Native Americans and the Voting Rights Act
Introduction
History of discrimination
Background

• American Indians and Alaskan Natives ("AIAN") have lived in North America for 15,000 years

• 574 federally recognized Native American tribes

• California, Arizona, and Oklahoma have largest AIAN populations

• AZ First Congressional District has the highest AIAN population in the United States (approx. 22.64% voting-aged population)
Early subjugation and discrimination

- European settlers subjugated and displaced Native tribes as they expanded across the continent
- Indian Appropriations Act of 1871
- U.S. Const., Article I:
  - “Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.”
AIANs often denied citizenship, let alone right to vote, unless
they assimilated

Minn. Const., art. VII, § 1(4) (1858)

“Cultural purity test” whether individual
“adopt[ed] the language, customs, and habits
of civilization.”

Swift v. Leach, 178 N.W. 437 (N.D. 1920)

Group of AIIs could vote only because they
“live the same as white people,” “are
Christians,” and “have severed their tribal
relations.”
Citizenship and struggle

• In 1924, Congress passed The Indian Citizenship Act

• *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928)
  - Court upheld rejection of AIs' voting registration
  - Relied on provision in Arizona Constitution that “no person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election.”

• *Trujillo v. Garley*, Civ. No. 1353 (D.N.M. 1948)
  - AIs ineligible to vote because not state residents

• *Allen v. Merrell*, 305 P.2d 490 (Utah 1956)
  - AIs ineligible to vote because not subject to state law on reservation
Discrimination and remediation in Arizona

Apache County: A case study

- **Shirley v. Superior Court for Apache Cty.** (Ariz. 1973) – Navajo tribe member denied certification after winning election

- **Goodluck v. Apache Cty.** (D. Ariz. 1975) – Board of Supervisors redistricting challenge

- **Apache Cty. High Sch. Dist. No. 90 v. United States** (D.D.C. 1980) – Ballot access and language resources consent decree

- DOJ objections (2002) re: inconsistent legislative districts
Voting Rights Act
Success in Enfranchising Native Americans
Language Assistance

• More than 25% single-race AIAN persons speak a language other than English at home.

• 2/3 speakers of AIAN languages live in a predominantly Native community, often geographically isolated.

• VRA Section 2 offers protection:

  • *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984) – VRA Section 2 requires jurisdictions to recruit poll workers who speak minority languages.
Language Assistance – Section 203

• 1975 Amendments to VRA

• Requires “covered jurisdictions” to provide bilingual written materials and oral language assistance

• For “historically unwritten” language, the covered jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting.”

• Must take “all reasonable steps” to ensure that sufficient information is available to allow the minority group to “participate effectively in voting-connected activities.”

• “Substantial compliance,” not perfection
Language Assistance – Section 203 cont.

“Covered Jurisdiction”

- Single-language minority population who are “limited-English proficient”
- Literacy rate
- Determined by Director of the Census
- Not affected by *Shelby County v. Holder* (2013)
Election Procedures Generally

• Unique geography, culture, and access to infrastructure or other resources present enfranchisement pitfalls

• *Navajo Nation et. al. v. Hobbs, et. al.* (D. Ariz. 2019) – to settle VRA litigation, state agreed:
  
  • additional in-person early voting polling places;
  
  • voter registration plan to maximize voter registration;
  
  • radio advertisements and election information in the Navajo language;
  
  • Navajo translators at each polling place;
  
  • allow voters an opportunity to cure unsigned ballots.

• *Brnovich v. DNC* (U.S. 2021)
Voter ID

• Recent high-profile cases

• *Brakebill* and *Spirit Lake Tribe* litigation in North Dakota (2018)

• No address on tribal ID cards

• Quarter of tribal residents lacked documentation to obtain ID

• Remote geography with unreliable internet access

• Settlement: voter could mark on map to show where they lived
Redistricting and Malapportionment

• AIAN voters have won vote dilution claims under Section 2

• *Large v. Fremont Cty.* (D. Wyo. 2010) – Eastern Shoshone and Northern Arapaho Tribes challenged at-large elections for County Commissioners.

  • *Thornburg v. Gingles* factors:
Redistricting and Malapportionment, cont.

• *Nation v. San Juan Cty.*, 266 F. Supp. 3d 1341 (D. Utah 2017)

  • “The focus in the design of the County's Plan was to create districts, consistent with other redistricting principles (including maintaining traditional communities of interest and precinct boundaries), that reflected the overall composition of the County's population, thereby affording both Native Americans and non-Hispanic whites the opportunity to have a reasonable opportunity to elect candidates of their choice . . . .”

  • “Because the County's attempt at compliance with Section 2 of the Voting Rights Act entailed nothing more than proportionality (meaning the establishment of racial targets for the resulting districts); and because compliance with the Voting Rights Act was the County's highest priority, save one-person, one-vote; the court concludes San Juan County adopted a countywide policy of prioritizing racial targets above all other traditional redistricting criteria.”
Recommendations
Native Americans and Redistricting

- Recognize history of discrimination against AIANs

- AIANs form unique communities with distinctive culture, language, and traditions

- Native communities and reservations may constitute communities of interest to be preserved in redistricting
Thank you.