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THE VOTING RIGHTS ACT IN INDIAN COUNTRY: SOUTH DAKOTA, A CASE STUDY

*Laughlin McDonald**

The problems that Indians continue to experience in South Dakota in securing an equal right to vote strongly support the extension of the special provisions of the Voting Rights Act scheduled to expire in 2007. They also demonstrate the ultimate wisdom of Congress in making permanent and nationwide the basic guarantee of equal political participation contained in the act.¹

I. South Dakota's Refusal to Comply with Section 5

Ten years after its enactment in 1965, Congress amended the Voting Rights Act to include American Indians, to expand the geographic reach of the special preclearance provisions of Section 5, and to require certain jurisdictions to provide bilingual election materials to language minorities. As a result of the amendments, Shannon and Todd Counties in South Dakota, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance.² Further, eight counties in the state, because of their significant Indian populations, were required to conduct bilingual elections — Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh.³

William Janklow, at that time Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the Secretary of State, he derided the 1975 law as a “facial absurdity.” Borrowing the states’ rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power “almost meaningless.” He quoted with approval Justice Hugo Black’s famous dissent in *South Carolina v. Katzenbach*,⁴ arguing that Section 5 treated covered jurisdictions as “little more than conquered

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

2. 41 Fed. Reg. 784 (Jan. 5, 1976).

3. 41 Fed. Reg. 30,002 (July 20, 1976).

4. 383 U.S. 301 (1966).

provinces.”⁵ Janklow expressed hope that Congress would soon repeal “the Voting Rights Act currently plaguing South Dakota.” In the meantime, he advised the Secretary of State not to comply with the preclearance requirement. “I see no need,” he said, “to proceed with undue speed to subject our State’s laws to a ‘one-man veto’ by the United States Attorney General.”⁶

Although the 1975 amendments were never in fact repealed, state officials followed Janklow’s advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.

II. How the Special Provisions Work

The Voting Rights Act of 1965 was a complex, interlocking set of permanent provisions that applied nationwide, along with special provisions that applied only in jurisdictions that had used a “test or devise” for voting and in which registration and voting were depressed. The most controversial of the special provisions was Section 5,⁷ which covered most of the South where discrimination against blacks in voting had been most persistent and flagrant.

Section 5 requires “covered” jurisdictions to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory, or retrogressive, purpose or effect. A voting change is deemed to be retrogressive if it diminishes the “effective exercise” of minority political participation compared to the preexisting practice.⁸ Preclearance can be obtained by making an administrative submission to the Attorney General or by bringing a declaratory judgment action in the federal court in the District of Columbia. The purpose of the preclearance requirement, as explained by the Supreme Court, was “to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims.”⁹ The majority of the Supreme Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found that it was justified by the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”¹⁰

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

6. 77 S.D. Op. Att’y Gen. 175 (1977).

7. 42 U.S.C. § 1973c (2000).

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

9. *Katzenbach*, 383 U.S. at 328.

10. *Id.* at 309.

The 1975 amendments extended the protections of the act to “language minorities,” defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage.¹¹ 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.¹² As a result of this new definition, the preclearance requirement was extended to counties in California, Florida, Michigan, New Hampshire, New York, South Dakota, and the State of Texas.¹³

The 1975 amendments also required certain states and political subdivisions to provide voting materials in languages other than English.¹⁴ While there are several tests for “coverage,” the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Washington.¹⁵

Indians, as a “cognizable racial group,” were undoubtedly already covered by the permanent provisions of the 1965 Voting Rights Act which prohibited discrimination on the basis of “race or color.”¹⁶ 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.”¹⁷ In a variety of contexts, courts have held that Indians were a racial group entitled to the protection of the constitution and federal civil rights laws,

11. 42 U.S.C. § 1973aa-1a(e) (2000).

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

13. 28 C.F.R. pt. 51, app. (1990).

14. 42 U.S.C. § 1973aa-1a.

15. 28 C.F.R. pt. 55, app. (1990).

16. 42 U.S.C. § 1973.

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

e.g., in legislative redistricting,¹⁸ in jury selection,¹⁹ in employment,²⁰ in public education,²¹ in access to services,²² etc. In addition, a number of jurisdictions which 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.²³ The 1975 amendments, however, expanded the geographic reach of Section 5 and made the coverage of Indians explicit.

III. The Reasons for Extending Coverage

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, said that members of language minority groups, including American Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation."²⁴ 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."²⁵ Rep. Robert Drinan noted similarly during the floor debate that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in thirty-three cases involving discrimination against Indians since 1970."²⁶ House members also took note of various court decisions documenting voting discrimination against Native

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

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

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

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

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

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

24. 121 CONG. REC. 16,244 (1975) (statement by Rep. Rodino).

25. *Id.*

26. 121 CONG. REC. 16,262 (1975) (statement of Rep. Drinan).

Americans, including *Klahr v. Williams*,²⁷ *Oregon v. Mitchell*,²⁸ and *Goodluck v. Apache County*.²⁹

The House report that accompanied the 1975 amendments of the Act found “a close and direct correlation between high illiteracy among [language minority] groups and low voter participation.”³⁰ The illiteracy rate among American Indians was 15.5%, compared to a nationwide illiteracy rate of only 4.5% for Anglos. The report concluded that these disparities were “the product of the failure of state and local officials to offer equal educational opportunities to members of language minority groups.”³¹

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

Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . [A]s late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society.³²

Discrimination against Indians has not only been severe, it has been unique. Even during the days of slavery, blacks, who were regarded as valuable property, were never subjected to the kind of extermination policies that were often visited upon tribal members in the West.³³

The first laws enacted by the Dakota Territory involving Indians were distinctly racist. They praised the “indomitable spirit of the Anglo-Saxon,” and

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

28. 400 U.S. 112, 147 (1970) (Douglas, J., concurring) (noting that literacy “tests have been used at times as a discriminatory weapon against . . . American Indians”), cited in 121 CONG. REC. 16,245 (1975) (statement of Rep. Edwards).

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

30. H. REP. NO. 94-196, at 30 (1975).

31. *Id.*

32. 121 CONG. REC. 13,603 (1975) (statement of Sen. Scott).

33. This bleak chapter in American history has been recounted in many places, including in DEE ALEXANDER BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (1970).

described Indians as "red children" and the "poor child" of the prairie.³⁴ Four years later, the legislature described Indians as the "revengeful and murderous savage."³⁵

Territorial laws (and later state laws) restricted voting and office-holding to free white males and citizens of the United States.³⁶ Indians who sustained tribal relations, received support from the government, or held untaxable land were prohibited from voting in any state election.³⁷ The establishment of precincts on Indian reservations was forbidden,³⁸ and as election judges and clerks were required to have the "qualifications of electors," Indians were effectively denied the right to serve as election officials.³⁹

South Dakota discriminated against Indians in a variety of other ways. Indians were prohibited from entering ceded lands without a permit.⁴⁰ 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."⁴¹

Jury service was restricted to "free white males."⁴² The "intermarriage of white persons with persons of color" was prohibited.⁴³ Further, it was a crime to provide instruction in any language other than English.⁴⁴

South Dakota also played a leading role in breaking various treaties between tribes and the United States. The legislature sent a stream of resolutions and memorials to Congress urging it to extinguish Indian title to land and remove the Indians to make way for white settlement. In 1862, it asked Congress to

34. 1862 Dakota Terr. Laws Preface.

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

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

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

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

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

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

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

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

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

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

extinguish title “to the country now claimed and occupied by the Brule Sioux Indians,”⁴⁵ and to extinguish title to land occupied by the Chippewa Indians.⁴⁶ Four years later, it requested the Secretary of War to establish a military post to protect “the colonization of the Black Hills.”⁴⁷ 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.”⁴⁸ On December 31, 1870, it renewed its request for the removal of Chippewa Indians from ceded lands.⁴⁹ In 1873, it again asked Congress to open Indian lands, including the Black Hills, to white settlement.⁵⁰ As a result of the intense pressure from the territorial government and white miners and settlers, and the United States's capitulation to it, the Black Hills and other traditional tribal lands were finally taken from the Indians.⁵¹ The Supreme Court, commenting on the expropriation of the Black Hills from the Sioux in 1877, said that “[a] more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history.”⁵² 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.⁵³

Despite passage of the Indian Citizenship Act of 1924,⁵⁴ which granted full rights of citizenship to Indians, South Dakota officially excluded Indians from voting and holding office until the 1940s.⁵⁵ Even after the repeal of state law denying Indians the right to vote, as late as 1975 the state prohibited Indians from voting in elections in counties that were “unorganized” under state law.⁵⁶ The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of the unorganized counties from holding county office until as late as 1980.⁵⁷

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

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

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

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

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

50. Memorial to the Congress, 1872 Dakota Terr. Laws 204.

51. BROWN, *supra* note 33, at 269.

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

53. House Joint Resolution 6, ch. 147, 1901 S.D. Laws 248.

54. 8 U.S.C. § 1401(a)(2) (2000).

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

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

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

For most of the twentieth century, voters were required to register in person at the office of the county auditor.⁵⁸ Getting to the county seat was a hardship for Indians who lacked transportation, particularly for those in unorganized counties who were required to travel to another county to register. Moreover, state law did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities.⁵⁹ 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 nontaxpayers, many of whom were Indian, were required to make the trip to the courthouse to register in person.⁶⁰ Mail-in registration was not fully implemented in South Dakota until 1973.⁶¹

IV. 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.⁶² Unemployment rates on the reservations were even higher. In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80%. At the Standing Rock Indian Reservation it was 74%.⁶³ 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."⁶⁴ Infant mortality in Indian Country "is double the national average."⁶⁵

Native Americans experience a poverty rate that is five times the poverty rate for whites. The 2000 census reported that 48.1% of Indians in South Dakota were living below the poverty line, compared to 9.7% of whites. Sixty-one percent of Native American households received incomes below \$20,000,

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

59. 1963-1964 S.D. ATT'Y GEN. BIENNIAL REP. 341.

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

61. Act of Mar. 27, 1973, ch. 70, 1973 S.D. Laws 111.

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

63. SOUTH DAKOTA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM 6 (2000) [hereinafter S.D. ADVISORY COMM. REPORT (2000)].

64. *Id.*

65. *Id.* at 6-7.

compared to 24.4% of white households. The per capita income of Indians was \$6,799 compared to \$28,837 for whites.⁶⁶

Of Native Americans twenty-five years of age and over, 29% have not finished high school, while 14% of whites are without a high school diploma. The drop-out rate among Indians aged sixteen through nineteen is 24%, four times the drop-out rate for whites. Nearly one-fourth of Indian households live in crowded conditions, compared to 1.6% for whites. Approximately 21% of Indian households lack telephones, compared to 1.2% of white households. Native American households are three times as likely as white households to be without access to vehicles; 17.9% of Native American households are without access to vehicles versus 5.4% of white households.⁶⁷

The link between depressed socioeconomic status and reduced political participation is direct. As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."⁶⁸ Numerous appellate and trial court decisions, including those from Indian country, are to the same effect.

In a case from South Dakota involving the Sisseton Independent School District, the Court of Appeals for the Eighth Circuit concluded that "[l]ow political participation is one of the effects of past discrimination."⁶⁹ Similarly, in a case involving tribal members in Thurston County, Nebraska, the court held that "disparate socio-economic status is causally connected to Native Americans' depressed level of political participation."⁷⁰ 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."⁷¹

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

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

67. *Id.*

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

69. *Buckanaga*, 804 F.2d at 475.

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

71. *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000); *accord Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1016-017 (D. Mont. 1986) ("Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors . . . but the lingering effects of past discrimination is certainly one of those factors.").

registered to vote.⁷² The South Dakota Advisory Committee to the U.S. Commission on Civil Rights soberly concluded in a 2000 report that:

For the most part, Native Americans are very much separate and unequal members of society . . . [who] do not fully participate in local, State, and Federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality.⁷³

V. 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.⁷⁴

Section 2, one of the original provisions of the 1965 Act, was a permanent, nationwide prohibition on the use of voting practices or procedures that "deny or abridge" the right to vote on the basis of race or color. The Supreme Court subsequently held in *Mobile v. Bolden*⁷⁵ that proof of a discriminatory purpose, as was the case for a constitutional violation, was also required for a violation of Section 2. Two years later Congress responded to *Mobile v. Bolden* by amending Section 2 and dispensing with the requirement of proving that a challenged practice was enacted, or was being maintained, with a discriminatory purpose.⁷⁶ Congress also made explicit that Section 2 protected the equal right of minorities "to elect representatives of their choice."

The Supreme Court construed Section 2 for the first time in *Thornburg v. Gingles*,⁷⁷ 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.⁷⁸ The

72. *Buckanaga*, 804 F.2d at 474.

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

74. See 42 U.S.C. § 1973 (2000).

75. 446 U.S. 55 (1980).

76. S. REP. NO. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214.

77. 478 U.S. 30 (1986).

78. *Id.* at 50-51.

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.”⁷⁹ The amendment of Section 2 and *Gingles* were critical in facilitating what has accurately been described as a “quiet revolution” in minority voting rights and office holding.⁸⁰

The lack of enforcement of the Voting Rights Act in Indian Country was the result of a combination of factors. They included a lack of resources and access to legal assistance by the Indian community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments.

The first challenge under amended Section 2 in South Dakota was brought in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall Counties. Represented by the Native American Rights Fund, they claimed that the at-large method of electing members of the board of education of the Sisseton Independent School District diluted Indian voting strength. The trial court dismissed the complaint, but the Court of Appeals for the Eighth Circuit reversed. It held that the trial court failed to consider “substantial evidence . . . that voting in the District was polarized along racial lines.”⁸¹ 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,”⁸² the discriminatory impact of staggered terms of office and apportioning “seats between rural and urban members on the basis of registered voters”⁸³ which underrepresented Indians, and “the presence of only two polling places.”⁸⁴ On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members.⁸⁵

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

80. 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).

81. *Buckanaga*, 804 F.2d at 473.

82. *Id.* at 474.

83. *Id.* at 475.

84. *Id.* at 476.

85. 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).

In 1986, Alberta Black Bull and other Indian residents of the Cheyenne River Sioux Reservation brought a successful Section 2 suit against Ziebach County because of its failure to provide sufficient polling places for school district elections.⁸⁶ The same year, Indian plaintiffs on the reservation secured an order requiring the auditor of Dewey County to provide Indians additional voter registration cards and extend the deadline for voter registration.⁸⁷

Some thirteen years later, in 1999, the United States sued officials in Day County for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several noncontiguous 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. 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.⁸⁸

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU's Voting Rights Project, filed suit in 2000 challenging the state's 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff reports of the commission concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted."⁸⁹ The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties.⁹⁰ 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.⁹¹ Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said that the plan gerrymandered the Rosebud and Pine Ridge Reservations by "divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area."⁹² The legislature, however, ignored the task force's recommendation.

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

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

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

89. TASK FORCE ON INDIAN-STATE GOV'T RELATIONS, LEGISLATIVE APPORTIONMENT AND INDIAN VOTER POTENTIAL 17 (1974).

90. *Id.* at 25.

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

92. *Id.* at 981.

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.”⁹³

Prior to the 1980s round of redistricting, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The Committee issued a report in which it said that the existing districts “inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district.”⁹⁴ The Department of Justice, pursuant to its oversight under Section 5, advised the state that it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable and in 1981 drew a redistricting plan creating for the first time in the state's history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.⁹⁵ Thomas Short Bull, an early proponent of equal voting rights for Indians, ran for the senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state's upper chamber.

The South Dakota legislature adopted a new redistricting plan in 1991.⁹⁶ The plan divided the state into thirty-five districts and provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was new House District 28. The 1991 legislation provided that “in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts.”⁹⁷ District 28A consisted of Dewey and Ziebach Counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting age population (VAP) of House District 28A, and less than 4% of the VAP of House district 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for

93. *Id.*

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

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

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

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

the House to run in District 28 at-large.⁹⁸ Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.⁹⁹ The reconstituted House District 28 contained an Indian VAP of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

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

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.¹⁰⁰

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.”¹⁰¹ Any reapportionment that occurred outside of the authority granted by the state Constitution was therefore invalid as a matter of state law.¹⁰²

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

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

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

100. S.D. CONST. art. III, § 5.

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

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

South Dakota Constitution precludes any redistricting before 2001.”¹⁰³ 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.”¹⁰⁴ 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 1992-1994 to determine the existence, and extent, of any racial bloc voting. 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%. In all six of the contests the candidate preferred by Indians was defeated.¹⁰⁵

Dr. Cole also analyzed one countywide contest involving an Indian candidate, the 1992 general election for treasurer of Dewey County. Indian cohesion was 100%, white cohesion was 95%, and again the Indian-preferred candidate was defeated.¹⁰⁶

There were five white-white legislative contests from 1992-1998, four of which were head-to-head contests and one of which was a vote-for-two contest. All of the contests showed significant levels of polarized voting. For the six seats filled in the five contests, the candidates preferred by Indians lost four times. Notably, the Indian-preferred white candidate(s) won only in majority Indian District 28A. Schrempp, the white candidate, was preferred by Indian voters in District 28A in the 1992 and 1996 general elections and won both times. In the 1998 general election, however, he ran for state senate in District 28. Although he was again preferred by Indian voters, running in a district in which Indians were 29% of the VAP, he lost. This sequence of elections demonstrates in an obvious way the manner in which at-large elections in District 28 dilute or submerge the voting strength of Indian voters.¹⁰⁷

103. SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL, ISSUE MEMORANDUM 95-36, MAJORITY-MINORITY DISTRICTS: LEGISLATIVE REAPPORTIONMENT AFTER *MILLER v. JOHNSON* 6 (1995).

104. SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL, ISSUE MEMORANDUM 98-12, COMPARISON OF SINGLE MEMBER AND MULTIPLE MEMBER HOUSE DISTRICTS 5 (1998).

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

106. *Id.*

107. *Id.* at tbl. 3.

White cohesion also fluctuated widely depending on whether or not an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68%. In the Indian-white legislative contests, the average level of white cohesion jumped to 94%.¹⁰⁸ 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.¹⁰⁹

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%). The candidate with the next lowest support from Indian voters (Klaudt) received the second highest white support.¹¹⁰

The plaintiffs' Section 2 claim was strong. They met the basic requirements set out in *Gingles* for proof of vote dilution: they were sufficiently geographically compact to constitute a majority in a single member district; they were politically cohesive; and whites voted as a bloc usually to defeat the candidates of their choice. In addition, other "totality of circumstances" factors probative of vote dilution 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."¹¹¹ Voting was polarized. District 28 was also large, *i.e.*, twice the size of District 28A, making it much more difficult for poorly financed Indian candidates to campaign.

But before the Section 2 vote dilution claim could be heard, the district court certified the state law question to the South Dakota Supreme Court. That court

108. *Id.* at tbls. 1 & 3.

109. 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."); *RWTAAC v. Sundquist*, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998) (same), *aff'd*, 209 F.3d 835 (6th Cir. 2000).

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

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

accepted certification and held that in enacting the 1996 redistricting plan “the Legislature acted beyond its constitutional limits.”¹¹² It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

Another Section 2 case was filed in March 2002 by Indian plaintiffs against the at-large method of electing the board of education of the Wagner Community School District in Charles Mix County. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003.¹¹³ At the next election John Sully, an Indian, was elected to the board of education. A similar Section 2 suit against the city of Martin is pending.¹¹⁴

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. 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. Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government. Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted that its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.¹¹⁵

VI. 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

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

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

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

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

provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single-shot voting, or "concentrating on a single candidate."¹¹⁶ Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor.¹¹⁷ A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections.¹¹⁸ 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.¹¹⁹ 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. 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. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over-concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District 26A, would have had an Indian majority. Bradford's amendment was voted down fifty-one to sixteen.¹²⁰ Thomas Short Bull criticized the way in which District 27 had been drawn because there were "just too many Indians in that legislative district," which he said diluted the Indian vote.¹²¹ 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.¹²²

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

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

118. *City of Rome, Ga. v. United States*, 446 U.S. 156, 183-84 (1980).

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

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

121. *Id.* at 985.

122. *Id.*

Despite enacting these admitted changes in voting — a new legislative plan affecting Todd and Shannon Counties, which were covered by Section 5 — the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also 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.

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held that "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared under [Section] 5."¹²³ 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.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144-page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found that Indians were geographically compact and could constitute a majority in an additional House district in the area of the Pine Ridge and Rosebud Indian Reservations. Indians were politically cohesive, as a significant number of Indians usually voted for the same candidates, shared common beliefs, ideals, and concerns, and had organized themselves politically and in other areas. The court also found that plaintiffs established the third *Gingles* factor, *i.e.*, that whites voted as a bloc usually to defeat the candidates favored by Indians.¹²⁴

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."¹²⁵ Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile."¹²⁶ Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be

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

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

125. *Id.* at 1019.

126. *Id.* at 1025.

unfounded, they have "intimidated Indian voters."¹²⁷ According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."¹²⁸

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.¹²⁹ 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."¹³⁰ During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."¹³¹ Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice.¹³²

The district court also found that "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice."¹³³ Thomas Hennies, Chief of Police in Rapid City, has stated publically that "I personally know that there is racism and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement."¹³⁴ Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions."¹³⁵

127. *Id.* at 1026.

128. *Id.*

129. *Id.*

130. *Id.*

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

132. *Id.* at 1028.

133. *Id.* at 1030.

134. *Id.*

135. *Id.*

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.”¹³⁶ There was also “a significant lack of responsiveness on the part of elected officials to Indian concerns.”¹³⁷ Representative Van Norman noted that in the legislature any bill that has “[a]nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all.” “[W]hen it comes to issues of race or discrimination,” he said, “people don’t want to hear that.” One member of the legislature even accused Van Norman of “being racist” for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops.¹³⁸

Indians in South Dakota, as found by the district court, “have also been subject to discrimination in lending.”¹³⁹ Monica Drapeau, a business owner in Martin, said that she was unable to obtain a loan from the local Blackpipe State Bank, even though other banks in the state readily loaned her money.¹⁴⁰ 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.¹⁴¹

Some of the most compelling testimony in the *Bone Shirt* case, and which was credited by the district court, came from tribal members who recounted “numerous incidents of being mistreated, embarrassed or humiliated by whites.”¹⁴² Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact “that there might be some people who didn’t think well of people from the reservation.” When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, “somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me.” Meeks said that there is a “disconnect between Indians and non-Indians” in the state. “[W]hat most people don’t realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community. . . . [T]hen their . . . reciprocal feelings are based on that, that

136. *Id.* at 1037.

137. *Id.* at 1046.

138. *Id.*

139. *Id.* at 1031.

140. *Id.*

141. *Id.*

142. *Id.* at 1032.

they know, or at least feel that the non-Indians don't like them and don't trust them."¹⁴³

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities." But in the towns bordering the reservations, the reception "was more hostile." There, she ran into "this whole notion that . . . Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don't pay property tax . . . that we shouldn't be allowed [to run for office.]"¹⁴⁴ Such views were expressed by a member of the state legislature who said that he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty and paying their fair share of the tax burden."¹⁴⁵

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for "fun and games." The mayor, however, "interviewed" Dillon in his office to see if he was "good enough" to be a friend of his son's. Dillon says that he flunked the interview. "I guess I didn't measure up because . . . I was the only one that wasn't invited back to the house after football practice after that." He found the experience to be "pretty demoralizing."¹⁴⁶

Monica Drapeau said that one of the reasons she didn't want to attend the public school in Winner was because of the racial tension that existed there. White students often called Indians "prairie niggers" and made other derogatory comments.¹⁴⁷

Arlene Brandis, a tribal member at Rosebud, remembers walking to and from school in Tripp County. "Cars would drive by and they would holler at us and call us names . . . like dirty Indian, drunken Indian, and say why don't you go back to the reservation."¹⁴⁸

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session. The white students referred to the Indian

143. *Id.*

144. *Id.* at 1035-36.

145. *Id.* at 1046.

146. *Id.* at 1032.

147. *Id.*

148. *Id.* at 1033.

students as “GI’s,” which stood for government issue. “I just withdrew. I had no friends at school. Most of the girls that I dormed with didn’t finish high school . . . I didn’t associate with anybody,” Young said. Even today, Young has little contact with the white community. “I don’t want to. I have no desire to open up my life or my children’s life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more.” Testifying in court was particularly difficult for her. “This was a big job for me to come here today. . . . I’m the only Indian woman in here, and I’m nervous. I’m very uncomfortable.”¹⁴⁹

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

The district court, based upon proof of the three *Gingles* factors and the totality of circumstances, concluded that the state’s legislative plan violated Section 2. Bryan Sells, the lead ACLU lawyer for the plaintiffs in *Bone Shirt*, said that “no impartial observer of the political process in South Dakota could reach a conclusion other than that of the district court, that the 2001 plan diluted Indian voting strength.”¹⁵⁰

As for the other six hundred odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU’s Voting Rights Project, brought suit against the state in August 2002 to force it to comply with Section 5.¹⁵¹ Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan “that will promptly bring the State into full compliance with its obligations under Section 5.”¹⁵² The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Many jurisdictions in the South also failed to comply with Section 5 in the years following their coverage. But in none was the failure so deliberate and prolonged as in South Dakota.¹⁵³

149. *Id.*

150. Interview with Bryan Sells, staff attorney for ACLU’s Voting Rights Project, in Atlanta, Ga. (Sept. 28, 2004).

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

152. *Id.*, slip op. at 3.

153. For a discussion of noncompliance with Section 5 by covered jurisdictions in the South,

VII. The "Reservation" Defense

The state conceded in the lawsuit over the 1996 interim redistricting plan that Indians were not equal participants in elections in District 28, but argued that it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs."¹⁵⁴ According to defendants, Indians' loyalty was to tribal elections; they simply didn't care about participating in elections run by the state. The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying 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."¹⁵⁵

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

Undoubtedly, more Indians would have run for office had they believed that the state system was fair and provided them a realistic chance of being elected. As one court has explained, the lack of minority candidates "is a likely result of a racially discriminatory system."¹⁵⁶ As another court has said, white bloc voting "undoubtedly discourages [minority] candidates because they face the certain prospect of defeat."¹⁵⁷

The Cheyenne River Sioux have made a decision to conduct elections for the Tribe and the state at the same time, a measure designed to increase Indian participation in state elections. The Sisseton-Wahpeton litigation, the suits brought by Indians in 1986 protesting the failure of county officials to provide sufficient polling places for elections and voter registration cards, the challenge

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).

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

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

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

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

to the 1996 legislative redistricting, the Section 5 enforcement law suit, the challenge to the 2001 redistricting plan, and the dilution claims filed in Charles Mix County, the city of Martin, and Buffalo County further show that Indians do care about participating in state and local elections.

The state's "reservation" defense was not new. An alleged lack of Indian interest in state elections was also advanced as a defense by South Dakota in the cases that involved denying residents of the unorganized counties the right to vote or run for county office. In the first case, the state sought to justify denying residents in 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."¹⁵⁸ The court rejected the defense, noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with "skepticism," because "[a]ll too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote." The court concluded that Indians residing on the reservation had a "substantial interest" in the choice of county officials, and held the state scheme unconstitutional.¹⁵⁹

In the second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an "Indian Reservation and hence have little, if any, interest in county government."¹⁶⁰ Again, the court disagreed. It held that the "presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one."¹⁶¹

The "reservation" defense has been raised — and rejected — in other voting cases brought by Native Americans in the West. In a suit by Crow and Northern Cheyenne in Big Horn County, Montana, the county argued that Indian dual sovereignty, not at-large voting, was the cause of reduced Indian participation in county politics. The court disagreed, noting that Indians had run for office in recent years and were as concerned about issues relating to their welfare as white voters. According to the court, "[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."¹⁶²

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

159. *Id.* at 1256.

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

161. *Id.* at 245.

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

Similarly, in a case in Montezuma County, Colorado, the court found that Indian participation in elections was depressed and noted "the reticence of the Native American population of Montezuma County to integrate into the non-Indian population."¹⁶³ But instead of counting this "reticence" against a finding of vote dilution, the court concluded that it was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past."¹⁶⁴ Further, in a case from Montana involving Indians in Blaine County, most of whom resided on the Fort Belknap Reservation, the court rejected the argument that low voter participation was a defense to a vote dilution claim. The court reasoned that:

if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on.¹⁶⁵

South Dakota's claims that Indians didn't care about state politics was familiar for another reason. It was virtually identical to the argument that whites in the South made in an attempt to defeat challenges brought by blacks to election systems that diluted black voting strength. "It's not the method of elections," they said in cases from Arkansas to Mississippi, "black voters are just apathetic." But as the court held in a case from Marengo County, Alabama, "[b]oth Congress and the courts have rejected efforts to blame reduced black participation on 'apathy.'"¹⁶⁶ 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.¹⁶⁷

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

164. *Id.*

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

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

167. *Id.* at 1574.

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

In a case from Mississippi, the court rejected a similar “apathy” defense. “Voter apathy,” it said, “is not a matter for judicial notice.”¹⁶⁸ 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.”¹⁶⁹ It is convenient and reassuring for a jurisdiction to blame the victims of discrimination for their condition, 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.”¹⁷⁰ To argue, as South Dakota and other states have frequently done, that the depressed levels of minority political participation preclude a claim under Section 2 would reward jurisdictions with the worst records of discrimination by making them the most secure from challenge under the act. Congress could not have intended such an inappropriate result. In *Gingles* the Court said that:

The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.¹⁷¹

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

VIII. 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

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

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

170. *Katzenbach*, 383 U.S. at 308.

171. *Gingles*, 478 U.S. at 47.

politics and electing candidates of their choice are not restricted to South Dakota. A variety of common factors have coalesced to isolate Indian voters from the political mainstream throughout the West: past discrimination, polarized voting, overt hostility of white public officials, cultural and language barriers, a depressed socioeconomic status, inability to finance campaigns, difficulties in establishing coalitions with white voters, a lack of faith in the state system, and conflicts with non-Indians over issues such as water rights, taxation, and tribal jurisdiction.

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

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

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.¹⁷²

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

In a recent suit invalidating at-large elections in Montezuma County, Colorado, brought by residents of the Ute Mountain Ute Reservation, for example, the court found: a "history of discrimination — social, economic, and political, including official discrimination by the state and federal government;" a "strong" pattern of racially polarized voting; depressed Indian political participation; a "depressed socio-economic status of Native Americans;" and a lack of Indian elected officials.¹⁷³

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

172. President's Special Message to Congress on Indian Affairs, PUB. PAPERS: RICHARD NIXON 564-67, 575-76 (1970).

173. *Cuthair*, 7 F. Supp. 2d at 1169-70.

participation,” there was a lack of “interaction” between Indians and whites, and there was “overt and subtle discrimination in the community.”¹⁷⁴

In another case brought by residents of the Crow and Northern Cheyenne Reservations in Montana, the court found “recent interference with the right of Indians to vote,” “the polarized nature of campaigns,” “official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote,” “a strong desire on the part of some white citizens to keep Indians out of Big Horn County government,” polarized “voting patterns,” the continuing “effects on Indians of being frozen out of county government,” and a depressed socioeconomic status that makes it “more difficult for Indians to participate in the political process.”¹⁷⁵

As is apparent, the “inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination,” and which the Voting Rights Act was designed to eradicate, still persist throughout the West.¹⁷⁶ The Voting Rights Act, including the special preclearance requirement of Section 5, are still urgently needed in Indian Country. Of all the modern legislation enacted to redress the problems facing American Indians,¹⁷⁷ 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.

IX. Addendum: The Voting Rights Act of 1965: What Expires in 2007 and What Does Not

A. What Does Not Expire

1. The Ban on “Tests or Devices,” 42 U.S.C. § 1973aa

The Voting Rights Act¹⁷⁸ bans the use of any “test or device” for registering or voting in any federal, state, or local election. A “test or device” includes literacy, understanding, or interpretation tests, educational or knowledge requirements, good character tests, proof of qualifications by “vouchers” from third parties, or registration procedures or elections conducted solely in English

174. *Stabler*, 129 F.3d at 1023.

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

176. *Gingles*, 478 U.S. at 69.

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

178. 42 U.S.C. § 1973aa (2000).

where a single language minority comprises more than 5% of the voting age population of the jurisdiction.¹⁷⁹ "Language minorities" are defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage.¹⁸⁰ The ban on tests or devices is nationwide and permanent.

2. The "Results" Standard of Section 2, 42 U.S.C. § 1973

Section 2 of the Voting Rights Act¹⁸¹ prohibits the use of any voting procedure or practice which "results" in a denial or abridgement of the right to vote on account of race or color or membership in a language minority. Section 2 applies nationwide and is permanent.

3. Voter Assistance, 42 U.S.C. § 1973aa-6

By amendment in 1982, the Voting Rights Act¹⁸² provides that any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or union. The voter assistance provision is nationwide and permanent.

4. Court Appointment of Federal Examiners, 42 U.S.C. § 1973a

In any action to enforce the voting guarantees of the fourteenth or fifteenth amendments a court may, pursuant to Section 3(a) of the Act,¹⁸³ appoint federal examiners to register voters. The federal examiner provision is nationwide and permanent, although it is rarely, if ever, used today.

5. Civil and Criminal Penalties, 42 U.S.C. §§ 1973i and 1973j

Sections 11 and 12 of the Act¹⁸⁴ authorize the imposition of civil and criminal sanctions on those who interfere with the right to vote, fail to comply with the Act, or commit voter fraud. These provisions are permanent and nationwide.

6. Pocket Trigger, 42 U.S.C. § 1973a(c)

Section 3(c) of the Act,¹⁸⁵ the so-called "pocket trigger," requires a court which has found a violation of voting rights protected by the fourteenth or

179. *Id.* § 1973b(c), (f)(3).

180. *Id.* § 1973aa-1a(e).

181. *Id.* § 1973.

182. *Id.* § 1973aa-6.

183. *Id.* § 1973a.

184. *Id.* §§ 1973i, 1973j.

185. *Id.* § 1973a(c).

fifteenth amendments as part of any equitable relief to require a jurisdiction for an “appropriate” period of time to preclear its proposed new voting practices or procedures. The preclearance process provided for in § 1973a(c) is similar to that described in the discussion below of Section 5 of the Act.¹⁸⁶ There is no expiration date for the pocket trigger.

7. Presidential Elections, 42 U.S.C. § 1973aa-1

By amendments in 1970,¹⁸⁷ Section 202 of the Act abolished durational residency requirements and established uniform standards for absentee voting in presidential elections. These provisions are permanent and nationwide.

B. What Does Expire

1. Section 4 Coverage Formula, 42 U.S.C. § 1973b

Section 4(b) of the Act¹⁸⁸ contains a formula defining jurisdictions subject to, or “covered” by, special remedial provisions of the Act. The special provisions are discussed below. Jurisdictions are covered if they used a “test or device” for voting and less than half of voting age residents were registered or voted in the 1964, 1968, or 1972 presidential elections. Coverage is determined by the attorney general and the director of the census, and is not judicially reviewable. Coverage, and with it the application of the special provisions, is set to expire in August 2007.

2. Section 5 Preclearance, 42 U.S.C. § 1973c

Section 5,¹⁸⁹ known as the “preclearance” requirement, is one of the special provisions of Act whose application is triggered by the coverage formula in Section 4(b). Section 5 requires covered jurisdictions to get approval, or preclearance, from federal authorities (either the attorney general or the federal court for the District of Columbia) prior to implementing any changes in their voting laws or procedures. The jurisdiction has the burden of proving that a proposed change does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority. Jurisdictions covered by Section 5 are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New

186. *Id.* § 1973c.

187. *Id.* § 1973aa-1.

188. *Id.* § 1973b(b).

189. *Id.* § 1973c.

York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, Virginia. U.S. Department of Justice, Section 5 Covered Jurisdictions (Jan. 28, 2002). Section 5, unless extended, will expire in August 2007.

3. Assignment of Federal Examiners and Poll Watchers by the Attorney General, 42 U.S.C. §§ 1973d, e, f & k

The attorney general can assign federal examiners to covered jurisdictions pursuant to Sections 6(b), 7, 9, and 13(a) of the Act,¹⁹⁰ to list qualified applicants who are thereafter entitled to vote in all elections. The attorney general is also authorized by Section 8 of the Act¹⁹¹ to appoint federal poll-watchers in places to which federal examiners have been assigned. These provisions are set to expire in August 2007.

4. Bilingual Voting Materials Requirement, 42 U.S.C. § 1973aa-1a

Certain states and political subdivisions are required by 42 U.S.C. § 1973aa-1a to provide voting materials in languages other than English. While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions required to provide bilingual election procedures for one or more language minorities 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.¹⁹² The bilingual voting materials requirement is scheduled to expire in August 2007.

190. *Id.* § 1973d, e, k.

191. *Id.* § 1973f.

192. 67 Fed. Reg. 48,872 (July 26, 2002).