VOTING RIGHTS IN SOUTH DAKOTA: 1982–2006

LAUGHLIN MCDONALD,[*] JANINE PEASE[†] AND RICHARD GUEST[‡]

I. THE VOTING RIGHTS ACT IN INDIAN COUNTRY: SOUTH DAKOTA, A CASE STUDY[1]

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

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 Indians, expand the geographic reach of the special preclearance provisions of Section 5 and require certain jurisdictions to

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[*] 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.

[†] 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*, a voting rights case in Montana during the 1980s, and she served as Presiding Officer of the Montana Districting and Apportionment Commission from 1999 to 2003. Dr. Pease was president of Little Big Horn College on the Crow Indian Reservation for eighteen years, from 1982 to 2000.

[‡] 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. He 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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provide bilingual election materials to language minorities.[2] 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.[3] Furthermore, eight counties in the State—Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette and Washabaugh—were required to conduct bilingual elections because of their significant Indian populations.[4] Congress extended Section 5 and the minority language provisions in 2006, and they are scheduled to expire in 2032.[5]

William Janklow, the attorney general of South Dakota at the time, 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."[6] 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."[7] He quoted with approval Justice Hugo Black's famous dissent in *South Carolina v. Katzenbach*,[8] arguing that Section 5 treated covered jurisdictions as "little more than conquered provinces."[9] Janklow expressed hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota."[10] 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."[11]

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement.[12] From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an ef-

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[2] *See* Pub. L. No. 94-73, §§ 203, 204, 89 Stat. 400, 401–03 (1975) (codified as amended at 42 U.S.C. §§ 1973a to 1973c (2000)).

[3] *See* 41 Fed. Reg. 783, 784 (Jan. 5, 1976).

[4] 41 Fed. Reg. 29,998, 30,002 (July 20, 1976) (codified at 28 C.F.R. pt. 55).

[5] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577 (2006) (to be codified at 42 U.S.C. § 1973aa-1a(b)(1)).

[6] *See* 77 S.D. OP. ATT'Y GEN. 175 (1977).

[7] *See id.*

[8] 383 U.S. 301, 355–62 (1966).

[9] *Id.* at 360 (Black, J., dissenting); 77 S.D. OP. ATT'Y GEN. 175 (1977).

[10] 77 S.D. OP. ATT'Y GEN. 175 (1977).

[11] *Id.* at 184.

[12] *See* Complaint at 7, Quick Bear Quiver v. Hazeltine, No. 02-5069 (D.S.D. filed Aug. 5, 2002).

fect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.[13]

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 device" for voting and in which registration and voting were depressed.[14] The most controversial of the special provisions was Section 5,[15] which covered most places in the South in which 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 to prove that they do not have a discriminatory purpose or effect.[16] A voting change is deemed to have a discriminatory effect if it is retrogressive or diminishes the "effective exercise" of minority political participation compared to the preexisting practice.[17] A voting change violates the purpose prong of Section 2 if it was adopted with "any discriminatory purpose," and not simply a purpose that is retrogressive.[18] 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.[19] The purpose of the preclearance requirement, as explained by the Supreme Court, was "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims."[20] The majority of the Supreme Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found 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."[21]

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[13] *See id.*

[14] *See* Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

[15] *Id.* § 5.

[16] 42 U.S.C. § 1973c(a) (2000).

[17] Beer v. United States, 425 U.S. 130, 141 (1976).

[18] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577 (2006) (to be codified at 42 U.S.C. § 1973c).

[19] 42 U.S.C. § 1973c(a).

[20] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[21] *Id.* at 309.

The 1975 amendments extended the protections of the Act to "language minorities," defined as Indians, Asian Americans, Alaska Natives and persons of Spanish Heritage.[22] 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% of the voting-age citizen population was comprised of a single-language minority group.[23] 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 to the State of Texas.[24]

The 1975 amendments also required certain states and political subdivisions to provide voting materials in languages other than English.[25] 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.[26] Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English.[27] 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.[28]

Indians, as "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."[29] 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."[30] In a variety of contexts, courts have held that In-

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[22] 42 U.S.C. § 1973aa-1a(e).

[23] S. REP. NO. 94-295, at 31–32 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 775; *see also* 42 U.S.C. § 1973aa-1a(b)(2)(A).

[24] *See* 28 C.F.R 51 app. (1990) (July 1, 2006).

[25] *See* 42 U.S.C. § 1973aa-1a.

[26] *See id.* § 1973aa-1a(b).

[27] *Id.*

[28] *See* 28 C.F.R. 55 app. As of the 2007 revision, covered counties in Colorado, New Mexico and Oklahoma have "bailed out" pursuant to 42 U.S.C. § 1973b(a).

[29] *See* 42 U.S.C. § 1973(a).

[30] Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 76 (1955).

dians were a racial group entitled to the protection of the Constitution and federal civil rights laws in the contexts of, for instance, legislative redistricting,[31] jury selection,[32] employment,[33] public education[34] and access to services.[35] In addition, a 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.[36] The 1975 amendments, however, expanded the geographic reach of Section 5 and made the coverage of Indians explicit.[37]

C. THE REASONS FOR EXTENDING THE COVERAGE

During hearings on the 1975 amendments, Representative Peter Rodino, Chair of the House Judiciary Committee, said members of language minority groups, including Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation."[38] 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."[39] House members also took note of various court decisions documenting voting discrimination against Native Americans, including *Klahr v. Williams*,[40] *Oregon v. Mitchell*[41] and *Goodluck v. Apache County*.[42]

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[31] *See* Klahr v. Williams, 339 F. Supp. 922, 927 (D. Ariz. 1972); Goodluck v. Apache County, 417 F. Supp. 13, 16 (D. Ariz. 1975).

[32] *See* United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989). *But see* United States v. Raszkiewicz, 169 F.3d 459, 464–66 (7th Cir. 1999).

[33] *See* Poolaw v. City of Anadarko, 660 F.2d 459, 462 (10th Cir. 1981).

[34] *See* Natonabah v. Bd. of Educ., 355 F. Supp. 716, 724–25 (D.N.M. 1973).

[35] *See* Scott v. Eversole Mortuary, 522 F.2d 1110, 1112 (9th Cir. 1975).

[36] 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 applied discriminatorily against Indians. *See* Apache County v. United States, 256 F. Supp. 903, 913 (D.D.C. 1966). The State of Alaska, with its substantial Alaska Native population, was also allowed to bail out, and for similar reasons. S. REP. NO. 94-295, at 778 n.4 (1975) (citing 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.

[37] *See* Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. §§ 1971, 1973 1973bb-1 (2000)).

[38] 121 CONG. REC. 16,245 (1975) (statement of Rep. Rodino).

[39] *Id.*

[40] 339 F. Supp. 922, 927 (D. Ariz. 1972) (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength). *Klahr* was cited in *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 1225–30 (1975) [hereinafter *1975 House Hearings*].

The House Report that accompanied the 1975 amendments to the Act found "a close and direct correlation between high illiteracy among [language minority] groups and low voter participation."[43] The illiteracy rate among Indians was 15.5%, compared to a nationwide illiteracy rate of only 4.5% for Anglos.[44] The Report concluded these disparities were "the product of the failure of state and local officials to offer equal educational opportunities to members of language minority groups."[45]

The Senate Report made similar findings of discrimination against language minorities, including Indians, in access to voter registration, public education, housing, administration of justice and employment.[46]

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 inflicted upon tribal members in the West.[47]

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."[48] Four years later, the legislature described Indians as the "revengeful and murderous savage."[49]

Territorial laws (and later state laws) restricted voting and office-holding to free white males and citizens of the United States.[50] Indians who sustained tribal relations, received support from the government or held untaxable land were prohibited from voting in any state election.[51] The establishment of precincts on Indian reservations was forbidden[52] and,

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[41] 400 U.S. 112, 147 (1970) (Douglas, J., dissenting) (noting that literacy "tests have been used at times as a discriminatory weapon against . . . American Indians"). *Mitchell* was cited in 121 CONG. REC. 16,249 (1975) (statement of Rep. Edwards).

[42] 417 F. Supp. 13, 16 (D. Ariz. 1975) (finding that a county redistricting plan had been adopted to diminish Indian voting strength).

[43] H.R. REP. NO. 94-196, at 30 (1975).

[44] *Id.*

[45] *Id.*

[46] *See* S. REP. NO. 94-295, at 25, 29 (1974), *as reprinted in* 1975 U.S.C.C.A.N. 774, 790.

[47] This bleak chapter in American history has been recounted in many places, including in DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1970).

[48] *See* 1862 Dakota Territory Sess. Laws v-vii.

[49] *See* Memorial and Joint Resolution Relative to the Appointment of an Indian Agent, ch. 38, 1866 Dakota Territory Sess. Laws 551.

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

[51] Act of Mar. 8, 1890, ch. 45, 1890 S.D. Sess. Laws 119.

[52] *See* Act of Mar. 12, 1895, ch. 84, 1895 S.D. Sess. Laws 88.

since election judges and clerks were required to have the "qualifications of electors," Indians were effectively denied the right to serve as election officials.[53]

South Dakota discriminated against Indians in a variety of other ways. Indians were prohibited from entering ceded lands without a permit.[54] 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."[55] Jury service was restricted to "free white males."[56] The intermarriage of white persons with persons of "color" was prohibited.[57] Further, it was a crime to provide instruction in any language other than English.[58]

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 to 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"[59] and to extinguish title to land occupied by the Chippewa Indians.[60] Four years later, it requested the Secretary of War to establish a military post to protect the colonization of the Black Hills.[61] 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."[62] On December 31, 1870, it renewed its request for the removal of Chippewa Indians from ceded lands.[63] In 1873, it again asked Congress to open Indian lands, including the Black Hills, to white settlement.[64] As a

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[53] *See* Dakota Territory Compiled Laws §§ 1442–1443 (1887).

[54] Act to Prevent Indians From Trespassing on Ceded Lands, ch. 46, 1862 Dakota Territory Sess. Laws 319.

[55] Act Prohibiting the Harboring of Indians Within the Organized Counties, ch. 19, 1866 Dakota Territory Sess. Laws 482.

[56] Act Respecting Jurors, ch. 52, 1862 Dakota Territory Sess. Laws 374–75; *see also* Act of Mar. 5, 1901, ch. 168, 1901 S.D. Sess. Laws 270 (providing for the selection of jurors from tax lists).

[57] Act Regulating Marriages, ch. 59, 1862 Dakota Territory Sess. Laws 390; *see also* Act of Mar. 14, 1913, ch. 226, 1913 S.D. Sess. Laws 405–06 (prohibiting the "intermarriage, or illicit cohabitation of members of the white and colored races").

[58] Act of Mar. 11, 1921, ch. 203, 1921 S.D. Sess. Laws 307.

[59] Memorial and Joint Resolution Regarding the Brule Sioux Indians, ch. 99, 1862 Dakota Territory Sess. Laws 503.

[60] Memorial to Congress Regarding the Chippewa Indians, ch. 100, 1862 Dakota Territory Sess. Laws 505–06.

[61] Memorial to the Secretary of War, ch. 50, 1866 Dakota Territory Sess. Laws 566.

[62] Memorial and Joint Resolution Regarding Indian Affairs, 1867 Dakota Territory Sess. Laws 275.

[63] Memorial to the President, 1870 Dakota Territory Sess. Laws 585.

[64] Memorial to Congress, 1872 Dakota Territory Sess. Laws 204.

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.[65] The Supreme Court, commenting on the expropriation of the Black Hills from the Sioux in 1877, said, "[a] more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history."[66] Shortly after the turn of the century, South Dakota, by then a state, asked Congress to open portions of the Rosebud Reservation to white settlement.[67]

Despite passage of the Indian Citizenship Act of 1924,[68] which granted full rights of citizenship to Indians, South Dakota officially excluded Indians from voting and holding office until the 1940s.[69] Even after the repeal of state laws 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.[70] The three unorganized counties were Todd, Shannon and Washabaugh, whose residents were overwhelmingly Indian.[71] The State also prohibited residents of the unorganized counties from holding county office until as late as 1980.[72]

For most of the twentieth century, voters were required to register in person at the office of the county auditor.[73] 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.[74] Moreover, state law did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities.[75] 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 court-

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[65] BROWN, *supra* note 47, at 269.

[66] United States v. Sioux Nation of Indians, 448 U.S. 371, 388 (1980) (citing the Court of Claims decision, 518 F.2d 1298, 1301 (1975)).

[67] House Joint Resolution 6, ch. 147, 1901 S.D. Sess. Laws 248.

[68] Indian Citizenship Act of June 2, 1924, 43 Stat. 253 (1924) (current version at 8 U.S.C. § 1401(b) (2000)).

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

[70] *See* Little Thunder v. South Dakota, 518 F.2d 1253, 1254–55 (8th Cir. 1975).

[71] *See id.* at 1254.

[72] *See* United States v. South Dakota, 636 F.2d 241 (8th Cir. 1980).

[73] *See* S.D. CODIFIED LAWS §§ 16.0701 to 16.0706 (1939); *see also* Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1024 (D.S.D 2004).

[74] *See Bone Shirt*, 336 F. Supp. 2d at 1024.

[75] 1963–1964 S.D. ATT'Y GEN. BIENNIAL REP. at 341.

house to register in person.[76] Mail-in registration was not fully implemented in South Dakota until 1973.[77]

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%, compared to 3.2% for whites.[78] Unemployment rates on the reservations were even higher. In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80%.[79] At the Standing Rock Indian Reservation, it was 74%.[80] Additionally, 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-50s."[81] Infant mortality in Indian Country "is double the national average."[82]

Native Americans experience a poverty rate that is five times the poverty rate for whites. The 2000 Census reported 48.1% of Indians in South Dakota were living below the poverty line, compared to 9.7% of whites.[83] Sixty-one percent of Native American households received incomes below $20,000, compared to 24.4% of white households.[84] The per capita income of Indians was $6799, compared to $28,837 for whites.[85]

Of Indians twenty-five years of age and over, 29% have not finished high school, while only 14% of whites are without a high school diploma.[86] The drop-out rate among Indians aged sixteen through nineteen is 24%, four times the drop-out rate for whites.[87] Nearly one-fourth of Indian

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[76] *See Bone Shirt*, 336 F. Supp. 2d at 1024.

[77] Act to Repeal and Reenact SDCL 12-4-7, Relating to Absentee Registration of Voters, and Declaring an Emergency, ch. 70, 1973 S.D. Sess. Laws 111.

[78] U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P150A, P150C, *available at* http://factfinder.census.gov (last visited Nov. 20, 2007).

[79] S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM ch. 1 tbl.1 (2000), *available at* http://www.usccr.gov/pubs/sac/sd0300/main.htm [hereinafter S.D. ADVISORY COMMITTEE REPORT].

[80] *Id.*

[81] *Id.*

[82] *Id.* at 6–7.

[83] *See* U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P159A, P159C, *available at* http://factfinder.census.gov (last visited Nov. 20, 2007).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

households live in crowded conditions, compared to 1.6% for whites.[88] Approximately 21% of Indian households lack telephones, compared to 1.2% of white households.[89] In addition, Indian households are three times as likely as white households to be without access to vehicles: 17.9% of Indian households are without access to vehicles versus 5.4% of white households.[90]

The link between depressed socioeconomic status and reduced political participation is direct. As the Supreme Court has recognized, "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."[91] Numerous appellate and trial court decisions, including those from Indian country, have made statements 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."[92] Similarly, in a case involving tribal members in Thurston County, Nebraska, the Eighth Circuit held that "disparate socio-economic status is causally connected to Native Americans' depressed level of political participation."[93] Finally, the Court of Appeals for the Ninth Circuit held that "lower . . . social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process."[94]

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% of Indians in the state were registered to vote.[95] The South Dakota Advisory Committee to the U.S. Commission on Civil Rights soberly concluded in a 2000 report:

> 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

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Thornburg v. Gingles, 478 U.S. 30, 69 (1986).

[92] Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469, 475 (8th Cir. 1986).

[93] Stabler v. County of Thurston, 129 F.3d 1015, 1023 (8th Cir. 1997).

[94] Old Person v. Cooney, 230 F.3d 1113, 1129 (9th Cir. 2000); *accord* Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1017 (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.").

[95] *Buckanaga*, 804 F.2d at 474.

ensure the continued neglect and inattention to issues of disparity and inequality.[96]

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.[97]

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 *City of Mobile v. Bolden*[98] 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 *City of Mobile* 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.[99] Congress also made explicit that Section 2 protected the equal right of minorities "to elect representatives of their choice."[100]

The Supreme Court construed the amended Section 2 for the first time in *Thornburg v. Gingles*[101] 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.[102] 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 to elect their preferred representatives."[103] The amendment of Section 2 and *Gingles* were critical

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[96] S.D. ADVISORY COMMITTEE REPORT, *supra* note 79, at ch. 3.
[97] *See* 42 U.S.C. § 1973 (2000).
[98] 446 U.S. 55, 66 (1980).
[99] *See* S. REP. NO. 97-417, at 36 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 214.
[100] *Id.* at 32.
[101] 478 U.S. 30 (1986).
[102] *Id.* at 50–51.
[103] *Id.* at 47; *accord* Johnson v. DeGrandy, 512 U.S. 997, 1012 (1994).

to facilitating what has accurately been described as a "quiet revolution" in minority voting rights and office holding.[104]

The lack of enforcement of the Voting Rights Act in Indian country was the result of a combination of factors, including 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 the amended Section 2 in South Dakota was brought in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall Counties.[105] Represented by the Native American Rights Fund, the tribe claimed the at-large method of electing members of the Board of Education of the Sisseton Independent School District diluted Indian voting strength.[106] The trial court dismissed the complaint, but the Eighth Circuit reversed.[107] It held that the trial court failed to consider "substantial evidence . . . that voting in the District was polarized along racial lines."[108] 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";[109] the discriminatory impact of staggered terms of office and apportioning "seats between rural and urban members on the basis of registered voters,"[110] which underrepresented Indians; and "the presence of only two polling places in the District."[111] On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members.[112]

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

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[104] *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).

[105] *See* Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469 (8th Cir. 1986).

[106] *Id.* at 470.

[107] *Id.* at 470, 478.

[108] *Id.* at 473.

[109] *Id.* at 474.

[110] *Id.* at 475.

[111] *Id.* at 476.

[112] *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).

for school district elections.[113] The same year, Indian plaintiffs on the reservation secured an order requiring the auditor of Dewey County to provide Indians with additional voter registration cards and to extend the deadline for voter registration.[114]

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 areas of Enemy Swim Lake and Campbell Slough.[115] Under the challenged scheme, only residents of several non-contiguous pieces of land owned by whites could vote, while residents of the remaining 87% 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.[116] 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.[117]

Steven Emery, Rocky LeCompte and James Picotte, residents of the Cheyenne River Sioux Reservation, represented by the ACLU's Voting Rights Project, filed suit in 2000 challenging the State's 1996 interim legislative redistricting plan.[118] 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 task force concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted."[119] The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd and Bennett Counties.[120] Under the existing plan, there were twenty-eight legislative districts, all of which were majority white and none of which had ever elected an Indian.[121] Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said the plan gerrymandered the Rosebud and Pine Ridge Reservations by dividing them "into three legisla-

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[113] *See* Stipulation for Settlement and Dismissal of the Case, Black Bull v. Dupree Sch. Dist., No. 86-3012 (D.S.D. May 14, 1986).

[114] *See* Fiddler v. Sieker, No. 85-3050 (D.S.D. Oct. 24, 1986) (order requiring provision of additional registration cards and extending deadline for voter registration).

[115] *See* United States v. Day County, No. 99-1024 (D.S.D. June 16, 2000).

[116] *See id.*

[117] *Id.*

[118] *See* Emery v. Hunt, 272 F.3d 1042, 1044–45 (8th Cir. 2001).

[119] *See* TASK FORCE ON INDIAN-STATE GOV'T RELATIONS, LEGISLATIVE APPORTIONMENT AND INDIAN VOTER POTENTIAL 17 (1974).

[120] *See id.* at 25.

[121] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 980 (D.S.D. 2004).

tive districts, effectively neutralizing the Indian vote in that area."[122] 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."[123]

Before 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 the existing districts "inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district."[124] 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 that created 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.[125] Thomas Short Bull, an early proponent of equal voting rights for Indians, ran for the South Dakota State Senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the South Dakota upper chamber.

The South Dakota legislature adopted a new redistricting plan in 1991.[126] 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.[127] The exception was the 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."[128] 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

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[122] *Id*. at 980–81.

[123] *Id.* at 981.

[124] REPORT OF THE SOUTH DAKOTA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS 35, 52 (1981).

[125] *Bone Shirt*, 336 F. Supp. 2d at 981.

[126] *See* Act to Redistrict the Legislature, ch.1, 1991 S.D. Sess. Laws 1st Spec. Sess. 1 (codified as amended at S.D. CODIFIED LAWS §§ 2-2-24 to 2-2-31 (2000)).

[127] *See id.*

[128] *Id.* § 5, 1991 S.D. Sess. Laws 1st Spec. Sess. 1, 5.

data, Indians were 60% of the voting age population (VAP) of House District 28A and less than 4% of the VAP of House District 28B.[129]

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.[130] Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A major sponsor of the repealing legislation was Eric Bogue, a Republican candidate who defeated Van Norman in the general election.[131] The reconstituted House District 28 contained an Indian VAP of 29%.[132] Given the prevailing patterns of racially polarized voting, of which members of the legislature were surely aware, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

In *Emery v. Hunt*, plaintiffs claimed 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.[133] 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.[134]

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."[135] Any reapportionment that occurred outside of the authority granted by the state constitution was therefore invalid as a matter of state law.[136]

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[129] *See* Emery v. Hunt, 272 F.3d 1042, 1044 (8th Cir. 2001).

[130] Act to Eliminate the Single-Member House Districts in District 28, ch. 21, 1996 S.D. Sess. Laws 45 (codified as amended at S.D. CODIFIED LAWS § 2-2-28 (2000)).

[131] House State Affairs Comm., Minutes 5 (Jan. 29, 1996).

[132] *Emery*, 272 F.3d at 1044.

[133] *Id.* at 1045.

[134] S.D. CONST. art. III, § 5.

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

[136] *See 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 Constitu-

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."[137] 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."[138] Despite the prohibitions of the state constitution and the views of the 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 and 1994 to determine the existence and extent of any racial bloc voting.[139] Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the white candidates at an average rate of 93%.[140] In all six of the contests, the candidate preferred by Indians was defeated.[141]

Dr. Cole also analyzed one countywide contest involving an Indian candidate, the 1992 general election for treasurer of Dewey County.[142] Indian cohesion was 100%, white cohesion was 95%; again, the Indian-preferred candidate was defeated.[143]

There were five white-white legislative contests from 1992 to 1998, four of which were head-to-head contests and one of which was a vote-for-two contest.[144] 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.[145] Notably, the Indian-preferred white candi-

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tion); Legislature of Cal. v. Deukmejian, 669 P.2d 17, 18 (Cal. 1983) (per curiam); *In re* Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 311–12, 319–20 (Colo. 1975).

[137] Memorandum, South Dakota Legislative Research Council, Issue Memorandum 95-36, Majority-Minority Districts: Legislative Reapportionment After *Miller v. Johnson* 6 (Sept. 12, 1995).

[138] Memorandum, South Dakota Legislative Research Council, Issue Memorandum 98-12, Comparison of Single Member and Multiple Member House Districts 5 (Apr. 22, 1998).

[139] *See* STEVEN P. COLE, REPORT OF STEPHEN P. COLE, PH.D.: EMERY ET AL. V. HUNT ET AL., D. S. DAK., CIV. NO. 00-3008 (2000). 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.

[140] *Id.* at 14, 17.

[141] *Id.* at tbls.1 & 2 (tables on file with authors).

[142] *Id.* at 13.

[143] *Id.*

[144] *Id.* at 14–16.

[145] *Id.* at 17.

date(s) won only in majority Indian District 28A.[146] Schrempp, the white candidate, was preferred by Indian voters in District 28A in the 1992 and 1996 general elections, and won both times.[147] In the 1998 general election, however, he ran for State Senate in District 28.[148] Although he was again preferred by Indian voters, running in a district in which Indians were 29% of the VAP, he lost.[149] This sequence of elections demonstrates in an obvious way the manner in which at-large elections in District 28 diluted or submerged the voting strength of Indian voters.[150]

White cohesion also fluctuated widely depending on whether 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%.[151] In the Indian-white legislative contests, the average level of white cohesion jumped to 94%.[152] 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.[153]

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% of the Indian vote) got the highest amount of support from white voters (70%).[154] The candidate with the next lowest amount of support from Indian voters (Klaudt) received the second highest amount of white support.[155]

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

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[146] *Id.*

[147] *Id.* at 15.

[148] *Id.*

[149] *Id.* at 13, 15–16.

[150] *Id.* at tbl.3 (table on file with authors).

[151] *Id.* at 17.

[152] *Id.*

[153] *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."); Rural W. Tenn. African Am. Affairs Council, Inc. v. Sundquist, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998) (same), *aff'd*, 209 F.3d 835 (6th Cir. 2000).

[154] COLE, *supra* note 139, at 16.

[155] *Id*.

defeat the candidates of their choice.[156] In addition, other "totality of circumstances" factors that were probative of vote dilution, as identified in *Gingles* and the Senate Report that accompanied the 1982 amendments, were present. 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."[157] Voting was polarized. District 28 was 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.[158] That court accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits."[159] It declared the plan null and void and reinstated the preexisting 1991 plan.[160] 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.[161]

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.[162] At the next election, John Sully, an Indian, was elected to the board of education.

A similar Section 2 suit was brought by tribal members, represented by the ACLU, against the city of Martin.[163] Martin, the county seat of Bennett County, has a population of just over 1000 people, nearly 45% of

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[156] *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

[157] S.D. ADVISORY COMMITTEE REPORT, *supra* note 79, at ch. 1.

[158] Emery v. Hunt (*In re* Certification of a Question of Law), 615 N.W.2d 590, 592–93 (S.D. 2000).

[159] *Id.* at 597.

[160] *Id.*

[161] *See* Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1028 (D.S.D. 2004).

[162] *See* Consent Decree, Weddell v. Wagner Cmty. Sch. Dist., No. 02-4056 (D.S.D. Mar. 18, 2003).

[163] *See* Wilcox v. City of Martin, No. 02-5021 (D.S.D. filed Apr. 23, 2002).

whom are Indians.[164] Indians, however, had been unable to elect any candidates of their choice to the city council because the redistricting plan ensured that white voters could control all three city council wards.[165] The city is near the Pine Ridge and Rosebud Reservations, and, like many border towns, it has had its share of racial conflict.[166]

The case was tried in June 2004. Despite significant evidence of vote dilution, the court ruled against the plaintiffs, finding on the basis of county elections that the plaintiffs had not satisfied the third *Gingles* factor.[167] While Indians are a minority in Martin, they are the majority in Bennett County.

The plaintiffs appealed, and on May 5, 2006, the Eighth Circuit reversed the decision of the district court.[168] It held that "plaintiffs proved by a preponderance of the evidence that the white majority votes as a bloc to usually defeat Indian-preferred candidates" in Martin aldermanic elections.[169] The court also noted the history of ongoing intentional discrimination against Indians in Martin:

> For more than a decade Martin has been the focus of racial tension between Native-Americans and whites. In the mid-1990's, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Justice Department sued and later entered into a consent decree with the local bank requiring an end to "redlining" loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.[170]

On remand, the district court ruled that the at-large system diluted Indian voting strength. Among the findings of the court were:

> There is a long, elaborate history of discrimination against Indians in South Dakota in matters relating to voting in South Dakota. . . . Indians in Martin continue to suffer the effects of past discrimination, including lower levels of income, education, home ownership, automobile ownership, and standard of living. . . . Martin city officials have taken inten-

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[164] Cottier v. City of Martin, 445 F.3d 1113, 1115 (8th Cir. 2006).
[165] *See id.* at 1116 & n.2.
[166] *See id.* at 1115.
[167] *See id.* at 1116.
[168] *See id.* at 1122.
[169] *Id.* at 1117.
[170] *Id.* at 1115–16.

> tional steps to thwart Indian voters from exercising political influence. . . . [T]here is a persistent and unacceptable level of racially polarized voting in the City of Martin.[171]

The City was given an opportunity to propose a remedial plan, but refused to do so.[172] The court then implemented a system of cumulative voting,[173] and at the elections held in June 2007, three Indian-friendly candidates were elected. The City has filed a notice of appeal.

One of the most blatant schemes to disfranchise Indian voters was employed in Buffalo County. The population of the County was approximately 2000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe.[174] Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population—some 1500 people—were packed in one district.[175] Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government.[176] 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 to ensure 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.[177] The case was settled by a consent decree in which the County admitted 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.[178]

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 can-

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[171] Cottier v. City of Martin, 466 F. Supp. 2d 1175, 1184–88 (D.S.D. 2006).

[172] *See* Cottier v. City of Martin, 475 F. Supp. 2d 932, 936 (D.S.D. 2007).

[173] *See id.* at 936–37.

[174] *See* Complaint at 4, Kirkie v. Buffalo County, No. 03-3011 (D.S.D. Feb. 12, 2004), *available at* http://www.aclu.org/FilesPDFs/kirkie.pdf.

[175] *See id.*

[176] *Id.* at 6.

[177] *See id.* at 7.

[178] *See* Consent Decree, Kirkie v. Buffalo County, No. 03-3011 (D.S.D. Feb. 12, 2004).

didate."[179] Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for the United States Senate and House of Representatives, as well as for governor.[180] A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections.[181] 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.[182] 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 Rock Indian Reservation.[183] 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% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the State.[184] Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the State.[185] As was apparent, Indians were more "packed," or overconcentrated, in the new District 27 than under the 1991 plan.[186] Had Indians been "unpacked," they could have been a majority in a House district in adjacent District 26.[187]

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 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.[188] Bradford's amendment was voted down fifty-one to sixteen.[189] Thomas Short Bull criticized the way in which District 27 had been drawn because there were "just too many Indians in that legislative district,"

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[179] Rogers v. Lodge, 458 U.S. 613, 627 (1982).
[180] Act of July 1, 1985, ch. 110, 1985 S.D. Sess. Laws 295.
[181] City of Rome v. United States, 446 U.S. 156, 183–84 (1980).
[182] S.D. CODIFIED LAWS § 2-2-34 (2001).
[183] *See id.*
[184] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1040 (D.S.D. 2004).
[185] *Id.* at 984–85.
[186] *See id.* at 1011.
[187] *See id.* at 991.
[188] *Id.* at 984.
[189] *Id.*

which he said diluted the Indian vote.[190] 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.[191]

Despite enacting the admitted changes in voting relating to 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.[192] The plaintiffs claimed 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.[193]

A three-judge court was convened to hear the plaintiffs' Section 5 claim.[194] 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.[195] 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."[196] The State submitted the plan to the attorney general, who precleared it, apparently concluding that the additional packing of Indians in District 27 did not have a retrogressive effect.[197]

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.[198] 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.[199] The court also found that 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 both politically and in other areas.[200] Finally, the court found

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[190] *Id.* at 985.
[191] *Id.*
[192] *See id.* at 980.
[193] *Id.*
[194] *Id.*
[195] Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1153 (D.S.D. 2002) (three-judge court).
[196] *Id.* at 1154.
[197] *See id.*
[198] *See id.* at 1052.
[199] *Bone Shirt*, 336 F. Supp. 2d at 981, 994–95.
[200] *Id.* at 1003–04.

plaintiffs established the third *Gingles* factor, namely, that whites usually voted as a bloc to defeat the candidates favored by Indians.[201]

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."[202] Indians in recent times had encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile."[203] Indians involved in voter registration drives had regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded, they had intimidated Indian voters.[204] According to Daniel 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. . . . based on negative stereotypes, and . . . [are] a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."[205]

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.[206] 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."[207] 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."[208] Moreover, "[a]lluding to Indian voters, he stated, 'I'm not sure we want that sort of person in the polling place.' "[209] Bennett County did not comply with the provisions of the Voting Rights Act requiring it to provide minority language assistance in voting until before the 2002 elections; only then did it act because it was directed to do so by the Department of Justice.[210]

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[201] *Id.* at 1110–17.
[202] *Id.* at 1019.
[203] *Id.* at 1025.
[204] *Id.* at 1026.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.* (quoting Rep. Stanford Adelstein).
[210] *Id.* at 1028.

The district court also found "[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."[211] Thomas Hennies, Chief of Police in Rapid City, stated that he "personally know[s] that there is racism and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement."[212] Don Holloway, the Sheriff of Pennington County, concurred that accounts of "prejudice and the perception of prejudice in [the] community were 'true or accurate descriptions.' "[213]

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."[214] There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns."[215] 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."[216] "[W]hen it comes to issues of race or discrimination," he said, "people don't want to hear that."[217] 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.[218]

Indians in South Dakota, as found by the district court, "have also been subject to discrimination in lending."[219] Monica Drapeaux, a business owner in Martin, said she was unable to obtain a loan from the local Blackpipe State Bank, even though other banks in the State readily lent her money.[220] 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.[221]

Some of the most compelling testimony in *Bone Shirt*, which was credited by the district court, came from tribal members who recounted "numerous incidents of being mistreated, embarrassed or humiliated by

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[211] *Id.* at 1030.
[212] *Id.*
[213] *Id.*
[214] *Id.* at 1041.
[215] *Id.* at 1046.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 1031.
[220] *Id.*
[221] *Id.*

whites."[222] 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."[223] 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."[224] Meeks said there was a "disconnect between Indians and non-Indians" in the State.[225] "[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 . . . . Then 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."[226]

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities."[227] But in the towns bordering the reservations, the reception "was more hostile."[228] 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]."[229] Such views were expressed by a member of the state legislature who said 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."[230]

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school.[231] After practice, members of the team would go to the home of the mayor's son for "fun and games."[232] The mayor "interviewed" Dillon in his office to see if he was "good enough" to be a friend to his son.[233] Dillon said he flunked the interview. "I guess I didn't measure up because . . . I was the

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[222] *Id.* at 1032.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 1035–36.
[228] *Id.* at 1036.
[229] *Id.*
[230] *Id.* at 1046.
[231] *See id.* at 1032.
[232] *Id.*
[233] *Id.*

only one that wasn't invited back to the house after football practice after that."[234] He found the experience to be "pretty demoralizing."[235]

Monica Drapeaux said one of the reasons she did not want to attend the public school in Winner was because of the racial tension that existed there.[236] White students "often called Indians 'prairie niggers' and made other derogatory comments."[237]

Arlene Brandis, a Rosebud tribal member, remembered her walks 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."[238]

Lyla Young, who grew up in Parmalee, said the first contact she had with whites was when she went to high school in Todd County.[239] The Indian students lived in a segregated dorm at the Rosebud boarding school.[240] They 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.[241] The white students referred to Indian students as "GI's," which stood for Government Issue.[242] "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.[243] Even now, 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 kind of discrimination or harsh treatment. Things are tough enough without inviting more."[244] 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."[245]

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

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[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.* at 1033.
[239] *Id.* at 1032.
[240] *Id.*
[241] *Id.*
[242] *Id.* at 1033.
[243] *Id.*
[244] *Id.*
[245] *Id.*

The district court, upon proof of the three *Gingles* factors and the totality of circumstances, concluded the State's legislative plan violated Section 2.[246] Bryan Sells, the lead ACLU lawyer for the plaintiffs in *Bone Shirt*, said "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."[247]

As for the approximately 600 unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties brought suit against the State in August 2002 to force it to comply with Section 5.[248] They were represented by the ACLU's Voting Rights Project. Following negotiations among the parties, the court entered a consent order in December 2002.[249] The order immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance.[250] It directed the State to develop a comprehensive plan "that [would] promptly bring the State into full compliance with its obligations under Section 5."[251] The State made its first submission in April 2003, and thus began a process that took approximately three years to complete.

Many other jurisdictions in the South also failed to comply with Section 5 in the years following their coverage.[252] But in none was the failure as deliberate and prolonged as in South Dakota.

G. THE "RESERVATION" DEFENSE

The State conceded in the *Emery* lawsuit over the 1996 interim redistricting plan that Indians were not equal participants in elections in District 28, but argued it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs."[253] According to defendants, Indians' loyalty was to tribal elections; they sim-

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[246] *Id.* at 1052.

[247] Interview with Bryan Sells, Staff Attorney, ACLU Voting Rights Project, in Atlanta, Ga. (Sept. 28, 2004) (on file with authors).

[248] *See generally* Complaint, Quick Bear Quiver v. Hazeltine, No. 02-5069-KES (D.S.D. Dec. 27, 2002) (three-judge court).

[249] *See generally* Consent Order, Quick Bear Quiver v. Hazeltine, No. 02-5069-KES (D.S.D. Dec. 27, 2002) (three-judge court).

[250] *See id.* at 2.

[251] *Id*. at 3.

[252] 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).

[253] State Defendants' Response at 26, Emery v. Hunt, 615 N.W.2d 590, 597 (S.D. 2000) (No. 00-3008).

ply did not care about participating in elections run by the State.[254] The argument overlooked the fact that the State historically denied Indians the opportunity to develop a "loyalty" to state elections. As the court 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."[255]

Furthermore, defendants were factually incorrect. Although 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.[256] In 1992, an Indian ran for Treasurer of Dewey County and received 100% of the Indian vote. Indians have also run for and been elected to other offices in District 28A. If Indians did not 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 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."[257] As another court said, white bloc voting "undoubtedly discourages [minority] candidates because they face the certain prospect of defeat."[258]

For example, 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. Additional evidence of Indians' concern about participating in state and local elections can be seen in 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 lawsuit; and the challenge to the 2001 redistricting plan.[259] The dilution claims filed in Charles Mix County, the city of Martin and Buffalo County further show that Indians do care about participating in state and local elections.

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[254] *See generally id.*

[255] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1022 (D.S.D. 2004).

[256] *See supra* notes 139–155 and accompanying text.

[257] McMillan v. Escambia County, 748 F.2d 1037, 1045 (Former 5th Cir. 1984) (discussing African American candidates).

[258] Hendrix v. McKinney, 460 F. Supp. 626, 632 (M.D. Ala. 1978) (discussing African American candidates).

[259] *See supra* Part I.E–F.

The State's "reservation" defense, however, was not new. An alleged lack of Indian interest in state elections was also advanced as a defense by South Dakota in a case 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."[260] The court in that case 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 "all 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."[261] 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.[262]

Similarly, in *United States v. South Dakota*, 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 the county government."[263] Again, the court disagreed. It held that the "presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one."[264]

The "reservation" defense has been raised—and rejected—in other voting cases brought by Indians in the West. In a suit by Crow and Northern Cheyenne Indians 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.[265] 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.[266] According to the court, "[r]acially 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."[267]

Similarly, in a case in Montezuma County, Colorado, the court found Indian participation in elections was depressed and noted "the reticence of

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[260] Little Thunder v. South Dakota, 518 F.2d 1253, 1255 (8th Cir. 1975).
[261] *Id.* at 1256 (quoting Evans v. Cornman, 398 U.S. 419, 423 (1970)).
[262] *Id.* at 1258.
[263] United States v. South Dakota, 636 F.2d 241, 244 (8th Cir. 1980).
[264] *Id.* at 245.
[265] Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1020–21 (D. Mont. 1986).
[266] *Id.* at 1021.
[267] *Id.*

the Native American population of Montezuma County to integrate into the non-Indian population."[268] However, instead of counting this "reticence" against a finding of vote dilution, the court concluded it was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past."[269]

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.[270] The court reasoned:

> [I]f 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 the discriminatory practices, which would perpetuate low voter turnout, and so on.[271]

South Dakota's claim in these cases that Indians did not care about state politics 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 and the courts have rejected efforts to blame reduced black participation on 'apathy.' "[272] 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.[273]

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

In a case from Mississippi regarding the political participation of black residents, the court rejected a similar "apathy" defense.[274] "[V]oter

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

[269] *Id.*

[270] United States v. Blaine County, 363 F.3d 897, 910–11 (9th Cir. 2004).

[271] *Id.* at 911.

[272] United States v. Marengo County Comm'n, 731 F.2d 1546, 1568 (11th Cir. 1984).

[273] *Id.* at 1574.

[274] Teague v. Attala County, 92 F.3d 283, 295 (5th Cir. 1996).

apathy," the court said, "is not a matter for judicial notice."[275] 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."[276] 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."[277] To argue 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:

> 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.[278]

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

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

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[275] *Id.*

[276] *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 Ark., 890 F.2d 1423, 1431 (8th Cir. 1989); Kirksey v. Bd. of Supervisors, 554 F.2d 139, 145 & n.13 (5th Cir. 1977) (rejecting the apathy defense and listing past discrimination, socioeconomic disparities and bloc voting as probable causes for nonregistration).

[277] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

[278] Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

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 Indians 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.[279]

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

For example, in a recent suit invalidating at-large elections in Montezuma County, Colorado, brought by residents of the Ute Mountain Ute Reservation, 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.[280]

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 "depressed level of political participation"; that there was a lack of "interaction" between Indians and whites; and that there was "overt and subtle discrimination in the community."[281]

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

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[279] Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564, 576 (July 8, 1970).

[280] Cuthair v. Montezuma-Cortez, Colo. Sch. Dist., No. RE-1, 7 F. Supp. 2d 1152, 1169–70 (D. Colo. 1998).

[281] Stabler v. County of Thurston, 129 F.3d 1015, 1023 (8th Cir. 1997).

patterns"; 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."[282]

As is apparent, the "inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination,"[283] 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, is still urgently needed in Indian Country. Of all the modern legislation enacted to redress the problems facing Indians,[284] 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.

II. VOTING RIGHTS, 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.[285] According to the 2000 Census, South Dakota is home to 63,652 Indians, or 8.3% of the total state population.[286]

In the 1879 trial of Chief Standing Bear, the federal courts were faced with the questions of whether 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.[287] In addressing the court, Standing Bear, who did not speak English,

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[282] Windy Boy v. Big Horn County, 647 F. Supp. 1002, 1016, 1022 (D. Mont. 1986).

[283] *Gingles*, 478 U.S. at 69.

[284] *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); Joint Resolution on American Indian Religious Freedom, Pub. L. No. 95-341, 92 Stat. 469 (1978); Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978).

[285] *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,328–33 (July 12, 2002).

[286] U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 5 tbl.2 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf [hereinafter THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000].

[287] United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 696–97 (D. Neb. 1879) (No. 14,891); *see also* NebraskaStudies.org, The Trial of Standing Bear, http://www.nebraskastudies.org/0600/stories/0601_0106.html (last visited Oct. 8, 2007) (providing a narrative summary of the trial proceedings).

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."[288] 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.' "[289] 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[290] and the right to vote until decades later. Today, federal courtrooms in South Dakota remain a battleground for 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% are "covered" jurisdictions under Section 5 of the Voting Rights Act, and eighteen South Dakota counties are required to provide minority language assistance to Indian voters under Section 203.[291]

Second, remarkable demographic shifts are occurring in South Dakota, particularly in the rural areas where the 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 Act, ignoring the preclearance requirement of Section 5 for more than twenty-five years (1977 to 2002), created a significant preclearance backlog[292] 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 decisive in close elections. These four factors have united to catalyze South Dakota

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[288] NebraskaStudies.org, *supra* note 287.

[289] *Standing Bear*, 25 F. Cas. at 700–01.

[290] Indian Citizenship Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (current version at 8 U.S.C. § 1401(b) (2000)).

[291] *See* 28 C.F.R. 55 app. (2007); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

[292] *See* Quick Bear Quiver v. Nelson, 387 F. Supp. 2d 1027, 1029 (D.S.D. 2005).

into a hotbed of voting rights litigation, with thirteen voting rights lawsuits initiated on behalf of South Dakota's Indian people in the past ten years.[293]

[293] For a sampling of these recent cases, see *supra* Part I.E–F.

Table 1.
Indian Tribes of South Dakota

Tribe	Population[294]	Federal Reservation (size in sq. mi.)[295]	Counties (Indian majority counties in bold)
Cheyenne River Sioux	8470	Cheyenne River Reservation (4420)	**Dewey**, **Ziebach**
Crow Creek Sioux	2225	Crow Creek Sioux Reservation (461)	**Buffalo**, Hyde, Hughes
Flandreau Santee	408	Flandreau Santee Sioux Reservation (4)	Moody
Lower Brule Sioux	1353	Lower Brule Sioux Indian Reservation (390)	Lyman, Stanley
Oglala Sioux	15,507	Pine Ridge Reservation (3471)*	**Shannon, Bennett**, Jackson
Rosebud Sioux	10,469	Rosebud Reservation (1975)	**Todd, Mellette,** Tripp
Sisseton-Wahpeton Oyate	10,217	(Former) Lake Traverse Reservation (1401)†	Roberts, Day, Codington, Marshall, Grant
Standing Rock Sioux	4206[296]	Standing Rock Reservation (2534)†	**Corson**
Yankton Sioux	6500	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.

For Indians, there is no one defining moment when the right to vote was secured. Rather, the struggle for that right has been "an extraordinarily

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[294] U.S. Census Bureau, 2000 Census Summary File 1, at tbl.GCT-PH1, *available at* http://factfinder.census.gov (last visited Nov. 13, 2007) [hereinafter Geographic Comparison Table].

[295] *Id.*

[296] The population of the South Dakota reservation lands is 4206. The population of the South Dakota and North Dakota lands combined is 8250. *See* U.S. Census Bureau, Census 2000 Data for Reservations and Other American Indian and Alaska Native Areas, http://factfinder.census.gov/home/aian/sf1_sf3.html (select "Standing Rock Reservation, SD-ND"; then select "go").

prolonged, complex, and piecemeal process that has yet to be fully resolved."[297] 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 Voting Rights Act in South Dakota, which identifies emerging trends in voting by Indians in South Dakota and chronicles the continuing attempts by state and local officials to suppress Indians' right to vote.

A. 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. As Alfred Bone Shirt, lead plaintiff in a 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."[298]

In further testimony in *Bone Shirt*, Belva Black Lance, from the Rosebud Indian Reservation, recounted her experience attending school in Todd County, where Indian students were severely disciplined if they spoke in their own language.[299] In today's world, she is afraid to leave the reservation: "It seems like we left a safe area and go [*sic*] to an area where it's prejudiced."[300]

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

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[297] Suzanne E. Evans, *Voting*, *in* ENCYCLOPEDIA OF NORTH AMERICAN INDIANS 658 (1996), *available at* http://college.hmco.com/history/readerscomp/naind/html/na_ 041800_voting.htm.

[298] Denise Ross, *Judge Says South Dakota Violates Federal Voting Rights Law*, RAPID CITY JOURNAL, Sept. 16, 2004.

[299] Denise Ross, *Witnesses Testify on Racism at ACLU Trial*, RAPID CITY JOURNAL, Apr. 15, 2004.

[300] *Id.*

names: 'Dirty Indians, drunken Indians. Why don't you go back to the reservation?' "[301]

As of the 2000 Census, the vast majority of South Dakota's Indians lived on the nine reservations within the State.[302] Steven 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 school. You can't legislate societal change. Folks in those counties have never paid attention to the Voting Rights Act."[303]

Distance from mainstream population centers, poor road conditions and the distinctive Indian cultures and languages only heighten the separation and inequality experienced by Indians. This has had an impact on voting; even registering to vote has been difficult for Indians. Since the 1950s, many counties have 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.[304] For Indians, registering or "signing up" has negative associations and is reminiscent of past abuses inherent in the reservation system.[305] For instance, registration often went hand-in-hand with governmental efforts to confiscate land and forcibly remove Indian families and children.[306] Furthermore, requiring an Indian to "sign here" is reminiscent of coerced land leases or sales, or even the forced removal of Indian children who were taken by tribal police or government officials from their families to distant Indian boarding schools.[307]

These geographic barriers continue to the present day. In testimony before the National Commission on the Voting Rights Act, Raymond Uses the Knife explained that "[w]hen 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,

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[301] *Id.*

[302] *See* Geographic Comparison Table, *supra* note 294.

[303] Interview with Steven Emery, attorney for Standing Rock Sioux Tribe of North and South Dakota and lead plaintiff in *Emery v. Hunt*, in Rosebud, S.D. (Jan. 12, 2006) (on file with authors).

[304] *See* SENATE DEMOCRATIC POLICY COMM., THE AMERICAN INDIAN VOTE: CELEBRATING 80 YEARS OF U.S. CITIZENSHIP (2004), *available at* http://www.democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-108-2-283.

[305] *See id.*

[306] *See id.*

[307] *See id.*

Promise, Black Foot also eighty miles to the central reservation. Lack of transportation, lack of transit systems, you name it." [308]

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

South Dakota's Indians are among the poorest of all U.S. citizens. As Table 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.[309] Buffalo County, with an 81.6% Indian population, was the poorest county in the country as of 2000.[310] Shannon County, which at 94.2%, has the highest percentage of Indians in any U.S. county, and was named the second-poorest county nationwide.[311]

In 2000, 13.3% of all families lived below the poverty line in South Dakota. In Todd County, which includes the Rosebud Sioux Reservation, 48.3% of families were living below the poverty line, and in Shannon County, which includes the Pine Ridge Reservation, 52.3% of families were below the poverty line.[312] 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.[313]

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[308] *South Dakota Hearing Before the National Commission on the Voting Rights Act* 55–56 (Sept. 9, 2005) [hereinafter *South Dakota Hearing*] (testimony of Raymond Uses the Knife) (on file with authors).

[309] *See infra* Table 2.

[310] *See infra* Table 2.

[311] *See infra* Table 2.

[312] *See infra* Table 2.

[313] *See* U.S. Census Bureau, Shannon County, South Dakota Fact Sheet, http://factfinder.census.gov (search "Shannon County, South Dakota") (last visited Nov. 20, 2007) [hereinafter Shannon County]; U.S. Census Bureau, Todd County, South Dakota Fact Sheet, http://factfinder.census.gov (search "Todd County, South Dakota") (last visited Nov. 20, 2007) [hereinafter Todd County]; U.S. Census Bureau, South Dakota Fact Sheet, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "South Dakota") (last visited Nov. 20, 2007).

Table 2.
Majority-Indian Counties: Poverty Ranking Among U.S. Counties[314]

County	Percent Indian	Poverty Ranking Among All U.S. Counties	Per-Capita Income	Percent Below Poverty Line
Buffalo*	81.6%	1	$5213	56.9%
Shannon	94.2%	2	$686	52.3%
Ziebach	72.3%	4	$7463	49.9%
Todd	85.6%	5	$7714	48.3%
Corson*	60.8%	7	$8615	41.0%
Dewey	74.2%	11	$9251	33.6%
Bennett	52.1%	25	$10,106	39.2%
Mellette	52.4%	32	$10,362	35.8%
South Dakota	8.3	n/a	$17,562	13.3%

* Not covered by Sections 203 and 4(f)(4) (bilingual assistance provisions)

The Supreme Court "ha[s] recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."[315]

As discussed below, even with the recent surge in Indian electoral participation, a racial gap remains. 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

[314] Table 2 was compiled using U.S. Census Bureau Fact Sheets for the respective South Dakota counties and the State as a whole. *See* U.S. Census Bureau, Fact Sheets, http://factfinder.census.gov (search for respective counties) (last visited Nov. 20, 2007).

[315] Thornburg v. Gingles, 478 U.S. 30, 69 (1986) (citations omitted).

bootstraps?' But there is no means for Indian people to join mainstream America, if you are American Indian in South Dakota."[316]

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 high, and many Indians still speak their native languages.[317] Significant numbers of Indians require assistance in the form of 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 Voting Rights Act Are Intended to Break Down Language-Related Barriers to Voting

Jurisdictions covered for a particular minority language under Section 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.[318] Depending on the needs of the voters, the assistance can be written, oral, or both.[319] Eighteen South Dakota counties meet the coverage criteria of either Section 203 or Section 4(f)(4), or both.[320]

A county is covered by Section 203 if (1) more than 5% of its voting age citizens (VAP) are "members of a single language minority" and are limited English proficient (LEP), *or* (2) more than 10,000 individuals in the county's VAP are LEP and belong to a single language minority group, *or* (3) the county is within an Indian reservation where more than 5% of the Indian VAP 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. [321]

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[316] Interview with Thomas Short Bull, President of Oglala Lakota College, former South Dakota State Senator and member of Oglala Sioux, in Kyle, S.D. (Jan. 10, 2006) (on file with authors).

[317] *See* U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P148C, *available at* http://factfinder.census.gov (last visited Nov. 20, 2007).

[318] 42 U.S.C. § 1973aa-1a(b) (2000).

[319] *Id.* § 1973aa-1a(c).

[320] *See* 28 C.F.R. 55 app. (2007); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

[321] 42 U.S.C. § 1973aa-1a(b). For purposes of the Act, "illiteracy" means the failure to complete the 5th primary grade. *Id.* § 1973aa-1a(b)(3)(E).

The coverage formula for Section 4(f)(4) is based on whether the jurisdiction—the county, in the case of South Dakota—maintained any English-only elections, had a VAP of 5% or more from a minority language group and had less than 50% of the eligible voters registered or turn out to vote at the time of the 1972 presidential election.[322]

[322] 42 U.S.C. § 1973b(b).

Table 3.
Counties Covered by Sections 203 and 4(f)(4): Language[323]

County	Population (2004 est.)	Percent Indian (2000)	Percent Who Speak a Language Other than English	Percent Under 18
Shannon	13,346	94.2%	26.2%	45.3%
Ziebach	2658	72.3%	23.8%	40.6%
Todd	9738	85.6%	22.0%	44.0%
Dewey	6115	74.2%	16.2%	38.9%
Mellette	2089	52.4%	15.8%	35.3%
Bennett	3522	52.1%	13.7%	36.3%
Jackson	2910	47.8%	13.4%	36.5%
Marshall	4354	6.3%	8.8%	27.0%
Roberts	10,056	29.9%	6.8%	30.0%
Lyman	3977	33.3%	4.9%	32.1%
Meade	24,856	2.0%	4.3%	28.4%
Day	5865	7.4%	3.9%	25.5%
Codington	25,914	1.4%	3.8%	26.8%
Tripp	6075	11.2%	3.8%	27.7%
Stanley	2802	4.9%	3.7%	27.1%
Haakon	1998	2.5%	3.2%	25.7%
Grant	7598	0.4%	3.0%	26.6%
Gregory	4332	5.6%	2.1%	24.3%
South Dakota	770,883	8.3%	6.5%	26.8%

[323] *See* 28 C.F.R. 55 app.; Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. at 48,872; U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P1, P6, P8, P19, *available at* http://factfinder.census.gov (last visited Nov. 20, 2007).

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

According to Steven Emery, Voting Rights Act 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."[324] Raymond Uses The Knife, a Cheyenne River Tribe councilmember and poll watcher on the Pine Ridge Indian Reservation during the 2004 election, testified that poll workers there 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 . . . .[325]

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.[326]

B. THE CURRENT POLITICAL LANDSCAPE FOR SOUTH DAKOTA'S 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 Act, 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 bal-

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[324] Interview with Steven Emery, *supra* note 303.
[325] *South Dakota Hearing*, *supra* note 308, at 51.
[326] *Id.* at 53.

lot. 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 Act.

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% of VAP, compared to 84.7% statewide, and voter turnout was 47.1%, compared to 73.7% statewide.[327] But ten years later, in 2004, turnout in Todd County was 65.2%, compared to 78.6% statewide.[328] In majority-Indian Shannon County, turnout rose from 38% in 2000 to 45% in 2002.[329]

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% from 2000 to 2004, but in the counties covered by the Cheyenne River and Standing Rock Reservations, the increases in turnout were 40–57% over the same time period.[330] In Shannon County, that same statistic was 122%, and in Todd County, 139%—almost six times the increase elsewhere in the State.[331]

In addition, five of the top six counties in South Dakota in terms of percent of VAP registered have a population that is either majority- or significantly-Indian, and of the eight majority-Indian counties in South Dakota, six have voter turnout rates higher than the state average.[332] Nelson noted that these changes in Indian voter turnout were in "profound contrast" to figures from 1985, when only 9.9% of South Dakota's Indians were registered to vote.[333]

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[327] South Dakota Secretary of State, Election Information 1994 (1994), http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo94_GEregistrationstats.shtm.

[328] South Dakota Secretary of State, Election Information 2004 (2004), http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo04_voterturnoutbycounty.shtm.

[329] *Compare* South Dakota Secretary of State, Election Information 2000 (2000), http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo00_GEturnoutbycounty.shtm, *with* South Dakota Secretary of State, Election Information 2002 (2002), http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo02_GEturnoutbycounty.shtm.

[330] *South Dakota Hearing*, *supra* note 308, at 18–19 (testimony of Chris Nelson, South Dakota Secretary of State).

[331] *Id.* at 18.

[332] *Id.* at 18–19.

[333] *Id*.

At the same time that the percentage of Indian turnout is increasing, the number of eligible Indian voters is increasing. Nationwide, the Indian population grew 38% between 1990 and 2000.[334] The population of South Dakota as a whole increased 6.8% during the decade,[335] but the populations of the majority-Indian counties of Shannon, Bennett and Todd increased 25.9%, 11.5% and 8.4%, respectively.[336]

The natural growth of the Indian population has simultaneously lowered the average age of the population. According to Census data, 33% of all Indians in the United States are eighteen or younger, compared to 25.6% of all Americans.[337] Viewing the South Dakota population as a whole, 26.8% are eighteen or younger, whereas the majority-Indian counties of Shannon, Todd and Bennett are 45.3%, 44.0% and 36.3% eighteen or younger, respectively.[338] 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 eighteen 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 Indian voter bloc, as well as an increase in tensions between Indian and non-Indian South Dakotans. This influence has been especially pronounced in close elections. The results of the 2000, 2002 and 2004 elections demonstrated that elections can be inordinately influenced by 1 to 5% of the votes cast.

The 2002 and 2004 Congressional races also demonstrate the impact of the Indian vote in South Dakota. After having been elected by only 500 votes in one of the closest elections in the 2002 midterm election, Senator Tim Johnson stated:

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[334] *See* THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, *supra* note 286, at 5 tbl.2.

[335] *See* U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION: 1990 TO 2000 2 tbl.1 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf.

[336] *See* U.S. CENSUS BUREAU, POPULATION AND HOUSING UNIT COUNTS: SOUTH DAKOTA 5 tbl.5 (1990), *available at* http://www.census.gov/prod/cen1990/cph2/cph-2-43.pdf; U.S. Census Bureau, Bennett County, South Dakota Fact Sheet, http://factfinder.census.gov (search "Bennett County, South Dakota") (last visited Nov. 20, 2007); Shannon County, *supra* note 313; Todd County, *supra* note 313.

[337] U.S. CENSUS BUREAU, CHARACTERISTICS OF AMERICAN INDIANS AND ALASKA NATIVES BY TRIBE AND LANGUAGE: 2000 Table 1, *available at* http://www.census.gov/prod/cen2000/phc-5-pt1.pdf.

[338] U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov/qfd/maps/south_dakota_map.html (click on respective county names) (last visited Nov. 20, 2007).

> 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 . . . . [T]his was a lesson heard around the world that Native power is part of the political process and can't be ignored.[339]

State House member Paul Valandra said that Senator Johnson's election in 2002 gave Indian voter participation a "bump."[340] 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.[341]

Indian voters also contributed to the special congressional election of Stephanie Herseth in June 2004.[342] That was a special election for the vacancy left by William Janklow's resignation in 2004.[343] Herseth collected 94% of the vote on the Pine Ridge Indian Reservation, contributing to a close victory.[344]

The 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."[345] The Indian percentages in western states can make a difference.[346] Unfortunately, this potentially places Indian voters under increased scrutiny.[347] Candidates will be "courting the Native vote," and more election monitors will be required when elections are close.[348]

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[339] David Melmer, *Indian Power Surge; Rez Vote Elects Johnson*, INDIAN COUNTRY TODAY, Nov. 8, 2002, *available at* http://www.indiancountry.com/content.cfm?id=1036767785.

[340] Telephone Interview with Paul Valandra, Representative, South Dakota State Legislature (Jan. 13, 2005).

[341] *Id.*

[342] *See* David Melmer, *Indian Voices Heard at the Polls*, INDIAN COUNTRY TODAY, June 11, 2004, *available at* http://www.indiancountry.com/content.cfm?id=1086961518 [hereinafter *Indian Voices*].

[343] *Id.*

[344] *See id.*

[345] Geneva Horsechief, *Primaries, Caucuses and Earning the Native Vote*, NATIVE AMERICAN TIMES, Feb. 6, 2004.

[346] *See id.*

[347] *See id.*

[348] *Id.*

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

Since the Act was amended in 1975, only seven Indians have served in the South Dakota legislature.[349] But times are changing. The 2006 legislature is currently in session, with four Indian legislators: Theresa Two Bulls, Valandra, Van Norman and Bradford.[350] Six legislators were elected to the House or the Senate, based on the majority-Indian legislative districts established since 1980 and on the Act's protections that address voter dilution. Nearly all of these districts were formed through extensive litigation and court orders.

[349] *See infra* Table 4.

[350] *See* South Dakota Legislature, 81st Legislature Session Members (2006), http://legis.state.sd.us/sessions/2006/mem.htm.

Table 4.
Indian Officeholders[351]

Officeholder	District	Office	Act Reference
James Bradford (Oglala Sioux)	SD 27	S.D. State Senator	Section 5 Preclearance, 1981
Richard "Dick" Hagaen (Oglala Sioux)	Former HD 27	S.D. House Member	Section 5 Preclearance, 1981
Thomas Short Bull (Oglala Sioux)	Former SD 28	S.D. State Senator	Section 5 Preclearance, 1981
Theresa Two Bulls (Oglala Sioux)	SD 27	S.D. State Senator	*Bone Shirt v. Hazelton*, 2002
Paul Valandra (Rosebud Sioux)	HD 27	S.D. House Member	*Bone Shirt v. Hazelton*, 2002
Tom Van Norman (Cheyenne River Sioux)	HD 28A	S.D. House Member	*Emery v. Hunt*, 2000
Jim Emery (N/A)	Custer County	S.D. House Member	Elected Under 1970s Schemes

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. Before the 2002 election, there was an aggressive effort by South Dakota's Attorney General, in conjunction with the Department of Justice's "Voting Integrity Initiative," to investigate programs focused on registering Indian voters.[352]

According to Valandra, Senator Johnson's victory in the 2002 election "caused a serious backlash based on the Indian voter turnout."[353] Indeed,

[351] Interview with Paul Valandra, *supra* note 340; Interview with Thomas Short Bull, *supra* note 316; Interview with Steven Emery, *supra* note 303.

[352] See Laughlin McDonald, *The New Poll Tax: Republican-Sponsored Ballot-Security Measures Are Being Used to Keep Minorities From Voting*, AMERICAN PROSPECT, Dec. 30, 2002, at 26.

[353] Interview with Paul Valandra, *supra* note 340.

soon after the 2002 election, the results of which were credited to the turnout of Indian voters, several legislative initiatives that would have made 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 identification card to register to vote, to vote and to acquire an absentee ballot.[354] The bill became law but is still opposed by many.[355] Short Bull, asserts that it "punishe[s]" Indian voters for the outcome of the 2002 election.[356] In addition, according to opponents, the plan would prevent eligible Indian voters from voting, and was unnecessary, as the State contended, to prevent voter fraud, since never "in the state's history has anyone ever been prosecuted for voter fraud at the polls."[357] Short Bull stated, "The polling place . . . is not made friendly with the photo I.D."[358]

Another opponent of the law, attorney Oliver Semans of the non-profit voter registration organization Four Directions Committee, pointed out that it could be "culturally incorrect" to ask an elderly Indian to pull out a photo identification card.[359] The law has also been criticized because, in its implementation, it was not always made clear to potential voters that individuals without photo identification could still vote by filling out an affidavit at the polling place.[360]

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.[361]

Yet 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. Steven Em-

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[354] *See* David Melmer, *Republican Voter Regulations May Target American Indians*, INDIAN COUNTRY TODAY, Feb. 25, 2003, *available at* http://www.indiancountry.com/content.cfm?id=1046183362 [hereinafter *Republican Voter Regulations*]. To obtain an absentee ballot without a photo identification card, the absentee ballot request must be notarized.

[355] *See id.*

[356] David Melmer, *Hearing Conducted on New Voting Law*, INDIAN COUNTRY TODAY, July 23, 2004.

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *Republican Voter Regulations*, *supra* note 354.

ery, 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."[362] The arrangement, according to Emery, would have increased voter turnout.[363] The bill was introduced by legislator Tom Van Norman.[364] The hearing was scheduled to take place in 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 a three-and-a-half hour drive, in good weather.[365] The bill, however, was defeated in committee.[366]

Several incidents of discriminatory treatment were documented during the 2004 elections. At the Porcupine polling place on the Pine Ridge Indian Reservation, two poll watchers, Amalia Anderson and Alyssa Burhans, were told by a precinct representative that they "did not need to be [t]here."[367] According to their affidavits, they were then directed to the lobby in a different room, fifty feet from the ballot box. It was only after intervention by an attorney for the Four Directions Foundation that the two were allowed to view the ballot box.[368]

Another complaint filed by Alton Mousseaux and Stella White Eyes involved South Dakota's photo identification law, which was relatively new at the time.[369] The law requires that a photo identification card be presented in order to receive a ballot, but if a voter does not have a card, he or she may instead sign an affidavit as proof of his or her address.[370] However, a precinct representative at the Porcupine polling place insisted that voters needed to show photo identification in order to receive an affidavit.[371]

Elections in the unorganized county of Shannon are administered by officials of Fall River County.[372] On election day 2004, the Fall River Sheriff's vehicles were present near the polling places.[373] "[T]he presence of law enforcement vehicles and personnel has the effect of intimidating

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[362] Interview with Steven Emery, *supra* note 303.
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.*
[367] *Indian Voices*, *supra* note 342.
[368] *Id.*
[369] *See id.*
[370] *See id.*
[371] *Id.*
[372] *Id.*
[373] *Id.*

American Indian people . . . . Witnesses said many people were seen leaving the area, rather than entering the voting location."[374]

Another reflection of the present day voting discrimination and resistance of whites to Indians achieving full electoral participation is seen in recent litigation. In 2001, the year before the landmark 2002 elections, the state legislature enacted a redistricting plan that was later found to violate the Act.[375] 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."[376]

This position appears in spite of the number of Voting Rights Act 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."[377] Certain legislators 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."[378]

That is only one of several examples. In 1986, Ziebach County failed to provide polling places on the Cheyenne River Sioux reservation.[379] In 1999, members of the Sisseton-Wahpeton Oyate found themselves excluded from the sanitary district elections.[380] Buffalo County, which is more than 80% Indian, packed over 80% of its overall population and most of its Indian population into one district in order to avoid having an Indian majority on the three-member county commission.[381] However, a 2004 settlement equalized the population in the districts.[382] The city of Martin also maintained districts that were unequal in population at the expense of Indian voters.[383] 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.[384]

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[374] *Id.*

[375] *See* Terry Woster, *Lawmakers Ponder Redistricting Appeal*, ARGUS LEADER, July 10, 2005.

[376] *Id.*

[377] *Id.*

[378] *See id.*

[379] Black Bull v. Dupree Sch. Dist., No. 86-3012 (D.S.D. May 14, 1986).

[380] United States v. Day County, No. 99-1024 (D.S.D. June 16, 2000).

[381] David Melmer, *Court Settlement Gives County Control to Reservation*, INDIAN COUNTRY TODAY, Mar. 3, 2004.

[382] *Id.*

[383] David Melmer, *Voting Rights Violation Argued*, INDIAN COUNTRY TODAY, July 12, 2004.

[384] *Id.*

The contrasting demographic dynamics of an expanding Indian population and a shrinking white population exacerbate frictions between Indians and whites, heightening the "us versus them" mentality. Uncertainty permeates both sides of this demographic shift, for the potential change of power in city and county government or in a school board 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 jurisdictional divisions represent a significant sector of economic life. In the past, jurisdictions were created at the exclusion of Indians. The ballot box wields the power to elect, and, with it, the power to impact economics. 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 have become an especially contested field. Election schemes that dilute Indian voting strength at the school board, city, county and legislative district levels are under challenge and before the federal courts in South Dakota. Court-ordered reorganizations of election schemes have resulted in elections of Indians. While Indians are exerting their voting rights and participating in the election process in steadily increasing percentages, reactionary legislative initiatives to install hyper-technical voting procedures and to forestall the fulfillment of Indian voter strength and influence persist.

The combination of South Dakota's history of discrimination against Indians in voting, shifting demographics and an environment of racial hostility makes the State of South Dakota a prime candidate for future challenges under the Voting Rights Act. A growing Indian population and greater percentage of Indians voting will bring additional jurisdictions into the purview of 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 Act's 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 Indian voters and their future access to voting and holding office.