

DEMOCRACY’S RAINBOW: THE LONG ASCENT AND RAPID DESCENT OF VOTING RIGHTS IN KANSAS

*By Stephen Douglas Bonney**

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”

Wesberry v. Sanders, 376 U.S. 1, 17 (1964)

I. INTRODUCTION

More than fifty years have passed since the Warren Court issued its seminal voting rights decisions, including *Baker v. Carr*,¹ *Wesberry v. Sanders*,² and *Reynolds v. Sims*,³ among many others. In his majority opinion in *Reynolds*, Chief Justice Warren noted that, “history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”⁴

For its first 150 years, Kansas expanded the right to vote, often ahead of federal constitutional amendments. But, in 2011, the Kansas Legislature—at the insistence of then newly elected Secretary of State Kris W. Kobach—passed the Secure and Fair Elections Act (“the SAFE Act”), which is among the more restrictive voter identification laws in the country.⁵ This article will survey Kansas’s historical expansion of the right to vote, will review the SAFE Act’s requirements and its impact on Kansas’s voters, and will argue that the SAFE Act is bad public policy.

II. THE RIGHT TO VOTE IN KANSAS 1861 TO 2011

On June 17, 1859, the people of the Kansas Territory elected 52 delegates—35 Republicans and 17 Democrats—to the Constitutional Convention of 1859, and those delegates began meeting at Wyandotte on July 5, 1859.⁶ The debates over the Wyandotte Constitution were contentious and involved many significant issues, but the Convention produced a relatively progressive state

* Chief Counsel & Legal Director, American Civil Liberties Foundation of Kansas; BA, & JD University of Kansas. I would also like to thank my intern, Abby Hall (KU JD 2016), for her outstanding research assistance and her citation expertise.

1. 369 U.S. 186 (1962) (holding that federal courts can review states’ drawing of election district boundaries despite “political question” doctrine).

2. 376 U.S. 1 (1964).

3. 377 U.S. 533 (1964).

4. *Id.* at 555.

5. Kansas Secure and Fair Elections (SAFE) Act, ch. 56, 2011 Kan. Sess. Laws 795 (2011).

6. Kan. Historical Soc’y, *Wyandotte Constitutional Convention*, KANSAPEDIA (Aug. 2012), <https://www.kshs.org/kansapedia/wyandotte-constitutional-convention/17884>.

charter modeled on the Ohio Constitution. Among other things, the Wyandotte Constitution granted women property rights and equal custody rights to their children,⁷ which were rights not commonly enjoyed by women in ante-bellum America. But, on the regressive side of the ledger, the delegates—with solid support from the Democrats—seriously considered, but ultimately rejected, a provision that would have prohibited the migration of free blacks into the new state.⁸

The debate over suffrage was one of many significant issues that divided the Wyandotte Convention's delegates. The draft constitution granted suffrage only to "[e]very white male person, of twenty-one years and upward."⁹ One delegate—William Hutchinson—made an impassioned plea "to strike out the word 'white'" from the draft constitution's provision defining the franchise because "[i]f the operation of the elective franchise is beneficial . . . then we should extend that benefit to every class of men."¹⁰ Moreover, although none of the delegates was a woman, a group of women led by Clarina I. H. Nichols "sat in the Wyandotte constitutional convention, unelected and uninvited, with their knitting in their hands, hoping to influence the delegates to leave the word 'male' out of the franchise clause."¹¹ Neither Hutchinson nor Nichols achieved these suffragist goals.

In the end, the delegates rejected universal suffrage and fully enfranchised only white men twenty-one years of age and over. Specifically, the Wyandotte Constitution of 1859 defined the right to vote in the following terms:

Every white male person, of twenty-one years and upward, belonging to either of the following classes, who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector: First, Citizens of the United States. Second, Persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization.¹²

The second class of voters enfranchised in the Wyandotte Constitution's suffrage provision is the most interesting. From 1861 until 1918, when the state constitution was amended to remove the reference to the second class of voters,¹³ Kansas allowed non-citizens to vote as long as they had "declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization."¹⁴ In this regard, Kansas was not alone. Twenty-two states

7. WYANDOTTE CONST. of 1859, art. XV, § 6.

8. See generally Kan. Historical Soc'y, *Wyandotte Constitution*, KANSAPEDIA (Apr. 2010), <https://www.kshs.org/kansapedia/wyandotte-constitution/13884> (last modified Oct. 2015).

9. WYANDOTTE CONST. of 1859, art. V, § 1.

10. Kan. Historical Soc'y, *William Hutchinson*, KANSAPEDIA (June 2010), <https://www.kshs.org/kansapedia/william-hutchinson/17071> (last modified Nov. 2012).

11. Wilda M. Smith, *A Half Century of Struggle: Gaining Woman Suffrage in Kansas*, 4 KAN. HIST. 74, 75 (1981).

12. WYANDOTTE CONST. of 1859, art. V, § 1.

13. The Suffrage Amendment to the Constitution, ch. 353, 1919 Kan. Sess. Laws xii (1919).

14. *State ex rel. Gregory v. Irely*, 116 Kan. 21, 22, 225 P. 1050 (1924). Coming at the height

allowed non-citizens to vote for significant periods of time during the nineteenth and early twentieth centuries.¹⁵ Arkansas was the last state to amend its constitution to stop that practice, doing so in 1926.¹⁶

The constitution's suffrage article also withdrew the right to vote from certain classes of white men. Specifically, it denied the right to vote to persons who were under guardianship, incompetent, insane, or had been convicted of treason or a felony unless restored to their civil rights.¹⁷ The new constitution further empowered the state legislature to "pass such laws as may be necessary for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established."¹⁸

Statehood did not end the political debate over suffrage in Kansas. In 1867, for instance, Kansans voted on two proposed constitutional amendments that would have extended suffrage to all Kansans over the age of twenty-one by eliminating the words "white" and "male" from the suffrage provision of the Kansas Constitution.¹⁹ But the all-white, all-male electorate rejected those measures on November 5, 1867.²⁰ Black men finally gained the right to vote in 1870 upon ratification of the Fifteenth Amendment to the United States Constitution.²¹

Women's suffrage came to Kansas in incremental steps. The first Kansas Legislature gave women the right to vote in school board elections, which the legislators apparently saw as a topic of special concern to women.²² At the time, this provision was radical, with Kentucky being the only other state to extend such a partial franchise to women.²³ Although suffragists were active in Kansas even before statehood, the movement really took hold in 1884 with the founding of the Kansas Equal Suffrage Association.²⁴ In 1887, women gained the right to vote in municipal elections, and many women were promptly elected to municipal governments.²⁵ For instance, in 1887, voters in the little Quaker village of Argonia, Kansas, elected Susanna Madora Salter as the first woman mayor in United States history.²⁶ Despite that triumph, however, voters in the

of American involvement in World War I, the amendment of the Kansas Constitution to delete the provision allowing alien voting may have been influenced by anti-German animus. *See State ex rel. Brewster v. Covell*, 103 Kan. 754, 175 P. 989 (1918) (holding that aliens from an enemy nation are ineligible for citizenship and cannot exercise any political rights).

15. *See* Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114–116 (1931).

16. *Id.*

17. WYANDOTTE CONST. of 1859, art. V, § 2.

18. WYANDOTTE CONST. of 1859, art. V, § 4.

19. *See* Kan. Historical Soc'y, *Women's Suffrage*, KANSAPEDIA (Nov. 2001), <https://www.kshs.org/kansapedia/women-s-suffrage/14524>.

20. *See id.*

21. U.S. CONST. amend. XV, § 1.

22. Martha B. Caldwell, *The Woman Suffrage Campaign of 1912*, 12 KAN. HIST. Q. 300 (1943).

23. *Id.*

24. *Id.*

25. *Id.*

26. Monroe Billington, *Susanna Madora Salter—First Woman Mayor*, 21 KAN. HIST. Q. 173

election of 1894 once again rejected an equal suffrage amendment.²⁷ Finally, on November 5, 1912, nearly eight years before the Nineteenth Amendment enfranchised women throughout the nation, voters approved the Equal Suffrage Amendment to the Kansas Constitution.²⁸

On April 7, 1971, Kansans voted to ratify the Twenty-sixth Amendment, which gave eighteen year olds the right to vote.²⁹ At the same time, Kansas voters amended Article 5, Section 1 of the Kansas Constitution to change the voting age from twenty-one to eighteen.³⁰ The Twenty-sixth Amendment was finally ratified on July 1, 1971, just over three months after Congress had proposed it.³¹

III. ELECTION FRAUD & LEGISLATIVE RESPONSES IN KANSAS

In 1854, Congress passed the Kansas-Nebraska Act, which among other things established the Kansas Territory on the principle of popular sovereignty—the right of the people to choose whether each new state would be slave or free.³² Territorial elections held for the purpose of choosing whether Kansas would permit slavery spawned repeated instances of election fraud, usually as a result of the illegal actions of election officials.³³ Perhaps the most notorious fraud in the territorial era involved the elections surrounding the Lecompton Constitution. On December 21, 1857, the territorial government held an election on the question of whether the Lecompton Constitution should be submitted to Congress “with” or “with no” slavery.³⁴ Two weeks later, on January 4, 1858, Kansans voted for state officers under the hotly disputed Lecompton Constitution.³⁵ Fraud tainted both elections.³⁶ For instance, on January 4, 1858, election judges working at the polls in Shawnee falsified poll books to record nearly 900 proslavery votes when only about 250 men had voted in that township, and election judges at Kickapoo listed on the township’s poll books fraudulent votes by Horace Greeley, President James Buchanan, and many other prominent politicians of that era.³⁷ These fraudulent practices were typical of other Kansas territorial elections during the 1850s.

In 1859, in the wake of five years of electoral mischief, the territorial legislature enacted Kansas’s first voter registration law, which required

(1954).

27. Caldwell, *supra* note 22.

28. *Id.*

29. Tom McVey, *U.S. Teen Vote Change Approved*, WICHITA EAGLE, Apr. 8, 1971 at 8A.

30. *Id.*

31. *18-Year-Old Vote: Constitutional Amendment Cleared*, CQ ALMANAC, <https://library.cqpress.com/cqalmanac/document.php?id=cqa171-1253597> (last visited Apr. 30, 2016)..

32. NICOLE ETCHESON, *BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA* 156 (University Press of Kansas 2006).

33. *Id.* at 164.

34. *Id.* at 156.

35. *Id.* at 162.

36. *Id.* at 163–164.

37. *Id.* at 164.

assessors of all cities and townships to register every qualified voter and prohibited eligible voters (white men age twenty-one and above) from voting if they were not registered.³⁸ The first Kansas state legislature declined to enact a similar voter registration law.³⁹ But registration requirements reappeared briefly in 1867 when the Kansas legislature passed a law requiring trustees to ascertain the names of every qualified voter in their respective township or ward.⁴⁰ Eligible voters left off of the lists were authorized to apply for the inclusion of their names,⁴¹ but anyone ultimately absent from the lists of qualified voters was not permitted to cast a ballot in any election.⁴² This requirement was short-lived, however, because the legislature repealed this voter registration law in 1868.⁴³

In 1869, the legislature addressed election fraud in a voter registration law that required voters in first class cities to register and also defined certain election crimes.⁴⁴ At the time, state law defined first class cities as those having more than fifteen thousand inhabitants.⁴⁵ The voter registration portion of the law required every eligible voter from those cities to appear in person before an appointed board in order to register his “name, age, occupation, and particular place of residence.”⁴⁶ Proof of identity was not required unless requested by a member of the board or by some “other person.”⁴⁷ If any person objected to the registration, the person attempting to register would be required to prove his eligibility by at least two witnesses, himself included.⁴⁸ The criminal provisions of the 1869 legislation addressed both fraud by election officials and voter impersonation fraud. Specifically, the law made it a crime, first, for an election official to refuse to enter a voter on the registration lists or to enter on the lists the name of any person not entitled to vote and, second, for any person to “falsely personate another” for purposes of registering a false name to vote.⁴⁹ The law made both crimes punishable by a year of confinement at hard labor and permanent loss of the right to vote.⁵⁰

Registration requirements remained largely the same for the next ten years,

38. Act of Feb. 4, 1859, ch. 65, 1859 Kan. Sess. Laws 386. During the territorial period, an eligible voter was a “free white male citizen of the United States” or a “free male Indian who is made a citizen by treaty or otherwise,” who was at least twenty-one years old, an inhabitant of the county or district where he voted, and a territorial taxpayer. Elections, ch. 66, § 11, 1855 Kan. Sess. Laws. 329, 332.

39. KAN. CONST. of 1861, art. IV; KAN. CONST. of 1861, art. V. The first Kansas legislature’s elections statutes repeated the suffrage definition included in the Kansas Constitution but included no voter registration requirement.

40. Act of Feb. 26, 1867, ch. 112, 1867 Kan. Sess. Laws 190.

41. *Id.* at 191–92.

42. *Id.* at 193.

43. Act to Provide for the Regulation of Voters, ch. 87, 1868 Kan. Sess. Laws 895.

44. Act of Mar. 3, 1869, ch. 117, 1869 Kan. Sess. Laws 232.

45. Act of Feb. 24, 1868, ch. 18, 1868 Kan. Sess. Laws 129.

46. Act of Mar. 3, 1869, ch. 123, §9–20, 1869 Kan. Sess. Laws 232, 234–36.

47. *Id.*

48. *Id.*

49. *Id.* at § 18–19.

50. *Id.*

when, in 1879, the legislature added residents of second class cities to the list of municipalities whose eligible voters would be required to register before voting.⁵¹ At the time, state law defined second-class cities as those municipalities having between 2,000 and 15,000 residents.⁵² The registration lists, referred to in the law as “poll-books,” were held open at all times during the year until ten days preceding any election.⁵³ Every registration required the voter’s name, date of registration, age, occupation, and residence address.⁵⁴ Eligible voters who had not registered in a timely manner were not allowed to vote.⁵⁵

Kansas experienced another episode of election fraud during the Populist uprising of the late-nineteenth century. In 1893, for example, the Republican-controlled state board of canvassers certified eighteen Republican candidates as victorious over Populist candidates despite acknowledged official election fraud, including the transposition of vote totals for Republican and Populist candidates, permitting ineligible and non-resident candidates to run and be elected, bribery of election workers, and miscounting of votes.⁵⁶ Despite these stolen elections, mostly in rural areas where the Populists were strongest, the Republican legislature did not see fit to expand voter registration statewide. The legislature did, however, pass laws adopting the Australian ballot and regulating certain corrupt election practices.⁵⁷ Specifically, the corrupt practices legislation expanded criminal prohibitions against bribery in conjunction with elections, making it unlawful to buy votes with cash, intoxicating liquor, and cigars, among other things.⁵⁸ The Australian ballot law standardized ballots and procedures for the holding of elections, enhanced the enforcement of ballot secrecy, and provided for the punishment of violations of the act.⁵⁹

Over the next ninety years, the legislature slowly expanded voter registration requirements. But, as late as the early 1970s, Kansas law only required eligible voters living in cities of the first or second class and in counties of more than 100,000 people to register to vote.⁶⁰ Finally, in 1971, the sixty-fourth legislature adopted universal voter registration so that all legally qualified voters were required to register before being allowed to vote.⁶¹ Although Kansas was particularly slow to adopt statewide voter registration, its history of voter registration requirements was typical of other states. Specifically, Kansas’s

51. Act of Mar. 11, 1879, ch. 80, 1879 Kan. Sess. Laws 159.

52. Act of Feb. 28, 1868, ch. 19, 1868 Kan. Sess. Laws 154.

53. Act of Mar. 11, 1879, ch. 80, § 5, 1879 Kan. Sess. Laws 159,159–60.

54. *Id.* at 160.

55. *Id.*

56. Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age*, 100 POLI. SCI. Q. 669, 675–76 (1985).

57. Act to Prohibit the Corrupt Use of Money and Corrupt Practices at Elections, ch. 77, 1893 Kan. Sess. Laws 101; Act of Mar. 11, 1863, ch. 78, 1893 Kan. Sess. Laws 106.

58. Act to Prohibit the Corrupt Use of Money and Corrupt Practices at Elections, ch. 77, 1893 Kan. Sess. Laws 101.

59. Act of Mar. 11, 1863, ch. 78, 1893 Kan. Sess. Laws 106.

60. *Id.*

61. Act of Mar. 27, 1971, ch. 131, 1971 Kan. Sess. Laws 295.

voter registration laws were inspired by election irregularities and began in urban areas where voters were more likely to be immigrants and anonymous.⁶² Similarly, Kansas's history shows that changes in voter registration laws were often manipulated for partisan political reasons.⁶³

IV. THE VOTING WARS, VOTER ID, AND THE SAFE ACT

The disputed 2000 presidential election brought the partisan voting wars onto the nation's television screens and front pages, thus alerting everyone who was paying attention to the fact that elections in large democracies are messy and partisan affairs. Congress's major response to the problems that surfaced during the 2000 general election and the Florida election contest, in particular, was to pass the Help America Vote Act of 2002 (HAVA).⁶⁴ Despite the enactment of HAVA and other measures, serious problems with election administration in the United States persist.⁶⁵

During the debates over HAVA, Senator Christopher "Kit" Bond (R-MO) "demanded that the act include a provision requiring first-time voters who registered by mail to produce identification the first time they voted in person."⁶⁶ Although that provision of HAVA marked the first time any federal election law required a voter to produce identification at the polls, it is an exceedingly narrow requirement, applying only if the voter registers for the first time by mail and if the responsible election authorities fail to verify that registration against a state database before the election.⁶⁷ Even when the HAVA identification requirement applies, it is easily met since—under HAVA—a "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" is sufficient proof of identity.⁶⁸

Currently, thirty-four states have adopted voter ID laws, many of which—like HAVA itself—permit voters to prove their identities by showing utility bills and other such documents that list the voter's name and address.⁶⁹ In 2004, the Kansas legislature amended the law to require—in compliance with HAVA—

62. Vanessa Perez, *The Effects of Voter Registration and Declining Political Party Competition on Turnout in the United States of America, 1880–1916* (2014) (unpublished Ph.D. dissertation, Columbia University) at 50–51 (on file with author).

63. Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age*, 100 POLI. SCI. Q. 669, 675–76 (1985).

64. Help America Vote Act of 2002, Pub. L. No. 107–252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–15545 (2012)).

65. PEW CHARITABLE TRUSTS, THE FIRST COMPREHENSIVE ASSESSMENT OF ELECTION ADMINISTRATION ACROSS THE NATION (2013), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/pwelectionsperformancindexbriefpdf.pdf. These problems include the rejection of absentee, overseas, and provisional ballots, difficulty with voter registration, and voter confusion or vote recording errors caused by voting technology, among others.

66. RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 47 (2012).

67. 42 U.S.C. § 15483(b) (2012).

68. 42 U.S.C. § 15483 (b)(2)(A)(i)(I),(II) (2012).

69. Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 744 (2015).

first-time voters to produce a similar array of identification documents.⁷⁰ But, in the years since Congress adopted HAVA, at least seven states—Georgia, Indiana, Kansas, Mississippi, Tennessee, Texas, and Virginia—have adopted strict photo ID laws that typically require voters to produce a valid driver's license or passport before casting a ballot.⁷¹ If a voter fails to produce a qualifying photo ID, the voter is permitted to cast a provisional ballot, which will only be counted if the voter provides the election authorities with a qualifying photo ID within a specified time period, usually a few days, after the election.⁷²

The Kansas ID law resulted from the 2010 general election. That year, Kris Kobach campaigned for the office of Secretary of State on a platform that stricter voter identification and proof of citizenship laws were essential because the United States was facing an epidemic of voter fraud.⁷³ On November 2, 2010, voters elected Mr. Kobach as the Kansas's thirty-first Secretary of State.⁷⁴

Shortly after taking office in January 2011, Secretary Kobach drafted and submitted the SAFE Act to the Kansas legislature.⁷⁵ The bill passed both houses, and Governor Brownback signed it into law on April 18, 2011.⁷⁶ The SAFE Act significantly amended three facets of Kansas's election laws on advance voting, in-person voting, and voter registration, and—in a law review article—Secretary Kobach proudly declared that passage of the SAFE Act made Kansas the first state to require voters to produce a photo ID for in-person voting, to require absentee voters to list their driver's license numbers on their ballot application forms and to require election officials to verify the signatures on absentee ballots, and to require people who register to vote for the first time after January 1, 2013 to produce documentary proof of citizenship before they can be registered to vote.⁷⁷

As a result of the SAFE Act, Kansas voters must now show specific, government-issued photo identification when they vote at the polls or by advance voting, either in person or by mail.⁷⁸ As originally enacted, the statute listed the following photo IDs as acceptable for voting: (1) a valid⁷⁹ driver's

70. Act of Apr. 5, 2004, ch. 25, § 4, 2004 Kan. Sess. Laws 95, 97–98. (relating to voter identification)

71. *Id.*

72. *Id.*

73. Scott Rothschild, *Kobach Presses Issue of Election Fraud: Current, Former Secretaries of State Say No Problem Actually Exists*, LAWRENCE J.-WORLD (Aug. 15, 2010), <http://www2.ljworld.com/news/2010/aug/15/kobach-presses-issue-election-fraud/>.

74. See KAN. SEC'Y OF STATE, 2010 GENERAL ELECTION OFFICIAL VOTE TOTALS (2010), http://www.kssos.org/elections/10elec/2010_General_Election_Results.pdf.

75. Kris. H. Kobach, *Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put – People Want Secure and Fair Elections*, 62 SYRACUSE L. REV. 1, 2 (2012).

76. H.B. 2067, KAN. LEGIS. 2011-2012 SESSIONS, http://kslegislature.org/li_2012/b2011_12/measures/hb2067/ (last visited May 15, 2016).

77. *Id.*

78. KAN. STAT. ANN. § 25-2908(h) (2015).

79. Voters over the age of sixty-five could present an expired driver's license, and it also contained strictly limited exemptions. *Id.*

license issued by any state or district; (2) a state-issued photo ID card; (3) a concealed carry license; (4) a United States passport; (5) a governmental ID badge or document; (6) a United States military ID; (7) a student ID from a Kansas accredited postsecondary education institution; or (8) a government-issued public assistance card.⁸⁰ The law exempts from the photo ID requirement active duty military personnel and their families, people with religious objections, and people with permanent physical disabilities who are unable to travel to obtain a qualifying ID.⁸¹ In the 2012 legislative session, the Legislature added Native American tribal IDs to the list of acceptable photo identification.⁸² Thus, after the SAFE Act took effect, non-photo identification—such as utility bills, bank statements, paychecks, government checks, and other documents showing the name and address of the voter—were no longer sufficient.⁸³ With regard to advance voting by mail, the SAFE Act also requires signature verification.⁸⁴

With respect to voter registration, the SAFE Act requires that, effective January 1, 2013, new voters seeking to register to vote in Kansas for the first time must supply documentary proof of citizenship before their names are entered on the voting rolls.⁸⁵ However, voters registered to vote on the effective date of the SAFE Act's documentary proof of citizenship requirement are "deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship."⁸⁶ The law contains a short list of documents that the state election authorities will accept as adequate proof of citizenship, including birth certificates, passports, and naturalization documents.⁸⁷

The documentary proof of citizenship aspect of the SAFE Act has caused a huge problem in Kansas. As a result of the National Voter Registration Act's so-called "motor-voter" provision, nearly half of all Kansas people register to vote at driver's license offices.⁸⁸ But, when the SAFE Act's proof of citizenship requirement took effect, the Kansas Department of Revenue offices that handle driver's license renewals had no systems in place to collect citizenship documents or to transmit such documents to the Secretary of State's office or to the local election authorities.⁸⁹ This bottleneck has caused the number of would-

80. H.B. 2067 § 11(h)(1)(A)–(H), 2011 Leg., Reg. Sess. (Kan. 2011).

81. KAN. STAT. ANN. § 252908(i) (2012).

82. S.B. 129, 2012 Leg., Reg. Sess. (Kan. 2012).

83. KAN. STAT. ANN. § 25-2908(d) (2010).

84. KAN. STAT. ANN. § 25-1122(b), (d) (2015).

85. Kansas SAFE Act, ch. 56, § 8, 2011 Kan. Sess. Laws 80607;

86. KAN. STAT. ANN. 25-2309(n).

87. *Id.*

88. See U.S. ELECTION ASSISTANCE COMMISSION, THE 2014 EAC ELECTION ADMINISTRATION AND VOTING SURVEY COMPREHENSIVE REPORT: A REPORT TO THE 114TH CONGRESS 80 (2015), http://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf.

89. See John Hanna, *Kansas won't require proof of legal residency for driver's license renewals*, KAN. CITY STAR (Sept. 16, 2013), <http://www.kansascity.com/news/local/article327552/Kansas-won%E2%80%99t-require-proof-of-legal-residency-for-driver%E2%80%99s-license-renewals.html> (Kansas Dept. of Revenue did not have a procedure for collecting citizenship

be voter registrants in so-called “suspense status” to mount to outrageous totals.⁹⁰ By September 2015, for instance, the suspense list had grown to include nearly 37,000 people, an increase of nearly 10,000 from a year earlier.⁹¹ The vast majority of those people are on the suspense list because they failed to produce documentary proof of citizenship.⁹² Historically, there had always been some people who failed to complete the registration process properly, often because they failed to sign their registration applications or failed to provide their addresses.⁹³ Before 2013, the statewide suspense list had a couple of thousand names on it, and those names had accumulated slowly over a period of years.⁹⁴ With the advent of the documentary proof of citizenship requirement, however, the number of names on the suspense list increased by about forty fold in a matter of a few months.

The names of people on the suspense list do not appear on the voter registration rolls.⁹⁵ Thus, they cannot cast a ballot that will count, and there is no way that they can fix the problem after the election. If a voter’s name is not on the voter rolls three weeks before the election, any provisional ballot the voter casts in Kansas will not count.⁹⁶ In contrast, a voter who left his photo ID at home can cast a provisional ballot and that ballot will count if the voter shows the local election authority a valid photo ID before the canvas.⁹⁷

Before the advent of the SAFE Act, people had been able to attest to their citizenship by signing an oath under penalty of perjury.⁹⁸ And that is still how people prove citizenship when they sign the federal voter registration form, which was first created by the National Voter Registration Act of 1993 (NVRA), popularly known as the “motor-voter” law.⁹⁹

In June 2013, the United States Supreme Court held that, because the NVRA requires states to accept and use the federal voter registration form for purposes of registering people to vote in federal elections, states cannot “requir[e] a Federal Form applicant to submit information beyond that required by the form itself.”¹⁰⁰ That holding put a crimp in Secretary Kobach’s plans to implement the SAFE Act’s documentary proof of citizenship requirement, at

documents but planned to develop such a policy); Associated Press, *One-third of voter registration applications “in suspense,”* HUTCH NEWS (Jun. 24, 2013), http://www.hutchnews.com/news/one-third-of-voter-registration-applications-in-suspense/article_12cdbfa3-4f60-5813-9a81-d7d8092942d3.html.

90. Mary Clarkin, *Voting “Suspense,”* HUTCHINSON NEWS (Aug. 2, 2013), http://www.hutchnews.com/news/voting-suspense/article_173ed7e5-3fb7-54dc-9d47-52123bd5b396.html.

91. Kelsey Ryan & Bryan Lowry, *Young Voters, Wichitans Top Kansas’ Suspended Voter List*, WICHITA EAGLE (Sept. 26, 2015), http://www.kansas.com/news/politics-government/article_36705666.html.

92. *Id.*

93. Interview with Jamie Shew, County Clerk, Douglas County, Kansas (May 17, 2016).

94. *Id.*

95. KAN. STAT. ANN. § 25-2309(l) (2015).

96. KAN. STAT. ANN. 25-2311(e) (2015).

97. KAN. STAT. ANN. § 25-2908(d) (2015).

98. KAN. STAT. ANN. 2010 Supp. 25-2309(b)(11 & 12).

99. 52 U.S.C. § 20508(b)(2)(B) (2012).

100. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2260 (2013).

least as to federal form applicants. In response to the Court's decision, Secretary Kobach directed local election authorities throughout the state to create a dual voter registration system.¹⁰¹ Under that system, the names of people who register to vote using the federal form without providing documentary proof of citizenship are not entered on the poll books.¹⁰² Instead, their names are maintained separately, and they are allowed to cast provisional ballots with their votes counting in federal elections but not in state or local elections.¹⁰³

V. THE SAFE ACT IS BAD PUBLIC POLICY

In order to evaluate the SAFE Act, a definition of "public policy" must first be posited. Although there is no one definition, for purposes of this analysis, public policy is government action taken on the public's behalf to resolve a problem.¹⁰⁴ Under the United States Constitution, "decreeing what accords with 'common sense and the public weal'" rests with the political branches of government,¹⁰⁵ and in so doing, those branches are responsible for "assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest."¹⁰⁶

Under this construct, making sound public policy requires several steps. First, the political branches of government must determine whether a serious problem exists and whether that problem requires and is susceptible to a regulatory solution. Second, the political branches must determine whether there are competing interests at stake. Next, the political branches must identify the available policy choices and must weigh the competing views of the public interest. Finally, the legislature must decide whether the available policy choices will accord with common sense and advance the public good. If the available policy choices are sensible, the legislature may enact a law designed to solve the problem identified.

The first order of business in evaluating the SAFE Act is to determine whether there is a real problem that requires a legislative solution. Secretary Kobach has repeatedly asserted that "voter fraud has become a well-documented reality in American elections."¹⁰⁷ In support of this claim, Secretary Kobach cites to the work of Hans A. Von Spakovsky, who has mischaracterized a handful of incidents—some over thirty years old—to claim that "[v]oter fraud has been and continues to be a serious problem."¹⁰⁸ Based on the problems with

101. *Belenky v. Kobach*, 2014 U.S. Dist. LEXIS 48020 at 3 (D. Kan. Apr. 7, 2014).

102. *Id.* at 4.

103. *Belenky v. Kobach*, No. 2013CV1331, slip. op. at 14 (Shawnee Cy. D. Ct. Aug. 21, 2015) (on file with author).

104. THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS AND MODELS OF PUBLIC POLICY MAKING 8–9 (M.E. Sharpe, Inc., 3d ed. 2011).

105. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

106. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

107. Kobach, *supra* note 75, at 5.

108. Hans A. von Spakovsky, Editorial, *Voter ID is a Sensible Precaution*, KAN. CITY STAR (July 28, 2011); also available at Hans von Spakovsky, Editorial, *Spakovsky: Voter ID is a Sensible Precaution*, STATESMAN.COM, <http://www.statesman.com/opinion/spakovsky-voter->

the “evidence” cited by Mr. Von Spakovsky, Professor Richard L. Hasen, the well-respected and perhaps preeminent election law expert, has identified him as “a founding member of the Fraudulent Fraud Squad.”¹⁰⁹ In addition, Secretary Kobach cites to specific alleged instances of voter fraud.

One of Secretary Kobach’s (and Mr. Von Spakovsky’s) favorite examples of alleged voter fraud comes from the 2010 Democratic primary election for a seat in the Missouri House of Representatives, a race that John Rizzo won by one vote.¹¹⁰ Mr. Kobach claims that the election “was stolen when one candidate received approximately thirty votes illegally cast by citizens of Somalia . . . who did not speak English [and] were coached to vote in one candidate’s favor by an adult male who accompanied them to the polling place.”¹¹¹ One serious problem with this claim of voter fraud, unacknowledged in Mr. Kobach’s article, is that it was fully vetted in a bench trial held in the Circuit Court of Jackson County, Missouri, in September 2010 and was found wanting.¹¹² Both the trial and appellate courts ruled that the Somali voters in question sought assistance voting because they had difficulty reading the ballot and communicating with poll workers in English and that, under Missouri’s election statutes, the voters were entitled to have a person of their choice assist them in voting.¹¹³ The trial court found no evidence of illegal “coaching” and further ruled that everyone who voted at the polling place in question was registered to vote in the contested election, which at the very least raises the inference that the Somalis in question were United States citizens.¹¹⁴ In addition, the case involved no allegations that the Somalis who voted were not United States citizens.¹¹⁵ Despite the fact that the court rulings were handed down in the fall of 2010, Secretary Kobach never cites to those decisions in his law review article, which was published in the fall of 2012.¹¹⁶

id-is-a-sensible-precaution-1667416.html.

109. HASEN, *supra* note 66, at 62; Kobach, *supra* note 75, at 5. Kobach also cites to an article posted on <http://Missouri.watchdog.org>. Watchdogs are located in many states and have a conservative bias. See Joshua Benton, *Pew: Nonprofit Journalism Doesn't Mean Ideology-Free*, NIEMANLAB, (July 18, 2011, 9:00 AM), <http://www.niemanlab.org/2011/07/pew-nonprofit-journalism-doesnt-mean-ideology-free/>. In addition, “as often as not, their reporting is thin and missing important context, which occasionally leads to gross distortions.” Laura McGann, *WASHINGTON MONTHLY* (May/June 2010). Kobach, *supra* note 75, at 5.

110. Kobach, *supra* note 75, at 5. Mr. Kobach does not tell us how he divined the Somalis’ voting preferences in light of Missouri’s secret ballot.

111. *Id.*

112. *Royster v. Rizzo*, 326 S.W.3d 104, 107–108 (Mo. Ct. App. 2010).

113. *Id.* at 112–13.

114. *Id.* In fact, Contestant Royster did not claim that the voters of Somalian national origin were not American citizens. See Contestant’s Amended Petition, filed , at 8–9, and Trial Brief of Contestant, filed Sept. 3, 2010, at 2–7, *Royster v. Rizzo*, Case No. 1016-CV25576 (Jackson Cty.. Cir. Ct. 2010). Secretary Kobach and Mr. Von Spakovsky drew that logically questionable conclusion on their own without any support in the trial court record.

115. *Royster*, 326 S.W.3d at 110.

116. See Kobach, *supra* note 75, at 5. When Neal Conan asked him about the court rulings in *Royster* during an interview on NPR’s *Talk of the Nation*, Kobach said the court had not determined whether the Somalis were citizens. *Voter ID Debate Ramping UP Again*, NPR (May 24, 2001), <http://www.npr.org/2011/05/24/136617706/voter-id-debate-ramping-up-again-for->

Equally concerning is Secretary Kobach's shaky logic and potential discriminatory bias. Mr. Kobach refers to the voters in question as "Somalis" and notes ominously that they "did not speak English."¹¹⁷ From these two propositions, he draws the unsound conclusion that the voters were "citizens of Somalia."¹¹⁸ This reasoning is reminiscent of Boris Grushenko's flawed syllogism in *Love and Death*: "A. Socrates is a man. B. All men are mortal. C. All men are Socrates."¹¹⁹ In fact, naturalized citizens have the right to vote, and the Voting Rights Act "prohibit[s] both the explicit conditioning of the right to vote on the ability to speak English, and the conduct of English-only elections."¹²⁰ The fact of Somalian national origin and limited proficiency in English falls far short of proving that the voters Secretary Kobach focused on were not American citizens, and – at the very least – his equation of these facts with non-citizenship raises a question of national origin discrimination and racism.¹²¹

Secretary Kobach also posits that "221 incidents of voter fraud were reported [in Kansas] between 1997 and 2010" and that "by early 2011, [his] office found sixty-seven aliens illegally registered to vote in Kansas; and that is just the tip of the iceberg," warning that, when all the figures are in, the total number of aliens registered to vote in Kansas "will likely be in the hundreds."¹²² According to the Brennan Center for Justice, the "221 incidents" claim "relies upon data about 'reported' events and 'allegations' of problems with no reference to actual prosecutions, arrests or actual findings of voter malfeasance."¹²³ As authority for his claim that sixty-seven aliens illegally

2012. But Kobach failed to address the logical fallacy at the heart of his reliance on the Rizzo election contest. His conclusion that the incident reeked of citizenship fraud is based on pure supposition, not facts or even reasonable inferences.

117. Kobach, *supra* note 75, at 5.

118. *Id.*

119. *LOVE AND DEATH* (MGM 1975).

120. *United States v. Berks Cty.*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003).

121. The United States grants asylum requests to many Somalians each year. In 2010, for instance, 6.7 percent of asylees admitted to the United States were from Somalia. DANIEL C. MARTIN, DEP'T OF HOMELAND SEC., *REFUGEES AND ASYLEES: 2010 3* (2011), https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf. Moreover, English proficiency is not an absolute requirement for naturalization. See 8 U.S.C. § 1423(b) (1994) (exceptions to English requirement). Moreover, the mere fact that voters, who speak English as a second language, need assistance voting does not mean that they are not citizens. For instance, Senator Diane Feinstein's mother, Betty Goldman, immigrated to California during the Russian Revolution. She spoke English well enough to become a naturalized American citizen, but she still needed language assistance in her native Russian so that she could understand the ballot and cast an informed ballot. JOCELYN FRIEDRICHSON BENSON, *SU VOTO ES SU VOZ! INCORPORATING VOTERS OF LIMITED ENGLISH PROFICIENCY INTO AMERICAN DEMOCRACY*, 48 B.C. L. Rev 251 (2007).

122. Kobach, *supra* note 75, at 5.

123. *New State Voting Laws: Barriers to the Ballot?: Testimony Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 20 (2011) (testimony of the Brennan Center for Justice at NYU School of Law), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/9.16.11%20-%20Voter%20ID%20Testimony.Final.pdf>. The Brennan Center's full analysis of Kobach's claim concluded as follows: "A review of the 221 incidents of reported 'voter fraud' that he cites revealed that the

registered to vote in Kansas, Secretary Kobach cited his own testimony in support of the SAFE Act but provided no hard evidence to support his claims.¹²⁴

More recently, in support of his claim of non-citizens registering to vote, Secretary Kobach stated that “workers at the DMV often unwittingly register noncitizens to vote.”¹²⁵ But such registrations cannot have been, in most instances, truly “unwitting” because Kansas law requires first-time driver’s license applicants to show proof of lawful presence in the United States, which – for citizens – will be a birth certificate or United States passport.¹²⁶ Because those documents clearly indicate whether an applicant is a citizen or not and because non-citizens will not have a U.S. birth certificate or passport and will instead use a document that shows their alien status such as a green card,¹²⁷ the registration of non-citizens as voters is primarily attributable to the failure of the Kansas Department of Revenue to train DMV employees properly in their voter registration obligations rather than some completely blameless, “unwitting” event. The State must take responsibility for such errors and should train its DMV employees so as to avoid such errors.

Because Secretary Kobach’s numbers are unsupported by hard evidence and specific details, they are unverifiable. They are also couched in terms of fear and loathing. American history has seen such appeals before. In the 1950s, Senator Joseph McCarthy recklessly claimed that he had lists containing the names of varying but unverifiable numbers of Communists working for the federal government.¹²⁸ McCarthy also repeatedly resorted to foreboding rhetoric, warning—in one of his early speeches—that he had evidence of “a conspiracy so immense and an infamy so black as to dwarf any previous venture in the history of man.”¹²⁹ Secretary Kobach’s warning that the sixty-seven aliens who allegedly registered to vote in Kansas is “just the tip of the iceberg” fits neatly in the same rich vein of baseless fear-mongering hyperbole.

One final bit of evidence shows that voter fraud is not running rampant in Kansas. During the 2015 session, the Kansas legislature gave the Kansas Secretary of State the authority to prosecute election crimes, thus becoming the only state in the country to give such powers to the chief election officer of a

categories of violations included: electioneering too close to a polling location, failure to deliver voter registration cards, improper ballot challenges, registration cards containing improper zip codes, non-citizen registration (no allegation of non-citizen voting), intimidation of poll workers, double-voting and voter impersonation. Of the seven convictions arising out of the incidents of ‘voter fraud’ there were two for electioneering and the remainder for double-voting between states or counties. None of the seven convictions based upon the 221 allegations over 13 years would have been prevented by the introduction of photo ID laws.”

124. Kobach, *supra* note 75, at 5 n.29.

125. Sari Horwitz, *Want to Vote in This State? You Have to Have a Passport or Dig Up a Birth Certificate*, WASH. POST (Feb. 19, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/>.

126. KAN. STAT. ANN. § 8-247(d)(1) (2015).

127. *Id.*

128. DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 305 (1978).

129. JOSEPH MCCARTHY, *MAJOR SPEECHES AND DEBATES OF SENATOR JOE MCCARTHY DELIVERED IN THE UNITED STATES SENATE, 1950–1951* 264 (photo. reprint 1975) (1951).

state.¹³⁰ Since July 1, 2015, when Secretary Kobach took on the prosecutorial powers, he has filed only six voter fraud cases, all of which have involved double voting – cases in which voters register to vote in two places using their own names and their own identification.¹³¹ Laws like the SAFE Act have no effect on double voting, which is instead restrained by long-existing criminal laws making it a crime to vote twice in the same election or in two different places.¹³² The fact that there are so few cases of double voting strongly suggests that these criminal laws are effective in discouraging such fraudulent acts.

Academics and journalists who have looked into the swirling claims that America is beset by an epidemic of voter fraud have consistently concluded that there is no such problem and that incidents of voter fraud are rare and isolated.¹³³ In fact, Ron Thornburgh, the last Republican Secretary of State before Secretary Kobach, has said that voting fraud is not a significant issue in Kansas.¹³⁴ Moreover, from 2002 through 2005, President George W. Bush's Justice Department prosecuted fewer than a hundred election fraud cases and only twenty of those cases involved the casting fraudulent ballots.¹³⁵

Professor Hasen summed up the findings of the relevant academic research and journalism succinctly:

130. S.B. 34 § 2(a)(3), 2015 Leg., Reg. Sess. (Kan. 2015).

131. Bryan Lowry, *Kobach's Voter Prosecutions Draw Scrutiny to Proof of Citizenship Requirement*, WICHITA EAGLE (Oct. 18, 2015), <http://www.kansas.com/news/politics-government/article39670275.html>; Edward M. Eveld, *Kris Kobach Proposes Voting Machine Audits, Files New Voter Fraud Cases*, KAN. CITY STAR (Jan. 25, 2016), <http://www.kansascity.com/news/politics-government/article56474273.html>; Edward M. Eveld, *Kris Kobach Defends Prosecution of Voter Fraud Cases in Kansas*, KAN. CITY STAR (Apr. 12, 2016), <http://www.kansascity.com/news/politics-government/article71453637.html>.

132. KAN. STAT. ANN. § 25-2416 (2015) (voting without being qualified, including being lawfully registered in the place where the vote was cast). The SAFE Act's photo-ID requirement is targeted at preventing voter impersonation, which is also a crime in Kansas. KAN. STAT. ANN. § 25-2431 (2015). But there are no reported cases involving prosecutions for such fraud in Kansas, even though it has been a crime since 1869. Moreover, Secretary Kobach has neither posited the existence of actual instances of voter impersonation nor filed criminal prosecutions for voter impersonation under Kan. Stat. Ann. § 25-2431.

133. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, NEW YORK TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/washington/12fraud.html>; See also LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010) ("Voter fraud is a politically constructed myth"); HASEN, *supra* note 66, at 41–73 (detailing how claimed instances of voter fraud either did not involve fraud or involved fraudulent conduct that voter ID laws would not stop); Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 103 (2012).

134. Dion Lefler, *Kobach Seeks Voter IDs, Power to Prosecute*, KAN. CITY STAR (Jan. 19, 2011), <http://www.kansascity.com/news/local/article297642/Kobach-seeks-voter-IDs-power-to-prosecute.html>.

135. Ian Urbina, *Fraudulent Voting Re-emerges as a Partisan Issue*, N.Y. TIMES (Oct. 26, 2010), <http://www.nytimes.com/2010/10/27/us/politics/27fraud.html>. When the Bush Justice Department was intensely focused on finding and prosecuting voter fraud, Hans Von Spakovsky was a senior lawyer in the Civil Rights Division and was responsible for approving a controversial Georgia voter ID law. Dan Eggen, *Official's Article on Voting Law Spurs Outcry*, WASH. POST (April 13, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/12/AR2006041201950.html>.

There are virtually no recent cases of voter impersonation fraud and no evidence in at least a generation that it has been used in an effort to steal an election. There is a simple reason for this: it is an exceedingly dumb strategy . . . The reason voter impersonation fraud is never prosecuted is that it almost never happens.¹³⁶

During the Bush years, moreover, the Justice Department devoted vast resources to investigate the alleged tidal wave of voter fraud, but the Justice Department filed only a few federal election fraud prosecutions and most of those involved the actions of party and campaign workers.¹³⁷ In other words, election fraud that has a real chance of stealing an election has not changed much in the past 150 years. Successful election fraud requires an organized effort by election officials and other insiders. Elections cannot be stolen by random acts of double voting by individuals.

Next, voter ID and proof of citizenship requirements might adversely affect competing interests. The most obvious competing interests are voter registration and voter turnout, which laws like the SAFE Act may adversely affect. Congress passed the National Voter Registration Act of 1993 (NVRA) to make voter registration easier and to promote the exercise of the fundamental right to vote by the citizens of this country.¹³⁸ Congress found that the NVRA was necessary because “unfair registration laws and procedures can have a direct and damaging effect on voter participation.”¹³⁹

The SAFE Act’s proof of citizenship requirement has had an immediate adverse effect on voter registration in Kansas. Specifically, the number of voter registrants whose names wound up on the “suspense list” ballooned from a few hundred to many thousands. By late September 2015, Kansas’s suspense list had nearly 37,000 names on it, and the vast majority of those were on the suspense list because they had not provided—or because bureaucrats could not find—documentary proof of citizenship for the voter registrants. That means that almost fifteen percent of the voters who attempted to register after the documentary proof of citizenship requirement took effect have been placed in suspense status.

The voter registrants on the suspense list in late September 2015 were much more likely to be under the age of thirty and unaffiliated with any political party than fully registered voters. For instance, in August 2015, Kansas had about 1.7 million registered voters.¹⁴⁰ Of those, about thirty-one percent are unaffiliated

136. HASEN, *supra* note 66, at 61.

137. HASEN, *supra* note 66, at 53. Even academics sympathetic to calls for voter ID requirements admit that voter impersonation fraud is rare and not a significant problem in U.S. elections today. Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct. 29 & Nov. 5, 2012), (quoting Robert Pastor, director of the Center for Democracy and Election Management at American University, and Larry Sabato, political science professor at the University of Virginia, both of whom Von Spakovsky referred the author to as “experts who, he said, would confirm that voter-impersonation fraud posed a significant peril”).

138. 52 U.S.C. § 20501(b)(1)–(2) (2012).

139. 52 U.S.C. § 20501(a)(3) (2012).

140. 2015 August (Official) Voter Registration Numbers, KAN. SEC’Y OF STATE, http://www.kssos.org/elections/15elec/2015_August_Voter_Registration_and_Party_Affiliation_

and about fifteen percent are under the age of thirty.¹⁴¹ In contrast, unaffiliated voters made up about fifty-eight percent of the people on the suspense list because of lack of documentary proof of citizenship, and over forty percent of the people on the suspense list because of citizenship documents were under the age of thirty.¹⁴²

The 32,600 people who were on the suspense list in September 2015 because of proof of citizenship problems equaled two percent of all the registered voters in Kansas in the fall of 2015. When a law causes the equivalent of two percent of all registered voters in the state to go into suspense, that law is having “a direct and damaging effect on voter participation.”¹⁴³ This direct and damaging effect comes into much clearer relief when one considers that Secretary Kobach’s January 2011 report in support of the SAFE Act listed a total of twenty-one alleged instances of non-citizens either registering to vote or voting in Kansas between 1997 and 2010.¹⁴⁴ Twenty-one alleged cases of voter fraud amounted to one one-thousandth (0.001) of one percent of the approximately 1.7 million registered voters in Kansas in 2011. In other words, the cure here is much more damaging to the right to vote than is the disease.

But that is not the end of the problem. As the suspense list totals approached 35,000 without any sign of abating, Secretary of State Kobach proposed—in June 2015—new regulations requiring local election officials to purge from the suspense list the names of voters who had not fully completed the registration process within ninety days of submitting their voter registration applications.¹⁴⁵ Those regulations took effect on October 2, 2015.¹⁴⁶ By mid-December 2015, over 12,000 people had been purged from the suspense list because they had failed to produce documentary proof of citizenship.¹⁴⁷

The SAFE Act also fails to comply with other Kansas election laws. On January 15, 2016, Shawnee County District Court Judge Franklin Theis declared that the Secretary of State’s implementation of the SAFE Act is inconsistent with Kansas laws on voter registration, ballot format, and ballot secrecy.¹⁴⁸ Specifically, the court found that, by failing to put on the Kansas voter rolls citizens who register to vote using the federal mail-in voter registration form, the Secretary of State’s office is violating Kansas statutes requiring that Kansas

Numbers_Certified.xlsx (last visited Apr. 20, 2016).

141. *Id.*

142. Ryan & Lowry, *supra*, note 91.

143. 52 U.S.C. § 20501(a)(3) (2012).

144. OFFICE OF THE KANSAS SECRETARY OF STATE, KNOWN REPORTED INCIDENTS OF ELECTION CRIMES, 1997–2010 (2011), http://aclu.org/files/votingrights/kselection_crimes_reporting.pdf. In his law review article, Kobach cited to the report as posted on the ACLU’s website. See Kobach, *supra* note 75, at 5 n. 27.

145. Notice of Hearing on Proposed Administrative Regulations, 34 Kan. Reg. 804 (July 2, 2015) (copy of full text of proposed regulations on file with author).

146. KAN. ADMIN. REGS. § 7-23-15 (2015).

147. Expert Report of Dr. Michael P. McDonald at 3, *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Feb. 26, 2016).

148. *Belenky v. Kobach*, No. 2013CV1331, slip op. at 26 (Shawnee County Dist. Ct. Jan. 15, 2016) (on file with author).

accept the federal registration form as proof of registration and providing for a unitary voter registration roll and a unitary and secret ballot.¹⁴⁹

VI. CONCLUSION

Since January 1, 2013, the SAFE Act's documentary proof of citizenship requirement has caused tens of thousands of voter registration applications to be rejected for failure of the voters to provide citizenship documents, and that amounts to at least fifteen percent of all voter registration applications submitted during that time period. Those affected voters are disproportionately younger citizens. This means that a group of citizens equivalent to nearly two percent of all the registered voters in the state of Kansas has not been added to the voter rolls, thus effectively disenfranchising those citizens in order to protect a non-existent or at most *de minimis* problem of citizenship impersonation voter fraud. In addition, the SAFE Act's photo ID provision has no effect on double voting, which seems to be the only kind of in-person voter fraud that actually exists in Kansas, though this problem is also so infrequent as to be *de minimis*. Moreover, the Secretary of State's implementation of the SAFE Act has been inconsistent with Kansas law. In light of these facts, it is apparent that the SAFE Act has had "a direct and damaging effect on voter participation" in Kansas and is the kind of state law that the NVRA was passed to redress.

The SAFE Act also fails to meet the standards for assessing public policy. Specifically, it attempts to remedy the virtually non-existent problems of citizenship impersonation voter registration fraud and in-person voter fraud, and it does so in a manner that grossly tramples the most obvious competing public policy interests—making voter registration easier and increasing voter turnout. Moreover, the SAFE Act focuses on these extremely insignificant problems while ignoring much more significant problems with election administration, such as rejection of valid ballots and poor training of poll workers. For all of these reasons, the SAFE Act is a classic example of bad public policy.

149. *Id.* at 17–18.