

VOTING RIGHTS IN SOUTH DAKOTA 1982-2006

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PREPARED BY LAUGHLIN McDONALD, JANINE PEASE, AND
RICHARD GUEST

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LAUGHLIN McDONALD¹, JANINE PEASE², D. ED., AND RICHARD GUEST³

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¹ Director of the Voting Rights Project of the American Civil Liberties Union Foundation in Atlanta, Georgia. He earned a B.A. from Columbia University in 1960 and an LL.B. in 1965 from the University of Virginia School of Law.

² Director of Native American Studies at Rocky Mountain College in Billings, Montana. An enrolled Crow Indian, Dr. Pease holds a B.A. in Sociology and Anthropology (1970) from Central Washington University and a master’s and doctorate in higher education from Montana State University. Dr. Pease was the lead plaintiff in *Windy Boy v. Big Horn County et. al.*, a voting rights case in Montana during the 1980s, and she served as Presiding Officer of the Montana Districting and Apportionment Commission from 1999–2003. Ms. Pease was president of Little Big Horn College on the Crow Indian Reservation for 18 years, from 1982 to 2000.

³ Senior Staff Attorney at the Native American Rights Fund in the Washington, D.C. office. He earned his J.D. from the University of Arizona College of Law in 1994, receiving the Roger C. Henderson Award for Distinguished Graduating Senior. He is licensed in Arizona, Washington and the District of Columbia and is admitted to practice before the United States Supreme Court, the United States Tax Court and the United States Courts of Appeals for the Ninth Circuit and the D.C. Circuit.

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EXECUTIVE SUMMARY

In the past 40 years, South Dakota has become a battleground for American Indian voting rights. Since 1966, of the sixty-six lawsuits filed nationwide in which voting rights of Indians were at issue, seventeen have been filed in South Dakota. In 1977, then-South Dakota Attorney General William Janklow expressed his outrage over the extension of Section 5 (the preclearance requirement) and Sections 4(f)(4) and 203 (the minority language assistance provision) of the Voting Rights Act (“VRA”) to his state on behalf of American Indians. He derided Section 5 as a “facial absurdity” and, in a formal legal opinion, he advised the Secretary of State to ignore the preclearance requirement, stating: “I see no need to proceed with undue speed to subject our State’s laws to a ‘one-man veto’ by the United States Attorney General.” This official practice of ignoring the preclearance requirement of the VRA continued virtually unabated for the next twenty-five years.

Janklow’s position was consistent with the history of discrimination in South Dakota. Part I of this report is a reprint of an article recently published in the American Indian Law Review by Laughlin McDonald, Director of the ACLU Voting Rights Project, entitled “The Voting Rights Act in Indian Country: South Dakota, A Case Study.” Part I recounts this history of discrimination in detail. When the very first territorial assembly of South Dakota met in 1862, it determined that the right to vote and the ability to hold office would be limited to free white men. The early territorial laws described Indians either as “red children” and “the poor child” of the prairie, or as the “revengeful and murderous savage.” As a matter of territorial, and then state law, Indians were systematically denied the right to vote or the ability to hold office. South Dakota enacted and enforced its very own “anti-Indian civil right statute.”

In 1924, Congress adopted the Indian Citizenship Act, which granted citizenship to “all non-citizen Indians born within the territorial limits of the United States.” Although this law definitively granted Indians citizenship, it still left open the question of whether Indians could vote in South Dakota. Once again, state officials determined that an Indian could only vote if he completely severed his tribal relations and fully adopted the habits of “civilized” life – a determination to be made on a case-by-case basis. South Dakota did not repeal the state law denying Indians the right to vote until 1951, making it one of the last states in the nation to officially grant the right to vote to all Indians.

Yet, discrimination persisted. Even after adoption of the VRA in 1965 and the subsequent amendments in 1975, legal restrictions on voting by Indians and restrictions on Indians’ ability to hold offices were still in place as late as 1980. South Dakota prohibited Indians from voting in elections in counties that were “unorganized” under state law and prohibited residents of the unorganized counties from holding office. The three unorganized counties at that time were Todd, Shannon, and Washabaugh counties, whose residents were overwhelmingly Indian. These laws only ended as a result of litigation.

One of the many legacies of discrimination Indians have encountered is the severe depressed socio-economic status of American Indians in South Dakota and its direct link to reduced political participation. Part I highlights the socio-economic barriers confronting American Indians South Dakota, including unemployment rates on Indian reservations in excess of 70-80 percent; a poverty rate approaching 50 percent; a high school drop-out rate of 24 percent; and an infant mortality rate double the national average. Given these statistics, it is not surprising that, as late as 1985, only 9.9 percent of Indians in South Dakota were registered to vote. In a 2000 report, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights concluded: “ For the most part, Native Americans are very much separate and unequal members of society ... [who] do not fully participate in local, State and Federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality.”

Finally, Part I thoroughly chronicles the recent Indian voting rights litigation in South Dakota, which has involved the entire range of jurisdictions, from challenging state legislative redistricting plans, to opposing at-large elections for school districts, to vindicating the right of Indians to vote in a sanitary district election. In case after case, the state raised the “Reservation” defense, arguing that the Indians’ loyalty was to tribal elections; accordingly, Indians simply did not care about participating in state elections. But the courts uniformly rejected this argument, noting that it completely overlooks the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to participate in state elections.

Part II of this report is an article by Janine Pease, Director of Native American Studies at Rocky Mountain College, entitled “Voting Rights, American Indians and South Dakota,” which documents her ongoing research and analysis of voting rights, emerging trends, and resulting backlash. This part provides an overview of the legal, geographic, social, and economic barriers that American Indians must overcome to exercise their right to vote. Next, the emerging trends in voting rights in South Dakota are examined. Grassroots American Indian organizations have registered several thousand new American Indian voters, voters who turned out in record numbers in the 2002 and 2004 elections. In addition, Indians from throughout the State are seeking protection under the Voting Rights Act under Sections 2 and 5 and the minority language provisions. The growth of the American Indian population, the young age of many tribe members, and the increasing rates of Indian voter participation are beginning to re-shape the politics of the state. American Indian voters have demonstrated their voting power in their search for representation in sanitation districts, school districts, cities, counties, and legislative districts, as well as in congressional elections.

Finally, this report covers some of the negative aspects of the voting process itself that tend to disproportionately affect, or be targeted at, minorities, such as voter intimidation, accusations of voter fraud, and “anti-fraud” programs. Recent legislative proposals reflect present-day hostility toward Indian voters.

The history of voting rights in South Dakota strongly supports the extension of the temporary provisions of the Voting Rights Act – preclearance and minority language assistance. Unfortunately, however, the difficulties that Indians experience in participating effectively in state and local politics and electing candidates of their choice are not restricted to South Dakota.

A variety of common factors have coalesced to isolate Indian voters from the political mainstream throughout the West: historical discrimination; polarized voting; overt hostility of white public officials; cultural and language barriers; a depressed socioeconomic status; inability to finance campaigns; difficulties in establishing coalitions with white voters; a lack of faith in the state system; and conflicts with non-Indians over issues such as water rights, taxation, and tribal jurisdiction.

It is apparent that “inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination,” and which the Voting Rights Act was designed to eradicate, still persist throughout the West. The Voting Rights Act, including the special preclearance requirement of Section 5 and minority language provisions of Sections 4(f)(4) and Section 203, are still urgently needed in Indian Country. Of all the modern legislation enacted to redress the problems facing American Indians, the Voting Rights Act provides the most effective means of advancing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

I. The Voting Rights Act in Indian Country: South Dakota, A Case Study

The problems that Indians continue to experience in South Dakota in securing an equal right to vote strongly support the extension of the special provisions of the Voting Rights Act scheduled to expire in 2007. They also demonstrate the ultimate wisdom of Congress in making permanent and nationwide the basic guarantee of equal political participation contained in the Act.⁴

A. South Dakota’s Refusal to Comply with Section 5

Ten years after its enactment in 1965, Congress amended the Voting Rights Act to include American Indians, to expand the geographic reach of the special preclearance provisions of Section 5, and to require certain jurisdictions to provide bilingual election materials to language minorities. As a result of the amendments, Shannon and Todd Counties in South Dakota, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance.⁵ Further, eight counties in the state, because of their significant Indian populations, were required to conduct bilingual elections—Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh.⁶

William Janklow, at that time attorney general of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. 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.” He quoted with approval Justice Hugo Black’s famous

⁴ The permanent provisions of the act and the special provisions scheduled to expire in 2007 are set out in the attached addendum.

⁵ 41 Fed. Reg. 784 (Jan. 5, 1976).

⁶ 41 Fed. Reg. 30,002 (July 20, 1976).

dissent in *South Carolina v. Katzenbach*,⁷ arguing that Section 5 treated covered jurisdictions as “little more than conquered provinces.”⁸ 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.”⁹

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.

B. How the Special Provisions Work

The Voting Rights Act of 1965 was a complex, interlocking set of permanent provisions that applied nationwide, along with special provisions that applied only in jurisdictions that had used a “test or devise” for voting and in which registration and voting were depressed. The most controversial of the special provisions was Section 5,¹⁰ which covered most of the South where discrimination against blacks in voting had been most persistent and flagrant.

Section 5 requires “covered” jurisdictions to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory, or retrogressive, purpose or effect. A voting change is deemed to be retrogressive if it diminishes the “effective exercise” of minority political participation compared to the preexisting practice.¹¹ Preclearance can be obtained by making an administrative submission to the attorney general or by bringing a declaratory judgment action in the federal court in the District of Columbia. The purpose of the preclearance requirement, as explained by the Supreme Court, was “to shift the advantages of time and inertia from the perpetrators of evil (of discrimination in voting) to its victims.”¹² The majority of the Supreme Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found that it was justified by the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”¹³

⁷ 383 U.S. 301 (1966).

⁸ *Id.* at 328 (Black, J., dissenting).

⁹ 77 S.D. Op. Att’y Gen. 175 (1977).

¹⁰ 42 U.S.C. § 1973c (2000).

¹¹ *Beer v. United States*, 425 U.S. 130, 151 (1976).

¹² *Katzenbach*, 383 U.S. at 328.

¹³ *Id.* at 309.

The 1975 amendments extended the protections of the act to “language minorities,” defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage.¹⁴ The amendments also expanded the geographic coverage of Section 5 by including in the definition of a “test or device” the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population was comprised of a single-language minority group.¹⁵ As a result of this new definition, the preclearance requirement was extended to counties in California, Florida, Michigan, New Hampshire, New York, South Dakota, and the state of Texas.¹⁶

The 1975 amendments also required certain states and political subdivisions to provide voting materials in languages other than English.¹⁷ While there are several tests for “coverage,” the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah and Washington.¹⁸

Indians, as a “cognizable racial groups,” were undoubtedly already covered by the permanent provisions of the 1965 Voting Rights Act, which prohibited discrimination on the basis of “race or color.”¹⁹ In a 1955 decision, for example, the Supreme Court acknowledged that an Indian would be entitled to the protection of a state law prohibiting discrimination on the basis of “race or color.”²⁰ In a variety of contexts, courts have held that Indians were a racial group entitled to the protection of the constitution and federal civil rights laws, e.g., in legislative redistricting,²¹ in jury selection,²² in employment,²³ in public education,²⁴ in access to services,²⁵ etc. In addition, a

¹⁴ 42 U.S.C. § 1973aa-1a(e) (2000).

¹⁵ S. REP. NO. 94-295, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 775.

¹⁶ 28 C.F.R. pt. 51, app. (1990).

¹⁷ 42 U.S.C. § 1973aa-1a.

¹⁸ 28 C.F.R. pt. 55, app (1990).

¹⁹ 42 U.S.C. § 1973.

²⁰ *Rice v. Sioux City Mem'l Part Cemetery*, 349 U.S. 70, 76 (1955).

²¹ *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972); *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975).

²² *United States v. Iron Moccasin*, 878 F. 2d 226 (8th Cir. 1989); *United States v. Raszkievicz*, 169 F. 3d 459, 464 (7th Cir. 1999).

²³ *Poolaw v. City of Anadarko, Okla.*, 660 F. 2d 459 (10th Cir. 1981).

²⁴ *Natonabah v. Bd. Of Educ.*, 355 F. Supp. 716, 724 (D.N. Mex. 1973).

number of jurisdictions that had substantial Native American populations were covered by the special preclearance provisions of the 1965 Act, including the state of Alaska and four counties in Arizona.²⁶ The 1975 amendments, however, expanded the geographic reach of Section 5 and made the coverage of Indians explicit.

C. The Reasons for Extending the Coverage

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, said that members of language minority groups, including American Indians, related “instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation.”²⁷ According to Rodino, “(t)he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas.”²⁸ Rep. Robert Drinan noted similarly during the floor debate that there was “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.”²⁹ House members also took note of various court decisions documenting voting discrimination against Native American, including *Klahr v. Williams*,³⁰ *Oregon v. Mitchell*,³¹ and *Goodluck v. Apache County*.³²

The House report that accompanied the 1975 amendments of the Act found “a close and direct correlation between high illiteracy among (language minority) groups and low voter participation.”³³ The illiteracy rate among American Indians was 15.5 percent, compared to a nationwide illiteracy rate of only 4.5 percent for Anglos. The report concluded that these

²⁵ *Scott v. Eversole Mortuary*, 522 F. 2d 1110, 1112 (9th Cir. 1975).

²⁶ Three counties in Arizona—Apache, Navajo, and Coconino—were allowed to “bail out” from Section 5 coverage after the court concluded that the state’s literacy test had not been discriminatorily applied against American Indians. *Apache County v. United States*, 256 F. Supp. 903, 913 (D.D.C. 1966). The state of Alaska, with its substantial Alaskan Native population, was also removed to bail out and for similar reasons. *Alaska v. United States*, No. 101-66 (D.D.C. Aug. 17, 1966). As a result of subsequent amendments to the act, both Alaska and Arizona were “recaptured” by Section 5.

²⁷ 121 CONG. REC. 16,244 (1975) (statement of Rep. Rodino).

²⁸ *Id.*

²⁹ 121 CONG. REC. 16,262 (1975) (statement of Rep. Drinan).

³⁰ *Klahr*, 339 F. Supp. At 927 (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength), cited in Extension of the Voting Rights Act: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Judiciary Comm. 94th Cong., app. at 1225-30 (1975) (hereinafter 1975 House Hearings).

³¹ 400 U.S. 112, 147 (1970) (Douglas, J., concurring) (noting that literacy “tests have been used at times as a discriminatory weapon against ... American Indians”), cited in 121 CONG. REC. 16,245 (1975) (statement of Rep. Edwards).

³² *Goodluck*, 417 F. Supp. At 14 (finding that a county redistricting plan had been adopted to diminish Indian voting strength, cited in 1975 House Hearings, supra note 27, app. at 1225-30; 121 CONG. REC. 16,250 (1975) (statement of Rep. Young).

³³ H. REP. NO. 94-196, at 30 (1975).

disparities were “the product of the failure of state and local officials to offer equal educational opportunities to members of minority groups.”³⁴

During debate in the Senate, Senator William Scott read into the record a report prepared by the Library of Congress, “Prejudice and Discrimination in American History,” 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.³⁵

Discrimination against Indians has not only been severe, it has been unique. Even during the days of slavery, blacks, who were regarded as valuable property, were never subjected to the kind of extermination policies that were often visited upon tribal members in the West.³⁶

The first laws enacted by the Dakota Territory involving Indians were distinctly racist. They praised the “indomitable spirit of the Anglo-Saxon,” and described Indians as “red children” and the “poor child” of the prairie.³⁷ Four years later, the legislature described Indians as the “revengeful and murderous savage.”³⁸

Territorial laws (and later state laws) restricted voting and office-holding to free white males and citizens of the United States.³⁹ Indians who sustained tribal relations, received support from the government, or held untaxable land were prohibited from voting in any state election.⁴⁰ The establishment of precincts on Indian reservations was forbidden,⁴¹ and as election judges and clerks were required to have the “qualifications of electors,” Indians were effectively denied the right to serve as election officials.⁴²

³⁴ *Id.*

³⁵ 121 CONG. REC. 13,603 (1975) (statement of Sen. Scott).

³⁶ This bleak chapter in American history has been recounted in many places, including in Dee Alexander Brown’s *Bury My Heart at Wounded Knee: An Indian History of the American West* (1970).

³⁷ 1862 Dakota Terr. Laws Preface.

³⁸ Memorial and Joint Resolution Regarding the Appointment of an Indian Agent, ch. 38, 1866 Dakota Terr. Laws 551.

³⁹ *See, e.g.*, Act of Jan. 14, 1864, ch. 19, 1864 Dakota Terr. Laws 51; Civil Code § 26, 1866 Dakota Terr. Laws 1, 4 (providing that Indians cannot vote or hold office); Act of Mar. 8, 1890, ch. 45, 1890 S.D. Laws 118.

⁴⁰ Act of Mar. 8, 1890, ch. 45, 1890 S.D. Laws 118.

⁴¹ Act of Mar. 12, 1895, ch. 84, 1895 Dakota Terr. Laws 88.

⁴² Dakota Terr. Comp. L. §§ 1442-1443 (1887).

South Dakota discriminated against Indians in a variety of other ways. Indians were prohibited from entering ceded lands without a permit.⁴³ It was a crime to harbor or keep on one's premises or within any village settlement of white people any reservation Indians "who have not adopted the manners and habits of civilized life."⁴⁴

Jury service was restricted to "free white males."⁴⁵ The intermarriage of white persons with persons of color" was prohibited.⁴⁶ Further, it was a crime to provide instruction in any language other than English.⁴⁷

South Dakota also played a leading role in breaking various treaties between tribes and the United States. The legislature sent a stream of resolutions and memorials to Congress urging it to extinguish Indian title to land and remove the Indians to make way for white settlement. In 1862, it asked Congress to extinguish title "to the country now claimed and occupied by the Brule Sioux Indians,"⁴⁸ and to extinguish title to land occupied by the Chippewa Indians.⁴⁹ Four years later, it requested the Secretary of War to establish a military post to protect "the colonization of the Black Hills."⁵⁰ In 1868, it proposed the removal of Dakota Indians and exclusion from "habitation of the Indians that portion of Dakota known as the Black Hills."⁵¹ On December 31, 1870, it renewed its request for the removal of Chippewa Indians from ceded lands.⁵² In 1873, it again asked Congress to open Indian lands, including the Black Hills, to white settlement.⁵³ As a result of the intense pressure from the territorial government and white miners and settlers, and the United States' capitulation to it, the Black Hills and other traditional tribal lands were finally taken from the Indians.⁵⁴ The Supreme Court, commenting on the expropriation of the Black Hills from the Sioux in 1877, said that "(a) more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history."⁵⁵ Shortly after the

⁴³ Act to Prevent Indians From Trespassing on Ceded Lands, ch. 46, 1862 Dakota Terr. Laws 319.

⁴⁴ Act Prohibiting the Harboring of Indians Within the Organized Counties, ch. 19, 1866 Dakota Terr. Laws 482.

⁴⁵ Act Respecting Jurors, Ch. 52, 1862 Dakota Terr. Laws 374; *see also* Act of Mar. 5, 1901, Ch. 168, 1901 S.D. Laws 270 (providing for the selection of jurors from tax lists).

⁴⁶ Act Regulating Marriages, Ch. 59, 1862 Dakota Terr. Laws 390; *see also* Act of Mar 14, 1913, Ch. 226, 1913 S.D. Laws 406 (prohibiting the "intermarriage, or illicit cohabitation" of members of the white and colored races).

⁴⁷ Act of Mar. 11, 1921, ch. 203, 1921 S.D. Laws 307.

⁴⁸ Memorial and Joint Resolution Regarding the Brule Sioux Indians, ch. 99, 1862 Dakota Terr. Laws 503.

⁴⁹ Memorial to Congress Regarding the Chippewa Indians, ch. 100, 1862 Dakota Terr. Laws 505.

⁵⁰ Memorial to the Secretary of War, ch. 50, 1866 Dakota Terr. Laws 566.

⁵¹ Memorial and Joint Resolution Regarding Indian Affairs, 1867 Dakota Terr. Laws 275.

⁵² Memorial to the President, 1870 Dakota Terr. Laws 585.

⁵³ Memorial to Congress, 1872 Dakota Terr. Laws 204.

⁵⁴ BROWN, *supra* note 33, at 269.

⁵⁵ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 387 (1980).

turn of the century, South Dakota, by then a state, asked Congress to open portions of the Rosebud Reservation to white settlement.⁵⁶

Despite passage of the Indian Citizenship Act of 1924,⁵⁷ which granted full rights of citizenship to Indians, South Dakota officially excluded Indians from voting and holding office until the 1940's.⁵⁸ Even after the repeal of state law denying Indians the right to vote, as late as 1975, the state prohibited Indians from voting in elections in counties that were "unorganized" under state law.⁵⁹ The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of the unorganized counties from holding county office until as late as 1980.⁶⁰

For most of the Twentieth Century, voters were required to register in person at the office of the county auditor.⁶¹ Getting to the county seat was a hardship for Indians who lacked transportation, particularly for those in unorganized counties who were required to travel to another county to register. Moreover, state law did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities.⁶² There was one exception, however. State law required the tax assessor to register property owners in the course of assessing the value of their land. Thus, taxpayers were automatically registered to vote, while non-taxpayers, many of whom were Indians, were required to make the trip to the courthouse to register in person.⁶³ Mail-in registration was not fully implemented in South Dakota until 1973.⁶⁴

D. Depressed Socioeconomic Status and Reduced Political Participation

One of the many legacies of discrimination against Indians is a severely depressed socioeconomic status. According to the 2000 Census, the unemployment rate for Indians in South Dakota was 23.6 percent, compared to 3.2 percent for whites.⁶⁵ Unemployment rates on the reservations were even higher. In 1997, the unemployment rate on the Cheyenne River

⁵⁶ House Joint Resolution 6, Ch. 147, 1901 S.D. Laws 248.

⁵⁷ 8 U.S.C. § 1401(a)(2)(2000).

⁵⁸ *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F. 2d 469, 474 (8th Cir. 1986).

⁵⁹ *Little Thunder v. South Dakota*, 518 F. 2d 1253, 1255-57 (8th Cir. 1975).

⁶⁰ *United States v. South Dakota*, 636 F. 2d 241, 244-45 (8th Cir. 1980).

⁶¹ S.D.CODIFIED LAWS §§ 16.0701-.0706 (Michie 1939).

⁶² 1963-1964 S.D. ATT'Y GEN. BIENNIAL REP. 341.

⁶³ *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1024 (D.S.D 2004).

⁶⁴ Act of Mar. 27, 1973, Ch. 70, 1973 S.D. Laws 111.

⁶⁵ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SOUTH DAKOTA: 2000: CENSUS 2000 SUMMARY FILE 3 (2002) (hereinafter U.S. CENSUS SUMMARY FILE 3).

Sioux Reservation was 80 percent. At the Standing Rock Indian Reservation it was 74 percent.⁶⁶ The average life expectancy of Indians is shorter than that of other Americans. According to a report drafted by the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, “Indian men in South Dakota ... usually live only into their mid-50’s.”⁶⁷ Infant mortality in Indian Country “is double the national average.”⁶⁸

Native Americans experience a poverty rate that is five times the poverty rate for whites. The 2000 Census reported the 48.1 percent of Indians in South Dakota were living below the poverty line, compared to 9.7 percent of whites. Sixty-one percent of Native American households received incomes below \$20,000, compared to 24.4 percent of white households. The per capita income of Indians was \$6,799 compared to \$28,837 for whites.⁶⁹

Of Native Americans twenty-five years of age and over, 29 percent have not finished high school, while 14 percent of whites are without a high school diploma. The drop-out rate among Indians aged sixteen through nineteen is 24 percent, four times the drop-out rate for whites. Nearly one-fourth of Indian households live in crowded conditions, compared to 1.6 percent for whites. Approximately 21 percent of Indian households lack telephones, compared to 1.2 percent of white households. Native American households are three times as likely as white households to be without access to vehicles; 17.9 percent of Native American households are without access to vehicles versus 5.4 percent of white households.⁷⁰

The link between depressed socioeconomic status and reduced political participation is direct. As the Supreme Court has recognized, “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.”⁷¹ Numerous appellate and trial court decisions, including those from Indian country, are to the same effect.

In a case from South Dakota involving the Sisseton Independent School District, the U.S. Court of Appeals for the Eighth Circuit concluded that “(l)ow political participation is one of the effects of past discrimination.”⁷² Similarly, in a case involving tribal members in Thurston County, Nebraska, the court held that “disparate socio-economic status is causally connected to Native Americans’ depressed level of political participation.”⁷³ Finally, the Court of Appeals for

⁶⁶ 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 (2000) (hereinafter S.D. ADVISORY COMM. REPORT (2000)).

⁶⁷ *Id.*

⁶⁸ *Id.* at 6–7.

⁶⁹ U.S. CENSUS SUMMARY FILE 3, *supra* note 62.

⁷⁰ *Id.*

⁷¹ *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986).

⁷² *Buckanaga*, 804 F. 2d at 475.

⁷³ *Stabler v. County of Thurston*, 129 F. 3d 1015, 1023 (8th Cir. 1997).

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.”⁷⁴

Given the socioeconomic status of Indians in South Dakota, it is not surprising that their voter registration and political participation have been severely depressed. As late as 1985, only 9.9 percent of Indians in the state were registered to vote.⁷⁵ The South Dakota Advisory Committee to the U.S. Commission on Civil Rights soberly concluded in a 2000 report that:

For the most part, Native Americans are very much separate and unequal members of society ... (who) do not fully participate in local, State and Federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality.⁷⁶

E. Indian Voting Rights Litigation

Despite the application of the Voting Rights Act to Indians, both in its enactment in 1965 and extension in 1975, relatively little litigation to enforce the Act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently. Indian country was largely bypassed by the extensive voting rights litigation campaign that was waged elsewhere, particularly in the South, after the amendment of Section 2 of the Voting Rights Act in 1982 to incorporate a discriminatory “results” standard.⁷⁷

Section 2, one of the original provisions of the 1965 Act, was a permanent, nationwide prohibition on the use of voting practices or procedures that “deny or abridge” the right to vote on the basis of race or color. The Supreme Court subsequently held in *Mobile v. Bolden*⁷⁸ that proof of a discriminatory purpose, as was the case for a constitutional violation, was also required for a violation of Section 2. Two years later, Congress responded to *Mobile v. Bolden* by amending Section 2 and dispensing with the requirement of proving that a challenged practice was enacted, or was being maintained, with a discriminatory purpose.⁷⁹ Congress also made explicit that Section 2 protected the equal right of minorities “to elect representatives of their choice.”

⁷⁴ *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000); accord, *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.”).

⁷⁵ *Buckanaga*, 804 F.2d at 474.

⁷⁶ S.D. ADVISORY COMM. REPORT (2000), *supra* note 63, at 38-39.

⁷⁷ See 42 U.S.C. § 1973 (2000).

⁷⁸ 446 U.S. 55 (1980).

⁷⁹ S. REP. NO. 97-417, at 36 (1982) U.S.C.C.A.N. 177, 214.

The Supreme Court construed Section 2 for the first time in *Thornburg v. Gingles*,⁸⁰ and simplified the test for proving a violation of the statute by identifying three factors as most probative of minority vote dilution: geographic compactness, political cohesion, and legally significant white bloc voting.⁸¹ The ultimate test under Section 2 is whether a challenged practice, based on the totality of circumstances, “interacts with social and historical conditions to create an inequality in the opportunities enjoyed by (minority) and white voters.”⁸² The amendment of Section 2 and *Gingles* were critical in facilitating what has accurately been described as a “quiet revolution” in minority voting rights and office holding.⁸³

The lack of enforcement of the Voting Rights Act in Indian country was the result of a combination of factors. They included 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, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments.

The first challenge under amended Section 2 in South Dakota was brought in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall Counties. Represented by the Native American Rights Fund, they claimed that the at-large method of electing members of the board of education of the Sisseton Independent School District diluted Indian voting strength. The trial court dismissed the complaint, but the Eighth Circuit reversed. It held that the trial court failed to consider “substantial evidence . . . that voting in the District was polarized along racial lines.”⁸⁴ The trial court had also failed to discuss the “substantial” evidence of discrimination against Indians in voting and office holding, the “substantial evidence regarding the present social and economic disparities between Indians and whites,”⁸⁵ the discriminatory impact of staggered terms of office and apportioning “seats between rural and urban members on the basis of registered voters”⁸⁶ which underrepresented Indians, and “the presence of only two

⁸⁰ 478 U.S. 30 (1986).

⁸¹ *Id.* at 50–51.

⁸² *Id.* at 47; *accord* *Johnson v. DeGrandy*, 512 U.S. 997, 1012 (1994).

⁸³ *See e.g.* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

⁸⁴ *Buckanaga*, 804 F.2d at 473.

⁸⁵ *Id.* at 474.

⁸⁶ *Id.* at 475.

polling places.”⁸⁷ On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members.⁸⁸

In 1986, Alberta Black Bull and other Indian residents of the Cheyenne River Sioux Reservation brought a successful Section 2 suit against Ziebach County because of its failure to provide sufficient polling places for school district elections.⁸⁹ The same year, Indian plaintiffs on the reservation secured an order requiring the auditor of Dewey County to provide Indians additional voter registration cards and extend the deadline for voter registration.⁹⁰

Some thirteen years later, in 1999, the United States sued officials in Day County for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several non-contiguous pieces of land owned by whites could vote, while residents of the remaining 87 percent of the land around the two lakes, which was owned by the Sisseton-Wahpeton Sioux Tribe and about two hundred tribal members, were excluded from the electorate. In an agreement settling the litigation, local officials admitted that Indians had been unlawfully denied the right to vote, and agreed upon a new sanitation district that included the Indian owned land around the two lakes.⁹¹

Steven Emery, Rocky LeCompte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU’s Voting Rights Project, filed suit in 2000 challenging the state’s 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff reports of the commission concluded that “(w)ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted.”⁹² The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd and Bennett Counties.⁹³ Under the existing plan, there were twenty-eight legislative districts, all of which were majority white and none of which had ever elected an Indians.⁹⁴ Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said that the plan gerrymandered the Rosebud and Pine Ridge Reservations by “divid(ing them) into three legislative districts,

⁸⁷ *Id.* at 476.

⁸⁸ See Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 200 (1991); see also *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 872, 874 (M.D. Ala. 1988) (discussing cumulative voting).

⁸⁹ *Black Bull v. Dupree Sch. Dist.*, No. 86-3012 (D.S.D. May 14, 1986).

⁹⁰ *Fiddler v. Sieker*, No. 85-3050 (D.S.D. Oct. 24, 1986).

⁹¹ *United States v. Day County*, S.D., No. 99-1024 (D.S.D. June 16, 2000).

⁹² Task Force on Indian-State Government Relations, *Legislative Apportionment and Indian Voter Potential* 17 (1974).

⁹³ *Id.* at 25.

⁹⁴ *Bone Shirt*, 336 F. Supp.2d at 980.

effectively neutralizing the Indian vote in that area.”⁹⁵ The legislature, however, ignored the task force’s recommendation. According to Short Bull, “the state representatives and senators felt it was a political hot potato ... (T)his was just too pro-Indian to take as an item of action.”⁹⁶

Prior to the 1980s round of redistricting, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The committee issued a report in which it said that the existing districts “inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district.”⁹⁷ The Department of Justice, pursuant to its oversight under Section 5, advised the state that it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable and, in 1981, drew a redistricting plan creating for the first time in the state’s history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.⁹⁸ Thomas Short Bull, an early proponent of equal voting rights for Indians, ran for the state Senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state’s upper chamber.

The South Dakota legislature adopted a new redistricting plan in 1991.⁹⁹ The plan divided the state into thirty-five districts and provided, with one exception, that each district would be entitled to one Senate member and two House members elected at-large from within the district. The exception was new House District 28. The 1991 legislation provided that “in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts.”¹⁰⁰ District 28A consisted of Dewey and Ziebach counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B consisted of Harding and Perkins Counties and portions of Corson and Butte counties. According to 1990 Census data, Indians were 60 percent of the voting age population (VAP) of House district 28A, and less than 4 percent of the VAP of House District 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the House to run in District 28 at-large.¹⁰¹ Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the

⁹⁵ *Id.* at 981.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Bone Shirt*, 336 F. Supp. 2d at 981.

⁹⁹ Act to Redistrict the Legislature, ch.1, 1991 S.D. Laws 1st Spec. Sess. 1 (codified as amended at S.D. CODIFIED LAWS §§ 2-2-24 through 2-2-31 (Michie 2000)).

¹⁰⁰ *Id.* § 5, 1991 S.D. Laws 1st Spec. Sess. 1, 5.

¹⁰¹ Act to Eliminate the Single-Member House Districts in District 28, Ch. 21, 1996 S.D. Laws 45 (amending S.D. CODIFIED LAWS § 2-2-28 (Michie 2000)).

Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.¹⁰² The reconstituted House District 28 contained an Indian VAP of 29 percent. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed that the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota Constitution. The state constitution provided that:

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.¹⁰³

The constitution thus contained both an affirmative mandate and an implied prohibition. It mandated reapportionment in 1983, 1991, and in every tenth year thereafter, and it also prohibited all interstitial reapportionment. The South Dakota Supreme Court had expressly held that “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration.”¹⁰⁴ Any reapportionment that occurred outside of the authority granted by the state constitution was therefore invalid as a matter of state law.¹⁰⁵

Pronouncements by the South Dakota Legislative Research Council were to the same effect. According to a 1995 memorandum prepared by the council, “(i)n the absence of a successful legal challenge, Article III, section 5 of the South Dakota Constitution precludes any redistricting before 2001.”¹⁰⁶ In another memorandum prepared in 1998, the council reiterated that “(u)nder the provisions of Article III, section 5, the legislature is, however, restricted to redistricting only once every ten years.”¹⁰⁷ Despite the prohibitions of the state constitution and the views of the

¹⁰² House State Affairs Comm., Minutes 5 (Jan. 29, 1996).

¹⁰³ S.D. CONST. Art. III, § 5.

¹⁰⁴ *In re Legislative Reapportionment*, 246 N.W. 295, 297 (S.D. 1933).

¹⁰⁵ *In re State Census*, 62 N.W. 129, 130 (S.D. 1895). Other states have similar constitutional provisions, and courts have interpreted them in the same way. See, e.g. *Exon v. Tiemann*, 279 F. Supp. 603, 608 (D. Neb. 1967) (per curiam) (three judge court) (interpreting the Nebraska Constitution); *Legislature of Cal. v. Deukmejian*, 669 P.2d 17 (Cal. 1983) (per curiam); *In re Interrogatories*, 536 P.2d 308 (Colo. 1975).

¹⁰⁶ South Dakota Legislative Research Council, Issue Memorandum 95-36, Majority-Minority Districts: Legislative Reapportionment After *Miller v. Johnson* 6 (1995).

¹⁰⁷ South Dakota Legislative Research Council, Issue Memorandum 98-12, Comparison of Single Member and Multiple Member House Districts 5 (1998).

research council, the legislature adopted the mid-census plan abolishing majority Indian District 28A.

Dr. Steven Cole, an expert witness for the *Emery* plaintiffs, analyzed the six legislative contests involving Indian and non-Indian candidates in District 28 held under the 1991 plan between 1992-1994, to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81 percent, while whites voted for the white candidates at an average rate of 93 percent. In all six of the contests, the candidate preferred by Indians was defeated.¹⁰⁸

Dr. Cole also analyzed one countywide contest involving an Indian candidate, the 1992 general election for treasurer of Dewey County. Indian cohesion was 100 percent, white cohesion was 95 percent, and again the Indian-preferred candidate was defeated.¹⁰⁹

There were five white-white legislative contests from 1992-1998, four of which were head-to-head contests, and one of which was a vote-for-two contest. All of the contests showed significant levels of polarized voting. For the six seats filled in the five contests, the candidates preferred by Indians lost four times. Notably, the Indian-preferred white candidate(s) won only in majority Indian District 28A. Schrempp, the white candidate, was preferred by Indian voters in District 28A in the 1992 and 1996 general elections, and won both times. In the 1998 general election, however, he ran for state Senate in District 28. Although he was again preferred by Indian voters, running in a district in which Indians were 29 percent of the VAP, he lost. This sequence of elections demonstrates in an obvious way the manner in which at-large elections in District 28 dilute or submerge the voting strength of Indian voters.¹¹⁰

White cohesion also fluctuated widely depending on whether or not an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68 percent. In the Indian-white legislative contests, the average level of white cohesion jumped to 94 percent.¹¹¹ This phenomenon of increased white cohesion to defeat minority candidates has been called “targeting,” and illustrates the way in which majority white districts operate to dilute minority voting strength.¹¹²

¹⁰⁸ *Emery v. Hunt*, No. 00-3008 (D.S.D. 2000), Report of Steven P. Cole, at tbls. 1 & 2 (hereinafter Report of Steven Cole). Dr. Cole used two standard techniques for determining the existence of cohesion and racial bloc voting, bivariate ecological regression analysis (BERA) and homogeneous precinct analysis.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at tbl. 3.

¹¹¹ *Id.* at tbls. 1 & 3.

¹¹² See *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (“When white bloc voting is ‘targeted’ against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race.”); *RWTAAAC v. Sundquist*, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998) (same), *aff’d*, 209 F.3d 835 (6th Cir. 2000).

The vote-for-two election for the House in 1998, the first such election held after the repeal of District 28A, also showed a remarkable divergence between Indian and white voters. The candidate with the least amount of Indian support (Wetz, with 8 percent of the Indian vote) got the highest amount of support from white voters (70 percent). The candidate with the next lowest support from Indian voters (Klaudt) received the second highest white support.¹¹³

The plaintiffs' Section 2 claim was strong. They met the basic requirements set out in *Gingles* for proof of vote dilution: they were sufficiently geographically compact to constitute a majority in a single member district; they were politically cohesive; and whites voted as a bloc usually to defeat the candidates of their choice. In addition, there were present other "totality of circumstances" factors that were probative of vote dilution identified in *Gingles* and the Senate report that accompanied the 1982 amendments. Indians had a depressed socioeconomic status. There was an extensive history of discrimination in the state, including discrimination that impeded the ability of Indians to register and otherwise participate in the political process. The history of Indian and white relations in South Dakota was, in the words of the South Dakota Advisory Committee, one of "broken treaties, and policies aimed at assimilation and acculturation that severed Indians of their language, customs, and beliefs."¹¹⁴ Voting was polarized. District 28 was also large, *i.e.*, twice the size of District 28A, making it much more difficult for poorly financed Indian candidates to campaign.

But before the Section 2 vote dilution claim could be heard, the district court certified the state law question to the South Dakota Supreme Court. That court accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits."¹¹⁵ It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

Another Section 2 case was filed in March 2002 by Indian plaintiffs against the at-large method of electing the board of education of the Wagner Community School District in Charles Mix County. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003.¹¹⁶ At the next election John Sully, an Indian, was elected to the board of education. A similar Section 2 suit against the city of Martin is pending.¹¹⁷

One of the most blatant schemes to disfranchise Indian voters was employed in Buffalo County. The population of the county was approximately 2,000 people, 83 percent of whom were Indian,

¹¹³ Report of Steven Cole, *supra* note 105, at tbl. 3.

¹¹⁴ S.D. ADVISORY COMM. REPORT (2000), *supra* note 63, at ch. 3.

¹¹⁵ *Emery v. Hunt*, 615 N.W.2d 590, 597 (S.D. 2000).

¹¹⁶ *Weddell v. Wagner Cmty. Sch. Dist.*, No. 02-4056 (D.S.D. Mar. 18, 2003).

¹¹⁷ *Wilcox v. City of Martin*, No. 02-5021 (D.S.D.).

and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population—some 1,500 people—were packed in one district. Whites, though only 17 percent of the population, controlled the remaining two districts, and thus the county government. The system was not only in violation of one-person, one-vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government. Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted that its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.¹¹⁸

F. The Unsubmitted Voting Changes

A number of the voting changes which South Dakota enacted after it became covered by Section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single-shot voting, or “concentrating on a single candidate.”¹¹⁹ Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States Senate, House of Representatives, and governor.¹²⁰ A majority vote requirement can “significantly” decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections.¹²¹ Still another voting change the state failed to submit was its 2001 legislative redistricting plan.

The 2001 plan divided the state into thirty-five legislative districts, each of which elected one senator and two members of the House of Representatives.¹²² No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rocky Indian Reservation. The boundaries of the district that included Shannon and Todd counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87 percent of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90 percent of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more “packed,” or over-

¹¹⁸ *Kirkie v. Buffalo County*, S.D., No. 03-3011 (D.S.D. Feb. 12, 2004).

¹¹⁹ *Rogers v. Lodge*, 458 U.S. 613, 627 (1982).

¹²⁰ Act of July 1, 1985, ch. 110, 1985 S.D. Laws 295.

¹²¹ *City of Rome, Ga. v. United States*, 447 U.S. 156, 183-84 (1980).

¹²² S.D. CODIFIED LAWS § 2-2-34 (Michie 2001).

concentrated, in the new District 27 than under the 1991 plan. Had Indians been “unpacked,” they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring District 26 and 27 that would have retained District 27 as majority Indian and divided up District 26 into two House districts, one of which, District 26A, would have had an Indian majority. Bradford’s amendment was voted down fifty-one to sixteen.¹²³ Thomas Short Bull criticized the way in which District 27 had been drawn because there were “just too many Indians in that legislative district,” which he said diluted the Indian vote.¹²⁴ Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said that the plan “segregates Indians,” and denies them equal voting power.¹²⁵

Despite enacting these admitted changes in voting—a new legislative plan affecting Todd and Shannon counties, which were covered by Section 5—the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claim that the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice.

A three-judge court was convened to hear the plaintiffs’ Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd counties, there was no need to comply with Section 5. The three-judge court disagreed. It held that “demographic shifts render the new District 27 a change ‘in voting’ for the voters of Shannon and Todd counties that must be precleared under (Section) 5.”¹²⁶ The state submitted the plan to the attorney general, who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs’ Section 2 claim and, in a detailed 144-page opinion, invalidated the state’s 2001 legislative plan as diluting Indian voting strength. The court found that Indians were geographically compact and could constitute a majority in an additional House district in the area of Pine Ridge and Rosebud Indian Reservations. Indians were politically cohesive, as a significant number of Indians usually voted for the same candidates, shared common beliefs, ideals, and concerns, and had organized themselves politically and in other areas. The court also found that plaintiffs established the third *Gingles* factor, *i.e.*, that whites voted as a bloc usually to defeat the candidates favored by Indians.¹²⁷

¹²³ *Bone Shirt*, 336 F. Supp. 2d at 984.

¹²⁴ *Id.* at 985.

¹²⁵ *Id.*

¹²⁶ *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150, 1154 (D.S.D. 2002) (three-judge court).

¹²⁷ *Bone Shirt*, 336 F. Supp. 2d at 987-1017.

Turning to the totality of circumstances analysis required by Section 2, the court found there was “substantial evidence that South Dakota officially excluded Indians from voting and holding office.”¹²⁸ Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior “ranged from unhelpful to hostile.”¹²⁹ Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded, they have “intimidated Indian voters.”¹³⁰ According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were “part of an effort to create a racially hostile and polarized atmosphere. It’s based on negative stereotypes, and I think it’s a symbol of just how polarized politics are in the state in regard to Indians and non-Indians.”¹³¹

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed laws that added additional requirements to voting, including a law requiring photo identification at the polls.¹³² Representative Van Norman said that in passing the burdensome new photo requirement, “the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race.”¹³³ During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, “I, in my heart, feel that this bill ... will encourage those who we don’t particularly want to have in the system.” Alluding to the Indian voters, he said “I’m not sure we want that sort of person in the polling place.”¹³⁴ Bennett County did not comply with the provisions of the Voting Rights Act until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice.¹³⁵

The district court also found that “(n)umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice.”¹³⁶ Thomas Hennies, Chief of Police in Rapid City, has stated publicly that “I personally know that there is racism and there is discrimination and there are prejudices among all people and that they’re apparent in law enforcement.”¹³⁷ Don Holloway, the sheriff of

¹²⁸ *Id.* at 1019.

¹²⁹ *Id.* at 1025.

¹³⁰ *Id.* at 1026.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* (comments of Rep. Stanford Addelstein).

¹³⁵ *Id.* at 1028.

¹³⁶ *Id.* at 1030.

¹³⁷ *Id.*

Pennington County, concurred that prejudice and the perception of prejudice in the community were “true or accurate descriptions.”¹³⁸

The court concluded that “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.”¹³⁹ There was also “a significant lack of responsiveness on the part of elected officials to Indian concerns.”¹⁴⁰ Representative Van Norman noted that in the legislature any bill that has “(a)nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all.” “(W)hen it comes to issues of race or discrimination,” he said, “people don’t want to hear that.” One member of the legislature even accused Van Norman of “being racist” for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops.¹⁴¹

Indians in South Dakota, as found by the district court, “have also been subject to discrimination in lending.”¹⁴² Monica Drapeau, a business owner in Martin, said that she was unable to obtain a loan from the local Blackpipe State Bank, even though other banks in the state readily lent her money.¹⁴³ Blackpipe was later sued by the United States and agreed to end its policy of refusing to make secured loans subject to tribal court jurisdiction and agreed to pay \$125,000 to the victims of its lending policies.¹⁴⁴

Some of the most compelling testimony in the *Bone Shirt* case, and which was credited by the district court, came from tribal members who recounted “numerous incidents of being mistreated, embarrassed or humiliated by whites.”¹⁴⁵ Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact “that there might be some people who didn’t think well of people from the reservation.” When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, “somebody behind us said ... the Indians should go back to the reservation. And I mean I was fairly hurt by it ... it was just sort of a shock to me.” Meeks said that here is a “disconnect between Indians and non-Indians” in the state. “(W)hat most people don’t realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community ... (T)hen

¹³⁸ *Id.*

¹³⁹ *Id.* at 1037.

¹⁴⁰ *Id.* at 1046.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1031.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1032.

their ... reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don't like them and don't trust them.”¹⁴⁶

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome “in Sioux Falls and lot of the East River communities.” But in the towns bordering the reservations, the reception “was more hostile.” There, she ran into “this whole notion that ... Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that ... we don't pay property tax ... that we shouldn't be allowed (to run for office.)”¹⁴⁷ Such views were expressed by a member of the state legislature who said that he would be “leading the charge ... to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty and paying their fair share of the tax burden.”¹⁴⁸

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for “fun and games.” The mayor, however, “interviewed” Dillon in his office to see if he was “good enough” to be a friend of his son's. Dillon says that he flunked the interview. “I guess I didn't measure up because ... I was the only one that wasn't invited back to the house after football practice after that.” He found the experience to “pretty demoralizing.”¹⁴⁹

Monica Drapeau said that one of the reasons she didn't want to attend the public school in Winner was because of the racial tension that existed there. White students often called Indians “prairie niggers” and made other derogatory comments.¹⁵⁰

Arlene Brandis, a tribal member a Rosebud, remembers walking to and from school in Tripp County. “Cars would drive by and they would holler at us and call us names ... like dirty Indian, drunken Indian, and say why don't you go back to the reservation.”¹⁵¹

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bussed again to the high school for the afternoon session. The white students referred to Indian students as “GI's,” which stood for government issue. “I just withdrew. I had no friends at school. Most of the girls that I dormed with didn't finish high school ... I didn't associate with anybody,” Young said. Even today, Young has little contact with the white community. “I don't want to. I have no desire to open up my life or my children's life to any

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1035-36.

¹⁴⁸ *Id.* at 1046.

¹⁴⁹ *Id.* at 1032.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1033.

kind of discrimination or harsh treatment. Things are tough enough without inviting more.” Testifying in court was particularly difficult for her. “This was a big job for me to come here today ... I’m the only Indian woman in here, and I’m nervous. I’m very uncomfortable.”¹⁵²

The testimony of Young, Meeks, and the others illustrates the polarization that continues to exist between the Indian and white communities in South Dakota, which manifests itself in many ways, including in patterns of racially polarized voting.

The district court, based upon proof of the three *Gingles* factors and the totality of circumstances, concluded that the state’s legislative plan violated Section 2. Bryan Sells, the lead ACLU lawyer for the plaintiffs in *Bone Shirt*, said that “no impartial observer of the political process in South Dakota could reach a conclusion other than that of the district court, that the 2001 plan diluted Indian voting strength.”¹⁵³

As for the other six hundred odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, again represented by the ACLU’s Voting Rights Project, brought suit against the state in August 2002 to force it to comply with Section 5.¹⁵⁴ Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan “that will promptly bring the State into full compliance with its obligations under Section 5.”¹⁵⁵ The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Many jurisdictions in the south also failed to comply with Section 5 in the years following their coverage. But in none was the failure so deliberate and prolonged as in South Dakota.¹⁵⁶

G. The “Reservation” Defense

The state conceded in the lawsuit over the 1996 interim redistricting plan that Indians were not equal participants in elections in District 28, but argued that it was the “reservation system” and “not the multimember district which is the cause of (the) ‘problem’ identified by Plaintiffs.”¹⁵⁷ According to defendants, Indians’ loyalty was to tribal elections; they simply did not care about participating in elections run by the state. The argument overlooked the fact that the state historically denied Indians the opportunity to develop a “loyalty” to state elections. As the court

¹⁵² *Id.*

¹⁵³ Interview of Bryan Sells, staff attorney for ACLU’s Voting Rights Project, in Atlanta, Georgia, September 28, 2004.

¹⁵⁴ *Quick Bear Quiver v. Hazeltine*, No. 02-5069 (D.S.D. Dec. 27, 2002) (three-judge court).

¹⁵⁵ *Id.*, Slip Op. at 3.

¹⁵⁶ For a discussion of noncompliance with Section 5 by covered jurisdictions in the South, see Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 62-67 (1983).

¹⁵⁷ State Defendants’ Response at 26, *Emery v. Hunt*, 615 N.W.2d 590, 597 (S.D. 2000) (No. 00-3008).

concluded in *Bone Shirt*, “the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process.”¹⁵⁸

Factually, however, defendants were incorrect. While Indian political participation was undoubtedly depressed, Indians did care about state politics. Indians were candidates for the House and Senate in 1992 and 1994, and received overwhelming support from Indian voters. An Indian ran for Treasurer of Dewey County, in 1992 and received 100 percent of the Indian vote. Indians have also run for and been elected to other offices in District 28A. If Indians didn’t care about state politics, they would not have run for office, nor would they have supported the Indian candidates.

Undoubtedly, more Indians would have run for office had they believed that the state system was fair and provided them a realistic chance of being elected. As one court has explained, the lack of minority candidates “is a likely result of a racially discriminatory system.”¹⁵⁹ As another court has said, white bloc voting “undoubtedly discourages (minority) candidates because they face the certain prospect of defeat.”¹⁶⁰

The Cheyenne River Sioux have made a decision to conduct elections for the Tribe and the state at the same time, a measure designed to increase Indian participation in state elections. The Sisseton-Wahpeton litigation; the suits brought by Indians in 1986 protesting the failure of county officials to provide sufficient polling places for elections and voter registration cards; the challenge to the 1996 legislative redistricting; the Section 5 enforcement law suit; the challenge to the 2001 redistricting plan; and the dilution claims filed in Charles Mix County and the city of Martin, and Buffalo County further show that Indians do care about participating in state and local elections.

The state’s “reservation” defense was not new. An alleged lack of Indian interest in state elections was also advanced as a defense by South Dakota in the cases that involved denying residents of the unorganized counties the right to vote for officials in organized counties on the ground that a majority of the residents were “reservation Indians” who “do not share the same interest in county government as the residents of the organized counties.”¹⁶¹ The court rejected the defense, noting that a claim that a particular class of voters lacks 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 ‘(f)encing out’ from the franchise a sector of the population because of the way they may vote.” The court concluded that Indians residing on the reservation had a “substantial interest” in the choice of county officials, and held the state scheme unconstitutional.¹⁶²

¹⁵⁸ *Bone Shirt*, 336 F. Supp. 2d at 1022.

¹⁵⁹ *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984).

¹⁶⁰ *Hendrix v. McKinney*, 460 F. Supp. 626, 632 (M.D. Ala. 1978).

¹⁶¹ *Little Thunder*, 518 F.2d at 1255.

¹⁶² *Id.* at 1256.

In the second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an “Indian Reservation and hence have little, if any, interest in county government.”¹⁶³ Again, the court disagreed. It held that the “presumption” that Indians lacked a substantial interest in county elections “is not a reasonable one.”¹⁶⁴

The “reservation” defense has been raised—and rejected—in other voting cases brought by Native Americans in the West. In a suit by Crow and Northern Cheyenne in Big Horn County, Montana, the county argued that Indian dual sovereignty, not at-large voting, was the cause of reduced Indian participation in county politics. The court disagreed, noting that Indians had run for office in recent years and were as concerned about issues relating to their welfare as white voters. According to the court, “Racially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government.”¹⁶⁵

Similarly, in a case in Montezuma County, Colorado, the court found that Indian participation in elections was depressed and noted “the reticence of the Native American population of Montezuma County to integrate into the non-Indian population.”¹⁶⁶ But instead of counting this “reticence” against a finding of vote dilution, the court concluded that it was “an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past.”¹⁶⁷ Further, in a case from Montana involving Indians in Blaine County, most of whom resided on the Fort Belknap Reservation, the court rejected the argument that low voter participation was a defense to a vote dilution claim. The court reasoned that:

if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to discriminatory practices, which would perpetuate low voter turnout, and so on.¹⁶⁸

South Dakota’s claims that Indians didn’t care about state politics was familiar for another reason. It was virtually identical to the argument that whites in the South made in an attempt to defeat challenges brought by blacks to election systems that diluted black voting strength. “It’s not the method of elections,” they said in cases from Arkansas to Mississippi, “black voters are just apathetic.” But as the court held in a case from Marengo County, Alabama “(b)oth Congress

¹⁶³ *United States v. South Dakota*, 636 F.2d at 244.

¹⁶⁴ *Id.* at 245.

¹⁶⁵ *Windy Boy*, 647 F. Supp. at 1021.

¹⁶⁶ *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist.*, No. RE-1, 7 F. Supp. 2d 1152, 1161 (D. Colo. 1998).

¹⁶⁷ *Id.*

¹⁶⁸ *United States v. Blaine County, Mont.*, 363 F.3d 897, 911 (9th Cir. 2004).

and the courts have rejected efforts to blame reduced black participation on ‘apathy.’”¹⁶⁹ The real cause of the depressed level of political participation by blacks in Marengo County was:

racially polarized voting; a nearly complete absence of black elected officials; a history of pervasive discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged; polling practices that have impaired the ability of blacks to register and participate actively in the electoral process; election features that enhance the opportunity for dilution; and considerable unresponsiveness on the part of some public bodies.¹⁷⁰

The court could have been writing about Indians in South Dakota.

In a case from Mississippi, the court rejected a similar “apathy” defense. “Voter apathy,” it said, “is not a matter for judicial notice.”¹⁷¹ According to the court, “(t)he considerable evidence of the socioeconomic differences between black and white voters in Attala County argues against the ... reiteration that black voter apathy is the reason for generally lower black political participation.”¹⁷² It is convenient and reassuring for a jurisdiction to blame the victims of discrimination for their conditions, but it is not a defense to a challenge under Section 2.

The basic purpose of the Voting Rights Act is “to banish the blight of racial discrimination in voting.”¹⁷³ To argue, as South Dakota and other states have frequently done, that the depressed levels of minority political participation preclude a claim under Section 2 would reward jurisdictions with the worst records of discrimination by making them the most secure from challenge under the act. Congress could not have intended such an inappropriate result. In *Gingles*, the Supreme Court said that:

The essence of a (Section) 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.¹⁷⁴

There can be no serious doubt that social and historical conditions, whatever their causes, have created a condition under which at-large voting and other election practices dilute the voting strength of Indian voters.

¹⁶⁹ *United States v. Marengo County Comm’n*, 731 F. 2d 1546, 1568 (11th Cir. 1984).

¹⁷⁰ *Id.* at 1574.

¹⁷¹ *Teague v. Attala County, Miss.*, 92 F. 3d 283, 295 (5th Cir. 1996).

¹⁷² *Id.* at 294. Other courts have similarly rejected “apathy” as the cause for low minority voter political participation. *See, e.g., Whitfield v. Democratic Party of State of Ark.*, 890 F. 2d 1423, 1431 (8th Cir. 1989); *Kirksey v. Bd. Of Supervisors of Hinds County, Miss.*, 554 F. 2d 139, 145, & n. 13 (5th Cir. 1977) (rejecting the apathy defense and listing past discrimination, socioeconomic disparities, and bloc voting as causes for nonregistration).

¹⁷³ *Katzenbach*, 383 U.S. at 308.

¹⁷⁴ *Gingles*, 478 U.S. at 47.

H. Conclusion

The history of voting rights in South Dakota strongly supports the extension of the special provisions of the Voting Rights Act, and demonstrates the wisdom of Congress in making permanent and nationwide the basic guarantee of equal political participation contained in the Act. Unfortunately, however, the difficulties Indians experience in participating effectively in state and local politics and electing candidates of their choice are not restricted to South Dakota. A variety of common factors have coalesced to isolate Indian voters from the political mainstream throughout the West: past discrimination; polarized voting; overt hostility of white public officials; cultural and language barriers; a depressed socioeconomic status; inability to finance campaigns; difficulties in establishing coalitions with white voters; a lack of faith in the state system; and conflicts with non-Indians over issues such as water rights; taxation; and tribal jurisdiction.

President Nixon, in a special message to Congress in 1970, gave a grim assessment of the status of Native Americans in the United States:

The First Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.¹⁷⁵

Recent voting rights litigation in South Dakota and other western states shows that the conditions described by President Nixon have not been significantly ameliorated.

In a recent suit invalidating at-large elections in Montezuma County, Colorado, brought by residents of the Ute Mountain Ute Reservation, for example, the court found: a “history of discrimination—social, economic, and political, including official discrimination by the state and federal government;” a “strong” pattern of racially polarized voting; depressed Indian political participation; a “depressed socio-economic status of Native Americans;” and a lack of Indian elected officials.¹⁷⁶

In a case from Nebraska involving Omaha and Winnebago Indians, the court found “legally significant: white bloc voting, a “lack of success achieved by Native American candidates,” that Indians “bear the effects of social, economic, and educational discrimination,” that Indians had a

¹⁷⁵ President’s Special Message to Congress on Indian Affairs, PUB. PAPERS: RICHARD NIXON 564–76 (1970).

¹⁷⁶ *Cuthair*, 7 F. Supp. 2d at 1169–70.

“depressed level of political participation,” there was a lack of “interaction” between Indians and whites, and there was “overt and subtle discrimination in the community.”¹⁷⁷

In another case brought by residents of the Crow and Northern Cheyenne Reservations in Montana, the court found “recent interference with the right of Indians to vote,” “the polarized nature of campaigns,” “official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote,” “a strong desire on the part of some white citizens to keep Indians out of Big Horn county government,” polarized “voting patterns,” the continuing “effects on Indians of being frozen out of county government,” and a depressed socioeconomic status that makes it “more difficult for Indians to participate in the political process.”¹⁷⁸

As is apparent, the “inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination,” and which the Voting Rights Act was designed to eradicate, still persist throughout the West.¹⁷⁹ The Voting Rights Act, including the special preclearance requirement of Section 5, is still urgently needed in Indian Country. Of all the modern legislation enacted to redress the problems facing American Indians,¹⁸⁰ the Voting Rights Act provides the most effective means of advancing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

¹⁷⁷ *Stabler*, 129 F. 3d at 1023.

¹⁷⁸ *Windy Boy*, 647 F. Supp. at 1016, 1022.

¹⁷⁹ *Gingles*, 478 U.S. at 69.

¹⁸⁰ *See, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976); American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978); Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978).

II. Voting Rights, American Indians, and South Dakota

South Dakota is the homeland of the Lakota, Dakota and Nakoda People—the Great Sioux Nation. Today, there are nine federally recognized Indian tribes in South Dakota: the Cheyenne River Sioux; the Crow Creek Sioux; the Flandreau Santee Sioux; the Lower Brule Sioux; the Oglala Sioux; the Rosebud Sioux; the Sisseton-Wahpeton Oyate; the Standing Rock Sioux; and the Yankton Sioux. See Chart 1, “American Indian Tribes of South Dakota.” According to the 2000 Census, South Dakota is home to 63,652 American Indians, or 8.3 percent of the total state population.

In the 1879 trial of Chief Standing Bear, the federal courts were faced with the questions of whether American Indians were “persons” protected under the laws of the United States and whether Indians were “citizens” entitled to protection under the newly adopted 14th Amendment to the U.S. Constitution. In addressing the court, Standing Bear, who did not speak English, rose from his seat, extended his hand, and eloquently stated:

That hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be the same color as yours. I am a man. God made us both.

In his famous ruling, Judge Dundy declared that “[an] *Indian* is a person within the meaning of the laws of the United States ... [who has] the inalienable right to ‘life, liberty and the pursuit of happiness.’”¹⁸¹ But his opinion was silent on the question of whether Indians are “citizens” with all the privileges and immunities secured under the 14th Amendment, including the right to vote. Indeed, Indians were not given the right of citizenship until 1924 and the right to vote until decades later. Today, federal courtrooms in South Dakota remain a battleground for American Indians to vindicate their rights, including their right to vote.

Several conditions coincide to create a highly litigious and politically charged voting rights environment in South Dakota. First, two South Dakota counties with Indian populations of between 85 and 95 percent are “covered” jurisdictions under Section 5 of the Voting Rights Act (the “VRA”), and eighteen South Dakota counties are required to provide minority language assistance to American Indian voters under Section 203. Second, remarkable demographic shifts are occurring in South Dakota, particularly in the rural areas where the American Indian population is steadily growing and the white population is steadily declining. These shifts threaten the balance of power in the many local jurisdictions.

Third, South Dakota’s official defiance of the VRA, ignoring the preclearance requirement of Section 5 for more than twenty-five years (1977–2002), created a significant preclearance backlog¹⁸² and increased the level of animosity between Indians and non-Indians. Fourth, recent high-profile congressional races have split South Dakota’s voters down the middle, making the Indian voter bloc highly sought after and highly scrutinized because the Indian vote has been

¹⁸¹ *United States ex rel Standing Bear v. Crook*, 25 F.Cas. 695, 700-01 (D.NB 1879). A narrative summary of the trial proceedings is available at www.nebraskastudies.org/0600/stories/0601_0106.html

¹⁸² *Quiver v. Nelson*, 387 F.Supp.2d 1027 (D.SD 2005).

decisive in close elections. These four factors have united to catalyze South Dakota into a hotbed of voting rights litigation, with thirteen voting rights lawsuits initiated on behalf of South Dakota’s American Indian people in the past ten years.

Chart 1: American Indian Tribes of South Dakota

Tribe	Population (Enrolled Tribal Members)¹⁸³	Name of Federal Reservation (size in sq. mi.)¹⁸⁴	Counties (Indian majority counties in bold)
Cheyenne River Sioux	8,470	Cheyenne River Reservation (4,420)	Dewey, Ziebach
Crow Creek Sioux	2,225	Crow Creek Sioux Reservation (461)	Buffalo , Hyde, Hughes
Flandreau Santee	408	Flandreau Santee Sioux Reservation (4)	Moody
Lower Brule Sioux	1,353	Lower Brule Sioux Indian Reservation (390)	Lyman, Stanley
Oglala Sioux	15,507	Pine Ridge Reservation (3,471)*	Shannon, Bennett, Jackson
Rosebud Sioux	10,469	Rosebud Reservation (1,975)	Todd, Mellette, Tripp
Sisseton-Wahpeton Oyate	10,217	(Former) Lake Traverse Reservation (1,401) †	Roberts, Day, Codington, Marshall, Grant
Standing Rock Sioux	4,206 ¹⁸⁵	Standing Rock Reservation (2,534) †	Corson
Yankton Sioux	6,500	Yankton Reservation (684)	Charles Mix
* A small amount of the reservation land is in Nebraska. † A small amount of the reservation land is in North Dakota.			

¹⁸³ U.S. Census 2000 Data for Reservations and Other American Indian and Alaska Native Areas. See http://factfinder.census.gov/home/aian/sf1_sf3.html

¹⁸⁴ U.S. Census Bureau Geographic Comparison Table: “GCT-PH1. Population, Housing Units, Area and Density: 2000.” http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US46&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-8

¹⁸⁵ The population of the South Dakota reservation lands is 4,206. The population of the South Dakota and North Dakota lands combined is 8,250.

For American Indians, there is no one defining moment when the right to vote was secured. Rather, the struggle for that right has been “an extraordinarily prolonged, complex and piecemeal process that has yet to be fully resolved.”¹⁸⁶ While the barriers that keep Indians from voting today are not as obvious as those of the past, they do exist. Historical discrimination against Indians, which included voting-related discrimination, was severe and continues to color the attitudes of Indians and non-Indians alike. Below is an overview of the status of the VRA in South Dakota; identifies emerging trends in voting by American Indians in South Dakota; and chronicles the continuing attempts by state and local officials to suppress Indians’ right to vote.

A. In South Dakota, American Indians Have Had to Overcome Legal, Geographic, Social, and Economic Barriers in Order to Exercise Their Right to Vote

1. South Dakota’s Indians Are Separated And Isolated From the Rest of the State

To participate in the electoral process, Indians must overcome separation and isolation. The federal reservation system physically, socially, politically, and economically separates Indians from their white neighbors. Alfred Bone Shirt, lead plaintiff in the lawsuit concerning South Dakota’s compliance with Section 5, stated, “This is a system ... that has alienated my people from the political process for decades.”¹⁸⁷ In further testimony in the *Bone Shirt* case, Belva Black Lance from the Rosebud Indian Reservation recounted her experience attending school in Todd County, where Indian students were severely disciplined if they talked in their own language. In today’s world, she is afraid to leave the Reservation: “It seems like we left a safe area and go to an area where its prejudiced.”¹⁸⁸ Arlene Brandeis, an enrolled member of the Rosebud Sioux Tribe testified that while growing up in Winner, South Dakota, she experienced racial slurs and social segregation: “As we were walking down the street [from school], cars would drive by. They would holler at us and call us names. ‘Dirty Indians, drunken Indians. Why don’t you go back to the Reservation?’”¹⁸⁹ As of the 2000 Census, the vast majority of South Dakota’s Indians lived on the nine reservations within the state. Steve Emery, attorney for the Standing Rock tribe, described the separate status of Indians:

Out in the [South Dakota] counties close to and bordering the reservations, what is clear is that there are Indians and there are non-Indians. They only meet at

¹⁸⁶ Evans, Suzanne E. (University of California at Berkeley), “Voting,” Encyclopedia of North American Indians. Houghton Mifflin, College Division: (on-line) http://college.hmco.com/history/readerscomp/naind/html/na_041800_voting.htm. pp. 1–2.

¹⁸⁷ Ross, Denise. “Judge says South Dakota violates federal voting rights law.” *Rapid City Journal*. September 16, 2004.

¹⁸⁸ Ross, Denise. “Witnesses testify on racism at ACLU trial.” *Rapid City Journal*. April 15, 2004.

¹⁸⁹ *Id.*

school. You can't legislate societal change. Folks in those counties have never paid attention to the Voting Rights Act.¹⁹⁰

Distance from mainstream population centers, poor road conditions, and the distinctive Indian cultures and languages only heighten the separation and inequality experienced by American Indians. This has had an impact on voting. Even registering to vote has been difficult for American Indians. Since the 1950s, many counties limited access to voter registration. In the recent past, rural counties required in-person registration at the county clerk or auditor's office in the county courthouse, which most often was located in a non-Indian town bordering the reservation. For American Indians, registering or "signing up" has negative associations and is reminiscent of past abuses inherent in the reservations system. Under the early reservation system, the U.S. government took household censuses on the reservations. Indian families were "registered" or "enrolled" and subsequently assigned to specific reservation districts. The reservation system did not allow Indians mobility among communities, except with permission from the appropriate government agent. Furthermore, requiring an Indian to "sign here" is reminiscent of coerced land leases or sales, or even the forced removal of Indian children from their families. Children were taken by tribal police or government officials to far-away Indian boarding schools.¹⁹¹

These geographic barriers continue to the present day. In testimony before the National Commission on the Voting Rights Act, Raymond Uses the Knife explained: "When election time comes, people can't find rides. A lot of our people don't have transportation [and] ... it's a common fact that it costs \$50 just to get a ride to the hub of the reservation some places. Eighty miles from Bridger to the middle of the reservation, Promise, Black Foot also eighty miles to the central reservation. Lack of transportation, lack of transit systems, you name it."¹⁹²

2. South Dakota's Indians Are Among the Poorest Citizens of the United States

South Dakota's Indians are among the poorest of all U.S. citizens. As Chart 2 shows, all eight of South Dakota's majority-Indian counties are among the very poorest counties in the United States. Five of the ten poorest U.S. counties are majority-Indian counties in South Dakota. Buffalo County, with an 81.6 percent Indian population, was the poorest county in the country as of 2000. Shannon County, which has the highest percentage Indian population of any U.S. county at 94.2 percent, was the second-poorest county nationwide. In South Dakota, 13.3 percent of all families lived below the poverty line in 2000. In Todd County, which includes the Rosebud Sioux Reservation, 48.3 percent of families were living below the poverty line, and in Shannon County, which includes the Pine Ridge Reservation, 52.3 percent of families were

¹⁹⁰ Interview of Steve Emery, attorney for the Standing Rock Sioux Tribe of North and South Dakota and lead plaintiff in *Emery v. Hunt*. By Janine Pease in Rosebud, South Dakota, January 12, 2006.

¹⁹¹ Report of the Senate Democratic Policy Committee: "The American Indian Vote: Celebrating 80 Years of U.S. Citizenship," http://www.democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-108-2-283.

¹⁹² Testimony of Raymond Uses the Knife before the National Commission on the Voting Rights Act, South Dakota Hearing, Rapid City, South Dakota, September 9, 2005. Transcript pp. 55-56.

below the poverty line. Median household incomes in Shannon and Todd counties were \$20,916 and \$20,035, respectively, as compared to \$35,282 for South Dakota as a whole.

Chart 2: The Eight Majority-Indian Counties in South Dakota Listed in Order of Poverty Ranking Among All U.S. Counties, per Census 2000

County	Percent Indian	Poverty Ranking Among All U.S. Counties	Per-Capita Income	Percent Below Poverty Line
Buffalo*	81.6	1	\$5,213	
Shannon	94.2	2	\$6,286	52.3
Ziebach	72.3	4	\$7,463	49.9
Todd	85.6	5	\$7,714	48.3
Corson*	60.8	7	\$8,615	41.0
Dewey	74.2	11	\$9,251	33.6
Bennett	52.1	25	\$10,106	39.2
Mellette	52.4	32	\$10,362	35.8
<i>South Dakota</i>	8.3	<i>n/a</i>	\$17,562	13.3
<i>* Not covered by Sections 203 and 4(f)(4) (bilingual assistance provisions)</i>				

The Supreme Court “has recognized [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.”¹⁹³ As discussed below, even with the recent surge in Indian electoral participation, a racial gap remains and Indians have not been able to fully overcome the effects on participation of poor employment, low rates of educational attainment, and low income. Former state senator Thomas Short Bull noted a consistent reluctance among state legislators to address the serious and pressing needs of Indian people: “I noticed in the legislature, they would say ‘why can’t you people be like us, and pull yourself up by the bootstraps?’ But there is no means for Indian people to join mainstream America, if you are American Indian in South Dakota.”¹⁹⁴

3. South Dakota’s Indians Have High Rates of Illiteracy and Limited English Proficiency

Language can be one of the most significant barriers to voting. The primary language-related barriers faced by Indian voters in South Dakota are illiteracy and limited English proficiency. The illiteracy rate within South Dakota’s Indian population is very high, and many Indians still speak their Native languages. Significant numbers of Indians require assistance in the form of

¹⁹³ *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986).

¹⁹⁴ Interview of Thomas Short Bull, President of Oglala Lakota College, former South Dakota State Senator, and member of Oglala Sioux. By Janine Pease in Kyle, South Dakota, January 10, 2006.

translations of ballots and election materials published in the Lakota and Dakota languages as well as oral assistance in Lakota and Dakota.

a. The Language Assistance Provisions of the VRA Are Intended to Break Down Language-Related Barriers to Voting

Jurisdictions covered for a particular minority language under Sections 4(f)(4) or Section 203 are required to provide language assistance to voters from that minority language at all stages of the electoral process. Depending on the needs of the voters, the assistance can be written, oral, or both. Eighteen South Dakota counties meet the coverage criteria of either Section 203 or Section 4(f)(4), or both. See Table 4. The coverage criteria are summarized as follows: A county is covered by Section 203 if (1) more than 5 percent of its voting age citizens (“CVAP”) are limited English proficient (“LEP”) and belong to single minority language group, *or* (2) more than 10,000 individuals in the county’s CVAP are LEP and belong to a single language minority group, *or* (3) the county is within a Indian reservation where more than 5 percent of the Indian CVAP is LEP and belongs to a single language minority group, *and* (4) the illiteracy rate within the language minority group is higher than the national illiteracy rate.¹⁹⁵

The coverage formula for Section 4(f)(4) is based on whether the jurisdiction (the county, in the case of South Dakota), at the time of the 1972 Presidential election, maintained any English-only elections, had a CVAP of 5 percent or more from a minority language group, and where less than 50 percent of the eligible voters were registered or turned out to vote.¹⁹⁶

¹⁹⁵ For the purposes of the VRA, “illiteracy” means the failure to complete the 5th primary grade.

¹⁹⁶ 42 U.S.C. § 1973b – (b)

Chart 3: Eighteen South Dakota Counties Covered by Sections 203 and 4(f)(4)
(The Bilingual Assistance Provisions of the VRA)
Listed by Percentage of Residents Who Speak a Language Other than English

	Population, (2004 Est.)	Percent Indian (2000)	Percent Who Speak a Language Other than English*	Percent Under 18
1. Shannon	13,346	94.2	26.2	45.3
2. Ziebach	2,658	72.3	23.8	40.6
3. Todd	9,738	85.6	22.0	44.0
4. Dewey	6,115	74.2	16.2	38.9
5. Mellette	2,089	52.4	15.8	35.3
6. Bennett	3,522	52.1	13.7	36.3
7. Jackson	2,910	47.8	13.4	36.5
8. Marshall	4,354	6.3	8.8	27.0
9. Roberts	10,056	29.9	6.8	30.0
10. Lyman	3,977	33.3	4.9	32.1
11. Meade	24,856	2.0	4.3	28.4
12. Day	5,865	7.4	3.9	25.5
13. Codington	25,914	1.4	3.8	26.8
14. Tripp	6,075	11.2	3.8	27.7
15. Stanley	2,802	4.9	3.7	27.1
16. Haakon	1,998	2.5	3.2	25.7
17. Grant	7,598	0.4	3.0	26.6
18. Gregory	4,332	5.6	2.1	24.3
<i>S. Dakota</i>	770,883	8.3	6.5	26.8

b. The Covered Counties' Lack of Compliance with Sections 203 and 4(f)(4)

According to Steve Emery, VRA plaintiff and attorney for the Standing Rock tribe,

the state and subdivisions have never produced a single document in the Lakota language explaining the ballot or any literature about the ballot or about the voting process. Personally, I have offered to translate whatever materials they needed. But this has never happened.¹⁹⁷

¹⁹⁷ *Id.* Interview of Steve Emery, January 2006.

Raymond Uses The Knife, a Cheyenne River Tribe councilmember who was present during the 2004 elections, testified that poll workers on the Pine Ridge Indian Reservation failed to provide the required assistance to Lakota speakers:

Polls on the reservation are ... very limited. Accessibility is not there, and a lot of the issues pertaining to language proficiency [are] very, very real. A lot of my people are Lakota speakers. Lakota is our number one language and English is our number two language. So when it comes time to vote ... and you don't understand the English, you want to ask questions, and the ... poll watchers are there from the county governments or their representatives ... and you want to know what's going on, ... sometimes you're made to feel like you have no business there, ... like you're taking up too much of their time....

About a voter who needed literacy assistance, Raymond Uses the Knife testified,

I've also witnessed one of our tribal members didn't know how to read or write and he needed help from his wife. His wife was proficient in the English language, and that's what his request was, but this [assistance] was denied. So he was so upset with this situation that he picked up his ballot and tore it in half and threw it in the trash can. He said this is the second time that this is the way he was treated at the polls.¹⁹⁸

B. The Current Political Landscape for South Dakota's American Indians: Voting Trends and Progress Toward Political Power

Since the 1990s, voting among South Dakota's Indians has been increasing. As a result of this trend, along with the protections afforded by the VRA, Indians are wielding somewhat more political influence in South Dakota. The increase in voter turnout has been driven primarily by growth of the Indian population and voter registration drives, but in some cases, it can also be attributed to the popularity of a particular candidate on the ballot. The statistics are encouraging, but there is evidence of backlash to the threat of Indians' increasing political power, which proves the importance of renewing Sections 203, 4(f)(4), and 5 of the VRA.

1. South Dakota's Indians Are Voting in Greater Numbers, Driven by Growth of the Indian Population

Voting among Indians in South Dakota has surged since 1994. In that year, in majority-Indian Todd County, voter registration was 65.8 percent of VAP, compared to 84.7 percent statewide, and voter turnout was 47.1 percent, compared to 73.7 percent statewide. But ten years later, in 2004, turnout in Todd County was 65.17 percent, compared to 78.6 percent statewide.¹⁹⁹ In majority-Indian Shannon County, turnout rose from 38 percent in 2000 to 45 percent in 2002.

¹⁹⁸ *Id.* Testimony of Raymond Uses The Knife (Poll watcher on the Pine Ridge Reservation in the 2004 elections). p. 53.

¹⁹⁹ Website of the South Dakota Secretary of State (<http://www.sdsos.gov/2004/04countyvoterturnout.htm> and <http://www.sdsos.gov/Elections>)

South Dakota Secretary of State Chris Nelson recounted more of these encouraging statistics during the South Dakota Hearing of the National Commission on the Voting Rights Act in September 2005. Nelson noted that voter turnout statewide increased about 23 percent from 2000 to 2004, but in the counties covered by the Cheyenne River and Standing Rock reservations, the increases in turnout were 40–57 percent over the same time period. In Shannon County, that same statistic was 122 percent, and in Todd County, 139 percent—almost six times the increase elsewhere in the state. In addition, five of the top six counties in South Dakota in terms of percent of VAP registered are majority- or significantly-Indian counties, and of the eight majority-Indian counties in South Dakota, six have voter turnout rates higher than the state average.²⁰⁰ Nelson noted that these changes in Indian voter turnout were in “profound contrast” to figures from 1985, when only 9.9 percent of South Dakota’s Indians were registered to vote.

At the same time that the percentage of Indian turnout is increasing, the number of eligible of Indian voters is increasing. Nationwide, the Indian population grew 38 percent between 1990 and 2000. The population of South Dakota as a whole increased 6.8 percent during the decade, but the populations of the majority-Indian counties of Shannon, Bennett, and Todd increased 25.9 percent, 11.5 percent, and 8.4 percent, respectively. The growth of the Indian population naturally has simultaneously lowered the average age of the population. According to census data, 33 percent of all American Indians in the United States are 18 or younger, compared to 25.6 percent of all Americans.²⁰¹ In the South Dakota population as a whole, 26.8 percent are 18 and younger, whereas the majority-Indian counties of Shannon, Todd, and Bennett are 45.3 percent, 44.0 percent, and 36.3 percent, respectively, 18 or younger.²⁰² These statistics suggest that the trend will continue, or at least that voting among Indians is not likely to decline, as children reach the age of 18 and begin voting.

2. South Dakota’s Indians Are Having More Political Influence

The growth of the Indian population and the simultaneous decline in the white population (due to low birth rates, an aging population, and rural population losses) have meant an increase in the power of the existing and potential American Indian voter bloc, as well as an increase in tensions between Indians and non-Indian South Dakotans. Particularly in close elections, this influence has been seen. The results of the 2000, 2002, and 2004 elections demonstrated that elections can be inordinately influenced by 1–5 percent of the votes cast.

The 2002 and 2004 races for Congress also demonstrate the impact of the American Indian vote in South Dakota. Following one of the closest elections in the 2002 mid-term election, decided by only 500 votes, Senator Tim Johnson stated,

²⁰⁰ Testimony of South Dakota Secretary of State Chris Nelson before the National Commission on the Voting Rights Act, South Dakota Hearing, Rapid City, South Dakota, September 9, 2005. Transcript pp. 18–19

²⁰¹ U.S. Census 2000. “Characteristics of American Indians and Alaska Natives by Tribe and Language.” *See* <http://www.census.gov>.

²⁰² U.S. Census 2000, “State and County Quickfacts” for Shannon, Todd, and Bennett counties. (http://quickfacts.census.gov/qfd/maps/south_dakota_map.html)

I think the Native vote developed into a power that is showcasing to the world. I think politicians from every stripe will have to deal with the Native vote. This is a real presence in South Dakota. ... this was a lesson heard around the world that Native power is part of the political process and can't be ignored.²⁰³

State House member Paul Valandra said of the '02 election of Senator Johnson that that election "gave American Indian voter participation a bump." But Valandra said he would like to see the patterns in Indians' voting connected to routine and basic reasons for voting, not just tied to the high-profile candidates like Johnson. Indian voters also contributed to the special congressional election of Stephanie Herseth in June 2004. That was a special election for the vacancy left by Janklow's resignation in 2004. Herseth collected 94 percent of the vote on the Pine Ridge reservation, contributing to a close victory.²⁰⁴

The American Indian vote has been recognized as a swing vote in close races at many levels. The swing vote has been especially influential when the particular state is not clearly "red" or "blue." The Indian percentages in Western states can make a difference. Unfortunately, this potential places Indian voters under increased scrutiny. Candidates will be "courting the Indian vote," and more election monitors will be required when elections are close.²⁰⁵

3. South Dakota's Indian Candidates Are Finally Getting Elected in Majority-Indian Counties

Since the VRA was amended in 1975, only seven American Indians have served in the South Dakota legislature. *See* Chart 4. But times are changing. The 2006 Legislature is currently in session, with four American Indian legislators: Two Bulls, Valandra, Van Norman, and Bradford. Six legislators were elected to the House or the Senate based on the majority-Indian legislative districts established since 1980, and based on the VRA protections that address voter dilution. Nearly all of these districts were formed through extensive litigation, court orders, and the supervision of the Department of Justice in the Section 5 preclearance process.

²⁰³ Melmer, David. "Indian power surge; Rez vote elects Johnson." *Indian Country Today*. November 8, 2002.

²⁰⁴ Melmer, David. "Indian voices heard at the polls." *Indian Country Today*. June 11, 2004.

²⁰⁵ Horsechief, Geneva. "Primaries, Caucuses and Earning the Native Vote." *Native American Times*. February 6, 2004.

Chart 4: American Indian Office Holders

<u>Office-Holder</u>	<u>District</u>	<u>Office</u>	<u>VRA Reference</u>
James Bradford Oglala Sioux	SD 27	S.D. State Senator	Section 5 Preclearance 1981
Richard “Dick” Hagen Oglala Sioux	Former HD 27	S.D. House Member	Section 5 Preclearance 1981
Thomas Short Bull Oglala Sioux	Former, SD	S.D. State Senator	Section 5 Preclearance 1981
Theresa Two Bulls Oglala Sioux	SD 27	S.D. State Senator	<i>Bone Shirt v. Hazeltine</i> , 2002
Paul Valandra Rosebud Sioux	HD 27	H.D. House Member	<i>Bone Shirt v. Hazeltine</i> , 2002
Tom Van Norman Cheyenne River Sioux	HD 28A	H.D. House Member	<i>Emery v. Hunt</i> , 2000
Jim Emery	Custer Co.	S.D. House Member	Elected under 1970’s Schemes

Source: Interviews with Paul Valandra, Thomas Short Bull, and Steve Emery, January 2006.

C. Two Steps Forward, One Step Back: South Dakota’s Resistance to Progress under the Voting Rights Act

One reaction by whites to the increase of Indian voter participation has been to accuse Indian voters of engaging in fraud and implementing or attempting to implement “anti-fraud” measures. Prior to the 2002 election, there was an aggressive effort by South Dakota’s Attorney General, in conjunction with DOJ’s “Voting Integrity Initiative,” to investigate programs focused at registering Indian voters.²⁰⁶

According to Paul Valandra, Senator Johnson’s victory in the 2002 election “caused a serious backlash based on the Indian voter turnout.”²⁰⁷ Indeed, soon after the 2002 election, the results of which were credited to the turnout of Indian voters, several legislative initiatives that would make voting and registering to vote more difficult were introduced in the South Dakota legislature. In particular, in early 2003, state legislators introduced HB 1176, a bill requiring a photo I.D. to vote, to register to vote, and to acquire an absentee ballot.²⁰⁸ The bill became law but is still opposed by many. Thomas Short Bull, asserts that it “punishes” American Indian

²⁰⁶ McDonald, Laughlin. “The New Poll Tax: Republican-sponsored ballot-security measures are being used to keep minorities from voting.” *American Prospect*. January 2, 2003, p. 1.

²⁰⁷ *Id.* Interview of Paul Valandra, January 2006.

²⁰⁸ To obtain an absentee ballot without a photo ID, the absentee ballot request must be notarized.

voters for the outcome of the 2002 election, prevents eligible Indian voters from voting, and is not necessary, as the state contends, to prevent voter fraud, since never in the state's history has anyone been prosecuted for voter fraud at the polls.²⁰⁹ Short Bull stated, "The polling place ... is not made friendly with the photo I.D." Another opponent of the law, attorney Oliver Semans of the non-profit voter registration organization Four Seasons Committee, pointed out that it could be "culturally incorrect" to ask an elderly Indian to pull out a photo I.D.²¹⁰ The law has also been criticized because, in its implementation, it was not always made clear to potential voters that individuals without photo I.D. could still vote, by filling out an affidavit at the polling place. Another bill introduced in the state legislature just after the 2002 elections would have made it illegal to give or receive payment for registering new voters, a clear attempt to chill the successful voter registration drives on Indian reservations.²¹¹

Another example of resistance encountered by Indians seeking to improve their access to the ballot box occurred when members of the Cheyenne River Sioux Tribe proposed legislation that would expand the number of polling places on the Cheyenne River reservation. Steve Emery, the lead plaintiff in *Emery v. Hunt*, recalled, "We wanted to establish polling places for the state and county elections where American Indian voters could vote for tribal elections on one end of the polling place and the state, county and national elections on the other."²¹² The arrangement, according to Emery, would have increased voter turnout. The bill was introduced by legislator Tom Van Norman. The hearing was scheduled for Pierre (the capital of South Dakota) at 7:30 a.m., which made it difficult for tribal members to attend, as the trip from Eagle Butte is three and one half hours in good weather. The bill was defeated in committee.

Several incidents of discriminatory treatment were documented during the 2004 elections. At the Porcupine polling place on the Pine Ridge Reservation, two poll watchers, Amalia Anderson and Alyssa Burhans, were told by a precinct representative that they "did not need to be here." According to their affidavits, they were then directed to the lobby in a different room, 50 feet from the ballot box. Not until an attorney for Four Directions Foundation, a voting rights organization, intervened were the two allowed to view the ballot box.²¹³

Another complaint filed by Alton Mousseaux and Stella White Eyes involved South Dakota's photo I.D. law, which was relatively new at the time. The law requires that a photo I.D. be presented in order to receive a ballot, but if a voter does not have photo I.D., he may instead sign an affidavit as proof of his address. However, a precinct representative at the Porcupine polling place insisted that voters needed to show photo I.D. in order to receive an affidavit.²¹⁴

²⁰⁹ Melmer, David. "Hearing conducted on new voting law." *Indian Country Today*. July 23, 2004.

²¹⁰ *Id.*

²¹¹ Melmer, David. "Republican voter regulations may target American Indians." *Indian Country Today*. February 25, 2003.

²¹² *Id.* Interview of Steve Emery, January 2006.

²¹³ Melmer, David. "Indian voices heard at the polls." *Indian Country Today*. June 11, 2004.

²¹⁴ *Id.*

Elections in the unorganized county of Shannon are administered by officials of Fall River County. On election day 2004, the Fall River Sheriff's vehicles were present near the polling places. "[T]he presence of law enforcement vehicles and personnel has the effect of intimidating American Indian people ... [W]itnesses said many people were seen leaving the area, rather than entering the voting location."²¹⁵

Another reflection of the present day voting discrimination and resistance of whites to Indians achieving full electoral participation is recent litigation. In 2001, the year prior to the landmark 2002 elections, the state legislature enacted a redistricting plan that was later found to violate the VRA. In 2005, several South Dakota legislators were "willing to roll the dice in an appeals court rather than redo [the] 2001 redistricting plan that a federal judge said violates Native Americans' voting rights." This position appears in spite of the number of VRA violations found to have occurred in South Dakota. State Senator Broderick of Canton said, "I think at the time we voted on that plan, the Legislature had a good level of comfort that we were doing the right thing, following the necessary laws and trying to protect voting rights."²¹⁶ The legislators interviewed for the Woster article perceived the courts as a mere gamble and gauged the voter protections in their legislative redistricting on the basis of "comfort" and following "necessary laws."

That is only one several examples. In 1986, Ziebach County failed to provide polling places on the Cheyenne River Sioux reservation.²¹⁷ In 1999, members of the Sisseton-Wahpeton Oyate found themselves excluded from the sanitary district elections.²¹⁸ Buffalo County is more than 80 percent Indian. To avoid having an Indian majority on the three-member county commission, Buffalo County packed over 80 percent of its overall population and most of its Indian population into one district until a 2004 lawsuit equalized the population in the districts. The city of Martin also maintained districts that were unequal in population at the expense of Indian voters.²¹⁹ The mayor of the city of Martin said the city needed more information on race in Martin and complained he needed more time to acquire the race data before any redistricting of the city wards even though such information is readily available.²²⁰

The contrasting demographic dynamics of an expanding Indian population and a shrinking white population exacerbate frictions between Indians and whites, heightening the "us vs. them" mentality. Uncertainty permeates both sides of this demographic shift, for the potential change of power in city and county government or the school boards means a change in the decision makers—the officeholders. Officeholders determine the allocation of services and funds and the hiring of personnel. In many of the small and rural areas in Indian country, the jurisdictions represent a significant sector of economic life. In the past, jurisdictions were conducted at the

²¹⁵ *Id.*

²¹⁶ Woster, Terry. "Lawmakers ponder redistricting appeal." *Argus Leader*. July 10, 2005.

²¹⁷ *Black Bull v. Dupree School Dist.*, No. 86-3012 (D.S.D. May 14, 1986).

²¹⁸ *United States v. Day County, S.D.*, No. 99-1024 (D.S.D. June 16, 2000).

²¹⁹ Melmer, David. "Voting Rights Violation Argued." *Indian Country Today*. July 12, 2004.

²²⁰ *Id.*

exclusion of Indian people. The ballot box wields the power to elect, and with it economic impact. The control of South Dakota cities, counties, and legislative districts will not change hands easily or without a struggle.

D. Conclusion

Since 2000, voting rights in Indian Country has become an especially contested field. Election schemes that dilute American Indian voting strength at the city, school board, county, and legislative district levels are under challenge and before the federal courts in South Dakota, on behalf of American Indian people. Court-ordered reorganizations of election schemes have resulted in elections of American Indians. Indian people are exerting their voting rights and participating in the election process in steadily increasing percentages, accompanied by reactionary legislative initiatives to install hyper-technical voting procedures and forestall the fulfillment American Indian voter strength and influence.

The combination of South Dakota's history of discrimination against Indians in voting, shifting demographics, and an environment of racial hostility make the state of South Dakota a prime candidate for future challenges under the VRA. A growing American Indian population and greater numbers of American Indians voting will bring additional jurisdictions into the sights of American Indian voters and their advocates, at all levels. South Dakota's jurisdictions have shown persistent resistance to the standard of "one-person, one-vote," in open defiance of the standards of equality in redistricting and the VRA protections for racial and language minorities. Section 5 preclearance requirements and the minority language provisions in 4(f)(4) and Section 203 must be extended on behalf of American Indian voters and their future access to voting and holding office.