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Driscoll v. Stapleton: *Analyzing Election Regulations in Montana*

McKenna Ford
Alexander Blewett III School of Law at the University of Montana, mckenna.ford@umontana.edu

DRISCOLL V. STAPLETON: ANALYZING ELECTION REGULATIONS IN MONTANA

McKenna Ford*

I. INTRODUCTION

"If we are to have a true participatory democracy, we must ensure that as many people as possible vote for the people who represent them . . . ."[1] In our decentralized electoral system, one without an explicit federal constitutional right to vote, each state has the power to protect—or abuse—democracy according to its own constitutional text.[2] In Montana, the right to vote is afforded constitutional protection principally through Article II, section 13, which 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."[3]

In 1999, Montana took steps to make its elections freer and more open when it enacted no-excuse absentee voting, allowing all eligible Montana electors to cast an absentee ballot on request, without having to provide an excuse.[4] By 2018, more than 73 percent of votes in Montana were cast by absentee ballots.[5] Many were cast with the assistance of third-party ballot collection organizations who collect and deliver absentee ballots during election cycles.[6] Ballot collection organizations facilitate the delivery of ballots for citizens who face barriers to voting, including rural citizens living far from election offices and post offices, voters who lack transportation, are immunocompromised, lack access to mail boxes, or require caregivers when traveling.[7]

However, in 2017, the Montana Legislature passed the Ballot Interference Prevention Act ("Assistance Ban") which severely circumscribed ab-

* J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2022.

1. 3 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT 1241 (1972) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT].

2. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2014).

3. MONT. CONST. art. II, § 13.

4. *Frequently Asked Questions*, MONTANA SECRETARY OF STATE, https://perma.cc/E6EB-MYP3 (last visited Feb. 15, 2021).

5. Absentee Turnout 2000–Present, 2018 General Election Turnout, MONTANA SECRETARY OF STATE *available at* https://perma.cc/E6Z7-SEXU (last visited May 2, 2021).

6. Driscoll v. Stapleton, 473 P.3d 386, 389 (Mont. 2020).

7. *Id.*

sentee ballot collection.[8] The Assistance Ban restricted the categories of individuals authorized to collect and return another voter's ballot and mandated that an individual could not collect more than six ballots in an election cycle. Along with election officials and postal service workers, the law defined an authorized individual as a caregiver, family member, household member, or acquaintance of the voter.[9] Further, the Assistance Ban required authorized collectors to provide contact and address information for each voter, provide their own contact and address information, and describe their relationship to each voter.[10] The law imposed a $500 fine for each ballot unlawfully collected.[11] Although the Assistance Ban is no longer in effect, the Montana Legislature recently passed a similar measure, House Bill 530, signed into law by Governor Greg Gianforte. This law prohibits individuals from requesting or providing ballot collection services in exchange for a pecuniary benefit. For each ballot improperly requested, collected, or delivered, the bill imposes a $100 fine.[12]

The constitutionality of the Assistance Ban was challenged in *Driscoll v. Stapleton*,[13] and the law was temporarily enjoined. As the first challenge brought under Article II, section 13 as a standalone provision, *Driscoll* presented the Montana Supreme Court with its first opportunity to define the analytical framework applicable to Montana's right-of-suffrage provision.[14] While the Court declined to set forth a formal test for right-of-suffrage litigation at this stage of the proceedings,[15] *Driscoll* encapsulates the debate raging in Montana and around the country over how to balance the right to vote against the legislature's ability to regulate elections.[16] In doing so, it demonstrates the steep precipice upon which Montana teeters; if it steps too far in one direction, the right to vote may narrow beyond recognition.

This Note begins in Part II with a brief discussion of the historical meaning of the right-of-suffrage provision. It then sets forth the framework

8. *Id.* at 388–89. In 2018, Montana voters approved the Assistance Ban as Legislative Referendum 129. *2018 General Election*, MONTANA SECRETARY OF STATE, https://perma.cc/X8K3-G4LK (last visited Feb. 15, 2021).

9. MONT. CODE ANN. § 13-35-703 (2019).

10. *Id.* § 13-35-704.

11. *Id.* § 13-35-705.

12. H.B. 530, 67th Leg., § 2, (Mont. 2021).

13. 473 P.3d 386 (Mont. 2020).

14. Hannah Tokerud, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417, 427 (2013).

15. *Driscoll*, 473 P.3d at 393.

16. *See, e.g.*, Arizona Republican Party v. Democratic Nat'l Comm., 141 S. Ct. 221 (2020) (granting certiorari); Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020); Priorities USA v. Missouri, 591 S.W.3d 448 (Mo. 2020); Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 263 (2020).

devised by the United States Supreme Court to analyze election challenges and explores how that test fails to adequately protect Montana's right-of-suffrage. Part III discusses the legislative background of the Assistance Ban and the Court's decision in *Driscoll*. Finally, Part IV analyzes the application of strict scrutiny to the Assistance Ban and suggests how Montana's free and open right-of-suffrage can be best protected by courts in the future.

II. State and Federal Rights to Vote

A. State Constitutional Foundations

Montana's Constitution—ratified in 1972—adopted its right-of-suffrage provision verbatim from the 1884 Montana Constitution.[17] The provision, from its roots in the 1876 Colorado Constitution to its modern 1972 incarnation, has slept quietly in the background, passing through the years with remarkably little discussion to flesh out its contours.[18] Because courts and litigants have only rarely discussed Montana's right-of-suffrage provision,[19] the technical contours and conflicts inherent in a voting rights challenge have yet to be mapped out. However, while the provision has indeed slept quietly, it has not slept silently, and we are not left entirely without a guide to understand its meaning.

Transcripts from the 1889 Montana Constitutional Convention provide some guidance as to the meaning of "free" and "open" in Article II, section 13.[20] As Hannah Tokerud found in an earlier study of Montana's right-of-suffrage, "open" likely describes the accessibility of the voting process, that elections are "in public, free to everybody, and open to everybody," while "free" likely refers to voting without cost or restraint.[21] Delegate Vermillion captured the breadth of this right during the 1972 Montana Constitutional Convention when he stated, "the act of voting is not a privilege that the state merely hands out but is a basic right—a right that in no way should be infringed unless for very good reasons."[22] These "very good reasons" refer to the viable restraints on the right of suffrage listed in Article IV of the Montana Constitution,[23] such as the legislature's delegated authority to set voter age qualifications.[24]

17. Mont. Const. art. I, § 5 (1884) (superseded by Mont. Const. art. II, § 13 (1972)).

18. Tokerud, *supra* note 14, at 418.

19. *Id.* at 425 (identifying only nine Montana cases citing Article II, section 13 of the Montana Constitution).

20. *Id.* at 418.

21. *Id.* at 420–21.

22. Constitutional Convention Transcript, *supra* note 1, at 1237.

23. Tokerud, *supra* note 14, at 421.

24. Mont. Const. art. IV, § 2.

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Among the most relevant restraints on voting rights in Montana are those listed in Article IV, section 3: "The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process."[25] Thus, a conflict begins to take shape as Article II's expansive "free and open" right of suffrage naturally clashes with these Article IV provisions facilitating election regulation.[26]

Poll booth registration regulations provide an excellent example of the cross-textual tension between the two provisions. Near the turn of the 20th century, as the population grew and poll workers were increasingly unable to "personally recognize voters," a purported concern with preventing fraud spurned changes in the laws governing elections.[27] What began as a simple system of poll-booth registration involving checklists of electors over time morphed into modern voter-ID laws[28] with the potential to disenfranchise tens of thousands in exchange for a negligible reduction in fraud.[29]

However, the delegates of the 1972 Montana Constitutional Convention recognized the danger in allowing a mere concern with fraud to justify any system of poll-booth registration, whether checklists or voter-ID laws. While discussing his proposal to enshrine the existing voter registration requirements in Article IV, Delegate Vermillion stated that "those who want to maintain the present registration system must prove that there is a great chance of fraud in the state of Montana . . . We are assuming that the voters of Montana are innocent until proven guilty."[30] Delegate Champoux supported the proposal, calling the existing laws, which often resulted in eligible voters being removed from voting lists without their consent or notification, a "waste of time, effort, and money" after witnessing eligible voters turned away at polling booths.[31]

Delegate McKeon provided the strongest rebuke of burdensome election legislation. Referencing registration laws enacted to suppress the vote of southern black citizens, he proclaimed that "registration has been the greatest factor in subverting the turnout of the American electorate in the history of our country," as suppressed voter turnout undermined democracy

25. MONT. CONST. art. IV, § 3.

26. Douglas, *supra* note 2, at 135–36.

27. JAMES GRADY, SUFFRAGE AND ELECTIONS 74–75 (Mont. Constitutional Convention Comm'n, Constitutional Convention Study No. 11 (1971)).

28. Tokerud, *supra* note 14, at 424–25.

29. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634–35 (2007).

30. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 1, at 1238.

31. *Id.* at 1239.

itself.[32] Delegate McKeon then provided a dire, yet prescient, warning: "If we are to have a true participatory democracy, we must ensure that as many people as possible vote for the people who represent them . . . The voter registration laws . . . have effectively prevented so many people from voting that we cannot say that we have a truly representative democracy."[33]

These delegates' statements evince the absolute primacy of Montana's right of suffrage provision and shed light on the values imbedded in our democracy. Under the Montana Constitution, voting must be accessible, free of costs, unrestrained, and widely exercised, except for when restraints are patently necessary for effective election administration.

B. The Federal Framework

In many voting rights cases, whether brought in state or federal court, judges default to the *Burdick v. Takushi*[34] framework created by the Supreme Court.[35] Known as the *Burdick* balancing test, this framework is the dominant test employed by courts in election administration cases.[36] When evaluating a state election law challenge using the *Burdick* test, 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," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[37]

A court determines the severity of the burden and then applies the appropriate level of judicial scrutiny to the law. Severe burdens receive strict scrutiny while "reasonable, nondiscriminatory restrictions" receive intermediate or rational basis scrutiny.[38]

In practice, the *Burdick* test has proven to be a malleable standard eager to absorb the prejudices of its wielders.[39] Applying *Burdick*, one court upheld a burdensome election law when it merely disenfranchised a small number of voters,[40] while another court upheld a statute disenfranchising a larger swath of voters because it was applied neutrally to all citizens.[41]

32. *Id.* at 1240–41. Delegate McKeon noted the registration laws succeeded in decreasing turnout from eighty-two percent in 1874 to forty-eight percent in 1924. *Id.* at 1240.

33. *Id.* at 1240–41.

34. 504 U.S. 428 (1992).

35. Hasen, *supra* note 16, at 272.

36. Douglas, *supra* note 2, at 98.

37. *Burdick*, 504 U.S. at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

38. *Id.*

39. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1055–64 (2009).

40. Common Cause/Georgia v. Billups, 554 F.3d 1340, 1354–55 (11th Cir. 2009).

41. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008).

Cases have turned on the price and difficulty of obtaining a state ID,[42] the burden of producing certain documents for voter registration,[43] the reliability of the postal service,[44] and whether it was reasonable to require in-person voting during a pandemic.[45] Yet in each case, courts asked plaintiffs to demonstrate a law struck a sufficiently heavy blow to their voting rights to justify the deeper examination of the law itself.[46] In doing so, courts assumed a blow *must* be struck.

The *Burdick* test, in prioritizing inquiries into a statute's harm, places the wrong interests on the scales, resulting in an imbalanced right of suffrage. The root cause of this error is inherent in the test itself: Under the *Burdick* framework, courts first analyze the severity of the burden and then determine and apply the appropriate level of scrutiny.[47] Accordingly, this analytical structure places a high evidentiary burden on plaintiffs, often resulting in a devaluing and underenforcement of the right to vote.[48] Further, once a court concludes a state law constitutes a reasonable burden on the voters' rights, "it will be presumptively valid, since . . . normally [it] will be counterbalanced by the very state interests" that prompted the law.[49] In other words, if a plaintiff is unable to convincingly demonstrate the existence of a severe burden imposed by the voting restriction, then a state legislature's rationale for enacting the law escapes thorough examination, and laws suppressing voting rights are upheld.[50] Although the United States Supreme Court calls the right to vote fundamental,[51] this deference to state legislatures narrows the right and portrays a disregard for the freedom.[52]

Therefore, when a state with an explicit right-of-suffrage provision in its constitution adopts the *Burdick* test, it risks impeding "a state court's ability to provide the heightened level of protection that . . . provision . . . demands."[53] To preserve and faithfully observe an express right-of-suffrage, a state court should therefore turn to its own constitutional text and structure for guidance.

42. In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 447–48 (2007).

43. Gonzalez v. Arizona, 485 F.3d 1041, 1049–50 (9th Cir. 2007).

44. Texas League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 145–46 (5th Cir. 2020).

45. Tully v. Okeson, 977 F.3d 608, 617 (7th Cir. 2020).

46. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

47. *Id.* at 441. In *Burdick*, first the court determined Hawaii's prohibition of write-in voting constituted a slight burden on voting rights. *Id.* at 439. Next, the court determined the ban was justified by Hawaii's legitimate interest in avoiding "unrestrained factionalism" and "party raiding." *Id.* at 440–41.

48. Douglas, *supra* note 2, at 99.

49. *Burdick*, 504 U.S. at 441.

50. Douglas, *supra* note 2, at 98–99.

51. *Burdick*, 504 U.S. at 433.

52. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 152 (2008).

53. Douglas, *supra* note 2, at 124.

C. The Right-of-Suffrage in Montana Case Law

The Montana Supreme Court avoids "lock-stepping" with the United States Supreme Court when the Montana Constitution provides a right absent in the federal Constitution.[54] In contrast to the federal Constitution, the Montana Constitution grants an explicit right-of-suffrage, located in Article II, while simultaneously delegating to the legislature control over specific aspects of the electoral process in Article IV.[55] Therefore, under Montana's constitutional structure, "the specific conferral of the right to vote comes first, subject only secondarily to the legislature's authority to regulate the election process."[56] The central importance of Montana's right to vote strongly suggests that any legislation seeking to narrow the right must overcome a high burden to be upheld.[57]

Montana precedent, although sparsely discussing the right-of-suffrage directly, confirms this structural primacy. Rights found in Article II's Declaration of Rights are considered fundamental;[58] therefore, the right to vote is fundamental.[59] While it remains uncertain what test the Montana Supreme Court will apply to voting regulations,[60] laws abridging fundamental rights must ordinarily pass strict scrutiny[61] by demonstrating that they are narrowly tailored to achieve a compelling state interest.[62] Importantly, "*demonstrating* a compelling interest entails something more than simply saying it is so."[63] The State must support its claim through competent evidence.[64] Thus, Montana's constitutional structure inverts the paradigm set forth in *Burdick* by requiring the State to prove the law's worthiness instead of demanding the plaintiff to establish a complete denial of their right-of-suffrage as an initial matter. Placing the burden on the State to satisfy a high evidentiary standard is critical to accurately analyzing the competing inter-

54. State v. Guillaume, 975 P.2d 312, 316 (Mont. 1999).

55. MONT. CONST. art. II, § 13; MONT. CONST. art. IV.

56. Douglas, *supra* note 2, at 139; Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1311 (Mont. 1986). In *Butte Community Union*, the Montana Supreme Court addressed the right of welfare found in Article 12, section 3 of the Montana Constitution. The Court held the right was not fundamental because it was neither contained in Article II nor a right "without which other constitutionally guaranteed rights would have little meaning." Nevertheless, the Court found welfare benefits deserved greater protection than rational basis scrutiny "because the constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution." *Butte Cmty. Union*, 712 P.2d at 1311.

57. *Id.*

58. *Id.*

59. Willems v. State, 325 P.3d 1204, 1210 (Mont. 2014) (holding the Article II right to vote—in the context of redistricting—fundamental).

60. Tokerud, *supra* note 14, at 437–38.

61. Finke v. State ex rel. McGrath, 65 P.3d 576, 580 (Mont. 2003).

62. Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996).

63. *Id.* (emphasis in original).

64. *Id.*

ests contained in Article II and Article IV while maintaining the right-of-suffrage provision's structural centrality and constitutional teeth.[65]

III. *DRISCOLL V. STAPLETON*

A. Legislative Background

In 2017, the Montana Legislature passed the Assistance Ban, which voters subsequently approved as a legislative referendum in 2018. Senator Albert Olszewski introduced the Assistance Ban after receiving reports from voters concerned with ballot collectors' behavior. In a legislative hearing, Senator Olszewski stated the law was designed to protect the integrity of the election by bolstering "confidence in the election process."[66] In 2020, ahead of the primary election, the Chair of the Montana Democratic Party along with other interested organizations filed suit against the Montana Secretary of State, seeking a temporary and permanent injunction against enforcement of the Assistance Ban. The district court temporarily enjoined the law, concluding the Plaintiffs made a prima facie case showing that the Assistance Ban might unconstitutionally burden their right to vote under Article II, section 13 of the Montana Constitution by suppressing voter turnout.[67]

The State appealed the injunction, arguing the district court improperly applied strict scrutiny to the Assistance Ban instead of the *Burdick* balancing test used in other federal and state jurisdictions.[68] The State asserted that under the *Burdick* test, strict scrutiny of the Assistance Ban was inappropriate because the law imposed a minimal burden on the right-of-suffrage as voters could still deliver their ballots in person, at a mailbox, or through a family or friend.[69] Further, the State argued the legislature had a compelling interest in preventing voter fraud and intimidation that significantly outweighed the law's minimal burden. Therefore, the lower court erred in temporarily enjoining the law.[70]

65. Joshua A. Douglas, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote*, 75 GEO. WASH. L. REV. 372, 390 (2007).

66. Driscoll v. Stapleton, 473 P.3d 386, 388–89 (Mont. 2020).

67. *Id.* at 388.

68. Appellant Corey Stapleton's Opening Brief at 12–13, *Driscoll v. Stapleton*, 473 P.3d 386 (Mont. 2020) (No. DA 20-0295).

69. *Id.* at 28.

70. *Id.* at 30, 36.

B. Majority

In the majority opinion written by Justice Baker, the Court affirmed the district court's preliminary injunction against the Assistance Ban, finding that the Plaintiffs satisfied their evidentiary burden of showing that the law would likely infringe on their right-of-suffrage under Article II, section 13 the Montana Constitution.[71] The Court determined that the Plaintiffs demonstrated a prima facie case that the Assistance Ban would negatively impact voter turnout among certain sub-groups who rely on ballot collection, "including: senior and disabled voters . . . first-time student voters . . . working students, working parents, or low-wage workers . . . ."[72] In particular, the law disproportionately burdened Native American voters who face immense obstacles to cast a vote, including living great distances from polling places, high costs of transportation, shared P.O. boxes, and slower mail services.[73]

Along with the negative impacts on voter enfranchisement, the Court discussed the lack of evidentiary support for the State's position on voter fraud.[74] To this point, the Court held that the State's unsubstantiated claims—that the Assistance Ban prevented voter fraud and guarded against abuses of the electoral process while access to alternative voting methods remained "equally available to all voters"—failed to rebut the Plaintiffs' fact-based argument showing a real, quantifiable impact on the ability of certain groups to exercise their right to vote.[75] In fact, the record was utterly devoid of evidence supporting the State's position.[76] Because the Plaintiffs demonstrated the Assistance Ban burdened the constitutional right-of-suffrage, while the State could not proffer a cognizable interest weighing in its favor, the Court held that the district court properly enjoined the Assistance Ban.[77]

C. Dissent

Justice Sandefur's special concurrence dissented from the Court's conclusion as to the Assistance Ban.[78] Justice Sandefur, joined by Justice Rice, disagreed with the majority that the Plaintiffs sufficiently demonstrated

71. *Driscoll*, 473 P.3d at 393.
72. *Id.* at 389, 393–94.
73. *Id.* at 389. Before the Assistance Ban, ballot collection organizations facilitated the pooling and delivery of ballots on behalf of many Native Americans. These organizational efforts helped increase Native American turnout by 7,704 individuals from 2014 to 2018. *Id.* at 390.
74. *Id.* at 393–94.
75. *Id.* at 392–94.
76. *Id.* at 393.
77. *Id.* at 393–94.
78. *Id.* at 395.

harm to their constitutional voting rights, stating that instead the record was "devoid of any substantial non-speculative evidence" that the law might directly cause a decrease in absentee voting.[79] Justice Sandefur first suggested that the Assistance Ban imposed no "burden on the *right* of [any] specific class of Montanans to vote" before going on to say that the Montana Constitution did not provide the right to vote in "the most convenient" manner possible.[80] Justice Sandefur then argued the State need not offer particular evidence supporting a compelling interest; rather, a compelling state interest could be implied merely from the Assistance Ban's "manifest purposes . . . 'to prevent voter fraud, protect voters from harassment . . . and protect public integrity in the elections.'"[81]

Justice Sandefur then addressed the State's position that the perception of political corruption, along with actual corruption, is a compelling interest.[82] He noted the Montana Supreme Court has recognized the value in avoiding the appearance of corruption to maintain "the integrity of and public confidence in the electoral process and protecting against the *risk* of voter fraud."[83] Accordingly, Justice Sandefur would not require the government to provide evidence that the law was truly necessary, nor the least restrictive means of furthering the State's interest, and would evaluate the Assistance Ban's constitutionality using the standard of intermediate scrutiny as announced by the United States Supreme Court, which he suggests is equivalent to the federal *Burdick* test.[84]

IV. Analysis and Application

Decades of voting rights cases have helped develop a robust body of law concerning election integrity, voter participation rates, balancing tests, and the proper powers of state legislatures.[85] In *Driscoll*, the threads of these discussions make their first appearance in Montana against a back-

79. *Id.* at 395, 398–400 (Sandefur, J., dissenting in part). Justice Sandefur criticized the Affidavit of Kenneth Mayer, Ph.D, which analyzed the statistical data of Montana elections and found the Assistance Ban would decrease turnout. Justice Sandefur suggested the affidavit did not provide a sufficiently robust causal link between the law and voter turnout. He criticized evidence showing the law would exacerbate poor voter turnout on Native American reservations on the same grounds, suggesting voter turnout rates moved independent of efforts by ballot collection organizations to increase the rates of returned ballots.

80. *Id.* at 400 (emphasis in original).

81. *Id.* at 402.

82. *Id.* at 400–02.

83. *Id.* at 402. The dissent refers to Montana Auto Association v. Greely, 632 P.2d 300 (Mont. 1981), where the Montana Supreme Court held unconstitutional a ballot initiative that required public disclosure of money spent on lobbyists. *Greely* was not brought under Article II, section 13.

84. *Id.* at 404–05.

85. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008); Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983).

drop of sharply increased interest in state voting regulations. The majority's focus on both the State's lack of evidence and the extensive burdens placed on voters by the Assistance Ban—particularly Native American voters—suggests the Court will ultimately disregard the *Burdick* framework and instead apply strict scrutiny in a continuation of its fundamental rights precedent.[86] Nevertheless, the dissent's reasoning provides a useful example of the pitfalls and flaws inherent in applying a balancing test to the fundamental right-of-suffrage.[87]

The following Subsections discuss how strict scrutiny avoids these pitfalls and then apply strict scrutiny to the Assistance Ban to demonstrate how it protects Montana's expansive commitment to voting rights enshrined in its Constitution.

A. Scrutiny

While the majority declined to formally announce Montana's test for right-of-suffrage challenges brought under Article II, section 13 of the Montana Constitution,[88] the Court's precedent strongly supports applying strict scrutiny,[89] as does the structural primacy of the provision in the Constitution. Because the *Burdick* balancing test places an inappropriately high evidentiary burden on plaintiffs to show a severe infringement of their voting rights, it distorts values implicit in Montana's constitutional structure.

Justice Sandefur's dissent demonstrates the consequences of applying this distorted balancing test while also crediting the State's bare assertion of a compelling interest.[90] Justice Sandefur first rejected affidavits submitted by the Plaintiffs showing the likelihood of the Assistance Ban's negative impact on voter turnout. He criticized a political scientist's affidavit based on statistical modelling because it did not prove a direct link between the Assistance Ban and a decrease in anticipated voter turnout. Similarly, he disregarded evidence provided by voting rights organizations, calling it anecdotal speculation that failed to show the Assistance Ban would "cause . . . any significant decrease in absentee voter turnout . . . ."[91] Based on these perceived weaknesses, Justice Sandefur determined the Plaintiffs failed to meet their evidentiary burden.[92] Next, he argued the State need not "make a

86. *Driscoll*, 473 P.3d at 386, 393–94.

87. *Id.* at 404–05 (Sandefur, J., dissenting in part).

88. *Id.* at 386, 393 (majority opinion).

89. *Id.* at 392 (discussing the application of strict scrutiny "when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights"); Finke v. State ex rel. McGrath, 65 P.3d 576, 580 (Mont. 2003) (identifying strict scrutiny as an appropriate test in election litigation).

90. *Driscoll*, 473 P.3d at 403–04 (Sandefur, J., dissenting in part).

91. *Id.* at 398–400.

92. *Id.* at 400.

formal evidentiary showing of a compelling state interest" if, for example, the law's stated purpose is recognized as important by a state authority.[93] Because the Assistance Ban was allegedly enacted to prevent voter fraud, and Article IV, section 3 recognizes the need to "insure the purity of elections," Justice Sandefur argued the Montana Constitution recognized the law's purpose as important. Accordingly, he would not require the State to prove a compelling interest in enacting the law.[94]

Requiring direct causal proof from the Plaintiffs to protect their right-of-suffrage while crediting the State's unsupported generalities in support of its Article IV powers elevates Article IV's legislative directives above Article II's fundamental right-of-suffrage, thereby devaluing the constitutional meaning and force behind Montana's free and open elections provision. Conversely, strict scrutiny properly prioritizes the right to free, open, and ubiquitous voting by upholding infringements on that right only when the State proves the specific infringement is narrowly tailored to effectuate a patent compelling state interest.

The ability to conveniently cast one's ballot is included within the right to free and open voting. Indeed, Justice Sandefur's assertion that the Montana Constitution does not provide the right to vote in "the most convenient" manner possible wholly misrepresents what types of harm to the right-of-suffrage are granted constitutional significance.[95] Because widespread participation is essential to a functioning democracy, laws decreasing voter turnout threaten our democratic cohesion.[96] As Justice Brandeis stated, "a fundamental principle of the American government" is "that the greatest menace to freedom is an inert people."[97] Therefore, it is critical to recognize decreased voter turnout and the erection of additional barriers as constitutional harms.[98] While the Montana legislature may regulate elections,[99] the right-of-suffrage granted in Article II, section 13 has absolute

93. *Id.* at 401–02. "A compelling government interest may be manifestly implied from the language and effect of an enactment; judicial notice of precedent from other jurisdictions recognizing a compelling government interest in similar legislation; *or judicial notice of a related manifest government interest in preventing corruption of the political process,* preserving the integrity of essential government processes, or furthering the protection or exercise of individual rights." *Id.* at 401 (citing Mont. Auto. Ass'n v. Greely, 632 P.2d 300, 303–04 (Mont. 1981) (emphasis added).

94. *Id.* at 402.

95. *Id.* at 400.

96. Overton, *supra* note 29, at 657–58. Overton states that widespread participation serves four purposes: "First, it exposes decision-makers to a variety of ideas and viewpoints . . . Second, [it] allows the people, as a whole, to check the power of government officials who might otherwise enact . . . abusive practices . . . Third, [it] allows for a redistribution of government resources and priorities to reflect evolving problems and needs. Finally, [it] furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives." *Id.* at 657.

97. Whitney v. California, 274 U.S. 357, 375 (1927).

98. Overton, *supra* note 29, at 674.

99. MONT. CONST. art. IV.

primacy. Because Montana voters' right to free and open voting embraces the ability to conveniently cast a ballot, any barriers erected by the Assistance Ban have central constitutional significance.

B. Evidentiary Standard Required to Demonstrate a Compelling State Interest

Strict scrutiny's requirement that the State provide a compelling interest in enacting a law guards the right-of-suffrage provision behind an evidentiary fence.[100] To surmount this threshold evidentiary burden, a state must provide hard data demonstrating the law "is consistent with" Article IV's "specific conferral of legislative power to regulate elections."[101] Without such concrete factual support, claims of fraud and nebulous interests in preserving election purity act as kindling, stoking partisan divides. In fact, regulations justified by these baseless claims *heighten* voters' perceptions of fraud without any corresponding increase in systemic trust.[102] To protect both the integrity of the electoral system and the right-of-suffrage, courts should deem election regulations presumptively invalid if the State cannot supply direct evidence for its claims.[103]

Judges, legislators, and humans generally, frequently misperceive risk because stereotypes, emotion, and other lived experiences skew their perceptions. Mere anecdotes of voter fraud "mislead us into thinking we know things that anecdotes simply cannot teach us."[104] Hard data improves the consistency and reasoning of court opinions by quelling these assumptions, thereby limiting "ad hoc, contestable conjecture about the danger of fraud" and "flowery language to declare a law "necessary to improve voter confidence."[105] It dampens the instinct to reach for "vague state interest[s]" as "makeweight constitutional argument[s]."[106]

Thus, the failure to require hard data in support of allegations of voter fraud can lead to unsound decisions that disenfranchise voters. As an example, in *Crawford v. Marion County Election Board*,[107] the United States Supreme Court found that a voter-ID law's claimed effect of preventing fraud—despite no evidence of actual voter fraud having occurred in Indiana—constituted a significant state interest because it increased public trust

100. Douglas, *supra* note 2, at 121.

101. *Id.* at 138–39.

102. Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1480–81, 1483 (2016).

103. Douglas, *supra* note 2, at 141.

104. Overton, *supra* note 29, at 645, 652.

105. *Id.* at 631, 665.

106. Stewart, Ansolabehere & Persily, *supra* note 102, at 1483.

107. 553 U.S. 181 (2008).

in elections.[108] However, there is "no relationship between the existence of . . . [a voter] ID law and greater voter confidence or voter turnout." The law needlessly erected a barrier to voting based on illogical, spectral justifications which posed actual threat to state elections. The voter-ID law disenfranchised voters to allegedly increase trust; however, perceptions of voter fraud "have deeper ideological or political roots which remain unaffected by a state's election law regime."[109]

The Ninth Circuit recently summarized these political roots underlying voter fraud perceptions when it held:

> . . . [I]f some Arizonans today distrust third-party [absentee] ballot collection, it is because of the fraudulent . . . efforts to persuade Arizonans that third-party ballot collectors have engaged in election fraud. To the degree that there has been any fraud, it has been the false and race-based claims of the [bill's] proponents. It would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation.[110]

Allowing false perceptions of election fraud to justify onerous election regulations invites malevolent actors to propagate those very falsehoods, impermissibly prioritizing a specter over enfranchising citizens. Such regulations are doubly inappropriate when a state has a history of ballot collection without fraud, and "fraud is already illegal under existing [state] law."[111] The inquiry should be "intensely local," and made in the context of a state's specific voting history, constitution, and with the benefit of hard data, if any, to support claims of fraud or illegality.[112]

Applying these standards to Montana, the State *may* satisfy its threshold evidentiary burden if it can provide hard data of actual cases of fraud in Montana. However, the State *cannot* satisfy its burden in *Driscoll* because fraud remains inexistent in Montana. Although over 73 percent of Montana voters cast an absentee ballot in the 2018 general election, not one case of absentee ballot fraud was uncovered.[113] With no proof of fraud occurring throughout Montana's "established and well used absentee system," the State cannot justify the Assistance Ban as a tool to ensure a fair election.[114]

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108. *Id.* at 197.

109. Stewart, Ansolabehere & Persily, *supra* note 102, at 1460.

110. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1037 (9th Cir. 2020) *cert. granted*.

111. *Democratic Nat'l Comm.*, 948 F.3d at 1045.

112. Thornburg v. Gingles, 478 U.S. 30, 78 (1986) (quoting White v. Regester, 412 U.S. 755, 769–70 (1973)).

113. Intervenors Western Native Voice, Montana Native Vote, Assiniboine and Sioux Tribes of Fort Peck, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Crow Tribe and Fort Belknap Indian Community's Answer Brief at 6, 21, *Driscoll v. Stapleton*, 473 P.3d 386 (Mont. 2020) (No. DA 20-0295) [hereinafter "Intervenors"].

114. Donald J. Trump for Pres., Inc. v. Bullock, 491 F. Supp. 3d 814, 834 (D. Mont. Sept. 30, 2020).

Additionally, Montana's existing statutes prohibiting electoral fraud negate the need or use for redundant and burdensome election regulations.[115]

C. Requirement of Narrow Tailoring

While the State's argument in *Driscoll* should fail based on its inability to show a compelling state interest, the Assistance Ban is similarly unnecessary because it is not "closely tailored to effectuate only that compelling state interest" and it is not "the least onerous path" to do so.[116] This prong of strict scrutiny involves context-specific balancing of a law's burdens with its benefits and an examination of whether there is a "'fit' between the state's goals and the methods it has employed."[117] The constitutional mandate that elections be free and open—meaning accessible, free of cost, unrestrained, and widely exercised—should therefore guide this context-specific analysis. Additionally, the analysis of voter costs should include indirect expenses incurred by a voter that are not paid to the government, such as travel costs and time loss.[118] These indirect costs and barriers will be specific to Montana's particular geography, demographics, and history.[119]

Applying these factors to the Assistance Ban demonstrates the discordance between the law's impact on voter fraud and the actual anticipated effects on Montana citizens. First, election regulations must be narrowly adapted to Montana's geography to increase accessibility and voter participation while reducing voter costs. Montana's rural geography and voting population are particularly served by the adoption of generous absentee voting methods.[120] Ballot collection assists "senior and disabled voters who may have trouble with transportation, standing in line, or the unavailability of a caregiver to assist them."[121] Because of Montana's size, in larger coun-

115. MONT. CODE ANN. § 13-35-214 (2019) (Illegal influence of voters); *id.* § 13-35-218 (Coercion or undue influence of voters).

116. Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996).

117. Douglas, *supra* note 52, at 199.

118. Ellis, *supra* note 39, at 1067. Ellis describes how indirect costs result in structural disenfranchisement, explaining "the voter who does not think that there is a benefit to participating and who is, moreover, overwhelmed by the nature of the cost exacted, that person will be effectively excluded from the electorate because that person will choose not to vote. This effect is sometimes called 'structural disenfranchisement'. . . [which] has been defined as a complex interaction between the direct and indirect costs exacted upon voters for participation in the electoral system." *Id.* at 1035–36.

119. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1045 (9th Cir. 2020).

120. Daniel R. Biggers & Michael J. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15.2 ST. POL. & POL'Y Q., 192–210 (2015).

121. Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups, 439 F. Supp. 2d 1294, 1347 (N.D. Ga 2006) (concluding that "many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate that process or any long waits successfully"); Driscoll v. Stapleton, 473 P.3d 386, 389 (Mont. 2020).

ties, many citizens travel long distances to reach their county seats.[122] This presents a serious barrier for Native Americans living on reservations, a voting bloc disproportionately disenfranchised by restrictions on absentee voting[123] due in part to low rates of car ownership, a lack of mail services, and long distances from polling places.[124] As the Court in *Driscoll* describes:

> . . . Native American voters as a group face significant barriers to voting: many live far away from county elections offices and postal centers; many have limited access to transportation; many have limited access to postal services, lacking residential mailing services and using Post Office boxes instead, which brings associated costs and travel; mail for those living on reservations may take longer to reach its destination than for other voters in the state; some reservations lack a uniform and consistent addressing system, which makes it difficult for residents to register to vote; and many experience higher rates of poverty. Further, despite satellite voting locations on some reservations, this requires tribes to submit annual written requests, a significant administrative hurdle, and typically those locations still are located quite far from many Native American voters.[125]

To surmount these barriers, a majority of Montana voters cast absentee ballots in elections.[126] Indeed, absentee voting has become so ubiquitous that "the method has transcended convenience and has become instead a practical necessity."[127] Still, voters without access to mailboxes or who live far from P.O. boxes struggle with absentee voting.[128] Ballot collection organizations eliminate these remaining obstacles by collecting and delivering ballots for voters. During the 2018 election, ballot collection organizations increased turnout by conveying over 850 ballots on Native American reservations.[129] Those 850 voters did not have to choose between paying for gas or eating a meal, nor did they have to take a day off work to make the trip to a polling station or P.O. Box to drop off their ballot. Of course, not all barriers can be removed, and voting will always require a degree of economic sacrifice. However, any uncast vote—whether legally barred or leg-

122. *Bordertown Discrimination in Montana* 9, U.S. COMMISSION ON CIVIL RIGHTS (May 2019), https://perma.cc/U54Y-22AW.

123. Mark Wandering Med. v. McCulloch, No. CV 12-135-BLG-DWM, 2014 WL 12588302, at *5 (Mont. Dist. Ct. Mar. 26, 2014) (finding poverty and limited vehicle access made in person voting difficult for residents of three reservations).

124. *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1738–40 (2016).

125. *Driscoll*, 473 P.3d at 390.

126. Absentee Turnout 2000-Present, *supra* note 5; Donald J. Trump for Pres., Inc. v. Bullock, 491 F. Supp. 3d 814, 822 (D. Mont. 2020).

127. Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 456 (2019).

128. Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters, NATIVE AMERICAN RIGHTS FUND 34, 40–41, 91, 113 (2020) https://perma.cc/KYN9-QUSQ.

129. Intervenors, *supra* note 113, at 9.

islatively discouraged—harms the ideal of a robust democracy supported by widespread electoral participation.[130]

Because of Montana's geography and demographics, as well as the ubiquitous use of absentee voting, the Court in *Driscoll* found the Assistance Ban would exacerbate barriers for Native Americans, the elderly and disabled, the indigent, students, and caregivers, resulting in "unequal access to the polls."[131] Despite these barriers, the Assistance Ban could be considered narrowly tailored if it targeted and prevented actual fraud and improved the integrity of Montana's elections.

But the Assistance Ban provides no benefit to voters. Not only is the law impotent in preventing Montana's non-existent ballot collection fraud,[132] the law also negatively impacts traditional in-person voting. By forcing ballot collectors to register with election personnel when delivering ballots, wait times are increased for all voters, causing "delays [with] ripple effects."[133] Because the Assistance Ban suppresses the right to vote in Montana while providing no benefit in increasing election integrity, it fails both prongs of strict scrutiny and should be held to unconstitutionally burden Montana's free and open right-of-suffrage.

V. Conclusion

Preserved in Montana's free and open elections provision is the constitutional right to cast a ballot without restraint or the imposition of unnecessary costs. The structural primacy of the right-of-suffrage demands that strict scrutiny be applied in challenges to election regulations. Courts should place the evidentiary burden on the State to prove an election regulation's necessity through actual evidence specific to the realities of life in Montana. Further, in close cases, the balance should always tip in favor of "a citizen in the exercise of the right to vote,"[134] because widespread participation is a critical component of a robust democracy. Barriers erected to curtail free and open voting create a stark—though invisible—divide in society between those with a voice and those without that is "antithetical to a coherent theory of democracy."[135]

130. Ellis, *supra* note 39, at 1033.
131. Driscoll v. Stapleton, 473 P.3d 386, 393 (Mont. 2020).
132. Donald J. Trump for Pres., Inc. v. Bullock, 491 F. Supp. 3d 814, 822 (D. Mont. 2020).
133. Common Cause/New York v. Brehm, 432 F. Supp. 3d 285, 300 (S.D.N.Y. 2020).
134. Stackpole v. Hallahan, 40 P. 80, 85 (Mont. 1895).
135. Ellis, *supra* note 39, at 1065.

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