

# **CALIFORNIA INITIATIVE REVIEW**

## **Report: Voter Fraud vs Voter Suppression: A Refocus in Values**

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## I. Introduction

In a Democracy, the theory is that all eligible voters should vote. There are two significant ways that this is prevented- voter fraud and voter suppression. The 2000 Presidential Election was one of the closest elections in our nation's history. David Schultz, *Less Than Fundamental: The Myth of voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 Wm. Mitchell L. Rev. 483, 487 (2008). It was also one of the most contentious. *Id.* Claims of miscounted ballots, overstuffed ballot boxes, and ineligible voters abounded. *Id.* The 2000 election reminded us that each vote does count, and it brought national attention to the way in which each vote was counted. Congress responded relatively quickly with the Help American Vote Act of 2002, a bipartisan compromise aimed at enhancing access to the polls while controlling the problems of fraud in the voting process. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 638 (2006).

Many states have expanded the scope of Congress' act by enacting stricter Voter Identification Laws, most notably Indiana. *Id.* Indiana's law requires registered voters to bring a state issued identification card when they vote. *Id.* at 642. If an individual fails to bring their photo identification to the polls, they must travel to the county seat and sign an affidavit within ten days of the election. *Id.* at 643. The enactment of this law and others like it spawned a debate over the efficacy of Voter Identification Laws in general and a debate on how to improve the overall quality of the electoral process. *Id.* at 634. Despite Voter Identification Laws being a focus of this debate, there is little evidence that voter fraud is a problem in the United States. R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout*, Cal. Inst. Of Tech. Div. of the Hum. And Soc. Sciences, pg 4 (Jan. 2008). There is evidence, however, that Voter Identification Laws deter voter turnout- especially amongst voters with lower income and lower education. *Id.*

While a great deal of national attention has focused on voter fraud in the form of sweeping legislative reform, very little attention has been paid to voter suppression. Jordan T. Stringer, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 Emory L.J. 1011, 1011 (2008). Organized groups have had great impact on the outcome of elections by aiming their resources at preventing key demographics of voters from coming out to vote. *Id.* These groups actively engage in scare tactics, misinformation, and a variety of other strategies to prevent voters from reaching to polls on election day. *Id.* at 1012. And while this problem is well-documented, there is no legislation in place that directly combats this form of fraud. *Id.* at 1042. Currently, Senator Barack Obama has legislation pending in the Senate that would make it illegal to engage in Voter suppression. <http://www.govtrack.us/congress/bill.xpd?bill=s110-453>. This legislation is an important step in combating fraud and ensuring that every single registered voter has the opportunity to vote.

This article first discusses the evolution of Voter Identification Laws, the frequency of voter fraud, and the likelihood that the new laws actually prevent fraud. Next, this article examines the frequency with which new Voter Identification Laws prevent eligible voters from voting. Finally, this article discusses issues surrounding voter suppression and the current state of voter suppression legislation in the United States and California.

## **II. The Push for Voter Identification Laws**

### **A. Developments in Voter Identification Laws Following the 2000 Presidential Election**

Voter fraud is the intentional corruption of the electoral process by the voters. Schultz, 34 Wm. Mitchell L. Rev. 494. Voter fraud can take a variety of forms. It can manifest as a voter attempting to vote twice. *Id.* at 495. Another problem arises when states fail to purge individuals who have died from their voter rolls, allowing individuals to attempt to cast a vote for the deceased. Finally, voter fraud arises when an unregistered individual attempts to vote. *Id.*

In response to the claims of fraud in the 2000 Presidential Election, Congress enacted the Help America Vote Act (HAVA) of 2002. Overton, 105 Mich. L. Rev. 634. There were two basic responses to the problems encountered in the 2000 election. The first was to make sure every single vote was counted. *Id.* This was accomplished by improving voter access to the polls, replacing outdated punch card machines, and by providing provisional ballots to registered voters who appeared at the polls to vote on election day, but whose name did not appear on voter rolls. *Id.* The second was to make sure that only eligible voters voted on election day. *Id.* HAVA effectuated this goal by requiring all first time voters who registered by mail to provide photo identification when they arrived at the polls to vote. *Id.*

Following the enactment of HAVA in 2002, many states began to expand the photo identification requirement by enacting statutes requiring voters to present various forms of identification at the polls. *Id.* Proponents' main reason for enacting Voter Identification Laws is to prevent voter fraud. Schultz, 34 Wm. Mitchell L. Rev. 494. They argue that by showing a form of identification, this will prevent most, if not all, instances of fraud. *Id.* at 495. However, proponents cite no statistical data to show that voter fraud is a problem. Instead, proponents argue that voter fraud is difficult to detect and that “[i]t is common sense to require any eligible citizen to present proof of his or her identity...before receiving a ballot.” Cal. Assembly 9, 2006-2007 Reg. Sess. (Jan 8, 2008). Opponents of Voter Identification Laws point to the lack of evidence that voter fraud is a problem. Alvarez, Bailey & Katz, Cal. Inst. Of Tech. Div. of the Hum. And Soc. Sciences 1. They also cite to statistical evidence that shows that Voter Identification Laws depress turnout for less educated and lower income populations. *Id.* Data also suggests that states with the strictest Voter Identification Laws have a lower turn out of registered voters when compared to states with the weakest requirements. *Id.*

### **B. Indiana's Voter Identification Law and *Crawford v. Marion County Election Board*.**

Indiana enacted one of the strictest Voter Identification Laws in 2006. Overton, 105 Mich. L. Rev. at 640. Indiana is one of two states (Georgia is the other) to enact a law that required individuals to present a state issued photo identification at the poll, and if they did not, they would not be able to vote a regular ballot that day. *Id.* If a person did not have photo identification at the poll they could vote on a provisional ballot that same day. *Id.* However, within ten days of the election, that voter would be required to travel to the county seat and sign

a sworn affidavit. *Id.* Opponents of the law criticized this requirement, arguing that the lack of comprehensive public transportation in Indiana prevents many rural Indianan voters from traveling to the county seat to sign an affidavit.. *Id.* at 641. The law did have a provision for indigent voters that allowed them to obtain a government issued photo identification free of charge or place a provisional ballot on the day of the election and then travel to the county seat within ten days. *Id.* at 642. While the ID was free, there were costs involved, most notably, a cost of ten dollars to obtain a birth certificate. *Id.*

In *Crawford v. Marion County Election Board*, petitioners alleged that Indiana’s Voter Identification Law (SEA 483) substantially burdened the right to vote, violating the Fourteenth Amendment. 128 S. Ct. 1610, 1614 (2008). In a divided opinion, the Supreme Court rejected this facial challenge to the law. *Id.* at 1624. Three justices joined in the controlling opinion, three concurred in the judgment, and three justices dissented. The controlling opinion carefully constrained its holding to the facts of the case and emphasized that the record before it lacked evidence that the law had actually deterred voters from voting. Carrie Apfel, *The Pitfalls of Voter Identification in a Post-Crawford World*, American Constitution Society for Law and Policy, 1, 7 (June 11, 2008), <http://www.acslaw.org/node/6715>.

To find a constitutional violation, the Court would have had to find that the statute imposed “excessively burdensome requirements” on a class of voters. *Crawford*, 128 S. Ct. at 1623. However, petitioners failed to sufficiently demonstrate such a burden on a class of voters *Id.* The Court indicated that there was a dearth of evidence on both sides of the lawsuit, and it made the facial challenge to the law problematic. *Id.* at 1622. Indiana asserted that it had a legitimate interest in preventing voter fraud and in safeguarding voter confidence. However, “[t]he only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.” *Crawford*, 128 S. Ct. at 1618-1619.

The record also contained no evidence that the law actually burdened a class of voters. *Id.* at 1622. “The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed.” *Id.* Because the petitioners brought suit immediately after the law was passed and before any election had been held, they didn’t have any data on the whether the law actually had an effect on voter turnout. Apfel, *The Pitfalls of Voter Identification*, at 7. Despite this, petitioners argued that certain voters would not be able to obtain a birth certificate or make the trip to the county seat within ten days of the election and therefore the law imposed excessively burdensome requirements. *Crawford*, 128 S Ct. at 1622. The Court held, “on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified,” and found that the law was valid. *Id.* However, the Court did articulate the type of evidence that would establish that the Voter Identification Law impermissibly imposed a burden on voters. *Id.* It indicated that the number of registered voters without photo identification, concrete evidence of the burden the new law placed on registered persons, and the burden the new law might have placed on indigent or elderly voters were all relevant considerations in determining whether the law placed an impermissible burden on voters. *Id.* The lack of evidence of this type was fatal to petitioners claim. *Id.*

The *Crawford* decision is not a useful decision in predicting how the Supreme Court will decide future challenges to Voter Identification Laws. Apfel, *The Pitfalls of Voter Identification Laws* at 6. The decision was issued by a deeply divided court with a controlling opinion that was anything but clear. *Id.* The controlling opinion did make clear that if petitioners gathered data that demonstrated that the Voter Identification Laws did excessively burden voters, the Court would overturn such a law. *Id.* In response to *Crawford*'s call for data, several studies have been performed to measure the effect of Voter Identification Laws.

### **C. Response to *Crawford v. Marion County Election Board***

In response to the Supreme Court's holding in *Crawford*, several studies have gathered data about the effects of Voter Identification Laws and their efficacy. See e.g. Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 Harvard L. Rev. 1731 (May, 2008). There is still very little evidence of actual voter fraud- even in *Crawford* itself the state acknowledged there had not been a single instance of documented voter fraud in the entire history of Indiana. 128 S. Ct. at 1618-1619.

#### **1. Proponents of Voter Identification Laws**

Despite the lack of evidence of actual voter fraud, *Crawford* found that “[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is clear.” *Crawford*, 128 S. Ct. at 1620. Therefore, the state had an interest in and could enact a law to prevent voter fraud, even in the absence of evidence that there was a problem. *Id.* Proponents also contend that because the voter rolls in their state are inflated with names of voters who have died (because the state has failed to purge these rolls), Voter Identification Laws provide a method to prevent individuals from voting on behalf of the deceased. *Id.*

Proponents also contend that the state has a legitimate interest in protecting public confidence in its election process. *Id.* “Public confidence in the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* Similarly, proponents of Voter Identification Laws argue that the appearance of voter fraud depresses voter turnout and that these laws reduce the appearance of fraud. Andrew N. DeLaney, *Appearance Matters: Why the State has an interest in Preventing the Appearance of Voter Fraud*, 83 N.Y.U. L. Rev. 847 (June 2008). They argue that Voter Identification Laws make the process seem more reliable and therefore increase voter turnout. *Id.*

#### **2. Opponents of Voter Identification Laws**

Opponents of Voter Identification Laws argue that there is little evidence of actual voter fraud, stricter requirements depress turnout for low income and less educated voters, and that Voter Identification Laws actually depress voter turnout. Alvarez, Bailey & Katz, Cal. Inst. Of Tech. Div. of the Hum. and Soc. Sciences at 3. Opponents claim that there is very little evidence of actual voter fraud, and that proponents merely cite anecdotal evidence to support their claims. Overton, 105 Mich. L. Rev. at 640. The Carter-Baker Commission was a bipartisan commission formed following the 2000 Presidential election to study and propose solutions to the country's election problems. *Id.* The Commission found that from 2002 to 2005, 89 individuals

throughout the country were charged with voter fraud. *Id.* at 654. This translates to a fraud rate of .0000005%. *Id.* Similarly, an Ohio statewide study found that there were only 4 instances of voter fraud found out of 9,078,728 votes cast in the state's 2002 and 2004 general elections. *Id.* These contentions are supported by *Crawford* itself, in which the state could not point to one instance of voter fraud in the entirety of Indianan history. 128 S. Ct. at 1618-1619.

Studies promulgated in the wake of *Crawford* have also found that Voter Identification Laws depress turnout in certain populations. Once researchers focused the data on the effect of the Voter Identification Laws on the individual state level, they discovered that the stricter the requirements (the strictest requiring the voter to show a state issued ID card) the lower the turnout for less educated and lower income populations. Alvarez, Bailey, & Katz, Cal. Inst. of Tech. Div. of Hum. and Soc. Sciences at 3.

Finally, opponents indicate that there is also evidence that the appearance of voter fraud does not depress voter turnout. A study conducted by Nathaniel Persily published in the Harvard Law Review found that a voter's perception of voter fraud has no relationship to whether they actually vote or not. Persily, 121 Harv. L. Rev. 1751. In fact, the section of voters who are not sure if fraud has occurred (as opposed to those who think fraud is likely or very likely) are the least likely to turn out to vote. *Id.* at 1751. Also, individuals who were subjected to the strictest form of requirements, showing their photo identification at the polls, did not report a higher level of confidence in the electoral process. *Id.* at 1755.

#### **D. Voter Identification Laws in California**

Currently in California, a registered voter has only to appear at the poll on the day of the election, state their name and address to the precinct officer, the precinct officer repeats it back to them, and then they enter it into the voter roll. Cal. Assembly 9, 2006-2007 Reg. Sess. (Jan. 8, 2008). If an individual who is not registered to vote attempts to vote, there are several ways in which they may be held accountable. *Id.* A member of the precinct board can challenge a person's ability to cast the ballot, and anyone who votes more than once, attempts to vote more than once, or impersonates a voter is guilty of a crime punishable by up to two years imprisonment. *Id.*

The Democratic led Legislature has defeated about a dozen Republican bills devoted to voter identification in the past few years. Kevin Yamamura, *California Voter ID Push by GOP Rejected*, The Sacramento Bee Politics (April 29, 2008). In January of this year, The Assembly Committee on Elections and Redistricting (the Committee) killed a Voter Identification Bill proposed by Assemblyman Bob Huff. If this legislation passed, a voter would have two options on election day. A voter could either show photo identification at the polls or, if the voter did not have identification on election day, they could submit a provisional ballot and then present a valid identification to the county registrar within five days.

The Committee rejected this bill because the proponent presented no empirical evidence that voter fraud is a problem in California. Cal. Assembly 9, 2006-2007 Reg. Sess. "In fact, a May 2006 report commissioned by the United States Election Assistance Commission, found

that ‘more researchers find [voter fraud] to be less of a problem than is commonly described in the political debate,’ and that ‘[t]here is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed’ *Id.* Similarly, since October of 2002, despite the United States Department of Justice making voter fraud a higher priority, only 24 people were convicted of voter fraud in three years. *Id.*

The Committee further rejected this bill because it had no provision for indigent voters. *Id.* Of the three forms of identification widely available under this bill, a driver’s license costs \$27, an identification card costs \$7 for those who are younger than 62, and a new passport costs \$97. *Id.* Because of the lack of evidence that voter fraud was a problem, the Committee decided to direct its resources to combating more problematic areas of fraud by focusing on fraud hotlines, removing non-eligible names from voter rolls, and vigorous prosecution. *Id.*

### **III. A Need to Refocus Attention on Voter Suppression**

There is very little evidence of voter fraud. No study cites to widespread abuse of the system. Further, politicians proposing new voter identification bills cite no instances of abuse in support of their bills. Stringer, 57 Emory L.J. at 1017. As discussed above, instances of voter fraud occurs in the tens, with the Department of Justice convicting only twenty-four people in a three-year period. Cal. Assembly 9, 2006-2007 Reg. Sess. Instances of voter suppression occurs in the tens of thousands. Stringer, 57 Emory L.J. at 1017. Despite being a wider and more concerning aspect of election manipulation, there are few laws to combat this abuse of the election process and, as a result, there is no disincentive for campaigns or individuals to refrain from abusing the system. *Id.*

#### **A. Instances of Voter Suppression**

Unlike voter fraud, there are several instances in recent history of voter suppression. In 1990, thousands of African American voters received misleading postcards calculated to deter them from voting on election day. *Id.* While the Department of Justice was able to successfully prosecute the Carolina Republican Party and the Helms for Senate Committee, the penalties were minor. *Id.* at 1030-1031. Helms mailed between 125,000 and 150,000 postcards, predominantly to African Americans. *Id.* The postcards gave voters false information about their eligibility to vote by telling them they could not vote if they had not lived in the precinct for more than thirty days.

<http://query.nytimes.com/gst/fullpage.html?res=9C0CE4DE1E3BF935A35752C1A966958260>. The postcard then threatened that violating the non-existent 30 day residency rule could result in five years imprisonment. *Id.* Plaintiffs sued the Carolina Republican Party and the Helms for Senate Committee, and while they won, their victories were hollow. Stringer, 57 Emory L.L. at 1031. Two years after the postcards were mailed and two years after Jessie Helms had won the Senate seat, the judge was able to issue an injunction to stop the mailings. *Id.* The defendants were not subjected to any other penalties. *Id.*

Another example occurred in October of 2002 in New Hampshire. *Id.* at 1032. The Director of the New Hampshire Republican Party, Charles McGee, received a flier from the Democratic Party that provided voters a phone number to call if they wanted a free ride to the

polls on election day. *Id.* Mr. McGee then contacted James Tobin to help him find a company that would jam the telephone lines of the phone number advertised on the flier. *Id.* On election day, the company continuously called the offices of the Democratic Party between the hours of 7:45 am and 9:10 am. *Id.* The Republican Party's tactics resulted in the Democratic Party being unable to field a single call. *Id.* Because there was no bill that dealt specifically with this form of voter suppression, prosecutors had to reach to an obscure phone harassment law to prosecute Tobin. *Id.* at 1033. While Tobin was convicted of phone harassment by a jury, the Court of Appeals for the First Circuit held that the jury instruction given by the District Court inappropriately broadened the statute's reach. *United States v. Tobin*, 480 F.3d 53, 55 (1st Cir. 2007). On remand, the District Court reversed the conviction. *United States v. Tobin*, 545 F.Supp.2d 189, 191 (D. N.H. 2008).

Unlike the specter of voter identification fraud, charges of voter suppression are backed by well-documented instances of abuse of the electoral process through misinformation, intimidation, and harassment. Stringer, 57 Emory L.J. at 1032. Yet, Voter Identification Laws are being proposed and passed with increasing frequency, and, in the wake of *Crawford*, increasingly strict requirements. *Id.* Because of the dearth of legislation in the arena of voter suppression, Barack Obama proposed a bill in Congress in 2007.

### **B. The Deceptive Practices and Voter Intimidation Act**

The Deceptive Practices and Voter Intimidation Act of 2007 was proposed by Senator Obama and Senator Schumer. GovTrack.us. S. 453--110th Congress (2007): Deceptive Practices and Voter Intimidation Prevention Act of 2007, *GovTrack.us (database of federal legislation)* <<http://www.govtrack.us/congress/bill.xpd?bill=s110-453>> (accessed Oct 14, 2008). "This bill would make voter intimidation and election misinformation punishable by law, and contains strong penalties so that people who commit these crimes suffer more than just a slap on the wrist." [http://Obama.senate.gov/press/070607-obama\\_bill\\_would\\_1/](http://Obama.senate.gov/press/070607-obama_bill_would_1/). Illegal acts under the bill would include deceptive fliers, misleading automated telephone calls, false threats of criminal penalties, and other dishonest strategies. <http://govtrack.us/congress/bill=s110-453&tab=summary>. It also allows any person to report false election information to the Attorney General who is mandated to investigate and prosecute the case if there is a reasonable basis to find that an election violation has occurred. *Id.*

On June 7, 2007, the Judiciary Committee held a hearing on the Deceptive Practices and Voter Intimidation Act. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:sr191.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr191.pdf). The Committee Report discussed the history of voter suppression and intimidation, and found that the constitutional protections on the right to vote and the protection provided by the Voting Rights Act were unable to combat the current, subtler tactics used in today's elections. *Id.* The Committee discussed the current practices used today such as intimidating voters with false penalties and providing false information about the day of the election. *Id.* In 2002, fliers were distributed in the public housing areas of New Orleans stating falsely that if the weather was bad, voters could cast their ballots the day after the election. *Id.* In the 2004 Presidential election, voters in Milwaukee received fliers warning that if they were guilty of even a traffic offense and tried to vote, they would be subjected to extreme penalties. *Id.* In the 2006 Congressional Election in Orange

County California, 14,000 letters were mailed to Spanish-surname voters. <http://judiciary.senate.gov/hearings/hearing.cfm?id=2798>. The letters appeared on the letterhead of the California Coalition for Immigration Reform and contained several misleading and false statements. *Id.* The letter falsely stated that it is a crime for immigrants to vote in a federal election. *Id.* It is worth noting that naturalized immigrants can vote legally. *Id.*

After examining these instances and other material relating to the Deceptive Practices and Voter Intimidation Prevention Act, the Judiciary Committee found that the right to vote was an essential right accorded to citizens and that “the unimpeded exercise of that right is essential to the functioning of our democracy.” *Id.* The Committee explored the current state of the law, and found it inadequate to combat the newer challenges to voter suppression. *Id.* The Deceptive Practices and Voter Intimidation Prevention Act remedied this problem by punishing individuals who publish false information about an election, engage in acts intended to keep individuals who were qualified to vote from voting, and increasing penalties associated with intimidation tactics used in federal elections. *Id.* “Because these more modern methods of coercion and intimidation do not fall neatly within the ambit of current law, legislation amending Section 1971(b) is needed.” *Id.*

After these findings, the Committee recommended this bill to the floor of the Senate where it has faced partisan opposition. <http://govtrack.us/congress/record.xpd?id=110-s20080722-48&bill=s110-453>. On July 22, 2008, Senator Patrick Leahy expressed his frustration at this opposition. *Id.* Despite making it through the Judiciary Committee, The Deceptive Practices and Voter Intimidation Act of 2007 is waiting to be voted on by the Senate. *Id.*

#### **IV. Conclusion**

Currently, because recent presidential races have been decided by a small margin of voters in a few battleground states where each vote was weighted, questioned, and debated, there has been a focus in this country on Voter Identification Laws. However, the conduct that these laws are aimed at deterring is not conduct that is a problem for this country. In fact, the Voter Identification Laws themselves may become a problem- impeding vulnerable populations from access to the polls on election day and depriving them of their constitutional right to vote.

In contrast, in almost every election cycle in this country there are at least a few instances of documented mass voter suppression. There are few laws in place that protect these voters from the intimidation, misinformation and ultimately disenfranchisement which results from these tactics. What we currently have are outdated laws that are not effective in combating the subtler, but just as pernicious, strategies to deter voting today. Hopefully, either the Deceptive Practices and Voter Intimidation Act of 2007 will pass the Senate, and give some real protection to voters in future elections.