



# POLICY BRIEF

## **How Nebraska's Constitutional Protection of Voting Rights Compares to Other States**

**By Ryan Patrick**

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### **Executive Summary**

Article I, Section 22 of the Nebraska Constitution states: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." The Constitutional Conventions of several states with language similar to that of Nebraska seem to indicate that the intent of an election being "free," is to be construed as having no intervention by another person to stop an authorized party from exercising their right. States left it open to their legislative bodies to decide how it would be decided who was first free to vote, through registration or possible taxes, but once a citizen (typically only a white male at the time) had fulfilled that state-created obligation, he was free, with no hindrance to his ability to vote.

Nebraska's legislative history does not show any direct links as to where its own language came from. However, by comparison with other states' intents as well as looking at the brief conversation made during Nebraska's Constitutional Convention debate, calling elections free, with no hindrance or impediment appears to be redundant. The second section of Nebraska's language appears to be simply a clarification of what is meant by the word "free."

### **Nebraska's Elections Language**

Article I, Section 22 of the Nebraska Constitution states: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

There was very little debate in the Convention about the phrase, with only one back-and-forth about the language included in Nebraska's Constitutional Convention debates. The transcript from July 13 of 1871 reads:

MR. ESTABROOK. Mr. Chairman, I would like to inquire what is meant by the worlds “all elections shall be free.”

MR. WAKELEY. I understand that to mean that no voter shall be intimidated, but shall be allowed to exercise free choice as to who he votes for.<sup>1</sup>

MR. LAKE. I suppose it means that there shall be no charge made, but a man shall be allowed to vote without it costing him anything.<sup>2</sup>

Similarly, Mr. Hascall moved to amend by adding “but laws may be made to ascertain by proper proofs the citizens who are entitled to the right of suffrage.” Later, Mr. Lake stated that, “It says that the elective franchise shall be free and without hindrance, but certainly the Legislature would have the right to adopt any reasonable mode to ascertain that, and lay down some rules by which the officers of the election shall be governed. You might as well say that a man should not be challenged on election day, or sworn to his qualifications to vote.”<sup>3</sup> The amendment was then withdrawn.

On August 5, Mr. Hascall offered a new amendment that “Laws shall be made for ascertaining by proper proof the citizens who are entitled to the right of suffrage hereby established.” While some opposed the idea of voter registration rolls because the list was in the hands of partisans and considered a limitation on voting, it was agreed on that this loss of liberty could be approved so long as the law was “a good one.”<sup>4</sup>

The meaning of “all elections shall be free” was brought up again by Mr. Vifquain. Mr. Philpott responded, “Mr. Chairman. All a person, who is entitled to vote, has to do is to go to the registrar and ask to be registered and then he can go to the polls to vote.”<sup>5</sup>

It appears from these conversations that it was quite acceptable under the Nebraska framers’ understanding of free and without hindrance or impediment that this did not mean one should not have to register or that limitations could not be placed upon a person before being allowed to vote, but that, after following the prescribed rules

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<sup>1</sup> It should be noted, for what it’s worth, that Mr. E. Wakeley, from Douglas County, was on the standing committee for Article I, the Bill of Rights, and thus may be owed more deference in his interpretation.

<sup>2</sup> Addison Sheldon, “Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention” (1905).

<sup>3</sup> *Id.* at 348.

<sup>4</sup> *Id.* at 483.

<sup>5</sup> *Id.* at 485.

in order to obtain the right to partake in an election, they should then be able to do so unimpeded. However, qualification were still allowed before granting this freedom.

The opinion of Mr. Wakely in the original definition of “free” may be allowed more credence because of his standing, but we may also glean a clear meaning by looking at similar language from nearby states in earlier constitutions.

Some states with similar Bill of Rights election language to that of Nebraska include: Arkansas, written in 1868, Idaho in 1890, Missouri in 1875, New Mexico in 1910, Oklahoma in 1902, Pennsylvania in 1790, South Carolina in 1868, South Dakota in 1889, Washington in 1889, and Wyoming in 1889.

### **Comparative State Histories**

There are several states that share a close approximation to the language Nebraska employs. By examining the verbiage utilized in similar phrases as well as the legislative history behind each state’s related terminology, we may be able to get a better picture of the meaning behind these somewhat vague words.

The following is each state’s legislative history with the current election language in bold.

#### **Pennsylvania**

**Article 1, Section 5. “All elections are free and equal and no civil or military power shall interfere to prevent the free exercise of the right of suffrage.”**

One of the earliest, similar, Rights of election to Nebraska is that of Pennsylvania, which uses the language “That elections shall be free and equal” in Art. IX, Sec. V.<sup>6</sup> There was no debate on the language and there appears to be no discussion upon the meaning of this phrase before acceptance.

#### **Arkansas**

**Article 3, Section 2. “Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector’s name; or whereby such**

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<sup>6</sup> D. Caldwell, *The Minutes of the Convention that Formed the Present Constitution of Pennsylvania* 174 (1790).

***right shall be impaired or forfeited, except for the commission of a felony at common law, upon lawful conviction thereof.”***

The first Arkansas Constitutional Convention was held in 1836 and discussion was had on the fourth Constitution again in 1864, still several years before that of Nebraska in 1871. In that 1864 discussion of Arkansas’ similar Right which states, “That all elections shall be free and equal,” it was asked “What do you mean by ‘equality’ in elections?” by Mr. Bradley.<sup>7</sup> He continued, rhetorically, “what does it mean when it is declared that ‘all elections shall be free?’ Free? No, sir; the people of the many counties had not the *power* [italics in original] to march to those bogus ballot-boxes that were lying at the root of the trees of Little Rock!”<sup>8</sup>

Mr. Bradley here refers to elections being “free,” not in that there is no poll or tax in order to do so, but that citizens have the unencumbered power or ability to do vote. There was no other conversation about the meaning of “free,” and “equal” seems not to have caused much consternation either. This is possibly due to the fact that this fourth constitution was in response to rejoining the Union after the Civil War.

### **South Carolina**

***Article 2, Sections 2-3. “No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State. Every citizen possessing the qualifications required by this Constitution and not laboring under the disabilities named in or authorized by it shall be an elector.”***

The Constitutional Convention of South Carolina was held in 1868. Section 33 was originally read as “All elections shall be free and open, and every inhabitant of this Commonwealth possessing the qualifications provided for in this Constitution, shall have an equal right to elect officers and be elected to fill public employments.”

One Mr. Ransier then said, “I desire to know whether the principle is provided for that every citizen, possessing equal qualifications as provided for in this Constitution, shall have equal, civil and political rights, and that such citizens could be elected to hold office or have the benefit of public carriages.”

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<sup>7</sup> John G. Price, *Debates and proceedings of the Convention to Form a Constitution for the State of Arkansas* 113 (1868), available at <http://ia600407.us.archive.org/10/items/cu31924032658480/cu31924032658480.pdf>.

<sup>8</sup> *Id.*

A Mr. Whittemore replied, “It appears to me the language of the section [. . .] is sufficiently plain and distinct.”<sup>9</sup> No other amendments were proposed by the Convention regarding the equality and availability of franchise, and the Right was approved only changing the term “public employments” to the word “offices.”<sup>10</sup> The language here is similar to that of Arkansas, including a requirement for possession of qualifications in order to vote.

## **Missouri**

**Article 1, Section 25. “*That all elections shall be free and open; and no poser, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.*”**

Missouri held their state convention in 1875, just four years after that of Nebraska. In discussion upon the language “That all elections ought to be free and open,” it was sought by Mr. Hammond that it less ambiguous. In order to clarify that no one, civil or military, should be able to remove from the people the “safety of the ballot” and keep parties from disenfranchising voters, one Mr. Cotty recommended replacing the word “open” with “equal.”<sup>11</sup>

When pressed on the meaning of the word “equal,” Mr. Cotty responded, “That every man shall have the right to vote. That there shall be no restriction on the right of any person to vote.” On further discussion it was noted that this change was made to show that there should not be some “tax of some nature [. . .] that would prevent the elections from being equal in one sense.”<sup>12</sup> No amendment was passed, however, and the Right stayed as “free and open.”

## **South Dakota**

**Article 7, Section 1. “*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.*”**

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<sup>9</sup> J. Woodruff, *Proceedings of the Constitutional Convention of South Carolina* 350 (1868).

<sup>10</sup> *Id.* at 792.

<sup>11</sup> Isidor Loeb, *Debates of the Missouri Constitutional Conventional of 1875* 67, 69 (1875).

<sup>12</sup> *Id.* at 225.

The 1889 Convention of South Dakota accepted the Right of elections with no discussion on the meaning of “free.” Indeed, most debate was on the length of time between elections.<sup>13</sup>

## **Wyoming**

**Article 1, Section 27. “Elections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammelled exercise of the right of suffrage.”**

Wyoming spent much of its debate on suffrage on the question of extending the franchise to women, but also if there should be an education test on the right to vote. Mr. Conaway pointed out that some people who are not educated are still wise enough to wield the vote effectively, but also that “it is not always that the wisdom, power, and influence given by education are wisely practiced.”<sup>14</sup> There was no test ultimately placed before the right to vote in Wyoming.

Looking into the legislative history of Conventions later than Nebraska would not shed light on the intent of Nebraska when originally authoring her own.

## **Comparative Conclusion**

By comparing the Constitutional Congress discussions of the states’ similar voting rights language in their Bills of Rights earlier than that of Nebraska, by looking at the conversations had while crafting Nebraska’s own, and by looking for debates in some states who may have looked at Nebraska for inspiration, we may see the intent of an election being “free,” as in having no intervention by another person to stop an authorized party from exercising their right. States left it open to their legislative bodies to decide how it would be decided who was free to vote, through registration or possible taxes. Once a citizen had fulfilled that state-created obligation he was free, with no hindrance to his ability to vote.

Nebraska’s legislative history does not show where its language came from. However, by comparison with other states’ intents as well as looking at the brief conversation made during Nebraska’s Constitutional Convention debate calling

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<sup>13</sup> A.J. Edgerton, *South Dakota Constitutional Convention*, vol. 2 471-483 (1889).

<sup>14</sup> *Journal and Debates of the Constitutional Convention of the State of Wyoming* 386 (1889).

elections free, with no hindrance or impediment, appears to be simply redundant. The second section appears to be simply a clarification of what is meant by the word “free.”