

DUAL REGISTRATION VOTING SYSTEMS: SAFER AND FAIRER?

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INTRODUCTION

On November 4, 2014, more than 21,000 Kansans who had attempted to register to vote were denied that opportunity. The cause? A law that went into effect in January 2013 requiring that registrants provide proof of citizenship. Kansas's law is only one of the most recent examples of this country's general trend toward stricter voting laws; several states have begun requiring proof of citizenship along with registration forms.¹ The Supreme Court struck down proof-of-citizenship laws as preempted by the National Voter Registration Act (NVRA).² But several states responded by implementing "dual registration" systems in which proof of citizenship is required to vote in state and local elections, but not in federal elections.³ This Essay analyzes both the legality and the practicalities of such dual registration systems and concludes that while such systems are unlikely to be struck down by the courts, they impose immense costs with little, if any, offsetting benefits given the dearth of actual voter fraud.

I. BACKGROUND

For several years now, many states have been particularly concerned with preventing voter fraud. In most states such efforts have taken the form of voter ID laws, requiring voters to show an acceptable (usually meaning government-issued) photo ID at the polls. Some states, however, have gone even further. The Kansas Legislature passed the Kansas Secure and Fair Elections (SAFE) Act in 2011, requiring registrants to provide documentary proof of citizenship, such as a birth certificate or passport, along with a registration form.⁴ Arizona

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1. ALA. CODE § 31-13-28(c), (k) (2014); ARIZ. REV. STAT. ANN. § 16-166(F) (2014); GA. CODE ANN. § 21-2-216(g) (2014); KAN. STAT. ANN. § 25-2309(I) (2014).

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

3. *See, e.g.*, Kansas Secure and Fair Elections (SAFE) Act, ch. 56, 2011 Kan. Sess. Laws 795.

4. *Id.*

voters passed a similar law, Proposition 200—the Arizona Taxpayer and Citizen Protection Act—in 2004.⁵

Both laws were justified by claims that these requirements would prevent voter fraud. Kansas Secretary of State Kris Kobach, probably the most widely recognized proponent of these reforms, introduced the SAFE Act at a press conference in which he harkened back to voter fraud at Kansas’s founding.⁶ Additionally, he both testified to the Kansas Legislature and wrote articles and editorials claiming proof of voter fraud that could be stopped with these reforms.⁷ Indeed, popular support for proof-of-citizenship requirements was high: a 2010 poll showed 84% of Kansas voters supported proof-of-citizenship requirements,⁸ the SAFE Act passed the House in a 111-11 vote and the Senate in a 36-3 vote,⁹ and Arizona passed its proof-of-citizenship requirement through a popular referendum that garnered 56% of the vote.¹⁰

Despite popular support, the proof-of-citizenship requirement was mired in litigation until June 2013, when the Supreme Court held that states could not demand proof of citizenship to vote in federal elections as long as such proof was not required by the federal registration form.¹¹ Undeterred, Kobach and his counterpart in Arizona implemented “dual registration” systems, arguing that doing so was the only way to simultaneously comply with both the NVRA and state laws requiring proof of citizenship.¹² Under the dual registration system, states will “accept and use” the federal form, as required by the NVRA,¹³ but

5. Ariz. Prop. 200 (2004).

6. KansasWatchdogTV, *Kris Kobach: Voter ID Bill, Kansas Secure and Fair Elections Act*, YOUTUBE (Jan. 18, 2011), <https://www.youtube.com/watch?v=Zn3HxYsU-k8>.

7. See, e.g., Kris W. 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, 5 (2012).

8. *Results of SurveyUSA News Poll #17639*, SURV. USA (Nov. 4, 2010, 9:10 PM ET), <http://www.surveysusa.com/client/PollReportEmail.aspx?g=a26cf8f3-4a0a-40e5-a503-66444130ca17>.

9. News Release, Kris W. Kobach, Kan. Sec’y of State, *Kansas Secure and Fair Elections (SAFE) Act Signed by Governor* (Apr. 18, 2011), https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf.

10. *Election Results: Ballot Measures*, CNN, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (last visited Jan. 22, 2015). Popular support for the referendum was as high as 80% before opposition groups deployed an opposition campaign. Nat’l Immigration Forum, *2004 Election Analysis: Arizona’s Proposition 200* (Dec. 2004), <http://research.policyarchive.org/11661.pdf>.

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

12. The states are currently challenging the Election Assistance Commission’s refusal to include a proof-of-citizenship requirement on the federal registration form, so far unsuccessfully. Though the states initially won in the district court, *Kobach v. U.S. Election Assistance Comm’n*, 6 F. Supp. 3d 1252 (D. Kan. 2014), the Tenth Circuit recently reversed the district judge’s decision, *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183 (10th Cir. 2014). Kobach plans to appeal to the U.S. Supreme Court. Peter Hancock, *Kobach to Appeal 10th Circuit Citizenship Ruling*, LAWRENCE J.-WORLD (Nov. 10, 2014), <http://www2.ljworld.com/news/2014/nov/10/kobach-appeal-10th-circuit-citizenship-ruling>.

13. 42 U.S.C. § 1973gg-4(a)(1) (2013).

only for federal elections if the form is unaccompanied by proof of citizenship. Kobach has described this as a state of “suspense,” during which the voter may vote in federal elections, but not state or local elections, unless and until the voter provides documentary proof of citizenship.¹⁴ If a registrant supplies proof of citizenship with the federal form or uses the state-specific form, the registration will be valid for all elections. But if a registrant uses a state-specific form and does not provide proof of citizenship, the registration is invalid for all types of elections until the registrant supplies citizenship documents.¹⁵

II. POTENTIAL CHALLENGES

A. Legal Challenges

Opponents of dual registration systems have several potential legal avenues by which to challenge such systems, both constitutional and statutory. Prospects for a successful challenge, however, are slim, though not entirely without a reasonable basis in law. Nevertheless, a challenge to the system as a violation of section 2 of the Voting Rights Act has the highest potential for success, especially with increasing evidence that voter ID laws place a particular burden on minorities.

1. Poll tax

Requiring proof of citizenship to register may be challenged as an unconstitutional poll tax, though success is unlikely. The Twenty-Fourth Amendment, which prohibits poll taxes, only applies to federal elections,¹⁶ so any claim would have to come under the Equal Protection Clause of the Fourteenth Amendment. The leading case is *Harper v. Virginia Board of Elections*, in which the Supreme Court struck down a poll tax as an unconstitutional violation of equal protection because it discriminated on the basis of a suspect class (wealth) that was irrelevant to a voter’s qualifications.¹⁷

In the proof-of-citizenship context, obtaining documentary proof of citizenship may be difficult and expensive. Most states charge for copies of a birth certificate, anywhere from about \$10 to about \$50, with an average of around

14. Deb Gruver, *More than 21,000 Kansans' Voter Registrations in Suspense Because of Proof of Citizenship*, WICHITA EAGLE (Oct. 31, 2014, 9:06 PM), <http://www.kansas.com/news/politics-government/article3504228.html>.

15. *Dual Voting Systems in Three States*, CANVASS (Nat’l Conference of State Legislatures, D.C.), Nov. 2013, at 1, 2-3, available at http://www.ncsl.org/documents/legismgt/elect/Canvass_Nov_2013_No_43.pdf.

16. U.S. CONST. amend. XXIV.

17. 383 U.S. 663, 668 (1966).

\$30.¹⁸ Obtaining a passport is even more expensive, costing well over \$100.¹⁹ Requiring voters to incur these costs before registering may effectively be an unconstitutional poll tax. Nevertheless, the prospects for a successful challenge are grim. *Harper* is an anomaly in its treatment of wealth as a suspect class.²⁰ More recently, courts have been reluctant to define as poll taxes those expenses that voters must incur to vote. For example, the Court in *Crawford v. Marion County Election Board* upheld a photo ID requirement despite the fact that the plurality (obliquely) acknowledged that obtaining a free photo ID also required the voter to present documentary proof of citizenship, which would most likely come at a cost.²¹ Additionally, the Ninth Circuit in *Gonzalez v. Arizona* refused to hold that requiring proof of citizenship constituted a poll tax under either the Twenty-Fourth or Fourteenth Amendments.²² Because the requirement neither forced voters to choose between paying a poll tax and proving citizenship nor made the wealth of the voter or payment of a fee an electoral standard, it was not a poll tax.²³

In any event, states implementing a dual registration system may largely avoid the poll tax problem. Just as states implementing photo ID laws have allowed for the provision of free photo IDs, states requiring proof of citizenship could provide free birth certificates. The Kansas Legislature, for example, amended the SAFE Act to allow voters to obtain a free Kansas birth certificate for the purposes of proving citizenship to register to vote.²⁴ Of course, Kansas can only waive the fee for Kansas birth certificates, so anyone born outside of Kansas must pay any fees requested by the issuing state. Nevertheless, the fee waiver probably is not constitutionally required, as demonstrated by the Ninth Circuit's decision in *Gonzalez*.

18. See *Order an Official Birth Certificate*, VITALCHEK, <https://www.vitalchek.com/birth-certificates> (last visited Jan. 22, 2015) (providing links to information, including cost, about obtaining birth certificates from all fifty states).

19. See *Passport Fees*, U.S. DEP'T ST., <http://travel.state.gov/content/passports/english/passports/information/fees.html> (last updated Nov. 2013).

20. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

21. 553 U.S. 181, 198 n.17 (2008) (plurality opinion). This decision may not be on as firm of footing as it once was. Judge Posner has since acknowledged that voter ID laws are "now widely regarded as a means of voter suppression rather than of fraud prevention." RICHARD A. POSNER, REFLECTIONS ON JUDGING 84-85 (2013). And a federal district judge recently struck down Wisconsin's voter ID law, heavily relying on the burdens that such a requirement places on low-income voters, though that decision was subsequently overturned. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

22. 677 F.3d 383, 407-10 (9th Cir. 2010) (en banc), *aff'd on other grounds sub nom.* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

23. *Id.*

24. *Birth Certificate Instructions for Voter ID*, KAN. DEP'T HEALTH & ENV'T, http://www.kdheks.gov/vital/birth_cert_voter_ID_instructions.htm (last visited Jan. 22, 2015).

2. *Equal protection*

Dual registration systems may also be susceptible to other equal protection challenges. There is nothing inherently legally wrong with a dual registration system. Indeed, the Supreme Court has long held that states are free to set their own voting qualifications, even if those qualifications differ from what is federally required.²⁵ Some states and localities have been using them for years.²⁶ And the U.S. Department of Justice precleared Arizona's proof-of-citizenship law under section 5 of the Voting Rights Act.²⁷ Opponents, however, often cite *Young v. Fordice*, in which the Supreme Court unanimously refused to allow Mississippi to implement a dual registration system.²⁸ The problem there, however, was not the fact of the dual registration system, but rather that Mississippi had failed to seek preclearance for such a system.²⁹ The Court has never posited an opinion as to whether a dual registration system in and of itself is unconstitutional.

That does not mean a challenge is impossible. In fact, Kansas voters have already filed an equal protection claim (though based on the Kansas Constitution), alleging that the dual registration system "divides registered voters in Kansas into two separate and unequal classes, with vastly different rights and privileges" based solely on irrational and arbitrary factors, such as date of registration, military service, which form they use to register, and provision of certain documents.³⁰ Because the plaintiffs have not identified a suspect class, making a successful equal protection claim will be an uphill battle. However, it is possible that the system will be subject to "more exacting judicial scrutiny" considering the impact on voting, which may "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."³¹ An equal protection challenge, then, would not be without basis.

3. *Voting Rights Act*

Section 2 of the Voting Rights Act, which prohibits any voting practice or procedure that results in discrimination on the basis of race or color,³² has tak-

25. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (holding that Congress may extend suffrage to eighteen-year-olds in federal elections, but not state or local elections).

26. *See, e.g.*, *Dual Voting Systems in Three States*, *supra* note 15, at 2; Aaron Kraut, *Takoma Park Stands by Non-U.S. Citizen Voting Law*, WASH. POST (Mar. 14, 2012), <http://wapo.st/1yAhPYE>.

27. *See Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006) (per curiam).

28. 520 U.S. 273, 291 (1997).

29. *Id.*

30. Petition Pursuant to K.S.A. Chapter 60 for Declaratory & Injunctive Relief at 1-2, *Belenky v. Kobach*, No. 13C1331 (Kan. Dist. Ct. Nov. 21, 2013).

31. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

32. 42 U.S.C. § 1973 (2013).

en on new importance since *Shelby County v. Holder*³³ and may be of particular use in a challenge to dual registration systems. Though opponents have long asserted that voter ID and proof-of-citizenship requirements disproportionately affect minorities, only now has empirical evidence become available. Studies have shown that ID ownership is lower among Hispanics and African Americans than among whites.³⁴ The Government Accountability Office found that voter ID laws depressed turnout, particularly among African American registrants.³⁵ The district judge in Wisconsin that struck down a voter ID law did so on section 2 grounds.³⁶ Though the impact of voter ID laws may not be identical to the impact of proof-of-citizenship laws, the empirical evidence can be instructive, particularly because those who lack IDs may do so because they lack a required underlying document, such as proof of citizenship.³⁷ If anything, then, proof-of-citizenship laws likely have a *more* detrimental impact on minorities than voter ID laws.

Overall, then, dual registration systems are far from immune to legal challenges. While none of the legal challenges above are guaranteed to be successful, opponents of dual registration systems have legal ground on which to stand. The ultimate success of any challenge likely will depend on the availability of empirical evidence regarding the effects of voter ID laws.

B. *Practical Challenges*

Even if a state legally *can* implement a dual registration system, that says nothing about whether doing so is advisable. Indeed, the practical challenges and pitfalls seriously outweigh any potential legal challenges.

1. *Complexity*

The election process already suffers from enough complexity. One need look no further than the 2000 Florida recount or the long lines of the 2012 election for prime examples of the confusion that registration lists, ballots, and tabulation can engender. Election authorities are underfunded, and poll workers are undertrained.³⁸ Provisional ballots have been on the rise, particularly in states like Kansas that have adopted increasingly strict registration and voting

33. 133 S. Ct. 2612 (2013) (striking down part of the Voting Rights Act).

34. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 26 (2014).

35. *Id.* at 51-52.

36. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

37. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 27.

38. See PRESIDENTIAL COMM'N ON ELECTION REPRESENTATION, THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 10, 49 (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

requirements.³⁹ In fact, a large portion of provisional ballots rejected during the 2008 election were rejected due to the voter not being registered, likely due to the failure of outdated, inefficient registration systems.⁴⁰

Implementing a dual registration system will only exacerbate these problems. The states themselves have complained that they “are being forced to implement a bifurcated voter registration system that is unduly burdensome.”⁴¹ Election administrators will have to spend more time and money reprogramming registration systems, educating the public, and training poll workers.⁴² The result will likely be another increase in provisional ballots, which slow election results, as it takes time to determine whether they are valid. Additionally, election administrators will have to determine not only whether a provisional ballot as a whole is valid, but also whether only parts of the provisional ballot may be counted. And voters themselves are likely to be frustrated with the increased complexity.

Election offices are already feeling the cost of the increased complexity. They have had to design and print an extra set of ballots for “federal only” voters, redesign registration systems to accommodate two separate lists, and print and mail notices to individuals “in suspense.” Officials in Maricopa County have predicted that the cost of the dual registration system just in that county will exceed \$330,000 in 2014 alone.⁴³ Douglas County, Kansas, has allocated an extra \$32,735 (about an extra 10% over the last comparable election year’s budget) to the clerk’s office to pay for implementing the new proof laws.⁴⁴ Statewide costs are, of course, even higher.

2. *Turnout*

Additionally, voter turnout will likely decline. Indeed, voter ID laws alone decreased turnout by around 2-3% in Kansas and Tennessee according to an

39. See *2012 Election Snapshot—Provisional Ballot Use and Rejections in Kansas*, PEW CHARITABLE TRUSTS (Dec. 5, 2013), <http://www.pewtrusts.org/en/about/news-room/news/2013/12/05/2012-election-snapshot-provisional-ballot-use-and-rejections-in-kansas>.

40. DARON SHAW & VINCENT HUTCHINGS, REPORT ON PROVISIONAL BALLOTS AND AMERICAN ELECTIONS 5 (2013), available at <https://www.supportthevoter.gov/files/2013/08/Daron-Shaw-Provisional-Ballots-Shaw-and-Hutchings.pdf>.

41. Brief in Support of Plaintiffs’ Motion for Preliminary Injunctive Relief at 24, *Kobach v. U.S. Election Assistance Comm’n*, 6 F. Supp. 3d 1252 (D. Kan. 2014) (No. 13-4095-EFM-DJW) (bolding omitted).

42. See Declaration of Brad Bryant at 7, Exhibit A to Brief in Support of Plaintiffs’ Motion for Preliminary Injunctive Relief, *supra* note 41.

43. See Brief in Support of Plaintiffs’ Motion for Preliminary Injunctive Relief, *supra* note 41, at 24.

44. Peter Hancock, *County Budget Reflects Added Cost of Voter ID Laws*, LAWRENCE J.-WORLD (July 15, 2013), <http://www2.ljworld.com/news/2013/jul/15/county-budget-reflects-added-cost-voter-id-laws>.

analysis by the GAO.⁴⁵ Proof-of-citizenship requirements are only likely to exacerbate that trend.

A fundamental truism of economics is that the higher the cost of something, the less likely it will happen. Proof-of-citizenship requirements are likely to reduce registration and therefore result in reduced turnout. Such requirements already increase the cost of voting by requiring (sometimes costly) documents and the expenditure of time to locate them. Dual registration systems only exacerbate the problem by increasing confusion with multiple forms.

Voter registration drives will also be less common. Before proof laws, organizers needed only a stack of forms and a pen. Now, however, organizers will need to carry both federal and state forms to accommodate the registrant's preference, a pen, and a scanner or copier to satisfy the proof-of-citizenship requirement. Of course, doing so is a significant burden and will likely reduce the number of voter registration drives. Even keeping the number of drives constant, many people are unlikely to be willing to share copies of personal information with complete strangers. These exact obstacles have prompted Equality Kansas, an organization whose primary activity is assisting applicants with voter registration, to join the dual registration system lawsuit against Kobach.⁴⁶

The more complicated system will also likely increase wait times on election day as poll workers struggle to determine which ballots go to which voters. Lines, of course, deter people from voting, and as word spreads that lines are long, more voters will leave the line and fewer will show up in the first place. We already have a line problem in this country;⁴⁷ there is no need to exacerbate it.

An equally valid economics lesson is that the more benefit someone receives from an action, the more likely they are to do it. In a dual registration system, voters eligible to vote in both federal and state elections are "fully incentivized" to vote because they receive the full "benefit" of voting for a full slate of candidates. Those voters only eligible to vote in federal elections, however, receive less "value" because they may only vote for a portion of the positions on the ballot. On the margin, then, dual registration systems reduce the incentives of voting for some portion of the populace and therefore are likely to result in reduced turnout.

Notably, low turnout is not only negative in and of itself. High voter turnout signals political engagement by the populace and is generally understood as "fundamental to a healthy democracy."⁴⁸ Moreover, low turnout may result in unrepresentative election results, especially if certain groups of voters (as voter ID opponents argue) are disproportionately burdened by such laws. In fact,

45. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 48-50.

46. See Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief, *supra* note 30, at 1.

47. See PRESIDENTIAL COMM'N ON ELECTION REPRESENTATION, *supra* note 38, at 13.

48. See *Fair Vote*, CTR. VOTING & DEMOCRACY, <http://www.fairvote.org/research-and-analysis/voter-turnout> (last visited Jan. 22, 2015).

several Democrats have argued that low voter turnout may have changed the outcomes of some elections in the 2014 cycle, though such claims are difficult to prove.⁴⁹ Low voter turnout should therefore be a serious concern for all.

Admittedly, some have argued that voter ID laws do not actually decrease voter turnout because Democrats (generally believed to lose more voters to voter ID laws) use the existence of such laws to rally their base.⁵⁰ Nevertheless, the accumulating empirical evidence, particularly the latest GAO report, does not bear such hypotheses out.

3. *Disenfranchisement*

The elephant in the room is the high risk that voters will be disenfranchised. As of October 14, 2014, the last day to register to vote in the 2014 mid-term election, there were 23,026 registrations “in suspense” in Kansas due to failure to provide proof of citizenship.⁵¹ Indeed, disenfranchisement has already occurred: Aaron Belenky was prevented from voting in the Overland Park, Kansas, city elections on October 8, 2013, because he had only submitted the federal form.⁵² De Anna Allen was prevented from casting a ballot in the primary election in August.⁵³ And many “suspended” voters have reported that they are not receiving notice of their suspended status, only finding out they are not actually registered when they show up at the polls.⁵⁴

Of course, these various costs and obstacles might be acceptable if the advantages are large enough. Here, though, the gains from preventing voter fraud cannot outweigh the harms. Though proponents have pushed proof-of-citizenship laws on the ground that they prevent voter fraud, they have had a hard time providing any proof of voter fraud, especially fraud that could have been stopped by the proof laws. Take, for example, Kobach’s illustrations.

First, Kobach claimed to have compiled 221 incidents of reported voter fraud in Kansas between 1997 and 2010.⁵⁵ But only 7 of those 221 incidents

49. See Trip Gabriel & Manny Fernandez, *Voter ID Laws Scrutinized for Impact on Midterms*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/us/voter-id-laws-midterm-elections.html>.

50. See, e.g., Alec MacGillis, *Scott Walker’s 2014 Wisconsin Governor Campaign Is in Trouble*, NEW REPUBLIC (Oct. 28, 2014), <http://www.newrepublic.com/article/120023/scott-walkers-2014-wisconsin-governor-campaign-trouble>.

51. Gruver, *supra* note 14.

52. Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief, *supra* note 30, at 1.

53. Gruver, *supra* note 14.

54. *Id.*

55. Put aside, for the moment, the fact that 221 incidents over thirteen years in which hundreds of elections occurred and millions of votes were cast is an extremely small proportion of votes.

resulted in prosecutions.⁵⁶ Even more damning, most of the alleged incidents of voter fraud were anything but. An analysis by the *Wichita Eagle* showed that most of the “incidents” were just honest mistakes—signing an absentee ballot for a spouse or child off at college or voting on Election Day after forgetting an absentee ballot had already been submitted. Out of the 221 incidents, only 2 involved noncitizens casting ballots.⁵⁷

Kobach also claimed to have identified 67 noncitizens registered to vote, but it is unclear how many of those were also a result of confusion. Moreover, it is sometimes the case that noncitizens become citizens shortly after registering, but before voting.⁵⁸

Finally, Kobach claimed to have identified a Missouri race stolen by noncitizen voter fraud. However, the case was fully litigated, and not once did either of the parties allege that the Somalis whose votes were at issue were noncitizens.⁵⁹ The court ultimately found that “the evidence does not establish that the conduct was fraudulent, that any person who was not registered to vote voted, or that any registered voter was prevented from casting their ballot as they intended.”⁶⁰

Granted, some, like Kobach, believe that even one instance of voter fraud, even if it does not affect the election’s outcome, is too many.⁶¹ But voting regulations are not costless; at some point one has to question how many legitimate voters one is willing to disenfranchise to prevent the single case of fraud that would not have impacted the outcome anyway.

CONCLUSION

Ultimately, Kobach’s evidence is largely overblown. There is very little evidence of voter fraud, and the fraud that does exist likely is not susceptible to proof-of-citizenship laws, as discussed above. Dual registration laws only aggravate the problem by increasing litigation, complexity, cost, and disenfranchisement while reducing turnout. Surely that cannot have been what the legislature or voters intended when passing proof laws. But it is exactly what the dual registration process has caused. Opponents should make use of the mounting empirical evidence regarding the effects and costs of ID laws to fight dual registration systems in both legislatures and the courts. Only then can the people’s right to vote truly be protected.

56. Miranda Blue, *Kobach Uncovers Massive Voter Fraud . . . in 1855*, RIGHT WING WATCH (Oct. 24, 2013, 11:06 AM), <http://www.rightwingwatch.org/content/kobach-uncovers-massive-voter-fraud-1855>.

57. Dion Lefler, *Officials Say Only Two Cases of Voter Fraud in Sedgwick County*, WICHITA EAGLE (Mar. 1, 2011, 12:00 AM), <http://www.kansas.com/2011/03/01/1741068/officials-say-only-two-cases-of.html>.

58. See, e.g., Kobach, *supra* note 7, at 5 n.30.

59. Royster v. Rizzo, 326 S.W.3d 104 (Miss. Ct. App. 2010).

60. *Id.* at 114 (emphasis omitted) (quoting lower court findings).

61. See Lefler, *supra* note 57.