A JURY OF YOUR [TRIBAL] PEERS: HOW SUPPRESSION OF VOTING RIGHTS IN INDIAN COUNTRY LEADS TO THE SYSTEMATIC EXCLUSION OF NATIVE AMERICANS FROM THE JURY SELECTION PROCESS.

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I. INTRODUCTION

> [P]roviding [the] accused with the *right* to be tried by a *jury of his peers* [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.
> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (emphasis added).

The federal government has jurisdiction to prosecute felonies that occur on tribal sovereign land—often referred to as Indian Country—under the Major Crimes Act.[1] Many federal courts in districts with large Native American populations exclusively use state voter registries as the means to draw potential jurors.[2] The problem with using state voter registration as the exclusive means of selecting a jury pool is that voter suppression effects many Native American communities across the United States.[3] Consequently, Native American jury participation is diluted, and defendants who are prosecuted in federal court are suffering a Constitutional violation of their Sixth Amendment right to a jury of their peers.

This article seeks to demonstrate how Native Americans are systematically excluded from jury selection in federal court, and what can be done to fix this problem.

Part II of this article outlines the historical foundations of criminal justice in Indian country, with an emphasis on the Major Crimes Act, and how the federal government has jurisdiction to prosecute certain crimes on Indian country.[4] Part III outlines the Sixth Amendment's right to a jury trial, and how this right has been interpreted to require a jury of your "peers." This section explores how the Supreme Court has selectively incorporated the Sixth Amendment to the states, and how

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[1]. 18 U.S.C. § 1153 (2013).

[2]. *See* D.N.M., ORDER ADOPTING MODIFIED JURY PLAN, 15-MC-04-42, 1 (2015) https://www.nmd.uscourts.gov/sites/nmd/files/JurySelectionPlanFinal120408.pdf; D. ALASKA, JURY PLAN, 8 (2019) https://www.akd.uscourts.gov/sites/akd/files/Alaska_Jury_Plan_2019_Revised_Final.pdf; D.N.D., PLAN FOR RANDOM JURY SELECTION, 1-2 (2017) https://www.ndd.uscourts.gov/jury/jury_plan.pdf.

[3]. Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CENTER FOR JUSTICE, (Mar. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights.

[4]. Indian Country will be the term that this article uses to refer to Tribal lands and Indian Reservations.

the Due Process Clause of the Fifth Amendment reversely incorporates this right against the federal government. This section concludes with a sub-section on how juries are picked in federal districts that contain large tribal reservations and Native American populations.

Part III also illustrates, through statistics and the recent North Dakota case, *Brakebill v. Jaeger*, how Native Americans' right to vote is being suppressed in some states. Part IV makes a case for an as-applied" challenge against 28 U.S.C.A. § 1863(a), which mandates that juries be selected in accordance with a plan for random jury selection, because Native American representation on jury venires is being diluted.

The article concludes with suggestions on what can be done to right the injustice that Native Americans are suffering every day in federal courthouses. The goal is to highlight one of the greatest civil rights violations in the twenty-first century, an injustice that most people, even within the legal field, are unaware of, and to suggest creative solutions to stop this invidious discrimination.

II. FEDERAL JURISDICTION OVER CERTAIN CRIMES COMMITTED IN INDIAN COUNTRY.

Indian tribes[5] are considered to be separate sovereigns that preexist the Constitution[6] and as such, enjoy the ability to govern themselves to some degree.[7] Native Americans enjoy "special status long recognized for other once-sovereign indigenous peoples,"[8] and that special status entitles them to a form of limited self-government. As sovereign political bodies, tribes possess inherent power to determine their own "makeup and membership and to enact and enforce laws within their own boundaries of jurisdiction."[9] Indian tribes have "retained the right to try and punish individuals who transgress their

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[5]. *See* Indian Civil Rights Act, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 77 (1968) [hereinafter ICRA] (codified as amended at 25 U.S.C. §§ 1301-1303 (2006)) ("Indian Tribe" is the term ICRA uses to define "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government").

[6]. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

[7]. *See* ICRA, *supra* note 5 at § 1301 (Defining tribes "powers of self-government" as including all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians).

[8]. Rice v. Cayetano, 528 U.S. 495, 548 (2000) (Ginsburg, J. dissenting).

[9]. Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 332 (2013) (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)).

laws."[10] The right originates not from the federal government, but from the tribes' inherent sovereignty.[11]

Congress began to try and shape federal Indian law and policy in the late nineteenth century. In *Ex parte Kan-gi-Shun-ca*, better known as "Crow Dog's case," the United States Supreme Court refused to exercise federal criminal jurisdiction over crimes that occurred in Indian Country between two Native Americans.[12] Prior to *Crow Dog*, the federal government's authority to prosecute in Indian Country was limited to that which derived from the specific terms of applicable treaties, or to cases permitted under the Trade and Intercourse Acts.[13] The General Crimes Act, contained within the Trade and Intercourse Act of 1834, expressly granted federal jurisdiction over "interracial crimes (crimes involving Indian and non-Indian victims or perpetrators) committed in Indian Country."[14] In *Crow Dog*, Kan-gi-Shun-ca (Crow Dog) killed Chief Spotted Tail on an Indian reservation in the Dakota Territory.[15] Both Crow Dog and Chief Spotted Tail were members of the Brulé Sioux tribe and the tribe resolved the matter internally according to tribal custom.[16] The tribal council ordered Crow Dog to pay restitution to the victim's family.[17] Non-Indians were outraged with the tribes use of wergild[18] as a punishment for murder, and at Crow Dog's avoidance of incarceration.[19]

Subsequently, Crow Dog was charged and convicted for the murder of Chief Spotted Tail in federal court and given the death penalty.[20]

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[10]. United States v. Bird, 287 F.3d 709, n.5 (8th Cir. 2002) (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).

[11]. Creel, *supra* note 9 at 332.

[12]. 109 U.S. 556 (1883).

[13]. *See id*. at 571-72.

[14]. Creel, *supra* note 9 at 334 (citing 18 U.S.C. § 1152 (2006)).

[15]. *See* Ex parte Kan-gi-Shun-ca, 109 U.S. 556, 557 (1883).

[16]. *See* Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281, 686-87 (2016) (citing Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 336 n.118 (2013) ("Under the Brule tradition, the tribal council met to resolve the murder, ordered an end to the disturbance, and arranged a peaceful reconciliation of the families involved through offered or accepted gifts. For the murder, Kan-gi-shun-ca's family was ordered under tribal law to compensate Spotted Tail's family for the loss by offering $600 in cash, eight horses, and one blanket").

[17]. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 758-59 (Nell Jessup Newton et al. eds., 2005).

[18]. *Wergild*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The fixed value of a person's life, being the amount that a homicide's kindred must pay to the kindred of the slain person so as to avoid a blood feud").

[19]. *See* Ex parte Kan-gi-Shun-ca, 109 U.S. at 557.

[20]. *Id*.

Crow Dog appealed his case to the United States Supreme Court, which held that the offense was not a crime under the laws of the United States.[21] According to the Court, to apply such laws to cases in which Indians committed crimes against other Indians, would require Congress to give a "clear expression" of its intent to have these laws apply.[22] In response to *Crow Dog's* case, Congress enacted The Major Crimes Act (MCA), which originally covered seven felony-level offenses: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.[23]

A. The Major Crimes Act.

The Major Crimes Act[24] enables the exercise of federal criminal jurisdiction over certain crimes committed by Native Americans on tribal lands.[25] The current version of the Major Crimes Act enumerates fifteen criminal offenses over which the federal government has jurisdiction.[26] After its passage in 1885, the Major Crimes Act "fundamentally changed the criminal justice regime for Indians."[27] The exercise of jurisdiction under the Major Crimes Act is not exclusively federal, but the Indian Civil Rights Act ("ICRA") has gutted tribal responsibility for the prosecution of major offenses perpetrated by Indians in Indian Country.[28] The Major Crimes Act has survived several constitutional challenges.[29] The Supreme Court has upheld the MCA on the general principle that, "pursuant to treaties, Indian tribes are wards of the United States, which status imposes on the Federal Government a duty to protect the personal safety of tribal members and those among whom they dwell."[30]

The prerequisites for federal jurisdiction under the MCA are that: "(1) the accused is a Native American; (2) the offense occurred within the boundaries of 'Indian Country'; and (3) the offense occurred against a person or against the property of a person."[31] Federal courts

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[21]. *Id.*

[22]. *Id*. at 572.

[23]. *See* Gross *supra* note 16 at 287 n.29.

[24]. 18 U.S.C. § 1153 (2013).

[25]. *See e.g.* United States v. Bryant, 136 S. Ct. (1954).

[26]. *See* Major Crimes Act, 18 U.S.C. § 1153(a) (2013) (subjecting Indians who commit certain crimes in Indian country to federal jurisdiction).

[27]. Creel, *supra* note 9 at 337.

[28]. Warren Stapleton, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 338 (1997).

[29]. Brian L. Porto, Annotation, *Validity, Construction, and Application of Indian Major Crimes Act*, 184 A.L.R. FED. 107 (2003).

[30]. *Id*. at § 2[a].

[31]. *Id*. at § 2[a].

also apply Federal Sentencing Guidelines to Native Americans convicted under the Major Crimes Act.[32] Many of the crimes enumerated by the Major Crimes Act are crimes that would normally be prosecuted by the local District Attorney's office. But if the accused is a Native American, the offense occurred within the boundaries of Indian Country, and the offense occurred against a person or against the property of a person, the defendant is prosecuted in federal court.[33] Because state law typically defines the enumerated crimes, federal courts have generally held that sentences handed down for these crimes must fall not only within the range prescribed by the federal guidelines, but also fall between the minimum and maximum length prescribed by the laws of the respective states in which the offenses occurred.[34]

An early challenge to the validity of the Major Crimes Act was *United States v. Kagama*, but the Supreme Court upheld its constitutionality.[35] The Court reasoned that "the MCA interfered with neither the authority of state courts on the reservation, nor with the applicability of state laws to the non-Indians who lived nearby, as its effect was limited to criminal acts committed by Native Americans on reservations."[36] The Tribes and the federal government may have concurrent jurisdiction[37] over certain defendants, and the Supreme Court has held that this does not violate double jeopardy.[38] In *United States v. Walking Crow*, the defendant's federal court conviction for robbery under the Major Crimes Act was upheld even though the tribal court had already convicted him for the same crime.[39] The Eighth Circuit reasoned that double jeopardy protections did not protect the defendants from being prosecuted by two sovereigns because "tribal courts retained an inherent and original jurisdiction derivative of their quasi–sovereign powers."[40]

In sum, the Major Crimes Act is the jurisdictional hook used to prosecute Native Americans in federal court, and has been used since the late 1800s.

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[32]. *See id*.
[33]. *See id.*
[34]. *See id*.
[35]. 118 U.S. 375 (1886).
[36]. Porto, *supra* note 29; *accord Kagama*, 118 U.S. 375 (1886).
[37]. *See* United States v. Toxrres, 733 F.2d 449, 460 n.12 (7th Cir.1984).
[38]. *See* United States v. Wheeler, 435 U.S. 313, 319 (1978) (holding that prosecution of a tribal member by the tribe, and the federal government, for the same crime did not violate the Double Jeopardy provision of the Fifth Amendment).
[39]. *See* Porto, *supra* note 29 at §3[c].
[40]. *Id*.

III. SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

The U.S. Constitution guarantees that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[41] It was once thought, however, that the Bill of Rights only applied to the Federal Government and not to the States.[42] Even after the Civil War, and the passage of the Fourteenth Amendment, the Supreme Court expressed doubts as to whether the Bill of Rights applied to state criminal trials. For instance, in *Hurtado v. California*, the Court determined that the right to a grand jury was expressly a federal right.[43] In *Adamson v. California*, the Court held that the right against self-incrimination did not protect a defendant at trial who refused to testify in his or her own defense—thereby enabling a state prosecutor to argue that the defendant's silence equated to guilt[44]

Over time, there has been a "selective incorporation" of most of the rights contained in the Bill of Rights—including the right to a jury trial under the Sixth Amendment.[45] The Supreme Court has adopted a "theory of selective incorporation by which the Due Process Clause incorporates particular rights contained in the first eight Amendments."[46]

A. Selective Incorporation.

Currently, the First[47], Second[48], Fourth[49], Fifth[50], Sixth, and the Eighth Amendment's excessive bail provision, have been incorporated

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41. U.S. Const. amend. VI.

42. *See* Barron v. City of Baltimore, 32 U.S. 243 (1883).

43. *See* 110 U.S. 516 (1884).

44. *See* 332 U.S. 46 (1947) (Adamson was expressly overturned in 1965 by Malloy v. Hogan, 378 U.S. 1 (1964)).

45. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

46. McDonald v. Chicago, 561 U.S. 742, 763, 130 S. Ct. 3020, 3034 (2010) (citing Gideon v. Wainwright, 372 U.S. 335, 341 (1963)).

47. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws that violate the Free Exercise Clause); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (holding that the Establishment Clause "means at least this: Neither a state nor the Federal Government can set up a church").

48. *See McDonald*, 561 U.S. at 791 (holding that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in [District of Columbia v.] Heller").

49. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (incorporating of the right to be free from unreasonable searches and seizure against the states).

50. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause "should apply to the States through the Fourteenth Amendment").

as applied to the States.[51] But these incorporated rights do not apply to tribal courts.[52] In determining whether a right must be incorporated, the Court has stated that the standard of review is "whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice."[53] In a recent Supreme Court decision, *Gamble v. United States*, the Court held that an Alabama defendant's prosecution in state and federal court for the same felon-in-possession offense did not violate double jeopardy, because of the dual-sovereignty doctrine.[54] The Court discussed the bar in federal court against the use of evidence found during an illegal search, known as the "silver platter doctrine."[55] The Court recounted that there was a time where citizens were protected against illegal searches conducted by federal agents, but there were no such protections when dealing with a state officer.[56] Consequently, state authorities could hand over evidence to federal prosecutors, and evidence that would otherwise be excluded could be introduced at trial.[57] The silver-platter doctrine was ultimately eliminated through the incorporation of the Fourth Amendment.[58] Justice Ginsburg dissented in *Gamble*, stating that "[o]ne rationale [of the separate-sovereigns doctrine] emphasizes that the Double Jeopardy Clause originally restrained only the Federal Government and did not bar successive state prosecutions" and that "[i]ncorporation

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[51]. *See* Gross supra note 16 at 297 n.87 (citing Wolf v. Colorado, 338 U.S. 25); Mapp v. Ohio, 367 U.S. 643 (1961) (expanding Wolf v. Colorado, to incorporate the exclusionary rule); Aguilar v. Texas, 378 U.S. 108 (1964) (requiring a warrant); Ker v. California, 374 U.S. 23 (1963) (developing a standard for warrantless search or seizure); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the double jeopardy clause of the Fifth Amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the rights against self-incrimination); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating the right to a speedy trial); In re Oliver, 333 U.S. 257 (1948) (incorporating the right to a public trial and right to be informed of accusations); Pointer v. Texas, 380 U.S. 400 (1965) (incorporating the right to confront witnesses); Washington v. Texas, 388 U.S. 14 (1967) (developing compulsory process); Powell v. Alabama, 287 U.S. 85 (1932) (announcing the assistance of counsel in capital cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (announcing the right to assistance of counsel in felony cases); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the right to assistance of counsel to imprisonable misdemeanors); Schilb v. Kuebel, 404 U.S. 357 (1971) (dicta) (incorporating the excessive bail provision of the Eighth Amendment), Robinson v. California, 370 U.S. 660 (1962) (incorporating the cruel and unusual punishment provisions of the Eighth Amendment)); see also 42 U.S.C.A. § 1983 (the principal means for enforcing incorporated due process rights in civil suits).

[52]. See ICRA, *supra* note 5.

[53]. *See McDonald*, 561 U.S. at 791 (citing *Duncan*, 391 U.S. at 149, n. 14).

[54]. 139 S. Ct. 1960 (2019).

[55]. *Id*. at 1979.

[56]. *Id* (citing Weeks v. United States, 232 U.S. 383, 391–93, (1914)).

[57]. *Id*.

[58]. *Id* (citing Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25 (1949).

of the Clause as a restraint on action by the States, effected in *Benton v. Maryland*. . . has rendered this rationale obsolete."[59]

The Court held in 1968 that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and guaranteed by the Fourteenth Amendment.[60] Indeed, the protections of the Sixth Amendment also apply to the federal government. The Fifth Amendment, which only applies to the federal government, does not contain an equal protection clause; the Fourteenth Amendment, which contains an equal protection clause, only applies to the states.[61] In *Bolling v. Sharpe*, the Supreme Court held that the Fourteenth Amendment's equal protection guarantees apply to the federal government through the Fifth Amendment's due process clause by means of *reverse incorporation*.[62] Importantly, due to this reverse incorporation, Native American's unequivocally have the right to a fair and impartial jury guaranteed by the Sixth Amendment when charged with a crime in state and federal court.

Justice Scalia wrote in *McDonald* that, "[u]nless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States."[63] However, the Indian Civil Rights Act strips Native Americans of Sixth Amendment protections. ICRA only guarantees a right to a "speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense."[64] Unlike the Sixth Amendment, ICRA does not even include an impartial jury provision. Shockingly, ICRA does even not provide for effective assistance of counsel as required under *Gideon v. Wainwright*.[65] However, non-Indians charged with a crime in tribal court enjoy a jury venire drawn from sources that mirror a fair cross-section of the community, which includes non-Indians.[66]

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[59]. *Id* at 1989 (Ginsburg, J., dissenting) (citing Fox v. Ohio, 46 U.S. 410, 434–35 (1847); Benton v. Maryland, 395 U.S. 784 (1969)).

[60]. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[61]. *See* U.S. Const. amend. V, VI, XIV.

[62]. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[63]. *See* McDonald, 561 U.S. 742, 791 (2010) (citing *Duncan*, 391 U.S., at 149, n.14).

[64]. 25 U.S.C. § 1302(a)(6) (2010).

[65]. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 328 (2013).

[66]. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204(b)(4)(B), 127 Stat. 54, 122.

The Citizenship Act of 1924 conferred citizenship upon persons born to Indian tribes within the territory of the United States. This act gave Indians dual citizenship, and did not destroy tribal sovereignty of Indian tribes, or their jurisdiction over their members.[67] As early as 1911, common law held that even if a Native American has become a full-fledged citizen of the United States and resides on land patented to a prior grantor in fee simple absolute, so long as he remains within the limits of an Indian reservation he is subject to the constitutional control of the Federal government.[68]

Although ICRA is substantially similar to the Bill of Rights, there are significant differences that would render certain IRCA provisions unconstitutional if they were applied to non-tribal members.[69] In an article about Native American rights, Richard L. Bitter, Jr. wrote that "[i]t must be noted that the Bill of Rights applies to all citizens, including Native Americans, while they are under the jurisdiction of state and federal courts and the Indian Civil Rights Act applies only to Native Americans while under the jurisdiction of the courts of their particular tribe."[70] The Sixth Amendment undoubtedly applies to Native Americans indicted in state and federal courts. Accordingly, they are entitled to the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime was been committed.

B. The Right to a Jury of Your Peers.

The Court has stated that "[p]roviding an accused with the *right* to be tried by a *jury of his peers* [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."[71] Black's Law Dictionary defines "peers" as "[s]omeone who is of equal status, rank, or character with another."[72] In common law England, the concept of being judged by a jury of one's peers appeared to be related to the idea that an accused should not be judged by persons of "inferior status."[73] The United States, being less class conscience than England, thought

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[67]. Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

[68]. *See* United States v. Gardner, 189 F. 690 (E.D. Wis. 1911).

[69]. Richard L. Bitter, Jr., *To Secure Equal Rights to All Citizens*, 2 APPALACHIAN J.L. 1, 10 (2003).

[70]. *Id*.

[71]. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[72]. *Peer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[73]. *See* JAMES J. GOBERT & ELLEN KREITZBERG, A JURY OF ONE'S PEERS, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 2:7 (2019).

of peers as someone of the same legal status.[74] The Court recognized as early as 1879 in *Strauder v. West Virginia*, that "[t]he very idea of a jury is that it is a body of men composed of the *peers or equals* of the person whose rights it is selected or summoned to determine."[75] The Court in *Strauder* struck down a West Virginia statute that operated to exclude African-Americans from jury service.[76] The Court ruled that:

> [T]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons have the same legal status in society as that which he holds. . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.[77]

However, the concept of "peers" has never been taken literally by the courts.[78] In *United States v. Nururdin*, an African American defendant argued that white jurors could not be expected to understand the nature of the relationship between white Chicago police officers and black citizens, or the nature of life in the black inner city.[79] The Seventh Circuit was not persuaded by the defendant's argument, and upheld the verdict of an all-white jury.[80]

The Constitution only protects against the "systemic exclusion of identifiable groups from the jury selection process—but does not guarantee a particular make-up of an empaneled jury."[81] Consequently, there is not a constitutionally protected right to have someone of your same ethnic background on your jury, but there is a right that they have a fair opportunity to serve as a potential juror.

The Court, in looking to past precedent on the issue of jury composition, has stated, "the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community."[82] In *Smith v. Texas* a unanimous Court stated "[i]t is part of the established tradition in the use of juries

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[74]. *See id*.

[75]. Strauder v. State of West Virginia, 100 U.S. 303, 304, (1879), *rev'd* 419 U.S. 522, (1975) (emphasis added).

[76]. *See* Strauder, 100 U.S. at 303.

[77]. *Id.* at 308-09.

[78]. GOBERT, *supra* note 73.

[79]. 8 F.3d 1187, 1189-90 (7th Cir. 1993).

[80]. *See id*.

[81]. *See* United States v. Miller, 562 Fed. App'x 272, 281 (6th Cir. 2014) (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

[82]. *Taylor*, 419 U.S. at 527.

as instruments of public justice that the jury be a body truly representative of the community."[83] To exclude racial groups from jury service has been said by the Court to be at war with our basic concepts of a democratic society and a representative government.[84] In *Smith* the Court held that the systematic exclusion of African American jurors violated the Equal Protection Clause of the Fourteenth Amendment.[85] Therefore, applying the holding in *Smith* to Native Americans rather than African Americans, there can be no doubt that the Constitution protects against the systemic exclusion of Native Americans from juries, and a jury must be drawn from a fair cross section of the community where the crime is alleged to have occurred.

1. No Systemic Exclusion, No Problem.

On December 17, 2015 following a thirteen-day trial, Ricky and Katrina Lanier, a married African American couple, were convicted of conspiracy to commit wire fraud, wire fraud, and major fraud against the United States.[86] A venire panel of 60 prospective jurors was chosen in accordance with the district court's jury selection plan, but that panel included only one prospective African-American juror.[87] Prior to the start of *voir dire*, the defendants motioned the court for a new venire panel or, in the alternative, a change of venue.[88] The defendants argued that the racial composition of the panel, resulted in the African American defendants being denied a jury of their peers, and that the government had picked the Eastern District of Tennessee with the intent to secure an all-white jury, thus ensuring a guilty verdict.[89] The motion was denied as untimely, and because the defendant's failed to make a "prima facie showing for a challenge to the venire panel selection process."[90] During *voir dire*, the sole African American juror was struck for cause because he stated he could not be impartial.

After conviction, the defendants made a Rule 33 motion for a new trial, arguing that because of the exclusion of members of their race from the jury panel, their Sixth Amendment right to a jury of their peers

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[83]. Smith v. Texas, 311 U.S. 128, 130 (1940).

[84]. Glasser v. United States, 315 U.S. 60, 85-86 (1942) ("But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government").

[85]. *See Smith*, at 130.

[86]. United States v. Lanier, 2016 WL 2864310 at *1 (E.D. Tenn. 2016).

[87]. *See id*.

[88]. *Id*. at *2.

[89]. *Id*.

[90]. *Id*.

was denied.[91] To establish a *prima facie* violation of the Sixth Amendment right to a jury representing a fair cross-section of the community, the movant is required to show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that underrepresentation is due to systematic exclusion of the group in the jury-selection process."[92] The court denied the defendants' Rule 33 motion, stating that the defendants had failed to argue that African Americans were not represented fairly and reasonably on the jury panel in relation to the number of African Americans in the district or division, or that African Americans were systematically excluded from the juror selection process.[93]

The court further stated in *Lanier* that it summons prospective jurors at random from a jury wheel based on a list of registered voters who have been screened for their qualifications.[94] The court explained that its process for summoning potential jurors was reviewed by the Sixth Circuit to determine if the process violated an African-American defendant's right to equal protection in the selection of grand jurors.[95] The Sixth Circuit found that African Americans were not underrepresented on the jury selection wheel used to call grand jurors in relation to the number of African Americans in the community as a whole. Thus, an all-white jury convicted the Laniers, despite their attempts to argue a Sixth Amendment violation.

C. How Exactly are Juries Picked?

Congress codified non-discriminatory federal jury procedure requirements in the Federal Judicial Code of 1948.[96] Congress later codified the fair cross-section requirement in the Federal Jury Selection and Service Act (JSSA) of 1968.[97] The Judicial Code of 1948, a

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[91]. *Id*. at *4.

[92]. United States v. Lanier, 2016 WL 2864310 at *5 (E.D. Tenn. 2016). (citing United States v. Ovalle, 136 F.3d 1092, 1098 n.7 (6th Cir.1998)).

[93]. *Id*.

[94]. *Id*. at *6.

[95]. *Id*.

[96]. *See* Federal Judicial Code of 1948, Pub. L. No. 80–773, § 101, 62 Stat. 869, 952.

[97]. Gross *supra* note 16, at 300 (citing Jury Selection and Service Act of 1968, Pub. L. No. 90–274, § 1862, 82 Stat. 53, 54). Even before Congress codified fair cross section requirements for federal court, the Supreme Court had held that fair cross section requirements in federal court could be addressed through reviewing courts' supervisory powers over lower courts. Ballard v. United States, 329 U.S. 187, 193); ("We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which

predecessor to the JSSA, prohibited disqualification of citizens from jury service "on account of race or color," required that jurors be chosen "without reference to party affiliations," and required that jurors be "returned from such parts of the district as the court may direct . . . so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district."[98] The JSSA requires defendants to have grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes, and requires each federal court district to create a written random jury selection plan implementing these policies.[99] Juries must be selected in accordance with the "Plan for random jury selection" which is codified in Title 28 of the United States Code Annotated, Section 1863(a). Section 1863(a) states:

> Each United States district court shall devise and place into operation a *written plan* for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate.[100]

Most federal districts with a high concentration of Native Americans use voter registration *exclusively* as the means of selecting a jury pool.[101] The District of New Mexico has twenty-three Indian tribes within the state, and its jury plan states that "all qualified *registered voters* will have the opportunity to be considered for service on grand juries and petit juries and will have an obligation to serve as jurors

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Congress adopted and that . . . we should exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which permeated this proceeding.") (citing Thiel v. S. Pac. Co., 328 U.S. 217, 66 S. Ct. 984 (1946); McNabb v. United States, 318 U.S. 332, 63, S. Ct. 608 (1943)).

[98]. Gross *supra* note 16, at 300 (citing Federal Judicial Code of 1948, Pub. L. No. 80–773, § 101, 62 Stat. 869, 952).

[99]. *See* 28 U.S.C.A. § 1861 (2012).

[100]. 28 U.S.C.A. § 1863(a) (2012).

[101]. *See* D.N.M., ORDER ADOPTING MODIFIED JURY PLAN, 15-MC-04-42 at 1 (Oct. 27, 2015), https://www.nmd.uscourts.gov/sites/nmd/files/JurySelectionPlanFinal120408.pdf (emphasis added); D. ALASKA, JURY PLAN 8 (Feb. 2019), https://www.akd.uscourts.gov/sites/akd/files/Alaska_Jury_Plan_2019_Revised_Final.pdf; D.N.D., PLAN FOR RANDOM JURY SELECTION 1-2 (Nov. 15, 2016), https://www.ndd.uscourts.gov/jury/jury_plan.pdf.

when summoned for that purpose."[102] Congress has delegated to the federal courts the duty of coming up with a plan for the random selection of jurors.[103] Congress did, however, put in place certain requirements—like review by the judicial council of the circuit—in an attempt to ensure that the means of random jury selection are constitutional.[104] However, creating a plan to ensure a statutory requirement is met, is a duty falling exclusively under the executive branch's Article II power, not the judiciary's Article III power.[105] Using voter registration lists, on its face, seems like the simplest way to ensure Section 1863's jury requirements are met, however, by utilizing voter registration lists exclusively, the courts have created a situation where participation in the jury selection process is rare for Native Americans, because Native Americans statistically have lower numbers of registered voters.

III. NATIVE AMERICAN'S DO NOT HAVE FAIR AND EQUAL ACCESS TO THE BALLOT BOX.

Native American's were not recognized as citizens until 1924.[106] In 1924, Native American's won the right to full citizenship when President Calvin Coolidge signed the Indian Citizenship Act.[107] As illustrated by struggles of African Americans to solidify their right to vote, citizenship and the ability to vote are not one and the same. Historians researching Native American's fight to vote have concluded that "Native Americans were only able to win the right to vote by fighting for it state by state" and that "the last state to fully guarantee voting rights for Native people was Utah in 1962."[108] Despite these victories, Native people were still prevented from voting with poll taxes, literacy tests, and intimidation—the same tactics used against African American voters.[109]

The same kind of Jim Crow type schemes that were used to suppress African American voting rights, were also used to suppress Native American voting rights, and they are still going on today. Although

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[102]. See NATIVE AMERICANS IN NEW MEXICO (2020), https://www.visitalbuquerque.org/about-abq/culture-heritage/native-american/; D.N.M., ORDER ADOPTING MODIFIED JURY PLAN, 15-MC-04-42 at 1 (2015) (emphasis added).

[103]. *See generally* 28 U.S.C.A. § 1863(a).

[104]. *Id*.

[105]. *See generally* U.S. CONST. art. II-III.

[106]. *See* Becky Little, *Native Americans Weren't Guaranteed the Right to Vote in Every State Until 1962*, HISTORY STORIES (Nov. 6, 2018), https://www.history.com/news/native-american-voting-rights-citizenship.

[107]. *See id*.

[108]. *Id*.

[109]. *Id*.

Utah became the last state to remove a formal barrier to Native American's ability to vote in 1964, that does not mean that Natives have an unqualified ability to vote in 2020. This fight for equal voting rights was won through both legislation and litigation. The right of Native Americans to vote in U.S. elections was first recognized in 1948 with the landmark cases *Harrison v. Laveen* and *Trujillo v. Garley*, but it still took almost twenty years for every State to recognize this right.[110]

Peter Dunphy researched the issue of voter suppression in Indian country for an article he wrote for the Brennan Center for Justice and concluded that that "pernicious roadblocks remain to this day. Restrictive voting laws throughout the United States often carry a discriminatory effect, either by intent or consequence, for Native communities."[111] Mr. Dunphy went on to state that just a few of the major challenges Native Americans face when attempting to exercise their voting rights include:

> Restrictive voting laws that leave Native communities on the sidelines: Many Native Americans, especially those who live on reservations, do not have traditional street addresses. This has resulted in voter registration applications being rejected in many states. Even when accepted, the current format of registration forms often doesn't incorporate this reality. States with voter ID laws often do not accept tribal IDs as a valid form of identification.[112]

For example, North Dakota, a state with a large population of Native Americans, enacted a voter ID law in 2017 that requires a physical address to vote.[113] The law states that an individual must "show a valid form of identification with the information required under section 16.1-01-04.1" to vote.[114] This section requires that an individual's "[c]urrent residential street address in North Dakota" be provided on their form of identification.[115]

The problem with this legislation is that North Dakota has failed to provide a physical address to many Native Americans. Even when the state did assign an address, this information was often not communicated to the individual, or the person was provided with multiple conflicting addresses.[116] Dunphy further wrote that a "lawsuit brought by the Native American Rights Fund (NARF) and two North Dakota

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[110]. *See* Dunphy *supra* note 3

[111]. *Id*.

[112]. *Id* (emphasis added).

[113] *See* N.D. Cent. Code § 16.1-05-07 (2017).

[114] N.D. Cent. Code § 16.1-05-07 (1).

[115] N.D. Cent. Code § 16.1-01-04.1 (2017).

[116] Dunphy, *supra* note 3.

tribes challenging the law found that some voters with IDs listing an assigned residential address had their absentee ballot applications rejected for having "invalid" addresses."[117] While many local Native groups and individuals successfully mobilized to overcome these barriers before the 2018 election, the voter ID problem continues. North Dakota's 2017 voter ID law illustrates that the problem of voter suppression of Native American communities is a clear and present danger. This problem has seeped into the criminal justice system, infecting the jury pool.

A. Brakebill v. Jaeger: the fight for an equal and meaningful opportunity to vote in Indian Country.

In *Brakebill v. Jaeger*, six Native Americans sued the Secretary of State for North Dakota, Alvin Jaeger, alleging that the voter ID requirements the state had imposed, placed an unconstitutional burden on many Native Americans right to vote.[118] The plaintiffs filed suit in the United States District Court for the District of North Dakota, and The Honorable Chief Judge Daniel L. Hovland sided with the plaintiffs, enjoining Jaeger and the state from enforcing certain statutory requirements.[119] The *Brakebill* plaintiffs contended that, "the new voter ID requirements are needlessly and substantially burdensome for all the people of North Dakota, but impose particularly disproportionate burdens on Native Americans."[120] The plaintiffs argued that "thousands of Native Americans in North Dakota do not have qualifying voter ID's, or the resources to easily obtain qualifying ID's, because they do not have the money to pay the license fees or for travel" and that they did not have the "forms of ID required to get a new ID card (e.g. a birth certificate or social security card), and/or they have neither the time nor the means of transportation to track down documents and travel to a state office which issues the required forms of ID."[121]

The Federal District of North Dakota sits within the Eighth Circuit, and for the plaintiffs to receive a preliminary injunction, they were required to meet a four-factor test that the Eight Circuit set out in *Dataphase Systems, Inc., v. C L Systems, Inc*.[122] These factors include "(1) the threat of irreparable harm to the movant; (2) the state of balance

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[117] *Id*.

[118] *Brakebill v. Jaeger*, WL 7118548 (D.N.D. 2016).

[119] *Id*.

[120] *Id.* at *2.

[121] *Id*.

[122] 640 F.2d 109 (8th Cir. 1981).

between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[123]

The court first analyzed the third factor: the probability of success on the merits. The court cited an undisputed statistical survey of North Dakota voters performed by Dr. Matthew A. Barreto and Dr. Gabriel R. Sanchez.[124] This survey found that:

- 23.5% of Native Americans currently lack valid voter ID, compared to only 12% of non-Native Americans.
- 15.4% of Native Americans who voted in 2012 currently lack qualifying voter ID, compared to only 6.9% of non-Native Americans.
- Only 78.2% of Native Americans have a North Dakota driver's license, compared to 94.4% of non-Native Americans.
- 47.7% of Native Americans who do not currently have a qualifying voter ID lack the underlying documents they need to obtain an acceptable ID.
- Only 73.9% of Native Americans who lack a qualifying voter ID own or lease a car, compared to 88% of non-Native Americans; and 10.5% of Native Americans lack any access to a motor vehicle, compared to only 4.8% of non-Native Americans.
- Native Americans, on average, must travel twice as far as non-Native Americans to visit a Driver's License Site in North Dakota.
- 21.4% of Native Americans are not at all aware of the new voter ID laws, and only 20.8% have heard about the law.[125]

After considering these facts, the Court found that "N.D.C.C. § 16.1–05–07 imposes 'excessively burdensome requirements' on Native American voters in North Dakota that far outweighs the interests put forth by the State of North Dakota," and that "the lack of any current 'fail-safe' provisions in the North Dakota Century Code to be unacceptable and violative of the Equal Protection Clause of the 14th Amendment."[126] Because of these findings, the Court concluded that

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[123] Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981).

[124] *Brakebill* at *4.

[125] *Id*, at *10-11.

[126] *Id*. at *10.

the plaintiffs were likely to succeed on the merits of their Fourteenth Amendment Equal Protection Clause claim.[127]

The Court next analyzed the "irreparable harm" factor, and found in favor of the plaintiffs, ruling that "no legal remedy other than enjoining the State of North Dakota from implementing N.D.C.C. § 16.1–05–07 without any 'fail-safe' provisions will be sufficient to ensure Native Americans, and any other citizens struggling to comply with the new voter ID requirements, have a clear and unequivocal opportunity to have their voice heard in future elections."[128] In ruling on this factor, the court relied on the plaintiffs' evidence that "more than 3,800 Native Americans may likely be denied the right to vote in the upcoming general election in November 2016 absent injunctive relief."[129]

Lastly, the court conducted a combined analysis of the balance of harms and the public interest factors.[130] The court stated that "North Dakota's interests must be measured against the specific remedy the Plaintiffs' seek, which is an injunction requiring the Defendant to implement a 'fail-safe' measure as a part of its voter ID laws."[131] The court found that the State's interest in requiring a voter ID was to prevent voter fraud and promote voter confidence, and stated that these "interests would not be undermined by allowing Native American voters, or any other voters who cannot obtain an ID, to present an affidavit or declaration in lieu of one of the four forms of permissible voter ID's."[132]

The Court ultimately granted the plaintiffs injunction, and ordered the Secretary of State to accept as voter ID, various documents issued by a tribal authority to a tribal member, reasoning that the "public interest in protecting the most cherished right to vote for thousands of Native Americans who currently lack a qualifying ID and cannot obtain one, outweighs the purported interest and arguments of the State."[133] The Court concluded that "[i]t is critical the State of North Dakota provide Native Americans an equal and meaningful opportunity to vote in the 2016 election," and emphasized that "[n]o eligible voter, regardless of their station in life, should be denied the opportunity to vote."[134]

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[127] *See id.*

[128] *Id*.

[129] *Id*.

[130] *Brakebill v. Jaeger*, WL 7118548 at *11-13 (D.N.D. 2016).

[131] *Id*. at *11.

[132] *Id*.

[133] *Id*. at *13.

[134] *Id*.

1. The Second Motion for Preliminary Injunction.

After the 2016 election, the State filed a motion to dissolve the court's preliminary injunction on the grounds that the voter ID law had been amended.[135] The plaintiff's countered by filing a second motion for a preliminary injunction.[136] The amended voter ID law, N.D.C.C. § 16.1-01-04.1(5), permitted individuals who did not present a valid ID when appearing to vote, to file a preliminary ballot, which would then be set aside until the individual's qualifications could be verified.[137] The new voter ID law still required voters to produce identification listing a current residential street address in North Dakota.[138] However, it allowed voters to supplement this requirement with a current utility bill, bank statement, paycheck, or a check or document issued by a federal, state, or local government.[139] Nevertheless, the court found that it still "impose[d] a discriminatory and burdensome impact on Native Americans."[140]

The court took judicial notice of statistical data introduced by the plaintiffs, which was not challenged by the State.[141] This data illustrated the burden Native American's face in attempting to obtain the required information to vote.[142] Specifically, these statistics showed that Native Americans in North Dakota are significantly less likely to possess a driver's license, and that Native Americans face burdens in obtaining a state-issued ID.[143] The data showed that, 28.9 percent of Native Americans in North Dakota were found to not have a birth certificate or other proof of identity required by the state to obtain a driver's license.[144] The court went on to analyze *Crawford v. Marion Cty. Election Bd*., where the Supreme Court rejected a facial challenge to Indiana's photo identification law and upheld its constitutionality.[145] Based on the record before them, the district court held for the plaintiffs.[146]

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[135] Brakebill v. Jaeger, 2018 WL 1612190 at *1 (D.N.D. 2018).
[136] *Id*.
[137] *Id*.
[138] *See* N.D.C.C. § 16.1-01-04.1(2)(b) (2017).
[139] *See id.* at §§ (3)(b)(1)-(5).
[140] *Brakebill*, WL 1612190 at *2.
[141] *Id.*
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*. at *3.
[146] *Brakebill*, WL 1612190 at *8.

2. The Eight Circuit's Reversal of the Injunction.

After the district court's ruling, the state motioned the district court to stay the injunction pending appeal.[147] This motion was denied, and the defendant appealed to the Eighth Circuit, requesting that they stay the injunction pending appeal. The Eight Circuit sided with the defendant, concluding that "the Secretary has demonstrated a likelihood of success on the merits in his challenge to this aspect of the injunction, that the State would be irreparably harmed by the injunction during the general election in November, and that a stay should be granted after consideration of all relevant factors."[148] The court of appeals therefore granted the defendant's motion to stay the district court's injunction.

The *Brakebill* plaintiff's case is not over. The Eight Circuit reversed Judge Hovfield's decision on the injunction before the 2018 election, but in so doing, it may have given him, and the plaintiffs, guidance going forward. The court stated in its conclusion that "[a]lthough we conclude that the district court's statewide injunction was not warranted, *Crawford* left open the possibility that a court might have authority to enter a narrower injunction to relieve certain voters of an unjustified burden."[149] The court also stated that if the District Court had "rejected the request for statewide injunctive relief and required the plaintiffs to proceed with as-applied challenges based on their individual circumstances, then there may well have been time before the most recent election to consider whether narrower relief was justified."[150] Judge Jane Kelly dissented in *Brakebill*, stating that she would have denied the motion to stay because the facts relied upon by the District Court "demonstrate that North Dakota has erected unconstitutional barriers for prospective voters."[151] The plaintiffs may have suffered a defeat in the Eight Circuit, but their may still be a path towards invalidation of N.D.C.C. § 16.1-01-04.1 by arguing that it is unconstitutional as-applied.

Brakebill illustrates that in some states, Native Americans are still fighting against suppression of their right to vote. Because Native Americans are underrepresented in voter registries, they are also underrepresented in jury pools. However, there is still not sufficient

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[147] Brakebill v. Jaeger, 2018 WL 4714914, at *1 (D.N.D. Apr. 30, 2018).

[148] Brakebill v. Jaeger, 905 F.3d 553, 556 (8th Cir. 2018).

[149] *Id*. at 680 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 128 S. Ct. 1610 (2008)).

[150] *Id*. at 681.

[151] *Id*. at 563 (Kelly, J., dissenting).

protection against the systemic exclusion of Native Americans from the jury selection process. This lack of protection is due to: (1) the voter suppression that has affected Native Americans and (2) the use of voter registration alone in some jurisdictions as the means to summon jurors. Because of this lack of protection, a Native American criminal defendant's Sixth Amendment right to a jury of their peers is being infringed upon.

B. The Problem of Voter Suppression Effects Native American Communities Across the United States.

While *Brakebill* shows that the suppression of Native American voters is still prevalent in North Dakota, voter suppression persists throughout states in which there are large populations of Native Americans. Shortly after the 2018 midterms, the Navajo Nation in Arizona filed a lawsuit[152] alleging that state and county polling procedures violated the Voting Rights Act.[153] The suit claimed that many Navajo voters were effectively disenfranchised by the minimal number of polling locations in reservation counties, inaccurate information provided by poll workers, and a lack of interpreters for non-English speakers.[154]

Prior to the 2013 Supreme Court ruling in *Shelby County v. Holder*,[155] the preclearance requirement of the Voting Rights Act provided federal protections to many Native Americans. Under preclearance, states with a history of discriminatory voting practices were required to get approval from the DOJ or a D.C. District Court before implementing any voting changes.[156]Alaska and Arizona, home to sizable Native American communities, were among the nine states covered as a whole under preclearance. The two South Dakota counties covered by preclearance—Oglala Lakota County and Todd County—contain the Pine Ridge and Rosebud Indian reservations, respectively.[157]

In the years since *Shelby County*, which effectively ended preclearance, many previously covered jurisdictions have put new voting restrictions in place. Arizona recently made it a felony to collect and turn in another voter's completed ballot, even with that voter's permission.[158] While it is hard to say whether such a bill would have been

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[152] Dunphy, *supra* note 3.

[153] *Id*.

[154] *Id*.

[155] 570 U.S. 529 (2013).

[156] Dunphy, *supra* note 3.

[157] *Id*.

[158] *Id*.

prohibited by preclearance, increased federal protections would go far to ensure that states honor the right of Native Americans to vote.

These hurdles have real effects: statistics from the National Congress of American Indians, show that the turnout rate of American Indian and Alaska Native registered voters is between five and fourteen percentage points lower than turnout rates of other racial and ethnic groups."[159] In sum, because Native Americans are underrepresented in state voter registries, federal districts that use voter registration exclusively to draw their venire pursuant to 18 U.S.C.A. Section 1863 have denied Native American defendants charged under the Major Crimes Act their Sixth Amendment right to a jury of their peers.

IV. 28 U.S.C.A. § 1863(A) IS UNCONSTITUTIONAL AS-APPLIED TO NATIVE AMERICAN DEFENDANTS PROSECUTED IN FEDERAL COURT THROUGH THE MAJOR CRIMES ACT.

A plaintiff can challenge the constitutionality of a statute in two principal ways.[160] A facial challenge requires that a plaintiff prove that the statute is unconstitutional in all (or nearly all) of its applications.[161] An as-applied challenge alleges that the statute is unconstitutional given a particular set of facts, and as applied to a particular plaintiff and others similarly situated.[162] A facial challenge is typically described as one where "no application of the statute would be constitutional."[163] An as-applied challenge, however, has been defined as a challenge "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of [their] particular circumstances."[164] Because it is often easier to prove

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[159] *Id*.

[160] *See* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1647 (2009).

[161] *See id.*

[162] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 1081 (16th ed. 2007) ("Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; if the litigant prevails, the courts carve away the unconstitutional aspects of the law by invalidating its improper applications on a case-by-case basis.").

[163] Sabri v. United States, 541 U.S. 600, 609, 124 S. Ct. 1941, 1948 (2004).

[164] Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010) (citing Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex. 1995); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 236, 236 (1994) ("Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321-22 (2000) (summarizing the conventional account of facial and as-applied

a law is unconstitutional given a specific set of facts than on the whole, the as-applied challenge appears more favorable to plaintiffs than a facial challenge.[165] As the court held in in *United States v. Salerno*, to prevail in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid."[166]

Courts strongly favor as-applied challenges on the grounds that they are "more consistent with the goals of resolving concrete disputes and deferring as much as possible to the legislative process" where as a facial challenge, on the other hand, "should be used sparingly and only in exceptional circumstances."[167] Going back to *Brakebill*, the Eighth Circuit, in addressing the merits of the facial challenge to the statutory requirement of a residential street address, stated that "seeking relief that would invalidate an election provision in all of its applications bears 'a heavy burden of persuasion,' as facial challenges are disfavored."[168] The Court noted, however, that "*Crawford* left open the possibility that a subset of voters might bring as-applied challenges against a regulation, and that a court might have authority to enter a narrower injunction to relieve certain voters of an unjustified burden."[169] Upon denying the plaintiffs injunction, the *Brakebill* Court stated that the "district court in this case, however, did not limit its injunctive relief to the six plaintiffs" and that the injunction that Judge Hovland granted "applied across the board to all voters and effectively declared the street address requirement unconstitutional in all cases;" thus, by definition, "an as-applied theory [could not] support the district court's injunction."[170]

challenges); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 360 (1998) ("Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.").

[165] *See* Persily, *supra* note 160, at 1647.

[166] United States v. Salerno, 481 U.S. 739, 741, 107 S. Ct. 2095, 2098 (1987).

[167] Kreit, *supra* note 164, at 658 (citing Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-30 (2006) (discussing the Court's preference for as-applied challenges); Fallon, supra note 3, at 1321("Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge . . . .").

[168] Brakebill v. Jaeger, 905 F.3d 553, 558 (8th Cir. 2018) (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008)).

[169] *Id*.

[170] *Id*.

A. Jury Plans That Use Voter Registries in Districts Where There is a Large Native American Population Violate the Sixth Amendment's Fair Cross-Section of the Community Requirement.

To establish a *prima facie* violation of the Sixth Amendment's right to a jury representing a fair cross-section of the community, the movant must show that "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that underrepresentation is due to systematic exclusion of the group in the jury-selection process."[171] If this type of challenge was made in North Dakota, the movant would surely establish a prima facia violation of the Sixth Amendment.

But what about other states? As discussed above, many federal districts located in states with large Native American populations exclusively use state voter registries to fill the jury pool. A fair cross-section of the community challenge should succeed in any state with a large Native American population that (1) exclusively uses state voter registries to fill the jury pool, and (2) where Native Americans right to vote is being suppressed, like North Dakota. Thus, defendants looking to challenge the constitutionality of their jury could raise an as-applied challenge or establish a prima facie violation of the Sixth Amendment's right to a jury representing a fair cross-section of the community.

V. CONCLUSION

A. The Constitution Does Not Guarantee A Specific Make-Up of a Jury, But Maybe It Should When Native Americans Are Prosecuted Under the Major Crimes Act.

Without a doubt, the most powerful solution to the problems addressed in this article would be reworking jury requirements to curtail the dilution of Native Americans in the jury pool. As discussed earlier, the Constitution does not require a specific make-up of a defendant's jury, but maybe it should for defendants prosecuted under the Major Crimes Act. As the case of *United States v, Lanier* demonstrates, the constitution only protects against the systematic exclusion of particular groups. However, much of the jurisprudence on this issue does not focus on Native Americans, but African Americans. Jury requirements must be seriously reconsidered in situations where a Native American

[171] Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979).

is prosecuted under the Major Crimes Act. No other racial group is hailed into a federal criminal court based on their ethnicity. If the federal government is going to exercise jurisdiction over an individual based on their race, then there must be sufficient protections to ensure members of that race are not being excluded from jury selection. To accomplish this, Congress should add a specific make-up requirement to the Major Crimes Act, requiring that an individual from the same reservation as the defendant be selected for jury service. They could do this with relative ease by using tribal membership lists as the jury pool. This would ensure that Native American defendants prosecuted in federal court receive equal protection under the laws of the United States.

B. Jury Plan Expansion.

Additionally, Section 1863 needs to be re-worked to mandate that courts draw from a more extensive jury selection source than just state voter registries. Doing so will ensure that the issues illustrated by *Brakebill*, are adequately addressed. The barriers that Natives face in trying to get to the ballot box in 2020 are real. Expanding the types of sources juries are drawn from would mitigate the constitutional concern. Specifically, tribal voter registries and tribal membership lists must become a source that courts draw from in selecting potential jurors. Voter registries are a simple but insufficient means of selecting potential voters. 138 million Americans voted in the 2016 presidential election, but this only accounts for 58.1% of our voting-eligible population.[172] Voter registries are an insufficient means of pooling potential jurors for anyone, but especially for Native Americans who have historically been excluded from exercising their right to vote. To ensure that Native American participation on juries is not being diluted, jury plans must be expanded to include sources other than state voter registries.

Native Americans were the last ethnic minority to receive citizenship and the right to vote. Today, we are witnessing one of the greatest unknown civil rights challenges in modern history. By implementing these solutions, we can all work towards an America where every person is treated fairly no matter what they look like or where they come from.

[172] *2016 November General Election Turnout Rates*, UNITED STATES ELECTION PROJECT (last visited May 6, 2020) http://www.electproject.org/2016g.