



The Unconstitutionality of Voter ID

- 1. Nebraska has one of the strongest protection of voter rights in the country, LR1CA would insert language that directly contradicts it.**¹ Unlike federal protections that prohibit government action, the language of Article I, Section 22 of the Nebraska State Constitution explicitly grants the individual voter rights and liberties regarding exercising their elective franchise.² Any subsequent voter ID law that requires a voter to pay for a license or overcome an impediment to voting would be found unconstitutional pursuant to current case law.
- 2. The “Free Election” clause of the Nebraska Constitution is a limitation on the Legislature’s authority.**³ A term of art “free and equal” in many state constitutions encompasses both cost to the individual voter and ability to participate as a whole. LR1CA requires the state to pass a law to implement a photo ID requirement that will place a financial burden on various populations in Nebraskans that in turn denies the qualified voter their right to vote.⁴
- 3. State legislatures may provide *greater* protection of voters’ rights than the federal government, as Nebraska has done in Article I, Section 22 of the Nebraska State Constitution.**⁵
- 4. Under federal protections, the burden of a photo ID law is severe⁶ and thus, under the *Burdick Test*, the federal court would review the provision under strict scrutiny and most likely would find it to be an undue burden on the federally protected constitutional right to vote.**⁷
- 5. In the alternative, if the burden were not found to be severe, the state’s interest in preventing non-existent voter fraud does not outweigh the burden placed on the individual voter.**

¹ Article 1, Section 22 of the Nebraska State Constitution states “All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise”. State case law has held prior pay-to-play laws passed by the Legislature to be a violation of Art.1, Sec. 22. *See State v. Drexel, 74 Neb. 776, 105 N.W. 174 (1905)* (“It is not competent for the Legislature to provide in a primary election law that, before a person eligible to office can be voted for at a primary and have his name appear on a primary ballot, he shall pay a fee for filing nomination papers computed at 1 per cent of the emoluments authorized by law for the office to which ... candidate... would serve, if elected”). Furthermore, it is court form to construe all statutes regarding the exercise of the elective franchise in light of Art. 1, Section 22. *Morrissey v. Wait, 92 Neb. 271, 138 N.W. 186 (1912)*.

² Douglas, Joshua A., “The Right to Vote Under State Constitutions”, *Vanderbilt Law Review*, January 2014.

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³ As held by the Nebraska Supreme Court, “the Legislature has vast authority to legislate in the area of election matters, such powers being limited only by the state and federal Constitutions”. See *State ex. Re. Creighton University v. Smith*, 217 Neb. 682, 687, 353 N.W.2d, 271 (1984). The Nebraska Legislature is limited in its actions regarding requirements imposed on the qualified voter exercising their elective franchise to only those the Nebraska courts would deem neither an impediment nor a hindrance.

⁴ The Kentucky Supreme Court has held no election can be “free and equal” within its meaning if any substantial number of persons entitled to vote are denied the right to do so”. Douglas citing *Walbrecht*, 175 S.W. at 1026. (APPENDIX X)

⁵ State legislatures are bound to federal law regarding constitutional rights as a minimum standard that must be met. States are free to offer more and greater protection of those rights, which Nebraska has done in Article I, Section 22. See *Michigan v. Long*, 463 U.S. 1032 (1983)(noting a state constitution may afford greater protections than the US Constitution). Therefore, to be constitutional, any laws regarding the elective franchise by the Nebraska Legislature must pass muster under the Nebraska Constitution (in addition to the US Constitution). This requirement makes it unwise to rely on other voter ID court cases that are substantially different than the situation in Nebraska as that decision is not indicative of whether LB 111 complies with the Nebraska Constitution. The Nebraska State Constitution expressly grants the qualified voter the unequivocal right to vote free of impediment and hindrance, the US Constitution, via various voting amendments and the 14th Amendment Due Process Clause, implicitly grant the right to vote.

⁶ In *Crawford v. Marion County* (Indiana’s voter ID case) the Supreme Court held the burden was not severe because the state was applying it to everyone, stating “the evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious”. But one could argue that they are invidious when there exists no threat upon on the integrity of the electoral process, or when they do not combat the potential threat. Voter impersonation does not exist in Nebraska, nor is voter fraud in general prevalent, unlike Indiana which did have a few cases. Furthermore, Indiana’s bill provided free IDs to any, LR1CA requires only the legislature enact law requiring a photo ID, no protections or assurances of state-provided IDs is included. Past proposals like Lb 111 (2015) as written only provided a free ID to those who are indigent, but there are other substantial factors that change the burden – Indiana licenses are on average \$10-12 dollars cheaper and are good for 10 years. Indiana’s law did not have an address requirement meaning populations of higher mobility rates were not negatively impacted by the legislation and thus not disproportionately burdened.

⁷ Under the “Severe Burden Test” outlined by the Supreme Court in *Burdick v. Takushi*, the court first determines whether the state law in question imposes a severe burden on voters, if so then strict scrutiny is applied. Where the burden is found not to be severe, a lower scrutiny that balances the burden on the voter with the state’s interests, like that undertaken by the Court in Indiana’s voter ID case, is applied. In Indiana, due to documented cases of voter fraud, the Court found the state’s interest to outweigh the individual’s protection. Such documented cases do not exist in Nebraska. Secretary of State John Gale and representatives from his office have on numerous occasions, while testifying before the Government, Military and Veteran’s Affairs Committee, have stated the same. Therefore, even if the burden were to be determined by the federal court to not be severe, there still exists no state interest that outweighs the burden on the individual.