**Native American Vote Suppression: The Case of South Dakota**

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***Abstract***

A central point of contention in the Supreme Court’s recent *Shelby County v. Holder* (2013) ruling was the question of whether key provisions of the Voting Rights Act designed to make it easier for racial minorities to be elected to political office are still necessary. Although there is a large body of academic research on the relationship between African American representation in political office and provisions of the Voting Rights Act, as well as growing literature on factors influencing Latino representation, there is almost a complete absence of research examining the impact of the Voting Rights Act on the ability of Native Americans to be elected to political office. In this research, we do an in-depth analysis the impact of voting rights litigation on the electoral prospects of Native Americans in South Dakota, a state which has been described as “Mississippi of the North.”

**Introduction:**

 A basic premise of a democracy is that all citizens have an equal opportunity to participate in governance. Voting is the most common and direct form of citizen political participation. As such, ensuring that all citizens have equal access to the ballot is essential in ensuring governmental legitimacy. In the United States, the 14th and 15th Amendments to the Constitution and the 1965 Voting Act are fundamental in ensuring that all citizens have an opportunity to cast a meaningful vote. Americans can take justifiable pride in that legal barriers to the franchise, such as literacy tests, poll taxes, and the “white primary,” are considered historical relics of a racist past. In fact, the Supreme Court in its recent *Shelby County v. Holder* (2013) decision raised questions about whether conditions in the United States had changed so much that the Voting Rights Act is no longer needed.

In *Shelby County v. Holder*, Chief Justice John Roberts, joined by four other conservative justices, ruled that Section 4(b), which established the formula for implementing the Section 5 requirement that jurisdictions with histories of discrimination pre-clear changes in their voting laws and regulations, was unconstitutional in that it violates the “equal sovereignty of the states” by treating them differently based on “40 year old facts that have no relationship to the present day.” The goal of Section 5 is to prevent voting rights abuses before they occur, but without Section 4(b) that is all but impossible.[[1]](#footnote-1) The underlying assumption in the ruling is that racially motivated abuses of voting rights is no longer a significant problem in the United States, and the Court pointed to the substantial increase in African American elected officials in Southern states as evidence of that change. What the Court ignored, however, is evidence showing that the Voting Rights Act, in particular the “pre-clearance” of covered Southern jurisdictions, has been a major factor in ensuring that black voting strength not be diluted through the adoption of voting procedures that made it more difficult for them to elect candidates of their choice.[[2]](#footnote-2)

A broad consensus exists among scholars that “first generation” voting rights abuses that involve the outrights denial of voting have largely disappeared, but that “second generation” vote dilution problems that deny minorities an equal opportunity to affect political decisions have not disappeared (Alt1994; Handley and Grofman 1994; Davidson and Grofman 1994; Bowler and Donovan 2006; Grofman 2006; Lien, Pinderhughes, Hardy-Fanta, and Sierra 2007; Kousser 2008; Bentele and O’Brien 2013). A central point of contention in the *Shelby* ruling, as well as the academic research, is the question of whether racial minorities to have an equal opportunity to elect candidates of their choice to represent them in the corridors of power. There is a very large body of research linking increases in African American elected officials to “pre-clearance” and voting rights litigation preventing the adoption of a range of different procedures that diminish their voting strength. There also is a growing literature on Latino voting rights litigation.[[3]](#footnote-3)

A striking omission, however, from nearly all of the debates is an analysis of the impact of the Voting Rights Act on American Indians.[[4]](#footnote-4) They received very little attention in the 2006 re-authorization of the Act and were not mentioned in the Supreme Court’s *Shelby* ruling. Schroedel and Hart (forthcoming 2014) found in their content analysis of more than 300 media reports about the *Shelby* ruling, there was only one substantive article that considered its effect on Native Americans. This is particularly problematic, in light of the fact that a number of jurisdictions were placed in the pre-clearance category due to their very troubling histories of vote denial and dilution with respect to Native peoples.

***Academic Research***

But it is not only politicians and the mainstream media that has ignored voting rights abuses towards American Indians. Aside from several very fine studies of voting rights litigation involving Native Americans (McCool, Olson, and Robinson 2007; McDonald, Pease and Guest 2007; McDonald 2010), academics have paid scant attention to political jurisdictions that have egregious histories of voting rights discrimination towards Native Americans. This absence is most obvious in terms of research on whether voting rights litigation has been successful in increasing opportunities for Native Americans to be elected to political office. The Gender and Multi-Cultural Leadership Project (GMCL) (2007), which conducted “the first comprehensive survey of elected officials of color,” does not even include American Indians on its interactive political map of non-white elected officials in the 50 states. This should not be taken as a major criticism of the GMLC, but rather an indication of the generalized lack of knowledge about the political status of American Indians. Unlike African Americans, Latinos and Asian/Pacific Islanders, no group has taken on the task of compiling a master list of all Native Americans serving in political office in the United States.[[5]](#footnote-5)

**Reasons for Doing a Case Study of South Dakota**

The use of a single case study is appropriate in a situation when the phenomenon being studied is new or was previously inaccessible to researchers. A case study can shed light on the “how” or “why” something occurred, and can be used in developing a broader research agenda (Yin 1989). Given the lack of knowledge about the impact of voting rights litigation on the ability of American Indians to be elected to political office, a case study of a state with political jurisdictions subject to Section 5 pre-clearance is an appropriate methodological choice. Since only political jurisdictions with histories of racial discrimination are subjected to “pre-clearance,” any case examining a “covered” jurisdiction is likely to be an extreme case. Johnson and Joslyn (1995:146), however, argue that studying such phenomenon can be highly revelatory and contribute to our general understanding of the broader context.

 For this research, we have chosen to examine South Dakota as a case study of the impact of the Voting Rights Act on the ability of American Indians to achieve elected office. South Dakota is a particularly good methodological choice for several reasons. First, American Indians comprise 8.9% of the state’s population, which is one of the highest in the country (Census Bureau 2014). Second, substantial Native populations exist in political jurisdictions, which are subject to Section 5 “pre-clearance,” as well as those not subject to Section 5. Todd County and Shannon County, where American Indians comprise 86.8% and 92.3% of their respective populations, are the “covered” jurisdictions.[[6]](#footnote-6) However, there are six other majority Indian population counties, as well as another fifteen counties with Native populations ranging from 7.2% through 39.1%. Finally, political jurisdictions in South Dakota have been the subject of more voting rights litigation charging racial discrimination against Native Americans than any other state. Since 1975 there have been at least nineteen Voting Rights Act cases where South Dakota political jurisdictions have been charged with discriminating against Native Americans, with the largest number involving plaintiffs from political jurisdictions in Shannon and Todd Counties, but the others have included a mix of counties with differing levels of American Indians in the electorate. A summary of the cases is included in the Appendix. These conditions make South Dakota a very good place to identify and explore factors likely to influence the election of American Indians to political office.

**A History of Disenfranchisement**

 From the very earliest period of white settlement in the Dakotas, there were enormous conflicts between settlers and the indigenous inhabitants, who sought to stop encroachment into their territory.[[7]](#footnote-7) The Dakota Territorial Assembly in its initial 1862 session petitioned Congress to abrogate treaties ceding lands to the Sioux and Chippewa.[[8]](#footnote-8) They also limited jury service, voting and running for political office to “free white males.” After becoming admitted as a state in 1889, the state legislature adopted similar limitations on citizenship and voting. Even after
Congress passed the Indian Citizenship Act in 1924, which ostensibly granted full citizenship rights to tribal members, South Dakota was one of several states that refused to comply with its provisions. Indians were statutorily excluded from voting and holding office anywhere in the state until the 1940s and South Dakota continued prohibiting inhabitants in “unorganized” counties (Todd, Shannon and Washabaugh) from voting until as late as 1974 and from serving in some elected offices in those counties until 1980.[[9]](#footnote-9) In 1984, the county auditor in Fall River County, which included part of the Pine Ridge Reservation, refused to accept the registration of American Indians, who were trying to do so as part of a registration drive on the reservation (*American Horse v. Kundert*, 1984). Other political jurisdictions in the state have been subject to litigation over their unwillingness to provide American Indian voters with equal access to polling stations (*Black Bull v. Dupree School District*, 1986; *Weddell v. Wagner Community School District*, 2002).

***Elected Officials’ Opposition***

 The extension of Section 5 to political jurisdictions with large Native American populations was resisted by many in of the affected states, but the hostility among officials in South Dakota far surpassed that of their counterparts in other parts of Indian Country.[[10]](#footnote-10) The state’s Republican attorney general, William Janklow, called for the immediate repeal of the Voting Rights Act, using language first used by Southern racists, who labeled the Act as an unconstitutional infringement on states’ rights. Janklow called the Act an “absurdity” and subsequently labeled as “garbage” a U.S. Commission on Civil Rights report outlining many ways that South Dakota had violated the civil rights of Native Americans (American Civil Liberties Union 2009: 27).[[11]](#footnote-11) Between 1976 and 2002, Todd and Shannon Counties adopted more than 600 regulations and laws overseeing elections, but submitted less than ten for pre-clearance (American Civil Liberties Union 2009: 27-28). According to McDonald, Pease and Guest (2007: 214-215), some of the non-submitted changes were ones that had been found to cause racial vote dilution in other jurisdictions.

 South Dakota’s current attorney general has continued resisting efforts to facilitate Native American voting and engagement in politics. Like most states, South Dakota had a law prohibiting felons from voting while incarcerated, but the state did not disenfranchise felons on probation. However Shannon County election officials in 2008 removed two Native American women on probation from the voting rolls. After the women filed suit, the county was forced to re-register them (*Janis v. Nelson* 2009), but Secretary of State Gant refused to acknowledge that felons on probation had the right to vote. He went so far as to change the language on the state’s website to include language explicitly stating that all felons could not vote. Even a threatened lawsuit by the American Civil Liberties Union was unable to get Gant to change the language. He did, however, encourage the state legislature to pass legislation revising the law so that all felons are now disenfranchised (Schroedel and Hart forthcoming.)

South Dakota law allows counties to provide citizens with 46 days of early voting prior to the election date, but Shannon County only provided six days of early voting during the 2012 election. Residents, who wanted to vote early on other days, had to travel to a neighboring county to vote.[[12]](#footnote-12) This involved driving for one to three hours, which constitutes a severe hardship for low income reservation inhabitants, many of whom lack access to cars. Results from a survey conducted among county residents showed that a majority would not travel outside of the county to vote with most citing distance and expense as major hurdles (Braunstein 2012: 22-23). South Dakota law allows the state to step in when a county is unable to run elections, but Secretary of State Gant refused to either use federal funding through the Help America Vote Act available or have the state run elections (*Brooks v. Gant* 2012). Just prior to the court hearing, Shannon County officials discovered they did have sufficient funds to allow full early voting in the county (Woodard 2012).

Secretary of State Gant, however, continued his campaign against Indian voting. One week after the *Shelby* ruling, which was applauded by politicians in the state capitol, the South Dakota Board of Elections denied a request from tribes that federal government Help America Vote Act funds be used to establish satellite voting stations on reservations for the 2014 elections. The deciding vote in the 4-3 decision was cast by Secretary of State Gant. State and county officials, however, capitulated a few months later. They agreed to provide satellite early voting and registration offices on reservations, which will allow Indians in the state to have access to voting that is equal to that of other citizens in South Dakota during the 2014 election (Woodard 2013).

Given the deeply ingrained nature of South Dakota’s opposition to efforts designed to increase voting by Native Americans, we recognize this is what is described in the scholarly literature as an “extreme” case (Johnson and Joslyn 1995). In fact, some Native Americans have gone so far as to label South Dakota as the “Mississippi of the North” (Warm Water 2013). Yet if one takes seriously, the core provision of Section 2 of the Voting Rights Act, which prohibits rules and practices that “deny or abridge” the right to vote, then one must understand the nature of “extreme” cases, such as South Dakota.[[13]](#footnote-13)

**Data and Methodological Considerations**

We believe that a mixed methods approach, which integrates qualitative materials that provide contextual understandings of conditions in South Dakota and quantitative data analyzing the representation of Native Americans in elected offices in the state, is the most appropriate approach. We pay particular attention to the impact of Voting Rights Act litigation. One of the advantages of a mixed methods approach is that it allows greater flexibility, such that the researcher can address different aspects of the underlying phenomenon and employ methods that vary according to what is most useful in different contexts (Brannen, 2005; Hesse-Biber 2010). In this project we analyze quantitative data about the numbers of American Indians serving in political offices, but place that within broader contextual discussions of the political jurisdictions, paying particular attention to the lived realities of Native peoples in those localities. Much of the contextual material is gleaned from secondary sources and legal rulings. We include in the Appendix a comprehensive listing of all South Dakota voting rights cases.

***Quantitative Data***

As noted earlier, no one has collected information about the numbers of American Indians, who have served or currently are serving in elected office. Just compiling such a list for even South Dakota is a daunting task. There are more than 500 incorporated municipal entities (towns and cities) in South Dakota, as well as 66 counties and many other local governmental entities. None of the local government associations, such as the South Dakota Association of County Commissioners, have data on the race, gender or even party affiliation of the elected officials associated with their organizations.

We were, however, able to obtain lists of current and former state legislators from an archivist in the capitol’s library. Getting data about the make-up of county commissioners turned out to be more challenging. Most of the county commissioners serve on a part-time basis and have very limited staff support. We found that that best way to get information about the demographics of commissioners was by telephone and then persevere until we were directed to someone knowledgeable and willing to talk.[[14]](#footnote-14) This has turned into a very labor intensive process.[[15]](#footnote-15) We chose not to try to get information from the more than 500 incorporated town and cities and other local government entities. The effort involved in collecting this information would have been enormous and unlikely to turn up anything different from what we have found with respect to representation in state legislative and county council seats.

**Representation in the State Legislature**

South Dakota has a bicameral legislature, which is comprised of a 35 member Senate and a 70 member House. Since gaining statehood in 1889, a grand total of 12 Native Americans have served in state legislative office---all within the past three decades.[[16]](#footnote-16) Moreover, there are only three currently serving in the legislature, one in the Senate and another two in the House. Given that American Indians make up roughly 9% of the state’s population, it is hard not to view this as prima facie evidence of massive under-representation. But the numbers tell only part of the story.

***History and Context***

The struggle to achieve representation in the state legislature dates back to the 1970s, shortly after the 71 day Wounded Knee confrontation between members of the American Indian Movement and federal law enforcement officers at the Pine Ridge Reservation. The chairs of the nine federally recognized tribes in the state, four members of the state legislature, and five lay people were appointed to a state commission to make recommendations about ways to improve Indian-state government relations. The commission deliberated for two years and made a series of recommendations, many of which the state legislature adopted with minimal dissent,[[17]](#footnote-17) but the taskforce did not even bother presenting its findings about the political gerrymandering of districts that prevented residents of the Pine Ridge and Rosebud reservations from being able to have a realistic chance of electing a preferred candidate to the state legislature. The political clout of reservation voters was diluted by dividing them up into three legislative districts. The taskforce’s recommendation that Shannon and Todd Counties, home to the reservations, be combined into a single legislative district was too much of a “political hot potato” (McDonald 2010: 128; Shortbull 2013).

Following the 1980 census, the South Dakota Advisory Commission to the U.S. Commission on Civil Rights also recommended the creation of a majority Indian legislative district when the state legislature did its mandatory redistricting. The committee’s report stated that the division of the reservation voters into three districts was “inherently” discriminatory, preventing Native Americans from an opportunity to elect a legislator of their choice and the Department of Justice advised the state that any redistricting plan that did create such a majority American Indian district would not be pre-cleared as required by Section 5 of the Voting Rights Act. The state legislature acquiesced, creating District 28, which included Shannon County, Todd County and half of Bennett County. Thomas Shortbull, who had served as a member on the commission on Indian-state government relations, was elected to the State Senate from the new district (District 28), becoming the first American Indian (Oglala Sioux) to ever serve in that body. Another Oglala Sioux, Richard Hagen, was elected to one of two District 28 House seats.[[18]](#footnote-18)

After the 1990 census, the state legislature adopted a redistricting plan that divided the state into 35 legislative districts; each of which would elect one state senator and two house members, but with one exception. District 28 would have at large elections for its state senator, but there would be two state sub-districts house seats (28A and 28B) in order to “protect minority voting rights.” District 28A included the Cheyenne River Sioux Reservation and part of the Standing Rock Sioux Reservation and had a voting age population that was 60% Native American as opposed to District 28B that had less than 4% of its voting age population comprised of Native Americans[[19]](#footnote-19) Even though the state did not normally redistrict except following the decennial census, the state legislature in 1995 decided to abolish the two sub-districts. The main sponsor of the legislation was Eric Bogue, the Republican member from District 28A.[[20]](#footnote-20) The proportion of American Indians in the voting age population in the reconstituted 28th district was only 29%, which meant they would not have a reasonable chance of electing one of their own to the state legislature (McDonald 2010: 129). In the first election after the abolition of 28A and 28B, all of the candidates running for the House seat were white, and the candidate with the least support from Native American voters (8%) got the highest amount of support from white voters (70%) (*Emery v. Hunt*, 2000, table 3 from Report by Steven Cole).

In 2000 several members of the Cheyenne River Sioux went to court and challenged the state’s merging of District 28A and 28B as a violation of Section 2 of the Voting Rights Act, as well as a violating the state constitution’s mandating that redistricting occur following the decennial census (*Emery v. Hunt*, 2000). Before the Section 2 claim could be heard in federal court, the South Dakota Supreme Court ruled that the legislature’s actions had violated the state constitution and reinstated District 28A and District 28B as specified in the 1991 redistricting plan. A special election was ordered and Tom Van Norman from the Cheyenne River Sioux Reservation was elected to the state house.

Following the 2000 census, the state legislature continued the basic framework established by the 1991 plan. Each of the 35 districts elected one senator and two representatives to the house with District 28 still divided into sub-districts (28A and 28B). The electoral clout of Native Americans, however, was undermined by the “packing” of Indian voters into District 27, which includes Shannon and Todd Counties. Ninety percent of the district’s population was comprised of American Indians. Under the 2001 plan, District 27 became one of the most over-populated districts in the state, which allowed the adjacent District 26 to continue as a white dominated district. Proposals from James Bradford, who represented the 27th District in the state assembly, to reconfigure the boundaries between his district and District 26, and divide the latter district into two sub-districts as was the case with District 28 was voted down.[[21]](#footnote-21)

Even though any changes to electoral laws and regulations affecting “covered” jurisdictions were required by Section 5 of the Voting Rights Act to be pre-cleared, South Dakota did not attempted to get these changes approved. Three voters from District 26 and District 27 sued the state, claiming that the new plan was in violation of Section 5 for failure to pre-clear and Section 2 that it denied them equal opportunity to elect representatives of their choice. In *Bone Shirt v. Hazeltine* (2006), the 8th Circuit Court ruled there was “substantial evidence that South Dakota officially excluded Indians from voting and holding office.” As a result of that litigation, District 26 also was divided into two sub-districts.[[22]](#footnote-22)

The most recent redistricting in late 2011 made a few changes to the legislative districts that included the main South Dakota reservations, the most important being the inclusion of Rosebud Sioux Reservation with the Lower Brule and Crow Creek Reservation in a single district. However, these changes generally were supported by members of both parties, and tribal leaders. The biggest changes in districts involved changes to better reflect the growth of urban areas (Sioux Falls and Rapid City), but the re-districting was done in a manner limited the voting clout of American Indians and Democrats. For example, Rapid City was split into three different districts (29, 30 and 35), all of which are safely Republican, even though there are strong pockets of Democratic and Native American voters (Eagle, 2011).[[23]](#footnote-23) None of these changes, however, triggered Voting Rights Act litigation.

***Assessing Native American Representation in the State Legislature***

The most obvious fact that stands out from the aforementioned history is the depth of entrenched political leaders’ opposition to providing equal opportunities for American Indian voters to elect their own members to positions within the state legislature. Prior to voting rights litigation, there had not been a single Native American elected to the state senate and house. Over the past three decades, the number serving in these chambers has never exceeded five members and twice has dropped to only one member. During the 1980s and 1990s, the numbers ranged from one to three. After 2000, every legislative session has included at least three tribal members. Their clout, of course, has been limited by being divided between the two chambers, but this is better than being completely excluded. State leaders also have been very aware of the costs of voting rights litigation, as is evidenced by their reaching to tribal leaders for input during the 2011 round of re-districting (Walking Bull, 2012). Also State Senator James Bradford, who represents the 27th District, was appointed by the state senate body proposing district boundaries.

One way of assessing the degree of representativeness of a group in an elected body is to examine the “racial parity ratio”---the percentage of the group within the legislative body divided by their percentage in the population (Lien, Pinderhughes, Hardy-Fanta and Sierra 2007: 490). Perfect representation would be 1.0 and numbers below that indicate under-representation, while those above 1.0 indicate over-representation. Census Bureau data on the percentage of Native Americans in population from the 1980, 1990 and 2000, and 2010 are as follows: 6.5%, 7.3%, 8.3% and 8.9% (Gibson and Jung 2002; Census Bureau 2014).

The racial parity ratios for the representation of Native Americans in the South Dakota state legislature range from a low of 0.14 in 1990 to a high of 0.57 in 2007 through 2009. Given the very small numbers of Indians in these offices, one is hesitant to describe a pattern since a switch in the race of a single member results in substantial changes in the racial parity ratio. However, the situation did appear to be slowly improving over time, but the most recent couple years have shown a decrease with the racial parity ratios dropping to .032 for 2013 and 2014. While it is unclear whether this most recent drop is an anomaly or the start of a downward trend, there can be no disputing the fact that Indians have been and continue to be massively under-represented within South Dakota’s state legislature.[[24]](#footnote-24) See Figure 1 for a graph of the numbers of American Indian legislators, their percentages in the legislature, and the racial parity ratios for each year.

**Figure 1: Racial Parity Ratios Over Time for the State Legislature**

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**Representation at the County Level**

 As noted earlier, two South Dakota counties (Shannon and Todd) were designated as Section 5 Voting Rights Act covered counties because of their histories of racial discrimination and limited voting by Native Americans. Eight counties (Shannon, Todd, Bennett, Charles Mix, Corson, Lyman, Mellette and Washabaugh that is now part of Jackson County) were subject to the minority language provisions of the 1975 Voting Rights Act amendments because substantial portions of their American Indians populations were found to have limited English proficiency and high levels of illiteracy (Sells 2102: 192). Voting rights litigation has taken place in at least eleven of the counties, either involving the counties or sub-government units within the counties as the plaintiffs. See the Appendix for a summary of the Voting Rights Act cases.

***History and Context***

 Without a doubt, one of the most egregious examples of denying an equal opportunity to meaningfully participate in elections took place in Buffalo County. The county’s population is more than 80% American Indian, but the electoral districts for electing the three county council seats were mal-apportioned, such that nearly all of the Native Americans were lumped into a single district while the small number of whites were split between the other two districts. This meant that American Indians could elect one council member, but he was always outvoted. In 2003, tribal members brought suit and the case was settled after the county admitted to mal-apportioning the boundaries in violation of the “one person, one vote principle” (*Kirkie v. Buffalo County*, 2003).

A few years later another county, Charles Mix County, admitted to mal-apportioning its three electoral districts, such that the county’s 30% Native American population were never able to elect a council member of their choice (*Blackmoon v. Charles Mix County*,2007). After being forced to create an Indian majority district, Sharon Drapeau, a Yankton Sioux, was elected. White voters in the county responded by circulating a petition to increase the number of council seat to five, thereby succeeding in diluting the impact of the representative of the one predominantly Indian district, but eventually this too ended up being dis-allowed.

 Although there has been some movement into the towns and cities, most of the American Indian populations in the state live on or near the reservations.[[25]](#footnote-25) There are nine tribal nations in the state,[[26]](#footnote-26) but their reservation lands are split among 13 different counties, such that their voting clout in county elections is much diminished.[[27]](#footnote-27) Only three tribal nations (Flandreu Santee Sioux, Yankton Sioux, and Standing Rock Sioux) have their tribal lands within a single county. The reservations of the remaining six are included within multiple counties, and the Sisseton Wahpeton Oyate nation’s tribal lands are within five counties (South Dakota Department of Tribal Relations, 2014).

But the lack of representation on county councils cannot simply be explained by the fracturing of the reservation populations into different counties, because none of the three tribal nations that are within a single county have tribal members serving on the county councils. Moody County, which includes the lands of the Flandreu Santee Sioux, is only 13.2% Native American, so it is not surprising in a racially polarized environment that they have no representation on the five person county council. Corson County, where Native Americans make up nearly two-thirds of the population and the county includes all of the tribal lands of the Standing Rock Sioux, also has none on its county council. The outcome in Charles Mix County, however, points to the continuing challenges faced by American Indians, even after successful voting rights litigation. Charles Mix County is the home of the Yankton Sioux. American Indians, which comprise 31.5% of the county’s population, are concentrated in a single electoral district, so one might expect them to have a representative on the three person county council, but there are none at this time.

Yet it would be a mistake to think that voting rights litigation has no effect on Native American representation. The make-up of the Buffalo County council shifted immediately after their lawsuit. The council is no longer dominated by white Republicans, but now has all Democrats including two Native Americans, Donita Loudner and Ronald Petersen. Also the partisan composition of the council in Charles Mix County shifted following their voting rights challenge and the ensuing controversy over the number of electoral districts. Although all of the council members currently are white, a Native American woman was elected shortly after the court case, and the council is now more responsive to the concerns of Indians than it was prior to litigation.

***Assessing Native American Representation***

Although American Indians comprise roughly 9% of the state’s population, many counties within the state are nearly all white. There are, however, 24 counties that have over 7% of their population comprised of American Indians. We initially thought that 7% might be a large enough portion of the population that there might be examples of Native Americans being elected to council seats in those counties. To some extent this was premised on the fact that we had uncovered a couple instances of tribal members, who were Republicans, being elected to the state legislature from heavily white districts in the past. This did not turn out to be the case. Not only did we not uncover any instances of American Indians being elected in the heavily white counties, there were no records of their being elected at any time in a county that did not have at least 30% of its population comprised of Native Americans.

According to our research, the election of Sharon Drapeau in Charles Mix County right after the county was forced to change its mal-apportioned districts is baseline for the lowest percentage Indian population (31.5%) required to be elected to council seats. Roberts County with 35.9% is noteworthy. This is the only county in the state where Native American representation on the council exceeds their percentage in the population. Two of the five council members or 40% are American Indians. In contrast, Lyman County, which has a slightly larger proportion of Native Americans in its population (39.1%), has no Native Americans on the council. There are nine counties (Jackson, Mellette, Bennett, Corson, Ziebach, Dewey, Buffalo, Todd and Shannon) where over 50% of the population is American Indian, yet nearly half of these do not have any tribal members serving on their county councils. What this suggests is that achieving a majority in electoral districts, whether as the result of voting rights litigation or not, is an important factor in whether American Indians gain representation in these bodies, but it is not sufficient.

The quantitative data on Native American representation on county council seats is quite similar to what we found when examining the representation within the state legislature. There are no records of American Indians serving in any county council seats prior to Voting Rights Act litigation. There are 66 counties in the state; most of which have five elected members.[[28]](#footnote-28) This translates into a total of 322 county council members in the state. For American Indians to achieve parity on the council seats (e.g., hold the same proportion of seats as they have in the population), they would need to be elected to 29 county council seats. Instead only twelve or 3.7% of the 322 county council members from across the state are Native American. The statewide racial parity ratio for their representation on county councils is .42, and like what we found for state legislative seats, white majority jurisdictions do not elect Native Americans to political office. Out of the 57 majority white counties, only Roberts County that is 35.9% American Indians has a council that includes them. In contrast, every one of the counties, with a majority Native population, has at least one white serving in their county councils.

There are nine majority American Indian counties (Jackson, Mellette, Bennett, Corson, Ziebach, Dewey, Buffalo, Todd, and Shannon). Four of these have councils that include no Native Americans. As such the racial parity ratios for county council representation for the American Indian majority counties range from 0.0 to .83. Table 1 shows the population percentages, the numbers of Native Americans serving on county councils and the racial parity ratios for these nine county councils.

**Table 1: Representation on Councils in Majority Native American Counties**

|  |  |  |  |
| --- | --- | --- | --- |
| **County** | **% American Indian** | **Number on Council** | **Racial Parity Ratio** |
| Jackson | 51.6% | 1/5 | .39 |
| Mellette | 52.4% | 0/3 | .00 |
| Bennett | 60.4% | 1/5 | .33 |
| Corson | 65.8% | 0/5 | .00 |
| Ziebach | 71.8% | 0/5 | .00 |
| Dewey | 73.8% | 0/5 | .00 |
| Buffalo | 80.5% | 2/3 | .83 |
| Todd  | 86.8% | 3/5 | .69 |
| Shannon | 92.3% | 3/5 | .65 |

The top figure in the Number on Council column is the number of American Indians on the council. The bottom figure is the number of council members.

**Discussion**

The initial aim of this project was to discover whether the Voting Rights Act has significantly improved the chances of American Indians in South Dakota to be elected to political office. Given a major assumption in the Supreme Court’s *Shelby* decision was that racial minorities no longer face significant barriers that make it more difficult for them to meaningfully participate in electoral politics, we felt it was essential to discover whether that assumption holds up with respect to Native Americans, a group that has been almost entirely ignored by pundits and voting rights scholars. We chose to study South Dakota, an admittedly extreme case, because those are exactly the political jurisdictions that have been the locus of voting rights controversies. What we found was troubling for those who believe it is important for a democratic government to be representative of the people within its political jurisdiction. Native Americans are either entirely absent or massively under-represented. We recognize there can be a distinction between descriptive and substantive representation, such that the Indian preferred candidate in an electoral contest may be a white politician, who substantively acts on behalf of that population. However, we believe that having elected officials who mirror the ascriptive characteristics of their electorate is important. Such officials can serve as role models. More importantly they increase the political legitimacy of the system by showing people that all groups are included in settings where the decisions affecting their lives are being made.[[29]](#footnote-29)

Although the Voting Rights Act has increased opportunities for American Indians to be elected, this case study shows they are still massively under-represented. We were not able to find any records of a single American Indian being elected to the state legislature or a county council prior to voting rights litigation in the 1980s. Yet today, thirty years later, they continue to be a miniscule portion of elected officials in South Dakota. Despite comprising roughly nine percent of the population, currently there are only three serving in the 105 member state legislature for a racial parity ratio of 0.32 and their representation at the county level is equally bad.

Rather than finding that conditions have changed so dramatically that the Voting Rights Act is no longer essential as the Court was suggesting in *Shelby*, the opposite appears to be the case in South Dakota. At every juncture, the dominant political power structure in the state has sought to undermine the ability of American Indians to be full participants in governance. We would argue that if anything, the Justice Department needs to heighten the scrutiny of electoral laws and procedures in South Dakota. After so many years of being excluded, it may be the case that Native Americans in the state are reluctant to run for political office because they feel their voices will always be drowned out, but this is a question that future researchers should be encouraged to explore.

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**Appendix**

***Summary of South Dakota Voting Rights Cases involving American Indians***

*Little Thunder v. South Dakota,* 518 F. 2d 1253 (1975).---law preventing residents from unorganized counties from voting in county elections violated the Equal Protection Clause of the 14th Amendment.

*U.S. v. South Dakota.* 1979. Civ. No. 79-3039 (D. S.D.)---law preventing unorganized counties from voting violates Equal Protection Clause of 14th Amendment.

*U.S. v. South Dakota,* 1980. 636 F. 2d. 241 (8th Cir.)---After ruling in *U.S. v.* *South Dakota* 1979 that prevention of unorganized counties from voting violated the Equal Protection Clause, the state legislature failed to submit new plan for Section 5 clearance. The plan forced the unorganized counties and forced them to contract with the counties that they had previously been part of for services; implementation was enjoined.

*South Dakota v. U.S.,* No. 80-1976 (D.D.C. Dec. 1, 1981) ---the Unorganized Counties Act (see above) is not pre-cleared and a new plan for taxes, contracting and election provisions and are agreed upon with the Department of Justice.

*American Horse v. Kundert* , No. 84-5159. (D.S.D. Nov. 5, 1984)---South Dakota county’s refusal to accept voting registration cards from Indians violates the 14th and 15th Amendments.

*Fiddler v. Sieker* , No. 85-3050 (DSD Oct.24, 1986)---South Dakota registrars limited the number of voter registration cards that could be used for Indian registration drive in violation of Section 2 of VRA and 1st, 14th and 15th Amendments; court orders extended registration period to compensate.

*Black Bull v. Dupree School District* , No. 86-. 3012 (D.S.D. May 14, 1986) ---South Dakota county’s failure to provide sufficient polling places on reservation violated Section 2 of VRA and 1st, 14th and 15th Amendments; school district established more polling places and rescheduled election.

*Buckanaga v. Sisseton School District* 804 F. 2d 469 (8th Cir. 1986)--- At-large school board elections in South Dakota district violates Section 2 of VRA and adopts cumulative voting system.

*U.S. v. Day County, Enemy Swim Sanitary District*, Civ. No. 99-1024 (D. SD) (1999)---South Dakota county decided to incorporate a sanitary district that excluded Indians and a reservation from the being part of it in violation of Section 2 of VRA and the 14th and 15th Amendments; county agrees to incorporate a district that includes all residents.

*Weddell v. Wagner Community School District*, Civ. No. 02-4056-KES (D.S.D. 2002)---South Dakota case involving at-large elections for school board and number of locations for polling stations as violation of Section 2 of VRA; consent decree keeping the at-large elections but using a cumulative voting system and relocating polling stations.

*Kirkie v. Buffalo County* Civ. No. 03-CV-3011-CBK (D. S.D.) (2003)---South Dakota case on vote dilution and Equal Protection Clause because the Indian county commission district had more than 10 times as many people as a white district; consent decree required county to establish equal sized districts.

*Daschle v. Thune*, Civ. No. 04-4177 (D.S.D. 2004)---Senator Daschle of South Dakota got a temporary restraining order the night before the election to stop the copying of license plate numbers and following of Indian voters, which the court accepted as a violation of the Equal Protection Clause of the 14th Amendment and Section 2 of the VRA.

*Quiver v. Nelson*, 387 F. Supp 2d 1027 (D. SD 2005)*---*Two covered counties in South Dakota dispute requirement that all voting changes must get pre-cleared under Section 5 of VRA; in consent decree South Dakota agrees to seek pre-clearance of more than 600 statutes and regulations adopted since 1972 and get pre-clearance on two pending statutes.

*Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1024 (8th Cir. 2006)---South Dakota case involving the question of whether a legislative districts must be pre-cleared under Section 5 of VRA and whether packing Indians into a single district violates Section 2 of VRA; court holds that plan must be pre-cleared and the packing violates Section 2.

*Blackmoon v. Charles Mix County,* 505 F.Supp.2d 585 (2007) ---Yankton Sioux tribe members in South Dakota charge vote dilution in violation of Section 2 of VRA, 14th Amendment and 15th Amendment, because they were divided across three districts with a total deviation in district size that exceed 19% and county refused to change the boundaries and tried to redistrict without Section 5 VRA clearance; county agreed to create new districts and federal supervision through 2024.

*Janis v. Nelson,* No. CR 09-5019-KES, 2009 U.S. Dist. LEXIS 109569 (D.S.D. Nov. 24, 2009)---South Dakota law requires that felons, who had been incarcerated for their offenses, be removed from voting rolls, but two Native American felons, who got probation rather than incarceration, were removed from the voting rolls in violation the Equal Protection Clause, the Help America Vote Act, and sections 2 and 5 of the VRA; they got re-registered.

*Cottier v. City of Martin*, Case No. 07-1628 (C.A. 8, May 5, 2010)(originally *Wilcox v. Martin*) ---Dispute involved a redistricting plan in South Dakota city that divided up Indian voters into three districts, all of which had supermajorities of white voters in violation of Section 2 of VRA; initially the city was forced to adopt a cumulative voting system, but US Court of Appeals in a 7-4 decision allowed the city’s original district plan to be implemented; this is being appealed to the U.S. Supreme Court.

*U.S. v. Shannon County* 2010 (http://www.justice.gov/crt/about/vot/sec\_203/documents/shannon\_moa.pdf accessed April 15, 2013)---South Dakota county language assistance and voting access to Lakota speakers is charged with violating Sections 4(f)4 and 203 of VRA; agreed to improve its election practices with respect to Lakota speakers.

*Brooks v. Gant*, Case No. Civ. 12-5003 (2012)—plaintiffs argued that the absence of early voting in Shannon County was a violation of Section 2 by providing them with less opportunity to vote than was provided to citizens in predominantly white counties; the county settled and agreed to provide them with these opportunities in the next four elections.

1. Under Section 5, covered jurisdictions have been required to submit any changes in voting procedures and laws to the Department of Justice or the federal District Court for the District of Columbia for “pre-clearance.” Under Section 4(b), a jurisdiction was covered if it met the following criteria: 1. It had used a prohibited “test or device” to determine whether one could register or vote, and 2. Less than 50% of the eligible was either not registered or failed to vote. Although the original data used for establishing the covered jurisdictions had not changed since 1972, hence the comment about applying 40 year old criteria, Congress in 1982 revisions to the Voting Rights Act made it substantially easier for covered jurisdictions to “bail out” or get removed from the list of jurisdictions that had to be pre-cleared. Under the revised criteria, all that was required is that jurisdictions show no discrimination in the previous ten years and evidence of having taken positive steps to increase minority registration and voting. [↑](#footnote-ref-1)
2. Section 5 covered jurisdictions include Alabama, Alaska, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas and Virginia. [↑](#footnote-ref-2)
3. There are five main techniques that have been used to dilute minority voting strength: 1. Malapportionment of districts such that they are not of roughly equal size, 2. Cracking where a minority population is fragmented and spread across majority white districts, 3. Stacking by combining different concentrations of minority populations into heavily white districts to keep white majorities in those districts, 4. Packing where the minority population is heavily packed into as few districts as possible to limit the number of minority controlled districts, and 5. De-annexation where redistricting removes a geographic section to thereby eliminate that population (American Civil Liberties Union, 2009; Schroedel and Hart, forthcoming 2014). [↑](#footnote-ref-3)
4. We recognize as Wilkins and Stark (2011: xvii) note, “there is no single term that is acceptable to all indigenous people all the time.” In this paper, we use a number of terms interchangeably---Native American, Native, and American Indian. The latter term ignores the cultural diversity among indigenous nations, and almost certainly a legacy of colonialism. It is, however, as Wilkins and Stark reiterate, the term most often used by indigenous peoples in the United States when not referring to particular tribal nations. When referring to particular tribal entities, we use terms, such as Sioux and Cherokee. [↑](#footnote-ref-4)
5. The GMLC was able to identify 47 Native Americans serving in state legislatures and surveyed 27 of them (Hardy-Fanta, Lien, Pinderhughes and Sierra 2006; Lien, Pinderhughes, Hardy-Fanta and Sierra 2007). [↑](#footnote-ref-5)
6. The 1975 amendments to the Voting Rights Act expanded the geographic reach of the pre-clearance provisions of Section 5 beyond the South, resulting in Todd and Shannon Counties becoming “covered” jurisdictions. Minority language provisions (primarily Section 203), which require registration and voting materials be made available in some minority languages, also were adopted in 1975. The following eight South Dakota counties were covered by these provisions: Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Millette and Washabaugh. Washabaugh County was later merged into Jackson County. [↑](#footnote-ref-6)
7. There were at least four major military conflicts between the U.S. military and the Sioux between 1862 and 1890, the last of which was the Wounded Knee Massacre where 350 mostly unarmed Lakota Sioux men, women and children were killed (McDonald 2010: 118-122). [↑](#footnote-ref-7)
8. One of the more interesting historical ironies is that the South Dakota Republican Party in its 2012 party platform called for “dialogue pertaining to Article VI of the United States Constitution concerning treaties related to South Dakota” (South Dakota Republican Party 2012). This is the only state party platform that wants to re-open “dialogue” over treaty rights. [↑](#footnote-ref-8)
9. These practices are chronicled in the following court cases: *Little Thunder v. South Dakota* (1975); *United States v. South Dakota* (1980); *Buckanaga v. Sisseton Independent School District* (1986). [↑](#footnote-ref-9)
10. Indian Country is a legal term used to designate all reservation lands within the United States. It also is a commonly used as a shorthand designation for the parts of the country that include large swaths of reservation lands. [↑](#footnote-ref-10)
11. Although Janklow had worked as a Legal Services Corporation attorney on the rosebud Reservation, he discovered that demonizing Indians was a good campaign strategy. Janklow’s campaign for state attorney general gained traction when he began calling for the forceful prosecution and long criminal sentences for Indians involved in the 1974 Wounded Knee standoff (Sayer 1997: 174 and 200). [↑](#footnote-ref-11)
12. Shannon and Todd Counties, the two “covered” jurisdictions, are the only counties in the state that contract out the running of elections to neighboring counties. Shannon County, whose population is 92.3% Native American, contracts with Fall River County, while Todd County, whose population is 86.8% Native American, contracts with Tripp County. The contracting out appears to have worked much better in the second case, perhaps because the demographics in Todd and Tripp Counties are more similar (Braunstein 2012: 29). [↑](#footnote-ref-12)
13. Interestingly, on the interactive ESRI political map on the web site of the Gender and Multi-Cultural Leadership Project, which allows one to find a listing of African American, Latino and Asian American elected officials in each of the states, South Dakota is one of only two states that comes up with zero elected officials for each of these categories. The only other state in this category is Montana, which also is the subject of ongoing voting rights litigation involving the dilution of Native American voting. [↑](#footnote-ref-13)
14. Even though we did not ask for information about the representation of women, questions about whether there were any minorities, who had served on county commissions, often generated responses about women who had served in those positions at some point in the past or occasionally at the current time. [↑](#footnote-ref-14)
15. The web site of the South Dakota Association of County Commissioners includes the names of all county commissioners, as well as telephone numbers for each. Most of our data on the history and make-up of the county commissioners was gotten through telephone calls to these numbers. In cases, where we were unable to get information through this means, we followed up by asking representatives of Four Directions, the major non-profit group involved in voting rights issues in the state, to identify Indian council members for those counties. Although very labor intensive, we believe this has resulted in a comprehensive listing. [↑](#footnote-ref-15)
16. The twelve include Richard Hagen (Oglala Sioux), Thomas Shortbull (Oglala Sioux), Ronald Volesky (Cheyenne River Sioux, Paul Valandra (Rosebud Sioux), James Bradford (Oglala Sioux), Thomas Van Norman (Cheyenne River Sioux), Michael LaPointe (Rosebud Sioux), Theresa Two Bulls (Oglala Sioux), Eldon Nygaard (Choctaw Nation), Ed Iron Cloud III (Native Lakota), and Kevin Killer (Native Lakota). This material was provided by a reference librarian at the state library (Nickolas 2014). [↑](#footnote-ref-16)
17. The state adopted bills dealing with tribal-state tax collection agreements, license plates and the exemption of some tribal programs from state taxes (Shortbull, 2013). [↑](#footnote-ref-17)
18. Although Shortbull and Hagen were elected as Democrats from the heavily American Indian 28th district, a Standing Rock Sioux tribal member, Ron Volesky, was elected in the same year as Republican from a district that had very few Native Americans. Volesky subsequently switched his party affiliation and served many terms in both the House and the Senate. Then in 1985, Jim Emery, from the Cheyenne River Sioux, also was elected as a Republican from the mainly white 30th district and in 2007 another Native American Republican, Eldon Nygaard, was elected from another white district, the 17th district. The only other Republican out of the twelve, who have served in the state legislature, is Michael LaPointe, who was appointed to finish out a state senate term after the elected Democratic member from the 27th district died. LaPointe was defeated when he ran the following year. He was strongly attacked by Native American groups for co-sponsoring a voter identification bill that was opposed voters on the Pine Ridge and Rosebud reservations, which made up much of his district (Karaff, 2003). [↑](#footnote-ref-18)
19. District 28A included Dewey and Ziebach Counties and part of Corson County. District 28B included Harding and Perkins Counties, as well as some of Butte and Corson Counties. [↑](#footnote-ref-19)
20. Bogue and the state legislature took this action after Mark Van Norman, a Cheyenne River Sioux, won the Democratic primary in 1994. One has to wonder whether Bogue was afraid to face Van Norman in a rematch in the next election. [↑](#footnote-ref-20)
21. Bradford, an Oglala, represented District 27 as member of the state house from 2001 through 2008. From 2009 onwards, he has served as the senator from District 27. [↑](#footnote-ref-21)
22. The division of District 26 in sub-districts did not result in a Native American being elected, but it did allow them to form a coalition with some whites in District 26A and elect Democrat. District 26 B has continued to elect white Republicans. [↑](#footnote-ref-22)
23. The new plan, which was adopted by the state legislature on a party line vote and signed by Republican governor Dennis Daugaard, was denounced by Democrats. Senate Minority Leader Jason Frerichs accused the Republicans of partisan gerrymandering. Frerich has represented District 1, a traditionally Democratic stronghold in the northeastern part of the state. The redrawn District 1 placed 5 incumbent Democratic legislators in a single district and resulted in a decrease from 7 to 5 in the number of Democrats elected from those areas (Lammers 2014). [↑](#footnote-ref-23)
24. The three legislative districts with the largest portion of Native American voters are Districts 26, 27 and 28. Voters in Districts 26 and 28 elect their senators from their entire districts, but have representatives elected from sub-districts A and B. This has resulted in District 26 electing a white Democrat to the state senate seat, as well as a white Democrat to the District 26A seat in the House. As expected, a white Republican was elected to the House from District 26B. In District 28, the senate seat is occupied by a white Republican, as is the House seat from 28B. The representative from House seat 28A is a white Democrat, who has a long history of working closely with tribal members. The 27th District is not sub-divided and has one white Republican House member, as well as two American Indians in the Senate and the other House seat. [↑](#footnote-ref-24)
25. As noted in the earlier discussion of the most recent re-districting, there are some pockets of Native American populations that can be considered urban. For example, Rapid City’s is 12.4% American Indian. [↑](#footnote-ref-25)
26. The nine reservations are as follows: Lower Brulte Sioux, Crow Creek Sioux, Sisseton Wahpeton Oyate, Flandreu Santee Sioux, Rosebud Sioux, Yankton Sioux, Pine Ridge Oglala Sioux, Standing Rock Sioux, and Cheynee River Sioux. [↑](#footnote-ref-26)
27. Two counties (Coddington and Grant) have only very small portions of the Sisseton Wahpeton Oyate Reservations. [↑](#footnote-ref-27)
28. Charles Mix, Mellette, Buffalo and Jones counties only have three members on their county councils. [↑](#footnote-ref-28)
29. See Pitkin (1972) for the classic discussion of political representation as comprised of two elements: descriptive and substantive representation. [↑](#footnote-ref-29)