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—Preamble, NLG Constitution

From the beginning of the European colonization of North America, the original inhabitants of this land have been treated as subjects, not as equals. After centuries of genocide and marginalization, tribal Indians comprise less than two percent of the American population. Most live on "reservations" far removed from large U.S. population centers where power is concentrated and laws are made. Racial and ethnic bigotry still inform electoral laws in Indian Country. Congress has a constitutional duty to remedy the effects of this bigotry. This is the focus of *NLGR* Contributing Editor Ryan Dreveskracht's "Enfranchising Native Americans after *Shelby County v. Holder*: Congress's Duty to Act."

In *Shelby County*[1] the U.S. Supreme Court, dividing 5–4 along predictable ideological lines, struck down Section 4(b) of the Voting Rights Act of 1965 (VRA), one of the great legislative accomplishments of the civil rights era. Section 4(b) included the "coverage formula" designed to determine which parts of the country had a history of discriminatory election laws. The jurisdictions covered by Section 4(b)—including much of the old confederacy—were to be closely scrutinized by the Justice Department, which was empowered under Section 5 to reject any proposed changes to election laws designed to reintroduce forbidden forms of racism and voter exclusion. The right to vote that so many had marched and suffered for would be protected by the Attorney General, without whose "pre-clearance" or a federal court ruling no new election law in the covered areas could be promulgated.

The Court reasoned that Section 4(b)'s original coverage formula, reinstituted in 2006 by votes of 390–33 in the House and 98–0 in the Senate, failed to account for the improvement in race relations in the south and was now obsolete. "Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions," Chief Justice Roberts wrote for the Court. The 2006 reauthorization violated the so-called principle of "equal sovereignty," according to which the Constitution forbids Congress from favoring some states—those who have no longstanding history of disenfranchising minority voters—over others who have. That is, the 2006 VRA is unconstitutional for the same reason George Wallace claimed the 1965 VRA was—it violates states' rights. The new

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Ryan D. Dreveskracht

ENFRANCHISING NATIVE AMERICANS AFTER *SHELBY COUNTY V. HOLDER*: CONGRESS'S DUTY TO ACT

Introduction

The U.S. Constitution does not prescribe requirements for the right to take part in elections.[1] That right was left to the states to implement and regulate—and, for much of our history, they "generally limited the franchise to white male property owners, who were citizens of a certain age, occasionally of a specific religious faith."[2] Most nonwhites were not considered legal citizens of the United States until 1868, when the Fourteenth Amendment defined a "national citizenship."[3] Two years later, the Fifteenth Amendment prohibited the denial of suffrage to citizens "on account of race, color, or previous condition of servitude," thus extending the franchise to all races.[4] Women were enfranchised in 1920.[5]

Despite these changes in law, "violent suppression of the minority vote during Reconstruction, combined with weak federal enforcement thereafter and the eventual adoption of a variety of disenfranchising measures by Southern states after 1890," prevented most minorities from exercising their right to vote.[6] Many of the states instituted poll taxes that required minorities to pay a fee to vote. Other states imposed literacy tests that required minorities to answer arcane trivia to secure their rights at the polls. Still other states passed laws that limited the right to vote to those individuals whose grandparents had enjoyed the right.[7] Some states even enacted laws that limited participation in a state's primary elections to white persons only.[8]

Native Americans were not originally part of these constitutionally enfranchised groups. Despite their being federally recognized as "persons" in 1879,[9] in *Elk v. Wilkins* the Supreme Court held that the Fourteenth Amendment did not confer citizenship on those indigenous to the United States.[10] According to the Court, an Indian, [11] "not being a citizen of the United States under the Fourteenth Amendment of the constitution, [cannot be] deprived of [a] right secured by the Fifteenth Amendment."[12] The Fifteenth Amendment, in other words, was simply inapplicable—states retained the right to deny suffrage to Indians. It was not until the enactment of the Indian Citizenship Act in 1924 that Indians became eligible to vote.[13]

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Post-1924, Indians continued to struggle for actual suffrage. Notwithstanding the passage of the Indian Citizenship Act, several states, particularly Arizona, New Mexico, and Utah, continued to unequivocally deny the right to vote to Indians through much of the 1960s.[14] Several redistricting attempts in parts of Montana, Wyoming, and South Dakota also sought to dilute the Native American vote. Indeed, these redistricting/disenfranchisement attempts continue today.[15] In addition, Indians often confront "constitutional arguments contesting their suffrage, including arguments citing Native Americans' exemption from certain state taxes, as well as sovereignty arguments, claiming that Native Americans' status as members of alien nations precludes them from voting."[16]

It was not until the passage of the Voting Rights Act (VRA) in 1965[17] that a mechanism for near-universal suffrage was finally put into practice.[18] The VRA is partially permanent, and partially provisional. Section 5, the provisional part, was passed "on an emergency basis in response to the crisis of southern black disfranchisement ninety-five years after the enactment of the Fifteenth Amendment."[19] The provision required federal pre-approval, known as "preclearance," of any modifications to local state election law in certain "covered" jurisdictions determined to be historically racially suspect.[20] While Section 5 was originally intended to expire in 1970, it has been renewed every time that it has come up for a vote, most recently until 2031, as the cornerstone of the Voting Rights Act Reauthorization and Amendments Act of 2006.[21] The 1975 reauthorization enlarged Section 4(b)'s coverage formula—the portion of the VRA that establishes the formula by which federal authorities determine which jurisdictions are subject to Section 5's preclearance requirements—to cover any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration or turnout in the 1972 presidential election of less than 50 percent. "Although not altering the basic coverage formula, this change expanded section 4(b)'s scope to encompass jurisdictions with records of voting discrimination against 'language minorities.'"[22] Thus, in effect, the 1975 reauthorization also "extended special emergency protections to Latinos, Asian-Americans, and Native Americans and expanded the definition of disenfranchising devices to include the use of English-only ballots."[23]

Section 2, the permanent part, created a cause of action against a state or local government when its "system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process."[24]

It has been argued for years that Section 5 was an unconstitutional impingement on states' right to regulate the vote.[25] Indeed, in *Northwest Austin Municipal Utility District No. One v. Holder*,[26] the Supreme Court explicitly "raised serious questions about the continued constitutionality of section 5," warning that "the burdens imposed by section 5 may no longer be justified by

current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets."[27] In the wake of this decision, Abigail Thernstrom, vice-chair of the U.S. Commission on Civil Rights argued:

> If a challenge to the constitutionality of the amended Section 5 reaches the Supreme Court . . . the provision may no longer be regarded as unimpeachably valid. . . . The reworked statute rests on a racism-everywhere vision, particularly, but not exclusively, in the South. While that perspective was accurate in the 1960s, it no longer is. There is bound to be a reality check down the road. In passing the 2006 [reauthorization], undoubtedly Congress hoped to end argument over the statute until 2031. . . . [Section 5] is a careless, politically expedient promise unlikely to be kept and it carries a high cost.[28]

In *Shelby County v. Holder*, the Supreme Court faced squarely the "serious questions" raised in *Northwest Austin* and posed by Thernstrom: "[w]hether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution."[29] The High Court answered in the affirmative, holding that "[o]ur country has changed" so that Section 5's preclearance formula no longer "speaks to current conditions."[30]

What follows is a review of the Supreme Court's decision in *Shelby County*, and the applicability of that decision to Indian Country.[31] First, I give a background and context for the VRA, and then delve into a brief outline of historic and present-day tribal-state relations. Next, I analyze the Supreme Court's decision in *Shelby County*. I then make an Indian-specific application of the legal test employed in *Shelby County*. I conclude by arguing that Section 5 is both an appropriate and necessary measure to prevent ongoing voting discrimination targeting Native American citizens. Indeed, Congress not only has the power to compel preapproval of state voting legislation that is applicable to Indian Country, but it has an obligation to do so.

Background

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude,"[32] and grants to Congress the "power to enforce this article by appropriate legislation."[33] Put another way, as the Court described in *Rice v. Cayetano*,[34] the Fifteenth Amendment "reaffirmed the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise," and it did so in language "as simple in command as it was comprehensive in reach."[35]

The scope of Congress's power to enact law that implements the Fifteenth Amendment—what constitutes "appropriate legislation"[36]—was defined in an expansive manner. Early on, southern opponents to the Amendment argued

that the newly created "radical and revolutionary" power to restrict states' authority to set their own voting qualifications "strikes at the power of the States to determine and establish, each for itself, the qualification of its own vote[rs]"[37] and "invade[s] the jurisdiction of State authority and subject[s] all the States [in] the Union to Federal Control."[38] Some legislators, even those from northern states, couched the Amendment as bestowing upon Congress "all power over what [the] Constitution regards as the proper subject of State action exclusively."[39] States, in the words of one Illinois Senator, felt their sovereignty under attack: "when the Constitution of the United Sates takes away from the state the control over the subject of suffrage it takes away from the State the control over her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon."[40]

But this was the point—it took a change to the Constitution in order to ensure that "the political question of the right of suffrage" was available to all citizens, including those "large classes of citizens who [were being] practically ostracized from the Government."[41]

A Brief History of Tribal-State Voting Relations

As noted above, it was long held that tribal members were not U.S. citizens.[42] In 1924, however, Congress amended the Nationality Act to provide that "a person born in the United States to a member of an Indian tribe shall be a national and citizen of the United States at birth."[43] But were tribal members citizens of a state? How could that be, if "[s]tates have no jurisdiction over Indians in Indian country"? "If the Indian tribes are wards of the federal government and owe no allegiance to any state, and if the power over the Indian tribes rests with the federal government because it exists nowhere else," why should a tribal member have any say in matters of state governance?[44]

The Ninth Circuit Court of Appeals answered these questions in *Colliflower v. Garland*:

> In more recent times it has been the policy of the government to encourage the Indians to become independent participating citizens, while at the same time preserving the territories and the rights of those tribes which elect to continue to function as such. . . . "As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country." . . . The general notion . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. [45]

Tribal governments, of course, had little say in these "developments." While the Thirteenth, Fourteenth, and Fifteenth Amendments provided a

slight measure of greater equality for other minorities, Congress maintained the ability to quash and diminish Native American rights as it chose.[46] While the Fifteenth Amendment guarantees all persons, including Indians, the right to vote, the Fourteenth Amendment's due process and equal protection rights are not guaranteed to Indians within Indian territory—which renders the application of the Fifteenth Amendment impotent in many instances.[47]

"Because of the local ill feeling, the people of the States where they [Indian tribes] are found are often their deadliest enemies."[48] It is thus that the past "two-hundred years of federal Indian law jurisprudence . . . has evolved in large part to address and accommodate the historically thorny nature of tribal-state relations."[49] Although not Indian-specific, the VRA helped to accomplish this objective.[50]

Shelby County v. Holder and the Voting Rights Act

As noted above, the passage of the Fifteenth Amendment was not enough to curtail state voter discrimination—states continued to enact voting legislation "specifically designed to prevent [minorities] from voting."[51] In the late 1950s Congress finally responded by passing laws to "facilitat[e] case-by-case litigation," which the Supreme Court used to strike down numerous discriminatory state laws.[52] But this case-by-case approach proved to be ineffective in eliminating widespread voting discrimination. Voting suits were demanding, requiring "as many as 6,000 man-hours" per suit.[53] Even after positive judgments were secured, "favorable court decrees were circumvented with new practices that discriminated against racial minorities, and local officials outright defied court orders."[54]

In 1965 Congress enacted the VRA—a "sterner and more elaborate measure" to defeat the "insidious and pervasive evil . . . perpetuated . . . through unremitting and ingenious defiance of the Constitution."[55] Although much of the VRA was dedicated to creating a substantive private cause of action to combat the coordinated discriminatory efforts that had "infected the electoral process . . . for nearly a century,"[56] Section 5 was "a response to the common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones were struck down."[57] This provision allowed federal administration enforcement of the voting laws, rather than judicial enforcement, by forbidding certain states and local governments[58] from implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."[59] Jurisdictions were subject to the original preapproval obligation of Section 5 if they were found to have used a prohibited voting test or device in 1965, and less than 50 percent of the persons of voting age voted in the presidential election of 1964.[60]

Essentially, under Section 5 covered jurisdictions were prohibited from making any change in their voting law unless the change is pre-approved by

the Department of Justice ("DOJ").[61] By "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory," Section 5 ensured that gains in minority political participation were not eroded through new discriminatory procedures and techniques.[62] In order to be approved, "a covered jurisdiction must prove that any change in voting practices or procedures does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color before it may implement that change."[63] A covered jurisdiction had two avenues available to meet this obligation. First, the jurisdiction may have submitted the proposed voting change to the Attorney General.[64] "If the Attorney General affirmatively approve[d] the change or fail[ed] to object to it within 60 days, the change [wa] s deemed precleared."[65] Otherwise, "either in the first instance or following an objection from the Attorney General," a covered jurisdiction had the option to seek preclearance for a voting change "by filing a declaratory judgment action in the United States District Court for the District of Columbia."[66] The change was precleared "if the court declare[d] that the proposed 'qualification, prerequisite, standard, practice, or procedure d[id] not have the purpose and . . . effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees" set forth elsewhere in the VRA.[67] If a voting change subject to Section 5 has not been precleared, the plaintiff was entitled to an injunction prohibiting implementation of the change.[68]

As noted earlier, Section 5 of the VRA was originally contemplated to be a temporary provision, to last only five years.[69] But in 1970, having "recognized the continuing need" for Section 5,[70] Congress reauthorized its provisions for five years.[71] Congress extended it again in 1975, this time for seven years.[72] In 1982, having found that the "gains" obtained by the VRA since 1965 were still "fragile" and that "[c]ontinued progress toward equal opportunity in the electoral process will be halted" if Section 5 were abandoned,[73] Congress reauthorized it for twenty-five more years.[74] Section 5 was reauthorized for another twenty-five years in 2006.[75] The Supreme Court, prior to *Shelby County*, consistently found these extensions to be constitutional exercises of congressional prerogative.

Even though many of those jurisdictions originally covered by Section 5 were deemed "covered jurisdictions" in 2013, they were not necessarily subject to Section 5 in perpetuity. A covered jurisdiction had the option of avoiding the subjection to Section 5 if a court or the Attorney General granted it a "bailout" pursuant to VRA Section 4(a).[76] In order to successfully "bail out," a covered jurisdiction needed to "obtain a declaratory judgment from a three-judge court confirming that for the previous ten years the jurisdiction and its political subdivisions have not used a forbidden voting test, have not been subject to any valid objections under Section 5, and have not been assigned federal observer election coverage."[77] The covered jurisdiction was also required to show that it had "'eliminated voting procedures . . . which inhibit or

dilute equal access to the electoral process' and [has] engaged in 'constructive efforts' to expand the ability to vote."[78] Sixty-nine jurisdictions successfully bailed out between 1982 and 2009 From 2009 to 2013, that number jumped substantially. In total, nearly 200 jurisdictions were successfully released from the federal list. Notably, Shelby County was not among them and, because of its prior VRA violations, was not in a position to seek a bailout.[79]

The D.C. Circuit Court Opinion

The plaintiff in *Shelby County* was Shelby County, Alabama, a covered jurisdiction. Shelby County contended that when Congress reauthorized Section 5 of the VRA in 2006 "it exceeded its enumerated powers."[80] The question before the Court, then, was whether "the burdens imposed by Section 5" could be "justified by current needs" and whether "its geographic coverage . . . sufficiently relate[ed] to the problem it targets"[81]—essentially, is voting discrimination still a problem? The district court answered in the affirmative.[82] The D.C. Circuit Court of Appeals agreed.

The D.C. Circuit looked to the Supreme Court's 2009 decision in *Northwest Austin*[83] to determine (1) whether Section 5 "is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure,"[84] and (2) whether Section 4(b) "contains an 'obsolete' coverage formula that fails to identify the problem jurisdictions, rendering the provision "no longer rational 'in both practice and theory.'"[85] Under the test formulated by *Northwest Austin*, the Court must conduct a "searching" review of the congressional record to determine whether Section 5's imposition of the preapproval burden—as well as the serious "equal [state] sovereignty" implications that targeting a jurisdiction may have—is "congruent and proportional" to the injuries sought to be prevented.[86]

In making this determination, the Court split the legislative record—of "over 15,000 pages in length, and includ[ing] statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination"[87]—into six units.

First, the Court noted "numerous 'examples of modern instances' of racial discrimination in voting,"[88] including:

- Kilmichael, Mississippi's abrupt 2001 decision to cancel an election when "an unprecedented number" of African Americans ran for office. [89] [90]
- Webster County, Georgia's 1998 proposal to reduce the black population in three of the education board's five single-member districts after the school district elected a majority black school board for the first time.
- Mississippi's 1995 attempt to evade preclearance and revive a dual registration system initially enacted in 1892 to disenfranchise Black voters and previously struck down by a federal court.
- Washington Parish, Louisiana's 1993 attempt to reduce the impact of a majority-African American district by immediately creating a new at-large seat to ensure that no white incumbent would lose his seat.

- Waller County, Texas's 2004 attempt to reduce early voting at polling places near a historically black university and its threats to prosecute students for "illegal voting," after two black students announced their intent to run for office.
- Mississippi . . . state legislators['] oppos[ition to] an early 1990s redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the "black plan" and privately as the "nigger plan."[90]
- [In] Georgia, the state House Reapportionment Committee Chairman told his colleagues on numerous occasions, "I don't want to draw nigger districts.[91]"

The Court next looked to the "hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect."[92] Here, the congressional record evidenced that:

- [T]he absolute number of objections has not declined since the 1982 reauthorization . . . . [93]
- Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole or in part on discriminatory intent.
- [I]n the 1990s . . . the purpose prong of Section 5 had become the dominant legal basis for objections, with seventy-four percent of objections based in whole or in part on discriminatory intent . . . .
- [T]he average number of objections per year has not declined, suggesting that the level of discrimination has remained constant as the number of proposed voting changes . . . has increased.
- Even in the six years from 2000 to 2006, after objection rates had dropped to their lowest, Attorney General objections affected some 660,000 minority voters. [94]

Third, the Court looked to successful Section 2 litigation, which, it held, "reinforces the pattern of discrimination revealed" by the specific examples of modern racial discrimination and Attorney General objections. Section 2 "prohibits districting practices that 'resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race.'"[95] A denial or abridgment is established if, "based on the totality of circumstances," it is shown that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[96] In sum, the congressional record on this factor showed that "between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting practices in at least 825 counties."[97]

Fourth, the Court looked to "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions."[98] Every year between 1984 and 2000, anywhere from 300 to 600 observers were dispatched to covered jurisdictions—"amounting to 622 separate dispatches (most or all involving multiple observers)."[99] In some instances, monitoring by

federal observers "bec[ame] the foundation of Department of Justice enforcement efforts."[100] This was the case in Conecuh County, Alabama, and Johnson County, Georgia, for instance, where reports by federal observers enabled the federal government to bring suit against county officials for discriminatory conduct in polling locations, ultimately resulting in consent decrees.[101] As the Court saw it,

> [T]his continued need for federal observers in covered jurisdictions is indicative of discrimination and "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations."[102]

Fifth, the Court found that the congressional record revealed evidence of continued discrimination in two types of preclearance-related lawsuits. Regarding actions brought to enforce Section 5's preclearance requirement, Congress found that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge."[103] At least 105 successful Section 5 enforcement actions were brought against such covered jurisdictions between 1982 and 2004. Congress also found evidence of continued discrimination in "the number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia."[104] According to the congressional record, the number of unsuccessful preclearance actions has remained roughly constant since 1966: "twenty-five requests were denied or withdrawn between 1982 and 2004, compared to seventeen between 1966 and 1982."[105]

Finally, the Court deferred to Congress's findings that the existence of Section 5 "deterred covered jurisdictions from even attempting to enact discriminatory voting changes."[106]

> In Congress's view, Section 5's strong deterrent effect and the number of voting changes that have never gone forward as a result of that effect are as important as the number of objections that have been interposed to protect minority voters against discriminatory changes" that had actually been proposed. . . . [O]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result. For this reason, the mere existence of section 5 encourages the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process. [107]

As to Section 4(b)—the preclearance formula—the court held that the VRA must be analyzed "as a whole," including Section 5 and the VRA's "mechanisms for bail-in and bailout" discussed above.[108] Thus, as the court viewed it, the question "is whether the statute as a whole, not just the sec-

tion 4(b) formula, ensures that jurisdictions subject to section 5 are those in which unconstitutional voting discrimination is concentrated."[109] Looking to the above six Section 5 factors, "together with the statute's provisions for bail-in and bailout" the court found that Section 4(b) "continues to single out the jurisdictions in which discrimination is concentrated" and is therefore constitutional.[110]

In sum, the court determined that evidence in the congressional record—including 626 Attorney General objections that blocked discriminatory voting changes, 653 successful section 2 cases, tens of thousands of observers sent to covered jurisdictions, 105 successful section 5 enforcement actions, 25 unsuccessful judicial preclearance actions, and Section 5's strong deterrent effect—was enough to warrant continued application of "Section 5's strong medicine."[111] Both Sections 5 and 4(b) of the VRA, the D.C. Circuit Court of Appeals held, were congruent and proportional.[112]

The Supreme Court Opinion

Instead of focusing on Section 5's preclearance requirement, as the D.C. Circuit Court of Appeals had done, the Supreme Court focused on Section 4(b) of the VRA, which details the coverage formula that determines which states and/or political subdivisions of the state are subject to preclearance. The Court, with Chief Justice Roberts writing for the majority—while acknowledging the past transformative and salutary impact of the VRA—found that Congress's 2006 decision to reauthorize the VRA without updating Section 4(b)'s coverage formula violated the "principle that all States enjoy equal sovereignty" and was therefore unconstitutional.[113]

Like the D.C. Circuit Court of Appeals, the Supreme Court began by reviewing *Northwest Austin*,[114] reiterating its holding that Section 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty."[115] Under *Northwest Austin*'s "equal sovereignty" test, the Court held, "The question is whether the [VRA]'s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."[116] Rather than thoroughly examining the congressional record, as the D.C. Circuit Court had done, the High Court simply held that there is no longer any amount of voter discrimination that could justify Section 4(b)'s coverage formula:

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. . . . And voter registration and turnout numbers in the covered States have risen dramatically in the years since. . . . In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. . . .

> The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. [117]

Whether voter discrimination still exists, in other words, is inconsequential. If Congress compiles a record to show that voter discrimination still exists—as it had done in 1965, 1970, 1975, 1982, and 2006—Congress must "use the record it compiled to shape a coverage formula grounded in current conditions."[118] "If Congress had started from scratch in 2006," said the Court, "it plainly could not have enacted the present coverage formula." In sum, Congress has been sent back to the drawing board to draft a new Section 4(b) that is based on the new types of voter discrimination that are currently employed.[119]

The Court's ruling is troublesome. That voter discrimination exists, and that the VRA is needed to prevent it, is not enough. According to the rule formulated by the Court, Congress must modify the coverage formula every year that the VRA is reauthorized, based solely upon the new record compiled.[120] But what about those areas of the country that are still facing the disenfranchisement tactics employed in 1965, 1970, and 1975, or that continue to suffer from the impact of those tactics? Should not the VRA's coverage formula address those problems, in addition to any new evils?[121] This is where the Court's reasoning is flawed: The Court assumes that the disenfranchisement tactics used in the '60's and '70's have entirely vanished.[122] As discussed below, they have not—at least in Indian Country.

Although Section 5 survived, it will no longer have effect unless and until Congress enacts a new statute to determine which jurisdictions should be covered. While Congress is free to write "a new formula" based on "current conditions,"[123] it seems unlikely Congress will act any time soon. Professor Hasen, for example, has opined that the current state of bipartisanism has "closed the door on any potential Congressional action."[124] Likewise, Senate Majority Whip Dick Durbin has stated that because Congress "is embroiled in political conflict," it is "unlikely that Congress will pass another [VRA] bill."[125] Renowned constitutional law professor Erwin Chemerinsky has written that "it is hard to imagine Congress being able to ever agree on a new formula . . . . The effect likely will be . . . election systems going into place that otherwise would have been rejected because of their impact on minority voters."[126] Nor can one reasonably expect a coverage formula that would pass muster with this Supreme Court.

Following the High Court's decision, it appears that formally covered states have gone full-throttle in passing discriminatory voting legislation. North Carolina, for instance, immediately passed legislation that has "ma[de]

it harder for many people to cast ballots, with disproportionate effects on minority voters."[127] It only took a few hours for Texas to pass a voter ID law, considered the strictest in the nation, which was blocked in 2012 because it "discriminated against Latino and black voters."[128] Alabama[129] and Mississippi[130] are poised to pass similarly discriminatory legislation.[131] One district court has already found that *Shelby County* has effectively sanctioned "voter suppression tactics employed against members of the Latino community."[132] As William Faulkner, the great author of the South who spent a lifetime exploring the theme of state-imposed racial inequality, famously wrote: "The past is never dead. It's not even past."[133]

Voting Rights in Indian Country

This section will provide numerous examples of modern instances of voting discrimination against Native Americans—instances in which the Attorney General objected to proposed voting changes that would have had a discriminatory purpose or effect upon Indian Country; instances where Section 2 litigation initiated by Native Americans has been successful; instances where Federal observers witnessed discrimination against Native Americans; instances where Section 5 enforcement has been successful in Indian Country, and where state requests for preclearance have been denied in Indian Country; and congressional findings related to discrimination in Indian Country.[134] Keep in mind that while the instances of discrimination against Native Americans are not as abundant in pure numbers, American Indians make up a mere 1.7 percent of the total U.S. population, compared to 16.7 percent Hispanic, 13.1 percent African American, and 5 percent persons of Asian decent. This means that Native Americans bear a disproportionate brunt of voter discrimination.[135]

Voting Discrimination Against Native Americans

As discussed above, it was not until well after the passage of the VRA that many jurisdictions afforded Native Americans the *de jure* right to vote.[136] In Idaho, Maine, Mississippi, New Mexico, and Washington, "Indians not taxed" were unequivocally banned from voting.[137] Arizona prohibited Indians living on reservations from voting because they were "under guardianship" of the federal government and thus disqualified from voting by the state constitution.[138] In Utah, Indians living on reservations were denied the right to vote because they were non-residents under state law.[139] Montana amended its constitution in 1932 to require that a voter be a "citizen" and a "tax-payer"—defining both terms to exclude Native Americans.[140] In Colorado, Indians residing on reservations were absolutely prohibited from voting until 1970.[141] In South Dakota, the State's Attorney General outright refused to comply with the VRA's application to Indian Country until 2002:

> As a result of the [VRA's 1975] amendments, Shannon and Todd Counties in South Dakota, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance. Further, eight counties in the state, because of

> their significant Indian populations, were required to conduct bilingual elections . . . . William Janklow, at that time Attorney General of South Dakota, was outraged over the extension of Section 5 . . . . In a formal opinion addressed to the Secretary of State, he derided the 1975 law as a "facial absurdity." Borrowing the states' rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." . . . Janklow expressed hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the Secretary of State not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance. [143]

Indeed, Native communities still lack the *de facto* right to vote, due in large part to a depressed socio-economic status, the pervasive myth that Indians care only about politics on the reservation, and the lack of VRA enforcement.

One of the many legacies of discrimination against Indians is a severely depressed socioeconomic status. Native Americans living on reservations experience the highest poverty rate in the nation[144]—a rate five times the poverty rate for whites.[145] Per capita income for Indians and Alaskan Natives is half that of whites. More than one in four Native Americans live below the poverty line, while the rate amongst whites is less than one in ten.[146] Among Native Americans twenty-five years of age and over, 29 percent have not finished high school, compared to 14 percent of whites. Twenty-four percent of Indians aged sixteen to nineteen are drop-outs, four times the drop-out rate for whites. One-fourth of Indian households live in "crowded conditions," compared to 1.6 percent of whites. Roughly 21 percent of Indian households lack telephones, compared to 1.2 percent of white households. Native American homes are three times as likely as white households to be without access to vehicles.[147] In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80 percent, and at the Standing Rock Indian Reservation it was 74 percent.[148] Life expectancy for Native Americans is shorter than any other minority group. According to a report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, "Indian men in South Dakota . . . usually live only into their mid-50s," and infant mortality in Indian country "is double the national average."[149] To summarize: in every socio-economic factor reported in the census, American Indians lag far behind their white counterparts.[150] Numerous courts, both state and federal, including the U.S. Supreme Court, have held that the direct link between socio-economic status and reduced political participation is significant and not to be tolerated in VRA litigation.[151]

Defendants in Indian voting rights cases frequently raise the "reservation defense": dismal Native American participation in the political arena exists not because of voting discrimination, but because "Indians are mainly loyal to their tribes and simply do not care about participating in state and federal elections."[152] In *Emery v. Hunt*,[153] for example, the state argued that "the very existence of the reservation system and the concomitant first loyalty of tribal members to the tribe and to the United States . . . has produced a situation such that it cannot be that the [voting] system is responsible for any of the effects which the Plaintiffs claim." Rather, according to the state, it was more likely that the low turnout was explained by "the United States' [interest] in turning tribal members away from loyalty and interest in the state" and instead supporting "loyalty and interest in the tribes and the federal government."[154] The court rejected the State's defense, holding that it would be "the equivalent of engaging in racial stereotyping because we would be assuming that the affected Native Americans 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[155] This, the Court went on, would "impose 'the very racial stereotyping the Fourteenth Amendment forbids.'"[156] Every court that has entertained the argument has held likewise and dismissed it out of hand.[157]

Despite the abundance of overt discrimination taking place, only 76 voting rights cases were brought by or on behalf of American Indians between 1965 and 2010.[158]

The lack of VRA enforcement in Indian Country is the result of a combination of factors: "a lack of resources and access to legal assistance by the Indian community, lax enforcement of the Voting Rights Act by the Department of Justice,[159] the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments."[160] What is clear is that non-Indian governments are still actively attempting to suppress the Indian vote.[161] As discussed in more detail below, where litigation has occurred, courts have consistently found patterns of widespread voting discrimination against Native Americans.[162]

Still, even a court order does not always lead to the *de facto* right to vote. The *U.S. v. Sandoval County* litigation offers one such instance. In that case, because it was patently obvious that the County had failed to comply with the VRA, in March of 1990 the parties entered into a settlement agreement that required Sandoval County to develop and implement a comprehensive bilingual "Native American Voting Rights Program" ("NAEIP") designed to achieve compliance with the VRA.[163] The case was reopened in 1993 due to the County's "fail[ure] to comply substantially with the provisions of the NAEIP."[164] In 1994 the parties entered into a Consent Decree that would allow its termination upon the County's compliance with its terms over a ten-year period. In November of 2004, the Court found that the County had

still failed to comply with the Consent Decree, and extended it until 2007.[165] In November of 2007, the Court found that, again, "compliance problems remained," and extended the Consent Decree until January 31, 2009.[166] In March of 2009 the Court found that, still, the County was not in compliance with the VRA, and extended the Consent Decree to March 1, 2011.[167] In July of 2011, the Court, obviously frustrated, found that the County was "not yet in substantial compliance" with the VRA and again extended the Consent Decree to March of 2013.[168]

Attorney General objections to proposed voting changes, state requests for preclearance denied, and successful Section 5 litigation

The Attorney General has also objected to numerous proposed voting changes on the grounds that they attempt to dilute the voting power of Native Americans.[169] In 2008, for example, Charles Mix County, South Dakota, submitted a redistricting plan that would increase the number of commissioners from three to five, and elect them from five single-member districts.[170] Applying the test laid out by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Authority*,[171] the DOJ determined that "the County has not sustained its burden of showing that the proposed change does not have a discriminatory purpose."[172] First, the DOJ determined, "under the proposed plan, Native Americans can elect their candidate of choice in only one of five districts . . . . [T]here is no reasonable probability that Native American voters could elect their candidate of choice [under] the proposed plan." Second, the County "has a history of voting discrimination against Native Americans": Native Americans could not vote in the County until 1951, and when they were allowed to vote "they were discriminated against in registration and other parts of the voting process."[173] Third, depositions in the *Blackmoon v. Charles Mix County*[174] litigation—a Section 2 lawsuit brought by Native American voters against the County—revealed that after the 2000 Census the commissioners knew that the proposed plan would have a discriminatory effect. Finally, the DOJ observed, the timing of the redistricting plan—directly after the first Native American County Commissioner was elected—"raise[d] concerns of a discriminatory purpose."[175]

On the other hand, Section 5 litigation in Indian Country has taken the course of *Samuelsen v. Treadwell*.[176] In *Samuelson*, the Alaska Native plaintiffs sued the State of Alaska, alleging that the State "fail[ed] to obtain either administrative or judicial preclearance prior to implementing the change in their standards, practices, or procedures [in] violation of Section 5."[177] By May of 2012, the defendants had submitted the plan to the DOJ, and it was precleared 32 days later.[178] The case—as are most Section 5 cases in Indian Country[179]—was dismissed with little fanfare.[180] As Congress has recognized, this shows that the mere number of objections sustained and pro-Indian final orders rendered cannot measure section 5's importance. One must also con-

sider "the number of voting changes that have never gone forward as a result of Section 5."[181]

Successful Section 2 Litigation

Native Americans plaintiffs have shown that they were being denied equal access to the political process in successful suits against local governments under Section 2 of the VRA. In *Windy Boy v. Big Horn County*, Native American residents of Big Horn County, Montana, alleged that the at-large voting system employed by the County omitted names of Indians who had registered to vote; removed Indians who had voted in primary elections from voting lists disallowing them from voting in the subsequent general election; refused to offer voter registration cards to Indians; failed to appoint Indians to county boards and commissions; and prohibited Indians from eligibility for positions such as deputy registrar.[184] The Court held that the plaintiffs proved a violation of Section 2:

> The at-large system of voting gives Indians "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Indian participation in the political process has been further hampered by official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote; past discrimination against Indians in hiring and appointments to boards and commissions; and reluctance to appoint Indians as election judges and deputy registrars of voters. The immense size of Big Horn County, along with the effects of discrimination in employment, health, and education, are additional barriers to full Indian participation in the electoral process.[185]

In *Bone Shirt v. Hazeltine*,[186] the plaintiff group of Indians contended that South Dakota's 2001 legislative redistricting plan diluted Indian voting strength by packing one particular district with a 90 percent supermajority of Indians. This, the plaintiffs contended, "minimized the total number of districts in which Indians could select the candidate of their choice."[187] After considering the evidence admitted during a nine-day court trial, the court found that the redistricting plan violated Section 2 for the following reasons: (1) "there is a long and extensive history of discrimination against Indians in South Dakota that touches upon the right to register and to vote, and . . . [t]he effects of this history are ongoing"; (2) there was "substantial evidence, both statistical and lay, demonstrate[ing] that voting in South Dakota is racially polarized among whites and Indians"; (3) "county political party structure has hindered Indians from running for and getting elected to public office"; (4) "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process"; (5) "there is some evidence of racial appeals in political campaigns in South Dakota"; (6) there did not exist one election of an Indian candidate to the area under review; (7) "Indians do not have equal access to the political process"; (8) "nothing before the legislature

supports defendants' claim that it was necessary to create a district that is over 90 percent Indian"; (9) "[t]he fact that few Indians have run for legislative office is evidence that the existing system is discriminatory"; and (10) "[v]oter turnout and participation among Indians remain[ed] low, despite recent and successful efforts to register."[188]

In *Large v. Fremont County*,[189] the tribal plaintiffs challenged the elections for the County Commission on the basis that the elections "dilute[d] Indian voting strength in violation of Section 2."[190] In analyzing the plaintiffs' claim, the court first noted the numerous "instances of racial discrimination" that witnesses had testified about:

> The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable. The Court rejects any attempt to characterize this discrimination as being politically, rather than racially, motivated. It is unnecessary at this point for the Court to draft a treatise on federal Indian policy or the historical experience of American Indians in the west. Suffice it to say that the record is replete with expressions of anti-Indian sentiment, both historical and current.[191]

Current instances of "anti-Indian sentiment" included: (1) "racial tension and conflicts in the public schools"; (2) "signs on local businesses saying 'No Dogs Or Indians Allowed'"; (3) "racial slurs by both white students and adults"; (4) bail being "routinely denied to Indian defendants but granted to white defendants"; (5) a County Commissioner publicly referring to Indians as "prairie niggers"; and (6) an annual County event called the "One–Shot Antelope Hunt," which is "derogatory in its portrayal of Indian women."[192] The Court held that at-large elections diluted Indian voting strength in violation of Section 2.[193]

In *U.S. v. Blaine County*,[194] the United States brought a section 2 action against Blaine County, Montana, alleging that "the County's at-large voting system for electing members to the County Commission prevents American Indians from participating equally in the County's political process."[195] The Court held that "Montana laws repeatedly discriminated against American Indians' exercise of the franchise," in violation of Article 2.[196]

In *Brooks v. Gant*, tribal plaintiffs argued that residents of Shannon County, South Dakota, "a county that is almost entirely comprised of Native Americans," were forced to travel roughly three hours to exercise their right to vote—a requirement that "was substantially different from the voting opportunities afforded to the residents of other counties in South Dakota and to the majority of white voters."[198] The Court found for the plaintiffs, holding that, "based on their race," the plaintiffs "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in violation of Section 2.[199]

In *Spirit Lake Tribe v. Benson County*,[200] the Tribe brought an action against Benson County, North Dakota, seeking an injunction that would require the

County to keep a particular voting place open. The Tribe argued that the County's plan to close the nearest voting place would violate Section 2 because "[t]he poverty rate on the Spirit Lake Reservation is higher than that in the predominately white communities located in Benson County," and, thus, "[m]any members of the tribe do not have adequate transportation to travel" to any other polling place.[201] The Court agreed with the Tribe and granted the injunction, finding that (1) "pervasive discrimination is . . . a significant factor contributing to the entrenched problems of poverty, alcoholism, illiteracy, and homelessness"; (2) "closure of the voting places on the reservation will have a disparate impact on members of the Spirit Lake Tribe"; and (3) "Native Americans are more likely to have not received a ballot application, which when coupled with a decreased ability to vote in person, creates a disparate impact." [202]

Although these cases are by no means an exhaustive list of all successful Section 2 litigation,[203] they do exemplify the suits filed in covered jurisdictions where relief from discriminatory voting practices has been obtained. Notably, again, American Indians make up a mere 1.7 percent of the total U.S. population—even if the above cases were the only successful Section 2 cases brought by Native Americans, it is clear that a "pattern of discrimination" exists.[204]

What should also be clear at this point is that voting rights litigation brought on behalf of Native Americans is not the kind of "consolidating and preserving of the gains achieved over four decades" that other minorities seek to achieve.[205] Rather, it seeks relief from the kind of blatant and transparent discrimination that the original VRA and its Section 4(b) coverage formula sought to prevent.

In sum, the litigation that is taking place more closely resembles the "initial vote dilution suits in which black and Latino voters faced 'exclusion, plain and simple.'"[207] Indian communities, in other words, have not even gotten to the point of raising challenges to the complex contemporary vote dilution cases brought in significant numbers by other minorities—rather, "they are still facing the antecedent ones about their ability to elect representatives at all."[208]

Federal Observations of Native American Discrimination

Federal Observers have been utilized to make cases against the offending state jurisdictions in a majority of the suits discussed above. In the *U.S. v. Sandoval* litigation, for instance, the court reviewed at least ninety Federal Observer Reports to draw its conclusion that the State was not in compliance with the VRA.[209]

Congressional Findings

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, noted "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation" against Native Americans.[210] Rep. Robert Drinan also noted "evidence that

American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in thirty-three cases involving discrimination against Indians since 1970."[211] During debate in the Senate, Senator William Scott read into the record a report prepared by the Library of Congress, which concluded that:

> Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . [A]s late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society.[212]

Congress's most recent findings echo those of 1975. Joe Rodgers, Commissioner of the National Commission of the Voting Rights Act, testified that "the persistence of practices of discrimination in jurisdictions throughout the Nation" can be stymied by Section 5, noting that because of Section 5 "elderly Indian voters were able to vote for the first time because they were able to receive assistance in the language that they speak."[213] Prof. Nadine Strossen of the New York Law School testified that Section 5 was necessary to prevent "packing Native American . . . voters to dilute their influence, . . . voter intimidation, investigations of newly-registered voters, failure to provide polling places on reservations, discriminatory redistricting, and a failure to provide language assistance at the polls."[214] The Senate and House Reports on the 2007 VRA amendments noted the following:

- Congress expressly reaffirmed its commitment to assist Native Americans, particularly those who live on reservations, as intended beneficiaries of the language assistance provisions.
- Sections 4(f) and 203 [of the VRA] were enacted in response to substantial evidence received by Congress documenting the discrimination and unequal educational opportunities experienced by . . . Native American . . . and Native Alaskans compared to white citizens.
- [T]he number of Native American voter registration drives has increased substantially such that [there is] a direct correlation between focused localized commitments to increasing participation rates in Native communities and the actual increases that result.
- Many Native communities have seen steady, even significant, increases in registration. . . . In recent years, there has been a steady increase in the number of Native American candidates who are being elected to local school boards, county commissions and State legislatures, including the election of seven new Alaskan Natives to the Alaska State legislature.
- The candidacies of . . . Native Americans and Native Alaskans have rarely garnered the support of white voters, resulting in a disparity between the number of white elected officials and the number of language minority officials elected to office, including statewide offices.
- As of 2000, neither Hispanic nor Native American candidates have been elected to office from a majority white district.

- [A] lack of enforcement enabled South Dakota to defy Federal oversight requirements and to continue enforcing changes which negatively impacted Native American citizens and their ability to vote.
- Alaskan Natives and Native Americans continue to suffer from discrimination in voting.
- Native Americans . . . and Native Alaskans continue to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates.
- [M]any Native people speak English only as a second language, with many Native Alaskans and Native Americans continuing to speak in their native tongue, particularly among the elderly. [215]

Applicability of *Shelby County* to Indian Country

In light of the above, it is crystal clear that Indian Country is still in need of preclearance legislation. What is more, as discussed above, Section 4(b) unquestionably still applies to the problem targeted by the original VRA. In Indian Country, complex voter dilution schemes are not so much at issue—Indian Country is still faced with the straight-up voter discrimination of yesteryear.[216] As noted by the Navajo Nation's amicus brief in *Shelby County*:

> While passage of the Voting Rights Act in 1965 ended certain means of discrimination, Indians continued to be denied the right to vote through a variety of new strategies. As part of the 2006 reauthorization process, Congress obtained evidence that Indians continued to be disenfranchised by voting schemes, polling place discrimination and ineffective language assistance. The 2006 reauthorization was a legitimate Congressional response to [Indian] disenfranchisement. Protected by the Section 5 preclearance, voter registration and turnout have increased, but new challenges have arisen that require continued vigilance. Section 5 preclearance remains a key component to protecting the fundamental right to vote.[217]

Indian Country-specific preclearance legislation will pass judicial constitutional muster, *Shelby County* notwithstanding. Even in light of *Shelby County*, Congress is required to enact Indian Country-specific voting legislation.

The Federal Trust Obligation

The trust obligation is defined by the federal government's special duty to protect Indians and tribal interests, largely in exchange for land cessions that occurred throughout the eighteenth and nineteenth centuries.[218] This "self-imposed policy . . . has found expression in many acts of Congress and numerous decisions" of the Supreme Court and imposes the "moral obligations of the highest responsibility and trust."[219] The obligation arose specifically in order to protect tribes and their members from state discrimination[220] and "ascribes to the government both a political duty and a moral commitment to the Indians."[221] Federal agencies may not "abrogate or extinguish the trust relationship, . . . [a]bsent a direct conflict between an applicable statutory provision and the trust responsibility."[222] The trust obligation to ensure that states and their legislators do not trample tribal members' civil rights—an obligation that is separate and

distinct from, and heightened when compared to, the federal government's general obligations under the Constitution and its amendments—is well engrained in United States jurisprudence.[223]

The case of *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*[224] provides just one example of how this federal mandate is enforced. In *Joint Tribal Council*, the Passamaquoddy Tribe had voiced to the federal government the following grievances against the state of Maine: the state had divested the tribe of most of its aboriginal territory in a treaty negotiated in 1794; the state had wrongfully diverted 6,000 of the 23,000 acres reserved to the tribe in that treaty; the state had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and "taken away the right of members to vote."[225] In determining whether the federal government had an affirmative duty to take action to protect the tribe's interests against the state, the court held that "when the federal government enters into a treaty with an Indian tribe . . . the Government commits itself to a guardian-ward relationship with that tribe."[226] And by entering into this relationship, the court held, "a corresponding federal duty to investigate and take such action as may be warranted" arose as well.[227] The trust obligation *required* the federal government to, among other things, protect the "right of members to vote"[228] and to take action "in their behalf"[229] if that right is infringed upon by neighboring states.

The Plenary Power Doctrine

When the United States obtained Great Britain's "right of dominion"—based on Christian "discovery" of so-called "non-Christian lands"—it obtained "absolute governmental authority, over all the lands and inhabitants within the geographical limits claimed."[230] As described by Robert Coulter:

> The doctrine of discovery gave the "discovering" nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The "doctrine of discovery" gave the "discovering" nation no legal right as against the Native nations or peoples.[231]

This concept of "territorial dominion" was then used in subsequent Supreme Court decisions to establish that "the United States has an absolute legislative authority over Indian nations and peoples."[232] In *Worcester v. Georgia*,[233] the most famous of these decisions,[234] Chief Justice John Marshall held that Indian tribes (1) have limited sovereignty to manage their own affairs, (2) are nations in which state laws have no force, and (3) over which Congress has sole power. The third holding, commonly referred to as the "plenary power doctrine,"[235] stands for the premise that "Indian relations [are] the *exclusive* province of federal law"[236] and "courts 'have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority

under'" this power.[237] The Tenth Amendment, in other words, cannot supersede Congress's plenary power over Indian affairs.[238]

Indian Country-Specific Preclearance Legislation

To recapitulate:

- Blatant and outright voting discrimination in Indian Country—not merely the dilution of the Native American vote—is rampant, and has yet to be reduced by the VRA.[239]
- The trust obligation requires the federal government to protect Native Americans' right to vote and to ensure that that right is not infringed upon by neighboring states.
- Congress's power over Indian affairs is plenary, and cannot be trumped by Tenth Amendment constraints.

Taking these factors together, Indian Country's answer to *Shelby County* is evident. The nebulous "equal sovereignty" test employed by the Supreme Court is inapplicable when the inequality is between federal and state interests—the sovereigns are not equal. The power of Congress to legislate in Indian affairs is plenary, and its trust obligation requires the federal government to protect the "right of [tribal] members to vote"[240] and to take action "in their behalf"[241] if a state infringes on that right. Thus, no justice could legitimately conclude that an Indian Country-specific Section 4(b) does not pass constitutional muster—indeed, the federal trust obligation mandates that Congress take action.[242] Both President Obama[243] and the bulk of Congress have, as a matter of fact, recently taken an interest in passing Indian-specific legislation when a trust duty unfulfilled has been brought to their attention.[244] Here, too, Congress must act.[245]

Conclusion

The full impact of reforms contemplated by the Voting Rights Act, and at least partially achieved elsewhere, has yet to be felt in Indian communities. As noted by Professor Karlan, an "account of the Voting Rights Act's impacts in Indian country during [1965-1990] would have been a slim pamphlet . . . . It was not until 1983, long after litigation had begun to transform the deep south and Hispanic Southwest, that the ACLU Voting Rights Project brought its first vote dilution suit in Indian country."[246] It is only recently that positive results have been reached through litigation to ensure the rights of American Indians to vote and to have a fair opportunity to elect candidates of their choice. This successful election of Indian candidates has also brought about positive shifts to laws, services, and policies provided by counties to their Indian residents. There have also been adjustments to electoral structures, resulting in the successful election of Indian candidates and affecting positively the perceptions and the willingness of Indians to participate in the democratic process.[247]

As demonstrated above, Section 5 of the VRA does not exceed the limitations placed by the Supreme Court upon Congress's Fifteenth Amendment powers, at least as to Native Americans. "Times" have not changed in Indian Country. Native Americans are still trying to tackle the issues raised in the "initial vote dilution suits" in the 1960s as they face "exclusion, plain and simple."[248] Section 5 was both an appropriate and necessary measure to prevent ongoing voting discrimination against affected citizens in covered jurisdictions. The non-Indian majorities in certain jurisdictions of Montana, Utah, and South Dakota have very recently made clear their intent to disenfranchise their Native neighbors. Section 4(b) was a crucial component to protecting the Indian right to vote. The minimal burden placed upon covered jurisdictions—merely passing nondiscriminatory voting laws, submitting them to the Attorney General, and waiting sixty days or less—was absolutely justified to protect Indian voters.

Whether Congress decides to breath life into the now defunct Section 5, it is absolutely clear that Indian-specific preclearance legislation is justified, necessary, and indispensable to the protection of the Native vote.[249] This is particularly true considering "Congress' plenary and exclusive authority over Indian affairs, including relations between states and . . . tribes."[250] Indeed, if there is any area where limitations placed upon Congress by the Fifteenth Amendment would *not* prevent preclearance legislation, it is in Indian Country, where Congress has an affirmative trust and fiduciary *obligation* to ensure that Native American voters are fully enfranchised.

NOTES

1. Minor v. Happersett, 88 U.S. 162, 170-78 (1874); *see also* Pope v. Williams, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments.").
2. John V. Orth, *The Right to Vote*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1052 (Kermit L. Hall, ed. 2005) (citing Minor, 88 U.S. 162).
3. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 28 (1997).
4. U.S. CONST., amend. 15, § 1; *see also* Rice v. Cayetano, 528 U.S. 495, 523 (2000) ("Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.").
5. U.S. CONST., amend. 19.
6. Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 561 (2003).
7. Orth, *supra* note 2, at 1053.
8. *See e.g.* Smith v. Allwright 321 U.S. 649, 667 (1944) (Texas state law providing that "white Democrats, and no other, should be allowed to participate in the party's primaries.")
9. U.S. v. Crook, 25 F.Cas. 695 (C.C.D. Neb. 1879).
10. 112 U.S. 94 (1884).

11. The term "Indian" is a legal term defined as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479,109 .
12. *Id.* at 109.
13. 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)). "Prior to this time, some Indians were naturalized to U.S. citizenship by specific laws, such as those admitting veterans of the U.S. armed services to citizenship and those allowing Indian women who married non-Indian citizens to take the status of their husbands." Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 Wash. L. Rev. 1133, 1168 n. 226 (2012). Most, Native Americans, however, remained non-citizens until 1924. *Id.*
14. Daniel McCool, *Indian Voting*, *in* American Indian Policy in the Twentieth Century 30 (Vine Deloria, Jr. ed., 1985).
15. David E. Wilkins, American Indian Politics and the American Political System 194 (2002); *see e.g.* Large v. Fremont County, Wyo., 709 F.Supp.2d 1176 (D. Wyo. 2010); Spirit Lake Tribe v. Benson County, N.D., No. 10-0095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010).
16. David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 Cornell L. Rev. 515, 516 (2005) (citing Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo County*, 15 Am. Indian Culture Res. J. 63 (1991); McCool, *supra* note 14, at 106-07).
17. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1).
18. *See generally* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000); Morgan J. Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 (1974).
19. Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, Geo. J. L. & Pub. Pol. 41, 43 (2007).
20. 42 U.S.C. § 1973c.
21. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577.
22. Shelby County, Ala. v. Holder, 679 F.3d 848, 855 (D.C. Cir. 2012).
23. Orth, *supra* note 2, at 1054.
24. McGee v. City of Warrensville Heights, 16 F.Supp.2d 837, 845 (D.Ohio 1998) (quotation omitted); *see also* Harris v. Siegelman, 695 F.Supp. 517 (M.D.Ala.1988) ("[T]o put it another way, the claim is established, if as a result of the practice, minority voters cannot participate in the electoral process on the same terms and to the same extent as non-minority voters.").
25. *See, e.g.* Luther J. Strange, *Section 5 of Voting Rights Act is Unconstitutional*, The Town Talk, Feb. 28, 2013, *available at* http://www.thetowntalk.com/article/20130228/OPINION/130227023/Commentary-Section-5-Voting-Rights-Act-unconstitutional; Carrie Severino, *Section 5 of the Voting Rights Act Is Unconstitutional*, Nat. Rev., Feb. 26, 2013, *available at* http://www.nationalreview.com/bench-memos/341628/section-5-voting-rights-act-unconstitutional-carrie-severino; Roger Clegg & Joshua P. Thompson, *Overturn Unconstitutional Voting Rights Act*, Wash. Times, Nov. 14, 2012, *available at* http://www.washingtontimes.com/news/2012/nov/14/overturn-unconstitutional-voting-rights-act/.
26. 557 U.S. 193 (2009).
27. Shelby County, 679 F.3d at 852-53.
28. Thernstrom, *supra* note 19, at 42 (citing Stephen Thernstrom & Abigail Thernstrom, America in Black and White: One Nation Indivisible (1997) for "an extended

examination of the changing status of blacks and changing racial attitudes" and noting that "the picture drawn has only gotten better in the years since the book was published.") Glenn Kunkes has recently made a similar argument:

> [T]he legislative record consists of scattered and anecdotal allegations of intentional discrimination occurring in covered jurisdictions since 1982. This "scant" showing is a far cry from the persistent and insidious discrimination found in 1965. . . . A sweeping prophylactic remedy like Section 5 cannot be sustained on sporadic incidents of intentional discrimination in covered jurisdictions. Instead, the first generation barriers of intentional discrimination relied on by Congress in 1965 to justify Section 5 are the main evidence needed to warrant the retention of the preclearance obligation. Statistical evidence of registration data, voter turnout, and the election of minority officials amply demonstrate the dramatic changes that have occurred in covered jurisdictions over the last half-century. . . . The racial registration gap has essentially disappeared . . . . In sum, things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare, and minority candidates hold office at unprecedented levels.
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> Glenn Kunkes, *The Times, They Are Changing: The VRA is No Longer Constitutional*, 27 J.L. & POL. 357, 373-74 (2012) (quotation omitted).

29. Shelby County, Ala. v. Holder, 133 S.Ct. 594, 594 (2012).
30. Shelby County, Ala. v. Holder, 133 S.Ct. 2612, 2631 (2013).
31. The term "Indian Country" is a legal term of art defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151.
32. U.S. CONST., amend. 15, § 1.
33. *Id.* at § 2.
34. 528 U.S. 495 (2000).
35. *Id.* at 512.
36. U.S. CONST., amend. 15, § 2.
37. Cong. Globe, 40th Cong. 3rd Sess. 708 (1869) (Sen. Dixon)
38. *Id.* at 642 (Rep. Elridge).
39. *Id.* at 697 (Rep. Burr).
40. *Id.* at 989 (Sen. Hendricks).
41. *Id.* at 1626 (Sen. Edmunds).
42. *Elk,* 112 U.S. 94.
43. Colliflower v. Garland, 342 F.2d 369, 375 (9th Cir. 1965) (citing 8 U.S.C. § 1401(a)(2)).
44. U.S. v. Hamilton, 233 F. 685, 689 (D.C.N.Y. 1915).
45. *Id.* at 375-76 (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); citation omitted).
46. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 140-50 (1999); *see also* United States v. Rogers, 45 U.S. 567, 571-72 (1846) ("The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations . . . . On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.")
47. Wilkins, *supra* note 16, at 527-28
48. U.S. v. Kagama, 118 U.S. 375, 383 (1886).
49. New York v. Shinnecock Indian Nation, 701 F.3d 101, 103 (2nd Cir. 2012)

50. *See generally* Jennifer L. Robinson, Empowerment of American Indians and the Effect on Political Participation (Dec., 2010) (unpublished Ph.D. dissertation, University of Utah) (on file with J. Willard Marriott Library, University of Utah).
51. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966).
52. *Id.* at 810-11. The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960, 74 Stat. 86, permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964, 42 U.S.C. § 1971, expedited the hearing of voting cases before three-judge courts and specifically outlawed some of the tactics used to disqualify minorities from voting in federal elections.
53. *Katzenbach,* 383 U.S. at 314.
54. United States v. Louisiana, 952 F.Supp. 1151, 1157 (W.D. La. 1997).
55. *Katzenbach,* 383 U.S. at 309. The bill was with passed with "bipartisan majorities of both houses." Robert McDuff, *The Voting Rights Act and Mississippi: 1965-2006*, Rev. L. & Soc. Just. 475, 477 (2008). This is not to say, though, that everyone, especially those in the south, agreed with the law. *See, e.g.* Lyle Wilson, *Today Marks End of Political Era in United States*, Lebanon Daily News, Nov. 1, 1965, at 15 (noting that under the VRA, "substandard, ignorant citizens would qualify for political office and, equally, to vote in state and local elections with respect to public finance, bond issues, and expenditures!").
56. *Katzenbach*, 383 U.S. at 308. As noted above, Section 2, for instance, created a private cause of action when any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* at 328.
57. Beer v. United States, 425 U.S. 130, 140 (1976); *see also* U.S. v. Louisiana, 952 F.Supp. at 1157 ("Congress' frustrations with recalcitrant state and local officials found its most potent expression in § 5 of the VRA."); *see also generally* Kieesha M Middlemass, The U.S. Justice Department & The Voting Rights Act of 1965: Preclearance and the Implementation of Section Five (2004) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).
58. A current list of covered jurisdictions is available at 28 C.F.R. § 51.
59. 79 Stat. at 439. This is described in more detail below.
60. *Id.* at 438-39.
61. 79 Stat. at 439.
62. Beer, 425 U.S. at 140 (quotation omitted).
63. Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n, 366 F.Supp.2d 887, 896 (D. Ariz. 2005) (citing 42 U.S.C. § 1973c; *Katzenbach*, 383 U.S. at 335).
64. *Lopez v. Monterey County, 525 U.S. 266, 270 (1999).*
65. *Id.* In all, the DOJ has objected to about one percent of the voting rules changes that have been submitted to the agency. U.S. Dep't of Justice, Section 5 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 1, 2013).
66. *Id.*
67. *Id.* at 270-71 (quoting 42 U.S.C. § 1973c).
68. Clark v. Roemer, 500 U.S. 646, 652-53 (1991) (citing Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969)).
69. Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 199 (2009).
70. *U.S. Dep't of Justice*, *supra* note 65.

71. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.
72. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400. According to the Supreme Court in 1980, "Congress found that a seven-year extension of the Act was necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome v. United States*, 446 U.S. 156, 182 (1980).
73. S. Rep. No. 417, 97th Cong., 2d Sess. 10 (1982).
74. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.
75. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 [hereinafter "2006 VRA"]. The burdens imposed by the preclearance provisions were not changed, nor was Section 4(b)'s coverage formula. *Id.* Congress determined that although some progress had been made since 1975, "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." *Id.* at § 2(b)(2); *see also generally id.* at § 2(b)(3)-(9).
76. 42 U.S.C. § 1973b(a).
77. Arizona v. Holder, 839 F.Supp.2d 36, 38 (D.D.C. 2012) (citing 42 U.S.C. § 1973b(a)(1)(A)-(E)).
78. *Id.* (quoting 42 U.S.C. § 1973b(a)(1)(F)).
79. Liz Halloran, *Has The U.S. Outgrown The Voting Rights Act?,* NAT'L PUB. RADIO, Feb. 26, 2013, *available at* http://www.npr.org/blogs/itsallpolitics/2013/ 02/26/172971321/has-u-s-outgrown-the-voting-rights-act.
80. *Shelby County,* 679 F.3d at 853.
81. *Id.*
82. *See generally* Shelby County, Ala. v. Holder, 811 F.Supp.2d 424 (D.D.C. 2011).

    Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters. Understanding the preeminent constitutional role of Congress under the Fifteenth Amendment to determine the legislation needed to enforce it, and the caution required of the federal courts when undertaking the "grave" and "delicate" responsibility of judging the constitutionality of such legislation—particularly where the right to vote and racial discrimination intersect—this Court declines to overturn Congress' carefully considered judgment.

    Id. at 508.
83. 557 U.S. 193.
84. *Shelby County,* 679 F.3d at 858; *see also* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").
85. *Shelby County,* 679 F.3d at 858 (quoting Katzenbach, 383 U.S. at 330).
86. *Id.* at 858-61. In determining whether or not to use the heightened "congruent and proportional" test, the Court noted, "[i]n any event, if section 5 survives the arguably more rigorous 'congruent and proportional' standard, it would also survive *Katzenbach*'s 'rationality' review." *Id.* at 859. Under this test, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).
87. *Shelby County*, 811 F.Supp.2d at 435 (quotation omitted).
88. *Shelby County*, 679 F.3d at 865 (quoting City of Boerne, 521 U.S. at 530).
89. *Id.* at 865.

90. *Id.* at 866
91. *Id.*
92. *Id.*
93. *Id.* The Attorney General interposed over 626 objections from 1982 to 2004 (an average of 28.5 each year), compared to 490 interposed from 1965 to 1982 (an average of 28.8 each year). *Id.*
94. *Id.* at 867 (quotation omitted).
95. Bartlett v. Strickland, 556 U.S. 1, 28 (2009) (quoting 42 U.S.C. § 1973(a)).
96. 42 U.S.C. § 1973(b).
97. *Shelby County*, 679 F.3d at 868.
98. 2006 VRA, at § 2(b)(5).
99. *Shelby County*, 679 F.3d at 868.
100. H.R. Rep. No. 109-478, at 44.
101. *Shelby County*, 679 F.3d at 868.
102. H.R. Rep. No. 109-478, at 44.
103. *Shelby County*, 679 F.3d at 870 (quoting H.R. Rep. No. 109 478, at 41).
104. 2006 VRA, at § 2(b)(4)(B).
105. *Shelby County*, 679 F.3d at 870-71.
106. H.R. Rep. No. 109-478, at 24.
107. *Shelby County*, 679 F.3d at 871 (quotation, citation, and modification omitted).
108. *Id*. at 873.
109. *Id.* at 874.
110. *Id.* at 883.
111. *Id.* at 875
112. *Id.* at 884
113. *Shelby County*, 133 S.Ct. at 2619.
114. 557 U.S. 193.
115. *Shelby County*, 133 S.Ct. at 2621 (quotation omitted).
116. *Id.* at 2619. The Court did not explain what exactly the parameters of this test are. In *City of Boerne v. Flores*, the Court described it as follows: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507, 508 (1997). At least one Court has held that the *Northwest Austin* test was *dicta*, refused to employ it, and instead "adhere[d] to the long standing rational basis standard." National Collegiate Athletic Ass'n v. Christie, 926 F.Supp.2d 551, 573 n.23 (D.N.J. 2013). On first blush, it appears that the Shelby County Count also used the rational basis test. *See* Shelby County, 133 S.Ct. at 2628 (noting that "the coverage formula [i]s rational [if] the formula [i]s relevant to the problem") (quotation omitted). In all, it is not clear what standard the Court applied. The "equal sovereignty" test is an unusual one, rarely (if ever) used outside of the VRA context. *See* National Collegiate Athletic Ass'n v. Governor of New Jersey, Nos. 13–1713, 13–1714, 13–1715, 2013 WL 5184139, at *23 (3rd. Cir. Sept. 17, 2013). ("[T]here is nothing . . . to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of sensitive areas of state and local policymaking.") (quotation omitted); *see also generally* Joseph Fishkin, *The Dignity of the South*, 123 Yale L.J. Online 175 (2013) (discussing the "equal sovereignty" rule).
117. *Shelby County*, 133 S.Ct. at 2627-68, 2629.

118. *Id.* at 2629; *see also id.* ("[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping [Section 4(b)].").
119. *See* Hall v. Louisiana, No. 12-0657, 2013 WL 5405656, at *4 (M.D. La. Sept. 27, 2013) ("[A]s a result of the Court's opinion, the Voting Rights Act no longer has a formula by which federal authorities may determine which jurisdictions are subject to preclearance under Section 5.").
120. "The suggestion [of the Shelby County majority] seems to be that the Constitution required Congress to revise rather than maintain the coverage formula no matter what evidence it documented." Ellen D. Katz, *What Was Wrong With the Record*, 12 ELECTION L.J. 329, 330 (2013).
121. This is essentially the chicken-or-the-egg question. As noted Professor Schultz:

    > The political changes that the VRA sought to secure will not be permanent until the South wants them to be permanent. The VRA and Section 5 alone cannot secure that. That is the final dilemma of *Shelby County*. If the social attitudes needed to make the VRA goals permanent were in place, then preclearance would not be necessary. But lacking this change in the South, the VRA is still needed, even though it may never be able to effect the cultural changes required to render the law unnecessary.

    David Schultz, *William Faulkner and the Dilemmas of Shelby County*, 12 ELECTION L.J. 341, 342 (2013).
122. *Id.* at 2627-68 ("Racial disparity . . . was compelling evidence justifying the preclearance remedy and the coverage formula [in 1965]. There is no longer such a disparity.") (citation omitted); *id.* at 2628 ("[D]isparities in voter registration and turnout due to race [have been] erased, and African–Americans [have] attained political office in record numbers.").
123. *Id.* at 2629.
124. Abby Rapoport, *Eric Holder's Big Voting-Rights Gamble*, THE AMERICAN PROSPECT, Oct. 2, 2013, *available at* http://prospect.org/article/eric-holders-big-voting-rights-gamble.
125. Jake Sherman & Burgess Everett, *Eric Cantor urges 'responsible path' on Voting Rights Act*, POLITICO, June 25, 2013, *available at* http://www.politico.com/story/2013/06/voting-rights-act-congress-93331.html.
126. Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 361, 370 (2013).
127. *Voting Rights Act Should be Revived by Congress, Not by Justice Suing States*, WASH. POST, Oct. 6, 2013, *available at* http://articles.washingtonpost.com/2013-10-06/opinions/42771257_1_justice-department-voting-rights-act-clear-changes.
128. Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, FRONTLINE, June 26, 2013, *available at* http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/
129. Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, ANNISTON/GADSDEN (June 26m 2013, 12:43 PM), http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.
130. *Voting Rights Act Ruling Clears Path for Mississippi Voter ID Use in 2014*, MISSISSIPPI PRESS, Jun. 25, 2013, *available at* http://blog.gulflive.com/mississippi-press-news/2013/06/voting_rights_act_ruling_clear.html.
131. *See also generally* Myrna Pérez & Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, BRENNAN CENTER FOR JUSTICE ANALYSIS, 2013, http://www.brennancenter.org/publication/if-section-5-falls-new-voting-implications.
132. Rodriguez v. Harris County, Tex., No. 11-2907, 2013 WL 3980651, at 73, 90 (S.D. Tex. Aug. 1, 2013). The court went on: "While some members of the Supreme Court imagine that barriers to voting have been eradicated, the record here is replete with evidence to

the contrary. . . [I]t is clear that more can be done to ensure that all citizens have a full and fair opportunity to participate in the political process." *Id.* at 90 (quotation omitted).

133. William Faulkner, Requiem for a Nun 92 (1951).
134. *Shelby County*, 679 F.3d at 865-71. Much of this proof was collected and prepared by counsel for Amici Curiae in the Brief for Navajo Nation, et al., as Amici Curiae Supporting Respondent-Interveners, Shelby County v. Holder, 2013 WL 432965 (U.S. Feb. 1, 2013) (No. 12-96) [hereinafter Navajo Amicus Brief].
135. U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/00000.html (last visited June 17, 2013).
136. Letter from Joe Garcia, NCAI, to S. Comm. on the Judiciary, Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 309 (2006).
137. Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 Am. Indian L. Rev. 167, 185 (1991).
138. Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948). The practice continued until 1948, when Arizona's supreme court ruled that the state constitution referred to a judicially established type of guardianship and had no application to the status of Indians. *Id.* at 463.
139. Act of Feb. 14, 1957, Utah Laws 89-90. The Utah Supreme Court upheld the law, but the legislature repealed it in 1957, when the U.S. Supreme Court, at the request of the state attorney general, agreed to review the decision. *See* Allen v. Merrell, 353 U.S. 932 (1957) (vacating a state court decision as moot).
140. Montana Const., art. IX, § 2 (1932).
141. Cuthair v. Montezuma-Cortez, 7 F.Supp.2d 1152, 1161-62 (D. Colo. 1998).
142. When a U.S. Commission on Civil Rights report confirmed that South Dakota has violated the civil rights of Native Americans, Janklow called the report "garbage." ACLU Voting Rights Project, *Voting Rights in Indian Country* 37 (2009) (citation omitted). In further evidence of discrimination, before the 2002 Congressional election, Janklow announced a voter fraud initiative that would entail the questioning of almost 2,000 newly registered Native American voters, while failing to investigate new registrants in counties without significant Native American populations. *See generally* Laughlin McDonald, *The New Poll Tax*, 13 Am. Prospect 23, 26 (2002).
143. Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, a Case Study*, 29 Am. Indian L. Rev. 43, 43-44 (2005) (citation omitted); *see also id.* at 47-48 (noting South Dakota laws that "praised the 'indomitable spirit of the Anglo-Saxon' and described Indians as 'red children[,]' the 'poor child' of the prairie[, and] the 'revengeful and murderous savage.'") (quoting 1862 Dakota Terr. Laws Preface; Memorial and Joint Resolution Regarding the Appointment of an Indian Agent, ch. 38, 1866 Dakota Terr. Laws 551). Not surprisingly, Attorney General Janklow's position has resulted in a flood of recent litigation. *See, e.g.,* Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469, 474 (8th Cir. 1986); Little Thunder v. South Dakota, 518 F.2d 1253, 1255-57 (8th Cir. 1975); United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1980); Black Bull v. Dupree Sch. Dist., No. 86-3012 (D.S.D.); Fiddler v. Sieker, No. 85-3050 (D.S.D.); United States v. Day County, S.D., No. 99-1024 (D.S.D.); Weddell v. Wagner Cmty. Sch. Dist., No. 02-4056 (D.S.D.); Wilcox v. City of Martin, No. 02-5021 (D.S.D.); Kirkie v. Buffalo County, S.D., No. 03-3011 (D.S.D.); Quick Bear Quiver v. Hazeltine, No. 02-5069 (D.S.D.).
144. Lindsey Hanson, *American Indian Poverty on Reservations*, in Encyclopedia of American Indian Issues Today 75, 75-79 (Russell M. Lawson ed., 2013).
145. McDonald, *supra* note 143, at 51.
146. ACLU Voting Rights Project, *supra* note 142, at 14 .
147. McDonald, *supra* note 143, at 51.

148. ACLU Voting Rights Project, *supra* note 142, at 14.
149. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System 6-7 (2000).
150. ACLU Voting Rights Project, *supra* note 142, at 14.
151. *See* McDonald, *supra* note 143, at 51 (noting that "[n]umerous appellate and trial court decisions, including those from Indian country" have held that "[t]he link between depressed socioeconomic status and reduced political participation is direct"). The Supreme Court has noted that, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." Thornburg v. Gingles, 478 U.S. 30, 69 (1986). In Buckanaga v. Sisseton Independent School Dist., the Eigth Circuit Court of Appeals held that, "Low political participation is one of the effects of past discrimination." 804 F.2d 469, 475 (8th Cir. 1986); *see also* Stabler v. County of Thurston, 129 F.3d 1015, 1023 (8th Cir. 1997) (holding that "disparate socio-economic status is causally connected to Native Americans' depressed level of political participation."). Likewise, in *Old Person v. Cooney*, Court of Appeals for the Ninth Circuit held that "lower . . . social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process." 230 F.3d 1113, 1129 (9th Cir. 2000); *see also* Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1016-017 (D. Mont. 1986) ("Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors . . . but the lingering effects of past discrimination is certainly one of those factors.").
152. ACLU Voting Rights Project, *supra* note 142, at 14-15.
153. 615 N.W.2d 590, 597 (D.S.D. 2000).
154 State Defendants' Response to Motions for Preliminary Injunction, Emery v. Hunt, No. 00-3015 (D.S.D. May 16, 2000), ECF No. 69 at 19.
155. *Emery*, 615 N.W.2d at 599 n.4 (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)).
156. *Id.* (quoting Miller, 515 U.S. at 928).
157. *See, e.g.,* Little Thunder v. South Dakota, 518 F.2d 1253, 1255-56 (8th Cir. 1975) (holding that any claim that a particular class of voters lack a substantial interest in local elections should be viewed with "skepticism," because "[a]ll too often, lack of a substantial interest might mean no more than a different interest" and concluding that "Indians residing on the reservation have a substantial interest in the choice of county officials") (quotation omitted); United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1980) (holding that the State's "presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one"); McMillan v. Escambia County, 748 F.2d 1037, 1045 (11th Cir. 1984) (holding that the lack of minority candidates "is a likely result of a racially discriminatory system"); Hendrix v. McKinney, 460 F. Supp. 626, 632 (M.D. Ala. 1978) (white bloc voting "undoubtedly discourages [minority] candidates because they face the certain prospect of defeat.").
158. Robinson, *supra* note 50, at 4.
159. *See* ACLU Voting Rights Project, *supra* note 142, at 28 (noting that the Department of Justice has "turned a blind eye to the state's failure to comply" with the VRA in Indian Country).
160. McDonald, *supra* note 143, at 53.
161. *See, e.g.,* Mike Wenstrup, *Defend Alaskans' Right to Vote*, Indian Country Today, Mar. 23, 2013, *available at* http://indiancountrytodaymedianetwork.com/opinion/defend-alaskans-right-vote-148311 (noting that Alaska State officials have recently attempted to close polling places and early voting from Alaska Native villages, tried to remove Native Alaskans from the list of Alaska registrars, failed to provide bilingual voting assistance, and have been actively gerrymandering against the Indian vote); H.R. Rep. No. 109-478,

at 6 (2006) ("Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same.").

162. In South Dakota, for instance, there have been nineteen Indian voting rights cases brought against the state and its subordinate governments; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs. *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 264 (2006).
163. U.S. v. Sandoval County, No. 88-1457 (D.N.M. May 17, 1990), ECF No. 125.
164. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Nov. 5, 2004), ECF No. 165 at 2.
165. *Id.*
166. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Nov. 28, 2007), ECF No. 211 at 3.
167. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Mar. 3, 2009), ECF No. 223.
168. U.S. v. Sandoval County, No. 88-1457 (D.N.M. Jul. 6, 2011), ECF No. 235 at 10. The Court went on to chide the County's continued defiance of law with threats of holding its officials in contempt should they fail to comply with the VRA again:

    > The parties are forewarned . . . that the time for Sandoval County to come into compliance with the VRA is now. We will grant no further extension of the consent decree in this case absent an extended evidentiary hearing, at which all named Defendants will appear, to determine the precise extent to which Sandoval County has complied with its legal obligations under the VRA. In the absence of substantial compliance, we will further order Sandoval County, or more precisely its duly elected officials, to show cause why they should not be held in contempt of court for failure to abide by our decree and comply with the VRA.

    Id. at 3 (emphasis in original) (citing United States v. McKinley Cnty., 941 F. Supp. 1062, 1065 (D.N.M. 1996)).
169. S*ee generally* Brief for Alaska Federation of Natives, et al., as Amici Curiae Supporting Respondent-Interveners, Shelby County v. Holder, at 30-33 (U.S. Feb. 1, 2013) (No. 12-96) (discussing preclearance denials in involving Alaska natives).
170. Letter from Grace C. Becker, Acting Assistant Attorney General, U.S. Dep't of Justice, to Sara Frankenstein, attorney for Charles Mix County, South Dakota (Feb. 11, 2008) (on file with author) [hereinafter Becker Letter].
171. 429 U.S. 252, 256-57 (1977).
172. Becker Letter, *supra* note 170, at 2.
173 *Id.*
174. No. 05-4017 (D.S.D.).
175. Becker Letter, *supra* note 170, at 3.
176. No. 12-0118 (D. Alaska).
177. Complaint at 7, Samuelsen v. Treadwell, No. 12-0118 (D. Alaska June 7, 2012), ECF No. 1.
178. Statement of Interest at 3, Samuelsen v. Treadwell, No. 12-0118 (D. Alaska June 27, 2012), ECF No. 99.
179. *See generally* NAACP Legal Defense and Educational Fund, Recent Examples of Discriminatory Voting Measures Blocked by Section 5 of the Voting Rights Act, http://www.naacpldf.org/files/case_issue/Shelby-Recent%20Section%205%20Successes.pdf (last accessed June 23, 2013).
180. Samuelsen v. Treadwell, No. 12-0118 (D. Alaska June 27, 2012), ECF No. 101.
181. H.R. Rep. No. 109-478 at 24.

182. *See generally* Deborah F. Buckman, *Application of Voting Rights Act to Native Americans*, 40 A.L.R. FED. 2d 1, §7 (2009) (discussing many, if not all, of the Section 2 VRA cases involving Native Americans up to 2009).
183. 647 F.Supp. 1002 (D. Mont. 1986).
184. *Id.* at 1009-1009.
185. *Id.*
186. 336 F.Supp.2d 976 (D.S.D. 2004).
187. *Id.* at 980.
188. *Id.* at 1032–1051.
189. 709 F.Supp.2d 1176 (D. Wyo. 2010).
190. *Id.* at 1182.
191. *Id.* at 1184.
192. *Id. at 1186-88.*
193. *Id.* at 1231.
194. 363 F.3d 897 (9th Cir. 2004).
195. *Id.* at 900.
196. *Id.* at 912-13.
197. No. 12-5003 (D.S.D. Sept. 27, 2012), ECF No. 95.
198. *Id.* at 16.
199. *Id.*
200. No. 10-0095 (D.N.D. Oct. 21, 2010), ECF No. 38.
201. *Id.* at 2.
202. *Id.*at 5-6.
203. *See, e.g.,* Old Person v. Cooney, 230 F. 3d 1113 (9th Cir. 2000); Navajo Nation v. Brewer, No. 06-1575 (D. Ariz. May 27, 2008); *Cuthair*, 7 F. Supp. 2d 1152.
204. *Shelby County*, 679 F.3d at 868.
205. Pamela S. Karlan, Book Review, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1442 (2011) (reviewing LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010))
206. ACLU Voting Rights Project, *supra* note 142, at 16.
207. Karlan, *supra* note 205, at 1441 (quoting Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 880 (1995)).
208. *Id.* at 1442.
209. *See, e.g.,* U.S. v. Sandoval County, No. 88-1457 (D.N.M.), ECF Nos. 186-89, 212-13, 224, 228, 240
210. 121 Cong. Rec. 16,244 (1975) (statement by Rep. Rodino).
211. 121 Cong. Rec. 16,262 (1975) (statement of Rep. Drinan).
212. 121 Cong. Rec. 13,603 (1975) (statement of Sen. Scott).
213. Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 1990 (2006) (statement of Joe Rodgers).
214. *Id.* (statement of Nadine Strossen).
215. H.R. Rep. No. 109-478, at 11–46.46.
216. Karlan, *supra* note 205, at 1442.
217. Navajo Amicus Brief, 2013 WL 432965, at 4.

218. Stephen L. Pevar, The Rights of Indians and Tribes 26 (2d ed. 1992); *see also* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1976) ("The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian a status accompanied by fiduciary obligations.") (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942); United States v. Kagama, 118 U.S. 375 (1886); Beecher v. Wetherly, 95 U.S. 517, 525 (1877); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831)); United States v. Nice, 241 U.S. 591 (1916) (An individual Indians' land is protected against state taxation by virtue of the trust relationship). As explained by the Supreme Court in 1942:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Board of Com'rs of Creek County v. Seber, 318 U.S. 705, 715 (1942). Although based on the treaty relationship, the doctrine "stands independent of treaties and inures to the benefit of all tribes, treaty and non treaty alike." Mary Christina Woods, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 Envtl. L. 733, 742 (1995).

219. 316 U.S. 286, 296-97 (1941).

220. *See* Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976) ("[A]ntagonism between reservation Indians and the surrounding populations does persist. History, broken promises, cultural differences and neglect all contribute to it. Reluctance on the part of the States to accord to the Indians rights guaranteed to them by treaties still exists."); *see also* Claire R. Newman, Note, *Creating an Environmental No-Man's Land: The Tenth Circuit's Departure From Environmental and Indian Law Protecting a Tribal Community's Health and Environment*, 1 Wash. J. Envtl. L. & Pol'y 352, 393 (2011) ("The federal trust responsibility [i]s a safeguard against state aggression towards Indian tribes."); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. Rev. 381, 387 n.52 (2004) ("The federal government's reason for establishing a trust relation with the Indian tribes was based upon the notion that the states were often the tribe's deadliest enemies."); Peter D. Lepsch, *A Wolf in Sheep's Clothing: Is New York's Move to Cleanup the Awkesasne Reservation an Endeavor to Assert Authority over Indian Tribes?*, 8 Alb. L. Envtl. Outlook J. 65, 107 (2002) (noting that the "Trust Doctrine" is "a shield against the states' gentleman's sword"); Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Towards Ending State Adjudication of Indian Water Rights*, 18 Harv. Envtl. L. Rev. 433, 444 (1994) ("Shielding important federal interests from the potential biases of state court is not a novel concept. In fact, it was apprehension regarding states' attitudes toward the Indians which comprised the very foundation of the federal-Indian trust relationship.")

221. Dewakuku v. Martinez, 271 F.3d 1031, 1040 (Fed. Cir. 2001); *see also* Kimberly T. Ellwanger, *Money Damages for Breach of the Federal-Indian Trust Relationship After Mitchell II*, 59 Wash. L.Rev. 675, 675 (1984) ("[C]ourts have cited the federal-Indian 'trust' relationship as authority . . . to place an affirmative duty on the government to act on behalf of Indians."); Sharon O'Brien, *Tribes and Indians: With Whom does the United States Maintain a Relationship?*, 66 Notre Dame L. Rev. 1461, 1493 n.163 (1991) (noting that the trust and fiduciary duty's "broad purposes, as revealed through thoughtful

reading of the various legal sources, is to protect and enhance the people, property and self-government of Indian tribes.").

222. Woods, *supra* note 218, at 744.

223. *See, e.g.,* Morton v. Ruiz, 415 U.S. 199 (1974) (a court may order the BIA to expend funds to ensure that the trust obligation is fulfilled); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980) ("If . . . the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence *vel non* of the relationship can be inferred from the nature of the transaction or activity."); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 256-257 (D.D.C. 1973) (federal government has trust duty to minimize adverse impact on Indian Reservations); *see also generally* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Klamath Indians, 304 U.S. 119; United States v. Shoshone Tribe, 304 U.S. 111 (1938); United States v. Creek Nation, 295 U.S. 103 (1935); Carpenter v. Shaw, 280 U.S. 363 (1930).

224. 528 F.2d 370 (1st Cir. 1975)

225. *Id.* at 372.

226. *Id.* at 379.

227. *Id.*; *see also generally* Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635 (1982) (discussing generally the pre and post-*Joint Tribal Council* trust and fiduciary duty).

228. Joint Tribal Council, 528 F.2d at 372.

229. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F.Supp. 649, 667 (D. Me. 1975).

230. Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery,* Johnson v. McIntosh*, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 327 (1993); *see also* BENJAMIN ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 44 (1939).

231. ROBERT T. COULTER, NATIVE LAND LAW § 1:2 (2012); it is from this relationship where the trust obligation arises. *See* Jana L. Walker, et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 383-84 (2002) ("From this guardian-ward relationship, as well as federal laws and the promises made in Indian treaties, a trust responsibility flows from the federal government to the Tribes and Indians. It is this unique trust responsibility that imposes obligations on the federal government to protect, defend, and provide services to Tribes and Indians.").

232. Newcomb, *supra* note 230, at 327 (citing United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 533 (1903)).

233. 31 U.S. (6 Pet.) 515 (1832); *see also* Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1144 (2012) ("The Doctrine of Discovery may have originated in the international law authorizing European colonialism, but it was ultimately incorporated into domestic law.") (citing *McIntosh*, 21 U.S. (8 Wheat.) 543).

234. *See* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 717 (2004) (noting that the doctrine of discovery's "implications on native sovereignty were evident almost immediately after the Court handed down the most famous of its decisions, Worcester v. Georgia, in 1832").

235. KIRKE KICKINGBIRD, ET AL., INDIAN TREATIES: INDIAN LEGAL CURRICULUM AND TRAINING OF THE INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW 27 (1980).

236. Cnty. of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 234 (1985) (emphasis added); *see also* Morton v. Mancari, 417 U.S. 535, 552 (1974) (tribal members may be "single[ed] out as a proper subject for separate legislation").

237. Gila River Indian Community v. U.S., Nos. 11–15631, 11–15633, 11–15639, 11–15641, 11–15642, 2013 WL 2171652, at *12 (9th Cir. Jul. 9, 2013) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985)); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify . . . tribal rights."); Blumm, *supra* note 234, at 776 ("The discovery doctrine's limit on the sovereign authority of Indians to deal with governments other than the discovering government laid the foundation for buffering tribes from state laws, while authorizing federal plenary power.").
238. Gila River Indian Community, 2013 WL 2171652, at *11.
239. *See generally* Karlan, *supra* note 205, at 1440-43.
240. Joint Tribal Council, 528 F.2d at 372.
241. Joint Tribal Council, 388 F.Supp. at 667.
242. *See* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 717 (2001) ("Congress [has been vested], through the trust responsibility, with specialized power concerning Indians akin to those Congress exercised respecting all minorities in the civil rights legislation of the 1960s—the power to prefer racial distinctions as the means by which to erase the inequities caused by such distinctions.").
243. *See* JEFFERY TOOBIN, THE OATH 30-31 (2012) (noting that to President Obama, "the point of politics [i]s actually to accomplish something—to vindicate democratic values by passing [voting rights] laws"); Robin I. Mordfin, *From the Green Lounge to the White House*, THE RECORD ONLINE, Spring 2009, *available at* http://www.law.uchicago.edu/alumni/magazine/spring09/greenloungetowhitehouse (noting that President Obama practiced voting rights law at Miner, Barnhill & Galland prior to his election to the U.S. Senate in 2005).
244. *See, e.g.,* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C); Violence Against Women Act of 2013, Pub. L. No. 109-162, Title IX, § 901, Jan. 5, 2006, 119 Stat. 3077 ("[T]he unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."); Helping Expedite and Advance Responsible Tribal Home Ownership Act, Pub. L. No. 112-151, 126 Stat. 1150 (2012); *see also* Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 166 (2011) ("[F]ailing to pass the TLOA would have been a dereliction of Congress' trust responsibility to the Native Americans."); Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, WHITE HOUSE BLOG (Jul. 30, 2012, 1:54 PM), http://www.whitehouse.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act (describing how the HEARTH Act "make[s] meaningful progress on advancing tribal self-determination, promoting economic growth, and revitalizing [the federal] trust responsibility.").
245. Although I will not opine as to what, exactly, this legislation should look like, I would propose some formula whereby jurisdictions will be subject to preclearance if: (a)(1) they have been found to have violated Section 4 of the VRA in some point in time; or (2) were previously subject to preclearance; and (b) there exists Indian country situated within such jurisdiction.
246. Karlan, *supra* note 205, at 1441-42.
247. Robinson, *supra* note 50, at 4.
248. Karlan, *supra* note 205, at 1441 (quotation omitted).
249. Another idea is a "trust agreement" that promises preclearance. As Sharon O'Brien has noted:

    The federal government also has a trust relationship with tribes. Tribes could guarantee more equality in their relationship by negotiating a trust agreement with the federal gov-

ernment. I think this is a very appropriate solution because the problem is that the federal government simply redescribes and redefines trust relationship whenever it wants to, just as it redefines tribal status. That would be one avenue of recognizing the group rights of the tribe and building on the political status as well as the needs status.

O'Brien, *supra* note 221, at 1502-1503.

250. Heidi McNeil Staudenmaier, et al., *Tribal Court Litigation*, *in* AMERICAN BAR ASSOCIATION, ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION, § 27.2.1 (2013); *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) (stating that "the power of the Federal Government over the Indian tribe is plenary"); United States v. Forty-Three Gallons of Whiskey, 93 US 188, 194 (1876) (same).

Catherine Phillips

IT'S THE ECONOMY, STUPID:[1] CAPITALISM, ENVIRONMENTAL LAW, AND THE NEED FOR SUSTAINABLE ECONOMIES

Introduction

Most environmental laws in the United States are ostensibly public health and environmental protection statutes that contain bold statements about the ability of the law to rectify the environmental harms caused by human activities.[2] Indeed, some commentators have characterized these laws as enshrined statutory rights to a clean environment.[3] For example, the National Environmental Policy Act establishes "a national policy which [would] encourage productive and enjoyable harmony between man and his environment; [and] promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[4] The rhetoric is lofty and the aspirations are high. But the practical results have been more ambiguous.

While these statutes have resulted in some improvements to the environment,[5] an array of seemingly intractable environmental problems undermines the notion that the current legal framework can achieve its lofty aspirations: growing dead zones in oceans;[6] the resurgence of debilitating water pollution in major inland waterways;[7] the pervasiveness of synthetic chemicals of unknown safety in Americans' bodies;[8] and, most significantly, systemic climate disruption.[9] While there is widespread recognition of these problems,[10] few writers have adequately explained why these problems remain so intractable within our current context and thus most proposed solutions fall short of what is needed.[11]

Specifically, most critiques of our environmental legal framework suggest making minor changes to the text or implementation of environmental statutes. Common proposed solutions include merely strengthening existing standards[12] or making the regulatory system more flexible and market driven.[13] However, these critiques fail to acknowledge, much less account for, how enduring environmental problems relate to indelible aspects of our current economic system, making their solutions impossible without addressing the underlying system.

Capitalism creates and incentivizes individual, communal, and industrial practices that harm individuals, communities, and the wider natural world.

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Our current food system depends upon cheap, synthetic chemicals both in agriculture and food production, creating dead zones in our water sources and poisoning our bodies.[14] The panoply of consumer goods on which people rely generates toxic waste from production to disposal. Climate-disrupting fossil fuels are the bedrock of our economic system—supplying not only the bulk of our energy but the main ingredient in seemingly essential consumer products from lipstick to babies' bottles. The economics of agriculture, consumer goods, and fossil fuels are, in part necessitated by the fast pace of modern life.

The failures of our environmental laws suggest an inherent problem not just with the laws themselves but with our entire economic system. A healthy environment that is conducive to human and other life flourishing is impossible because our economic system, as it is currently constituted, is not sustainable—for the environment, for individuals, or for communities. Achieving a successful environmental legal system will require much more than tweaking the current system around the margins. It will require reforming our entire legal system to be one that supports economies and practices that are sustainable for the environment, communities and individuals.

Part I of this article will briefly critique three characteristics of our current economic system: growth, abstraction, and consumption. Part II will link these characteristics with three seemingly intractable environmental problems, demonstrating how these problems are inextricably linked with how our economy is currently structured. Part III will explore several critiques of the current environmental regulatory system, arguing that these critiques and the new systems that they imagine will not remedy the problems. Part IV will further unpack the meaning of "sustainability" and highlight what a "sustainable" legal system would look like, arguing that it is only such a system that will be able to address the environmental challenges faced today.

I. Capitalism: Growth, Abstraction, and Consumption[15]

Capitalism, as a matter of principle, relies on continuous economic growth to sustain and increase prosperity.[16] Indeed, the rate of economic growth is one of the dominant indicators used to monitor the state of an economy.[17] Some economists argue that continued and growing wealth creation is essential to provide the basics of shelter and food to a growing population.[18] Others focus on the necessity of growth to provide for human flourishing, defined largely as expanding material prosperity.[19] There are even arguments that growth is necessary for basic social stability[20] or that growth will solve environmental degradation by ending poverty.[21] All of these arguments assume capitalist growth as a core characteristic for the economic future.

The reality, however, is that the planet offers finite resources to sustain this endless growth.[22] Most notably, scientists have outlined nine earth systems that have "critical boundaries" that limit human societies: (1) stratospheric ozone

layer; (2) biodiversity; (3) chemical pollution; (4) climate change; (5) ocean acidification; (6) freshwater consumption and the global hydrological cycle; (7) land system change (conversion of land for human use); (8) nitrogen and phosphorus inputs to the biosphere and oceans (related to dead zones); and (9) atmospheric aerosol loading.[23] These boundaries circumscribe human activity insofar as transgressions disrupt the factors that allow the planet to sustain life as we know it.[24] Scientists estimate that humans have already transgressed these boundaries beyond the safe zone for climate change, biodiversity loss, and the nitrogen/phosphorus inputs.[25] Capitalism, however, is ill-equipped to respond to these transgressions because natural boundaries are in tension with the principle of endless growth.[26]

Capitalism is also unable to respond to these planetary boundaries because it has abstracted that which is real and made real that which is abstract.[27] Our current economic system is an abstraction, meaning there is nothing absolute, inevitable, or unchangeable about it.[28] Much of our currency, for instance, is a complete abstraction. Financial transactions exist in the virtual world, lacking even the abstract definiteness of paper money.[29]

On the other hand, planetary boundaries are real, meaning that they are absolute, inevitable, and unchangeable. We cannot conjure more clean water out of thin air the way complex market systems can conjure wealth with a single keystroke. Nor can we change the fact that human cells respond to certain chemicals by becoming cancerous the way that advertisers can change the name of a meat product to improve people's reaction to it.[30]

Perhaps the best illustration of this reversal in the United States—treating the real environment as abstract, and our contingent economic system as absolute and immutable—may be seen by comparing the reaction of U.S. politicians to the 2008 economic collapse with their reaction to climate change. When it was the U.S. economy that was threatened, ashen-faced public officials, with fear in their eyes, promised swift and decisive action to stabilize the banking system.[31] They acted quickly, decisively, and with bi-partisan support[32] to save the world's economy from what many believed would be an irrecoverable disaster.[33] Despite the inherently abstract and mutable nature of our economic system, it is this system that seems most real to most people in the modern world. Few, if any, people in positions of power pointed out that the disruptions could signal deeper problems, suggesting the need to restructure the economic system in significant ways. Nor did most people respond by focusing on remedying the human suffering created by the economic disruption. Rather, the focus was on stabilizing the system as such—a system that was treated as an absolute, inevitable, and unchangeable part of our world.[34]

However, despite the long-term, serious, and perhaps irreversible consequences of a disrupted climate system,[35] no nation has taken quick, decisive,

or consensus-driven steps to adequately address climate change, even after over two decades of attempts. Facially, the best explanation for this failure is the continuing economic competition amongst nations that makes taking any economically disruptive step politically impossible. At a deeper level, though, the failure demonstrates how deep the reversal has been for people living under capitalism between what is real and what is abstract.[36] While the economy is mutable, planetary boundaries are not. If society were to truly understand what is real and what is abstract, the reactions to economic disruption and climate change would be reversed. Moreover, it would be difficult to continue to compromise the real, long-term survival capacity of the planet based on the demands of a mutable and contingent economic structure.

Third, and finally, capitalism relies upon consumption being disconnected from use, meaning that the system is set up to require unnecessary waste.[37] Car companies could produce cars that last a lifetime, shoes could be fixed, clothes mended, furniture repaired—as it was until about sixty or so years ago.[38] However, it is excessive consumption, often fueled by debt, that supports economic growth.[39] The U.S. economy cannot sustain itself without over-consumption, and inversely, huge waste that is harmful to the environment from its production to its disposal.

These primary characteristics of capitalism—endless growth, a reversal of what is abstract and what is real, and production being disconnected from human need—suggest that it is an illusion to think environmental sustainability can be achieved in the context of such a system.

II. Seemingly intractable environmental problems

Many areas of environmental law are encountering seemingly intractable problems that suggest a new framework is needed to achieve envisioned environmental and public health goals. Three areas in particular highlight the deficiencies in our current approach and how these deficiencies cannot be remedied without restructuring our economic system: (1) climate change; (2) water pollution; and (3) toxic chemical regulation.

A. Climate change

Countries have been meeting to address climate change at least annually since 1992. The tone of the Intergovernmental Panel on Climate Change (IPCC) annual reports has been urgent since that time and alarmist since at least 2000.[40] However, these meetings have not resulted in any meaningful changes to the worldwide release of greenhouse gases.[41] Instead, the global emissions rate has continued to grow annually, with the single exception of year 2009, along with the worldwide GDP.[42]

At a national level, the United States has always been reluctant to adequately respond to climate change. At the first United Nations Framework Convention on Climate Change, the United States asserted that it would only adopt

greenhouse gas reduction policies that were beneficial in some *other* way, namely policies that also yielded economic benefits.[43]

After President Barack Obama was elected, he made speeches about the importance of taking action on climate change. During his first years in office, the President had an opportunity to elevate climate change as one of his administration's top political priorities. Instead he chose to focus almost all of his political capital on health care reform legislation. Indeed, until recently, the President has been largely disengaged from the issue at national or international levels.[44]

Some of President Obama's supporters may argue that his efforts to ameliorate climate change have centered on executive action. However, even administrative action has been modest, at best. The Environmental Protection Agency (EPA) attempted to use existing environmental laws to address the problem. The EPA increased fuel-efficiency standards[45] and opened up Clean Air Act tools by making an "endangerment" finding for greenhouse gases, which allowed for the regulation of new stationary sources (like new power plants) and motor vehicles.[46] But from there progress has slowed, as the agency recently backed off a proposed rule that would have required new coal power plants to meet the lower emission standards of natural gas plants.[47] In the end, the administration has relied almost exclusively on a transition from coal to natural gas—which itself is fraught with significant and as yet unquantified potential environmental harms[48]—to reduce greenhouse gases even by the slightest and ultimately insignificant percentage.[49] The results are a far cry from the major and urgent action promoted by the political rhetoric.

The primary challenge to addressing climate change is that fossil fuels make up the backbone of our economic system—from our energy sources to our ubiquitous plastics. The changes that scientists tell us are needed to get greenhouse gas levels back to a safe level would require us to move completely away from fossil fuels and would involve changing how we live, work, and consume.[50] These changes would conflict with the foundations of our capitalist system.

Adequately addressing climate change would disrupt the endless pursuit of economic growth, recalibrate the current disconnect between consumption and human need, and force the economic system to account for real planetary boundaries.[51] Consumption and energy use need to be reduced dramatically.[52] While significant economic activity may be generated by the transition from our current system to a more sustainable economic system, there is no way to sustainably continue to increase economic growth at the same rate as over the last fifty years without further contributing to climate change problems.

Solar panels provide a good example of the tension that currently exists between transitioning to a sustainable economy and a capitalist system.[53] It

would be better for the environment to produce solar panels that last a long time and can be easily fixed. In contrast, it would be better for the economy, as it is currently constituted, to produce solar panels that require a lot of maintenance and need regular replacement. The more sustainable option would allow us to effectively use alternative power sources but demand a dramatic reduction in our consumption patterns. The latter scheme requires more non-renewable resources and thus more pollution but is consistent with our current lifestyle of short-term use and disposability. It is difficult to imagine a scenario where capitalist forces would invest in the more sustainable option.

Moreover, to respond adequately to climate change would require economists to treat natural systems as real and absolute in ways that they have not yet done.[54] Most economic analysis has determined that the present day costs of the changes needed to address climate change are too great to justify because economists almost always undervalue natural systems.[55]

Finally, the entire consumptive model of capitalism would require changing. Climate change exists not just because of the cars we drive and how we heat and cool our homes. Our fossil fuel usage extends to every sector of our economy—the cheap plastic goods that are ubiquitous in our homes and that help fuel our continued growth come from fossil fuels and require fossil fuels to get to our homes.[56] Were we to only consume what is necessary for basic human existence and flourishing, or to consume durable, sustainable products, the entire capitalist system as it is currently constituted would suffer, if not collapse. Thus, shifting to a more sustainable system would mean changing our underlying capitalist structure in significant ways, because our current system essentially eliminates all genuinely sustainable possibilities.

B. Water Pollution

In the 1970s, Lake Erie was dying. The high phosphorus levels were feeding an ever-growing summer algae bloom that threatened to suffocate all other life in the lake.[62] A response was needed—new laws were passed to regulate sewage outfalls and phosphorus amounts used in detergents were reduced. Not surprisingly, Lake Erie resurged during the 1980s, after the changes took effect. Then, problems re-emerged during the 1990s and have worsened each year for the last two decades. Why? Run-off from conventional farming.[57]

Farm run-off is an example of non-point source pollution—i.e., it does not flow into navigable waters from a point source, like a pipe or a culvert. The Clean Water Act regulates non-point source pollution such as agricultural run-off only indirectly by regulating the maximum amount of pollutants that can be discharged into a particular body of water. Point source pollution can be regulated, at least in theory and almost always in practice, by making changes to the physical plant while leaving the underlying industrial practice unhindered, if more expensive.

The regulation of most *non*-point sources, however, would require dramatically changing the underlying industrial process. It would require not clear-cutting land or stopping the use of synthetic fertilizers and pesticides in agriculture. The lack of regulation in non-point source areas arguably has nothing to do with the level of pollution risk they generate compared with point sources such as the average factory. Rather, it has everything to do with the inability to reduce the pollution risk without significant economic disruption to essential sectors of our economy.[58] Effective clean water regulation would require restructuring these sectors of our economy and the guiding principles that dictate what is economically efficient today. Until such restructuring occurs, water pollution will continue to worsen, despite the over four decades spent trying to improve water quality.

C. Toxic chemical regulation

The Toxic Substances Control Act (TSCA) was passed during the 1970s around the same time as its better known environmental statutory siblings, the Clean Air Act and the Clean Water Act. Unlike these laws, however, the TSCA contained an explicitly risk-benefit standard from its inception, aiming only to control commercial chemicals when they "pose an unreasonable risk to health or to the environment."[59] While the TSCA mentions public health goals, its purpose was always to balance market demands with public health needs.[60] As discussed below, risk-benefit standards almost always privilege the more easily-quantifiable market demands over public health needs.[61]

As a result, it has been a largely ineffective statute.[62] Recent efforts to update the TSCA have failed due to a prevailing concern that changing the law to require industry to prove the safety of its tens of thousands of chemicals would ultimately bring the economy to a halt.

III. Mainstream Solutions

A. Progressive Critiques

Many progressive critiques of our current environmental laws center on attacking cost-benefit analysis and the way it is executed.[63] Cost-benefit analysis quantifies the cost of a certain regulation and then attempts to quantify its benefits. Regulations in which the costs outweigh the benefits are not pursued. Even though many environmental statutes were not originally cost-benefit statutes, government actors have begun to assess these statutes in cost-benefit terms. There has been a judicial erosion of non-cost/benefit standards[64] and the Office of Management and Budget now requires that proposed regulations meet cost-benefit standards.[65]

The problem with cost-benefit analysis is that it is nearly impossible to quantify the benefits of environmental regulation accurately but it is quite easy to quantify its economic costs. First, there is the challenge of quantifying public health improvements. How much is it worth to keep one child

from having asthma? An adult from an early death from cancer? The healthy reproduction of a toad? Second, even if one could quantify these benefits, as some optimistically assert is possible, cost-benefit analysis always undervalues *future* benefits. While we might be able to quantify the benefit of reducing air pollution for children alive today, how do we calculate the benefit of clean air for the next generation of children? Thus, cost-benefit analysis intrinsically privileges economic considerations over public health or environmental ones because the former are easier to quantify. Industry is saved from what is perceived as overly burdensome costs and the public and the environment never get to receive what was determined to be a too insignificant benefit.[66]

Despite the wisdom of these critiques, the proposed solutions often continue to be driven by what is considered possible according to dominant theories of economics and the technologies that serve those economic ends—rather than what is necessary for human health and the environment.[67] For example, technology-based standards are often lauded as a desirable alternative.[68] A technology-based standard is one that requires an entity use the best available control technology. To be sure, technology-based standards achieve better results than other measures.

Yet, the phrase "best available control technology" in environmental statutes does not mean the technology that would most reduce pollution, as one may assume. Best available control technology is defined, in the Clean Air Act for example, as: "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter . . . taking into account energy, environmental, and economic impacts and other costs."[69] It thus incorporates economic considerations into what is "best," blunting the potential environmental improvements of such standards. Such standards still define what is possible in terms of what is economically possible for an industry, rather than what level of pollution is possible for the earth or human beings to sustain.[70] Economic assumptions about what is possible remain unchallenged.[71]

Another closely related, suggested progressive reform is feasibility analysis: environmental regulations should require polluters to take whatever steps are feasible to reduce pollution.[72] Again, this approach is an improvement over cost-benefit analysis because it is grounded in a moral imperative for industries to avoid harming people. However, it still assumes as normative the reality that industry will harm people.[73] Under feasibility analysis the harms should occur only when it would be economically infeasible to stop them. The ultimate concern is still centered on economic demands, not environmental or public health needs.

Finally, numerous progressive critics focus on the economic system as the core problem preventing a sustainable future, but they fail to provide

an adequate vision for what reform would look like. As outlined in *Winner Take All Politics*, our political system increasingly benefits the wealthy and corporate interests at the expense of everything else.[74] It is no wonder that the Environmental Protection Agency has increasingly protected corporate interests over the public and environmental interests. Craig Collins argues in *Toxic Loopholes: Failures and Future Prospects for Environmental Law* that it is our perverse political economy that has led to failures of environmental law.[75] He rightly points out that reforming our political system, and thus our environmental laws, will take a grassroots movement.[76] Nonetheless, Collins is short on specifics of what the movement would seek to create beyond the broadest outlines.[77]

B. Conservative critiques

Conservatives often critique our environmental laws as being too centralized, complex and inflexible.[78] Some go so far as to argue that all environmental regulation should be abolished, allowing the market to protect the environment only to the extent that it determines appropriate.[79] Others take a more moderate position by calling for more market-based solutions and flexible regulatory tools.

For example, in *Breaking the Logjam: Environmental Protections that Will Work*, the authors argue that using more economic incentives to achieve compliance "would save on costs, prompt technological innovations that would pay dividends for the environment and economy, and give agencies doable jobs."[80] Specifically, they argue for (1) market-based mechanisms that penalize failure and reward progress toward an environmental goal; (2) encourage innovative ways to be "green"; (3) "employ property right-like instruments in natural resources as a regulatory strategy"; and (4) "require the disclosure of information as a tactic to energize consumers, investors, and citizen activists as well as product managers and regulators."[81]

Flexible. Efficient. Innovative. These are all buzz-words to which, at first blush, one would find it hard to object. Who does not think flexibility and innovation are good things? Who would dare to suggest that efficiency is not an ultimate value?

The primary problem, however, is the flawed assumption that values and systems designed to increase profit for a few individuals can somehow seamlessly be converted to serve other, usually contradictory, ends. More flexible regulations may spur innovation by allowing companies to do what they want to achieve their desired profit-making ends. It seems unlikely, though, that providing companies with more flexibility would also lead the companies to better meet "green" ends (unless of course these values were already inherent to the company).[82] Many conservative critiques, similar to most progressive critiques, romanticize the market's ability to protect the planet and public health as well as build new sustainable systems.

IV. Sustainable Economies Law

Environmental law needs a new organizing ethos that cuts through the logjam created by our current economic system. Sustainability is a popular buzzword in the environmental community. However, its potential as a foundational organizing principle for a new, grassroots economy has yet to be realized.

To be a sustainable system, as envisioned here, the system must first be sustainable for the planet and its ecosystems. Rather than an economy operating in isolation, beholden only to its own abstract constraints and attempting to require the planet to be its servant, the economy would need to operate within the natural, fixed constraints of the planet and its ecosystems. It would be designed to serve, not exploit, the continued life and flourishing on this planet.[83] Long debates about whether we owe a moral obligation to nature or to future generations will no longer be necessary. Such moral obligations would be obvious and fundamental. Complex calculations that purport to balance economic needs against social and environmental needs would be irrelevant. No balancing is needed because the planetary demands would form the economy's foundation.

Such a system would not rely on endless growth. As in nature, growth would need to be balanced by death.[84] Change occurs in all systems; but sustainable change (growth or death) does not disrupt the system's equilibrium. Moreover, as in nature, death feeds new life in a sustainable system.[85] There is no waste problem in natural systems because waste is always put to new life-giving uses. A new economic system would experience predictable cycles of growth, death, and renewal. The focus during periods of transition would not be on attempting to stop the change or disruption but on minimizing any human suffering as a result of the change.

A sustainable system would treat that which is real as real and that which is abstract as abstract. In other words, natural limits and basic human needs would be treated as real and determinative for the system's basic structure. Conversely, the particulars within the economic system would be properly seen as abstractions and thus, changeable to address the real needs of people and nature. Real needs of human beings include the basics of healthy food, non-toxic shelter, and clean water but also include the need for community, leisure, and individual autonomy.

Consumption in such a system would be connected with actual human wellbeing. Such a system would produce goods that are durable, generate minimal waste, and do not have toxic side effects for humans or the environment. Finally, the seeming and ongoing conflict between economic demands and environmental demands would not exist because the system would be designed to harmoniously serve both ends.

In order to have sustainable economies, the law must be changed to support the natural development of such a system.[86] Environmental law would be integral to all legal areas. Environmental considerations would be as foundational for land use law as for agriculture law as for business law. Indeed, there would be no "environmental law," just law.

The most important work in environmental law for the coming decades will be focused on what such a system looks like at every level of society and how the law must change to facilitate the creation of such a system. What would corporate structures look like in a system that prioritizes human and environmental wellbeing? How should zoning laws respond to the proliferation of urban agriculture? How must building codes change to allow sustainable dwellings to be built? How do we construct systems and laws that protect endangered species when climate disruption is the largest problem? In what ways should local producers be privileged in order to build more resilient communities and how can such privilege be recognized as an exception under the dormant commerce clause? What would the Resource Conservation Recovery Act look like if all productive systems were designed not to create any toxic and unusable waste? How should the tax system respond to the growing gift economy or alternative local currencies? What would labor law look like if it recognized the connection between the exploitation of human labor and the exploitation of the earth?

Answering these questions, as well as others, will take a great deal of creative work and grassroots organizing for legal professionals in the coming decades. But through such work lies the possibility of creating a system that serves both the needs of humans and the natural world. Climate change, water pollution, and toxic chemical pollution would be adequately remedied. People would indeed have a right to a clean environment.[87] And we would finally create "a national policy which [would] encourage productive and enjoyable harmony between man and his environment; [and] promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ."[88]

NOTES

1. This is a reference to James Carville's famous mantra during the 1992 Bill Clinton Presidential campaign. No offense is intended. *See, e.g.*, William Safire, *On Language: Warlords, Bandits, Thugs and Regional Leaders*, NY TIMES, Dec 27, 1992 ("James Carville, the Clinton political strategist, put up a sign in his Little Rock headquarters: "It's the Economy, Stupid!" That was supposedly his answer to the question "What's the campaign about?" The sign, and the stories about it, helped keep the central attack issue constantly in focus.")

2. *See, e.g.*, Clean Water Act § 101, 42 U.S.C. § 7401 (2006) (noting the Congressional purpose of the Act is, in pertinent part, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare").

3. *See*, *e.g.*, Victor B. Flatt, *This Land is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 204 (arguing that we must change our understanding of our current environmental laws, recognizing the environmental rights framework that pervades the laws, if we are to properly implement these laws).
4. 42 U.S.C. 4321 (2006). *See also*, The Clean Water Act, 33 U.S.C. 1251 (2006). Of course, the nation did not come anywhere close to eliminating "the discharge of pollutants into navigable waters" by 2013, much less by 1985.
5. While beyond the scope of this paper, an argument can be made that much of the environmental improvements that have been made over the last several decades are in fact illusory. First, most technology-based fixes to pollution just shift the pollution from one area of the environment to another. Air is made cleaner by the installation of scrubbers on a factory or power plant, but the pollutants filtered from the air must then be disposed of in a landfill, creating other potentially significant environmental problems, most notably for ground and surface water. *See, e.g.,* Charles Duhigg, *Cleansing the Air at the Expense of Waterways,* NY TIMES, Oct. 13, 2009, at A1. Second, the reduction of industrial pollution may be explained in part because industries have moved to other parts of the planet. Thus, the dye chemical used to stain blue jeans that caused the pollution recounted in the book and movie, *A Civil Action*, is still being widely used to stain blue jeans worn in the United States—just not those made in the United States. Dan Fagin, *A Cancer Cycle, From Here to China*, N.Y. TIMES, Jan. 12, 2013, A 19, *available at* http://www.nytimes.com/2013/01/12/opinion/a-cycle-of-contamination-and-cancer-that-wont-end.html?_r=0. This argument also points towards the uniqueness of climate change. While the immorality of outsourcing our pollution to other nations should be obvious for any one not brainwashed by economic ideology, such outsourcing does normally insulate the United States from suffering immediate consequences of the pollution. However, greenhouse gas emissions do not function in this way. It matters little whether the greenhouse gas is emitted from a factory in the United States or China. It will impact the climate. Moreover, the climate disruption impact will be felt all throughout the planet in various ways without regard for where the generating source was located.
6. *See, e.g.*, Bina Venkataraman, *Ocean 'Dead Zones' on the Rise*, N.Y. TIMES, Aug. 14, 2008, *available at* http://www.nytimes.com/2008/08/15/science/earth/15oceans.html.
7 *See, e.g.*, Michael Wines, *Algae Blooms Threaten Lake Erie*, N.Y .TIMES, Mar. 15, 2013 at A1, *available at* http://www.nytimes.com/2013/03/15/science/earth/algae-blooms-threaten-lake-erie.html?pagewanted=all.
8. *See, e.g.*, Patricia Callahan & Sam Roe, *Playing with Fire*, CHICAGO TRIB., *available at* http://media.apps.chicagotribune.com/flames/index.html (website with links to the *Tribune* series on toxic flame retardants in consumer products).
9. *See, e.g.*, JAMES HANSEN, STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY (2009).
10. *See supra* notes 6–9.
11. *See infra* notes 13–14 and Section II & III.
12. *See, e.g.*, David Driesen, *A Useful Alternative to Cost-Benefit Analysis* (September 2009) http://www.progressivereform.org/perspFeasibility.cfm.
13. *See, e.g.*, DAVID SCHOENBROD, ET AL., BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK (2010).
14. *See* Michael Wines, *Spring Rain, Then Foul Algae in Ailing Lake Erie*, NY TIMES, Mar. 15, 2013, *available at* A1, http://www.nytimes.com/2013/03/15/science/earth/algae-blooms-threaten-lake-erie.html?pagewanted=all.
15. It is beyond the scope of this paper to do an exhaustive critique of current capitalism. Rather, this section is intended to begin a conversation that points beyond the problems endemic to the current capitalist system towards another way of structuring society that

produces more enduring life and flourishing without the economic oppression, natural exploitation and perverse incentives of the current system.

16. Peter W. Howitt & Philippe Aghion, The Economics of Growth, 2, (2008) (noting that "economic growth is what mainly determines the material well-being of billions of people"); Robert J. Barro & Xavier I. Sala-i-Martin, Economic Growth, 5-6, (2004) (discussing the importance of economic growth rates for determining long-term standards of living in various countries); Edd S. Noell & Stephen L.S. Smith, Economic Growth: Unleashing the Potential of Human Flourishing (Values and Capitalism), 107-108 (2013) (discussing economic growth as a moral issue because of its impact on human flourishing and arguing that poverty, not economic growth, is the real cause of environmental degradation).
17. For example, see the numerous articles unpacking the state of our economic growth just in the last few months: Nelson D. Schwartz & Binyamin Appelbaum, *U.S. Growth Halted as Federal Spending Fell in 4th Quarter*, N.Y. Times, Jan. 30, 2013, *available at* http://www.nytimes.com/2013/01/31/business/economy/us-economy-unexpectedly-contracted-in-fourth-quarter.html?_r=0; Eduardo Port, *In a Shovel, a Cure for Our Stunted Economic Growth*, N.Y. Times, Feb. 12, 2013, *available at* http://www.nytimes.com/2013/02/13/business/in-a-shovel-a-cure-for-stunted-economic-growth.html?pagewanted=all; Binyamin Appelbaum & Annie Lowrey, *Budget Cuts Seen as Risk to Growth of U.S. Economy*, N.Y. Times, Feb. 20, 2013, *available at* http://www.nytimes.com/2013/02/21/business/budget-cuts-may-stall-economic-growth.html; *Economy Grows Despite Tax Rise and Spending Cuts*, AP, Mar. 28, 2013, *at* http://www.nytimes.com/2013/03/29/business/economy/unexpectedly-jobless-claims-inch-up.html.
18. Howitt & Aghion, *supra* note 16, at 2.
19. Barro & Sala-i-Martin, *supra* note 16.
20 *See* Tim Jackson, Prosperity Without Growth: Economics for a Finite Planet (2009) (discussing various economic theories supporting the necessity of endless growth).
21 Noell & Smith, *supra* note 16, at 107–08.
22. For a more thorough discussions of this tension, *see, generally*, Richard Heinberg, The End of Growth: Adapting to Our New Economic Reality (2011); and Jackson, *supra* note 20.
23. *The Nine Planetary Boundaries*, Stockholm Resilience Centre, *at* http://www.stockholmresilience.org/research/researchnews/tippingtowardstheunknown/thenineplanetaryboundaries.4.1fe8f33123572b59ab80007039.html; *see also* Fred Magdoff & John Bellamy Foster, What Every Environmentalist Needs to Know about Capitalism, 6-8 (2011).
24. *The Nine Planetary Boundaries*, *supra* note 23
25. *Id*.
26. *See, e.g.*, John Bellamy Foster, *Capitalism and Degrowth: An Impossibility Theorem,* 62 Monthly Review (Jan 2011) (discussing the problems of growth in capitalism for the environment); *see, also*, Richard York et al., *Capitalism in Wonderland,* 61 Monthly Review (May 2009) (discussing economists inability to reckon adequately with the reality of environmental problems). It is also important to note that when growth stagnates in the current system it is the poor and marginalized who suffer the most; those people who drive growth are largely insulated from these downturns.
27. *See, e.g.*, Jean-Joseph Goux, Symbolic Economies: After Marx and Freud (1990) (exploring the increasing abstraction of monetary exchange, which reaches its apex in late capitalism).
28. The very fact that this system has not always existed proves this assertion that other ways of organizing human societies are possible. *See, e.g.*, Joseph Henrich et al., *"Economic*

man" in cross-cultural perspective: Behavioral experiments in 15 small-scale societies, *in* 28 BEHAVIORAL & BRAIN SCIENCES 795-855 (2005) (exploring how the model of self-interest, on which modern economic theory is based, fails in all small-scale, indigenous societies studied).

29. Many transactions exist only digitally while other transactions, such as derivatives, are the result of complex mathematical formulas.

30. In June 2013, Taco Bell announced plans to create a new "Power Protein" menu that uses the word "protein" instead of "meat." Vanessa Wong, *At Taco Bell, It's Not 'Meat,' It's 'Protein'*, BUSINESSWEEK, Jun. 24, 2013, *available at* http://www.businessweek.com/articles/2013-06-24/at-taco-bell-protein-is-code-for-meat. People tend to associate the word "protein" with positive terms like "healthy." *Id*. Conversely, people increasingly tend to hold negative views about the word "meat." *Id*.

31 *See, e.g., President Bush Addresses Nation on Economic Crisis*, YOU TUBE, *at* http://www.youtube.com/watch?v=YsDmPEeurfA; *see also*, Edmund L. Andrews, *Greenspan Concedes Error on Regulation,* N.Y. TIMES, Oct. 23, 2008, *available at* http://www.nytimes.com/2008/10/24/business/economy/24panel.html (discussing Alan Greenspan's congressional testimony and his "state of shocked disbelief" that markets failed to protect against this level of systemic risk).

32. There was of course disagreement about the Bailout Plan, with the strongest objectives coming both from the most liberal and the most conservative members, for different reasons. *See* David M. Herszenhorn, *A Curious Coalition Opposed Bailout Bill*, N.Y. TIMES, Oct. 2, 2008, *available at* http://www.nytimes.com/2008/10/03/business/03naysayers.html?ref=bailoutplan. However, what is most significant is that a major piece of legislation, worth over $700 billion, was passed in a matter of weeks. Compared with the decades of inaction on climate change, the pace and definitiveness is striking.

33. *See* David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 3, 2008, *available at* http://www.nytimes.com/2008/10/04/business/economy/04bailout.html?ref=bailoutplan The House voted 263 to 171 in favor of the bailout. The Senate voted 74 to 25. *See also* Carl Hulse, *Pressure Builds on House After Senate Backs Bailout,* N.Y. TIMES, Oct. 1, 2008, *available at* http://www.nytimes.com/2008/10/02/business/02bailout.html?pagewanted=all.

34 This argument is not intended to downplay the human suffering that arises from economic disruptions – particularly among those already most vulnerable in society. However, much of the response to the economic disruption was not targeted at protecting individuals and communities from suffering; rather, the responses were designed to protect the system itself.

35. HANSEN, *supra* note 9. Even if one dismisses his predictions as too extreme, increasingly even more mainstream scientists and politicians are making dire predictions in the face of, for example, the precipitous decline of arctic sea ice, which is predicted to disappear as soon as 2015, rather than the earlier mainstream prediction of 2100. Nafeez Ahmed, *White House Warned on Imminent Arctic Ice Death Spiral*, GUARDIAN BLOG, May 2, 2013, 9:16 am EDT *at* http://www.guardian.co.uk/environment/earth-insight/2013/may/02/white-house-arctic-ice-death-spiral.

36. *See, e.g*., Ezra Markowitz & Azim Shariff, *Climate Change and Moral Judgment, 2* NATURE CLIMATE CHANGE, (April 2012) (arguing, in part, that our inability to respond to climate change arises from its inherent "abstractness and cognitive complexity"). While Markowitz and Shariff are insightful in explaining and attempting to remedy the cognitive dissonance about climate change in the developed world, they fail to recognize that nature—or reality—has become an abstraction only for certain people. For indigenous and poor people all around the world climate change is far from being an abstraction. It is a matter of life or death, food or starvation. *See, e.g*. THE EARTH IS

FASTER NOW: INDIGENOUS OBSERVATIONS OF ARCTIC ENVIRONMENTAL CHANGE (Igor Krupnik & Dyanna Jolly, eds., 2002).

37. MAGDOFF & FOSTER, *supra* note 23, at 37-40.
38. *See id.*
39. Households in the United States carry over 11 trillion in debt, including over 600 billion in credit card debt, almost 1 trillion in student loans, and almost 8 trillion in mortgages. *The Federal Reserve Bank of New York, Household Debt & Student Loan Debt*, *available at* http://www.newyorkfed.org/householdcredit/index.html. The US GDP in 2012 was 15.68 trillion. THE WORLD BANK, *at* http://data.worldbank.org/indicator/NY.GDP.MKTP.CD
40. The first IPCC report found with great certainty that the greenhouse effect did exist and that greenhouse gas emissions, primarily CO2, methane, CFCs, and nitrous oxide, were impacting this natural process and causing increased warming. Intergovernmental Panel on Climate Change, Working Group I, *Scientific Assessment of Climate Change*, at Policymakers Summary (1992), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#.T58Dy7-yfNU. The report acknowledged a great deal of uncertainty surrounding the "timing, magnitude, and regional patterns of climate change." *Id.* The 1995 IPCC report asserted that the science was more persuasive that human activity was causing a substantial part of global warming. Intergovernmental Panel on Climate Change, Working Group I, *The Science of Climate Change*, at Scientific Assessment (1995), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#.T58Dy7-yfNU.
41. Justin Gillis & John M. Broder, *Carbon Dioxide Emissions Hit Record in 2011, Researchers Say*, N.Y. TIMES, Dec. 2, 2012, http://www.nytimes.com/2012/12/03/world/emissions-of-carbon-dioxide-hit-record-in-2011-researchers-say.html.
42. World–GDP- real growth rate, INDEX-MUNDI, *available at* http://www.indexmundi.com/g/g.aspx?c=xx&v=66 and World Bank, Global Emission, *available at* https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=en_atm_co2e_pc&tdim=true&dl=en&hl=en&q=global%20carbon%20emissions.
43. In other words, the United States would only act to save the earth if acting somehow benefited their economy or some other interest. That this might have things backwards perhaps never occurred to them.
44. For example, he has not attended an international meeting since Copenhagen.
45 Bill Vlasic, *US Sets Much Higher Fuel Efficiency Standards*, N.Y. TIMES, Aug. 28, 2012, *available at* http://www.nytimes.com/2012/08/29/business/energy-environment/obama-unveils-tighter-fuel-efficiency-standards.html.
46 Matthew L. Wald, *Court Backs E.P.A. Over Emissions Limits Intended to Reduce Global Warming*, NY TIMES, June 26, 2012, *available at* http://www.nytimes.com/2012/06/27/science/earth/epa-emissions-rules-backed-by-court.html?_r=0.
47 John Broader, *EPA to Delay Emissions Rule at New Power Plants*, N.Y. TIMES, Apr. 12, 2013.
48 Aside from the significant water pollution and water use problems from the drilling process, the drilling waste water posses significant threats to the environment for decades to come. Perhaps most frustrating, however, is the reality that drilling for natural gas releases methane into the atmosphere. Methane is a greenhouse gas that is significantly more potent than carbon dioxide. This reality is almost always ignored in calculations asserting how natural gas will reduce greenhouse gas emissions. *See* Mason Inman, *Natural Gas a Weak Weapon Against Climate Change, New Study Asserts*, NAT'L GEOGRAPHIC NEWS, Mar. 14, 2012, *at* http://news.nationalgeographic.com/news/energy/2012/03/120314-natural-gas-global-warming-study/.

49 *See* Bill McKibben, *Global Warming's Terrifying New Math,* ROLLING STONE, Jul. 19, 2012.

50. *See, e.g.*, HANSEN, *supra* note 9.

51. *See, e.g.*, Susan Lund, et al., *Game changes: Five opportunities for US growth and renwal*, MCKINSEY GLOBAL INSTITUTE, June 2013, *at* http://www.mckinsey.com/insights/americas/us_game_changers (discussing factors that could lead to renewed and sustained growth in the United States, none of which are addressing climate change or developing renewable energy and many of which directly relate to increasing climate change, such as the natural gas boom and an increase in plastic production).

52. *See* McKibben, *supra* note 49 and HANSEN, *supra* note 9.

53. Shauna Theel, *Myths and Facts About Solar Energy*, MEDIA MATTERS, Jan. 24, 2013, 10:13 AM, *at* http://mediamatters.org/research/2013/01/24/myths-and-facts-about-solar-energy/192364 (discussing the often-over stated impact of solar panel production).

54. York, *supra* note 26. *But see,* JACKSON, *supra* note 20.

55. *Id.; but see*, NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE, THE STERN REVIEW (2007) (putting forth an economic argument for bold climate action by, in part, greatly reducing the discount factor for future generations and arguing for the importance of non-quantifiable goods).

56. *See* Peter North, *Fossil fuel limits: Hidden Dependencies,* PACIFIC ECOLOGIST, (Spring 2004).

57. Wines, *supra* note 14.

58. One excellent way to see this tension is to reflect upon how the law treats pesticides. It is entirely legal to spray a field with a toxic chemical, notwithstanding the fact that this chemical will likely run-off into nearby water bodies, because this chemical has been determined to be economically useful. However, that same chemical will become a pollutant when, for example, a pesticide applicator washes out the pesticide container and that waste water flows into the same nearby water body. What distinguishes the two examples is not the harm caused by the pesticide but rather the economic necessity of the act.

59. 15 USC §§ 2601 to 2697.

60. The main TSCA standard, "unreasonable risk of injury to health or the environment," is not defined in the statute. However, in the statement of policy the law states that "authority over chemical substances and mixtures should be exercised in such a manner as not to impeded unduly or create unnecessary economic barriers to technological innovation while . . . [assuring that such chemicals] do not present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2601(b)(3). Congressional intent is stated as: "It is the intent of Congress that the Administrator shall carry out this Act in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this Act." 15 U.S.C 2601(c).

    Of course all environmental statutes embody this balancing to some degree and increasingly are administered in ways that require this balancing take place. However, the balancing language in other statutes is more subtle, usually explicitly privileging environmental or public health ends. For example, the Clean Air Act defines "best available control technology" as "an emission limitation based on the maximum degree of reduction of each pollutant . . . taking into account energy, environmental, and economic impacts and other costs." Clean Air Act § 169, 42 U.S.C. § 7479(3) (2006). To be sure, this definition includes economic considerations; however, its foundational concern is to control emissions.

61. *See infra* Section III.

62. Of the 80,000 synthetic chemicals currently in commerce, EPA has screened only 200 and banned the use of only five.Jeremy P. Jacobs, *For Senator Lautenberg, Crusade*

to Reform Chemical Regulations is Personal, N.Y. Times, Jun. 27, 2011, *available at* http://www.nytimes.com/gwire/2011/06/27/27greenwire-for-sen-lautenberg-crusade-to-reform-chemical-99680.html?pagewanted=all (noting that of the 80,000 synthetic chemicals currently in commerce, EPA has screened only 200 and banned the use of only five).

63. *See, e.g.*, Frank Ackerman, Poisoned for Pennies: The Economics of Toxics and Precaution (2008); *see also*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Health, Safety, and Environmental Protection*, Progressive Reform, *at* http://www.progressivereform.org/perspCostbenefit.cfm (critiquing C-B analysis but allowing that it may be useful for determining means to achieve pre-determined ends).
64. *See, e.g.*, Entergy v. Riverkeeper, 556 U.S. __, 129, S. Ct. 1498 (2009).
65. *See* Center for Progressive Reform, Cost-Benefit Analysis Page, *at* http://www.progressivereform.org/costBenefit.cfm, for a thorough history of Executive Branch use of cost-benefit analysis as well as arguments against its use.
66. *Id.*
67. In other words, one could define what is possible in terms of what state of the environment makes healthy human life possible. Anything that disrupts healthy human life could be deemed not possible.
68. Robert Glicksman, *The Advantages of Technology-Based Standards in Protecting Health, Safety, and the Environment* (Sep. 2009), *at* http://www.progressivereform.org/perspStatutory.cfm
69. 42 U.S.C. 7479 (3) (2011) (emphasis added).
70. "Unlike ambient quality-based or risk-based approaches to regulation that establish standards designed to produce 'acceptable' levels of pollution, technology-based regulation is not oblivious to cost." Glickman, *supra* note 68.
71. "Ideally, regulation would eliminate all risk, but it is often impractical or impossible to eliminate all risks produced by industrial and developmental activity. Even when it is technically possible, it may be undesirable to eliminate all risk because to do so would require the banning of useful substances or the elimination of activities that provide significant benefits to society. Policymakers therefore must strike a balance between the desire to reduce risks and the desire to sustain economically and socially productive activity." *Id.*
72. David Driesen, *A Useful Alternative to Cost-Benefit Analysis* (Sep. 2009) *at* http://www.progressivereform.org/perspFeasibility.cfm.
73. "The feasibility principle conforms more closely to ethical values than a cost-benefit approach. Firms have a responsibility to avoid seriously harming people, just like individuals do. While the feasibility principle does not require that all pollution associated with potentially serious harm cease, it does demand that firms engage in all feasible efforts to reduce pollution. It is demanding without being absolutist. It only allows pollution to the extent necessary to guard against very serious concentrated economic harms, such as the shutdown of an industry or a large number of plants." *Id.*
74. Jacob S. Hacker and Paul Pierson, Winner Take All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class (2011).
75. Craig Collins, Toxic Loopholes: Failures and Future Prospects for Environmental Law (2010).
76. *Id*. at 239–40.
77. *See id.* at 233–40.
78. *See, e.g.*, Schoenbrod, et al., *supra* note 13.

79. This argument always seems easily dismissed insofar as that is more or less what the United States had until the 1970s. Moreover, in numerous important areas like pesticides, fertilizer, and toxic chemicals generally, that is more or less what the United States has today.
80. SCHOENBROD, *supra* note 13.
81. *Id.*
82. *But see* MAGDOFF & FOSTER, *supra* note 23, at 32 (discussing how capitalism co-opts companies that begin with non-capitalist values in order for these companies to continue to grow or compete).
83. For an interesting similar discussion, *see* Andrew C. Revkin, *Scientists Propose a New Architecture for Sustainable Development*, N.Y. TIMES (blog), Mar. 21, 2013, 9:27 am, *at* http://dotearth.blogs.nytimes.com/2013/03/21/scientists-propose-a-new-architecture-for-sustainable-development/ ("[S]ustainable development should be seen as an economy serving society within Earth's life support system, not as three pillars").
84. This is my attempt to frame this in a way that does not fall into the trap of assuming that life does not always entail death. That is, sustainability does not imply there will be no destruction on the earth, only that destruction will be of the sort that occurs in nature—it engenders new life (like decaying leaves in the forest).
85. This would be in contrast to the current system where death – i.e. lack of growth – almost always results in the increased suffering of the poor and marginalized.
86. *See*, for example, the work of the Sustainable Economies Law Center, *at* http://www.theselc.org/; Transition Los Angeles, *at* http://transitionla.org/aboutTLA.htm; and the Community Environmental Legal Defense Fund, *at* http://www.celdf.org/, all of which are re-thinking in different ways what it means to structure an economy that is sustainable and how the law may help support, rather than hinder such an economy.
87. *See, e.g.*, Victor B. Flatt, *This Land is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 204 (arguing that we must change our understanding of our current environmental laws, recognizing the environmental rights framework that pervades the laws, if we are to properly implement these laws).
88. 42 U.S.C. 4321.

Alan Clarke & Laurelyn Whitt

STATE EXECUTION: A MORALLY INDEFENSIBLE PROPOSITION[1]

Does it matter that the death penalty fails to deter more than long-term imprisonment? That it reflects and perpetrates deeply embedded racial and class discrimination? That it costs significantly more than life imprisonment? That it is ineffective in incapacitating would-be murderers? Empirical evidence reminds us that all of this is true, but does empirical evidence matter? Not to some defenders of state execution. For the hardcore, thoroughgoing retributivist, these empirical facts are immaterial. It does not matter that the consequences flowing from capital punishment are appalling. Cost versus benefit reasoning remains entirely irrelevant. The execution of those responsible for the worst homicides is morally justifiable precisely because they deserve it. The state, in exacting the ultimate penalty, is righting the scales of justice on this view, restoring balance to the social contract. What matters is that these murderers get what they deserve. What is the price of justice, retributivists ask?

Yet this position rests on an empirical assumption—that the justice system efficiently winnows the innocent from the guilty. For the retributivist believes that those guilty of such crimes, and only those, are deserving of death. If the practice of state execution is in fact resulting in the killing of innocent people, then the retributivist cannot support such an irremediable punishment. Empirical evidence of wrongful executions must change the hard-core retributivist's moral reasoning. The innocence argument is unique in that it alone completely undermines hard-core retributivism. The most ardent defender of "an eye for an eye " must seek the right eye. Otherwise, whatever it else might be, it cannot be "just deserts." Getting it right matters.

Executing the innocent

On January 23, 2012, Joe D'Ambrosio became the 140th death-sentenced person since the modern re-imposition of U.S. capital punishment in 1976 to be exonerated. D'Ambrosio spent 24 years with the threat of execution, much of that time on death row. One fails to comprehend his suffering. The only thing worse is that we could well have executed him, thereby snuffing out an innocent and unique life.

On average, we discover one wrongful conviction for every nine persons executed in the United States. Moreover, the rate at which we discover wrong-

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ful capital convictions continues to accelerate. This stands as a stunning indicator of a broken system. It shows, as criminologist and death penalty expert Michael Radelet argues, that when the state executes, it "makes godlike decisions without godlike skills."

However, these 140 people were belatedly exonerated and freed, notwithstanding wretched lives lived on death row. How many of the 1,279 persons executed since Gary Gilmore died at the hands of a firing squad in 1977 were innocent? How many of those wrongfully convicted have been killed by the state? Unfortunately, the exact number remains unknowable. Once a person has been executed interest in the case subsides, lawyers and journalists move on. Courts do not entertain hypothetical cases—looking into the case of a person already dead seems to serve little purpose. Thus, finding cases where the criminal justice system actually carried out an execution on a wholly innocent person depends predominately upon a thin band of volunteers whose findings remain unofficial. Nonetheless, cases of wrongful executions continue to surface.

Scholars and death penalty investigators have reinvestigated and found at least nine cases (by some counts more) where the person executed was likely innocent.[2] One case—that of Cameron Todd Willingham—demonstrates just how powerful this evidence is. Willingham was convicted of arson resulting in deaths and was executed by the State of Texas. Expert testimony at trial linked the fire to arson. This forensic evidence was almost certainly wrong, based on outdated and flawed theories. Indeed, the evidence that the forensic expert used a misguided theory was so strong that it led to the exoneration of another death row inmate. Texas, which has executed more often than any other state, does not willy-nilly free murderers from death row. This forensic expert strayed far wide of the mark. It was not arson. It was not murder. Texas likely executed an innocent man.

How likely is it that a system that has belatedly and reluctantly found 140 cases of wrongful capital convictions can timely find all erroneous convictions? Note that it is not the criminal justice system that finds these errors. Judges and prosecutors (particularly where they are elected) do not wish to discover their own errors. Indeed, most fight hard to retain their convictions even in the face of overwhelming evidence of error. As former prosecutor (now law professor) Bennett Gershman puts it, "They worked hard to get a guilty verdict. They've got a victim who has been traumatized by the defendant's crime. I don't think a prosecutor is going to say, 'Hey, this guy might be innocent, and I'm going to go out of my way to prove it.'"[3] U.S. prosecutors who admit too many serious errors do not get re-elected, and they certainly do not move on to higher office. The same goes for judges. Both have powerful incentives to reject allegations of error. Police are not elected, but promotions do not readily come to those who make serious errors. They too have no reason to re-investigate old cases.

Moreover, sometimes police lie. The police deliberately framed Walter McMillian (a black man in Alabama dating a white woman). They put him on death row notwithstanding his innocence. It would never have come to light but for a brilliant volunteer lawyer who uncovered and exposed it. What we know, then, is that the U.S. executes the innocent.

The moral potency of the innocence argument

Two questions are presented at this juncture. (1) Are people's attitudes affected by the knowledge that innocent people are being executed? (2) What are the moral implications of executing the innocent?

In 1829, Windsor, Ontario executed an innocent man. Citizens across the Detroit River in Michigan responded with outrage. Partly as a result of this, Michigan became, in 1846, the first English-speaking jurisdiction to abolish the death penalty. Intuitively, it seems obvious that executing the innocent would negatively affect attitudes on capital punishment. However, it was only in the twentieth century that social scientists began to systematically investigate people's attitudes about the ultimate sanction.

As a result of well-constructed social science experiments and analysis of poll data, we have learned that factual knowledge about the death penalty's lack of deterrence when compared with imprisonment, its costs, and its racist application does affect attitudes. It is likely that the reduction in support for the death penalty over the last few decades is in part a result of increasing awareness of these flaws in capital punishment.

However, this sort of evidence is unlikely to affect the committed retributivist, and the modern retentionist is increasingly retributivist and increasingly relies upon retributivism to support capital punishment. Does the innocence issue have a different salience here? Does execution of the innocent affect even the most committed retentionist—that person who regards the ultimate penalty as just deserts for the most heinous of crimes? Social scientists answer that innocence not only reduces support for capital punishment generally, but it also moves the most strongly committed retentionist. This is precisely what moral philosophy suggests ought to happen.

Implications of innocence for utilitarianism and retributivism

At its simplest, the principle of utility enjoins us to act in such a way as to maximize utility, i.e., to bring about the greatest happiness on balance. While this notion is seductive (who can argue with making the most people happy?) it suffers from a major defect. Utilitarians can, as an open moral possibility, justify scapegoating an innocent person for the greater good. Lynching in the South was sometimes justified on precisely that reasoning. Yet something feels awry in this. Sacrificing an innocent person offends most shared moral intuitions. Fortunately, we need not tarry on this problem. Whether one is an act or rule utilitarian, in this instance the calculation against the death penalty

is easy: no deterrence, excessive costs, racist administration and it executes the innocent. Once the facts are understood, any utilitarian calculation will be quick and confident: executions ought not proceed.

The rise of retributivist theories of punishment is partly due to the perceived vulnerability of utilitarian theories on matters of innocence, and partly to the conviction that "whatever else justice may be, it does not involve sacrificing some innocents for the sake of others."[4] Retributivism avoids this problem by forbidding the sacrifice of innocent lives no matter the cost. The finality of death coupled with compelling evidence that we execute innocent people thus raises significant problems for retributivism. No system of justice can avoid wrongful convictions entirely, but execution puts the injustice beyond repair. An innocent person's death at the hands of the state is irremediable. As Richard Lempert has pointed out, "If the retributivist's principles do not allow the intentional taking of the innocent life as a means to greater justice . . . they will not justify a system that makes such things inevitable. Those who think that modern retributivist philosophies allow this confuse the comforts of ignorance with justification in principle. Statistical thinking is not only thoughtful, it is, in its own way, precise."[5] Retributivism then can withstand and justify wrongful convictions by agreeing to remedy errors upon discovery; wrongful executions prove to be a knottier problem.

It is overly facile, however, to halt the debate with the irreversibility and inevitability of wrongful convictions. Retributivists have responses, the most potent of which revolves around the doctrine of double effect. This theory postulates that while moral norms bind us they do so only with respect to those consequences that we intend. The evil of executing the innocent may be foreseeable, but it is not the intended consequence of any rational system of justice. Simply put, when the state executes, it does not intend to kill innocent people and the fact that it does so is, therefore, morally unproblematic. Drawing on the work of Alison McIntyre we consider three responses to this argument.[6]

First, the doctrine of double effect is particularly suspect. As Nicholas Barlow argues, the principle "becomes an empty doctrine since one can justify any action at all, given enough time to work out an excuse."[7] By inviting us to wholly ignore foreseeable consequences of our actions the doctrine invites hypocrisy and a willful moral blindness to our actions. One example revolves around the reasoning of the so-called torture lawyers of the U.S. Justice Department who appeared to argue that the deliberate infliction of extreme pain (recall waterboarding) would not constitute torture if the ultimate intent were to gain information. One can always redefine one's intent away from an action's evil but inevitable effect. Thus, the doctrine is illicit in the conclusions it invites.

Second, as McIntyre also points out, one of the standard constraints on appeals to double effect is that the harmful effect is not permissible if the good effect can be obtained without the bad. Here we have a perfectly rational

alternative punishment—life imprisonment. Who can argue that life imprisonment is not a just punishment for murderers when in fact this is precisely the punishment meted out to most murderers? Out of approximately 15,000 or so homicides each year the U.S. executes fewer than 100 people. Even conceding that some murders are more heinous than others, what makes the execution of a few more just than the imprisonment of thousands? For every person executed there are others who remain safely and justly in prison despite crimes equally, if not more, vile.

Finally, no one would deny that a society that killed a few innocent scapegoats, whose names we know in advance of their execution, was fundamentally unjust. The only difference between our society and that plainly unjust society is that we do not usually know the names of those who are innocent yet nonetheless executed. By the time we learn their names it is too late. Should a life or death moral decision turn exclusively upon knowing the names of those who are innocent yet killed?

The now nearly trite phrase "death is different" captures the pivotal role that matters of innocence play in this debate and underscores just how much innocence matters. Death is different because it does not permit us to revoke unjustly inflicted punishment, because it rules out all possibility of offering the unjustly punished proper restitution and all opportunity of making admittedly imperfect amends. Death's irrevocability makes the problem of innocence more compelling than if the same innocent person were confined in prison. Thus, while all of the death penalty's flaws (lack of deterrence, racism, high cost, failure to effectively incapacitate) remain important, execution of the innocent has added significance in that it undercuts the remaining argument in favor of the death penalty—the notion of just deserts.

NOTES

1 The arguments and evidence outlined briefly in this essay are set out more fully and carefully in *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty*, by Alan W. Clarke and Laurelyn Whitt, (Northeastern University Press, 2007).

2 *Executed But Possibly Innocent,* Death Penalty Information Center, http://www.deathpenaltyinfo.org/executed-possibly-innocent (last visited January 31, 2012).

3 *DNA can exonerate convicts, implicate system: Resistance: Some Judges are reluctant to allow testing, but evidence often upholds convictions,* Telegraph-Herald (Dubuque, Iowa) *,* Oct. 8, 2000, *at* A6.

4 George Schedler, *Can Retributivists Support Legal Punishment?* 63 Monist 51, 61 (1980):

5 Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of Punishment,* 79 Mich. Law Rev 1177, 1227 (1981).

6 Alison McIntyre, *Doing Away with Double Effect*, 3 Ethics, (2001) at 219-355.

7 Nicolas Barlow, *Military Necessity and the Doctrine of the Double Effect,* 3 Forskarseminarium I filosofi, (Abo Akademi, Finland) (2008).

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David Gespass

BOOK REVIEW: *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS*

Michael Avery & Danielle McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from Liberals,* Vanderbilt University Press, 2013, 304 pp.

When I was in law school, those of us on the left were worried about the Supreme Court when Richard Nixon appointed Warren Burger and Harry Blackmun. Over the years, Blackmun's opinions reflected changes in his constitutional vision as he took positions that increasingly favored individual rights and liberties, most famously deciding never again to "tinker with the machinery of death"[1] and holding in *Roe v. Wade* that a woman has a constitutional right to abort a pregnancy before a fetus becomes viable. Back then, the concept of "state's rights" was seen almost universally as the discredited vision of the southern bourbon slaveholders. The idea that private property was so sacrosanct that any governmental interference with its use—however slight and however justified by the public interest—is unconstitutional was so outré that no rational lawyer or judge would entertain it. President Nixon had, without opposition, instituted affirmative action in government hiring.

Today, less than fifty years later those discredited and outré constitutional concepts reign on the Supreme Court and, to a greater or lesser extent, throughout the federal judiciary and appear entrenched for the foreseeable future. The practical effect of this sea change in jurisprudence has been to secure and amplify the disparities in our society. It is no coincidence that the gap between the wealthiest one percent of Americans and the rest of us is the greatest in history. Its growth corresponds to the rise to dominance of the ideology of the Federalist Society.

During that same period, critical legal theory and its descendants, such as critical race theory and critical gender theory, also arose and developed. These approaches hold that the law and jurisprudence are not neutral and equal, but reflect existing power relationships in society. While critical studies have gained some currency in the academy, they have not taken root in popular culture or in the judiciary, where the Federalists dominate. No doubt, one reason for this difference is that the elected officials who participate in the appointment

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of judges and the political parties that nominate judicial candidates in the states where judges are elected are not about to embrace theories that, when applied, call for a system of jurisprudence that does not favor transnational corporations, big financial firms and their super-rich owners which, after all, pay for their election.

But that is not the only reason. Popular movements in the latter half of the twentieth century overcame entrenched power to make significant gains. Jim Crow was abolished and the Voting Rights Act opened the door to African-American elected officials throughout the country but, primarily, in the old Confederacy. The women's rights movement made enormous strides. A president was toppled for his tenacious pursuit of American imperial ambition in Vietnam and the United States lost that war. And while it is clear that many of those gains cannot be completely rolled back, it is equally clear that monopoly capital in the United States has dug its roots deeper and spread its tentacles farther, utilizing a combination of concessions, propaganda and repression.

The Federalist Society has been an integral part of the monopolists' consolidation of their power. For too long, the left has bemoaned its prominence without analyzing how that prominence was achieved. Nor has it yet significantly engaged the Federalists intellectually or theoretically. In short, the left—whether broadly or narrowly defined—has been losing the battle of ideas. Without a clear understanding of Federalist ideology, it will continue to do so.

Parenthetically, one of the problems may have been that it was liberals, not radicals, who did have control of the law for a few decades. Liberals are not the firmest allies of the poor and disenfranchised.

Enter Michael Avery and Danielle McLaughlin who have taken a noble and substantial step in changing that dynamic with the publication of *The Federalist Society: How Conservatives Took the Law Back from Liberals*.While the book seeks a popular audience, the concepts it addresses are not simple ones, even for lawyers. I confess that I was better able to follow the authors' exposition in the areas in which I have some experience than in the others and admire the breadth of their understanding and scholarship. In some ways, that is both a good thing and an important lesson. The Federalist Society's rise to power and influence reflects, perhaps more than anything, the remarkable manner in which it has taken complex jurisprudential concepts, developed persuasive arguments to justify legal theories once scoffed at and distilled those arguments into simple and popular themes. The Society has no doubt been aided by support from a variety of wealthy, reactionary sources, including the Olin Foundation, the Bradley Foundation, the Smith Richardson Foundation and, more recently, the Sarah Scaife, Carthage, Koch, Earhart, and Castle Rock Foundations. But it would be a mistake, and an underestimation of its intellectual power, to attribute its influence exclusively, or even primarily, to its

funding sources. Its funding certainly amplifies its reach, but those sources recognize, as do the authors, the intellect of its theorists. While it is sad, but hardly surprising that they have chosen to place their skills in the service of the richest sector of American society, it is not enough just to condemn their loyalty to wealth. It is incumbent upon those of us who choose the other side in the class war to match—indeed, exceed—their intellectual firepower.

In order to do so, we must first understand the lynchpins of the Federalist Society's ideology and it is here where the authors provide their greatest service. They elucidate the key elements of Federalist thought, which has united various strains of reactionary ideology, including those that are doing battle within the Republican Party today, libertarians, the religious right and more "traditional" pro-business Republicans. The Society has carefully chosen the issues it wishes to advance, avoiding those that would alienate one or another group, while embracing those that promote the right the Society cherishes above all others, the right of the rich to exploit the rest of us in order to expand their wealth regardless of the environmental and social consequences.

Thus, the Society argues that any limitation imposed by a governmental body on the use of one's private property or regulation which may incidentally reduce its value, no matter how damaging such use may be to the commonweal or how valuable the regulation is to society, is a "taking" that requires compensation. The authors make the critical point that the Supreme Court has long scrutinized violations of individual and civil rights with more suspicion than violations of economic rights. They say the "distinction between weak protection for economic rights and vigorous protection for other individual rights, is at the heart of conservatives' complaints about Supreme Court jurisprudence from 1937 to the present." The Federalist Society has been the leading force that has stalled, if not reversed, that jurisprudence.

It has embraced "color blindness" as the touchstone of anti-discrimination laws, insisting that no consideration ever be given to race or gender. That ideology inevitably maintains the effects of centuries of discrimination under the banner of fighting discrimination. As Chief Justice Roberts infamously said in *Parents Involved in Community Schools v. Seattle School District No. 1*, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This simplistic, but attractive, formulation ignores history and its present-day effects, while justifying the belief of so many white males that they have become an oppressed minority. And, of course, it drives a wedge between struggling whites and people of color while, to quote Phil Ochs, "the automation bosses are laughing on the side."

With their discussion of international law and personal sexual autonomy, the authors recount the Society leadership's careful and calculated approach, not just to standing in the way of progress, but to undoing many of the most

important, if incomplete, gains that the New Deal began. Those advances have been far from steady. They have entailed ebbs and flows, survived McCarthyism and have seen and beaten back many frontal assaults over the years. The victories have not been won cheaply, with martyrs from the Rosenbergs to Malcolm and Martin to Fred Hampton and Mark Clark to Chelsea Manning and Lynne Stewart, not to mention the uncounted others—in the United States and around the world—who were killed, beaten and jailed for resisting the domination of America's rulers.

The Federalist Society is the subtle and sophisticated, kinder and gentler, instrument of oppression. It does not try to change things at one fell swoop, shocking people into resistance. Rather, it restricts rights and liberties incrementally, cutting one thin slice of salami at a time, until nothing is left. Thus, it promotes and defends "small" regulations on abortion rights such as waiting periods, parental notification, outlawing particular procedures, that inevitably and inexorably lead to making the procedure only available to the wealthy and well-connected. Not coincidentally, that is the pre-*Roe status quo ante.*

Finally, its approach to international law seeks to deny the advances that have been made since World War II, including the United Nations, the international human rights conventions and the jurisprudence of the International Court of Justice. It trumpets American values and law above, and exclusive of, all others. It demands sovereignty over cooperation and might over right. It creates a far more dangerous world, giving others leave to follow the American example of ignoring treaties they find inconvenient. It has led to the longest war in our history in Afghanistan and, arguably, the most disastrous in Iraq. It cloaks chauvinism with patriotic platitudes and, needless to say, enriches the few while sacrificing the poor.

Sun Tzu said: "If you know others and know yourself, you will not be imperiled in a hundred battles; if you do not know others but know yourself, you win one and lose one; if you do not know others and do not know yourself, you will be imperiled in every single battle." For too long, we on the left have simply mocked the Federalist Society's views without really knowing them, much less confronting them (perhaps because we do not really know ourselves either). Far more needs to be understood about the Federalist Society than Avery and McLaughlin were able to reveal in their thin volume, but they have made a meaningful and laudable start. One can only hope that others take up the gauntlet and build on their work.

NOTES

1. Callins v. Collins, 510 U.S. 1141, 1145.

racism doesn't teach that racism has merit and it doesn't deny that racism has been harmful in the past. It seeks to convince us that the problem no longer exists.

"Enfranchising Native Americans" argues that the VRA is needed to help enfranchise Indians, who remain subject to the same types of crude, overt forms of voter suppression that the civil rights movement of the 1950s and 1960s worked so hard to end in the south. Dreveskracht explains that the plight of would-be voters in Indian Country merits coverage under 4(b) even under the terms of the Court's opinion in *Shelby County*. Moreover, the legal doctrines defining the relationship between Indian tribes and the federal government, such as the "Trust Relationship" and the "Plenary Power Doctrine," give Congress heightened power to regulate in Indian Country. Congress has the constitutional authority and moral duty to step in and protect the voting rights of native peoples.

Catherine Phillips's "It's the Economy Stupid: Capitalism, Environmental Law, and the Need for Sustainable Economies" argues that effective solutions to the global environmental crises we face cannot be squared with the essential principles and attributes of American-style capitalism. The preservation of our planet inescapably requires diminishing something to which many in power assign a higher priority—their own bottom lines. Such misguided priorities are why so many American politicians, media and academic hacks speak of free market principles as if they were Platonic Forms, while treating the scientific consensus around global warming with skepticism and suspicion. When an economic system is incompatible with the laws of science and the conditions for sustainable living, Phillips explains, it is the former that must bend, because, flout them as we might, the latter remain unbendable.

In no area of the law have technological advances been so dramatic, or so revolutionary in their exposure of widespread injustice and inequality, as DNA exonerations of the wrongfully convicted. In "State Execution: A Morally Indefensible Proposition," Alan Clarke and Laurelyn Whitt examine how the extraordinary number of recently exonerated death row inmates further discredits the arguments in favor what we might now call America's new peculiar institution—the death penalty. With every "dead man walking" out of prison, the shrinking number who advocate for this morbid sanction stand on increasingly shaky philosophical ground.

If there were an essential reading list for Guild members, it would include *The Federalist Society: How Conservatives Took the Law Back from Liberals* by Michael Avery and Danielle McLaughlin. This issue closes with David Gespass's review of the book, which chronicles the ascendency of a right-wing activist legal organization founded on principles largely antagonistic to those of the Guild. The undoing of our hard-fought victories—for civil rights, gender equality, privacy, the rights of the accused, among others—was the conscious objective of this group from its conception. The Federalist Society has been winning in courtrooms around the country, including the U.S. Supreme Court—often because its members are sitting on the bench. Understanding how this group found its way to power is the first step toward reclaiming it from them.

—Nathan Goetting, *Editor in chief*

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