

South Dakota's Constitution: "Under God the People Rule"—But All the People?

For example, a treaty is, essentially, a contract between two sovereign nations.

Layli Long Soldier, *Whereas* (2017)

In 1889, voters in the newly created state of South Dakota ratified the state's first constitution. Although the constitution has been frequently amended, it remains in effect to this day.

Standard histories of South Dakota's constitution often emphasize its origins in the partisan conflicts, Gilded Age corruption, and prairie populism of the later nineteenth century. It took more than two decades after the creation of the Dakota Territory in 1861 for South Dakota to join the union and ratify a constitution. During that time, Democrats in Congress resisted Dakota statehood because the territory was expected to vote Republican. But after Republicans won back the White House and Congress in the elections of 1888, Democrats finally allowed the Dakotas to become the thirty-ninth and fortieth states as part of a deal that also included the admission of Washington and Montana.

Prior to statehood, many drafters and ratifiers of South Dakota's constitution were outraged by the corruption of federally appointed territorial governors such as Nehemiah Ordway. In response, the drafters of the 1889 constitution placed sharp limitations on the activities of the new state's government, including taxation and appropriations. The limitations prevented the state from funding internal improvements such as roads, bridges, and irrigation systems until an amendment loosened the restrictions in 1936, years into the economic and agricultural crises of the Great Depression.

The most celebrated aspect of South Dakota's constitution may be the state's adoption in 1898 of the nation's first initiative and referendum process, allowing citizens to propose and vote on their own laws, as well as to refer laws passed by the legislature to a citizens' veto. The innovation was supported by the state's Populist Party governor and promoted by Father Robert Haire, a Catholic priest who went on to help found the South Dakota Socialist Party. Today, nearly half the states have similar direct democracy provisions, but South Dakota was the first.

Histories that celebrate early South Dakota's expansive commitment to democracy have tended to downplay, or entirely ignore, another aspect of the state's founding. In the decades immediately preceding South Dakota's constitutional formation, a large part of the land within the state's borders was taken by the federal government from the Native nations who were its lawful owners, especially the Oceti Sakowin (sometimes referred to in the past as "Sioux").

The years surrounding South Dakota's founding were scarred by anti-Indian violence and displacement. The infamous Wounded Knee massacre took place only a year after constitutional ratification. Although federal troops carried out the massacre, they had been welcomed by South Dakotan settlers who were panicked by rumors of a looming Indian uprising.

Since being pushed west by the violent aftershocks of eastern colonization, the Lakota (a [powerful](#) subset of the Oceti Sakowin) had flourished largely through bison hunting. But after the near-extirpation of the bison through industrial-scale slaughter in the 1870s, many Lakota

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were struggling to subsist. Their conditions were often made worse by corrupt federal Indian agents who failed to provide rations guaranteed by federal treaty.

On December 28, 1890, about three hundred Miniconjou and Hunkpapa Lakota, mostly cold and hungry women and children, had surrendered to Army forces. The next morning, at a camp near Wounded Knee creek, a struggle over a deaf Native man's refusal to hand over his rifle without payment quickly escalated into a frenzy of killing. Army troops fired artillery at fleeing Natives in wagons and in a nearby ravine. In the words of a leading [history](#):

Over the next two hours, the soldiers hunted down and slaughtered all the [Oceti Sakowin] they could find, riding them down and shooting them at point-blank range as they tried to escape. One woman was murdered after she had run three miles from the camp. Soldiers shot babies in their cradle-boards. The only good Indian was a dead Indian, many of the troops had been taught, and they had just turned about two hundred and fifty [Oceti Sakowin] into good Indians. ... The captain of the Pine Ridge Indian police ... watched as two soldiers ran down five women. "[A]s soon as they saw they were being followed by the soldiers they sat down on the hill and faced them and the soldiers killed all five of them. When they saw they were going to be slain they covered their faces with their blankets and awaited death." Some of the soldiers scalped their victims.

Twenty soldiers would receive Medals of Honor for their service in South Dakota, with a few receiving specific praise for the killing of Natives in the ravine. In an indication of public sentiment among settlers in South Dakota, L. Frank Baum, the future author of *The Wizard of Oz* but in 1890 the sole proprietor of the *Aberdeen Saturday Pioneer*, responded to news of the massacre by publishing an [editorial](#) in favor of the "total extermination" of the Indians. Shortly before the massacre, he wrote: "Why not annihilation? ... [B]etter that they die than live the miserable wretches that they are." Similarly, a reporter from the *Deadwood Times* had [written](#): "Why should we spare even a semblance of an Indian? Wipe them from the face of the earth."

This was the world in which the South Dakota constitution was drafted and ratified. Yet many accounts of South Dakota's constitutional history have done little to grapple with the presence of Native nations in the state. Indian affairs have often been dismissed as a federal rather than a state concern. Herschel Melcher, the mayor of Chamberlain, South Dakota, captured this attitude in a 1954 [letter](#) opposing the movement of Natives to the city: "The people of Brule County do not feel that we should be saddled with a relief load for Indians, that is the job of the Federal Government, and we do not intend to let an Indian light around here at all. We do not want to live with them and we see no reason why we should, we don't want them in our schools, the hospital is plenty."

But the Oceti Sakowin who live in South Dakota are South Dakota citizens as well as tribal citizens, and



Mass grave for victims of Wounded Knee massacre,
December 1890

there is no history of South Dakota without the history of the Oceti Sakowin. The same applies to South Dakota's constitutional history. The lives of Native South Dakotans have been profoundly affected by South Dakota's constitutional structures and processes. The Indigenous population in South Dakota has in turn shaped the constitutional politics of South Dakota in countless direct and indirect ways.

Perhaps most significantly, from the territorial era to the present, political leaders in South Dakota have [attempted](#) to limit the political power of Natives in the state:

One of the first actions of the newly established Dakota Territorial Assembly in 1862 was the passage of a petition asking the U.S. Congress to abrogate treaty rights of the [Oceti Sakowin] and Chippewa. The initial assembly also passed a law limiting the franchise to "free white males" and then went further in 1866 by passing a law expressly denying "Indians" nearly all basic civil liberties. After South Dakota became a state in 1889, the state legislature adopted provisions limiting voting, jury service, and running for political office to white men. Even after Congress passed the Indian Citizenship Act (ICA) in 1924, South Dakota refused to comply with its provisions. The state explicitly prohibited Native Americans from voting until 1951 and then continued for decades to find ways to disenfranchise most Native Americans. The state's attorney general in 1963 ruled that Native Americans in Charles Mix County could not vote because their names did not appear on the county tax rolls and they were under the jurisdiction of the federal government. Also, until forced to change by the *Little Thunder v. South Dakota* (1975) ruling, state law prohibited residents living in "unorganized counties" (i.e., those with Indian reservations) from voting, and until forced to change by another case, *United States v. South Dakota* (1980), the state prohibited residents living in those "unorganized counties" from running for political office. ... Until forced to change due to VRA cases in the early 1980s, South Dakota law statutorily prohibited Native Americans living in Todd County and what is now Oglala Sioux County from voting.

The same article notes that the researchers "were unable to find records of Native Americans elected to political offices [in South Dakota] prior to the Department of Justice's threat after the 1980 census to not preclear any redistricting plan that did not include a majority Native American state legislative district."

As a federal judge wrote in a 2004 [decision](#) finding that South Dakota's legislative redistricting plan illegally diluted the votes of Native Americans: "South Dakota was one of the last states in the nation to officially grant voting rights to all Indians," and "[e]ven after receiving the right to vote by law, many Indians were still denied the opportunity to vote because the law prohibited the creation of precincts where Indians could cast their ballots." After the judge's decision, in the presidential election of 2004, a leading [history](#) of the right to vote notes that there were still "well-documented instances of Native-American voters being barred from the polls because they failed to present identification papers, even though the law did not require them to do so."

As recently as 2012, the South Dakota Republican Party platform [requested](#) "dialogue pertaining to Article VI of the United States Constitution concerning treaties related to South Dakota," a circumlocution that is hard to understand as anything other than an invitation to question tribal sovereignty in the state. At the same time, the party's secretary was a lawyer whose "private legal practice has focused on defending government entities from charges that their voting procedures discriminated against Native Americans." In 2020, the state legislature [rejected](#) legislation that would have allowed voter registration based on a tribal photo ID.

How can the traditional history of South Dakota as a bastion of robust constitutional democracy be reconciled with the frequent exclusion of Native voices and votes from that democracy? How can the traditional story of South Dakota's moderate and conservative constitutional culture be reconciled with the violent and authoritarian threads that run throughout the state's history?

The need to confront such questions has become more urgent as the state itself has embarked on a program of historical erasure. In 2022, South Dakota's Department of Education received [national](#) attention when it hired a retired professor from Hillsdale College, an institution dedicated to the spread of conservative Christian values, to create a new set of social studies standards modeled on Hillsdale's controversial "1776 Curriculum." Despite widespread condemnation by historians, teachers, tribal leaders, and educational organizations, the state approved the standards, which took effect in 2025.

A fuller understanding of South Dakota's constitutional culture will require incorporating insights from recent [scholarship](#) that rethinks the relationship between Indigenous and U.S. legal, social, and political history. What follows is an introduction to South Dakota's constitution that focuses on some of what has traditionally been excluded from historical accounts.

The Land and the People

Nearly all of South Dakota consists of prairie and plains. But within the semi-arid land west of the Missouri River, there is a notable exception, visible in any satellite image: a verdant island of forest-covered mountains, the Black Hills. According to Lakota thought, the Black Hills ("Pahá Sápa") are a sacred place of ancestral origins. In the Fort Laramie Treaty of 1868, under Native military pressure, the United States recognized the Black Hills as part of a thirty-two-million acre "permanent home" for the Lakota and other signatory tribes. This "Great Sioux Reservation" encompassed what is today South Dakota west of the Missouri River.

But in 1874, gold was discovered in the Black Hills, and the U.S. attitude changed. After failing to obtain consent to purchase the land, the federal government turned to military force, leading to the Lakota-led devastation of Custer's Seventh Cavalry at the Battle of Little Bighorn in 1876. The following year, with anti-Indian sentiment further inflamed by accounts of Custer's defeat, Congress asserted ownership of the Black Hills. A century later, in *United States v. Sioux Nation of Indians* (1980), the Supreme Court would recognize Congress's act as illegal. But at the time, Congress's asserted taking of the Black Hills facilitated the Great Dakota Boom. From 1878 to 1887, more than a quarter million settlers arrived in the Dakota Territory, lured by what

soon turned out to be illusory promises of agricultural fecundity. Railroads promoted the territory and laid hundreds of miles of tracks.

By the time South Dakota's eligible voters ratified the state's constitution in October 1889, settler farming practices were already contributing to an agricultural crisis. The federal government had also passed two additional acts that divided and diminished portions of the



*Aerial view of South Dakota showing the Black Hills in the southwest, and the Missouri River flowing through the center of the state
(U.S. Geological Survey)*

original Great Sioux Reservation. In 1887, Congress passed the Dawes Act, also known as the General Allotment Act, which facilitated the conversion of communally owned reservation lands into private property that could be partitioned, purchased, and sometimes simply claimed by non-Natives. In March 1889, partly in response to [demands](#) by the territorial government, Congress expropriated an additional nine million acres of the Great Sioux Reservation, opening the land to settlers, and carved the remaining land into five of the nine reservations that exist in South Dakota today: Standing Rock, Cheyenne River, Lower Brule, Rosebud, and Pine Ridge.

Thus, the drafters and ratifiers of South Dakota's constitution were declaring state sovereignty over vast expanses of land illegally expropriated from Native nations who, according to the Supreme Court's foundational federal Indian law cases, possessed their own sovereignty. It is difficult to reconcile celebrations of the expansive democracy of early South Dakota with the manifestly undemocratic foundations of the state's constitution. Traditional accounts often neglect the aspects of South Dakota history that, for example, led Nazi thinkers—not known for their democratic commitments—to praise America's conquest of the West as a [model](#) for Germany's exterminatory plan to seize, cleanse, and settle Slavic lands. In 1928, Hitler gave a [speech](#) admiring Americans for having “gunned down millions of Redskins to a few hundred thousand, and keep[ing] the modest remnant under observation in a cage.” The process of frontier settlement by pioneers that has been memorialized in popular books such as Laura Ingalls Wilder's *Little House on the Prairie* series was, from another perspective, a process of theft and violent expulsion.

There is no mention in the South Dakota constitution of the fact that much of the state belonged, by treaty, to Native nations. Indeed, only two passages in the constitution mention the Indigenous peoples who made up at least five percent of the state population in 1889. First, there is a reference to the apportionment of legislators “according to the number of inhabitants, excluding Indians not taxed,” a provision that echoes the denial of citizenship to Native Americans in the federal Fourteenth Amendment. Second, there is a declaration “that we forever disclaim all right and title to ... all lands ... owned or held by any Indian or Indian tribe”—at least

“until the title thereto shall have been extinguished by the United States.” This “disclaimer clause” was apparently required as a [prerequisite](#) for obtaining statehood.

Today, in many respects, Native nations in South Dakota are thriving. But areas of concentrated disadvantage persist both on some reservations and in some residentially segregated neighborhoods, such as in Rapid City. The result is that Native South Dakotans, in the aggregate, experience among the highest levels of socioeconomic inequality in the United States, including a poverty rate roughly four times higher than the overall state rate, and an infant mortality rate roughly three times as high. Three of the five counties with the highest poverty rates in the United States are counties in South Dakota containing reservations. Life expectancy in Oglala Lakota County, which lies inside the Pine Ridge reservation, was recently estimated to be 60 years. Native Americans are roughly ten percent of the state population but make up nearly fifty percent of the local jail population and thirty-five percent of the state prison population.

At the same time that Native Americans are overrepresented in South Dakota’s carceral state, they are, not coincidentally, underrepresented in positions of state power. To take just one example, it appears to be the case that in the history of South Dakota, there has been a total of [one](#) Native American state court judge, a magistrate judge appointed in [2019](#). South Dakota’s 2012 felon disenfranchisement statute, which disproportionately affects the Native population due to the disproportionate involvement of Natives in the state’s criminal legal system, creates a direct link between carceral overrepresentation and electoral underrepresentation.

Indigenous inequalities in South Dakota cannot be attributed solely to past federal policies, nor to the legacy of [private racism](#) that once expressed itself in [signs declaring](#) “No Dogs and Indians Allowed” and continues to receive [occasional](#) public expression today. A long history of state policies has also contributed to current inequalities. A particularly striking [example](#) can be found in the 1930s:

To curb and control off-reservation migration into white towns, in 1939 South Dakota passed a series of “warning out” laws that required “transient” populations to fill out and sign “certificates of non-residence” that excluded them from poor relief, public welfare, voting, and establishing permanent residency. In Rapid City, Pennington County, and South Dakota more broadly, warning-out laws specifically targeted off-



The Homestake Mine in the Black Hills, at one time the largest mine in the Western hemisphere, produced over 40 million ounces of gold. ([credit](#))

reservation Natives, barring them from legally residing within certain communities or receiving basic housing, social, welfare, educational, and medical services. Ramon Roubideaux, a Sicangu attorney from the Rosebud Reservation, described the practice at a 1962 civil rights hearing: “In Rapid City they follow that program religiously. They serve transient Indians ... a nonresident notice. This is what they call it. In other words, by service of this notice on the individual, you prevent him [*sic*] from acquiring, as the statute says, a *legal settlement*.” Often county social service and health officials issued nonresident certificates when Natives applied for services, or they were simply denied services altogether.

Over decades, city planning policies and redlining led to the segregation of Native residents in Rapid City into neighborhoods of [concentrated disadvantage](#) that continue to exist today. The South Dakota constitution failed to prevent such inequality either by ensuring the democratic inclusion of Native citizens or by effectively barring discrimination against them.

Rights Provisions

The South Dakota constitution in its current form, like many state constitutions, echoes the federal Bill of Rights but also includes additional rights. From its beginning in 1889, South Dakota’s Bill of Rights has provided, for example, a bar on imprisonment for debt (Art. VI § 15). Unlike the federal Second Amendment, South Dakota’s constitution also explicitly establishes an individual right to bear arms for self-defense (Art. VI § 24).

In 1946, in line with the national Republican backlash against the expansion of labor rights during the New Deal, South Dakota’s largely rural voters approved a “right to work” amendment prohibiting the “closed shop” agreements that would soon be prohibited nationwide by the Taft-Hartley Act of 1947 (Art. VI § 2). In 2010, South Dakota voters approved an additional amendment guaranteeing, among other things, the use of secret ballots in votes to authorize employee representation by a union (Art. VI § 28). Labor [protections remain weak](#) in the state.

In the spirit of the tax revolts of the 1970s, South Dakota added a constitutional amendment in 1978 requiring a two-thirds vote of both houses of the legislature in order to increase “certain tax rates or valuations” (Art. XI § 13). The longest provision of the Bill of Rights by far is a list of rights for crime victims added in 2016 and then revised in 2018 in response to practical difficulties with the initial drafting (Art. VI § 29, commonly known as “Marsy’s Law”). Unlike some more recent state constitutions, South Dakota’s does not contain an explicit right to privacy or sex equality, although it does contain an explicit declaration of the inherent right to “happiness” (Art. VI § 1).

The South Dakota Supreme Court has generally declined to recognize more expansive civil liberties under the state constitution than those recognized by the U.S. Supreme Court under analogous provisions of the federal Constitution. Since 1980, South Dakota’s Supreme Court has been selected according to the “Missouri plan,” in which the governor appoints state supreme court justices based on the recommendations of a nonpartisan nominating committee. Like many courts appointed in this manner, South Dakota’s Supreme Court has rarely heeded Justice Brennan’s [call](#) in 1977 to “step into the breach” and boldly guarantee the individual rights that Brennan saw as under threat from an increasingly right-leaning U.S. Supreme Court. A rare exception arrived when the U.S. Supreme Court reversed the South Dakota Supreme Court’s interpretation of the Fourth Amendment in *South Dakota v. Opperman* (1976). The South Dakota Supreme Court responded, defiantly, by [upholding](#) its prior ruling on state constitutional grounds.

Even where subtle differences exist between the language of South Dakota's constitutional rights and their federal equivalents, the South Dakota Supreme Court has generally held back from recognizing rights beyond those recognized by the U.S. Supreme Court. For example, South Dakota's equivalent of the federal Eighth Amendment prohibits all "cruel punishments," not just "cruel and unusual" ones. Some other states whose constitutions omit the "unusual" requirement, such as Delaware, Massachusetts, and Pennsylvania, have used the omission as a basis for imposing greater scrutiny on punishments. South Dakota's Supreme Court has thus far declined to do so. Similarly, South Dakota's constitution, like [many](#) state constitutions since the later nineteenth century, imposes a duty on the state to create free public schools (Art. VIII § 1). But while the courts of some states, such as Kansas, have used public education clauses to intervene in disputes over the adequate funding of schools, South Dakota's Supreme Court declined to do so in the 2011 [case](#) of *Davis v. State*.

In other contexts, perhaps due to South Dakota's small population and even smaller civil rights bar, as well as the apparent tendency of South Dakota lawyers not to include state constitutional claims alongside their federal ones, it may be that no litigant has brought a case giving the South Dakota Supreme Court the opportunity to make a bold state constitutional ruling. For example, in a section entitled "Right to vote," South Dakota's constitution guarantees "free and equal" elections. State courts in other states, such as Pennsylvania, have sometimes used similar language to prevent gerrymandering and unjustified burdens on voting. But in South Dakota, voting rights suits have typically been pursued in federal court. (Similarly, the successful legal challenge to Gov. [Noem](#)'s attempt to criminalize "riot boosting," passed in [response](#) to the Indigenous-led Keystone XL [pipeline protests](#), was filed in federal rather than state court.) The "free and equal" elections clause has also apparently never been used to defend the right of Native Americans to vote in South Dakota's elections.

The most significant and easily overlooked aspect of the rights provisions in South Dakota's constitution may be their frequent failure, historically, to protect rights that are now widely recognized as fundamental. For example, the constitution's declaration that "[a]ll men are born equally free" and have the right to "life and liberty" did not prevent the state law against miscegenation that required Yanktonai Dakota painter [Oscar Howe](#) to marry his German wife outside the state in 1947. The guarantee of equal freedom did not prevent the rise of South Dakota's [Ku Klux Klan](#) in the 1920s, including residential [cross-burnings](#) in Sioux Falls. Nor did it prevent the persistence of [racial segregation](#) in Rapid City into the early 1960s, when the *New York Times* described South Dakota as "a pocket of Northern resistance to legal efforts to erase racial discrimination in public places." A 1963 [report](#) by the U.S. Civil Rights Commission collected surveys suggesting that roughly 90 percent of bars and barbershops and roughly 50 percent of motels in Rapid City refused to serve Blacks. Recent [research](#) has also uncovered evidence of refusals to serve Blacks and Natives in Sioux Falls and residential segregation in cities across the state, including Vermillion, the home of the University of South Dakota, where



1962 New York Times article on racially segregated public places in Rapid City, as well as "discrimination against Indians in towns near reservations."

“[a] black barber with a white clientele ... was apparently forced to commute from Yankton ... because he could find no lodgings in or near Vermillion.” Yankton, by contrast, had a Black neighborhood that local whites referred to as “N_____ Hill.”

Nor did the state constitution’s promise of equality include the right to vote for women, which was [defeated](#) in every attempted amendment prior to 1918, despite suffragists’ observation that “women are people,” and thus according to the state’s motto—“Under God the People Rule”—should be among those who rule.

Nor did the South Dakota constitution’s promise of “[f]reedom of religion,” “[f]reedom of speech,” and “peaceable assembly” prevent the state from banning unpopular speech and religious practices in the early twentieth century, and even in more recent years. In [1923](#), South Dakota criminalized the use of peyote in ceremonies by the pan-Indian Native American Church, only adding an exception for the Church’s use through legislation in [1970](#). In 2009, South

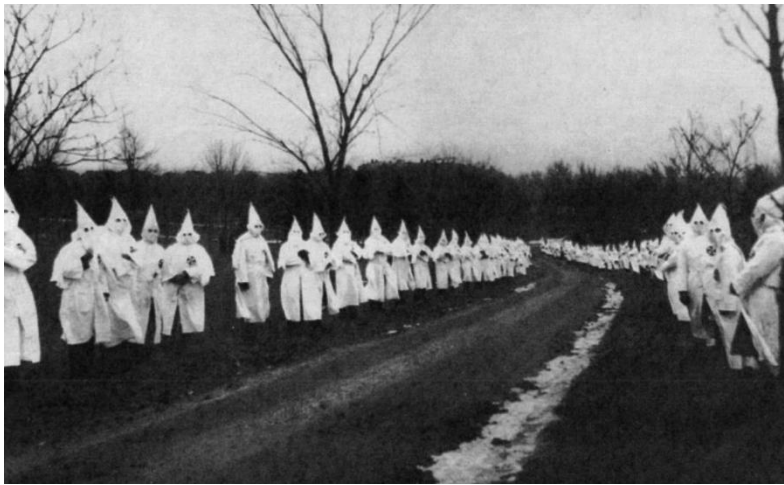


Photo of Sioux Falls Ku Klux Klan in the 1920s ([credit](#))

Dakota prohibited the use of tobacco in state prisons, including during Native American religious activities, a ban [struck down](#) in federal court under federal law. Even more recently, in 2024, South Dakota’s Department of Corrections [dismantled](#) three ceremonial sweat lodges, interfering with the religious practices of Native inmates.

World War I [saw](#) “the jailing of Hutterite pacifists, and the detention and fining of socialist German farmers,” as well as a

state-authorized ban on public teaching in German, “including sermons or public worship.” When Hutterites in [Yankton](#) County refused to buy war bonds, county [officials](#) “simply rounded up 100 steers and 1,000 sheep belonging to them, and auctioned them off.” (The federal government also joined in the persecution of the South Dakotan Hutterites, subjecting three conscientious objector brothers—Joseph, Michael, and David Hofer—to [torture](#) in federal prisons that caused two of their deaths.)

Nor did South Dakota’s constitution prevent the often violent suppression of socialist and labor organizing. Members of the American Protective League (a forerunner of the 1920s KKK) [purged](#) IWW-affiliated workers from South Dakota’s wheat fields in the late 1910s. In 1918, the mayor of [Mitchell](#), South Dakota, ordered the breakup of the Socialist Party’s state convention and the expulsion from town of all delegates, with at least one party leader being seized by five men, driven five miles into the prairie, and left to walk eighteen miles home to Parkston with a warning not to return. In 1919, a mob of several hundred in [Madison](#), South Dakota, attacked the home of the state chair of the Socialist Party, who had recently been released from a prison sentence as a conscientious objector. A recent history recounts that “[w]hen he failed to appear, members of the mob chopped their way through his roof with axes, tied his hands and feet, and prepared to paint him yellow.”

Later, in 1934, a state court [enjoined](#) the radical United Farmers League from meeting or distributing literature in the state. Soon after, the state prosecuted over a dozen members of the organization for “riotous assembly,” although a Sisseton jury acquitted the defendants. It was the liberal Warren Court, through decisions such as *Brandenburg v. Ohio* (1969), that eventually prohibited the prosecution of unpopular political speech, not South Dakota’s constitution.

Nor did any rights protections in the South Dakota constitution prevent the state from participating in the mass removal of Indian children to foster care during the “termination” era in federal Indian policy. A recent [history](#) states that, nationally, “[a] quarter to a third of all American Indian children were removed from their families during the Termination Era and placed into adoptive families, foster homes, or orphanages. ... Abuse was common. In one study, nearly half of the participants indicated that their adoptive family abused them, and of these, 70 percent reported sexual abuse.” In [South Dakota](#), “Indian children were placed in foster care at a rate sixteen times that of non-Indian children.” As recently as [2016](#), a federal court [found](#) that the state was removing Indian children from their parents’ custody based on inadequate procedures that [violated](#) the Indian Child Welfare Act and the Due Process Clause.

In South Dakota, as in the United States more generally, the liberal ideal of securing greater freedom and equality through judicial enforcement of constitutional rights, rather than through social mobilization and democratic action, has often turned out to be a [hollow hope](#).

Structural Provisions

Especially in light of the frequent failures of judicially enforced constitutional rights, it might be argued that the most important function of a constitution is not to protect individual rights, but to establish the groundrules for peaceful political contestation and democratic lawmaking. Rights-protecting legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 has often turned out to be much more consequential than even the most [celebrated](#) constitutional decisions.

The groundrules in the current South Dakota constitution, as in most state constitutions, are more democratic than the analogous provisions in the U.S. Constitution. In South Dakota, there is no “electoral college”: whoever receives the most votes for governor wins. South Dakota Supreme Court justices serve renewable eight-year terms rather than being permanently insulated from democratic change through life tenure. Each state senator represents an equal number of people, as opposed to the malapportioned federal Senate, where a voter in Wyoming receives nearly seventy times the legislative power of a voter in California. Perhaps most importantly, the South Dakota constitution can be amended based on a majority vote by the state’s citizens, as opposed to the virtually unamendable federal Constitution, which [may](#) in fact [be](#) the world’s most difficult to amend.

But the South Dakota constitution also contains various features that limit democratic responsiveness. Above all, legislators are elected to winner-take-all, “compact, contiguous” districts, and the elected legislature is itself responsible for defining the districts that will be used in future legislative elections (Art. III § 5). The result, especially in recent years, has been that relatively moderate or progressive voters have been packed into a few districts either representing Native American or urban areas, while conservative voters have been distributed more efficiently across the state. Predictably, a dramatic divergence between vote shares and seat shares has followed. Although a Democrat has not received above 60% in any statewide vote since 2008, Democratic candidates have continued to receive roughly 25% and often around 35% in statewide votes over the last decade. But in large part because of winner-take-all voting and

the legislative map, the state legislature is, as of this [writing](#) in 2025, 8% Democrat and 92% Republican.

Although not an explicit feature of South Dakota's constitution, the denial of Native Americans' voting rights, as described above, has been pervasive enough throughout state history that it might be seen as a kind of implicit structure of South Dakota's democracy, at least as it has functioned up to the present. Native disenfranchisement is especially significant because of the leading role that South Dakota's elected federal officials have often played in shaping federal Indian policies affecting Native South Dakotans.

Long-time representative and then senator Karl Mundt, along with longtime representative E.Y. Berry, both supported the policy of tribal termination and were critical of the Indian New Deal, which Berry [criticized](#) as an effort by "socialist Democrats" to "Communiz[e] the Indian." South Dakota's elected officials, including Mundt, were also enthusiastic supporters of the Pick-Sloan dam project, which resulted in the flooding of hundreds of thousands of acres of Native land and the displacement of hundreds of Native families in central South Dakota in the mid-twentieth century. The project has been [described](#) by Dakota scholar Vine Deloria Jr. as "without a doubt, the single most destructive act ever perpetrated on any tribe by the United States."

In 1985, when a bill was submitted to Congress to address the illegal taking of the Black Hills—"the [sole](#) meaningful legislative attempt for a comprehensive money and land return solution"—it was sponsored not by any member of South Dakota's congressional delegation but by Senator Bill Bradley of New Jersey. In fact, South Dakota's congressional delegation opposed the bill, including Senator Tom Daschle, who also apparently blocked the Sioux Nation Black Hills Act when it was reintroduced in 1988.

One explicit structural feature of South Dakota's constitution that has often received praise, as noted above, is the constitution's process for citizen-sponsored ballot initiatives. In accounts of South Dakota's constitutional history, ballot initiatives are often hailed as a testament to the state's vibrant democracy. From another perspective, however, every successful ballot initiative on an issue that could have been addressed through the legislative process might be seen as evidence of a failure of representative democracy. If the majority of voters supported the initiative, why did the voters' elected representatives not already pass the law as ordinary legislation? Why was a citizen-driven initiative necessary?

Ballot initiatives have long been a prominent focus of political activity in South Dakota, especially since a 1972 constitutional amendment allowed voters to propose amendments to the constitution. Some examples have already been mentioned, such as the passage of Marsy's Law in 2016 and the 1978 amendment requiring supermajorities for certain tax increases. To this day, South Dakota has no personal income tax, and ranks near the very [bottom](#) of the country in average teacher pay, child-care assistance, child welfare spending, mental-health spending, and disability aid spending, in addition to being one of only six states with no state-funded preschool. Although the right of indigent criminal defendants to state-appointed counsel was recognized even under Dakota Territory laws, South Dakota's public defense system also remains severely underfunded, with a recent [report](#) estimating that forty to seventy-five percent of defendants "go through the critical stages of plea negotiation, arraignment, entry of plea, and sentencing without an attorney."

Other successful ballot initiatives and referendums over the years have imposed term limits on elected officials (1992); vetoed a strict abortion ban passed by the state legislature (2006); vetoed education policy changes opposed by teachers' unions, such as the abolition of

teacher tenure (2012); raised the state’s minimum wage (2014); reformed campaign finance and ethics in government laws (2016); banned payday loans (2016); and expanded Medicaid coverage under the Affordable Care Act (2022), providing health coverage for tens of thousands of uninsured state residents after years of legislative opposition.

In some cases, federal courts have invalidated successful ballot initiatives, such as voters’ attempt to place term limits on federal office-holders in 1992 (invalidated by the U.S. Supreme Court’s *Thornton* case in 1995), a 1998 attempt to bar corporations from owning farmland, a ban on same-sex marriage passed in 2006, and a 2018 prohibition on out-of-state contributions to South Dakota ballot campaigns. In the 2021 case of *Thom v. Barnett*, initiated by then-Governor Kristi Noem, South Dakota’s Supreme Court controversially invalidated a successful 2020 citizen-initiated constitutional amendment that would have legalized marijuana in the state.

The basis for the Supreme Court’s decision in *Barnett* was a “single-subject” requirement for ballot initiatives adopted in 2018—perhaps not surprisingly, on the basis of a legislative referral rather than a voter initiative. The single-subject requirement is a subtle example of South Dakota legislators’ increasingly frequent attempts to obstruct or undermine the ballot initiative process. An especially stark example arrived in 2016, when the legislature responded to the passage of the voter-initiated “Accountability and Anti-Corruption Act” mentioned above by not only repealing it, but declaring the repeal to be part of a “state of emergency” and thus immune from being reversed by voter referendum.

More recently, legislators twice placed on the ballot, and voters twice rejected, constitutional amendments that would have increased the approval threshold for constitutional amendments—to 55% for all amendments in 2018’s Amendment X, and to 60% for amendments with certain fiscal impacts in 2022’s Amendment C, which was timed to appear on a low-turnout primary ballot. In November 2026, a legislatively referred constitutional amendment will again ask voters to create a 60% supermajority requirement for all future constitutional amendments.

Legislators also passed a series of laws in 2018 imposing burdens on petition circulators, including new paperwork requirements. A 2019 law attempting to create a state registry, fees, and identification badges for paid circulators was enjoined by a federal court, as was a 2020 law requiring circulators to be South Dakota residents and to disclose personal details if paid. The legislature continued its attempts to restrict the initiative process in 2021, passing a law requiring ballot measure petitions to use a large, fourteen-point font, and in 2024, passing a law allowing petition signers to recant their signatures. In 2025, the legislative onslaught continued with a law moving up the deadline for petitions by three months, as well as new petition formatting, disclosure, and address-matching requirements.

In all, a recent *South Dakota Law Review* [article](#) counted thirty-three new laws enacted between 2017 and 2024 to regulate initiated measures. If the initiative and referendum process once placed South Dakota at the vanguard of popular democracy, it seems to have now become the focus of a pitched battle between the people of South Dakota and their elected representatives. Every successful initiated measure, and every legislative attempt to undermine initiated measures, provides further evidence of a democratically troubling distance between the will of the legislature and the will of the people. Until the conflict is resolved, perhaps through the effective elimination of ballot initiatives, or perhaps through voting [reforms](#) that reduce the discrepancy between partisan vote share and seat share, ballot initiatives will continue to play a powerful role in shaping the South Dakota constitution. Even the text of the constitution will continue to grow in length and complexity through the passage of numerous amendments that could be addressed through legislation in a more effectively representative democracy.

Constitutional Culture and Values

The practical meaning of any constitution inevitably depends on how the people responsible for bringing its majestic generalities to life choose to do so, or not, and on whether they follow its “hard-wired” rules, or not. Accordingly, making sense of the practical meaning of the South Dakota constitution requires understanding the political culture and values of the state.

Standard historical writings on South Dakota have tended to emphasize the state’s conservatism and moderation. A portrait of life in South Dakota might focus on a hard-working, modest family living on a small family farm or in a small town, guided by traditional Protestant values. A portrait of the state’s politics might emphasize a historical commitment to fiscal and moral conservatism, pragmatic problem-solving, and (most of the time) the Republican Party.

But just as the election of Donald Trump as President of the United States in 2016 spurred scholarly reconsiderations of the nation’s political culture and values, so recent events in South Dakota invite a similar rethinking. In 2022, for example, the voters of South Dakota re-elected Kristi Noem as governor despite a number of controversial episodes that seem inconsistent with the standard portrait of South Dakota’s political culture. It is also difficult to reconcile the traditional portrait with South Dakota’s nearly two-to-one vote in 2016 and 2020 for Donald Trump, a flashy Queens billionaire and reality television star with a history of bankruptcies, adultery, corruption, lawlessness, pervasive dishonesty, racist demagoguery, and sexual assault. In 2024, despite Trump’s unprecedented attempt to stage an auto-coup following his 2020 election loss, an even higher percentage of South Dakota voters (63%) chose the former president over his Democratic rival.

Also in tension with the traditional portrait, elected officials in the state have recently been in the news for a remarkable series of bigoted comments. Even within the state legislature, according to a 2017 study, “anecdotal evidence suggests that racially discriminatory behaviors and comments are common.”

The state’s carceral practices might also seem to exist uncomfortably beside the assumption of moderation and fiscal conservatism. Despite having a violent crime rate around the U.S. average, South Dakota’s incarceration rate is generally in the top quintile among states. In particular, South Dakota incarcerates women at a higher rate than any other state in the country and any country in the world. This result is driven in part by South Dakota’s astonishingly high incarceration rate for Native women, often for drug offenses that might be addressed through treatment in less punitive jurisdictions. Partly in order to accommodate the projected growth in the state’s prison population, the legislature in recent years approved nearly \$750 million for the construction of new women’s and men’s prisons. The men’s prison will be the most expensive state-funded construction project in South Dakota history.



South Dakota highway billboard advertising museum dedicated to Gutzon Borglum, sculptor of Mount Rushmore and supporter of the second Ku Klux Klan (photo by author, June 14, 2025)

It might be tempting to dismiss the political developments of the last several years as anomalous reflections of contingent circumstances unrelated to South Dakota's enduring political culture. But a look back at other prominent figures in the state's political history in light of recent events reveals additional inconsistencies with the idea of South Dakota as a stronghold of moderation and consensus-driven, common-sense conservatism. There are numerous examples of swings toward fairly radical figures, beginning with the election of a Populist governor and senator in the 1890s after the fertile period of the Dakota Boom gave way to years of unbroken drought and financial calamity. One of South Dakota's first senators, the Republican Richard Pettigrew, was so radical that after leaving office he was federally indicted for criticizing World War I as a money-making scheme. His 1921 book in favor of revolution, *Triumphant Plutocracy*, received praise from Lenin and Trotsky.

In the 1970s, South Dakota found itself represented by two Democratic senators commonly known not for their moderation but for their fierce progressivism: George McGovern, whose liberal policies were successfully caricatured as “acid, amnesty, and abortion,” contributing to his landslide loss in the 1972 presidential election—including the loss of South Dakota—and Senator James Abourezk, an Arab-American who grew up on the Rosebud reservation and drove the passage of a number of landmark Indian rights bills, including the Indian Child Welfare Act of 1978.

Perhaps the most significant anomaly in the theory of South Dakota as a consistently moderate conservative state is the decades-long political success of Bill Janklow, a four-time governor whose orientation might best be described as authoritarian populist. After several years serving as a legal services attorney on the Rosebud reservation, Janklow pivoted as Attorney General toward hostility to Native rights, dismissing the Voting Rights Act as “garbage” and declaring the act to be an unconstitutional violation of states' rights. For the next nearly [thirty years](#) South Dakota silently refused to seek legally required pre-clearance for the hundreds of changes it made to voting policies. In a retrospective [interview](#), he celebrated his lack of compliance with laws: “It took me about four years to figure out that I could really ignore a lot of the federal rules and wouldn't have to face the sanctions ... Frankly, I just started ignoring all the federal rules and it made a remarkable difference in our ability to do things.”

Janklow was first elected governor in 1978, riding a tide of popularity based on violent [rhetoric](#) against the American Indian Movement (“The only way to deal with these AIM leaders is to put a bullet in their heads”), as well as his involvement in prosecutions of Natives after the 1973 Wounded Knee occupation and the earlier violent clash at the Custer Courthouse. At the outset of his career, Janklow had been [credibly](#) accused of raping a Native minor, Jancita Eagle Deer, an allegation that followed his earlier juvenile conviction for [assaulting](#) a 17-year-old Flandreau girl. In his first political campaign, he [explained](#) the earlier assault by saying it was not a rape: “It didn't go that far.” His career ended when he was incarcerated for manslaughter, following a trial in which he [apparently](#) lied under oath.

To the extent that material conditions, like cultural values, inevitably play a role in shaping legal understandings and aspirations, it may also be relevant to note the economic underpinnings of South Dakota's constitutional order. Against the [myth](#) of the [self-reliant small](#) family farmer called to feed the nation and the world through [stewardship](#) of the land, South Dakota's cropland today is in fact overwhelmingly dedicated to the [industrial-scale](#), heavily [federally subsidized](#) duoculture of soy and corn. A century of farm consolidation and industrialization, accelerated by the Reagan administration's [farm crisis](#) policies of the 1980s, has resulted in the largest ten percent of South Dakota's farms, with annual sales above \$1

million, producing over seventy percent of the state's agricultural output. Federal rules obtained by corn-state interests have resulted in two-thirds of the corn crop being dedicated to the [environmentally perverse](#) practice of [biofuel](#) production, with most of the remainder used to [feed factory-farmed livestock](#).

In any case, agriculture produces [less](#) than [ten](#) percent of South Dakota's economic output today, or [thirty](#) percent once indirect contributions are factored in. Only around [six percent](#) of South Dakota households rely on farming or ranching as their primary source of income.

The largest industry in the state is now finance and insurance. A decade ago, South Dakota held more bank assets than any other state in the country, although it has since been surpassed by Ohio. South Dakota first lured Citibank to the state in the early 1980s by offering the ability to charge high interest rates and fees that were illegal in other states. (In what has been [described](#) as a “breathtakingly quid pro quo” deal, Janklow's chief of staff left his position to lead Citibank's South Dakota operation.) South Dakota's lack of usury caps made it possible for T. Denny Sanford, now the wealthiest individual in the state, to build a multibillion-dollar empire by charging high credit card interest rates and fees to financially precarious Americans across the country. In an echo of the Gilded Age, Sanford's subsequent philanthropy has resulted in his name adorning institutions across the state. When child sexual abuse material was [discovered](#) on Sanford's AOL email account in 2019 and identified as having been sent from his phone, he retained former (and as of this writing, once again, current) Attorney General Marty [Jackley](#) as his defense attorney and was never charged.

In addition to biofuels and subprime credit cards, South Dakota has also become the leading tax haven in the United States, [rivaling](#) international destinations such as Panama and the Cayman Islands. As the 2021 “Pandora Papers” leak [revealed](#), the state's trust laws [have allowed](#) clients from around the world, including individuals [accused](#) of corruption and human rights abuses, to hide hundreds of billions of dollars of assets from official scrutiny and taxation.

Reconciliation and Democratic Reconstruction

There is no cult of veneration in South Dakota for the state's constitutional framers. Instead, the focus of the state's veneration is the federal constitution and the nation's presidents, including those whose faces appear on Mount Rushmore in the Black Hills. This monument, also called the “Shrine of Democracy,” was carved into the face of a mountain known by the Lakota as the Six Grandfathers (“*Thunǵášila Šákpe*”). The project was overseen by Gutzon Borglum, a white supremacist and Ku Klux Klan [insider](#) whose museum continues to be advertised on billboards across South Dakota. The monument also continues to feature prominently on state license plates and in the state's tourism advertising (“Great Faces, Great Places”).

Attention to what the presidents on Mount Rushmore said regarding Indians, however, raises doubts about the viability of a politics of deference to the values of elected officials in the distant past. During the Revolutionary War, Washington engaged in an exterminatory campaign of retaliation against the Haudenosaunee



*The Mount Rushmore National Memorial, carved into the face of *Thunǵášila Šákpe* in the Black Hills ([credit](#))*

(“Iroquois”), [ordering](#) “the total destruction and devastation of their settlements and the capture of as many prisoners of every age and sex as possible.” When he was not expressing paternalistic optimism about the peaceful assimilation and civilization of “[merciless Indian savages](#)” (in the words of the Declaration of Independence), Jefferson similarly endorsed Indian [removal](#) and “[extermination](#).” Roosevelt famously [declared](#): “I don’t go so far as to think that the only good Indians are dead Indians, but I believe nine out of every ten are, and I shouldn’t like to inquire too closely into the case of the tenth.” Even Lincoln approved the hanging of thirty-eight Dakota men after the Dakota War of 1862, the largest mass execution in U.S. history—although the white public in Minnesota was outraged that he had commuted over two hundred other death sentences.

Worship of the constitutional past, whether at the state or federal level, creates what might be called an “originalist dilemma”: either a constitution consistently binds us to the values of the past, in which case its results are abhorrent; or a constitution does not consistently bind us to the values of the past, in which case it becomes a [vehicle](#) for the expression of contemporary values. In practice, there appears to be no escaping the choice between unacceptable results and a lack of determinate constraint.

Rather than looking to South Dakota’s constitution as a way to escape from making political judgments in light of our own values, we might instead focus on the invitation to democratic self-rule embodied in the constitution’s preamble: “We, the people of South Dakota ... do ordain and establish this Constitution for the state of South Dakota.” The constitution’s bill of rights affirms that “[a]ll political power is inherent in the people.”

In practice, the phrase “the people of South Dakota” has not always included all the people of South Dakota. The members of Native nations, in particular, have often been excluded from South Dakota’s democracy. If a redemption of South Dakota’s democratic promise one day becomes politically feasible, it might begin by bringing together the three sovereigns—tribal, state, and federal—in a process of [reconciliation](#) based on a recognition of shared history.

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