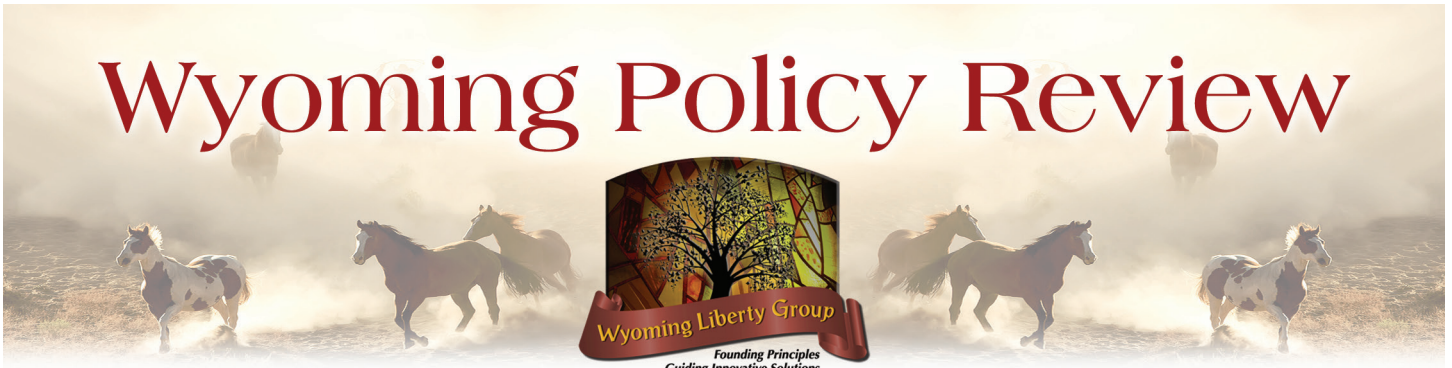


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Wyoming Voter Identification Reform

Introduction

In 2020, at least thirty-five states require some form of voter identification (“Voter ID”) before individuals may cast a vote.¹ Although a great deal of litigation has arisen over the issue, most challenges to voter identification laws are unsuccessful.² Only where states act with discriminatory intent or move to seriously burden the ability to vote will Voter ID laws be declared unconstitutional.

At the core of Voter ID reform rest two constitutional principles, which some believe are in tension: the right to vote and the right to maintain the integrity of elections. The Supreme Court generally treats the right to vote as a fundamental right because it is “preservative of all rights.”³ But states and the federal government also are entrusted with a solemn duty to ensure the integrity of elections.⁴ From Tammany Hall going forward, all sorts of schemes for vote buying, coercion, and over- or under-counting votes have threatened the integrity of our electoral system.

Opponents of Voter ID are quick to criticize the need for it, but the Carter-Baker Commission on Federal Election Reform and the Supreme Court have recognized that voter fraud does exist and it “could affect the outcome of a close election.”⁵ Wyoming is no stranger to close elections—in 2018, Mark Gordon won the gubernatorial Republican primary over Foster Friess by just more than 9,000 votes.⁶ Ensuring that election law protects the integrity of elections boosts confidence when such close elections happen.

Sensible Voter ID should not be a cause for controversy in Wyoming. Provided the state continues to make identification cards and driver licenses readily available at low costs and with few administrative burdens, the requirement would most likely be upheld upon judicial review. Ensuring that the poor, elderly, and minorities have ample options to cast provisional ballots if their identification is missing on election day is also important. This paper examines the most important components of sustainable Voter ID reform in Wyoming.



Legal and Constitutional Concerns

Two kinds of challenges are often made against Voter ID laws: claims under the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act (“VRA”). These present claims that are often related—the unlawful dilution of minority votes and improper gerrymandering based on racial considerations.

a. Fourteenth Amendment

In 2008, the U.S. Supreme Court decided *Crawford v. Marion County Election Board* in which it upheld Indiana’s Voter ID law.⁷ There, the Indiana law worked as follows:

- Anyone voting in person was required to show a form of photo identification.
- Indigent voters or those with religious objections to photography were entitled to cast provisional ballots.
- Individuals living in state-licensed facilities, such as nursing homes, were exempt from the law.
- Individuals who lost or forgot their photo identification on the day of voting could cast a provisional ballot and it would be counted so long as the voter presented his photo identification to the circuit clerk’s office within 10 days.
- The state provided free photo identification for qualified voters.

Both the Democratic Party and several nonprofits representing the elderly, poor, disabled, and minority voters brought the lawsuit. Their argument was simple: Voter ID did not avoid election fraud and it would “arbitrarily disenfranchise qualified voters”

while placing an “unjustified burden” on those who cannot readily obtain identification.⁸

The challengers in *Crawford* tried to liken the use of a Voter ID law to truly discriminatory laws of the past—such as poll taxes. In *Harper v. Virginia Board of Elections*, the Supreme Court struck down Virginia’s attempt to impose a \$1.50 poll tax because it violated the Equal Protection Clause of the Fourteenth Amendment.⁹ Through a series of cases, federal courts have applied a balancing approach to challenges to election laws, weighing the right to vote against the state interest in protecting the integrity of elections.¹⁰ The lesson of these cases is that reasonable, nondiscriminatory measures to protect the integrity of elections will generally be upheld.

Lower federal courts have wrestled with different kinds of Voter ID laws over the years. In *North Carolina State Conference of the NAACP v. McCrory*, the Fourth Circuit invalidated North Carolina’s Voter ID law for several reasons.¹¹ Specifically, the Fourth Circuit embraced a test examining several factors to determine if a violation of Equal Protection occurred. These factors include: (1) did the state have a history of racial discrimination, (2) were there special events leading up to the passage of the Voter ID law, (3) what does legislative history say about the purpose of the law, and (4) does the law, in fact, impact one race more than another?¹²

For the *McCrory* Court, the fact that North Carolina had a history rife with racial discrimination, that the legislature showed a peculiar rush to pass Voter ID laws, that the legislative history included racial data in its determinations, and that the law had a more disparate impact on minorities than others tilted toward invalidating the law under Equal Protection and statutory grounds.



In contrast to *McCrary* is *Lee v. Virginia State Board of Elections*—also decided by the Fourth Circuit.¹³ Unlike in *McCrary*, there was no evidence in Virginia of suspicious events leading up to the enactment of its Voter ID law, nor was racial data used in creating the law. Thus, because the Voter ID law was “passed by the Virginia legislature through the normal legislative process” without evidence of “racially discriminatory intent,” the law survived review.¹⁴

The Fifth Circuit examined the veracity of Voter ID laws in *Veasey v. Abbott*.¹⁵ Texas law, in the eyes of the Fifth Circuit, appeared to have a discriminatory effect, but not a discriminatory purpose. This was because the law primarily burdened people living in poverty and a disproportionate number of Texans living in poverty were African Americans and Hispanics. Key to the court’s analysis against the Voter ID law was that Texas failed to include a “reasonable impediment” exception to the law.

After remand to the lower court, the State of Texas amended its Voter ID law to include a reasonable impediment exemption. This exception allows people to cast a provisional ballot on election day when they lack identification due to lack of transport, lack of documents needed for identification, work schedule, lost or stolen identification, disability or illness, family responsibility, or the fact that an identification card was applied for but not yet received.¹⁶ Texas also allows people to apply for an Election Identification Certificate (“EIC”) and makes it costless to obtain copies of birth certificates to do so.¹⁷

Other states have confronted different issues arising out of Voter ID laws. North Dakota, for example, settled a lawsuit brought by the Spirit Lake Nation and Standing Rock Sioux tribes.¹⁸ There, parties entered into a consent decree to acknowledge that tribal-issued identification cards and tribal street

addresses would be recognized for purposes of Voter ID. Any valid system of Voter ID must carefully address how to handle any disparate impact issues in order to sustain their validity.¹⁹

b. Section 2 of the Voting Rights Act

Section 2 of the VRA provides that no voting law may be enacted “which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”²⁰ Congress included five factors in the VRA to determine whether an election law violated its dictates:

- the identification of a qualification, prerequisite, standard, practice, or procedure;
- which results in a denial or abridgement of the right to vote;
- on account of race or color or because the person is a member of a language minority group;
- such that, in the totality of circumstances, the political process is not equally open to the protected class;
- in that its members have less opportunity than others to participate in the process and elect representatives of their choice.²¹

There is an overlap between the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the VRA, but courts deem them “analytically distinct.”²² Section 2 of the VRA protects against the unlawful dilution of minority votes.²³ The Equal Protection Clause protects against an invalid gerrymander designed on the basis of race and discriminatory intent.²⁴ So, evidence might not exist to show unlawful dilution under Section 2 of the VRA, but even then enough discriminatory intent might show a violation of the Equal Protection Clause. Litigants can still use the Equal Protection Clause to allege



minority vote dilution, but such claims have fallen out of fashion since 1982 when Congress expanded the reach of Section 2.²⁵

In considering how Wyoming should construct its own Voter ID law, both legal concerns raised under Section 2 of the VRA and Equal Protection concerns will be addressed.

Building an Effective, Legally Sound Voter ID Law in Wyoming

Recently, the Wyoming Legislature has considered Voter ID laws, but they have not successfully passed.²⁶ The more recent versions included important amendments to the law to address concerns of native Americans, such as recognizing the validity of tribal identification cards.²⁷ Many legislators disagree over whether Wyoming really needs voter identification laws, how they would impact the elderly, and whether county clerks would get the training necessary to evaluate proper from improper identification; these appear to be the main stumbling points of the legislation.

Important factors to address in constructing a Voter ID law are those raised by the *Crawford* and *McCrary* Courts. States that demonstrate a lengthy or recent history of racial discrimination will face higher scrutiny for any Voter ID laws challenged in court. Wyoming is not a southern state and does not have any outstanding examples of widespread racist conduct. As a law is prepared for legislative consideration, courts will examine if there are any special or peculiar events leading to its passage. So, where a state has morally dubious individuals pressing for the passage of a Voter ID law, its intent will be deemed suspect. Where a state sees bipartisan support or mainstream groups and advocates pushing

for a Voter ID law, its intent will be deemed neutral. Next, courts will examine the legislative history and debate had over any Voter ID law, including whether the state relied on racial data in enacting a law. If clear racial discrimination is demonstrated in legislative records, it will count against the validity of the law. Lastly, courts will inquire whether the Voter ID law, in fact, will impact one race within the state than another. Courts recognize that some burdens are inherent in any system of Voter ID, and it will be upheld if these burdens are not too great and there is no evidence of discrimination.²⁸

In comparison with the factors that the courts use to analyze Section 2 and Equal Protection claims, Wyoming stands on favorable ground. It does not face the sort of racial animosity found in southern states where Voter ID laws have been successfully challenged. And it remains unlikely that legislation designed to enact Voter ID would be done out of racial animus. Wyoming also needs to consider how to implement provisional ballots so that if someone loses his identification or has some exceptional reason why he lacks identification, he may still vote on election day.²⁹ Several state laws exemplify this, and Wyoming should examine Texas and South Carolina's approach as ones that have passed judicial review.³⁰

The remaining considerations to successfully implement Voter ID are largely pragmatic, less constitutional, considerations.³¹ Wyoming charges \$40 to obtain a driver's license and a mere \$10 for a state identification card.³² Because there is such a low fee to obtain a state identification card, this should not present any serious burden for poor or disadvantaged individuals needing identification to vote. One of Wyoming's influential minority groups is found in the Eastern Shoshone and Northern Arapahoe tribes. The Wyoming Legislature has



already agreed to recognize tribal identification for purposes of Voter ID law, removing any likely claims against a Voter ID law as having disparate racial impact. This then leaves Wyoming with the question of whether its county clerks would be properly supported and trained to fairly implement the law.

A constant refrain of Voter ID critics in Wyoming is that county clerks will fail to properly administer the law. Indeed, it is possible to imagine that implementation of Voter ID in Wyoming would occur in a slipshod manner. But it this is far from a foregone conclusion. An easy way to diffuse this concern would involve the inclusion of reasonable funding for a training program for county clerks, election judges and poll workers to understand how to differentiate proper from improper identification cards for voting. But it may be simple enough to entrust this training to the Secretary of State’s office in its ordinary course of business and not require enhanced funding. In the end, hypothetical, imaginary concerns do not equate to constitutional concerns.³³

Of the issues observed by courts when addressing Voter ID laws, many would be—or, at least, should be—insignificant in Wyoming. Assuming the legislature’s focus is on voter integrity and not making it harder for minorities to vote, an ordinary Voter ID law, as outlined in this paper, will work to secure the integrity of Wyoming elections and is likely to survive legal challenges.

Conclusion

Unlike so many states facing contentious litigation over Voter ID laws, Wyoming enjoys relatively wide discretion in reforming its election law. Wyoming already offers low-cost identification, shows no history of widescale racial animus, and its existing templates for Voter ID reform include the recognition

of tribal identification. Under existing case law, all major constitutional impediments for Voter ID law seem removed.

While pragmatic considerations remain at the discretion of the Wyoming Legislature, they are not insurmountable and should be considered as part of legislative reform. That focuses mainly on training and education offered to election workers to assure they will properly assess forms of identification. Thirty-five states have proven up to the task; it is achievable in Wyoming.

Citizens and states possess the solemn duty to ensure the integrity of their electoral process. For many years, Wyoming has stalled in enacting its own Voter ID law, but considerations about elderly voting and constitutional concerns should not hinder its enactment. As this paper has shown, the simple requirement for low-cost Voter ID to be shown in Wyoming should pass constitutional muster. All the state requires is the political will and clear messaging to achieve this.



