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ARTICLES

The Voting Rights Act's Pre-Clearance Provisions: The Experience of Native Americans in South Dakota

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On June 25, 2013—the 137th anniversary of General Custer's defeat in the Battle of Little Big Horn—five conservative members of the Supreme Court ruled in *Shelby County v. Holder* that a key provision within the Voting Rights Act (VRA) was unconstitutional.[1] That provision, Section 5, was unique in that it was designed to proactively prevent political jurisdictions with histories of voting rights abuses from adopting new laws and procedures that undermine the ability of racial minorities to access the ballot box. Section 5 required "covered" jurisdictions" to pre-clear changes to their voting laws and procedures with the Department of Justice or the Circuit Court for the District of Columbia.[2] While not actually ruling on Section 5, the court rendered it inoperable by finding Section 4(b) to be unconstitutional, which established the criteria for determining whether a political jurisdiction was "covered" by Section 5. The justices argued that Section 4(b) violated the "equal sovereignty of the states" by treating them differently based on "40-year-old facts that have no relationship to the present day."[3]

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Post-*Shelby* Voting Rights Litigation

In the post-*Shelby* era, the main VRA provision that can be used to challenge discriminatory voting laws is Section 2, which prohibits laws and other practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color." Courts have interpreted Section 2 as prohibiting both practices that deny the right to vote and those that dilute the power of minority voters to elect representatives of their choice. More recently, there have been a handful of cases that distinguish vote abridgement from vote dilution. Section 3(c) provides a "bail in" or "pocket trigger" mechanism for federal courts to subject political jurisdictions to some form of pre-clearance under Section 2. "Bailing in" provides for a judicial review for plaintiffs to show that a state or local jurisdiction has intentionally discriminated, either historically or currently, and therefore should be subject to a "pre-clearance" review from the Department of Justice before new election laws can go into effect. The standard of proof required under 3(c) is substantially higher than had been previously required under Section 4(b) and there is no mechanism to proactively address problems.[4] The remedies, either imposed by the court or reached through settlement, are individually crafted for specific jurisdictions. In many Section 2 cases, the remedy does not include pre-clearance of future changes in election procedures. When there is pre-clearance, it is narrowly tailored and for a specific period, such as the next three elections.

Since *Shelby*, plaintiffs must contest separately, in federal court, every new law or procedure that dilutes or abridges their access to voting, since there is no proactive mechanism in place unless it is established in specific jurisdictions via Section 3(c), and the pre-clearance is narrower and encompasses a much shorter time period. Also, judges often require plaintiffs to show intentional discrimination to prove their cases. Given the extreme poverty and limited legal resources in Indian country,[5] this imposes an enormous burden on Native Americans' ability to challenge discriminatory procedures.[6]

Minimal Interest in Native American Voting Rights

Although the *Shelby* ruling was widely covered in the media, its impact on Native Americans was largely ignored. Of more than 300 articles in the six-month period after the ruling, only two even mentioned American Indians.[7] Section 5 litigation has been very important in South Dakota, a state that because of its discrimination against Native Americans has been labeled "the Mississippi of the North."[8] As the American Civil Liberties Union's Laughlin McDonald notes, "Many jurisdictions in the South also failed to comply with Section 5 in the years following their coverage. But in none was the failure as deliberate and prolonged as in South Dakota."[9]

Although scholars have examined cases from the pre-*Shelby* period, research is needed on the prospects for voting-rights litigation in the current period.[10] Hence, we have chosen to do an in-depth case study of pre-clearance in South Dakota, which includes lands belonging to nine tribal nations. Reservation lands, however, are split among thirteen different counties, which dilutes their voting clout in county elections. As of mid-2017, there have been at least twenty-two voting rights cases in the state, a

figure that is substantially larger than in any of the three states with the next highest number of cases, New Mexico, Arizona, and Montana. This suggests that South Dakota is exactly the setting where proactive measures to prevent the adoption of discriminatory voting practices are most needed.

Beginning with a brief discussion of South Dakota's troubled history, we then consider the ways that Native Americans have used both Sections 2 and 5 to attack deeply entrenched discriminatory electoral practices. Finally, we turn our attention to whether a revitalized Section 2 can be used as a means of imposing pre-clearance in the post-*Shelby* era. We consider the problem of proving intentionality as well as the efforts by political jurisdictions to increase the financial costs of litigation as means of discouraging voting-rights lawsuits.

South Dakota's Troubled Past: Decades of Conflict and Treaty Violations

Louise Erdrich describes Native Americans as viewing history as a "living force," where current events are inextricably linked to the past.[11] We too believe the roots of the current animus are found in the history of white/Sioux interactions going back to the first Euro-American incursions into the lands occupied by the "Great Sioux Nation." At its height, the "Great Sioux Nation" stretched from Minnesota through the Dakotas to the Yellowstone River and into Nebraska, but the United States government, from the 1805 treaty onwards, continually encroached on Sioux territory.

The 1861 law creating the Dakota Territory explicitly limited voting to free white men and prohibited Indians from claiming US citizenship.[12] Five years later, the cutting of the Bozeman Trail through the Lakota Sioux reservation triggered the three-year Red Cloud's War,[13] which ended with the 1868 treaty establishing the sixty million-acre Great Sioux Reservation, which included the sacred Black Hills.[14] After gold was discovered in the Black Hills, the Sioux refused to renegotiate the treaty. As a result, beginning in December 1875 and extending through 1876, the army launched various attacks against the "hostile Sioux."[15] In 1877, Congress passed a law arbitrarily removing seven million acres of land from the Sioux, including the Black Hills, while adding 900,000 less-desirable acres.[16] There was sporadic fighting, but that ended after the 1890 Wounded Knee Massacre in which more than 350 mostly unarmed Sioux were killed. Wounded Knee did more than any other event to "poison the relations [in the state] between the Sioux and whites for generations to come."[17]

As a prerequisite of gaining statehood, South Dakota was required to include a "disclaimer clause" in its state constitution declaring that "[the white settlers] forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes."[18] Almost immediately, however, the US Congress responded to the South Dakota state legislature's requests to take another eleven million acres from the Sioux and split the Great Sioux Reservation into five much smaller, disconnected reservations. Because the state constitution limited voting and office-holding to white male citizens, Native peoples had no political voice. Moreover, laws prohibited polling places on Indian lands, required that jurors be selected from property tax

lists, and mandated "exclusion of non-taxpaying Indians from participation in the judicial process."[19]

This denial of civic status had devastating consequences. In 1903, Congress acted unilaterally to remove another 416,000 acres from the Rosebud Sioux Reservation.[20] In 1910, over the protests of Oglala Sioux leaders, a 1,273-square mile portion of the Pine Ridge Reservation was opened to non-Indians and a referendum then was held to create Bennett County from that territory. "Ration-drawing Indians who have not severed their tribal relations" were excluded from voting and the referendum passed overwhelmingly.[21] Then, in 1917, the state attorney general reiterated that state law prohibited polling places on reservation lands (e.g., those designated as "unorganized counties"), which meant that even "civilized"[22] Native Americans on the reservations could not vote.[23]

The 1924 Indian Citizenship Act: Disputes and Citizenship without the Franchise

Although the 1924 passage of the Indian Citizenship Act (ICA) unilaterally gave US citizenship to all Native Americans, the law did not address whether citizenship included the right to vote. According to Laughlin McDonald, minutes of the House Indian Affairs Committee show that Native Americans were clearly intended to have full rights, but Indian Affairs Commissioner Charles Burke recognized that there would be opposition to Indian voting in many of the states.[24] The South Dakota attorney general issued a report stating that citizenship did not necessarily confer the right to vote.[25]

Despite the ICA's prohibition of explicit racial bans on voting, South Dakota officials found many other ways to keep Native Americans from voting.[26] For example, in 1963 the attorney general stated that Yankton Sioux could not vote on a measure to establish a water district because their names were not on the county tax rolls and because they did not have full control over their affairs due to being under federal jurisdiction.[27] Sioux living on the Pine Ridge Reservation in Shannon and Washabaugh counties and those living on the Rosebud Sioux Reservation in Todd County were prohibited by state law from voting because those counties were "unorganized."[28] This is a designation South Dakota law applied only to counties that were entirely comprised of reservation lands.[29]

The Voting Rights Act

President Lyndon Johnson signed the 1965 Voting Rights Act (VRA) into law exactly 104 years to the day after Lincoln had signed legislation freeing slaves held in the Confederate states.[30] The timing conveyed the message that the VRA's purpose was to ensure that African Americans could vote. The VRA included permanent provisions, the most important being Section 2, but also nonpermanent provisions, including Section 5, which had to be renewed periodically. The general language in Section 2, which prohibited practices that "deny or abridge the right of any citizen of the United

States to vote on account of race or color," could be used against laws that disenfranchised Native Americans. Initially, however, Section 5 was geographically limited to the South.

This changed when in 1975, Congress reauthorized the VRA's nonpermanent provisions and also expanded Section 5's geographic coverage. On January 1, 1976, the Department of Justice used the trigger formula in Section 4(b) to subject "unorganized" Todd and Shannon counties in South Dakota to Section 5 pre-clearance.[31] Shannon County is entirely contained within the western part of the Pine Ridge Reservation and Todd County encompasses the Rosebud Reservation. The reaction in South Dakota was immediate and vitriolic. Attorney General William Janklow called the VRA "garbage" before issuing a formal opinion declaring the VRA to be an unconstitutional violation of states' rights.[32] He advised the South Dakota secretary of state to ignore the pre-clearance requirement.[33] Political leaders in the state followed this advice. During the next twenty-six years more than six hundred new statutes and regulations were adopted in the two "covered" counties, but less than ten were submitted for pre-clearance.[34]

Voting Rights Litigation in South Dakota

Although South Dakota has a long history of racial animus towards Native Americans, one cannot assume that opposition to Native voting is simply driven by racism, given that there are significant partisan differences that align with race. Aside from predominantly American Indian jurisdictions, which overwhelmingly vote for Democrats, the rest of the state votes for Republicans. For example, following the 2016 election, the party breakdown in the state legislature was 91 Republicans and 16 Democrats, with three of the latter being Native American.[35] To assess whether a group is under- or overrepresented in a legislative body, scholars use the "racial parity ratio," the percentage of the group within divided by their population.[36] Native Americans constitute 8.9% of the state population, but are only 2.86% of the state legislature; this means their racial parity ratio is 0.32, indicating they are severely underrepresented. Native representation is nearly as bad within county councils, but prior to voting rights litigation neither county councils nor the state legislature had any American Indian representation at all.[37]

The demographic trends, however, suggest that it will become increasingly difficult to keep Native Americans out of electoral office. Laughlin McDonald, Janine Pease, and Richard Guest were well aware of this a decade ago, writing that "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."[38] As is evident from the cases that we discuss in the following sections, the earliest voting rights struggles in South Dakota were over the denial of access to the ballot box, but more recent cases have involved vote dilution and abridgement.[39] None of these strategies, however, alter the underlying demographic shifts; rather, they only slow the process of change.

Early Vote-Denial Cases

Little Thunder v. South Dakota (1975) is an early case that deals with egregious vote-denial practices. Legal Services attorneys challenged a law prohibiting residents of "unorganized counties" (e.g., people living in Shannon and Todd counties) from voting and running for political office. The state argued that Native Americans living on reservations "did not share the same interest in county government as the residents of organized counties."[40] The federal district court accepted the state's rationale, but the Eighth Circuit Court of Appeals disagreed.

The success in *Little Thunder*, combined with the 1975 VRA amendments, empowered groups such as the Native American Rights Fund (NARF) and the ACLU to launch challenges against long-standing discriminatory practices. This first wave of voting-rights litigation involved local political jurisdictions whose Native American citizens were not covered by Section 5 and who consequently were litigating for coverage under Section 2. Thus, they had to prove intentional discrimination via Section 3(c).[41] In the process, they fought at-large elections, a shortage of polling places on reservations, and the outright rejection of voter-registration cards. These cases generally resulted in favorable settlements for the plaintiffs, but did not always obtain pre-clearance.[42]

Vote-Dilution Cases

In the 1990s the focus shifted to vote dilution. In 1996, the state consolidated legislative districts 28A and 28B into a single district. District 28A included the Cheyenne River Sioux Reservation and some of the Standing Rock Reservation. District 28B included no reservation land and Native Americans made up less than 4 percent of the voting-age population, compared with 60 percent in district 28A. The Cheyenne River Sioux filed suit, arguing the redistricting violated the state constitution in that it took place prior to the decennial census.[43] The state court ordered the legislature to redistrict only following the decennial census.[44]

After the 2000 census, the legislature developed a plan to create thirty-five districts, each with the power to elect one senator and two house members. The ACLU and plaintiffs in *Bone Shirt v. Hazeltine* argued that the new redistricting plan "packed" Native American voters into District 27 and diluted Native voting strength in District 26.[45] The lawyers argued the plan not only would dilute votes and violate Section 2 judicial rulings, but also violated Section 5 since the changed districts included the covered counties. Secretary of State Joyce Hazeltine argued that the changes were too minor to warrant pre-clearance, but the court disagreed.

The ACLU also supported plaintiffs in *Quick Bear Quiver v. Hazeltine* (2001).[46] Lawyers cited Shannon and Todd counties' failure to pre-clear 3,048 changes in their voting procedures as required by Section 5.[47] Secretary of State Chris Nelson initially insisted his office had complied with the letter of the law, but eventually entered a consent decree requiring the state to come into full compliance with Section 5 pre-clearance.[48]

Bailing In in Jurisdictions Using Section 2 and Section 3(c)

Early on, Native Americans in districts and counties not covered under Section 5 tried to get jurisdictions bailed in and subject to pre-clearance using Section 3(c)'s mechanism for gaining Section 2 pre-clearance. The standard for determining what constituted intentional discrimination, however, was unclear prior to the intentional discrimination standard established in 1986 by *Thornburg v. Gingles*; indeed, this "disparate impact" standard has been applied only sporadically ever since.[49] Currently, the standard applied depends on the federal circuit court hearing the case. The cases outlined below demonstrate that a wide degree of judicial latitude determines what constitutes intentional discrimination in vote-dilution cases.

Litigation involving the city of Martin, the seat of Bennett County, illustrates how difficult it is to prove intentional discrimination in Section 2 cases. Martin has a population of 1,071, with 45 percent of the population identifying as Native American and 40 percent identifying as white. In 2002, the ACLU sued the city, claiming the redistricting plan intentionally divided the Native American population in order to create three majority-white council districts. Although the ACLU was able to show that no Native-preferred candidate had ever been elected to the city council, it lost in district court because it failed to show all three necessary factors for establishing discriminatory intent. The Eighth Circuit, however, reversed that decision, finding that the plaintiffs had shown all the factors necessary to establish discriminatory intent.[50] On remand, the district court noted, "Martin city officials have taken intentional steps to thwart Indian voters from exercising political influence" and ordered the city to propose a remedial plan.[51] The city refused and then won on appeal when the Eighth Circuit[52] held that the district court was correct in finding that all three factors had not been established on the basis that there was not enough evidence showing that racially polarized voting among whites was enough to defeat Native-preferred candidates.[53]

Buffalo County, which includes the Crow Creek Reservation, was bailed in under Sections 2 and 3(c) for egregious malapportionment.[54] In 2000, 83 percent of the county's population was Native American.[55] The county council members were elected from three districts: District 1 held 101 residents, none of whom were Native American; District 2 held 353 residents, 56 percent of whom were Native American; District 3 held 1,578 residents, 94.6 percent of whom were Native American.[56] The county council decided in 2002 that the districts were "as regular and compact in form as practicable and required no change." In court two years later, however, they admitted that district apportionment was in violation of the "one person, one vote" standard and signed a consent decree mandating both a special election under a redistricting plan outlined by the court and pre-clearance of future redistricting plans until January 1, 2013.[57]

Blackmoon v. Charles Mix County (2005) involved extreme malapportionment. By race, the population of Charles Mix County is about two-thirds white and one-third Native American, mostly members of the Yankton Sioux tribe. In 2005, tribal members sued, charging that the three county council districts were malapportioned. Typically, *prima facie* evidence of malapportionment is a population deviation of 10

percent or more; Charles Mix County's plan had a deviation of 19 percent.[58] The plaintiffs argued the county was in violation of Section 2 with intentional vote dilution, as required by Section 3(c), and the court agreed. County officials adopted a new redistricting plan and a Yankton Sioux person was elected to the three-member county council in 2006.[59] The following year, the county passed a referendum to increase the number of county council seats from three to five. The new plan, which "packed" most of the Native Americans in a single district, was subject to pre-clearance, however, and the Department of Justice objected. The county requested mediation, which concluded with a consent decree that established that Charles Mix County was covered under Section 3(c) of the VRA and required pre-clearance until 2024.[60]

These pre-*Shelby* cases show that only under extreme duress have South Dakota elites acquiesced to Native American demands for voting rights. When forced to allow people in "unorganized counties" to vote and to run for political office, jurisdictions switched from denying the Native vote outright to diluting it. The Section 2 cases illustrate the challenges of proving intentional discrimination as well as the limited scope of pre-clearance via Section 3(c).

The Way Forward: Litigation in the Post-*Shelby* Era

In finding Section 4(b)'s formula unconstitutional, the *Shelby* court suggested that Congress exceeded its authority with respect to the Fourteenth and Fifteenth Amendments.[61] If so, according to the court, then Congress was also violating powers of the states as laid out in Article 4 of the Constitution and the reserved powers of the Tenth Amendment. While the court agreed that "[t]here is no doubt that these improvements are in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process," it found the Section 4(b) coverage formula to be outdated.[62]

Proving Intentional Discrimination

The *Shelby* decision triggered renewed interest in Section 2 litigation as a potential means of reinstituting pre-clearance via Section 3(c).[63] The major hurdles for Section 3(c) cases are lack of a unified standard for bringing such cases and the requirement in some courts that plaintiffs prove that the jurisdiction *intentionally* discriminated. Plaintiffs may use direct evidence or circumstantial evidence to prove intentional discrimination. Direct evidence is obviously desirable, but vote-dilution cases rarely present such clear corroboration and plaintiffs are left to piece together circumstantial evidence in order to make their case.

For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (1977), the Supreme Court suggested factors that indicate discriminatory intent: (1) disproportionate impact; (2) the historical background of the challenged decision; (3) the specific antecedent events, such as departures from normal procedures; and (4) contemporary statements of the decision-makers.[64] Later, in *Thornburg v. Gingles* (1986), the Court established that three preconditions had to be present in order to prove intentional discrimination in VRA cases, along with other criteria.[65]

While a useful starting point, it is not clear whether contemporary court decisions will be influenced by rulings from decades ago. Only shortly before the *Shelby* ruling in 2012, the Ninth Circuit Court stated in *Gonzalez v. Arizona* that Section 2 only required a "causal connection" between the electoral practice and a discriminatory result.[66] The Ninth Circuit Court is often more liberal than other federal courts, however, so it is unclear whether other courts will concur.

*Post-*Shelby *Section 2 Decisions*

Among a handful of post-*Shelby* Section 2 decisions, in *Frank v. Walker* (2014) the Seventh Circuit applied a very strict standard to prove intentional discrimination.[67] While recognizing that minority voters were less likely than white voters to have voter identification, the judges stated this "disparate outcome" did not constitute a "denial of anything." In contrast, the Fourth, Fifth, and Sixth Circuit Courts have been more lenient, instead adopting a two-pronged test for "disparate impact." A voting procedure is in violation of Section 2 if (1) there is a disproportionate burden on a protected class, and (2) if the burden is partially "caused by or linked to social and historical conditions that have or currently produce discrimination."[68] None of these cases involved Native Americans, who may face unique challenges in trying to register and vote.

Shortly before the 2016 election, Paiutes living on two Nevada reservations sought a preliminary injunction to force the state to provide early-voting sites on reservations. There were dozens of early-voting sites across the state, but none on reservations, whose residents had to travel long distances to vote. In granting the injunction, the judge cited *Gonzalez v. Arizona* (2012) before laying out a two-step test for determining Section 2 violations. The test largely mirrored the rulings from the Fourth, Fifth, and Sixth Circuit Courts, but broke new ground in recognizing travel distance as a barrier to Native American voting. *Sanchez v. Cegvaske* (2016) is the first court decision that stated travel distance disparities may work "in tandem with historical, social and political conditions to produce a discriminatory result" that constitutes voting abridgement in violation of Section 2.[69]

The Possibilities of Section 2 Voting Abridgement Litigation in South Dakota

South Dakota rests within the jurisdiction of the United States Court of Appeals for the Eighth Circuit, which has not yet heard a voting abridgement case. However, there are two reasons why the *Sanchez* decision may have ramifications in South Dakota. First, *Sanchez* extends the disparate impact standard of four other US Courts of Appeal to Native American voting rights litigation (the Fourth, Fifth, Sixth, and Ninth Circuits); it seems reasonable that the Eighth Circuit also would at least explore the merits of the standard. Second, the facts in *Sanchez* mirror those in recent South Dakota voting-abridgement cases. In fact, plaintiffs in these South Dakota voting-abridgement cases, *Brooks v. Gant* and *Poor Bear v. County of Jackson*, have faced substantially greater travel distance barriers than those faced by the Nevada litigants.[70] Additionally, the South Dakota plaintiffs' historical, political, and social conditions are

among the worst of any population in the United States. These South Dakota cases were settled before trial with an agreement that early-voting sites would be established on the Pine Ridge Reservation for several electoral cycles. Unless South Dakota agrees to continue to provide for these sites after that period, new lawsuits will be likely, which will give courts in the Eighth Circuit an opportunity to consider what standard is required in Section 2 litigation.

*The Financial Costs of Litigation in the Post-*Shelby *Era*

As we have noted, the *Shelby* decision has made it much more difficult to prevent political jurisdictions from adopting a range of new laws that erect barriers to registration and voting. Yet without pre-clearance, minority populations have no means of proactively preventing new discriminatory voting laws and procedures. Instead, every new discriminatory practice must be fought in court. Indeed, more than forty years ago, a Senate report noted, "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate rights in court."[71]

Data from the Legal Defense Fund shows that the costs in terms of time and money in Section 2 cases can be extraordinarily high, sometimes reaching as much as $5 million for one side. Moreover, defendants and their attorneys often adopt a conscious strategy of prolonging litigation, thereby increasing the costs for low-income plaintiffs.[72] This is called "papering up." Cases that are settled rather than going to trial will have lower costs, but nonetheless these can be considerable. While we were unable to obtain data on the costs in recent South Dakota cases, when the same legal team handled a Montana Section 2 voting rights case, these litigation costs were roughly $460,000 prior to being settled.[73]

Poor Bear v. County of Jackson

While it is possible for those who prevail in court to be reimbursed for the costs of litigation, most of the recent South Dakota voting-rights cases have been settled instead of being adjudicated, which means that the plaintiffs' costs are often not reimbursed. The states and counties, however, do not face an equivalent burden because their costs are borne by the public. *Poor Bear v. County of Jackson* (2015) offers a recent example.[74]

In 2014, the Oglala Lakota, fronted by lead plaintiff Thomas Poor Bear, filed a lawsuit in federal district court to force Jackson County to provide a satellite registration and early-voting site in Wanblee, the largest reservation community in the county. The southern portion of Jackson County includes the eastern portion of the Pine Ridge Reservation, while the northern, off-reservation portion is nearly all white. Eighty-four percent of Kadoka's population is white, while 92 percent of Wanblee's population is Native American.[75] Most of the whites live within a two-mile radius of the county auditor's office, but very few Native Americans live near the county seat. Without a satellite center, people in Wanblee had to travel nearly sixty miles

round-trip to the off-reservation county seat in Kadoka to do late registration and early voting. The plaintiffs argued that traveling this distance constitutes a substantial burden for Native Americans, whose annual income per capita is less than $6,000; for whites in the area, annual income per capita is nearly $24,000.[76] The plaintiffs requested that the county be "covered" via Section 3(c), claiming that the county was in violation of Section 2. Jackson County responded that it lacked the funds to establish a satellite center, even though South Dakota still had unused Help America Vote Act (HAVA) funds specifically designated to help rural populations with access to voting.

Just prior to the 2014 election, when it appeared likely that Jackson County would lose the case brought by the Oglala Lakota, the county commissioners did set up a satellite registration and voting center in Wanblee. The county then tried, unsuccessfully, to get the case dismissed. In ruling against dismissal, Judge Karen Schreier wrote, "The ability to vote absentee in-person must be viewed in conjunction with practical realities—such as poverty and lack of transportation—that exist on the Pine Ridge Reservation and must be compared to the opportunity to vote available to other Jackson County white citizens."[77] The judge also noted there were unused HAVA funds. She stated, "Based on the facts in the complaint, it is reasonable to infer that defendants knew that the funding justification was not true at the time they made the decision not to establish the satellite office. According to the complaint, the official action bears more heavily on minority voters and occurred against a backdrop of historical discrimination."[78]

The Role of the South Dakota Public Assurance Alliance in Driving Litigation Costs

Jackson County then tried to make fighting the case as costly as possible during the discovery phase by scheduling depositions, retaining expert witnesses, and incurring hours upon hours of legal time. Even as the county used public funds to cover the costs of "papering up," the plaintiffs had to rely on pro bono attorneys and financial donations. Jackson County belongs to the South Dakota Public Assurance Alliance (SDPAA), an insurance pool of more than four hundred public entities, which use taxpayer dollars to collectively buy municipal insurance through the alliance.

According to its website, the SDPAA was founded in 1987 and currently provides broad coverage including general liability, liability for automobiles, public officials, law enforcement, and cyber liability, in addition to coverage for property, vehicle physical damage, boiler and machinery, and enhanced crime.[79] Belonging to cooperative insurance pools is generally seen as good public administration practice. However, in this case the pool's original purpose was exceeded when members began using it to defend against civil rights and voting lawsuits brought by their own citizens. The authors of this article repeatedly attempted to contact SDPAA board members and staff, but received no response. However, Jonathan Ellis, a reporter at a South Dakota newspaper that has published stories on the SDPAA, did confirm that the organization has paid legal bills on behalf of Jackson County, but he too was unable to obtain from the SDPAA a figure for the total amount that has been spent.[80]

According to Bret Healy, a consultant with Four Directions, a grassroots Native American voting-rights nonprofit organization, the availability of SDPAA funds allows defendants to drive up the costs of litigation. Small communities are able to spend large sums of money on defense and litigation when without these funds they likely might seek early settlements. The SDPAA also allows a member municipality to continue in court, regardless of whether its legal position is likely to prevail. Healy also noted that, "Every week that goes by where they [defendants] keep fighting is another week they have to pay the lawyers.. . . It's a million dollars of South Dakota taxpayer money that goes straight from the insurance pool and directly to [their lawyers] Sara Frankenstein and Gunderson Palmer."[81]

Unlike the board of governors of a private insurance company, the board of the SDPAA has no incentive to compromise or settle lawsuits because it is comprised of members of the government entities that it represents, such as a county. Therefore, no one overseeing the funds wants to limit access to the cash—over $32 million in 2015—because their municipality may need the funds in the future.[82] According to the director of the voting-rights nonprofit Four Directions, two commissioners from the largest SDPAA shareholder county admitted the SDPAA has used its clout to intimidate Native American litigants.[83] Furthermore, the board lacks any citizen members who might raise questions about expending funds used to defend government entities against civil-rights lawsuits brought by their own citizens.

Insurance pools are not unique to South Dakota. Every state uses cooperative-risk pools to keep insurance costs down by collectivizing and sharing risks. National organizations such as the Association of Governmental Risk Pools, or AGRIP, also represent collective interests and share information among members.[84] The organization of these risk pools is often complicated by the unique needs of the localities which they serve. Some states, like New York, Texas, and California, use separate pools designed to protect discrete areas of concern, while others, like South Dakota or Montana, use a more general model which carries nearly all risks together. In general, large states tend to have systems that carry general municipal liability separately from other insurances for property such as police cars and buildings, or for protection such as workers' compensation. In these states, insurance claims tend to reach the insurance pools designed to cover specific areas of risk. In smaller states, where all risk is mixed together in a large pool, this is not the case. As in South Dakota, pools designed to save the taxpayer money on insuring police cars also goes to defending against citizen claims of vote suppression or intimidation. This should be of particular concern in Indian country: many states with large Native populations use the small-state model (Wyoming, South Dakota, Utah, Oklahoma, North Dakota, Nevada, Nebraska, Montana, Idaho, and Alaska).

Recovering the Costs of Litigation and the Prevailing Party Standard

In November 2015, the Jackson County Commissioners arranged to use HAVA funds to establish a voting site in Wanblee for federal elections through 2022. Judge Schreier then dismissed the suit. However, the case was not yet done. The plaintiffs' lawyers

then went back to court in an attempt to recover the costs of the lawsuit. On January 4, 2017, Judge Schreier found that the plaintiffs had not met the legal standard for fees to be awarded, which was established by *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services* (2001) and requires a court judgment or its functional equivalent.[85] Under this legal standard a settlement that essentially gives the plaintiffs everything or nearly everything they sought, as in *Poor Bear,* is not enough to be considered the prevailing party and awarded costs of suit.

Supporting Native American Voting Rights

The *Shelby* ruling means that most voting rights cases now must be litigated using Section 2. Not only do Native American litigants have to struggle with the possibility of having to prove intentionality, they must garner legal and financial support, typically found outside of their communities. This is a particularly difficult challenge in South Dakota, where the poverty rate among Native Americans has been roughly 48 percent—unchanged since 1999—which places them among the poorest in the entire country.[86]

As law professor Charles Epp notes, statutory and case law are no guarantee that rights will be protected. There must be a "legal support structure" to ensure that "rights matter."[87] Success in voting rights litigation often requires the expertise of social scientists, historians, and statisticians, in addition to legal counsel; moreover, there are only a handful of these experts with knowledge of the unique conditions affecting Native Americans and these services are expensive.

McDonald, Pease, and Guest identify the principal factors that impede VRA enforcement in Indian country to be "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."[88] At different junctures, the ACLU and the Department of Justice have provided substantial legal and financial support to voting rights cases involving American Indians, but both entities face many competing demands for their assistance.[89] Not surprisingly, the Department of Justice is also subject to political pressures, with some administrations strongly committed to voting rights and others much less so. The Lawyers' Committee for Civil Rights Under Law recently became engaged in Native American voting rights litigation as well, with its attorneys representing the plaintiffs in *Poor Bear v. County of Jackson*, the 2014 case involving satellite voting on the Pine Ridge Reservation.[90] However, the Lawyers' Committee has a small staff, with much of the litigation handled by pro bono attorneys from private law firms. Among the many types of cases these attorneys undertake, most do not involve Native Americans.[91]

In addition to grassroots activities by Native American groups, such as the North American Council of American Indians and Four Directions, there are several Native American legal-advocacy groups. The most important is the Native American Rights Fund (NARF), which handles VRA litigation as well as many other issues.[92] NARF's annual report for 2016 shows they handled fifty-six domestic cases, including tribal

trust funds, defense of sacred sites, water rights, and land issues.[93] The report suggests NARF was operating at near-capacity even prior to the election of Donald Trump, whose administration has taken a number of anti-Indian positions that NARF is contesting (e.g., the Dakota Access Pipeline and Bears Ears National Monument).

Recently, the Native American Voting Rights Coalition (NAVRC) was created in 2015. Including all of the aforementioned groups except the Department of Justice, as well as other nonprofits and individuals engaged in voting-rights research and litigation, the NAVRC is committed to working collaboratively to advance voting rights for Native Americans and to do so in a way that respects their cultural integrity. Research carried out by NAVRC associates was used in the *Sanchez v. Cegvaske* voting-abridgement case, although the legal work was handled pro bono by an attorney who is an enrolled member of the Sisseton-Wahpeton Oyate. The NAVRC also is engaged in a number of upcoming initiatives that suggest the organization will make a positive contribution to voting issues within Indian country.

Concluding Thoughts

Although a key aspect of democracy is that all citizens have an equal opportunity to vote and run for political office, the United States has not always lived up to this ideal. Given the legacy of slavery, it is not surprising that the voting rights struggles of African Americans have generated the most attention. But as we have shown in this study of South Dakota, the oppression of the original inhabitants of the North American continent is an equally troubling legacy—one that continues to cast a long shadow in Indian country. The past is still very much alive in these places. Seemingly, the Indian Wars of 150 years ago continue to shape the perceptions of both Native Americans and whites, many of whom sustain an "us versus them mentality."[94]

Even though passage of the Indian Citizenship Act in 1924 "gave" US citizenship to all Native peoples born within the country's boundaries, for decades they were excluded by statute from voting in South Dakota—even after the passage of the Voting Rights Act in some areas. While the extension of Section 5 to the "unorganized" South Dakota counties was an important step, jurisdictions in the state continued adopt policies that diluted the electoral clout of Native voters. The Supreme Court's *Shelby County v. Holder* (2013) ruling that Section 4(b) was unconstitutional resulted in the loss of Section 5 pre-clearance. Although it is possible to succeed in voting-rights litigation by relying instead on Section 2, which generally prohibits procedures that "deny or abridge the rights of any citizen of the United States to vote on account of race or color," as we have shown it is much harder to establish the requisite facts. Unless the political jurisdiction previously had been bailed in via Section 3(c), Section 2 cases can only be initiated after a violation has occurred. Also, while it is possible for Section 2 cases to be won, this largely depends upon the legal standard being applied. Will judges require proof of intentional discrimination, or will they consider travel distance and the "totality of circumstances" affecting Native Americans?

This situation is made even more difficult because the cost of litigation falls much more heavily on the plaintiffs than on the defendants. The government entities have

access to nearly unlimited funds through the South Dakota Public Assurance Alliance and thus can pursue a "papering up" strategy that runs up the costs for plaintiffs. Moreover, when a case is settled, plaintiffs are unlikely to be able to recover their costs. Under these conditions, individuals may decide that the cost of equal access to the ballot box is simply too high.[95]

What Indian country needs, and arguably the rest of the country as well, is for Congress to pass new voting rights legislation—preferably a law that "fixes" Section 4(b) and reverses *Buckhannon*, which would allow for plaintiffs to collect legal fees.[96] The chances of this happening are minimal, given what happened to the Voting Rights Advancement Act of 2015, a bipartisan bill with forty-four cosponsors in the Senate. The bill died in committee after House Judiciary Chair Robert Goodlatte (R-VA) refused even to hold any hearings. In response to questions about his refusal, Goodlatte stated the bill was not needed because "There are still strong protections under the Voting Rights Act, including the ability of a judge to order that a community or even a whole state be placed under the pre-clearance if there are new evidences of discrimination."[97] Despite Congressman Goodlatte's rationale, we believe that this essay clearly documents that the actual hurdles and barriers to obtaining pre-clearance remain steadfastly in place.

Notes

1. *Shelby County v. Holder*, 570 U.S. 2 (2013). The Voting Rights Act of 1965 and the sections thereof are referenced throughout this paper; for clarification, a summary of relevant sections is provided here. Section 2 of the VRA lays out the intention and purpose, that "No voting qualification or prerequisite . . . shall be imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color."

Section 3 outlines enforcement for coverage under the VRA. Specifically, Section 3(a) articulates procedures for the appointment of Federal examiners to guarantee the Fifteenth Amendment of the constitution Section 3(b) suspends any discriminatory test or device; Section (c) states that the court will retain jurisdiction to prevent new devices or tests for an appropriate period in the event of a violation, which is the "bailing in" of counties and regions. For Section 3 to come into effect, plaintiffs must prove a constitutional violation with intent to discriminate against a race or color.

Section 4 contains the "trigger" or "test" used to determine if a region's history of discrimination warrants coverage. This Section has been subject to frequent updates and expansions over the lifetime of the Voting Rights Act. The 1975 renewal of the VRA included an expansion of Section 4 to include language minority groups, specifically naming Native Americans and included Alaska, Arizona, Texas, and counties in California, Florida, Michigan, New York, North Carolina, and South Dakota. Section 4 also provides the means by which a covered region may 'bail out' of coverage, by no longer behaving in a discriminatory fashion.

Section 5 specifies, in the event that a covered state intends to make a change to voting or election qualifications, procedures, practices, or standards, said state must receive approval from the federal government. States choosing to make changes to election and voting laws procedures must submit their request to the Attorney General of the United States or to the United States District Court for the District of Columbia. The state or jurisdiction must prove that change in election or voting law does not have the effect of "denying" or "abridging" voting rights because of race, color, or language minority status. The court must render a "declaratory judgment" before any changes are made or the

Attorney General must not object to the changes within 60 days. Under this section, the Attorney General of the United States is given the authority to send federal examiners to the covered counties to monitor elections and voting qualifications.

2. Pre-clearance is a defense against systemic or pervasive racial biases in voting administration; it requires any changes to voting laws or practice to be reviewed by federal examiners, as detailed in Section 3. Federal retention of regional oversight disempowers local officials who may operate with biases toward protected racial groups, and subjects them to additional scrutiny based on a history of discrimination.

3. *Shelby County v. Holder*, 21.

4. Travis Crum, "The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," *The Yale Law Journal* 119, no. 8 (2010): 1992–2038, https://www.yalelawjournal.org/note/the-voting-rights-acts-secret-weapon-pocket-trigger-litigation-and-dynamic-preclearance.

5. *Indian country* is a legal term used to designate "all lands within the limits of any Indian reservation under the jurisdiction of the United States government," but which has come to be used to more generically refer to areas with large numbers of Native Americans. As David E.Wilkins and Heidi Kiiwetinepinesiik Stark note, there is no single term for indigenous peoples that is universally accepted; as such, when not referring to a particular Native nation we use the terms Native American, Native, and American Indian interchangeably in this article. See Wilkins and Stark, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2011), xvii.

6. While Native Americans comprise a smaller proportion of the national electorate, sparsely populated South Dakota is home to several large reservations and the counties containing these reservations have a large Native population. While the 2010 census reported that nationwide, 1.7 percent of people identified as at least partially indigenous, Native Americans make up 8.9 percent of the population of South Dakota. In Oglala Lakota, Jackson, and Todd counties, through which the Pine Ridge reservation extends, Native Americans make up 92.2, 51.9, and 86.2 percent of the populations, respectively. Even in South Dakota counties with a majority-white population (such as Charles Mix, home to the Yankton Reservation), 32.4 percent of the population is Native, a significant portion of the electorate. In these and other Native-majority counties, other minority populations represent single-digit percentages at best, and often the white population comprises the next-largest racial group.

7. Jean Reith Schroedel and Ryan Hart, "Vote Dilution and Suppression in Indian Country," *Studies in American Political Development* 29, no. 1 (2015): 40–67, https://doi.org/10.1017/S0898588X1400011X.

8. Luke Warm Water, "Aboriginal Performance: South Dakota is the Mississippi of the North," *e-misférica: Performance and Politics in the Americas* 2, no. 1 (Spring 2005), https://hemi.nyu.edu/journal/2_1/warmwater.html.

9. Laughlin McDonald, Jannine Pease, and Richard Guest, "Voting Rights in South Dakota: 1982-2006," *Review of Law and Social Justice* 17, no. 1 (2007), 221, https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/issue_17/09_South Dakota_Macro.pdf.

10. See Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (Cambridge University Press, 2007); McDonald, et al., "Voting Rights in South Dakota," 240; Laughlin McDonald, *American Indians and the Fight for Equal Voting Rights* (Norman: University of Oklahoma Press, 2010); Schroedel and Hart, "Vote Dilution and Suppression."

11. Louise Erdrich, "Holy Rage: Lessons from Standing Rock," *The New Yorker* (December 22, 2016), http://www.newyorker.com/news/news-desk/holy-rage-lessons-from-standing-rock.

12. McDonald, *American Indians and the Fight for Equal Voting Rights*, 118.

13. Evan Connell, *Son of the Morning Star: Custer and the Little Big Horn* (New York: Harper Perennial, 1985), 132.

14. McDonald, *American Indians and the Fight for Equal Voting Rights*, 120.

15. Dee Brown, *Bury My Heart at Wounded Knee* (New York: Holt, Rinehart & Winston, 1971), 268–72; Richmond L. Clow, "The Sioux Nation and Indian Territory: The Attempted Removal of 1876," *South Dakota History* 6, no. 4 (1976): 458, https://www.sdhspress.com/journal/south-dakota-history-6-4/the-sioux-nation-and-indian-territory-the-attempted-removal-of-1876.

16. McDonald, *American Indians and the Fight for Equal Voting Rights*, 121.

17. South Dakota Advisory Commission to the United States Commission on Civil Rights, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* (2000), 4, http://www.usccr.gov/pubs/sac/sd0300/main.htm.

18. South Dakota Constitution, Article 22, http://sdlegislature.gov/Statutes/Constitution/DisplayStatute.aspx?Type=Statute&Statute=0N-22.

19. McDonald, *American Indians and the Fight for Equal Voting Rights*, 122.

20. David H. DeJong, *American Indian Treaties* (Salt Lake City: University of Utah Press, 2015), 53.

21. Paul Robertson, *The Power of the Land* (New York: Routledge Press, 2002), 112.

22. In this context, "civilized" implies assimilation to European culture: adopting the clothes, hairstyle, religion, language, culture, and commercial and farming practice of settlers and white Americans. The word "civilized" often acts as a "dog-whistle" for indigenous populations; Native Americans were repeatedly offered status, humanity, or citizenship in exchange for becoming "civilized" by colonial and American standards. Native peoples are often described as "uncivilized" as a precursor to the removal of their human rights and the act of civilization was often the justification for limiting legal rights of Natives, removal and stewardship of Native land, and the practice of removing Native children from family homes and placing them in federally funded boarding houses, where they were punished for speaking their language or exhibiting their culture and often subject to physical, sexual, and psychological abuse.

23. South Dakota Attorney General, "Elections. Election Precincts Cannot Be Established in Unorganized Counties in Indian Reservations," *Report of the Attorney General of the State of South Dakota 1917–1918* (Pierre, SD: State Publication Co., 1918), 261, https://hdl.handle.net/2027/mdp.35112100985060?urlappend=%3Bseq=267.

24. McDonald, *American Indians and the Fight for Equal Voting Rights*, 120.

25. McCool, et al., *Native Vote*, 140.

26. Jean Reith Schroedel and Ryan Hart, "Vote Dilution and Suppression in Indian Country," *Studies in American Political Development* 29, no. 1 (2015), 40–67, https://doi.org/10.1017/S0898588X1400011X.

27. South Dakota Attorney General, *Report of the Attorney General, State of South Dakota, 1963–1964*, 106.

28. Washabaugh County, which included the eastern portion of the Pine Ridge Reservation, was merged in the early 1980s into the nearly all-white Jackson County.

29. *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975).

30. Chandler Davidson, "The Voting Rights Act: A Brief History," in *Controversies in Minority Voting: The Voting Rights Act in Perspective*, ed. Bernard Grofman and Chandler Davidson (Washington, DC: The Brookings Institution, 1992), 17.

31. Voting Rights Act of 1965 Amendments, Pub. L. No. 94-73, 89 Stat.2135 (1975).

32. For Janklow's "garbage" comment, see *Bone Shirt v. Hazeltine*, Civ. No. 01-3032 (D.S.Dak. 2004), 121; William J. Janklow, Attorney General, South Dakota, Official Opinion No. 77-73,

"Voting Rights Act of 1965, as amended by Public Law 94-73: bilingual elections," (August 23, 1977), https://atg.sd.gov/OfficialOpinions/Official Opinion 77-73.pdf.

33. Janklow, Official Opinion No. 77-73, 10–11.

34. *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005), 7.

35. See South Dakota Legislature Legislative Research Council, "2017 Legislator Listing," http://sdlegislature.gov/legislators/default.aspx?session=2017.

36. Pei-te Lien, Diane M. Pinderhughes, Carol Hardy-Fanta, and Christine M. Sierra, "The Voting Rights Act and the Election of Nonwhite Officials," *PS: Political Science & Politics* 40, no. 3 (2007): 489–94, https://doi.org/10.1017/S1049096507070746.

37. Jean Schroedel and Artour Aslanian, "Native American Vote: The Case of South Dakota," *Race, Gender & Class* 22, nos. 1/2 (2015): 308–23.

38. McDonald, et al., "Voting Rights in South Dakota," 240.

39. The distinction between vote dilution and abridgement is explained in a Statement of Interest presented to the United States District Court of Nevada by the Department of Justice's Civil Rights Division, Voting Section, acting as counsel for the United States: "Section 2 Vote dilution claims—for example, challenges to district lines—do not usually depend on allegations that a practice makes it more difficult participate in the political process by casting a valid ballot. In that context, the district lines' imposition of an inability to elect candidates of choice becomes the more important touchstone in establishing injury. . .. By contrast, in a Section 2 claim focused on an abridgement of the right to cast valid ballots, that abridgement alone amounts to injury necessarily impairing electoral opportunity." An example of abridgement occurs when there is not absolute denial of opportunities to vote, but the voting procedures and practices are such that the minority population is disproportionately burdened in trying to access them, as occurs when voting sites are located in places that are difficult for them to reach. See Statement of Interest of the United States of America, *Bobby D. Sanchez, et al. v. Barbara K. Cegavske, et al.*, 214 F.Supp. 3d 961, (D.Nev. 2016), 12, https://www.justice.gov/crt/case-document/file/926316/download.

40. *Little Thunder v. South Dakota*.

41. Section 3(c) allows the court to retain jurisdiction over a county or subdivision if a violation has been found. This effectively "bails in" or triggers coverage of the jurisdiction under the VRA, giving federal examiners the power to freeze current voting laws and requirements, and review any alteration to voting practice or procedure prior to enactment. A Section 3(c) bail in or pocket trigger has the same result as coverage through the Section 4 formula, the process is more difficult because complainants must prove intent to discriminate based on racial bias.

42. See *Buckanaga v. Sisseton School District* 804 F.2d 469 (8th Cir. 1986); *American Horse v. Kundert* Civ. No. 84-5159 (D.S.Dak. 1984); *Fiddler v. Sieker* Civ. No. 86-3050 (D.S.Dak 1986); and *Black Bull v. Dupree School District* Civ. No. 86-3012 (D.S.Dak.1986).

43. Bryan L. Sells, "The Voting Rights Act in South Dakota," in *The Most Fundamental Right*, ed. Daniel McCool (Bloomington: Indiana University Press, 2012), 188–226.

44. *Emery v. Hunt*, 272 F.3d 1042 (8th Cir. 2001).

45. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004). *Bone Shirt v. Hazeltine* is also known as *Bone Shirt v. Nelson*; Joyce Hazeltine was succeeded by Chris Nelson as South Dakota's Secretary of State in 2002.

46. When Chris Nelson became South Dakota's Secretary of State in 2002, *Quick Bear Quiver v. Hazeltine* became *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005).

47. Chris Nelson, "Realistic Expectations," in *The Most Fundamental Right*, 232.

48. *Quick Bear Quiver v. Nelson*, 3. *Quiver v. Hazeltine* was an extreme VRA case by multiple measures; South Dakota's refusal to submit to preclearance for decades speaks to the attitude South Dakota officials have toward Native American allegations of discrimination. Although South Dakota

agreed to submit all changes for retroactive preclearance, none were found to be in violation, making it a complicated resolution for both sides. Then Secretary of State Chris Nelson believed the lack of objectionable submissions indicated that pre-clearance was unnecessary and overreaching on the part of the federal government. Lawyer for the Native plaintiffs Bryan Sells argued that the way the changes to election statutes were submitted obfuscated the effect on minority voters, and nullified the effect of the *Quiver* case. Following *Quiver v. Hazeltine*, South Dakota continued to seek pre-clearance as required by the VRA. Since *Quiver*, other Native voting-rights cases have sought coverage and pre-clearance by bailing into Section 3(c); the cases described in this paper give examples of the legacy of *Quiver*, both as a landmark case and an example of the difficulty plaintiffs face in seeking fair treatment.

49. *Thornburg v. Gingles*, 478 US 30 (1986).

50. McDonald, *American Indians and the Fight for Equal Voting Rights*, 142.

51. *Cottier v. City of Martin*, 445 F. 1113 (8th Cir. 2006). On remand, 446 F. Supp.2d 1175 (D.S.D. 2006).

52. South Dakota lies within the jurisdiction of one of the most conservative courts in the nation. The Eighth Circuit Court of Appeals is considered the most "right-leaning" of the eleven courts of appeal (the Ninth Circuit Court of Appeals is regarded as the most "left-leaning"). This remains significant to litigants attempting to prove denial, dilution, and abridgement. With Democrats and Republicans so closely divided over issues of ballot access and ballot security, the partisan makeup of the court has a significant impact. Of the eleven seats on the Eighth Circuit Court, only one was made by a Democratic president and eight appointments were made by Republican presidents, including a recent appointment by President Donald Trump, who likely will be able fill two vacancies. Robert Steinbuch's empirical analysis showed that the Eighth Circuit Court "has a political-party bias" (see Steinbuch, "An Empirical Analysis of Conservative, Liberal, and Other 'Biases' in the United States Courts of Appeals for the Eighth & Ninth Circuits," *Seattle Journal for Social Justice* 11, no. 1 (2012), 255, http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss1/18); and that "the largely Republican Eighth Circuit reverses Democratic district judges' decisions significantly more often than those of Republican district judges" (see Steinbuch, "Further Empirical Insights and Findings on the Eighth Circuit," *Loyola of Los Angeles Law Review* 44, no. 1 (2010): 350, http://digitalcommons.lmu.edu/llr/vol44/iss1/14. See also Andreas Broscheid, "Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?" *Law & Society Review* 45, no. 1 (2011), 171–94, https://doi.org/10.1111/j.1540-5893.2011.00431.x; Desmond S. King and Rogers M. Smith, "The Last Stand? *Shelby County v. Holder*, White Political Power, and America's Racial Policy Alliances," *Du Bois Review: Social Science Research on Race* 13, no. 1 (2016), 25–44, https://doi.org/10.1017/S1742058X1500017X.

53. *Cottier v. City of Martin*, 445 F. 1113 (8th Cir. 2006). On remand, 446 F. Supp.2d 1175 (D.S.D. 2006).

54. *Kirkie v. Buffalo County, South Dakota*, Civ. No. 03-CV-3011 (D.S.D. February 12, 2004).

55. Sells, "The Voting Rights Act in South Dakota," 210.

56. *Kirkie v. Buffalo County*.

57. Sells, "The Voting Rights Act in South Dakota," 188–226.

58. *Blackmoon v. Charles Mix County*, 505 F.Supp.2d 585 (2007 D.S.D.).

59. Sells, "The Voting Rights Act in South Dakota," 214.

60. *Blackmoon v. Charles Mix County*.

61. Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act, House of Representatives, 109th Cong. (2005).

62. *Shelby County v. Holder*.

63. Devlin Barrett, "Holder Targets Texas in New Voting-Rights Push: Justice Department Wants to Scrutinize State for Potential Discrimination," *The Wall Street Journal* (July 25, 2013).

64. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

65. *Thornburg v. Gingles*.

66. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012).

67. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

68. Harvard Law Review, "Securing Indian Voting Rights," *Harvard Law Review* 129, no. 6 (April 2016): 1731–54, 1731.

69. *Sanchez, et al. v. Cegavske, et al.*

70. *Brooks, et al. v. Gant, et al.*, Civ. No.12-5003-KES, 2012 WL4482984 (D.S.D. September 27, 2012); *Poor Bear v. County of Jackson*, No. 5:14-cv-05059 2014 WL 4702282 (D.S.D. Sept. 18, 2014).

71. 94th Congress, Senate Report No. 94-1011, 42 USC section 1988 (1976), 3 (rpr. *United States Code Congressional and Administrative News*).

72. Legal Defense Fund, "The Cost (in Time, Money, and Burden) of Section 2 of Voting Rights Act Litigation," http://www.naacpldf.org/files/case_issue/Section 2 costs 10.25.17.pdf.

73. Phil Drake, "Costs of Indian Voting Rights Legal Counsel Released," *Great Falls Tribune*, June 10, 2016, http://www.greatfallstribune.com/story/news/local/2016/06/10/costs-indian-voting-rights-legal-counsel-released/85722534/.

74. *Poor Bear v. County of Jackson*.

75. Ibid.

76. United States Census Bureau, *American Community Survey, 2010*, "DP03 – Selected Economic Characteristics: Jackson County Totals," https://factfinder.census.gov/bkmk/table/1.0/en/ACS/10_5YR/DP03/0100000US.

77. *Poor Bear v. County of Jackson*, 16.

78. Ibid., 23.

79. South Dakota Public Assurance Alliance, "Membership Advantage," https://sdpaaonline.org/membership-advantage.

80. Jonathan Ellis, "Voting Rights Case Enters Costly Phase," *Sioux Falls Argus Leader*, August 15, 2015, http://www.argusleader.com/story/news/2015/08/15/voting-rights-case-enters-costly-phase/31802587/.

81. Bret Healy (advisor, Four Directions; owner, River Bluffs Strategies), in discussion with the author, March 16, 2017.

82. South Dakota Public Assurance Alliance, *2015 Annual Report*, https://sdpaaonline.org/media/files/2015_SDPAA_Annual_Report.pdf.

83. O. J. Semans, "The Long Hard Fight for Indian Equality and the Simple Right to Vote," *Sicangu Sun Times*, June–July, 2014.

84. The South Dakota Public Assurance Alliance, as well as AMERIND, is a member of AGRIP.

85. The judge determined that the Oglala Sioux plaintiffs failed to meet the *Buckhannon* criteria, which eliminated the idea that those who gain a favorable settlement are automatically determined to be the "prevailing party" and thus entitled to recover legal fees. This is also known as "fee-shifting." Instead, *Buckhannon* requires that to achieve such status, a party must have been awarded some relief, even nominal, by a court. In the decision, the Court called out two situations in which a plaintiff will always be a prevailing party: (1) when the plaintiff receives some judgment on the merits (even if only an award of nominal damages); and (2) when a plaintiff secures a consent decree. Under the previous doctrine, known as the "catalyst theory," plaintiffs could rely on their settlement to prove their

"prevailing" status, and thus recover legal fees, if their lawsuits caused the defendants voluntarily to alter their behavior to benefit the plaintiffs. Had the Supreme Court affirmed the "catalyst theory," the plaintiffs would have been able to get the awarding of fees, but under *Buckhannon* that was not true. See *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

86. Black Hills Knowledge Network, *South Dakota Dashboard*, "Nearly Half of South Dakota Native Americans in Poverty," March 11, 2016, https://www.southdakotadashboard.org/nearly-half-of-south-dakota-native-americans-in-poverty.

87. Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); Charles Epp, *Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State* (University of Chicago Press, 2009).

88. McDonald, et al., "Voting Rights in South Dakota," 206.

89. The ACLU's ability to provide assistance on voting rights litigation decreased when funding for that program dropped during the Great Recession and it was forced to close the Atlanta office. However, in October 2017 the ACLU launched a new voting rights initiative called "Let People Vote." While touting the new initiative, the ACLU's political director highlighted voting rights efforts in Florida, Georgia, and Kansas. MSNBC, *AM Joy*, "ACLU Launches Voting Rights Project for Trump Era" (broadcast), September 24, 2017, http://www.msnbc.com/am-joy/watch/aclu-launches-voting-rights-project-for-trump-era-1053825091767.

90. Lawyers' Committee for Civil Rights Under Law website, "Voting Rights Project," https://lawyerscommittee.org/project/voting-rights-project/.

91. Lawyers' Committee for Civil Rights Under Law website, "Mission," https://lawyerscommittee.org/mission; Charles T. Lester, Jr., "The History of The Lawyers' Committee for Civil Rights Under Law 1963–2008," https://lawyerscommittee.org/history/.

92. McCool, et al., *Native Vote*, 35–43.

93. Native American Rights Fund, *Water is Life: 2016 Annual Report*, http://www.narf.org/wordpress/wp-content/uploads/2014/12/NARF-Annual-2016.pdf.

94. McDonald, et al., "Voting Rights in South Dakota," 247.

95. In some states voting by mail is a simple solution to lack of access to polling places and the high cost associated with travel or other impediments to voting in person. In South Dakota, a voter must apply in writing for an absentee ballot, and submit a notarized sworn oath. The absentee ballots must be returned to the county auditor in time for them to be delivered to their respective polling places, implying both a thick margin of error with respect to timing and an additional level of complication. In Jackson County, there is one notary public located in the town of Kadoka. In rural communities, home mail delivery both on and off the reservation is rare; reservation residents must travel to a post office to collect and post mail, and these often have irregular hours. Many local and reservation post offices are independently operated, and as such do not adhere to strict US Postal Service guidelines. One potential solution is satellite polling places, established on reservations at central locations, which allow voters to register late and vote early. Results have been generally positive but tribal leaders seeking this solution are met with resistance from local election officials. See *Poor Bear v. County of Jackson*, No. 5:2014cv05059 (D.S.D. 2015).

96. See endnote 88.

97. Alicia Petska and Tiffany Holland, "Goodlatte: Voting Rights Act Remains Strong Without Amendment," *Roanoke Times*, June 22, 2015, http://www.roanoke.com/news/local/goodlatte-voting-rights-act-remains-strong-without-amendment/article_5bbff2ca-dae2-58ed-9930-f652b9317913.html.