second criticism arose from the activities of the County Planning and Zoning Board. That board, controlled by a majority of Navajos, was in a position to regulate the property of Apache County residents. Yet, because of their reservation status, the Indian board members were able to exempt themselves and all other tribal property from any of those regulations. Finally, many non-Indians criticized a series of spending decisions by the Navajo-controlled board of supervisors. For example, the

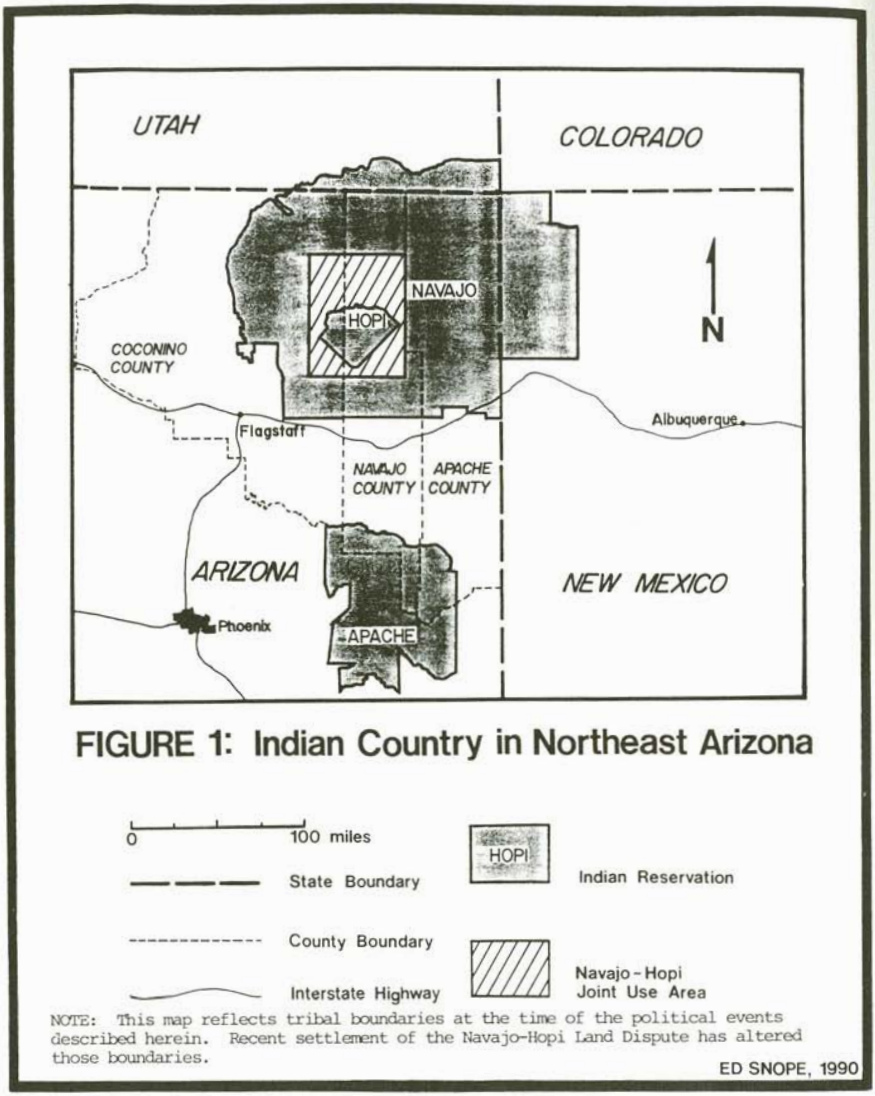

FIGURE 1. Indian Country in northeast Arizona.

board voted to open several "satellite" county offices on the reservation, complete with full-time staff members—this despite the fact that the county had very few responsibilities on the reservation and that board members in the past had served part-time and without the benefit of staff. Many perceived these actions as Indian "make-work" projects, again paid for by taxes assessed on non-Indians.

Most of the dissidents recognized that disenfranchising the Indian residents of Apache County was not possible. The weight of the law was firmly set against any such claim. Instead, many white citizens of Apache County (and Navajo and Coconino counties, each of which contain large portions of the Navajo Reservation) began a concerted political effort to make harmless the effects of Indian voting strength. What they proposed was that a new county be created by partitioning the northern half of Apache and Navajo counties along the southern border of the Navajo Reservation, effectively creating an "all-Indian" county.[18]

The Arizona state legislature quickly passed such a bill in its 1982 session, only briefly considering its consequences. A few voices rose in opposition. Senator Jaime Gutierrez angrily referred to the bill as the Arizona Apartheid Act.[19] Others questioned the bill's constitutionality. But the Republican-controlled legislature ignored all objections.[20] Governor Bruce Babbitt, a Democrat, vetoed the bill, claiming that it was a racially motivated solution to an essentially economic conflict.[21] In an attempt to defuse and perhaps bury the issue, he recommended a special commission to study the proposal. The "all-Indian" county idea has lain dormant since. The constitutionality of the plan was never tested in any court, and the legal questions remain unresolved.

But what if such a proposal were resurrected (and there are occasional rumblings to that effect)? Is there anything wrong in principle or in law with an all-Indian county? I believe that the principles undergirding the separationist position are based on several questionable assertions. Moreover, even if one were to concede the merit of those assertions, it is clear that there are *insurmountable* constitutional problems with the plan.

Let us first assess the claim that "those who do not pay taxes or those not subject to the laws of a place should not be entitled to decide its political affairs."[22] This is a principle with deep roots in American political practice. Prior to the early 1800s, most American communities extended suffrage only to those white males who owned property, usually a freehold. State require-

ments regarding the amount of property necessary to attain the vote varied, but the trend over time was to lower this threshold, so that by the early nineteenth century, it was general practice that a citizen merely needed to hold personal property in any form that could be taxed. The absolute value of that property became less important.

The principle undergirding the property requirement—that one should have a sufficient "stake in the community" before being allowed to exercise the suffrage—was generally accepted by most republican thinkers of the founding generation. They were deeply distrustful of those who held little or no property. They feared that such individuals would be tempted to use their votes to diminish the property rights of others or would be subject to corruption by those who would buy their votes. On the other hand, those with property could be relied upon to exercise prudence in levying taxes and spending public money, because they were subject to the very taxes that they assessed.[23]

Political and legal developments in the last century-and-a-half have diminished the potency of the "stake in the community" principle. The rise of Jacksonian democracy brought a new counter-principle—that those affected by government should have the opportunity to participate. It no longer mattered whether the size of a person's economic contribution to the community was large or insignificant; economic decisions were, after all, only a fraction of what government was responsible for. Since the activities of government affected all citizens, it was this new nexus that for most democrats justified universal manhood suffrage (and, indeed, later justified the expansion of the suffrage to women and Blacks). More to the point, developments in constitutional law indicate that anyone who insists on an economic contribution to the community as a prerequisite for voting is beating a legal "dead horse." For example, the Twenty-fourth Amendment prohibits the imposition of any sort of tax as a suffrage requirement. And, as a likely rebuff to the position taken by the Apache County dissidents, in a series of cases decided in 1969 and 1970 the United States Supreme Court argued that states and local governments could no longer exclude those who paid no property taxes from voting in special school district tax referenda, revenue bond elections, and general obligation bond elections.[24]

Moreover, an important assumption made by the dissidents is that reservation Indians pay no taxes. With regard to property

taxes there is some truth to the claim, although Indians who live on the reservation and own property outside of Indian Country are subject to the same property assessments as non-Indians. But property taxes are not the only taxes that citizens pay. In fact, the trend nationally is for local governments to rely less on property taxes and more on other taxes (principally sales taxes) as a source of revenue.[25] Arizona is no exception to that trend. When Indians purchase goods and services off the reservation, they pay those taxes. An analysis commissioned by the state task force studying the separation issue discovered that reservation Indians, in fact, made a significant economic contribution to Apache County's coffers—so great a contribution that the study questioned whether either of the two new nonreservation counties envisioned by the dissidents would have a sufficient revenue base to provide essential county services mandated by the state.[26]

Setting aside the economic issues in the dispute, the question might still be put, Can a state for any reason create an all-Indian county? For example, can a state essentially "fence out" certain voters because they are outside the reach of the state's power?

Current constitutional interpretation suggests that the Supreme Court would be extremely skeptical of any such attempt to dilute the fundamental right of voting. For example, Texas enacted a law that prohibited United States military personnel assigned to bases in Texas from voting in state and local elections. The state argued that base commanders would be in a position to wield substantial influence over their subordinates. Communities bordering on large military installations could find their political fortunes being determined by transients with neither a permanent stake in the community nor with any fiscal responsibility for their actions (an argument quite similar to that of the Apache County dissidents). The Supreme Court ruled that while Texas had a legitimate interest in imposing a reasonable residency requirement, " 'fencing out' from the franchise a sector of the population because of the way they may vote [was] constitutionally impermissible."[27]

The Court was equally critical of a similar attempt by Maryland to deny the suffrage to residents of a small federal enclave (the National Institutes of Health). Maryland claimed that the enclave residents were not subject to Maryland law while on federal land; they therefore lacked the requisite interest in state and local matters that would entitle them to vote. Maryland specifically argued

that the enclave was a "state within a state." The Court rejected this assertion as a legal fiction, noted that the enclave residents were substantially affected by state and local government decisions, and again supported the right to vote against a state's efforts to withdraw it.[28]

The most troublesome aspect of Arizona's law was its racist character. The boundaries of the proposed all-Indian county were not just geographically convenient; they contained the most heavily populated parts of the Navajo Reservation. In truth, not all of northeastern Arizona's Indians lived in the all-Indian county. Some of them lived off the reservation or on the less populated Apache Reservation. Nor did the proposed county include only Indians. Some non-Indians lived on the reservation or on private land within the jurisdiction of Indian Country. But even the proposal's advocates candidly conceded what all could see. The new county would be overwhelmingly Navajo.[29] The partitioned Apache and Navajo counties (the latter tentatively renamed Holbrook County) would be just as overwhelmingly white. No one suggested that other federal enclaves in Arizona such as military bases or national parks be cordoned off into new subdivisions, even though the jurisdictional problems were nearly identical. Only Indians and Indian Country were affected by the proposed law.

In 1957, the state of Alabama, with the encouragement of the white citizens of the city of Tuskegee, passed a law that redefined the boundaries of that city. The new Tuskegee bore little resemblance to the old Tuskegee. Instead of the squarish town boundaries that had existed previously, the new Tuskegee was defined by a twenty-eight-sided figure that looked like something produced by a four-year-old who had connected all the wrong dots. The boundaries carefully excluded all the areas in which Blacks lived. When the case reached the Supreme Court in 1959, the justices were quick to note that this was an attempt to "fence out" the community's Black residents and was, therefore, unconstitutional. The *Gomillion* opinion also endorsed principles that go to the heart of the white-Indian political conflict in Arizona. The Court noted that "when a legislature thus singles out a *readily isolated segment of a racial minority* [my emphasis] for special discriminatory treatment, it violates the 15th Amendment."[30] Those who questioned the constitutionality of the all-Indian county bill had good reason to be skeptical.

"IF YOU CAN'T BEAT 'EM, DILUTE 'EM"

The all-Indian county was not the only post-VRA effort to minimize the impact of Indian voting. In 1983, residents of neighboring Navajo County (see fig. 1) voted to expand the board of supervisors from three persons to five. This change meant that the county would have to reapportion its supervisorial districts. In recent years, one of three board seats has been occupied by an Indian. But population on the Navajo Reservation was increasing at a faster rate than the non-Indian population in the county, leading many whites to express concerns about the effects of reapportionment.

The expansion to a five-person board was, of course, precisely the sort of change in a voting unit that was subject to preclearance under section 5 of the VRA. Congress recognized that apportionment was (and still is) an effective instrument for frustrating emergent Black voters. Whites in the South commonly employed three strategies for adjusting electoral geography to their advantage: annexation, at-large representation, and gerrymandering.

As Blacks in some communities emerged as the numerical majority or near-majority, a few town leaders looked to annexation as a way of maintaining white dominance. If a nearby unincorporated area was predominantly white, it became a target for annexation.[31] The underlying racism of this strategy was even more apparent when a city sought to annex predominantly white communities but not similarly contiguous Black communities,[32] or, as illustrated by the Tuskegee case, when a community "deannexed" Black residential areas—seeking in some way to jettison Black neighborhoods and submerge them into larger political units that would dilute the effectiveness of those Black voters.

At-large representation was another tactic utilized by whites seeking to maintain their political control. Many local governments such as city councils, school boards, and county commissions elect multimember bodies. When those representatives are chosen at large, the white majority within a community can utilize racial bloc voting to elect *all* of the members of the board. Insulated minorities can be frozen out.

Gerrymandering, one of the oldest political traditions in the United States, is a strategy of drawing the boundaries of representational units in such a way as to help one's friends and hurt one's enemies. In the context of racial politics, this has often

meant that minority populations are dispersed among several districts so that they become a voting minority in each district. Or, when the minority group is numerous, districts can be gerrymandered in such a way as to concentrate the racial minority in one or two districts, thereby containing their political representation at a "safe" level.

The previous three-person board of supervisors in Navajo County had been apportioned so that at least one member would almost always be an Indian—not surprising given that 47.5 percent of the county's residents are Indians. One seat was equally "guaranteed" to non-Indians, and a third seat was "marginal" —a term indicating that both Indians and non-Indians had a reasonable chance for electoral success. Having failed with the all-Indian county proposal (a strategy of deannexation), some whites envisioned the change from a three-member board of supervisors to a five-member board as a new opportunity to reassert their diminishing political control over Navajo County.

At least ten different redistricting plans were submitted by various parties. (See table 1.) Each of these plans benefitted a different set of interests. The plan originally submitted by the board of supervisors was configured so as to guarantee only one Indian-majority district. (See fig. 2a.) Three of the proposed districts had clear non-Indian majorities. The population of a fifth district had roughly equal numbers of Indians and non-Indians. At first glance, this arrangement would seem to concede the real possibility that a second seat on the board could be controlled by Indian voters. In reality, it did nothing of the kind. For reasons noted above, Indians register and vote at much lower levels than non-Indians. Thus, any electoral district that is populated equally by Indians and non-Indians will almost certainly be dominated by non-Indians. Thus, the board plan would have reduced Indian representation from 33 percent (1 in 3 seats) on the old board to 20 percent (1 in 5) on the new board.

Not surprisingly, all three of the Indian tribes located within Navajo County (the Navajo, Hopi, and Apache) protested vigorously. Their argument was simple: They believed that, since the Indian population of Navajo County was more than 47 percent, it was reasonable to insist that any apportionment give them at least two seats (40 percent) on the new board. They carried their objections to the United States Justice Department which, when asked by the Navajo County board to preclear its apportionment plan, declined to do so.

The board defended its plan as the best it could conceive within the constraints under which it operated. First of all, the districts had to be as nearly equal in population as possible;[33] second, Arizona law stipulated that districts be geographically contiguous; and finally, the board faced vigorous lobbying by residents of Holbrook and Winslow, the two largest nonreservation communities, not to partition their towns in any redistricting.

The first two concerns were, on their face, racially neutral. But the third criterion, that Winslow and Holbrook not be divided, was not. Maintaining those two towns as the demographic core of two districts had the effect of compressing a large number of Navajo voters into one nearly all-Indian northern district (see district 1 of fig. 2a) and distributing the rest of the Indian voters in such a way as to dilute their voting strength (see, especially, districts 2 and 3 of fig. 2a). The Indian tribes proposed four alternative redistricting plans, each of which met the first two criteria, but not the third. By allowing for the partition of portions of Winslow and Holbrook into several different districts, the tribes were able to demonstrate that Navajo County could be apportioned so as to reflect Indian voting strength more fairly. Moreover, this apportionment could be accomplished without extreme measures. The districts in the tribal plans met the one person-one vote and geographical contiguity criteria every bit as well as the board plan did.

With at least ten different plans on the table, it became apparent that a speedy resolution to the controversy would not happen without federal intervention. Shortly after receiving the tribal objections to the board's plan, the Justice Department cancelled the 1984 board elections and intimated that no election would be held until an acceptable apportionment plan was approved by the CRD. With this federal presence in evidence, all parties agreed to a proposal—the Low Deviation Compromise Plan (see fig. 2b)—that the Justice Department approved. The plan featured the partition of some precincts in Winslow and the establishment of two predominantly Indian districts (see, especially, the redrawn district 2 in fig. 2b). The first election for the new county board was held in 1986 and led to the predicted results—a board composed of two Indians and three non-Indians.

The sensibleness of the compromise in Navajo County is tempered by the realization that the constitutional issues raised in the controversy were not adjudicated. What might have happened if the racial animus had been deeper—if the controversy

TABLE 1
RACIAL DEMOGRAPHY OF NAVAJO COUNTY
REDISTRICTING PLANS (1984)

	Proposed Supervisorial Districts				
Plan	*1*	*2*	*3*	*4*	*5*
County Board	I	W	?W	W	W
Percy Deal	I	I	W	W	W
Johnny Butler	I	?W	?W	W	W
Pete Shumway #1	I	W	?W	W	W
Pete Shumway #2	I	W	I	W	W
Navajo A	I	I	W	W	W
Navajo B	I	I	W	W	W
Hopi	I	I	W	W	W
Three Tribes*	I	I	W	W	W
Low Deviation Compromise	I	I	W	W	W

I = Proposed district population has a substantial Indian majority.
W = Proposed district population has a substantial non-Indian majority.
?W = Proposed district population is closely divided between Indians and non-Indians. (Given lower registration and turnout figures among potential Indian voters, elections in such districts would likely be controlled by non-Indians.)
NOTE: Percy Deal, Johnny Butler, and Pete Shumway were Navajo County's three supervisors in 1984.
* = The Three Tribes plan refers to a joint proposal of the Navajo, Hopi, Apache tribal leadership.

had arisen in Apache County instead? And what might have happened had the Justice Department not applied pressure to bring about a compromise sympathetic to the claims of Indian voters? Recent developments suggest that the Civil Rights Division is becoming substantially less sympathetic toward minority claims of voting rights violations. The Reagan administration actively campaigned against any extension of the Voting Rights Act when it was due to expire. The administration lost that legislative battle, but the Justice Department retains virtually unlimited discretion in enforcing (or not enforcing) the law. Indeed, the Justice Department has recently taken several *amicus curiae* positions in support of state and local governments that are resisting minority claims based on the VRA.

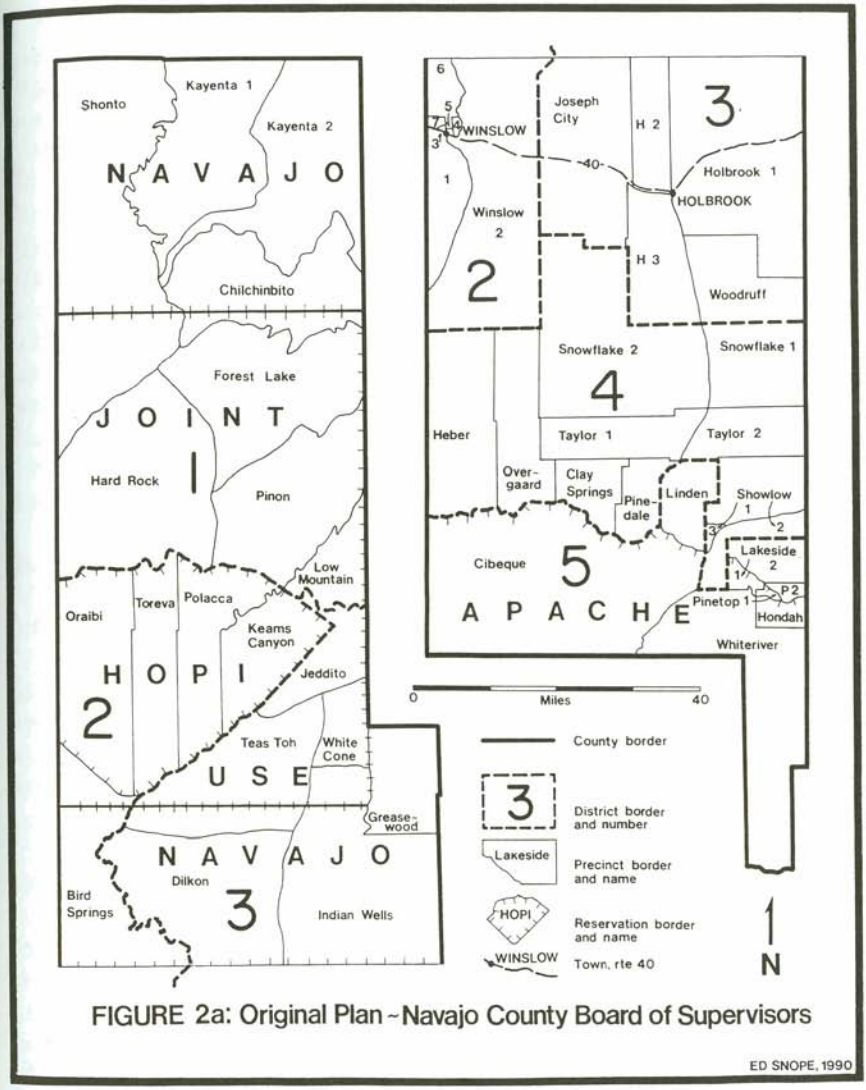

FIGURE 2a: Original Plan - Navajo County Board of Supervisors

ED SNOPE, 1990

FIGURE 2a. Original plan—Navajo County Board of Supervisors.

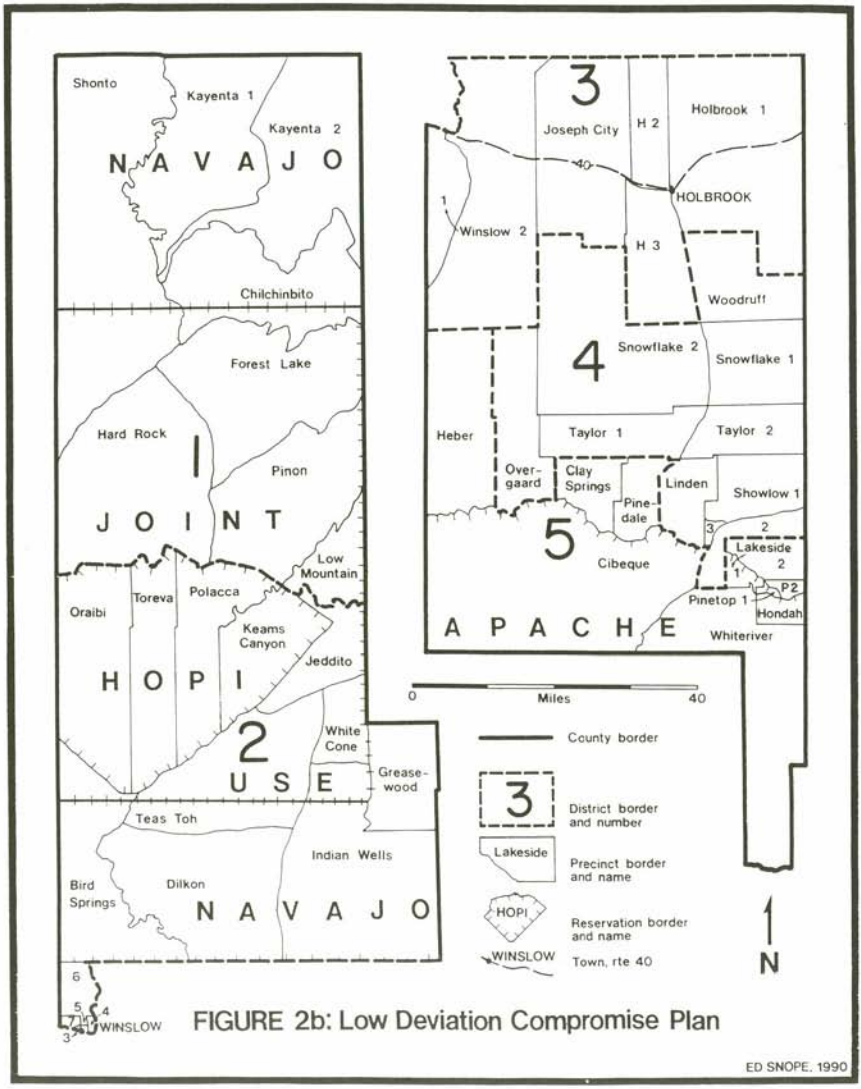

FIGURE 2b. Low deviation compromise plan.

What, then, if the compromise effort in Navajo County had failed? What if the Justice Department had opposed the claims made by Indian voters? The only remaining avenue of nonviolent action would likely have been litigation.[34] At some point in that process, the crucial question would have been addressed: Is there anything in the Fourteenth or Fifteenth Amendment or in the Voting Rights Act that entitles minorities, including Indians, proportional representation? The answer is neither an unqualified yes nor an unequivocal no. On the one hand is the clear language of the 1982 amendments to the Voting Rights Act: There is "no right to have members of a protected class elected in numbers equal to their proportion in the population." A literal application of this section suggests that Navajo County Indians have no legal right to at least 40 percent of the seats on the county board. Disproportional electoral results alone are not a sufficient basis for a successful Voting Rights Act challenge.

In spite of this seemingly unequivocal language against proportional representation, Congress has indicated elsewhere in the VRA that the electoral success of racial minorities is a matter entitled to some protection. The legislative debates surrounding the VRA and the language of the statute make it clear that Congress is especially concerned with electoral practices that might somehow dilute the efficacy of racial minorities. Such practices cannot have the purpose *or effect* of subverting political opportunities for insular minorities. Since one way of measuring efficacy is to examine whether minorities are being elected to office, the principle of proportionality becomes a simple way of measuring compliance with the VRA.

The Supreme Court was at first reluctant to adopt the view that numerical underrepresentation was by itself convincing evidence of noncompliance with the VRA. But it did interpret the VRA to mean that "no voting procedure changes would be made that would lead to *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise [my emphasis]."[35] Applying this *Beer* principle, Navajo County Indians might well have argued that a plan that reduced their representation from 33 percent to 20 percent (at a time when the proportion of Indian population was growing) was a retrogression of their political efficacy. But a more conservative Court in 1980 seemed to extinguish much of the potency of *Beer*. In *Mobile v. Bolden*, the Court read the VRA to mean that electoral

changes whose effects were harmful to racial minorities were unlawful only when they resulted from purposely discriminatory actions—a threshold of proof evident in only the most overtly racist cases. Electoral changes that were racially neutral on their face could not be challenged merely because the minority in question was unhappy with the results.[36]

Congress chose not to accept the Court's interpretation of its handiwork. When Congress considered amendments to the VRA in 1982, it specifically overruled the Court's *Mobile* doctrine. Congress insisted that the *totality of the circumstances* be examined when assessing compliance with the VRA. The effect of the totality test was to reintroduce disproportionality as an important evidentiary element. Where the "intent to discriminate" standard was very difficult to prove (it inevitably involved such murky inquiries as, "What were you thinking when you voted for this electoral change?"), the more flexible totality-of-circumstances approach invited minority challengers to submit patterns of discriminatory actions and results as part of their package of evidence.

The Supreme Court recently has had its first opportunity to apply the amended VRA in *Thornburg v. Gingles*. Black voters claimed that North Carolina's system of legislative elections violated the VRA. They objected particularly to the mixed electoral format—some districts were single-member, others elected several members—which, Blacks complained, left them underrepresented in the state legislature. The Court's application of the totality-of-circumstances test in *Thornburg* also speaks to many of the circumstances affecting the Navajo County case. First, the Court noted that North Carolina had a history of racially discriminatory voting provisions that cast a shadow on the state's current arrangements. (A similar history of voting discrimination exists in Navajo County.) Next, the Court noted that discrimination in education, in housing, in health services, and in employment had hindered the ability and opportunity for Blacks to participate effectively in the political process. (Again, the plight of Indians in Arizona has a similar history.) Third, the Court recognized that there were alternative voting procedures—in this instance, single-member districts—that likely would have increased the efficacy of minority voting. (In Navajo County, there were equally valid districting plans that would have been less discriminatory toward Indians than the original county submis-

sion.) Fourth, the Court determined that many white candidates for legislative office had appealed to voters to vote along racial lines—i.e., that voting in North Carolina had been, and continued to be, racially polarized. (Voting in Navajo County exhibits the same sort of racial polarization.) Finally, the Court noted that Blacks had exhibited a decided lack of success in electing their "fair share" of candidates to office—that the existing electoral arrangements continually worked to their disadvantage. (Again, despite occasional successes, Indians in Navajo County are underrepresented.)

The lesson of *Thornburg* is this: Racial minorities are not guaranteed proportional representation, but where a pattern of racially polarized voting exists, the VRA insists that minority votes not be diluted. Racially polarized voting has characterized elections in northeastern Arizona for many years, usually to the disadvantage of Indians. In short, had Navajo County chosen to stand firm on its original redistricting plan, it probably would have lost the battle in the federal courts. The Indian claim that 47 percent of the voters should translate into no less than 40 percent of the representation on the county board might well, under the totality of the circumstances, have been judicially validated.

THE FUTURE OF VOTING RIGHTS IN INDIAN COUNTRY

The outcome of these cases would seem to bode well for Indian voting rights. Both of the attempts to roll back or limit the efficacy of Indian voters failed. But advocates of Indian voting rights should not be too sanguine about their successes. Conflicts over suffrage will continue to emerge, especially in those areas where Indians are either the local majority or the "swing bloc" in closely contested races. Whether by such unorthodox means as all-Indian counties or by more mundane methods like gerrymandering, Indians will continue to have their effective suffrage challenged.[37]

Where the extent of Indian Country is large, the constitutional issues connected with Indian voting will be especially acute. Opposition to Indian voting in those areas can be waged not just on illegitimate and unlawful racial grounds, but also on the battlefield of constitutional principle. It is one thing to demonstrate that an all-Indian county, grounded as it is in the most overt form of racism, is thoroughly unconstitutional. But it is quite another

thing to argue that all of the constitutional questions raised by the complainants can be dismissed easily. Put bluntly, the constitutional tension is this: Claims of tribal sovereignty and immunity from state and local processes cannot, in principle, coexist with the responsibilities incumbent upon citizenship and suffrage in state and local governments.

There are, however, some alternatives that can alleviate some of the constitutional concerns of non-Indians while retaining Indian voting rights and what remains of tribal sovereignty.[38] One approach is to constrict the powers of local government. For example, many states have enacted constitutional provisions that limit the taxing and bonding authority of local governments. Such an approach would lessen the fears of non-Indians that an Indian majority will enact confiscatory taxes—taxes from which most reservation Indians are exempt. Whites might still feel aggrieved, but the worst case scenario would be foreclosed. The principal disadvantage of this approach is that much of Indian Country is in dire need of social services and physical infrastructure. To constitutionally freeze or severely curtail county spending for these projects precisely at the time that Indians have attained the electoral muscle to obtain them is to make the voting rights struggle a cruel hoax.

A variation on the tax-limitation approach is to insist on extraordinary voting majorities when approving certain kinds of economic actions (e.g., increases in tax rates, approval of bonds, expansion of debt limits). For example, one could stipulate that such measures can be approved only when 60 percent or more of the votes are in favor; or that such measures must be approved in two successive elections. The Supreme Court seems willing, within limits, to tolerate this approach.[39] Again, the solution offers to protect, to some degree, the property rights of non-Indians without severely limiting Indian voting rights. Yet there remains the principle espoused in *Reynolds*—that no person's vote ought to be worth more than another's. The Court has been willing to concede that when important competing rights (i.e., the right to property) are asserted, as in *Gordon*, the one person-one vote principle can be made more flexible. But in Apache County the electorate is 75 percent Indian. Can *Reynolds* be stretched so far as to permit 25 percent of the electorate to exercise an effective veto over such important public policy matters? I doubt it.

A third strategy is to mitigate the economic burdens that local

governments situated in Indian Country must be made to bear. Indian peoples often are very poor, desperately so. It is not surprising, then, that they will make economic claims through their new electoral power when the opportunity presents itself. Those claims fall, unfortunately, upon local governments whose own resource bases are too limited for the task. One solution would be for the federal government to accept a greater share of these economic burdens. The argument is remarkably simple. Because relations with the Indian tribes are a special responsibility of the federal government, the federal government should assist local administrations in meeting the special needs of Indian Country. The federal government does this in other areas where its activities have taxed the capacities of local governments. For example, it contributes "in-lieu payments" on behalf of many federal agencies whose activities either impact on the local community (e.g., military installations) or remove substantial land from local tax rolls (e.g., national forests, national parks, federal lands). Indian Country qualifies on both accounts: The tribes have enormous development needs, but their sovereignty removes tribal property from county tax rolls.[40]

As neat as this solution appears, there are obstacles. How large, for example, should such payments be? And how should the amount be determined? Moreover, political experience suggests that any program that depends entirely on government largess is subject to the fickle fortunes of the most recent presidential election. The Reagan administration, many of whose most fervent supporters were found among the anti-Indian forces in Arizona, was largely unsympathetic to Indian demands. It was also an administration burdened by a monstrous federal deficit—a development that led to substantial cuts in revenue-sharing programs. Thus, unless increased federal support for tribal needs were made a legal entitlement, it could evaporate quickly.

Another alternative is to encourage tribal and local governments to negotiate intergovernmental agreements (IGAs). Negotiation has several attractive qualities, perhaps the most compelling of which is that it is grounded in an environment in which respect for tribal sovereignty must be assumed by all parties. In addition, partisans of both interests are likely to accept the results of such agreements. The very voluntariness of IGAs generates a legitimacy absent in most other approaches. Successful negotiations may engender a comity between Indians and non-Indians, be-

tween tribes and counties, attainable in no other way. And such agreements have the added advantage of flexibility. When the federal government intervenes to resolve issues uniformly, both Indians and non-Indians are liable to find that solutions appropriate to voting rights disputes in Arizona are inappropriate for disputes in South Dakota or New Mexico. But solutions offered through intergovernmental agreements between the affected parties (the negotiated redistricting settlement between the tribes and Navajo County, although conducted under the aura of federal coercion, is an excellent example) are likely to be a better "fit." Of course, even this option is not without its difficulties. Some non-Indians question whether these IGAs truly are compacts between two distinct parties. Would an IGA between the Navajo Nation and Apache County truly reflect a coming together of different views, when Apache County's government itself is controlled by Navajos? Rather than A and B negotiating on an equal footing to secure their mutual interests, the Apache County model would more closely resemble an agreement between A and B to take away something from C. Conversely, many Indians believe that they are not likely to be treated as equals in any negotiations; they suspect that racism and their own lack of tangible bargaining resources put them at a disadvantage. It is one thing to promote a spirit of comity and consensus; it is quite another to achieve it.

What remains is that Indians and Indian rights organizations will continue to press for effective participation in local governments. They likely will also insist on maintaining as much sovereignty and political autonomy within Indian Country as possible. The most powerful weapon in their arsenal is vigorous enforcement of the Voting Rights Act. Many non-Indians, especially those whose interests are directly affected by Indian bloc voting, will continue to oppose Indian suffrage; they will do so by making powerful appeals to equity and by challenging the ambiguous constitutional status of Indian Country. Solutions sensitive to tribal sovereignty *and* constitutional principle will require a climate of mutual respect and trust. This climate is still not easily attained.

NOTES

1. The Fifteenth Amendment prohibits states from denying the right to vote on account of race; the Seventeenth provides for popular election of United States senators; the Nineteenth forbids states from denying the right to vote

on account of gender; the Twenty-third extends to citizens of the District of Columbia the right to vote; the Twenty-fourth abolishes poll taxes; the Twenty-sixth validates the right of eighteen-year-olds to vote.

2. *Reynolds v. Sims*, 377 U.S. 533 (1964).

3. Howard Ball, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the 1965 Voting Rights Act* (Westport, CT: Greenwood Press, 1982), 116.

4. The legal conception of an insular minority appears first in an historic footnote to an otherwise uninteresting Supreme Court case involving economic regulation. Justice Harlan F. Stone noted that the Court bore a special responsibility to inquire "whether prejudices against *discrete and insular minorities* (my emphasis) may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

5. Actually, more than half of all Indians now live off-reservation. The largest population of these Indians lives in the Los Angeles metropolitan area. But their relative numbers are small, and they are largely unorganized; hence they usually have very little influence on local politics. Reservations, on the other hand, concentrate Indians in less populated rural areas where their potential political influence is greater.

6. See, especially, Rachel San Kronowitz et al., "Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations," *Harvard Civil Rights-Civil Liberties Law Review* 22(1987): 509–514.

7. *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

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

9. These few paragraphs cannot possibly do justice to an issue as complex as Indian sovereignty. More complete discussions can be found in San Kronowitz, "Toward Consent and Cooperation"; Kirke Kickingbirde, *Indian Jurisdiction* (Washington, DC: Institute for the Development of Indian Law, 1983); Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987); Felix S. Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1970).

10. *Rice v. Olsen*, 324 U.S. 786 (1945).

11. Public Law 280 was enacted by Congress in 1953 under its plenary power to administer Indian affairs. The statute extended broad criminal and civil jurisdiction over Indian Country to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin (Alaska was later added). The law has been widely criticized by most Indians and has not been extended further. Indeed, the trend in the last twenty-five years has been to reject, judicially or administratively, most new state jurisdictional claims and to cede back to tribal governments some of their lost jurisdiction.

12. An Arizona case decided only four years after the Citizenship Act, *Porter v. Hall* 271 P. 411 (1928) was typical of this sort of argument. The Arizona Supreme Court asserted that reservation Indians were under federal guardianship and "not capable of handling their own affairs in competition with whites."

13. *Harrison v. Laveen*, 196 P.2d 585 (1948). New Mexico was the last holdout, not extending the legal franchise to Indians until 1962, in *Montoya v. Bolack*, 372 P.2d 387.

14. Poll taxes were banned first by the Voting Rights Act of 1965, but only in the areas covered by the act. The Twentieth Amendment subsequently banned them throughout the nation.

15. It is a bit odd that Indians obtained coverage under the VRA as a language minority rather than a racial minority. After all, the Fifteenth Amendment includes no special protection for non-English-speaking peoples, while it does prohibit states from using race as a criterion for voter eligibility. The best explanation for Congress's approach was that it carried certain tactical advantages. Not only would racial minorities such as Indians and Asians be covered by a language minority provision, but so would Caucasian Hispanics.

16. Ball et al., *Compromised Compliance;* John P. MacCoon, "The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965," *Catholic University Law Review* 29 (1979): 107–127.

17. Data from James Paul Allen and Eugene James Turner, *We the People: An Atlas of America's Ethnic Diversity* (New York: Macmillan, 1988).

18. An "all-Indian" county for northeastern Arizona was not a novel idea. The proposal had surfaced in various guises several times previously. In 1962, for example, there was an effort to create an Indian Lands County from those parts of the Navajo and Hopi reservations that lay within all three northeastern counties (Apache, Coconino, and Navajo). None of these plans succeeded. In 1982, supporters of the all-Indian county again tried to solicit the support of the old coalition. But this time Coconino County officials decided not to join in the petition. The official explanation was that Indians were important members of the community and posed none of the special "problems" that were argued to exist in Apache and Navajo counties. A more realistic explanation turns on two factors. The first is that the Navajo Generating Station at Page, the single largest source of county revenue, would be lost if those portions of the Navajo and Hopi reservations currently within Coconino County were to become part of the new all-Indian county. Second, Coconino County is more heavily populated than its two eastern neighbors, and the Indian minority is proportionately smaller. In short, Indians pose no threat to the existing powers in Coconino County.

19. *Arizona Republic,* 17 April 1982.

20. Although support for the bill did not divide precisely along party lines, most Republicans (the majority party in both houses) voted in favor, and most Democrats voted against. The bill was a litmus test for many Arizona conservatives. The extremely conservative Rocky Mountain States Legal Foundation (where former Interior Secretary James Watt gained much of his early notoriety) was active in the separation movement.

21. The governor, a Democrat, was probably not unmindful of the angry reaction that the bill engendered among Indians. In recent years, Indians have become a crucial component in the Democratic coalition needed to win statewide races. See Daniel McCool, "Indian Voting," in *American Indian Policy in the Twentieth Century,* ed. Vine Deloria, Jr. (Norman: University of Oklahoma Press, 1985), 105–134.

22. A more complete statement of the separatist view can be found in Mitchell Platt, "Notes Concerning 'ASU Preliminary Report on Northeastern Counties for Governor's Task Force on Northeastern Counties' " (Unpublished report, 1982).

23. A much more complete discussion of early suffrage requirements can be found in Chilton Williamson, *American Suffrage: From Property to Democracy, 1760–1860* (Princeton: Princeton University Press, 1960).

24. Glenn A. Phelps, "Representation Without Taxation: Citizenship and Suffrage in Indian Country," *American Indian Quarterly* 9(1985): 139.

25. See Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics* (Washington, DC: CQ Press, 1988), 269.

26. Center for Public Affairs, Arizona State University, "Preliminary Report on Arizona Northeastern Counties for Governor's Task Force on Northeastern Counties," 1982.

27. *Carrington v. Rash*, 380 U.S. 89 (1965).

28. *Evans v. Cornman*, 398 U.S. 420 (1970).

29. This reality was of great concern to the Hopi people, much of whose reservation would now lie within the boundaries of the new county. Navajos would have far outnumbered Hopis within the all-Indian county. Given the history of conflict between the two tribes, it is not surprising that Hopis objected even more strenuously to the new county than many of the Navajos did.

30. *Gomillion v. Lightfoot*, 364 U.S. 339 (1959).

31. See, for example, *City of Richmond v. U.S.*, 422 U.S. 358 (1975). Richmond successfully annexed several contiguous areas, with the result that the proportion of white voters in the city increased.

32. See *City of Pleasant Grove v. U.S.*, 107 S.Ct. 794 (1987).

33. *Reynolds v. Sims*, 377 U.S. 533 (1964).

34. Litigation has long been a strategy utilized by minorities. Some of the most important steps in the civil rights movement took their impetus from victories in the United States Supreme Court. See, for example, Loren Miller, *The Petitioners* (Cleveland: World, 1966) and Richard Kluger, *Simple Justice* (New York: Knopf, 1976.) But a strategy of litigation is not without its costs—costs that can quickly become prohibitive for most minorities. One of the purposes of the VRA was to encourage minorities to secure their rights through a legal bureaucracy (the preclearance provisions of section 5) analogous to the courts, yet not be required to accept such a discouragingly heavy financial and social cost.

35. *Beer v. United States*, 425 U.S. 130 (1976).

36. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

37. For example, Navajo County is currently involved in a dispute with the Justice Department over whether the county has fulfilled its responsibilities under the VRA to effectively enroll potential Indian voters. The county has enlisted the state legislature as an ally—the legislature voting to underwrite the cost of a lawsuit.

38. Some might point out that these constitutional claims are self-interested—that the non-Indian critics of Indian suffrage are far more concerned with maintaining their own power and property than in carrying the banner of constitutional principle. Even if this is true (and I am inclined to believe that it is), parties in constitutional conflicts almost always have an interest in the outcome. In other words, while the messenger may be of questionable character, the constitutional message is still important.

39. In *Gordon v. Lance*, 403 U.S. 1 (1971), the Supreme Court upheld a West Virginia law requiring that bond issues be approved by at least 60 percent of those voting.

40. Some might challenge my use of the term *sovereignty* here. As noted earlier, there is an alternative legal history that supports the notion that sovereignty over Indian Country is exercised by the plenary power of Congress. The distinction is not important to this argument. Whether tribes are sovereign entities in a special relationship with the federal government, or whether they are dependents of Congress, the result for the state is the same. Federal law removes those lands from the jurisdiction of the states and from the reach of their tax rolls.