

Down the Up Staircase: Voting Rights in 21st Century Kansas

First, I'd like to thank the organizers of the Taking Back Kansas Convention for inviting me to speak to you today about voting rights in Kansas.

Barbara Robinson's story highlights a couple of the key problems posed by the recent changes in Kansas's voting laws. First, the laws have become too complicated. Second, the State government has not done enough to educate the public about them. The fact is that Barbara's expired driver's license is an acceptable form of photo identification under the Legislature's 2011 photo-ID law because she is over the age of 65. But she didn't know that because there has been precious little time and money spent on public education about the photo-ID law. Secretary Kobach's main educational initiative has been to create a website: gotvoterid.com. But my guess is that few voters and even fewer seniors go to the web for their tutorials about voting law changes. But those problems – complexity and insufficient public education – are only the tip of the iceberg. In my remarks here this morning, I'll try to give you an overview of the rest of the iceberg.

2014 is a year of anniversaries for civil rights and civil liberties in the United States. It is the sixtieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*. It is the fiftieth anniversary of the enactment of the Civil Rights Act of 1964. And it is also the fiftieth anniversary of the Supreme Court's decision in *Reynolds v. Sims*, which – along with *Baker v. Carr* – is one of the most important voting rights cases ever decided by the Supreme Court.

In *Reynolds v. Sims*, the Court 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.”

At least until recently, Kansas's history tracked that of the nation by expanding the scope of the right to vote. Let's review some of that history.

On October 4, 1859, the people of the Kansas Territory approved the Wyandotte Constitution, and Congress approved that state constitution when it passed the bill that admitted Kansas to statehood in late-January 1861.

As background, I want to point out that the debates over the Wyandotte Constitution were contentious and involved many significant issues. The Convention resulted in a relatively progressive state constitution modeled on the Ohio Constitution. Among other things, the Wyandotte Constitution granted property rights and equal custody of children to women, which were not rights commonly given to women in ante-bellum America. Moreover, despite solid support from the Democratic delegates, the Convention rejected a provision that would have prohibited the migration of free blacks to the new state.

The debate over universal suffrage was one of the issues that bitterly divided the delegates to the Wyandotte Convention. The delegates ultimately rejected universal suffrage and fully enfranchised only white male citizens over the age of twenty-one who had resided in Kansas for six months and in the township or ward in which they wished to vote for at least thirty days next preceding the election. The framers of the Wyandotte Constitution also specifically provided that “The Legislature shall 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.”

Under the Wyandotte Constitution, women were given the right to vote only in school board elections, which the delegates apparently saw as a topic of special concern to women. While this provision may now strike us as backward and regressive, giving women the right to vote in school board elections was actually a radical step in 1859 because, at that time, Kentucky was the only other state to extend this right of partial franchise to women.

In contrast to women, the Wyandotte Constitution completely disenfranchised Native Americans and blacks.

Many Kansans worked tirelessly to advance the cause of universal suffrage even before Kansas officially entered the Union on January 29, 1861, and that work continued and picked up steam after Kansas became a state. In 1867, the suffragists succeeded in putting two constitutional amendments on the ballot that would have extended universal suffrage to all Kansans. One provision proposed eliminating the word “white” from the suffrage provision of the Kansas Constitution and the other would have given women the vote in all elections. But the all-white, all-male electorate rejected those measures on November 5, 1867.

Black men finally gained the right to vote in 1870 upon ratification of the Fifteenth Amendment to the United States Constitution.

Women's suffrage came to Kansas in incremental steps. Although suffragettes were active in Kansas from the earliest days, the movement really took hold in 1884 with the founding of the Kansas Equal Suffrage Association. In 1887, women gained the right to vote in municipal elections, and many women were elected to municipal government offices. In fact, Susanna M. "Dora" Salter became the first woman elected to any political office in the United States when, on April 4, 1887, the people of Argonia, Kansas, elected her as their mayor.

But, after that partial victory, further progress on women's suffrage in Kansas hit a snag. In 1894, for instance, voters once again rejected an equal suffrage amendment. But, finally, on November 5, 1912, voters approved the Equal Suffrage Amendment to the Kansas Constitution. Thus, women in Kansas won voting equality nearly eight years before the Nineteenth Amendment enfranchised all women throughout the nation.

On April 7, 1971, Kansas voted to ratify the Twenty-sixth Amendment, which gave eighteen year olds the right to vote. At the same time, voters amended Article 5, Section 1 of the Kansas Constitution to change the voting age from twenty-one to eighteen. The Twenty-sixth Amendment was finally ratified on July 1, 1971, just over four months after Congress had proposed it. More recently, Kansas has made modest steps towards implementing advance voting, making it easier for voters to cast ballots at their convenience.

So, to recap, for the first 150 years, Kansas was on a one-way street leading to the gradual expansion of voting rights. But, shortly after Kansas's sesquicentennial on January 29, 2011, that history changed.

In November 2010, Kansas elected Kris Kobach as its Secretary of State. In that race, Professor Kobach's campaign signs bore the message "STOP VOTER FRAUD." In 2011, the Kansas Legislature passed and Governor Brownback signed the so-called SAFE Act. SAFE stands for Secure and Fair Elections. Secretary Kobach was the driving force behind that legislation, which substantially amended many facets of Kansas's election laws. Among other things, the SAFE Act cut back on advance voting and imposed onerous

new requirements for voter registration. Today, I primarily want to talk about two parts of that law, specifically the photo-ID requirement and the documentary proof of citizenship requirement.

The SAFE Act provides that, effective on January 1, 2012, voters must show photo identification in order to cast a ballot. The law's finite list of acceptable photo IDs originally included driver's licenses, state-issued non-driver's license ID cards, concealed carry permits, United States passports, government employee ID cards, military ID cards, student ID cards issued by Kansas post-secondary schools, and public assistance ID cards. But the original law left out some obvious forms of photo ID, such as tribal ID cards for Native Americans, and it failed to provide a way for Kansas residents who were born in other states to obtain a free Kansas non-driver's ID card without having to pay for their out-of-state birth certificate, which can cost up to \$20.

The second part of the law that I want to talk about is the requirement 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. The law contains a list of documents that will be accepted as adequate proof of citizenship, including a passport and a birth certificate.

For years, Professor Kobach has claimed that requiring photo IDs and documentary proof of citizenship is necessary to combat widespread voter impersonation fraud at the polls and illegal voter registration by non-citizens in Kansas and throughout the nation. In 2010, he made those claims the focus of his election campaign. But there is simply no evidence to support Secretary Kobach's claims of rampant fraud. In fact, the Kansas City Star has reported that, between 2004 and 2009, there were only seven cases of alleged electoral fraud in Kansas, and only one of those cases led to a prosecution. In addition, Ron Thornburgh, the last Republican Secretary of State before Secretary Kobach, has said that voting fraud was not a significant issue in Kansas. Moreover, reports prepared by the Brennan Center for Justice and many other foundations and academics have consistently shown that voter impersonation fraud simply does not exist in any appreciable numbers anywhere in the United States.

Illegal voting is an extremely rare crime. But, when it does occur in Kansas, it usually occurs – as it does in other states – when people register and vote in two jurisdictions under their own names or when people move but return to their old precinct to vote. These rare cases of voter fraud are usually discovered, and – if they involve intentional misconduct – the wrong-doer is prosecuted. About ten years ago, for instance, a Kansas City, Kansas, lawyer voted several times in both Missouri and Kansas during the 2000 and 2002 election cycles. He was caught, prosecuted, and convicted. As a result, he has forfeited his right to vote forever.

Likewise, there is no real or systemic evidence that citizenship impersonation occurs. The few cases where non-citizens have registered and voted have usually turned out to involve misunderstandings, mistakes, or plain foolishness. There is no evidence of an organized effort to register non-citizens to throw elections. But, with the mounting number of voters on the suspense list in Kansas, there is clear evidence that the cure for this non-existent problem is far worse than the malady it seeks to remedy.

Many people register to vote when they apply for or renew their driver’s licenses. But the Department of Revenue offices that handle driver’s license renewals had no systems in place to collect and store such citizenship documents and no way to transmit such documents to the Secretary of State’s Office or to the local election authorities. This bottleneck caused thousands of would-be voter registrations to be put into a legal limbo known as “suspense status.”

Since the citizenship provision took effect on January 1, 2013, the number of voters who are on the suspense list has mounted to outrageous totals. At one time last year, for instance, the suspense list had grown to include well over 20,000 people. Recent press reports have indicated that there are still over 18,000 people on the suspense list. Historically, there have 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. But, before 2013, the state-wide suspense list never had more than a few hundred names on it, and those names had accumulated slowly over a period of many, many years. In fact, some of the names on the suspense list before 2013 had been on the list for more than twenty years. With the advent of the documentary

proof of citizenship requirement, however, the number of names on the suspense list exploded, increasing by about forty fold in a matter of a few months.

Being on the suspense list prevents Kansans from casting a ballot that will count. That is because Kansas law has long provided that a person's voter registration is not complete until her name is entered on the voter rolls, and in order to vote a person must be fully registered three weeks before an election. Because the names of people on the suspense list do not appear on the voter registration rolls, they cannot cast a ballot that will count. People who have tried to register since January 1, 2013, but have failed to provide acceptable documentary proof of citizenship are not fully registered to vote. If those folks go to the polls, the election workers may give them a provisional ballot, but that ballot will never be counted because the voter was not fully registered three weeks before the election.

Moreover, there is no way that they can fix the documentary proof of citizenship problem after the election. In contrast, a voter who leaves his photo ID at home can cast a provisional ballot and that ballot will count if the voter provides the local election authority with a copy of a valid photo ID before the canvas of ballots is complete, typically about a week or so after election day.

Now, however, because of the enormity of the suspense list problem created by the SAFE Act's citizenship requirement, Secretary Kobach has created a special rule that allows would-be voter registrants to provide a citizenship document any time before the day of the election, even during the three week period before an election. If the voter does that, the State will consider the voter's registration complete before the three week period, and the voter's provisional ballot will be counted just like a regular ballot. But voters on the suspense list still cannot fix the problem by providing a citizenship document *after* the election. In that case, their ballots will not count.

Before the advent of the SAFE Act, people had – since time immemorial – been able to attest to their citizenship by signing an oath under penalty of perjury. And that is still how people prove citizenship when they sign the federal voter registration form. Last summer, however, Secretary Kobach sued the U.S. Election Assistance Commission in an effort to require people who register using the federal form to produce citizenship

documents before they are fully registered in Kansas. That case is now on appeal to the Tenth Circuit, which heard oral arguments this past Monday in Denver. But, frankly, however that case comes out, it will not provide any real relief from the effects of the SAFE Act.

Because federal law requires Kansas to accept federal voter registration forms as complete for purposes of registering voters, Secretary Kobach has directed local election authorities throughout the state to create a dual voter registration system. Under that system, people who register to vote using the federal form without providing documentary proof of citizenship will be allowed to vote in federal elections but not in state or local elections. Voters who have provided acceptable documentary proof of citizenship when they registered to vote will be allowed to vote in all elections regardless of how they registered. But voters who registered to vote using forms other than the federal form and who have failed to provide acceptable documentary proof of citizenship will not be allowed to vote at all.

I don't really expect you to understand the legal morass I've just described. In fact, that's exactly the point. The SAFE Act has created a "system" that is overly complicated and hard to understand and that has the terrible effect of putting nearly 20,000 people on the suspense list – a kind of Voting Never-Never Land. In sum, the Kansas Legislature and Secretary Kobach have created a convoluted system in which voters who register using the federal form can only vote in federal elections and many people who are clearly U. S. citizens are on the suspense list and cannot vote merely because they have not had time to track down and submit qualifying documentary proofs of citizenship. That system has disenfranchised thousands of Kansas *citizens* from voting, which is truly outrageous.

So, you may ask yourself, what is the ACLU doing about these laws.

First, let's consider the photo ID requirement. When the SAFE Act was introduced in the Legislature in early 2011, the ACLU of Kansas and various coalition partners lobbied against the bill, using many of the arguments I just related to you. On March 23, 2011, however, the Kansas Senate voted in favor of the bill by a margin of 36 to 3 with one member not voting. At that time, there were eight Democrats in the Senate, and six of those voted for the bill. The Republican Senators voted for the bill by a margin of 30 to 1. When the bill

reached the House on March 29, the members approved it by a margin of 111 to 11 with 3 members not voting. Twenty-two Democratic State Representatives voted in favor of the bill and only 10 Democrats voted against it. Despite the clear factual evidence that photo-ID laws are unnecessary and actually make it harder for some people to vote, the Kansas Legislature passed the SAFE Act by overwhelming bi-partisan margins in both Houses.

Upon passage of the SAFE Act, moreover, the ACLU of Kansas and our coalition partners started to investigate the impact of the law and to raise awareness about gaps in the law that would create hardships for various classes of voters. For instance, we met with representatives of the largest Native American Tribes in Kansas, and we mounted a public education effort to push back against the Rube Goldberg-like regulatory schemes that Secretary Kobach adopted to implement the law.

In the 2012 legislative session, furthermore, we mounted a campaign to expand the list of acceptable photo-IDs and to get Secretary Kobach to rationalize the Rube Goldberg systems he created to implement the SAFE Act. Partly as a result of our advocacy, the legislature added tribal IDs to the finite list of acceptable photo-IDs. Further, Secretary Kobach tweaked his regulations to provide a somewhat convoluted way for lower income Kansans who were born in other states to obtain a state-issued photo ID card.

We also looked at litigation. But, by the time Kansas adopted this requirement, the United States Supreme Court had, in 2008, decided *Crawford v. Marion County Elections Board*, in which the Court rejected a challenge to Indiana's photo ID law. Although we spent a considerable amount of time and effort trying to find people who lacked acceptable forms of photo-ID, we found very few Kansans who could not obtain such photo-IDs. So, we decided not to mount an immediate legal challenge to the law's photo-ID requirement.

Instead of filing suit immediately, we decided to monitor the photo-ID law's implementation and effects. So far, we've seen the law in the 2012 election cycle and the 2014 primary. Since the adoption of the SAFE Act, the law's photo-ID requirement has created some confusion and problems at the polls. In 2012, for instance, there were news reports about confusion at the polls regarding whether high school photo ID cards count as valid photo-IDs under the law. They do not. During the primary election earlier this month, a poll

worker in Topeka turned away some residents of the Brewster Place retirement community when they showed up to vote without photo-IDs. The poll worker should have allowed these people to vote provisional ballots, as required by law, but the poll worker didn't do that. At least some of those people returned to Brewster Place and were unable to return to the polling place to vote on the day of the primary.

Although these incidents show that the photo-ID law has caused problems, we have not yet found evidence that it has disenfranchised large swaths of voters in Kansas. Nevertheless, we continue to monitor the law's impact, and we may file a lawsuit challenging the photo ID requirement if we can find evidence of such widespread voter suppression effects.

Recent developments in litigation challenging photo ID laws in other states bear mentioning. In Arkansas, Pennsylvania, and Wisconsin, courts have struck down these laws on either federal or state constitutional grounds. In North Carolina and Wisconsin, courts have either upheld the laws or refused to put them on hold in this election cycle. I know that I mentioned Wisconsin's law twice and will explain why I did so.

In Wisconsin, different groups of litigants filed separate suits in both federal and state courts. On April 29, 2014, the federal court struck down the law, but – earlier this month – the Wisconsin Supreme Court upheld it. The federal judge found that “approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID.” He also found that “virtually no voter impersonation fraud occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future.” Thus, the court rejected Wisconsin's rationales in support of the law – preventing fraud and increasing voter confidence – and struck the law down as a violation of the United States Constitution's Equal Protection Clause. On his election law blog, Professor Rick Hasen wrote that the federal judge's opinion in the Wisconsin case “is heavy on both facts and law” and “is thoughtful and well written.” Professor Hasen also wrote that the constitutional law and Voting Rights Act claims are controversial. The federal case is set to be argued before the court of appeals in mid-September. Even though the Wisconsin Supreme Court upheld the law, it remains on hold pending the federal appellate court's decision.

In Pennsylvania, a state court struck down the photo-ID law on state constitutional grounds, and the governor decided not to appeal that ruling.

In May 2014, a trial court ruled that Arkansas's photo-ID law is unconstitutional, but the trial court stayed its ruling pending review by the Arkansas Supreme Court. Thus, the law is apparently still in effect at this time.

On August 8, 2014, after a week-long hearing, a federal judge denied a motion for preliminary relief and thus refused to suspend North Carolina's photo-ID law before the November general election.

So, the litigation results on photo-ID laws around the country are decidedly mixed. In addition, the laws in these states were actually much more restrictive than the Kansas law. And, so far, we have not been able to discover evidence of widespread disenfranchisement in Kansas similar to that found by the federal court in Wisconsin. But these court rulings may require us to reevaluate our decision to hold off on challenging the photo-ID portion of the SAFE Act, especially if that requirement causes widespread problems in the 2014 general election.

With regard to the proof of citizenship requirement, we filed suit last November in Shawnee County District Court challenging a very small part of the law. Specifically, we challenged Secretary Kobach's decision to allow people who registered using the federal form to vote only in federal elections but not in state and local races. This is the so-called bifurcated election system. We did not challenge the proof of citizenship requirement as a whole based, in significant part, on the fact that the Kansas Constitution's Suffrage Article specifically empowers the Legislature to "provide by law for proper proofs of the right of suffrage."

After we filed suit in November 2013, Secretary Kobach took our case on an early detour through federal court. But, in early April, the federal judge remanded our case to the Shawnee County District Court. In June, we filed a motion asking the judge to put the bifurcated election system on hold, but – after a hearing on July 11 – the judge denied our motion, finding that the remedy we requested would likely create a bigger problem that it would cure. Thus, in the primary and in the upcoming general election this year, people who have used the federal form to register but who have not provided acceptable documentary proof of citizenship

will only be able to vote for federal candidates and will be barred from voting for state and local candidates and issues.

The biggest problem in Kansas is that the citizenship requirement has put nearly 20,000 people on the suspense list where they are in legal limbo and unable to vote. We have tried to figure out a way to challenge that law, but – so far – we have come up short. Remember, the Kansas Constitution specifically empowers the legislature to adopt laws requiring proper proofs of the right of suffrage – which includes – and has always included – the requirement that voters be citizens. That means this is a tough nut to crack through litigation. It also means this is really a political problem.

The varied results in all of these voting rights cases shows that people of good will cannot count on civil rights organizations and courts to ride in and save the day. Constitutional law does not provide a shield against every bad decision that our legislators make. These are public policy choices, and legislatures have wide discretion to enact laws that, in their estimation, will advance the interests of the people. The state and federal constitutions establish a very large field of play for legislatures, and it is only when legislatures clearly trench upon fundamental constitutional rights that courts will intervene.

When the Kansas Legislature passed the SAFE Act by overwhelming bi-partisan majorities without any evidence of ANY record of significant voter fraud in Kansas, we were disappointed. And we heard, through the grapevine, that some legislators voted for the law on the mistaken belief that organizations like the ACLU would ride in and file suit and that the all-powerful courts would strike down the law on some mysterious constitutional grounds.

That is a foolish way to do the public's business. Legislation requires well-considered public policy decisions. The answer to these questions lies with the People and their elected representatives. Courts are only going to save the People from their poor choices in extreme circumstances. Thus, if you don't like the decisions that your elected representatives make, tell them so. If they don't listen to you, engage in the political process to elect different representatives who will make sound legislative decisions based on facts and legitimate public policy problems – not based on imaginary threats.

Rather than passing voting laws that unnecessarily restrict the franchise, the Kansas Legislature should be following the long arc of Kansas history that bends toward expanding the franchise. Legislators could do this by following the lead of other states. For instance, Colorado and Louisiana have allowed 16 and 17 year olds to register to vote when they apply for their first drivers' licenses. Currently, Kansas law provides that a person must reach the age of 18 before the next election in order to register to vote. The Kansas Legislature could also allow same day registration during early voting times. As a result of a new law passed earlier this year, Maryland now permits such same day registration during early voting. Kansas could also consider extending the dates available for advance voting. And, of course, the Kansas legislature could repeal the unnecessary and destructive SAFE Act. But those are political solutions and depend on responsible legislators to make sound legislative decisions based on real facts.

So, consider this: Changing the voting system in Kansas depends on you and the number of registered voters you encourage to **remember in November**.