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THE RIGHT OF SUFFRAGE IN MONTANA: VOTING PROTECTIONS UNDER THE STATE CONSTITUTION

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I. Introduction

"Suffrage is the basic right without which all others are meaningless. It gives . . . individuals . . . control over their own destinies."[1] Though today the right of suffrage is widely recognized as a fundamental right,[2] the federal constitution does not expressly grant the people the right to vote.[3] By contrast, an individual's right to vote is protected by more than half of the state constitutions in their "Declaration of Rights" or "Bill of Rights." Most of these state constitutional provisions require elections to be "free," "equal" and/or "open."[4] The drafters of many state constitutions included right-to-vote clauses long before the federal government offered any such protection.[5] In Montana, the right of suffrage is expressly granted by the state constitution. Article II, section 13 of the Montana Constitution states: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[6]

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1. James Grady, *Suffrage and Elections, Montana Constitutional Convention Study No. 11*, 25 (Mont. Const. Conv. Commn. 1971) (quoting Lyndon Baines Johnson).

2. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

3. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 Fla. St. U. L. Rev. 325, 345–346 (Bush v. Gore Issue 2001) ("The Constitution of its own force enfranchises no one. Article I, Section 2 sets the tone by looking to state law for the determination of who may vote in federal elections . . . . The Seventeenth Amendment makes the same provision for the electorate that chooses United States Senators. And, as we were so forcefully reminded by both *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*, the Constitution gives the people no vote in the presidential election at all. As for the voting rights provisions of the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments, none of these confer a right to vote in federal, state, or local elections. Rather, each is phrased in the negative, eliminating a qualification that a state or locality might otherwise have utilized to determine who may exercise the franchise but not requiring that anyone actually be enfranchised."); *see Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. . . . When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . . The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

4. Matthew C. Jones, *Fraud and the Franchise: The Pennsylvania Constitution's "Free and Equal Election" Clause as an Independent Basis for State and Local Election Challenges*, 68 Temp. L. Rev. 1473, 1474 (1995).

5. *Id*.

6. Mont. Const. art. II, § 13.

This clause would appear to bar any act, law, or practice that would prevent free and open elections. But what does it mean for an election to be "free and open"?

Montana lawyers and courts rarely reference this state constitutional provision despite, or perhaps because of, its vague and broad language. This comment begins with a discussion of the "free and open" provision and presents possible explanations for why the right has rarely been cited in Montana. The comment then examines how the state constitutional right to vote has played out in other states. Finally, the comment discusses a proposed voter identification law ("voter ID law") that would have implicated the right to vote in free and open elections in Montana.

II. Montana's Right to Vote

A. A Brief History of the Right

Montana's right-of-suffrage provision has remained unchanged since its first appearance in the proposed 1884 Montana Constitution.[7] The drafters of the 1889 and 1972 constitutions adopted the 1884 provision verbatim.[8] The 1884 proposed constitution, which was very similar to the 1889 constitution, was largely based on the 1876 Colorado Constitution.[9] There is no discussion of the right-of-suffrage provision on record from the Colorado Constitutional Convention proceedings to shed light on how the drafters understood the right. Delegates of the 1884 Montana Constitutional Convention adopted the provision without discussion.[10] At the 1889 Montana Constitutional Convention, much of the delegates' discussion about voting centered on whether women should have the right of suffrage. A review of the discussion sheds light on what the delegates meant by "open to everybody."[11] Based on the 1889 Convention transcripts, the delegates clearly meant open to those persons eligible to vote under existing state and federal law.

The delegates debated whether to change the provision's language.[12] Delegate Marshall moved to amend the provision by striking out the words "and open."[13] Marshall said he did "not know what the words 'and open,'

7. Mont. Const. art. I, § 5 (1884).

8. Mont. Const. art. III, § 5 (1889) (superseded by 1972 Mont. Const. art. II, § 13).

9. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 Mont. L. Rev. 325, 328 (2010).

10. Montana Constitutional Convention Proceedings of 1884 vol. 6.

11. Montana Constitutional Convention Proceedings of 1889 448–467 (State Publishing Co. 1921).

12. *Id.* at 98–99.

13. *Id.* at 98.

as they occur in the section, mean" and thought the phrase was unnecessary.[14] He argued:

> We have now the secret ballot, and by the late law of the Territory the polls are removed, and no man can come within a certain distance of the place of voting; and it seems to me that the word as printed may render that law unsatisfactory, although that is not the intention; and it seems to me that the words "and open" really add no force to the section.[15]

Delegate Bickford opposed the amendment, arguing the phrase had meaning.[16] Bickford responded:

> Not only are elections to be free, but they are also to be open. They should be open to all persons who are legally entitled to vote. The polls should be open to all persons, who, under the laws of this Territory and the United States, are entitled to the right of franchise. I believe that the words should be left in, because the right may be protected by their remaining in the place where they are now.[17]

There was some discussion of whether the Australian system prevented an open election by making voting secret.[18] The Australian ballot system formalized the voting process by providing uniform, official ballots that designated officials distributed at polling places and that voters filled out in a private booth.[19] Before the introduction of the Australian system, states administered elections by voice voting, by paper ballots, or by a combination of both.[20] Organized political parties started printing their own ballots, which were easily identifiable, and distributing them to voters, which opened the door to bribery, vote buying, and voter intimidation.[21] By the late nineteenth century, reformers in the United States, Great Britain, and Australia thought that the only way to ensure free and fair elections was to have voters cast their ballots in secrecy, and by 1910, the Australian system was in place in most states.[22] By 1972, most state constitutions guaranteed the secrecy of voting, but the Montana Constitution did not explicitly guarantee it.[23]

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14. *Id.*

15. *Id.*

16. *Id.*

17. Montana Constitutional Convention Proceedings of 1889, *supra* n. 11, at 98.

18. *Id.*

19. Grady, *supra* n. 1, at 67.

20. David L. Permut and Joseph P. Verdon, *Protecting the American Tradition of Write-In Voting after* Burdick v. Takushi, 9 J.L. & Pol. 185, 189–190 (Fall 1992).

21. *Id*. at 191–192.

22. *Id*. at 192. Soon after the Australian system was adopted, many states adopted automated voting systems, which changed how votes were counted but did not change the substance of the Australian system. *Id*. at 194.

23. Grady, *supra* n. 1, at 67. The Montana Constitution did provide for elections by ballot in Article IV, section 1, and it granted the legislature the authority to pass laws "to protect against the abuse of the elective franchise [Article IX, section 9]." The Montana Code Annotated had many provisions relating to the secrecy of elections. *Id.*

On this subject, Delegate Robinson argued elections must be open, even with secret ballots.[24] He said, "the elections themselves shall be open while the ballots may be secret, closed ballots. But the election itself must be free and open to everybody—as contradistinguished from any secret election; it is in public and free to everybody."[25] Robinson seems to be agreeing with the earlier point that polls should be open to all eligible voters. Delegate Warren, however, supported the proposed amendment, arguing it was time for a "free and not open" election.[26] According to Warren, "We have had enough of open elections in this country; and if this clause in this Constitution is for the purpose of doing away with or making a dead letter of the Australian System, which is now on our statute books, the sooner we know it the better."[27] Delegate Middleton responded by saying:

> [T]he words "and open," as used in that section, can certainly mean nothing more nor less than that the elections shall be public as contradistinguished from secret. Now, to say that that has anything to do with the Australian System of voting, or any other system of voting, is sheer nonsense. It certainly is right that that provision should remain where it is. The elections may not under any circumstances be conducted secretly. It means that the election itself should be public, but it has nothing to do with the mode or manner of voting.[28]

Delegates voted on the amendment after this debate, but it did not pass.[29] Thus, the adopted provision was identical to that in the 1884 proposed constitution.

The history of the 1889 Convention clarifies what the delegates understood the phrase "free and open" to mean. The delegates understood "open" to be consistent with secret ballots. "Open" seems to refer not to the ballot form but to the actual accessibility of the voting process. The elections were to be in public, free to everybody, and open to everybody. By open to everybody, the delegates meant open to eligible voters, as "everybody" in 1889 did not include women, "idiots and insane" persons, and felons.[30] It is harder to say what "free" meant to the delegates. "Free" seems to have meant without restraint as opposed to without cost because Montanans added an economic qualification for voting in certain types of elections to the constitution in 1932.[31] The U.S. Supreme Court declared

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24. Montana Constitutional Convention Proceedings of 1889, *supra* n. 11, at 98.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Mont. Const. art. IX, §§ 2, 8 (1889) (superseded by 1972 Mont. Const. art. IV, § 2).

31. Mont. Const. art. IX, § 2 (1932) (superseded by 1972 Mont. Const. art. IX, § 2). Grady, *supra* n. 1, at 38 (citing 1931 Mont. Laws ch. 101).

such provisions unconstitutional and invalid,[32] and the Montana Legislature recognized this by eliminating the requirement and by voting to submit a proposed constitutional amendment, which would have deleted the provision.[33] Therefore, to the 1972 Convention delegates, "free" probably meant both without cost and without restraint.

In the 1972 Bill of Rights Committee Comments to the proposed section 13, committee members stated the section should be unchanged to guarantee that elections remain free and open.[34] The Committee noted the proposed provision was the same as that in the 1889 constitution.[35] The Committee further commented that the provision supplemented the General Government Committee on Suffrage and Elections's proposals but did not replace them.[36] No delegate proposals were received.[37] In March 1972, the Montana Constitutional Convention adopted the provision unanimously.[38] A committee member read the comment mentioned above, and there was no other discussion.[39]

Though there was no discussion of the right to vote directly in relation to Article II, section 13, there was extensive discussion of the right when delegates discussed Article IV, Suffrage and Elections (which consists of six sections, including secret ballots, voter qualifications, and candidate qualifications).[40] Delegates stressed the act of voting is a basic right, not a privilege—that the right to vote is a fundamental, basic, and cherished right of citizenship, and if there are residency requirements for legislators in districts, the right of suffrage will be limited.[41] The fact that the delegates discussed the right to vote only in relation to Article IV and stated that Article IV supplements Article II, section 13 suggests that Article II, section 13 does not fully secure the right to vote and would not effectively define the right if Article IV were not also cited.

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32. Grady, *supra* n. 1, at 37 n. 45 (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204 (1970)).

33. *State ex rel. Ward v. Anderson*, 491 P.2d 868, 870 (Mont. 1971); *see* 1971 Mont. Laws. ch. 159.

34. Montana Constitutional Convention Proceedings of 1972 vol. II, 634 (Mont. Legis. 1972).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id*. at vol. VII, 2640–2641.

39. *Id.*

40. Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. III, 400–401, 406, 552.

41. *Id.*

B. The Right to Vote and Voter Qualifications

In the 1971 Montana Constitutional Convention Commission report on Suffrage and Elections, James Grady painted a picture of the delegates' understanding of election law at the time, which included the perception that state responsibility for establishing voter qualifications had been usurped by federal action in the previous decade. Grady referenced the 1963 Report of the U.S. Commission on Civil Rights and noted that the Commission focused on federal protection for the right to vote.[42] The Commission on Civil Rights asserted that the federal government needed to protect and guarantee the right to vote and that the only effective way to do so was for Congress to enact uniform voter qualification standards.[43] Grady wrote: "With the passage of the Voting Rights Act of 1965, Congress directly challenged the basic doctrine of state responsibility in establishing voter qualifications."[44]

Though Grady did not cite Article II when he mentioned the importance of the right to vote,[45] he noted the provision when discussing the Legislature's almost unlimited power to enact laws relative to the right of suffrage.[46] As Grady pointed out, only federal and state constitutions and federal laws restrict this power.[47] General constitutional limitations include provisions that establish the right to vote, prohibit special laws on conducting any election or designating the place of voting, and provide that if a voter meets the established qualifications, her right to vote cannot be impinged upon.[48]

Given this historical understanding of the broad scope of legislative power to define and limit the right to vote and the understanding that constitutional provisions do little to limit legislative discretion, various theories exist about how to best protect the right to vote from this legislative power. One theory is that state constitutions should expressly list voting qualifications to ensure the legislature cannot later add to or change the qualifications.[49] Another approach is that state constitutions include only a simple statement that the qualifications of electors shall be as provided in the con-

42. Grady, *supra* n. 1, at 22 (referencing Report on the President's Commission on Registration and Voting Participation 60 (Govt. Printing Off. 1963)).

43. *Id.* at 21.

44. *Id.* at 22.

45. *Id.* at 25. Grady, like the Montana Constitutional Convention delegates, cited the Qualified Elector Provision instead, noting statutory law augments Montana's constitutional suffrage provisions. *Id.* at 26.

46. *Id.* at 41. Pursuant to Article IV, section 3, the Legislature has the express power to enact laws to preserve the purity of elections.

47. Grady, *supra* n. 1, at 41.

48. *Id*. at 42.

49. *Id.*

stitution.[50] Yet another approach is to specify, and thereby limit, the areas in which the legislature may act.[51] The Montana delegates seem to have selected the latter approach of limiting the areas in which the legislature can act but did not include specific residence and registration requirements in the constitution.[52]

C. Voter Registration Systems

Commentators also debate the extent to which registration systems should be outlined in state constitutions.[53] While registration requirements are not generally intended as an additional qualification for voting, but as a mechanism to verify voters' identities, courts have occasionally invalidated registration laws and held that they do in effect add new requirements for voting.[54] Oftentimes, state constitutions, including the Montana Constitution, simply authorize the legislature to establish a system of registration.[55] To some, registration is an administrative matter and "the best means of promoting efficiency and voter participation, while preventing fraud, is a statutory question."[56] According to these commentators, legislatures should be able to update methods of registration as data-processing and record-keeping technology advances, and courts should be able to ensure that the legislature does not use registration laws to modify voting requirements.[57] This mirrors the discussion of the 1972 Convention delegates who noted that "[a]pproximately 60 percent of the states include specific residency and registration requirements in their constitutions, but most of the newer state constitutions . . . leave these matters to the Legislative Assembly."[58] Delegate Etchart, speaking on the General Government Committee's Suffrage and Elections report, said "[t]he proposed article [IV, section 2] constitutionally gives the Legislature the major burden for establishing explicit registration and residence requirements."[59]

Registration laws at the end of the nineteenth century paint a picture of how the delegates of the 1889 Convention understood the right to vote. The voter registration law in 1895 read as follows:

> No person is entitled to vote at any election mentioned in this title, except as otherwise provided in this title, unless his name on the day of the election

50. *Id.*
51. *Id.*
52. *See* Mont. Const. art. IV, § 3.
53. Grady, *supra* n. 1, at 76.
54. *Id.* at 75.
55. *Id.* at 77.
56. *Id.*
57. *Id.*
58. Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. III, 400.
59. *Id.* at 392.

> appears in the "check lists," on the copy of the official register furnished by the registry agents to the judges of election at the election precinct at which he offers to vote, or unless he produces and surrenders a county registry certificate or a state registry certificate, as provided in §§ 1204 and 1217, of this code, and the fact that his name so appears in the "check lists" and in the copy of the official register in the possession of the judges of election is *prima facie* evidence of his right to vote.[60]

The "check list" was a list of the names of all electors on the official register.[61] The registry agent alphabetically arranged the names of electors registered for each election precinct.[62] To be added to the "check list," a voter took the following oath or affirmation, which was administered by a registry agent:

> I do solemnly swear or affirm that I am a citizen of the United States; that I am of the age of twenty-one years, and will have been a resident of Montana one year, and in the county thirty days preceding the day of the next ensuing election and that I am not registered elsewhere in Montana for this electoral year, so help me God (or under the pains and penalties for perjury).[63]

If someone asked to be registered to vote and the registry agent did not know whether or not he met the voting qualifications, the registry agent was required to question the applicant about his qualifications. If the agent was "satisfied," he could enter the applicant's name in the register. If he was "not fully satisfied" or if a qualified elector challenged the applicant, "the registry agent must require the applicant to answer truly, under oath or affirmation, the following questions, together with such questions as said registry agent may consider necessary or proper, testing his qualifications as an elector for the ensuing election."[64] The registry agent was to ask the applicant whether he met the qualifications listed in the registry oath (U.S. citizenship; 21 years old by the day of the next election; residence in Montana for one year and in the county for 30 days before the election; resident of the registration district in which he proposed to be registered; and not registered to vote in any other district).[65] If the applicant did not meet the qualifications, he could not register.[66]

Voter registration systems became increasingly important with population growth, which meant high-population density urban areas and the increased mobility of voters.[67] Because election officials could no longer

60. Mont. Political Code § 1380 (1895).

61. Mont. Political Code § 1215.

62. *Id.*

63. Mont. Political Code § 1209.

64. Mont. Political Code § 1210.

65. *Id.*

66. *Id.*

67. Grady, *supra* n. 1, at 74–75.

personally recognize voters, they needed a system to prevent fraud.[68] This helps explain why changes to registration laws were implemented. However, recent attempts to pass voter ID laws, which this comment examines in Section IV, suggest that something may have changed to make these laws inadequate to protect voting or that there is a perception that something has changed.

Though the discussions from the three Conventions are helpful in determining what the delegates meant by "free and open" elections, they do little to explain how or when the clause would be enforced. The registration laws that were in place at the end of the nineteenth century further illuminate the delegates' understanding of the right to vote. However, it is still unclear what exactly Article II, section 13 means, which is one reason that lawyers today rarely cite it, as discussed in the next section.

D. The Right to Vote in Montana Case Law

This section gives a survey of the Montana case law on Article II, section 13. There are only nine Montana cases that cite Article II, section 13 and even fewer cases that address it in any detail. Oftentimes, the right to vote has simply been included in a laundry list of provisions cited to prove a particular point, such as the progressive nature of the Montana Constitution.[69]

For example, in *Finke v. State ex rel. McGrath*,[70] the Montana Supreme Court cited the right to vote in addressing a challenge to a statute relating to municipal and county elections that limited participation to record owners of real property.[71] Because the statutes at issue involved the fundamental right to vote, the Court applied strict scrutiny and declared the statute unconstitutional.[72] In so holding, the Court listed a total of six Montana and U.S. constitutional provisions that were at issue but failed to say how each provision factored into its decision.[73]

E. Why the Right Has Been Cited So Rarely

Considering that Article II, section 13 has been cited so infrequently, often just appearing in a laundry list of constitutional provisions, it seems at first glance that the right has little substantive force and may serve prima-

68. *Id.* at 75.

69. *See Buhmann v. State*, 201 P.3d 70, 108 (Mont. 2008) (Nelson, J., dissenting) ("The right to vote is explicitly and broadly protected by Article II, Section 13.").

70. *Finke v. State ex rel. McGrath*, 65 P.3d 576 (Mont. 2003).

71. *Id.* at 581.

72. *Id.* at 580–581.

73. *Id.* at 579.

rily as a constitutional platitude. Usually, the Montana Supreme Court broadly construes the rights contained in the Declaration of Rights,[74] which makes its cursory treatment of Article II, section 13 all the more noteworthy.

Montana is not the only state where the right to vote under the state constitution is rarely implicated. State courts rarely use their constitutional right-to-vote clauses to void elections, instead relying upon specific statutory mechanisms.[75] Matthew C. Jones conducted a similar inquiry into the right to vote under the Pennsylvania Constitution, and his analysis of why the constitutional right is rarely cited to remedy election fraud[76] may apply to the Montana experience. Pennsylvania's constitutional right-to-vote provision is identical to Article II, section 13 and is supplemented by the Pennsylvania Election Code.[77] Jones concluded that Pennsylvania's right-vote-clause "most likely does not afford voters an independent basis for challenging a fraudulent state or local election in state court."[78] He argued that the statutory scheme "poses substantial financial and political barriers to many election challenges," so that an independent "construction of the state constitution is necessary to ensure full compliance with the constitutional mandate of 'free and equal' elections."[79] So long as these barriers persist, he predicted that litigants would bring election challenges in federal, not state, court.[80] Jones presents one possible explanation for why the right-to-vote article comes up so rarely, namely that litigators bring claims under the state election code instead.[81] James A. Gardner presents two more possible explanations for why state court judges rarely adjudicate election law disputes, particularly gerrymandering. These explanations are that election lawyers are reluctant to bring election law claims in state court and that state court judges are reluctant to decide election law cases.[82]

It may be easier for litigants to bring a claim under Title 13 of the Montana Code Annotated and Article IV, section 2, instead of under Article II, section 13. As Jones explains, most states treat their constitutional election clauses as "enabling" provisions and "have enacted legislation to en-

74. *See e.g. State v. Scheetz*, 950 P.2d 722, 725 (Mont. 1997) ("Montana, however, recognizes broader protections for an individual's right of privacy pursuant to Article II, Section 10, of Montana's Constitution, than the United States Supreme Court does pursuant to the Fourth Amendment of the United States Constitution, and other states typically do pursuant to their state constitutions.").

75. Jones, *supra* n. 4, at 1474.

76. *Id.*

77. Pa. Const. art. I, § 5; Pa. Stat. Ann. tit. 25 §§ 2600–3555 (2013).

78. Jones, *supra* n. 4, at 1475.

79. *Id.*

80. *Id.*

81. *Id.*

82. James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 Election L.J. 643, 643, 651 (Winter 2004).

force the constitutional mandate of 'free and equal' elections."[83] In states where litigants may only bring election challenges via statutory mechanisms, "constitutional Election Clauses have no independent use and provide no independent right of action to the disfranchised citizen."[84] In other states, the constitutional election clause provides an independent basis for election challenges.[85] Montana does not seem to clearly fall under either category. There is no mandate that parties must follow the election code procedures, but there is also no instance of a party relying solely on Article II, section 13. For example, in *Finke*, the Court did not cite the election code but cited six state and federal constitutional provisions.[86] Perhaps the inherent ambiguity of the phrase "free and equal" leads practitioners and courts to cite other constitutional or statutory provisions.[87] The 1972 Convention delegates thought other provisions supplemented the right,[88] and the structure of the constitution does not limit lawyers to a single avenue of challenge. Or perhaps Montana's elections are so well-run that legal challenges are few and far between.

Another reason the clause is so rarely cited may simply be explained by election lawyers' reluctance to go to state courts. Election lawyers have been reluctant to bring election cases in state courts under state constitutions,[89] and this may be because state courts generally do not monitor state political processes using state constitutions.[90] Indeed, state courts rarely interpret any provisions of state constitutions.[91] Thus, the absence of an extensive body of election case law does not necessarily mean judges are reluctant to apply state constitutional electoral provisions; in fact, state courts may be increasingly relying on state constitutional provisions when adjudicating challenges relating to apportionment.[92] State judges may defer to federal judges' interpretations of state constitutions because they feel

83. Jones, *supra* n. 4, at 1474–1475.

84. *Id.* at 1475.

85. *Id.*

86. *Finke*, 65 P.3d at 579.

87. *See* Kirk H. Porter, *Suffrage Provisions in State Constitutions*, The American Political Science Review vol. 13, no. 4, 579 (1919) ("In a great many constitutions the phrase 'all elections shall be free and equal' is used. It is hard to tell what the phrase means and in any event it is useless.").

88. Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. II, 634.

89. Gardner, *supra* n. 82, at 643.

90. *Id.* at 650.

91. *Id.* at 650–651.

92. *Id.* at 651. "In the 2000 redistricting cycle, for example, courts in Colorado, Mississippi, North Carolina, and Virginia—none of which has a supreme court with a strong record of active reliance on its state constitution—all issued opinions providing new and important guidance concerning the meaning of state constitutional provisions regulating the redistricting process." *Id.* Ohio voters upheld their redistricting process in the November 2012 election by rejecting the Ohio Redistricting Amendment, an initiated constitutional amendment to create a citizen redistricting commission. *Results for Issue 2: Ohio Redistricting Amendment*, http://stateimpact.npr.org/ohio/tag/issue-2-2012/ (accessed Apr. 10, 2013).

"that the federal judiciary typically does a more or less adequate job of protecting individual rights and that there is thus no pressing need for state intervention under state constitutions."[93] State courts are more willing to act when they feel that federal courts are not adequately protecting rights and think they are needed as the last line of defense.[94]

State judges may be reluctant to interfere in election issues. Montana's district court judges are elected, and elected judges may depend more on the favor of political parties and leaders than appointed judges, who may be more willing to take controversial positions.[95] State judges may be particularly reluctant to take democratically unpopular positions regarding the state constitution.[96]

III. The Right to Vote in Other States

In general, state courts have been less likely than federal courts to uphold voter ID laws.[97] Many state constitutions include provisions similar or identical to Article II, section 13. This section lists the constitutional provisions of five other states and gives examples of how the respective state court has applied that provision. Given the dearth of Montana precedent on the issue, a Montana court might look to other states when deciding such a case, especially to a state with a similar or identical constitutional provision. Thus, the way other states apply these provisions may provide a model for Montana and may help us predict how a Montana court would analyze a claim brought under Article II, section 13.

A. Indiana

Under the Indiana Constitution, "All elections shall be free and equal."[98]

In *League of Women Voters of Indiana, Inc. v. Rokita*,[99] the challenged voter ID law required voters to show a form of government identification with an expiration date and a photo.[100] The plaintiffs cited state constitutional provisions on voter qualifications and equal privileges in support of their position that Indiana's voter ID law violated the Indiana Constitu-

93. Gardner, *supra* n. 82, at 651.

94. *Id.*

95. *Id.*

96. *Id.*

97. Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 Iowa L. Rev. 731, 782 (2008).

98. Ind. Const. art. 2, § 1.

99. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010).

100. *Id.* at 767.

tion.[101] Though the plaintiffs did not mention the "free and equal" provision in their brief,[102] the Supreme Court of Indiana noted the provision's relevance.[103] The defendant pointed to this constitutional provision to support his argument that the General Assembly has the power to protect the rights of citizens to "a fair and reliable electoral system in which their individual votes are not diluted by the fraudulently cast votes of others."[104] The Court concluded, "It is within the power of the legislature to require voters to identify themselves at the polls using a photo ID."[105]

Because the Court concluded that the voter ID law was merely an election regulation, the Court applied Indiana's test for reasonableness and uniformity, which the law passed.[106] The Court rejected the plaintiffs' argument that the voter ID law was unconstitutional because it established additional substantive voter qualifications.[107] The Court also rejected the plaintiffs' argument that the voter ID law was unconstitutional for violating the equal protection and immunities clause of the state constitution.[108] According to the dissent, a motion to dismiss was inappropriate because the plaintiffs sufficiently pled substantial impediments to the exercise of the right to vote.[109] The dissent does not mention the "free and equal" provision.

In *League of Women Voters of Indiana, Inc.*, the Court contrasted the Indiana voter ID law with the Missouri law that had been struck down in *Weinschenk v. Missouri*, discussed in Part D.[110] The Court noted that the facts differed; whereas citizens may have had to spend money to obtain the necessary documents to get a photo ID in Missouri, there was no cost in Indiana.[111] Not only were the voter ID laws different, so are the state constitutions.[112]

In *State Election Board v. Bartolomei*,[113] a redistricting case, the Supreme Court of Indiana found the "impingement upon the right to vote is the natural and unavoidable consequence of redistricting."[114] The Court

101. *Id.*

102. Appellant's Br., *League of Women Voters of Ind., Inc. v. Rokita*, 2009 WL 1023484 at *8 (Mar. 2, 2009). Instead, the appellants cited Indiana Constitution Article 2, section 2, on voting qualifications. *Id.*

103. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 763.

104. *Id.* at 765 (quoting Appellee's Br. at *13 (Apr. 15, 2009)).

105. *Id*. at 772.

106. *Id*. at 767–768.

107. *Id*. at 767.

108. *Id*. at 771–772.

109. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 778 (Boehm, J., dissenting).

110. *Id*. at 772–773 (majority).

111. *Id.*

112. *Id*. at 773.

113. *St. Election Bd. v. Bartolomei*, 434 N.E.2d 74 (Ind. 1982).

114. *Id.* at 78.

further held redistricting does not contravene the requirement of the "free and equal" provision because "[r]edistricting is the very technique by which the equality of the force of each vote is maintained as shifts in the population occur."[115]

In these cases, the Supreme Court of Indiana did not use its constitutional right-to-vote provision to invalidate voter ID and redistricting laws. Instead, the Court relied on the United States Supreme Court's analysis in *Crawford v. Marion County Election Board*.[116] The majority in *Crawford* upheld an Indiana voter ID law, finding the state justifications for the law neutral and sufficiently strong and deeming relief inappropriate even though the burden on a few voters' right to vote may have been unjustified.[117] The Court applied *Crawford* "even though the U.S. Supreme Court decided a *federal* constitutional challenge and the Indiana Supreme Court was considering a differently worded and voting-specific Indiana Constitutional provision."[118] This is not a promising model for a robust state right-to-vote provision.

B. Pennsylvania

Under the Pennsylvania Constitution, "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[119]

In *Applewhite v. Commonwealth of Pennsylvania*,[120] the Supreme Court of Pennsylvania cited the "free and equal" provision and noted the right to vote is a fundamental right in Pennsylvania.[121] It was clear to state officials that the integrity of the November General Election would have been impaired if enforcement of the voter ID law prevented qualified and eligible electors from voting.[122] The plaintiffs argued that many qualified voters would be disenfranchised because they would not have enough time to learn about the law's requirements and to obtain the necessary identification.[123] The plaintiffs conceded that nothing is inherently wrong with a voter ID law in the abstract, but they argued implementation of this law

115. *Id.*

116. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 761, 767–768 (relying on *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181 (2008)).

117. *Crawford*, 553 U.S. at 199–200, 204.

118. Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 Vanderbilt L. R. at *16 (forthcoming 2014, draft as of Mar. 17, 2013).

119. Pa. Const. art. I, § 5.

120. *Applewhite v. Pa.*, 54 A.3d 1 (Pa. 2012).

121. *Id.* at 3.

122. *Id.* at 4.

123. *Id.*

created problems.[124] The case was remanded so the lower court could assess the availability of the alternate identification cards in the time since they first had been available.[125]

On remand, the district court issued a preliminary injunction finding that some voter disenfranchisement could occur if the state implemented the voter ID law in the November election.[126] The court did not restrain election officials from requesting IDs but did enjoin those parts of the voter ID law that would result in disenfranchisement based on a failure to present photo-identification for in-person voting.[127]

Strengthening the state constitutional right to vote was not a main concern of either the Supreme Court or the trial court. The Supreme Court remanded the case "to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available."[128] The trial court was not directed to apply strict scrutiny but to determine whether there was liberal access to identity cards and whether there would be voter disenfranchisement without a preliminary injunction.[129] In this case, Pennsylvania also fails to present a strong model for applying the state right-to-vote provision.

C. Georgia

The Georgia Constitution states:

> *Every person* who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law *shall be entitled to vote at any election by the people*. The General Assembly shall provide by law for the registration of electors.[130]

In *Common Cause/Georgia v. Billups*,[131] a federal district court case, the plaintiffs argued that a photo identification law "imposes an unauthorized, unnecessary, and undue burden on the fundamental right to vote of hundreds of thousands of registered Georgia voters."[132] The plaintiffs further contended: "The Georgia legislature simply has no power to regulate voting outside the areas of defining residency and establishing registration

124. *Id.* at 4–5.
125. *Id.* at 5.
126. *Applewhite v. Pa.*, No. 330 M.D. 2012, 2012 WL 4497211 at *4 (Pa. Cmmw. Oct. 2, 2012).
127. *Id.* at **4–6.
128. *Applewhite*, 54 A.3d at 5.
129. *Id*. at 4.
130. Ga. Const. art. 2, § 1 (emphasis added).
131. *Com. Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).
132. *Id.* at 1329.

requirements."[133] In a letter to the Governor, the Secretary of State shared her belief that the law violated the Georgia Constitution by imposing both a qualification on voters that was not listed in the Georgia Constitution and an undue burden on the fundamental right of citizens to vote.[134] Interestingly, the right to vote and the qualifications for voters are listed in the same constitutional provision in the Georgia Constitution.[135] The court found that under either strict scrutiny or the more flexible *Burdick* test,[136] the plaintiffs had a substantial likelihood of succeeding on the merits of their claim that the photo ID requirement unduly burdened the right to vote.[137] The court granted the plaintiffs' Motion for Preliminary Injunction.[138]

In *Democratic Party of Georgia, Inc. v. Perdue*,[139] the plaintiffs argued that a state voter ID law violated the right to vote because, by requiring in-person voters to show a photo ID, it imposed an unauthorized condition and qualification for voting.[140] The Supreme Court of Georgia determined that the law did not affect registration or place a condition on the right to vote because no photo ID was required for voter registration and a voter could choose a manner of voting that did not require a photo ID.[141] Therefore, the Court upheld the law as a reasonable procedure for verifying that the person who came to vote and the person who registered to vote were the same person.[142] The Court said the Georgia Constitution does not require that qualified citizens be allowed to vote in any particular manner

133. *Id.* at 1357.

134. *Id.* at 1335.

135. Ga. Const. art. 2, § 1. The fact that the Montana drafters did not structure Article II, section 13 this way suggests the Montana constitutional provision may not exclusively reference voter qualifications.

136. *Burdick v. Takushi*, 504 U.S. 428 (1992). "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The rigorousness of the Court's "inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," and "when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "[W]hen a state election law imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (citing *Anderson*, 460 U.S. at 788).

137. *Com. Cause/Ga.*, 406 F. Supp. 2d at 1366.

138. *Id.*

139. *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011).

140. *Id.* at 69.

141. *Id.* at 72.

142. *Id.*

and that the photo ID requirement is not an impermissible qualification on voting.[143]

Interestingly, there was a different result in each of the Georgia cases. In *Common Cause/Georgia*, the law required that all in-person voters present a government-issued photo ID.[144] Everyone who wanted an acceptable photo ID was required to complete an application and pay a fee.[145] The federal district court analyzed the law under both strict scrutiny and the *Burdick* test.[146] In *Democratic Party of Georgia, Inc.*, the photo ID law in question was much like the law scrutinized in *Common Cause/Georgia*, except that the fee was eliminated.[147] In *Democratic Party of Georgia, Inc.*, the Court only applied the *Burdick* federal balancing test.[148] Though the elimination of the fee may partly explain the varying results, more likely the difference resulted from the application of different levels of scrutiny.

D. Missouri

Missouri's Constitution includes a provision identical to the Montana provision.[149]

In *Weinschenk v. Missouri*,[150] the Missouri Supreme Court held that a voter ID law violated Missouri's equal protection clause and Missouri's constitutional guarantee of the right of its qualified, registered citizens to vote—the Court cited the aforementioned provision as well as the voter qualifications provision.[151] The Court acknowledged that the state had a compelling interest in preventing voter fraud but argued the photo ID requirement was not narrowly tailored to do so.[152] The Court held the state right to vote provides more protection than the federal right to vote because, under federal law, the right to vote in state elections is only implied, whereas it is express under the Missouri Constitution.[153]

The Missouri voter ID law prohibited the use of out-of-state identification, social security cards, utility bills, and school and work IDs. According to the Court, in practice the law made a Missouri driver's license, non-driver's license, or U.S. passport the only acceptable forms of identifica-

143. *Id.* at 72–73.
144. *Com. Cause/Ga.*, 406 F. Supp. 2d at 1331.
145. *Id.* at 1339.
146. *Id.* at 1366.
147. *Democratic Party of Ga., Inc.*, 707 S.E.2d at 70.
148. *Id*. at 728–729.
149. Mo. Const. art 1, § 25.
150. *Weinschenk v. Mo.*, 203 S.W.3d 201 (Mo. 2006).
151. *Id.* at 204.
152. *Id.*
153. *Id.*

tion.[154] The Missouri Court in *Weinschenk* applied strict scrutiny because it determined the law impinged the right to vote.[155] Thus, to be constitutional, the law would have to be supported by a compelling state interest and would have to be both narrowly tailored and necessary. If the Court had determined the law would not "impose a heavy burden on the right to vote" and would impact few voters, it would have applied a lesser standard of scrutiny.[156]

The Missouri Court recognized that the state constitution provides greater protection of voting rights than the federal constitution.[157] The Court examined the burden of the law on the state right to vote and stressed that the appropriate test was constitutionality under the state constitution, not under *Burdick*.[158] In this case, the Court did apply the state right-to-vote provision to invalidate a voter ID law. Even had the law been "permissible under the U.S. Constitution the court would invalidate it under the state constitution."[159]

E. Wisconsin

Under the Wisconsin Constitution, "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[160]

In *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*,[161] the Court of Appeals of Wisconsin certified the appeal, and two related motions, to the Wisconsin Supreme Court.[162] The Court of Appeals summarized the circuit court's reasoning for declaring the photo ID law's requirements unconstitutional.[163] According to the circuit court, the Wisconsin constitution grants the right to vote to all electors, subject to limited qualifications on residency, registration, and absentee voting that the legislature may enact.[164] The photo ID law "is not expressly authorized by article III of the Wisconsin Constitution because it is not one of the stated qualifications for an elector in section 1, nor does it fall within the scope of

154. *Id.* at 205.

155. *Id.* at 215.

156. *Weinschenk*, 203 S.W.3d at 215–216.

157. *Id*. at 212.

158. *Id*. at 216. The Court said that under *Burdick* it would find a severe burden on the right to vote and apply strict scrutiny. *Id*.

159. Douglas, *supra* n. 118, at *24.

160. Wis. Const. art. 3, § 1.

161. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2012 WL 1020229 (Wis. App. 2012).

162. *Id*. at *1. The Wisconsin Supreme Court denied certification. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 811 N.W.2d 821 (2012).

163. *League of Women Voters of Wis. Educ. Network, Inc.*, 2012 WL 1020229 at *1.

164. *Id*.

an express delegation of legislative authority under section 2."[165] Thus, if the law were constitutional, it would be because the legislature had the authority to enact it pursuant to its plenary powers.[166] The legislature may "exercise its plenary power . . . to say 'how, when, and where' ballots shall be cast" so long as five tests are met, including that the legislation "not violate 'the express guaranty of the right to vote'" and "not impose additional conditions making it 'impracticable or impossible' for a qualified elector to vote at an election."[167] Under the photo ID law, "even qualified electors may not vote in an election unless they display acceptable government-authorized photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election."[168] The circuit court reasoned that the legislature did not have the authority to enact the law because it "'eliminate[d] the right to suffrage altogether' for qualified electors who lack acceptable photo identification" and "serve[d] as an additional condition for voting."[169] Because the legislature did not have express or implied authority to enact the law, "the provisions of [the photo ID law] are void and should be permanently enjoined."[170] In this case, the Court of Appeals did not even reference a federal right to vote or federal law but solely relied on the state constitution.[171]

Even with nearly identical constitutions and voter ID laws, states have reached different results. According to Joshua Douglas, the results depend on "the amount of deference the state courts gave to federal constitutional interpretation of the right to vote when construing the respective state constitutions."[172] Indeed, in these five states, the results do vary depending on the test the court applied. The Court in Indiana did not base its decisions on the state constitution. In Pennsylvania, the law was partly enjoined but not on the basis of the state constitution. In Georgia, two courts reached different results by applying different tests. In Missouri and Wisconsin, the courts struck down the voter ID laws based on the state right-to-vote provisions.

IV. Application of Voter ID Law

This section discusses a Montana voter ID law that was proposed in both the 2011 and 2013 legislative sessions. The section then predicts how

165. *Id*.
166. *Id*.
167. *Id*. at **1–2.
168. *Id*. at *2.
169. *League of Women Voters of Wis. Educ. Network, Inc.*, 2012 WL 1020229 at *2.
170. *Id*.
171. Douglas, *supra* n. 118, at *23.
172. *Id*. at *3.

Montana courts would analyze the proposed law, including the applicable level of scrutiny and whether the proposed law would survive that level of scrutiny.

A. Voter ID Law, House Bill 152

House Bill 152 ("the Bill"),[173] a voter ID law passed by the Montana Legislature in 2011 but vetoed by Governor Schweitzer, would probably violate the right to vote under the Montana Constitution if passed. State Representative Ted Washburn, a Republican from Bozeman, introduced the Bill in 2011,[174] and Washburn reintroduced the Bill during the 2013 legislative session.[175] The Bill was tabled in January 2013 and did not meet the April 5, 2013, deadline for the revenue bill transmittal.[176] Washburn believes the Bill will prevent nonresidents from coming to Montana to vote.[177] Under current law, eligible individuals can register to vote within 30 days of moving to Montana and can present a utility bill as proof of residence.[178] The Bill, however, would require a Montana driver's license as the primary form of identification and effectively means residents would have to live in Montana for 60 days before registering to vote.[179] The only acceptable forms of identification would be a Montana driver's license, a state ID card for non-drivers, and a tribal ID.[180] Passports, college IDs, and military IDs would not be allowed.[181]

Arguing in support of the law, Washburn cryptically states that he "believes that Montana should deal with Montana issues."[182] He argues that, under current law, people undeserving of the right to vote in Montana are allowed to vote: "the basic right to vote is better than being in the state for 30 days and having a utility bill."[183] He is particularly concerned about seasonal residents and out-of-state college students voting in Montana elec-

173. Mont. H. 152, 62d Legis. Sess. (Apr. 25, 2011).

174. John Celock, *Montana Voter ID Law Pushed by State Lawmaker*, Huffington Post, http://www.huffingtonpost.com/2012/11/29/montana-voter-id_n_2212152.html (Nov. 29, 2012).

175. Mont. H. 108, 63d Legis. Sess. (Dec. 13, 2012).

176. Montana Legislature, *Detailed Bill Information*, H.B. 108, http://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=108&P_BLTP_BILL_TYP_CD=HB&Z_ACTION=Find&P_SESS=20131.

177. *Id.*

178. Mont. Code Ann. §§ 13–1–111, 13–2–110.

179. Mont. H. 152, 62d Legis. Sess. (Apr. 25, 2011).

180. *Id.*

181. Celock, *supra* n. 174.

182. Ketti Wilhelm, *Critics of Montana's Voter Laws Look Forward to Making Changes*, Montana Public Media, http://www.montanapublicmedia.org/2012/11/critics-of-montanas-voting-and-registration-laws-look-forward-to-making-changes/ (Nov. 6, 2012).

183. Celock, *supra* n. 174.

tions.[184] Washburn wants to make out-of-state students "show a commitment to the state in order to vote."[185] Washburn has expressed concern about college students buying fake ID cards to purchase alcohol and vote in Montana.[186] Washburn said students are buying fake Montana IDs in New York City and other out-of-state locations. Ostensibly, they could use those fake IDs to register to vote in Montana.[187] Washburn does not believe that members of the armed services should be allowed to vote in Montana unless they are residents.[188] Concerns about the special needs of, or challenges presented by, student and service member voters are not new. At the 1972 Constitutional Convention, an amendment failed that would have limited absentee voting to service members and students.[189]

Secretary of State Linda McCulloch expressed her opposition to voter ID laws in her successful campaign in 2012.[190] In an op-ed piece for the *Billings Gazette* in September 2012, she stated that a state audit showed voter fraud was nonexistent in Montana.[191] Washburn remains concerned, stating: "There's no way for a state to check if you're registered in another state . . . . [s]o theoretically, you could vote in at least two states in a presidential election."[192] Washburn concedes the Bill would not address this issue but says "at least they'll have to show [photo] ID here in Montana."[193] When Governor Schweitzer vetoed the Bill, he noted the unnecessary burden it placed on elderly, low-income, disabled, and student voters.[194]

B. Standard of Scrutiny

A Montana court likely would apply strict scrutiny to the Bill because the right to vote is a fundamental right, as the Montana Supreme Court stated in *Finke*[195] and as the delegates to the 1972 Convention recog-

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. III, 432–433.

190. Linda McCulloch, *Guest Opinion: Audits show voter fraud nonexistent in Montana,* Billings Gazette, http://billingsgazette.com/news/opinion/guest/guest-opinion-audits-show-voter-fraud-nonexistent-in-montana/article_39594bb0-1991-51f5-844a-8fa956de2954.html (Sept. 9, 2012).

191. *Id*.

192. Wilhelm, *supra* n. 182.

193. *Id.*

194. Associated Press, *Governor vetoes bill for photo-ID voter registration*, Helena Independent Record, http://helenair.com/news/governor-vetoes-bill-for-photo-id-voter-registration/article_b55330d2-77a4-11e0-acac-001cc4c002e0.html (May 6, 2011).

195. *Finke*, 65 P.3d at 580.

nized.[196] The Court has noted that "[b]ecause voting rights cases involve a fundamental political right, the [U.S.] Supreme Court generally evaluates state legislation apportioning representation and regulating voter qualifications under the strict scrutiny standard."[197] When confronted with "legislation that implicates a fundamental constitutional right," the Montana Supreme Court applies strict scrutiny.[198] Under strict scrutiny, suspect legislation is "unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.'"[199] The legislature would be tasked with presenting a record to prove voter fraud and any other circumstances that provide a compelling interest for the law.

If the court based its analysis on that of the Supreme Court of Missouri in *Weinschenk*, it would analyze the Bill under its own *Burdick*-like test in addition to a strict scrutiny analysis. Under *Burdick*, a court must weigh "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . .' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" and must "[take] into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"[200] A Montana court using this approach would likely begin its analysis by looking to the extent of the burden the law places on the right to vote. As a way to measure the extent of the burden, a court would look to the percentage of Montanans who would not be able to vote because of the law even though they are otherwise eligible.[201] Other factors that would establish the burden on eligible voters are the money necessary to get identification and the time and ability necessary to navigate the bureaucracy, what notice was provided to voters about the law, how soon before the election the law was enacted, and other ways for voters to vote (e.g. absentee voting).[202]

C. With What Result?

If a plaintiff were to challenge the constitutionality of the Bill, she should cite Article II, section 13; Article IV, section 2; and the Montana Code Annotated, Title 13. Given the legislative history of Article II, section 13, it is clear that it would have the most force when supplemented by the other provisions. The proposed Montana voter ID law is stricter than

196. Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. III, 400–401, 406, 552.

197. *Finke*, 65 P.3d at 580 (quoting *Johnson v. Killingsworth*, 894 P.2d 272, 273 (Mont. 1995)).

198. *Mont. Cannabis Indus. Ass'n v. State*, 286 P.3d 1161, 1165 (Mont. 2012).

199. *Finke*, 65 P.3d at 580 (quoting *Johnson*, 894 P.2d at 273–274).

200. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 789).

201. This is how the *Weinschenk* Court determined the extent of the burden. 203 S.W.3d at 215.

202. Langholz, *supra* n. 97, at 789, 791, 793–794, 797.

the law analyzed in *League of Women Voters of Indiana, Inc.*; therefore, the issue would play out differently in Montana than it did in Indiana. Instead, the Montana case would likely resemble *Common Cause/Georgia*, *Weinschenk*, or *League of Women Voters of Wisconsin Education Network, Inc*.

The legislative history of Article II, section 13 suggests that the delegates to the 1972 Convention would have been skeptical of a legislative restriction and would not have been persuaded by Washburn's concerns about voter fraud. The delegates' discussion of Article IV, section 3, allowing the legislature to establish a system of poll booth registration, highlights that they understood the idea behind the vote to be that "when you put a restriction on it, that is, a restriction passed by a Legislature—they must register 40 days before or they do not have that right—then you are depriving, artificially, people of their vote, and when you deprive people of their vote, you deprive them of their rights."[203] Delegate Dahood was not concerned about the possibility of voter fraud and argued:

> Our law, and the wisdom that formed the basis for our law, provides not only judicial thinking but, by statute in this state, that all citizens are presumed to be honest, and we must deal with all of our citizens on the basis that we presume that when they participate in the functions of citizenship, they shall participate in an honest manner and in an honest endeavor.[204]

Washburn's intent behind the Bill to keep seasonal residents and out-of-state college students from voting in Montana is incompatible with the delegates' desire to have as many voters as possible participate in elections.

Since a Montana court would apply strict scrutiny, it would analyze whether the law was necessary to serve a compelling government interest. Although Montana courts would probably agree Montana has a compelling interest in preventing voter fraud, they would likely find the above law is not necessary or narrowly tailored to accomplish that interest. Under the regime created by the Bill, it is possible for an individual to vote in absentia without facing the same restrictions if she voted in person. The Bill does address provisional voting, though. The State would have a stronger case if it could demonstrate evidence of in-person voter fraud, but the Secretary of State asserts that currently voter fraud does not exist in Montana.[205] The potential for voter fraud would probably be insufficient to justify the Bill. As Representative Washburn conceded, the Bill does not address voters who are registered to vote in more than one state. The Bill would not pass constitutional muster.

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203. Mont. Const. art. IV, § 3 (1972). Montana Constitutional Convention Proceedings of 1972, *supra* n. 34, at vol. III, 409. Though the provision on poll booth registration was originally in a minority report, it was adopted by the Convention. *Id*. at 412–413.

204. *Id*. at 406.

205. McCulloch, *supra* n. 190.

V. Conclusion

Challengers to voter ID laws should more often look to Montana's constitutional right-to-vote clause. None of the possible explanations for why the right has been cited so infrequently bar it from being raised by future litigants. However, though there is no formal requirement under Montana law that cases challenging voter ID laws be brought in any particular fashion, it may need to be cited with other constitutional provisions. Article II, section 13 does little on its own given the frequent references to "supplementing" and "augmenting" the right. The history of the right, the way similar constitutional provisions are interpreted in other states, and the inherent ambiguity in the phrase support this hybrid approach. If the scope of the right to vote were defined more broadly, it could be used in a variety of circumstances, such as to challenge the consolidation of polling places. Litigants should push courts to interpret the right to vote so that it can be used effectively in subsequent challenges to laws impinging on voters' rights.