

# STATE SOLUTIONS TO STATE PROBLEMS: USING STATE CONSTITUTIONS TO FIGHT VOTER SUPPRESSION

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*Federal action has been undertaken throughout our nation's history to both quell voter suppression and expand the franchise, countering racist state efforts to restrict the vote. In the face of shrinking federal solutions, those seeking to protect the vote must look for new methods. This Article proposes that advocates look more deeply at state constitutional law and pursue claims in state court to vindicate voting rights, as state constitutional provisions and precedent may provide fertile ground. In advancing this argument, the Article swiftly reviews the history of the federal government's actions to protect voting throughout our nation's history as well as the recent breakdown of those protections. Thereafter, it reviews a state constitutional avenue to demonstrate its viability.*

## INTRODUCTION

The hunt to suppress votes has taken an interesting turn. In the days of yore, when overt racism was far more palatable (but no less despicable), suppression often did not go to great lengths to conceal itself. That particular “wolf [came] as a wolf,” more or less.<sup>1</sup> Today, such tactics are veiled—thinly—and the wolf comes in sheep's clothing. And the wolf's stalking habits continue to evolve. It takes new routes, wears new disguises, and deploys seemingly benign gambits to lull unsuspecting victims, all while the main guard fence protecting the herd has just been torn down. Those protecting the franchise must reconsider their defensive strategy in light of the new game afoot.

The wolf's new “innocuous” gambit? So-called voter ID laws that require voters to present government-issued identification to prove they are qualified to vote. Its new disguise? Arguing that IDs are necessary to “protect the sacred integrity of our elections,”<sup>2</sup> because no one could argue against that

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1. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).  
2. President Donald Trump, Address in Manchester, New Hampshire (Aug. 15, 2019), <https://www.c-span.org/video/?463428-1/president-trump-holds-rally-manchester-hampshire>

noble and seemingly innocuous aim, especially when an ID was considered necessary “to buy stuffy nose medicine,” in the words of one legislator.<sup>3</sup> And its new routes? Charging fees for those who did not previously have a government-issued ID or limiting the availability of identifications, like—as comedian John Oliver pointed out—“[i]n Sauk City, Wisconsin [where] the ID office is only open on the fifth Wednesday of every month, and only four months in 2016 even ha[d] five Wednesdays.”<sup>4</sup>

Like many suppressive tactics, voter ID laws are not heinously objectionable in the abstract. To wit, those fighting against such laws are certainly not trying to undermine the integrity of our most sacred expression of patriotism. Rather, detractors of voter ID laws would likely be substantially mollified if, in concert with enacting a voter ID law, states opened DMVs more frequently and for longer hours, barred charging a fee to obtain an ID, removed other barriers, issued the laws more efficiently, and made other accommodations for those who may find obtaining an ID difficult. But in practice voters are met with complimentary structural impediments like those in Sauk City which, in conjunction with such seemingly harmless actions, make it much more difficult to vote.

Unfortunately, voter ID laws are but one form of the larger, insidious umbrella of “voter suppression”<sup>5</sup> that has plagued our country since the expansion of the franchise beyond non-white males. And even more unfortunately, methods of voter suppression and de facto disenfranchisement have evolved, limited only by the creativity of their proponents.

Federal action has been undertaken throughout our nation’s history to both quell voter suppression and expand the franchise in the face of such efforts. Constitutional amendments, legislative enactments, and federal court adjudications have all been powerful weapons in the past. Recent actions suggest that will no longer be true, as evidenced by the Voting Rights Act’s judicial decapitation—and failure to pass replacement legislation—or the U.S. Supreme Court’s refusal to substantively grapple with partisan gerrymandering.<sup>6</sup> Therefore, advocates for “the legitimacy of representative government”<sup>7</sup> via open and honest voting must look for new shields to protect the vote. The most logical approach is to turn stateside.

Thankfully, state action has filled this void as state courts evince no such dereliction of duty.<sup>8</sup> Following the example of Pennsylvania, which struck down partisan gerrymandering on state constitutional grounds, this Article

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[<https://perma.cc/R7C7-V93X>] (imploring legislators to “protect the sacred integrity of our elections by supporting voter ID”).

3. *Last Week Tonight with John Oliver* (HBO television broadcast Feb. 14, 2016).

4. *Id.*

5. See *Forms of Voter Suppression*, VOTING RTS. ALLIANCE, <http://www.votingrightsalliance.org/forms-of-voter-suppression> (last visited Apr. 18, 2020) (listing sixty-one separate methods of voting suppression).

6. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2018) (holding that partisan gerrymandering is never justiciable); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (concluding that gerrymandering is never justiciable).

7. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

8. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018).

seeks to further plumb state constitutional law for fertile ground on which to mount the fight against voter suppression. To explain the potential of state courts, this Article begins with an overview of the current legal framework around voting. Then, the Article turns to the justifications underpinning why voting rights advocates should rely more heavily on state constitutional law. Specifically, the Article reviews how state constitutional law fought back voter suppression in Pennsylvania via its voter ID law and why it may be a viable path to do the same in Montana and South Dakota.

### I. THE GOVERNING FRAMEWORK ON THE RIGHT TO VOTE

Throughout American history, the powerful have maintained their status by ensuring “others” cannot vote in opposition to that power. These barriers have come in the form of statewide laws that, in effect, suppress the votes of these others. Though “[the] [p]rivilege of voting . . . is conferred by the [s]tate and . . . the [s]tate may condition suffrage as it deems appropriate,”<sup>9</sup> the federal government reactively thwarted state actions seeking to jeopardize the vote. So too did federal courts take action to protect the vote, having long ago concluded that voting “is regarded as a fundamental political right”<sup>10</sup> despite its qualifications and its absence from the Constitution’s original text.<sup>11</sup>

The first sign of federal involvement is the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments. These three amendments vindicated the long overdue voting rights of millions of Americans, outlawing overt racial discrimination at the federal level. Though not without setbacks,<sup>12</sup> the federal realm proved to be the driver of increased access to the ballot box. “History demonstrates that [federal] Reconstruction laws were initially successful in expanding access to the ballot box for recently freed slaves, and in providing voter protections for African-American citizens by outlawing any action taken to suppress their vote.”<sup>13</sup>

Following the Compromise of 1877 and the removal of troops from the Southern states to guard against racial discrimination and violence, racist states saw an opportunity to beat back minority voter participation.<sup>14</sup> They pounced, working unabated to undo this progress and suppress minority

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9. *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), *overruled by* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *see also* *Pope v. Williams*, 193 U.S. 621, 632 (1904), *overruled by* *Dunn v. Blumstein*, 405 U.S. 330 (1972).

10. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

11. *See, e.g.*, Rachel Suppé, *A Right in Theory But Not in Practice: Voter Discrimination and Trap Laws as Barriers to Exercising a Constitutional Right*, 23 J. GENDER SOC. POL’Y & L. 107, 109 (2014).

12. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3 (1883).

13. U.S. COMM’N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHT ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT 15 (2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf) [<https://perma.cc/62YR-988H>].

14. *See id.*

votes,<sup>15</sup> though they did so via facially neutral tactics such as poll taxes<sup>16</sup> and grandfather clauses.<sup>17</sup> As a result, minority turnout in the post-Reconstruction Jim Crow era plummeted.<sup>18</sup> Victims were forced to seek federal help.

Vindication came, albeit decades later following fits and starts. Federal litigation and advocacy won a declaration from the Supreme Court in 1915.<sup>19</sup> Poll taxes were finally banished when Congress passed the Twenty-Fourth Amendment nearly fifty years later in 1964.<sup>20</sup> But true victory came in the form of the Voting Rights Act of 1965 (VRA).

The VRA “reflects Congress’ firm intention to rid the country of racial discrimination in voting.”<sup>21</sup> But the “Act was ‘not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.’”<sup>22</sup> Put another way by one of its defenders in the Supreme Court, “[t]his statute is in part about our march through history to keep promises that our Constitution says for too long were unmet.”<sup>23</sup>

Arguably the most important aspect of the VRA was section 5,<sup>24</sup> which:

fr[oze] changes in election practices or procedures in covered jurisdictions [(states and municipalities specifically designated by Congress in light of evidence of racially motivated voting discrimination)] until the new procedures have been determined, either after administrative review by the Attorney General, or after a lawsuit before the United States District Court for the District of Columbia, to have neither discriminatory purpose or effect. Section 5 was designed to ensure that voting changes in covered jurisdictions could not be implemented [or] used until a favorable determination has been obtained.<sup>25</sup>

15. Anderson Bellegarde François, *To Make Freedom Happen: Shelby County v. Holder, the Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. ILL. U. L. REV. 529, 544 (2014).

16. *Abolition of the Poll Tax: Twenty-Fourth Amendment*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-24> [https://perma.cc/USY6-SZMX] (last visited Apr. 18, 2020).

17. See Alan Greenblatt, *The Racial History of the ‘Grandfather Clause,’* NPR (Oct. 22, 2013), <https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause> [https://perma.cc/DK23-585R].

18. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 13, at 17.

19. See *Guinn v. United States*, 238 U.S. 347, 367–68 (1915).

20. See *Abolition of the Poll Tax: Twenty-Fourth Amendment*, *supra* note 16.

21. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

22. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.9 (1986) (quoting 111 Cong. Rec. 8295 (1965) (statement of Sen. Javits)); *id.* at 69 (“Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination.”).

23. Transcript of Oral Argument at 62, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (statement of Debo Adegbile on behalf of respondents).

24. *Cf. South Carolina*, 383 U.S. at 315 (describing the “heart of the Act [a]s a complex scheme of stringent remedies” to include section 5’s preclearance).

25. *About Section 5 of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> [https://perma.cc/B23N-S3DG] (last visited Apr. 18, 2020).

This system was intended “to [e]nsure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>26</sup> The VRA’s preceding section, 4(b), determined which jurisdictions were “covered.”

The law, therefore, had a dual effect: in practical terms, it further entrenched voter protections in states that had a documented history of discrimination. It also—together with its multiple subsequent reauthorizations—served as a signal to deter would-be discriminators.<sup>27</sup>

Despite its place as one of the most important pieces of American legislation ever enacted<sup>28</sup> and the Supreme Court’s repeated affirmation of its constitutionality,<sup>29</sup> the VRA was recently gutted. Resting on the “fundamental principle of equal sovereignty”—a constitutional doctrine former Seventh Circuit Chief Judge Richard Posner claimed he “had never heard” of because “there is no such principle”<sup>30</sup>—the Supreme Court struck down the formula by which Congress determined which jurisdictions needed to have their voting rules and regulations precleared.<sup>31</sup> Thus, while the preclearance requirement exists, no jurisdiction is currently required to go through such a process. Though other provisions of the VRA might still be leveraged to stop laws aimed at suppressing the vote,<sup>32</sup> the ruling’s release of nine states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and other municipalities across the United States “rendered the Section 5 preclearance system effectively inoperable.”<sup>33</sup>

Absent longstanding federal entrenchment, the floodgates opened. “Within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law. Two other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal

26. *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

27. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 13, at 12. The same could be said for “Federal observers,” individuals sent by the attorney general or a federal court to “ensure compliance with the Act” and whose “presence at polling and ballot counting locations make voting discrimination less likely to occur . . .” James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 229 (2007).

28. Cf. Louis Jacobson, *Ten Bills That Really Mattered*, ROLL CALL (May 2, 2005, 6:25 PM), <https://www.rollcall.com/2005/05/02/ten-bills-that-really-mattered/> [<https://perma.cc/WDY5-EYNE>].

29. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980).

30. Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All About Conservatives’ Imagination*, SLATE (June 26, 2013), <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html> [<https://perma.cc/X9N7-4RGG>].

31. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

32. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437 § 2 (codified as amended at 52 U.S.C. § 10301 (2018)).

33. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/TCR9-XXM4>].

preclearance.”<sup>34</sup> Indeed, the Brennan Center for Justice estimates that “hundreds of harsh measures” enacted in recent years have “ma[de] it harder to vote.”<sup>35</sup> And, as mentioned above, such laws take many forms; their limits are bounded only by their creators’ imaginations.

Thankfully, advocates have tirelessly fought these suppressive laws. But they have focused on federal grounds, be it remaining federal statutory provisions<sup>36</sup> or the federal Constitution.<sup>37</sup> Notwithstanding some successes, the raft of state-led voter suppression demands an even greater call to action: the creativity of those who seek to suppress the vote in crafting laws must be met in equal measure by the creativity of those who seek to overcome such suppression. And in the face of shrinking federal avenues—both legislative and judicial—state litigation is the next frontier.<sup>38</sup>

## II. STATE CONSTITUTIONS

Thankfully, there is reason to think that state courts are the correct forum in which to stage the next wave of voter protection battles; state law—and specifically state constitutional law—will be our weaponry. In fact, even the Supreme Court has impliedly encouraged such a path. In *Rucho v. Common Cause*,<sup>39</sup> wherein the Supreme Court ruled that partisan gerrymandering was a nonjusticiable political question,<sup>40</sup> Chief Justice Roberts all but encouraged

34. *Id.*

35. NEW VOTING RESTRICTIONS IN AMERICA, BRENNAN CTR. FOR JUSTICE 1 (2019), <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf> [<https://perma.cc/ZPS4-QACU>].

36. *See, e.g.*, Class Action Complaint at 28–30, *Fish v. Kobach*, 189 F.Supp.3d 1107 (D. Kan. 2016) (No. 2:16-cv-02105), ECF No. 1 (asserting four unique claims arising under the National Voter Registration Act); *Janis v. Nelson*, No. CR 095019-KES, 2009 WL 5216902, at \*3 (D.S.D. Dec. 30, 2009) (“There are sufficient facts set out in the amended complaint for the court to draw the reasonable inference that state defendants violated the requirements set out in Section 303 of [Help America Vote Act].”).

37. *See, e.g.*, Class Action Complaint, *supra* note 36, at 31 (bringing claims arising under the Constitution’s Elections Clause, art. I, § 4, cl. 1).

38. Another suggestion has been put forward. Joshua Geltzer, the executive director of the Institute for Constitutional Advocacy and Protection, proposes “punishing infringement of voting rights with the stiff penalty of a reduction in [congressional] representation” as authorized by Section 2 of the Fourteenth Amendment. Joshua Geltzer, *The Lost 110 Words of Our Constitution*, POLITICO (Feb. 23, 2020), <https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612> [<https://perma.cc/K7NL-MB7E>]. This strategy has been proposed previously. *See* Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RES. L. REV. 965, 977–81 (1965). While innovative, I cannot endorse it due to its political toxicity. In short, even Geltzer is not sure what is required to effectuate this rule, but it undoubtedly requires exceedingly sensitive analysis of the sort unlikely to pass both houses of Congress. And even if it could, going about reducing congressional representation would almost assuredly dissolve any semblance of bipartisan cooperation to otherwise protect voting rights, particularly considering other pressing voting challenges. *See, e.g.*, Dale Ho, Opinion, *Voting by Mail Will Save the 2020 Election*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/opinion/coronavirus-election-vote-mail.html> [<https://perma.cc/S4P3-CE8Z>].

39. 139 S. Ct. 2484 (2019).

40. *Id.* at 2506–07.

litigants and voters to take up voting grievances at the state level, both through judicial interpretation of state constitutional law and state statutory law.<sup>41</sup> “Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply” in the realm of voting, the majority explained.<sup>42</sup> A sampling of state constitutions and interpretations thereof bear this out.

But first, a brief word on such provisions. To be sure, all state constitutions are drafted differently; these differences could have profound impacts on their viability as foundations for claims of voter discrimination. Different, too, is their limited reach; put another way, it is not as if a litigant can claim that interpretation of one state’s constitution—which is likely to be *very* different than even that of a neighboring state—should bind other states. Nonetheless, the fact that nearly all states protect the right to vote in their respective constitutions is a critically important foothold for litigants. Moreover, as the Pennsylvania Supreme Court recently observed, while nearly all state constitutions explicitly recognize a citizen’s right to vote,

a number of other states go further than merely recognizing the right to vote, and provide additional and independent protections through provisions in their constitutions guaranteeing that their elections shall be “free and equal.” More specifically, the constitutions of twelve additional states contain election clauses identical to our charter, requiring elections to be “free and equal.” These twelve other states are: Arizona, Arkansas, Delaware, Illinois, Indiana, Kentucky, Oklahoma, Oregon, South Dakota, Tennessee, Washington, and Wyoming.<sup>43</sup>

These sorts of provisions, for example, can be powerful in beating back voter suppression laws of all stripes. The chief example is the Keystone State itself, wherein Pennsylvania courts have struck down both a voter ID law and a politically gerrymandered district apportionment on the basis of those state constitutional protections in the last decade.<sup>44</sup> This section reviews that decision. Thereafter, it highlights other potentially ripe suits that would help quell voter suppression based on state constitutional law in South Dakota and Montana. Finally, the section concedes the limitations of such suits.

### *A. Pennsylvania*

In 2014, “one of two statewide intermediate appellate courts”<sup>45</sup> in the Keystone State analyzed the constitutionality of its voter ID laws under a state constitution that espouses strong voter protection.<sup>46</sup> Following a long,

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41. *See id.* at 2507–08.

42. *Id.* at 2507.

43. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 813 n.71 (Pa. 2018) (citations omitted).

44. *See id.* at 741; *infra* notes 45–51 and accompanying text.

45. *See Commonwealth Court of Pennsylvania*, UNIF. JUD. SYS. PA., <http://www.pacourts.us/courts/commonwealth-court/> [<https://perma.cc/93VN-AG2S>] (last visited Apr. 18, 2020).

46. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at \*19 (Pa. Commw. Ct. Jan. 17, 2014).

winding road—which included the denial of a preliminary injunction only to have the law enjoined by the state supreme court thereafter<sup>47</sup>—the Commonwealth Court concluded that the “the Voter ID Law on its face . . . does not pass constitutional muster because there is no legal, non-burdensome provision of a compliant photo ID to all qualified electors.”<sup>48</sup> Judge Bernard McGinley adopted the aforementioned reasoning, namely that the law could not stand because it did “not provide a non-burdensome means of obtaining compliant photo ID,”<sup>49</sup> thereby “mak[ing] it so difficult as to amount to a denial” in violation of the state’s constitution.<sup>50</sup>

Since the Commonwealth Court’s ruling, the Supreme Court of Pennsylvania has only offered additional language to expand on the “Free and Equal Elections Clause” that broadly guards against voter suppression of all kinds. In striking down a politically gerrymandered congressional map, the court expounded:

the Free and Equal Elections Clause—its plain language, its history, the occasion for the provision and the circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation—leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.<sup>51</sup>

Therefore, Pennsylvania provides a blueprint for state constitutional challenges, particularly for those aforementioned states with stringent election protection clauses.

### B. South Dakota

A third historical target of voter suppression is the Native American community.<sup>52</sup> According to the U.S. Department of Health and Human Services, “22 percent of American Indians and Alaska Natives live on

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47. *Id.* at \*1.

48. *Id.* at \*18.

49. *Id.*

50. *Id.* at \*19 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also id.* (quoting *DeWalt v. Bartley*, 24 A. 185 (Pa. 1892) (“The test is whether legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial.”)).

51. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018).

52. *See, e.g.,* Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, A.B.A. (Feb. 9, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/) [<https://perma.cc/L5UZ-W383>]; *see also* Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CTR. FOR JUST. (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights> [<https://perma.cc/6BUK-V2AW>] (“The right of Native Americans to vote in U.S. elections was recognized in 1948 with the landmark cases *Harrison v. Laveen* and *Trujillo v. Garley*. Even so, they were not eligible to vote in every state until 1962, when Utah became the last state to remove formal barriers. But pernicious roadblocks remain to this day. Restrictive voting laws throughout the United States often carry a discriminatory effect, either by intent or consequence, for Native communities.”).

reservations or other trust lands.”<sup>53</sup> That amounts to over 1.2 million people. And life on reservations presents unique challenges to voting in addition to the traditional challenges (e.g., poverty and travel costs, which prohibit getting to the polls, or a lack of interpreters for non-English speakers).<sup>54</sup> For example, many reservations “lack residential addresses”<sup>55</sup> and “[h]omes are usually described in terms of landmarks, crossroads, and directions.”<sup>56</sup> Ultimately, “[t]hrough no fault of the voter, the lack of a residential address can result in the political subdivision placing the voter in the wrong precinct, the voter’s ID address not matching the voter rolls, and/or the voter not receiving election mail timely, if at all.”<sup>57</sup> What is more, voter ID laws often stipulate that voters’ government-issued identification must include a valid street address,<sup>58</sup> thereby nullifying the efficacy of many Native Americans’ only form of identification and effectively prohibiting them from voting.

This was the case in North Dakota. There, Native Americans sued just before the 2016 election to enjoin a 2013 voter ID law that included a street address requirement and effectively disenfranchised a significant portion of the Native American population.<sup>59</sup> On August 1, 2016, the district court granted the plaintiffs’ motion for a preliminary injunction, justified by its finding that the bill imposed “‘excessively burdensome requirements’ on Native American voters in North Dakota that far outweighs the interests put forth by the State of North Dakota.”<sup>60</sup> Thereafter, the North Dakota legislature modified the law—marginally—and the district court dissolved the initial injunction.<sup>61</sup> But the court also granted a second limited preliminary injunction, enjoining the provision of the statute that:

requires a voter to present at the polls a valid form of identification that provides the voter’s current residential street address . . . . The court

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53. *Profile: American Indian/Alaska Native*, U.S. DEP’T HEALTH & HUM. SERVICES OFF. MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> [<https://perma.cc/988G-5FH2>] (last visited Apr. 18, 2020).

54. See Dunphy, *supra* note 52.

55. Ferguson-Bohnee, *supra* note 52.

56. *Id.*

57. *Id.*

58. See Camila Domonoske, *Many Native IDs Won’t Be Accepted at North Dakota Polling Places*, NPR (Oct. 13, 2018, 10:46 AM), <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places> [<https://perma.cc/S79C-CJNA>] (“Native residents often use P.O. boxes for their mailing addresses and may rely on tribal identification that doesn’t list an address. Those IDs used to be accepted at polling places—including in this year’s primary election—but will not be valid for the general election.”).

59. Ruben Kimmelman, *Judge Rules Native Americans in North Dakota Must Comply with Voter ID Law*, NPR (Nov. 2, 2018, 2:49 PM), <https://www.npr.org/2018/11/02/663417341/judge-rules-native-americans-in-north-dakota-must-comply-with-voter-id-law> [<https://perma.cc/4E5T-X9P4>]; Levi Lass, *Eighth Circuit Upholds North Dakota Voter ID Law*, COURTHOUSE NEWS SERV. (July 31, 2019), <https://www.courthousenews.com/eighth-circuit-upholds-north-dakota-voter-id-law/> [<https://perma.cc/6NYZ-HVHH>].

60. *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at \*10 (D.N.D. Aug. 1, 2016).

61. See *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190, at \*8 (D.N.D. Apr. 3, 2018), *vacated*, *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019).

required instead that the Secretary must deem a voter qualified if the voter presents identification that includes a voter's current *mailing* address, such as a post office box, that may be located in a different voting precinct from the voter's residence.<sup>62</sup>

Shortly thereafter, the Eighth Circuit stayed the injunction two months before the November 2018 elections.<sup>63</sup>

Ultimately, it took further litigation to drive the state to better protect the Native American population. In February 2020, the North Dakota secretary of state announced a settlement wherein:

the burden would be on the state to assign and verify street addresses ahead of an election. Tribal citizens who don't know their home address would be allowed to identify where they live using a map, and state and county officials would then work with the tribe to determine the proper address for the voter. The secretary of state would also coordinate with the governor's office and the state Department of Transportation to bring the agency to each reservation 30 days leading up to an election and issue free non-driver IDs . . . . In addition, the state would reimburse tribal governments up to a certain amount per election for administrative costs associated with having to issue IDs and addresses.<sup>64</sup>

North Dakota is not alone in having worked to solve the problem, though the settlement is a new tack. Other states such as Washington have passed narrow laws to deal with analogous issues to help bridge the gap. Indeed, Washington's Native American Voting Rights Act

modifies the minimum information required for voter registration under state law, to allow for "unmarked homes" and "a nontraditional residential address may be used when a voter resides on an Indian reservation or on Indian lands." The bill also allows for voters to list a building designated by the tribe in their precinct as their residential address, if need be.<sup>65</sup>

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62. *Brakebill v. Jaeger*, 905 F.3d 553, 555–56 (8th Cir. 2018).

63. *See id.* at 556.

64. Erik Ortiz, *North Dakota, Native Tribes Agree to Settle Voter ID Lawsuit to Combat Voter Suppression*, NBC NEWS (Feb. 14, 2020, 3:31 PM), <https://www.nbcnews.com/news/us-news/north-dakota-native-tribes-settle-voter-id-lawsuit-combat-voter-n1137141> [https://perma.cc/28S6-4WUZ]; *see also* Press Release, Alvin Jaeger, N.D. Sec'y of State, Agreement in Principle Related to Tribal IDs for Voting (Feb. 13, 2020), [http://sos.nd.gov/files/uploaded\\_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf](http://sos.nd.gov/files/uploaded_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf) [https://perma.cc/AF3D-PP6H]. One could be forgiven for thinking that the Republican secretary of state was only willing to make such an agreement after Republican Senator Kevin Cramer defeated then incumbent Democrat Heidi Heitkamp by more than 35,000 votes, *see Statewide Results*, SECRETARY ST. N.D., <https://results.sos.nd.gov/ResultsSW.aspx?text=All&type=SW&map=CTY> [https://perma.cc/9S6M-LPS7] (last visited Apr. 18, 2020)—approximately equal to the total number of Native Americans in the entire state, *see Statistics*, N.D. INDIAN AFF. COMM'N, <https://www.indianaffairs.nd.gov/tribal-nations/statistics> [https://perma.cc/UJ47-E6NF] (last visited Apr. 26, 2020), meaning that restoring voting rights for those Natives arguably disenfranchised would not change the balance of the next election.

65. *Native American Voting Rights Act Signed into Law*, SEATTLE WKLY. (Mar. 18, 2019, 10:30 AM), <https://www.seattleweekly.com/news/native-american-voting-rights-act-signed-into-law/> [https://perma.cc/5BVX-RZ7M]; *see* 2019 Wash. Sess. Laws 32.

Set against the backdrop of North Dakota and Washington, we arrive at South Dakota. According to the South Dakota Department of Tourism, “approximately 71,800 Native Americans live in South Dakota,”<sup>66</sup> which accounts for about “9 percent of the state’s total population.”<sup>67</sup> But at present, South Dakota’s voter ID law does not permit tribal IDs—including those that may lack a traditional address—and measures to amend that provision were recently defeated.

South Dakota Native Americans who are similarly situated to their northern counterparts and were in effect disenfranchised could—and should—sue under the state’s constitution. As the state’s supreme court has declared, “[i]t is not the policy of the State of South Dakota to disenfranchise its citizens of their constitutional right to vote.”<sup>68</sup> To the contrary, the state’s constitution also includes a “free and equal” clause: “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.”<sup>69</sup> And because the “state affords great protection to a citizen’s voting franchise,”<sup>70</sup> those concerned about Native American voter suppression in the home of Mount Rushmore should consider suing on the basis of their state’s foundational document. Without such a suit and judicial remedy, or an alternative such as an amendment to the voter ID law or a settlement like its northerly neighbor, it can hardly be said that South Dakota’s elections, given this voting regime, are a “free and fair expression of the people.”<sup>71</sup>

### C. Montana

Nearly identical to the Pennsylvania constitutional provision ensuring a free and equal election, article II, section 13 of the Montana Constitution reads in full: “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.”<sup>72</sup>

In 2003, the Montana Supreme Court struck down a law which dictated “elections were limited to ‘record owners of real property’ (RORPs) rather

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66. *General Information*, TRAVEL S.D., <https://www.travelsouthdakota.com/culture-history/native-american/general-information> [<https://perma.cc/8J7V-YLJ2>] (last visited Apr. 18, 2020).

67. Stephen Groves, *South Dakota Bars IDs and ‘Disenfranchises’ Tribal Citizens*, INDIAN COUNTRY TODAY (Feb. 9, 2020), <https://indiancountrytoday.com/news/south-dakota-bars-ids-and-disenfranchises-tribal-citizens-w1AVDYGwqEK-eubn--8qrA> [<https://perma.cc/52RQ-UBMF>]; see also *QuickFacts: South Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/SD> [<https://perma.cc/3DJM-T9SH>] (last visited Apr. 18, 2020).

68. *Duffy v. Mortenson*, 497 N.W.2d 437, 439 (S.D. 1993).

69. S.D. CONST. art. VI, § 19.

70. *Heinemeyer v. Heartland Consumers Power Dist.*, 757 N.W.2d 772, 783 (S.D. 2008) (Gilbertson, C.J., dissenting).

71. *In re Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999*, 628 N.W.2d 336, 339 (S.D. 2001).

72. MONT. CONST. art. II, § 13.

than to the general constituency.”<sup>73</sup> In that case, “[i]nterestingly, not only d[id] the Plaintiffs argue that these provisions are unconstitutional, but Defendant Yellowstone County and *Amici* McGee and Simon also agree[d] that these provisions [we]re, in part or *in toto*, unconstitutional [under the state’s constitution].”<sup>74</sup> The court swiftly agreed. Notwithstanding its concession that “[t]here are circumstances . . . under which franchise limitation is lawful and constitutional”<sup>75</sup>—namely when a state interest is compelling<sup>76</sup>—the Montana Supreme Court could not find such a compelling state interest for the law in question.<sup>77</sup> This logic lays the foundation for voter suppression laws to be passed in Montana and, unfortunately, one was recently passed.

In 2018, the state approved via ballot initiative LR-129, which bans “individuals (with certain exceptions) from helping others vote absentee by collecting and delivering their voted ballots.”<sup>78</sup> Specifically, it prohibits individuals not “exempted” from knowingly collecting another’s election ballot.<sup>79</sup> The list of exempted persons includes, among others, election officials, postal service workers, caregivers, and family members.<sup>80</sup> On its face, this may seem reasonable; however, the initiative also “require[s] all those ‘exceptions’ to register at the elections office and polling place when turning in a ballot—providing their name, address and phone number as well as the voter’s name and address and their relationship to the voter.”<sup>81</sup> It further limits an exempted person to a collection of up to six ballots per election.<sup>82</sup>

The *Billings Gazette*, the largest newspaper in the state,<sup>83</sup> summarizes LR-129 as such:

This mandate is at least unnecessary and inconvenient, and it is likely to keep some ballots from getting returned. Consider how LR-129 would affect:

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73. *Finke v. State ex rel. McGrath*, 65 P.3d 576, 578–79 (Mont. 2003).

74. *Id.* at 579.

75. *Id.* at 580.

76. *See, e.g., Hill v. Stone*, 421 U.S. 289, 297 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1971); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 205 (1970); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 (1969).

77. *Finke*, 65 P.3d at 581.

78. NEW VOTING RESTRICTIONS IN AMERICA, *supra* note 35.

79. *Montana LR-129, Ballot Collection Measure (2018)*, BALLOTPEdia, [https://ballotpedia.org/Montana\\_LR-129\\_Ballot\\_Collection\\_Measure\\_\(2018\)](https://ballotpedia.org/Montana_LR-129_Ballot_Collection_Measure_(2018)) [<https://perma.cc/6VUQ-EUBP>] (last visited Apr. 18, 2020).

80. S. 352, 65th Leg., Reg. Sess. § 3(2) (Mont. 2017).

81. Larry Mayer, *Gazette Opinion: Like Mail Ballots? Vote No on LR-129*, BILLINGS GAZETTE (Oct. 10, 2018), [https://billingsgazette.com/opinion/editorial/gazette-opinion-like-mail-ballots-vote-no-on-lr/article\\_c25b6b8a-e177-59bf-a86a-d1b006b3e3ed.html](https://billingsgazette.com/opinion/editorial/gazette-opinion-like-mail-ballots-vote-no-on-lr/article_c25b6b8a-e177-59bf-a86a-d1b006b3e3ed.html) [<https://perma.cc/CA37-XHN2>].

82. Mont. S. 352 § 3(3).

83. *See Billings Gazette*, BALLOTPEdia, [https://ballotpedia.org/Billings\\_Gazette](https://ballotpedia.org/Billings_Gazette) [<https://perma.cc/ZW5U-8B2T>] (last visited Apr. 18, 2020).

- A senior living community where the staff or a resident offered to turn in ballots for anyone who wanted to save a stamp? Couldn't turn in more than six.
- Voters who have disabilities and cannot drive or otherwise get to the Post Office?
- A student government organization trying to turn out the youth vote by offering to return students' ballots?
- Voters who live many miles from their elections office whose neighbor offers to return ballots.

This extra red tape would be no small matter in Yellowstone County where thousands of ballots are returned to the elections office. Under LR-129, there would be a line snaking through the courthouse in the weeks before an election as people waited to register and present identification. The county would have the additional expenses of hiring staff to mind the registry—or would take staff away from core election duties at the busiest time of the year.<sup>84</sup>

Given these sorts of impediments, the law would face an uphill battle in court.

Moreover, the survival of other states' analogous initiatives under separate lines of attack proves the point. In Arizona, a similar law was passed in 2016. Shortly after its passing, the bill was challenged on federal constitutional and statutory grounds.<sup>85</sup> After a lengthy procedural history—the bill wound its way through the courts amidst injunctions and subsequent stays<sup>86</sup>—U.S. District Court Judge Douglas L. Rayes ruled that the law was constitutional because the plaintiffs lacked evidence to show that it impacted *minorities*—and specifically, the Native American population—in violation of the federal constitutional and statutory grounds on which it was challenged.<sup>87</sup>

But imagine if the law was challenged under Montana's constitutional provision instead, which the Montana Supreme Court characterized as “guarantee[ing] the *unencumbered* right of suffrage.”<sup>88</sup> There would be no need to ask whether there was an effect solely on the minority community; strict scrutiny would apply to the law's impact on all individuals.

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84. Mayer, *supra* note 81; see also Susan Carstensen, Opinion, *Ballot Initiative Is Voter Suppression in Disguise*, BOZEMAN DAILY CHRON. (Nov. 2, 2018), [https://www.bozemandailychronicle.com/opinions/letters\\_to\\_editor/ballot-initiative-is-voter-suppression-in-disguise/article\\_3a6540b8-2f28-5efa-9e27-9036ec3c8126.html](https://www.bozemandailychronicle.com/opinions/letters_to_editor/ballot-initiative-is-voter-suppression-in-disguise/article_3a6540b8-2f28-5efa-9e27-9036ec3c8126.html) [https://perma.cc/3XDV-WG4D] (“LR-129 . . . [is] a thinly disguised attempt to suppress voting by the elderly, the disabled, the poor and Native Americans . . . . LR-129 makes it harder for people to collect someone else's ballot and turn it in for them . . . . It's purported to solve a problem that doesn't exist. What LR-129 will do . . . is make it harder for people who have limited access to transportation to vote. It will prevent non-partisan get-out-the-vote efforts from helping people deliver their ballots.”).

85. See Complaint at 6, *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074 (D. Ariz. 2016) (No. CV-16-01065-PHX-DLR), ECF No. 1.

86. See Amended Findings of Fact and Conclusions of Law at 19, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824 (D. Ariz. 2018) (No. CV-16-01065-PHX-DLR), ECF No. 416.

87. See *id.* at 65–67.

88. *Finke v. State ex rel. McGrath*, 65 P.3d 576, 579 (Mont. 2003) (emphasis added).

Thankfully, one need not imagine this—the ACLU and the Native American Rights Fund have taken up this mantle. In a fifty-three-page complaint, the nonprofits have artfully laid out the aforementioned systematic disenfranchisement of Native American voters and how said suppression is furthered under the ballot collection law.<sup>89</sup> In fact, the complaint dives deeper into aspects of the typical family on a Native American reservation and its incongruence with the law, such as overcrowded homes in Montanan reservations and limits on ballot collections,<sup>90</sup> showing with even more particularity why the law should be struck down under the state’s expansive voter protection constitutional provision.<sup>91</sup> Time will tell, however, if Montana state courts adhere to their constitutional principles and protect their native populations.<sup>92</sup>

#### D. Limitations

Of course, it must be said that inhibiting voter suppression via state constitutional law is neither particularly novel nor a guaranteed winner. On the contrary, state statutory and constitutional challenges have been levied against suppressive laws and lost, including in states with increased constitutional protections for voting.<sup>93</sup> Against both state statutory and constitutional challenges, the Indiana Supreme Court found that “[t]he burdens occasioned by the Voter ID Law serve numerous substantial interests relating to the use of technology to modernize and to protect the integrity and reliability of the electoral process” and that subsequent “procedural burdens associated with the voting process[] are not sufficiently unreasonable” to warrant striking down the law.<sup>94</sup> So, too, did the Tennessee Supreme Court.<sup>95</sup>

Nonetheless, poor precedents should not be dispiriting to pursuing justice at the state level for two chief reasons. *First*, where voter suppression takes a different form than a voter ID law—for example, partisan gerrymandering<sup>96</sup>—such precedents are meaningless, which is particularly important as voter suppression laws continue to become more and more

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89. *See generally* Complaint for Declaratory Judgment and Injunctive Relief, W. Native Voice v. Stapleton, No. DV-2020-377 (Mont. Dist. Ct. Mar. 12, 2020).

90. *See generally id.*

91. The complaint also argues that plaintiffs are entitled to relief under the state constitution’s freedom of speech, freedom of association, and due process clauses. *See id.* at 42–52. While important potential avenues for relief, these arguments are outside the scope of this Article.

92. In between the drafting and publication of this Article, Montana District Judge Jessica T. Fehr issued a temporary restraining order to block the law on May 20, 2020, pending a full hearing on May 29, 2020. *See generally* Order Granting Plaintiffs’ Motion for Temporary Restraining Order and Order Setting Hearing on Plaintiffs’ Motion for Preliminary Injunction, W. Native Voice v. Stapleton, No. DV-2020-377 (Mont. Dist. Ct. May 20, 2020).

93. *See, e.g.*, League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 768–69 (Ind. 2010); City of Memphis v. Hargett, 414 S.W.3d 88, 108 (Tenn. 2013).

94. *League of Women Voters*, 929 N.E.2d at 768–69.

95. *See City of Memphis*, 414 S.W.3d at 108.

96. *See Forms of Voter Suppression*, *supra* note 5.

egregious.<sup>97</sup> *Second*, as research grows around the pernicious impact of voter ID and other suppressive laws,<sup>98</sup> jurists have an opportunity to reconsider just how burdensome such regulations can be and reassess their previous holdings. In the words of multiple U.S. Supreme Court justices, “it is never too late to ‘surrende[r] former views to a better considered position.’”<sup>99</sup>

#### CONCLUSION

Jurists, legislators, and scholars all have waxed poetic about the invidiousness of voter suppression. So too have they reflected on how the practice has dogged American elections since the Founding. Recent, multifaceted suppression tactics are just the newest wave, having applied creative means to their misguided ends. As such, advocates of expanding voting rights should match the creativity of their opponents and defend against such methods on less charted avenues, particularly where the foundation for defenses is strong. This Article seeks to highlight state constitutional law as one such defense.

Federal constitutional law does not affirmatively guarantee the right to vote, but state constitutional law does—and in some cases, it goes even further. Federal statutory law made tremendous strides to effectuate more expedient solutions to voter suppression, as they could immediately have nationwide effects unlike individual suits,<sup>100</sup> but one of its most important firewalls—the VRA’s preclearance requirements—has been singed. As such, advocates should continue to plumb the depths of state law to give rise to claims that can bring forward positive change—or at least halt the

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97. See Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html> [<https://perma.cc/AES5-SUCE>] (observing that voting “restrictions fit an increasingly unabashed pattern of Republican politicians’ efforts to discourage voters likely to oppose them” (emphasis added)).

98. See, e.g., German Lopez, *A New Study Finds Voter ID Laws Don’t Reduce Voter Fraud—or Voter Turnout*, VOX (Feb. 21, 2019, 8:00 AM), <https://www.vox.com/policy-and-politics/2019/2/21/18230009/voter-id-laws-fraud-turnout-study-research> [<https://perma.cc/FR6K-6788>] (highlighting a “growing body of research that suggests voter ID laws have a much smaller effect than critics feared and proponents hoped”).

99. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring)); see also *Ring v. Arizona*, 536 U.S. 584, 611 (2002) (Scalia, J., concurring) (“I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance . . .”).

100. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As Chief Justice Earl Warren noted, legislation prior to the VRA

has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

*Id.* (footnote omitted).

regressive march of voter suppression. South Dakota and Montana are prime examples of states where such claims are currently ripe, using Pennsylvania as an exceedingly helpful precedent to further the cause of free and fair elections for all.