"Voter ID Laws Lead to Less Voting, Not Less Fraud"

Testimony for Forum

"Excluded from Democracy: The Impact of

Recent State Voting Changes"

November 14, 2011

by

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I am sorry that I am not able to attend this, the first hearing that the House of Representatives has held on the question of voting rights in the 112th Congress. I am also sad that this is the first such hearing. Prior to 2011, only two states had "strict photo ID laws" to vote. With Mississippi's referendum on Tuesday, November 09, that number has more than tripled.[1] Dozens of state legislatures have seen strict voter ID laws introduced this year. And yet the House committees of jurisdiction, that is the Committees on the Judiciary and House Administration, have not held a hearing on the subject. That is why I joined with dozens of my colleagues in requesting that Chairmen Smith and Lungren remedy this situation by calling hearings[2] and I hope that they will soon follow the lead of Mr. Conyers by doing so.

There is no right more fundamental to our national identity and our form and system of government than the right to vote. The genius of our constitution was horribly besmirched by the passages condoning slavery. It took us nearly 80 years and a bloody civil war before we amended the Constitution to end slavery and began to make right that failure. Since then, the Constitution has been amended 14 more times and fully half of those amendments focus on protecting and expanding the right to vote.[3] So it is right and proper that we, as Members of Congress, should examine whether any state law is infringing on that right of American citizens. If any such law exists, it is our duty, as citizens as well as members of the federal government who have taken an oath to uphold the Constitution, to act.

For many years now, we have heard tales of conspiracies to commit voter fraud, but they rarely survive close scrutiny.[4] During the Administration of George W. Bush, rooting out this rampant voter fraud was one of the Department of Justice's highest priorities. So important was this effort that top officials acted "improperly" and "violated Department policy and federal law".[5] And what was the result of this concerted push to find instances of voter fraud? After five years of effort, a period during which hundreds of millions of voters cast their ballots, the Department of Justice brought 95 cases to trial. Twenty-five of those cases were dismissed or

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[1] Amy Bingham, "States With Strict Voter Photo ID Laws More Than Tripled In 2011", *ABC News's The Note*, November 07, 2011 (http://abcnews.go.com/blogs/politics/2011/11/states-with-strict-voter-photo-id-laws-more-than-trippled-in-2011/)

[2] "Hastings and House Democrats Call for Congressional Hearings on Voter Suppression", November 09, 2011 (http://go.usa.gov/INF)

[3] See Amendments 14, 15, 17, 19, 23, 24, and 26. Except for the 14th Amendment, expanding or protecting the right to vote is the sole purpose of each of these amendments.

[4] See, *e.g.*, Jeannine Koranda, "Dead folks voting? At least one's still alive", *The Wichita Eagle*, October 29, 2010 (http://www.kansas.com/2010/10/29/1562791/dead-folks-voting-at-least-ones.html)(describing how Kris Kobach, then a candidate for his current position as Secretary of State, announced that one man on the voter roles was dead. "Reached Thursday at his home where he was raking leaves, Brewer, 78, was surprised some people thought he was dead. 'I don't think this is heaven, not when I'm raking leaves,' he said.") More generally, see, Justin Levitt "The Truth About Voter Fraud", Brennan Center for Justice at NYU School Of Law, 2007 (http://brennan.3cdn.net/c176576c0065a7eb84_gxm6ib0hl.pdf)

[5] See "An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General" by the U.S. Department of Justice's Office of Professional Responsibility and Office of the Inspector General, July 28, 2008, at 28, 35, 45, 67, 69, 81, 115, 117, 135, *et alia* (http://www.justice.gov/oig/special/s0807/final.pdf).

resulted in acquittals. As a former judge, I will say that seventy successful prosecutions is not good news. That's seventy examples of people breaking the law, knowingly or otherwise. But, as the New York Times reported, "Many of those charged by the Justice Department appear to have mistakenly filled out registration forms or misunderstood eligibility rules, a review of court records and interviews with prosecutors and defense lawyers show."[6]

What we're seeing, then, are examples of people making honest mistakes, be it registering twice or trying to vote even though their right to do so has been revoked because they've been convicted of a felony. At a hearing in the House Subcommittee on Elections on March 31, 2011, Minnesota Secretary of State Mark Ritchie told the story of a one of these "criminals":

> Election day 2008, a young man way up on the Canadian border, just out of the prison, was very proud, getting his life back together, putting his life back together, called his parole officer and got the answering machine and said: "I am getting my life back together. I am going to be a good citizen. I am a very strong supporter of Senator McCain and Senator Coleman. I am going down to vote. Aren't you proud of me for being a citizen and for being active?" He, unfortunately, was not yet off parole. And so he went down, not trying to hide anything, of course, and before his parole officer was able to reach him, he violated the law in Minnesota and committed another felony. His parole officer called him and said, "Don't", and it was too late. And so actually he was prosecuted under a gross misdemeanor, 30 days in the county workhouse, a little tiny county that really can't afford to do a lot of extra prosecutions or put people up for a jail term; very expensive problem for the county and for this young man's life.[7]

Is this the problem which is supposed to pose such a threat that we should pass new laws making it harder for eligible citizens to vote? So that we can, not empower but, rather, dragoon state prosecutors and United States attorneys into diverting limited resources to spend their time throwing people in jail for being overeager to be good citizens? That's not what the evidence proves. What it proves is that we need: to improve voter education about who can and cannot vote; to help the Election Assistance Commission provide more support to state and local governments on things like poll-worker training; and help states to coöperate in preventing multi-state registration. Rather than imposing burdensome solutions to problems we don't have, these are steps that would combat the actual problem that we're facing.

This state of affairs is simply amazing to me and I really do have trouble understanding it. It is a sad fact that only 41% of the voting-eligible population of this country actually cast a ballot last year. Many developed countries regularly see turnout above 70 and even 80% of the

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[6]Eric Lipton and Ian Urbina, "In 5-Year Effort, Scant Evidence of Voter Fraud", *The New York Times*, April 12, 2007 (http://www.nytimes.com/2007/04/12/washington/12fraud.html)

[7] See "The 2010 Election: A Look Back at What Went Right and Wrong, March 31, 2011" at 58 (quotation marks added) (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:67298.pdf)

voting-age population, a significantly larger group.[8] Our priority should be engaging our entire population so that everyone who is eligible to vote chooses and is able to participate directly in our democracy.[9] But instead of removing barriers to voting, state after state, especially in the past eight months, has imposed burdens and thrown hurdles into their path. I almost wrote that these were "new burdens" and "new hurdles" but the sad fact is that too many of them are not. They are, rather, burdens we had imposed in a darker age, hurdles we had cast aside and, it was hoped, smashed into kindling. As my colleague, John Lewis, wrote in the New York Times, in an article submitted for the record, these are "poll taxes by another name."[10]

On May 27, 2011, Texas Governor, Rick Perry, signed into law SB 14, a bill which has brought these unfortunate policy mistakes to the second largest state in the country. The governor, for reasons passing understanding, declared that this bill an emergency. This was not because we faced a new problem with voter fraud in Texas. Like every other state in the country, the allegations of voters committing fraud at the polls have consistently come up empty.[11] And it's not just that there is no evidence of the kind of fraud alleged by supporters of voter ID legislation.[12] There is also the fact that voter ID laws like Texas's wouldn't even counter the kinds of fraud that are likely to occur. As numerous experts have pointed out, in testimony before state legislatures, including Texas's[13], and before congressional committees in both chambers, a

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[8]See, *e.g.*, OECD Family Database, Societal Participation, Section CO4.2: Participation rates of first-time voters, at 1 (http://www.oecd.org/dataoecd/1/20/43200248.pdf) showing "voter turnout in the most recent parliamentary elections as based on administrative data". N.B. These figures refer to all voters, not merely first-time voters, information on whom follows in that report.

[9] I have heard too many times to count that political contributions are a vital means of participating. I would infinitely rather a voter in my district cast a ballot than signed a check.

[10] John Lewis, "A Poll Tax by Another Name", *The New York Times*, August 26, 2011 (http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html). See also the list of allegations of voter intimidation compiled by the American Center for Voting Rights Legislative Fund, a group which supported voter ID law, archived at http://web.archive.org/web/20061108140051/http://www.ac4vr.com/reports/072005/republicanincidents.html

[11] Again, this is not to suggest that election law violations are not occurring. A complaint was filed in October, 2010, by Texans for Public Justice with the Texas Ethics Commission against the "King Street Patriots" for funding violations and voter suppression in Houston. (http://www.tpj.org/2010_10_01_archive.html) In June, two aides to former Republican Governor Robert Ehrlich were indicted for "deceptive robocalls intended to suppress votes on the night of the election." Annie Linskey and Julie Bykowicz, "Ehrlich aides indicted in Election Day robocalls case", *The Baltimore Sun*, June 16, 2011. (http://weblogs.baltimoresun.com/news/local/politics/2011/06/ehrlich_aides_indicted_in_elec.html)

[12] See, *e.g.*, Ian Urbina, "Panel Said to Alter Finding on Voter Fraud", *The New York Times*, April 11, 2007, (http://www.nytimes.com/2007/04/11/washington/11voters.html). The article describes how a report on whether voter fraud was a problem by the United States Election Assistance Commission was altered to downplay the conclusion of the experts that it was not while voter intimidation was. Republican elections lawyer Job Serebrov, one of the experts who authored the original report, while prohibited from discussing differences between the original report and the finished version, told the *Times* that he and his colleague had produced, "a correct, accurate and truthful report.... I could care less that the results are not what the more conservative members of my party wanted." According to the draft obtained by the *Times*, only one interviewee "believes that polling place fraud is widespread and among the most significant problems in the system." (http://graphics8.nytimes.com/packages/pdf/national/20070411voters_draft_report.pdf at 7)

[13] See, *e.g.*, testimony of Justin Levitt before the Texas House of Representatives Elections Committee: Voter Fraud and Restrictive ID Requirements (http://www.brennancenter.org/content/resource/justin_levitt_before_texas_house_of_representatives/)

voter ID law can only combat one type of fraud, that of someone who goes to the polls and pretends to be someone else or to deny that he or she has already voted.[14] It's astonishing to find purported proponents of free market ideology propounding such an illogical course of action. While we can honestly say that every vote counts, even the most cursory cost-benefit analysis demonstrates the illogic of risking 10 years in prison to cast one more vote in even the most important race. Who would risk such a thing?

Actual Electoral Fraud Won't Be Stopped by Voter ID

The answer is that no one would. With few exceptions, chiefly cases of error like those mentioned above, the incidents of voter fraud state and federal prosecutors have actually found are vastly different things. Even in the 19th century, when the kind of fraud photo ID laws are supposed to stop was not so uncommon and men were unironically encouraged to "Vote early and vote often!", that kind of fraud was rarely the determining factor. Tammany Hall's William "Boss" Tweed has been quoted as saying that he didn't care who voted as long as he controlled who counted the ballots.[15] Thus, we find men and women convicted of submitting fraudulent counts of the ballots.[16] Just last month, one of my colleagues in the House announced plans to repeal the federal law that ensures that voters can read their ballots.[17] It's not easy to vote for your preferred candidate if the ballot's incomprehensible.

Tweed also said, "I don't care who does the electing as long as I do the nominating"[18], and a top complaint of many voting rights advocates is improper "ballot access" whereby rules are setup to prevent a rival candidate or political party from even getting on the ballot in the first place. The two independents who ran for governor of Texas in 2006 each had to collect 45,450

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[14] See generally, Christopher Beam, "Fake the Vote", *Slate.com*, October 26, 2010. (http://www.slate.com/id/2272405/pagenum/all/). See also, a letter from the American Civil Liberties Union Foundation, Inc. to Christian Herren, Chief of the Voting Section at the Department of Justice (http://www.aclu.org/files/assets/comment_under_section_5_re_submission_no__2011-2495.pdf) generally, but specifically at 9 saying that South Carolina's voter ID law: "has the potential to prevent one, and only one, type of voter fraud – voter impersonation. The ID requirement will prevent a person from going to a polling place on Election Day, fraudulently requesting a ballot under the name of a qualified voter of that precinct who has registered to vote but has not voted prior to the fraud, and casting that ballot. The ID requirement will not prevent any other type of fraud, such as double-voting, felon voting, non-citizen voting, absentee fraud, registration fraud, vote buying, or negative vote buying."

[15] In the 2003 movie "Gangs of New York", this was rendered as, "the first rule of politics. The ballots don't make the results, the counters make the results."

[16] See, *e.g.*, Bill Estep, "Jury convicts all 8 defendants in Clay vote-buying case", *Lexington Herald-Reader*, March 26, 2010 (http://www.kentucky.com/2010/03/25/1197075/jury-convicts-all-8-defendants.html) N.B. While those convicted in that case engaged in multiple types of fraud over several years, none of their chosen methods would have been prevented by voter ID law.

[17] "Coffman Wants to End Bilingual Ballot Requirement", August 17, 2011, (http://coffman.house.gov/index.php?option=com_content&task=view&id=496&Itemid=10)

[18] Arthur Twining Hadley, The Invisible Primary, © 1976 Prentice Hall, p. 8

valid signatures during a short period of time simply to get on the ballot. And yet they received more than 30% of the vote in that election, indicating that neither was a mere fringe candidate.[19]

Another kind of fraud that definitely does exist comes on the other end of the voting process. You don't have to control the votes cast or counted if you control who gets to vote. While the terrorism of the Jim Crow South is and will remain the quintessential example in American history, this practice is not a relic of a bygone era. In the most significant case of which I'm aware, the Republican National Committee avoid trial on charges of vote caging in New Jersey in the 1980s by signing a federal consent decree never to engage in so-called "ballot security" operations that improperly purged Democratic voters from the registration lists.[20] The RNC has repeatedly sought to be released from that decree, most recently in 2009, when Judge Dickinson R. Debevoise denied the request, holding, "Voter intimidation presents an ongoing threat to the participation of minority individuals in the political process, and continues to pose a far greater danger to the integrity of that process than the type of voter fraud the RNC is prevented from addressing by the Decree."[21] That this remains a concern was made clear in 2007 when, during her testimony before the House Judiciary Committee, disgraced former Department of Justice official Monica Goodling testified that now-Representative Tim Griffin (AR-2) may have engaged in illegal vote caging during the 2004 presidential campaign.[22]

In 2005, operatives of the New Hampshire GOP were convicted of organizing a malicious attack on the telephone network of the Democratic senate candidate on Election Day 2002. In a race decided by less than 5%[23], this electoral fraud may have decided one of our senate elections. This is the kind of electoral abuse about which we need to worry because it is the only fraud that makes sense to the unprincipled people who would even consider committing fraud. In such frauds, a single act can decide the turnout. In the kind of fraud targeted by voter ID laws, hundreds, thousands, or even millions of separate acts by separate people would be required to have the same impact. It simply isn't realistic.

The harmful results of the voter ID laws that purport to combat it, in contrast, are all too real, proven, and well known.

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[19] The Office of the Secretary of State, Race Summary Report, 2006 General Election, November 7, 2006 (available at http://elections.sos.state.tx.us/elchist.exe) indicates that Carole Keeton Strayhorn received 796,851 (18.11%) and Richard "Kinky" Friedman received 547,674 (12.44%).

[20] See, generally, John Schwartz, "U.S. Judge Opposes Republicans on Elections", *The New York Times*, December 2, 2009 (http://www.nytimes.com/2009/12/03/us/politics/03voting.html). The various complaints and briefs are available at "DNC v. RNC Consent Decree" by The Brennan Center (http://www.brennancenter.org/content/resource/dnc_v_rnc_consent_decree/)

[21] *DNC v. RNC*, Civ. No. 81-3876 (DRD), http://electionlawblog.org/archives/dnc_v_rnc_-_opinion_12.01.2009.pdf, at 3.

[22] See Dahlia Lithwick, "Raging Caging", *Slate.com*, May 31, 2007. http://www.slate.com/id/2167284/pagenum/all/

[23] State of New Hampshire, Elections Division, State General Election, November 5, 2002 (http://www.sos.nh.gov/general2002/sumuss.htm)

But Voter ID Laws Will Disfranchise Legitimate Voters

In the first place, more than 23 million Americans do not have government issued photo ID.[24] During oral argument before the Supreme Court, even the positive spin adopted by the attorney tasked with defending Indiana's misguided voter ID included the admission that at least 25,000 Indianans, and possibly could "be inconvenienced by this law."[25] Defense counsel put the number of people who would face hardship under the law at closer to 200,000.[26] That's from a state with 6,483,802 people, according to the 2010 Census.[27] If we extend those rates out to the nation as a whole, we get anywhere from 1.2 to 9.7 million people whose right to vote would be harmed by the imposition of voter ID laws that, as stated above, would do nothing to prevent actual fraud.[28]

These mere numbers, however, are not even the most telling point. It is not acceptable for the state to steal from one man even if it uses the money to provide for 100. There is no more fundamental right than that of voting and a barrier that stops 1% of the people from voting is not acceptable merely because 99% of the people are still able to vote. For, if 1% may be stopped today, 5% may be stopped tomorrow. The Supreme Court has held, "all qualified voters have a constitutionally protected right to vote," and "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[29] We must never descend to the level of deciding how many voters we're comfortable disfranchising. If even one voter is disfranchised by these additional barriers, that is one voter too many.

Groups Facing Disparate Impact

For many reasons, the young, the elderly, and the poor are disproportionately represented in this group. All three groups are less likely to own a car, so they don't need a driver's license. They're much less likely to travel abroad, so a passport is a luxury they cannot afford. Securing a photographic ID is also harder for them. A lawyer, doctor, or banker who doesn't drive or travel abroad can afford to take some time off during the day, and hop in a cab to get over to the DMV to pick up a walker's ID. She can provide the mortgage paperwork, utility bills, and the like to

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[24] This is a conservative estimate. "Citizens Without Proof: A Survey Of Americans' Possession Of Documentary Proof Of Citizenship And Photo Identification" by Brennan Center for Justice at NYU School Of Law, November 2006 at 3 (11% of "citizens do not have government-issued photo identification" (http://www.brennancenter.org/page/-/d/download_file_39242.pdf) and Census Bureau report on US population of 308,745,538 (http://2010.census.gov/news/releases/operations/cb10-cn93.html). Eleven percent of the US population would be 33.9 million people. Eleven percent of the voting-eligible population, as calculated by George Mason University's United States Election Project (http://elections.gmu.edu/Turnout_2010G.html) (calculating a VEP of 218,054,301) yields 24 million people.

[25] *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), Tr. of Oral Arg. at 32:17-25 (http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-21.pdf)

[26] *Id.* at 30:10.

[27] US Census Bureau, "State & County QuickFacts" (http://quickfacts.census.gov/qfd/states/18000.html)

[28] See, George Mason University's United States Election Project (http://elections.gmu.edu/Turnout_2010G.html) (25,000 and 200,000 are 0.51% and 4.10% of Indiana's Voting-Age Population (VAP); the same percentages were applied to the United States VAP)

[29] *Reynolds v. Sims*, 377 U.S. 533, 554, 567 (1964) and, generally *Crawford* Brief for Petitioners at 28 & 37ff (http://www.aclu.org/voting-rights/crawford-v-marion-county-election-board-brief-petitioners).

prove her residence. If she's misplaced her birth certificate, as so many of us have done over the years, she goes online and puts in her credit card to order a new one. It's a relatively simple process, the fee – $22 in Texas,[30] which is about average[31] – is of no concern, and the only challenge she really faces is time and aggravation. And yet that aggravation is so legendary that jokes about standing in line at the DMV have long been cliché and many of us put off that trip for as long as possible.

For your average hotel housekeeper, the situation's a bit different. She wakes up around 6:00 in the morning to get her kids ready for school and catch the 07:00 bus to make sure she's at work by 8:00. She probably can't leave work during the day; she's paid by the hour. She can't risk upsetting the boss by asking for time off to attend to a personal matter like this; there are a hundred out of work housekeepers vying for her job. But she wants to vote. This is her civic duty and it's important to her. So let's presume that she, perhaps, happens to get a day off on a day the DMV is open. She puts off the dozens of other chores she needs to get done that day, and hops on the bus. It's a 90 minute ride, with two transfers, to get to the DMV. She then waits in line for another 45-90 minutes, and spends 15-25 minutes filling out her paperwork[32], then 90 minutes more getting back home. If she's missing some paperwork, the $22 cost of a new birth certificate is more than 3 hours pay at the federal minimum wage, which is also the minimum wage in Texas[33] and, because she's being thrifty to stretch her paycheck, she has neither Internet access nor a credit card with which to purchase lost documents over the Web, and will need to go through the lengthier process of securing one via phone or postal mail. Low-income Americans are twice as likely to be without an accepted photo ID[34], and that's more than half a day our housekeeper must put in if she's lucky enough to have all the necessary paperwork, to get that workday off, and to be making enough money that she's only working one job. Is it really just or appropriate to require that special effort from her, just to exercise her right as a citizen to participate in our democracy?

Nor should it be ignored that ethnic minorities are less likely to have photo ID than White Americans. One recent study suggests that African-Americans and Hispanics are more than twice as likely not to have an "up-to-date driver's license or state issued ID card" as Whites, and Asian-Americans are nearly three times as likely.[35] Another study put the number of African-Americans without an acceptable photo ID as high as 25%.[36] When they added the restrictive

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[30] Website of the Texas Department of State Health Services Vital Statistics Unit (http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm)

[31] See, for example, $30 in Frederick County Maryland (http://www.frederickcountymd.gov/index.aspx?NID=2419), $20 in Wisconsin (http://www.dhs.wisconsin.gov/vitalrecords/birth.htm), and $14 in Florida (http://www.doh.state.fl.us/planning_eval/vital_statistics/birth_death.htm)

[32] Based on my staff's conversation with Texas Department of Public Safety officials on the average time required to complete the paperwork, including picture taking, for a voter ID.

[33] Website of the United States Department of Labor, Wage and Hour Division (WHD) (http://www.dol.gov/whd/minwage/america.htm#Texas)

[34] "Citizens without Proof" *supra* note 24, at 2

[35] Gabriel Sanchez, "The Disproportionate Impact of Photo-ID Laws on the Minority Electorate", *Latino Decisions*, May 24, 2011 (http://latinodecisions.wordpress.com/2011/05/24/the-disproportionate-impact-of-stringent-voter-id-laws/)

[36] "Citizens without Proof" *supra* note 24, at 3.

standards of Indiana's voter ID law, the percentages fell even further. According to that study, 12% of White voter and 19% of minority voters would be unable to vote in Indiana without securing an additional ID.

And what of the elderly man who has never driven? According to the Brennan Center, "Eighteen percent of American citizens age 65 and above do not have current government-issued photo ID."[37] Must he lug his aged bones halfway across town to continue to exercise the same right he's been exercising every year for most of his life? Or the homeless man, who has no address to point to, no utility bills, and nowhere to have stored his birth certificate since he's been sleeping on different friends' couches since his job was shipped overseas 18 months ago? We have seen efforts in several states to purge people from the voter rolls because they'd lost their homes to foreclosure.[38] Heaping that additional penalty atop the loss of one's home must be unacceptable to all of us.

Furthermore, even those who have ID may find that it is sufficiently out-of-date as to have been rendered insufficient under these laws, a problem faced by 18% of Americans 18-24 years old.[39] What of the college student whose ID, though issued by the state through his university, is rejected at the polls? Why do we ask him to take additional steps to secure another ID? And what do all of these people to do?

Voter ID Laws Lead to Less Voting, Not Less Fraud

It is a truism in economics that when you tax something, you get less of it. Republicans at every level of government and throughout the private sector frequently quote this argument in support of their opposition to the taxes that fund our government, yet they seemingly forget about it when it comes to voting.[40] That four hours we've demanded of these people before they're able to vote is a tax on their already far from copious free time and energy. Would it be a surprise if installing such barriers resulted in a drop in voter participation? Nor is that time free. Someone who must take off from work is literally and directly losing money to collect her ID. If she must drive or take public transportation, those costs, too, come out of her pocket to vote. If he needs to purchase a duplicate birth certificate or other proof of birth or citizenship, that costs money, too. And even if none of these things apply, surely every voter's time is worth something, so these new time costs are an additional tax to exercise one's right to vote. And yet the 24th Amendment to the Constitution forbids anyone being charged to exercise the franchise.[41]

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[37] *Id.* at 3.

[38] See, *e.g.*, Eartha Jane Melzer "Lose your house, lose your vote", *The Michigan Messenger*, September 10, 2008 (http://michiganmessenger.com/4076/lose-your-house-lose-your-vote), "Poll Purge for Foreclosed Voters?: Republicans had considered using foreclosure...", NBC-LA, October 24, 2008 (http://tinyurl.com/3wkw3d4), and Associated Press, "Link seen in Ohio foreclosures, provisional votes", *The Ledger Independent*, July 6, 2008 (http://www.maysville-online.com/news/article_53807aef-d1d1-5085-a51f-bbcfb3b879f9.html)

[39] "Citizens without Proof" *supra* note 24, at 3.

[40] See, *e.g.*, Senators Portman (S4429, July 7, 2011), Grassley (S3720, June 13, 2011), and Sessions (S3077, May 18, 2011).

[41] "The right of citizens of the United States to vote ...shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

Policies That Increase Civic Participation

It is disturbing that, even knowing all of this, we continue to place barriers in the path to civic responsibility tread by our most vulnerable fellow citizens. Early voting is a tremendous boon to the workers who cannot make it to the polls on Election Day. It allows them, instead, to come in on a Saturday or non-Tuesday they have off.[42] It's also a boon to the overworked officials who run our elections. By spreading out the voting period, they can get by with fewer staff on Election Day. And for everyone who doesn't vote early, it's a great deal, too, because each early voter is one less person standing in line ahead of you. Despite this, the past eight months have seen bills to curtail early voting in North Carolina[43], Ohio[44], and Florida.[45]

Another way to make everyone's lives easier is absentee ballots. Whether they fill it out on Election Day or the week before, the voters are completing it on their own schedule, when it works for them. The elections workers, similarly, get to handle the ballots when they're able – within reason and certain limits – rather than facing a sea of faces before them of people who can only vote now, Now, NOW! And for the Election Day voter, once again, each absentee ballot is one less person competing for resources. This is why many states and local jurisdictions have made a push in recent years to increase access to absentee ballots. As my colleague, Rep. Zoe Lofgren, former Chairwoman of the Elections Subcommittee, has said, "On average, vote by mail elections cost 30% less than regular polling place elections."[46] And yet, this past year has seen the reversion of many of these policies and imposition of new hurdles to voters who seek absentee ballots.[47]

All-Mail Voting in Oregon

We cannot discuss absentee balloting without mentioning the State of Oregon and its decision, more than a decade ago, to handle all voting by mail. This is an important topic not merely because it is such a strong laboratory for how increased access to absentee ballots might play out elsewhere but because, of all kinds of voter-side fraud, as opposed to the counter-side

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[42] "It is clear that expanded early voting provided increased opportunities across the board and should be further expanded." "Barriers to the Ballot: 2008 Election and Beyond" *The Advancement Project*, December, 2009, at 9. (http://advancementproject.org/sites/default/files/publications/Barriers%20to%20the%20Ballot%20Report%20Final.pdf)

[43] See, "Bill to curtail early voting is senseless", editorial in the *Winston-Salem Journal*, May 10, 2011 (http://www2.journalnow.com/news/2011/may/10/wsopin01-bill-to-curtail-early-voting-is-senseless-ar-1018433/)

[44] See, League of Women Voters of Ohio Education Fund, "Making Early Voting Easier, Not Harder", may 18, 2011 (http://www.lwvohio.org/site.cfm/imPACT-Home/Resources/Latest-News/May-2011/Make-Early-Voting-Easier.cfm)

[45] Steve Bousquet, "Florida Republicans push to cut early voting", *Miami Herald*, April 15, 2011 (http://www.miamiherald.com/2011/04/15/2169699/florida-republicans-push-to-cut.html)

[46] Committee on House Administration Subcommittee on Elections hearing, "Expanding and Improving Opportunities to Vote by Mail or Absentee", October 16, 2007, at 3. (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:40511.pdf)

[47] See, *e.g.*, Patrick Marley, "Bill affects more than voter ID", *Milwaukee-Wisconsin Journal Sentinel*, April 26, 2011 (http://www.jsonline.com/news/statepolitics/120748279.html), Stephen Fay, "Maine Secretary of State Advocates Restricting Election Day Registration, Absentee Ballot Use", *FenceViewer*, May 13, 2011 (http://tinyurl.com/3qghprp), and, Joe Vardon, "Husted forbids unsolicited absentee-ballot mailings", *The Columbus Dispatch*, August 23, 2011 (http://www.dispatch.com/content/stories/local/2011/08/23/husted-forbids-unsolicited-absentee-ballot-mailings.html)

discussed above, absentee voting is the most ripe for fraud. Has Oregon seen an uptick in fraudulent ballots? Have mysterious or devious groups been mass-producing fake ballots?

My staff did some research on voter fraud in Oregon, to see what kind of issues they'd been having. Well, the current Secretary of State, Kate Brown, a former state senator, is very pleased with their system. She responded last year to concerns about voter fraud by noting that, of the 15 million votes Oregonians had cast by mail in the previous decade and the "thousands of fraud complaints" they had investigated, they'd found and prosecuted all of nine cases.[48] Her predecessor, Bill Bradley, wrote in 2005 of the tremendous success Oregon had seen from the program, with record levels of participation and the same utter absence of the organized fraud campaigns with which we have been threatened in every state in the union.[49] But my staff did find one case of systemic fraud, and I would be remiss not to mention it.

In late 2004, the State of Oregon's Department of Justice began an investigation of Sproul & Associates in conjunction with a group called "America Votes" after charges surfaced that the group had altered and forged the paperwork of voters who tried to register as Democrats. Two former employees of a Nevada registration group blew the whistle on their former employer. They told the local television station that, "hundreds, if not thousands, of Democratic registration forms were destroyed by a Sproul & Associates group called Voters Outreach of America."[50] Similar allegations were alleged in Pennsylvania, where a former employee of Sproul & Associates told the Pittsburgh Post-Gazette, "We were only to register Republicans."[51] CNN reported that "Nathan Sproul, head of Sproul & Associates, disputed the allegations" but added that "Sproul, whose firm received nearly $500,000 this election cycle from the Republican Party, said that 'it is safe to say we were trying to register Republicans.'"[52]

Once again, then, we're seeing that, while some activists are carrying on the fraudulent traditions of Tweed and Tammany, they still recognize that there are smart ways to stuff the ballot and they're not opting for the single dumb one that voter ID laws might actually impede. What Boss Tweed would say that it is not his party but the opposition that has been linked to so many of these cases is an interesting question for another time. Certainly, one aspect of these vote suppressing laws that would flabbergast Tweed is the push to require voters to provide proof of citizenship.

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[48] Kate Brown, "Voter fraud: Why in Oregon it's extremely rare", *Albany* (OR) *Democrat-Herald,* April 30, 2010 (http://www.democratherald.com/news/opinion/editorial/article_a3a58f66-548b-11df-ac8e-001cc4c002e0.html)

[49] Bill Bradbury, "Vote-by-Mail: The Real Winner Is Democracy", *Washington Post*, January 1, 2005 (http://www.washingtonpost.com/wp-dyn/articles/A40032-2004Dec31.html)

[50] Joel Roberts, "Voter Fraud Charges Out West", *CBS News*, February 11, 2009 (http://www.cbsnews.com/stories/2004/10/14/politics/main649380.shtml)

[51] Dennis B. Roddy, "Campaign 2004: Voter registration workers cry fo", *Pittsburgh Post-Gazette*, October 20, 2004 (http://www.post-gazette.com/pg/04294/398767.stm)

[52] Dan Lothian and Phil Hirschkorn, "Nevada investigates voter registration", *CNN International*, October 14, 2004 (http://edition.cnn.com/2004/ALLPOLITICS/10/14/nevada.registration/index.html)

Illegal Targeting of Minorities

I have spoken above of the impact that these proposed laws will have on several communities, including minorities, the poor, and young and old voters. We should not, however, forget that these groups are already the targets of illegal actions that depress their voting, including voter intimidation efforts.

For most of our country's history, the United States has fully embraced our status as a nation of immigrants. The words from Emma Lazarus's "The New Colossus" engraved on a plaque inside of the Statue of Liberty reflect our immigration policy that was. Officially, whatever a small group of Know-Nothings felt, we welcomed newcomers from wherever they had come. To encourage them to put down roots and become strong and active members of their communities, naturalization was encouraged. Tammany Hall was not alone in greeting every man off the boat, because those immigrants represented new voters. Our current tradition has changed, and animosity towards immigrants, actual or suspected, appears to be seeing an unfortunate rise. "Latino communities are often alienated by an acrimonious relationship with local government", resulting in lower participation in elections.[53] Another way this has manifested is at the polls. People who have trouble with English or just speak with an accent are hassled at the polls even in jurisdictions where proof of citizenship is not required.[54]

Minorities are generally more likely than Whites to be challenged when they try to cast a vote.[55] As I've discussed above, voter intimidation against African-Americans, however much things have improved since passage of the Voting Rights Act brought to a close a century of voter suppression under color of law, remains a constant and serious problem.[56] The National

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[53] Alice Minor and Ben Serrurier, "Beyond the Ballot: Latino Political Participation in Washington State", Whitman College, December 14, 2009 at 21 (http://www.walatinos.org/images/aliceminor09final.pdf)

[54] See, *e.g.*, Sabrina Williams and Debbie Lopez, "Voter Intimidation Against Latinos Expected on November 2nd in Arizona", *The Advancement Project*, October 14, 2004 (http://www.advancementproject.org/news/press_releases/2004/10/voter_intimidation_against_latinos_expected_november_2nd_arizona).

[55] See, *e.g.*, James Thomas Tucker, " 'I Was Asked If I Was a Citizen': Latino Elected Officials Speak Out on the Voting Rights Act", NALEO Educational Fund, September, 2006 (http://www.naleo.org/downloads/NALEO_VRA_Report.pdf), Ian Urbina, "Polling Places Report Some Snags; Even Top Politicians Have Trouble", *New York Times*, November 8, 2006: "an anti-immigration activist, and a handful of supporters, staked out a South Tucson precinct and questioned Hispanic voters as they entered the polls to determine if they spoke English." (http://query.nytimes.com/gst/fullpage.html?res=9902E6DC1E3FF93BA35752C1A9609C8B63), Rachel Weiner, "New Mexico GOP Sued For Voter Intimidation", *The Huffington Post*, October 27, 2008 (http://www.huffingtonpost.com/2008/10/27/new-mexico-gop-sued-for-v_n_138199.html)

[56] In the summer of 2004, Michigan State Senator and then-State Representative John Pappageorge said of the 85% African-American city of Detroit, "If we do not suppress the Detroit vote, we're going to have a tough time in this election." Chip Reid, "Voter suppression charges on the rise", *NBC Nightly News*, October 13, 2004. (http://www.msnbc.msn.com/id/6242175/ns/nightly_news/t/voter-suppression-charges-rise/#.Tme_do7K2m8) See also, *e.g.*, Ryan J. Reilly, "DOJ Probes TX Voter Intimidation Complaints During Tea Party Anti-Voter Fraud Drive", *Talking Points Memo*, October 19, 2010 (http://tpmmuckraker.talkingpointsmemo.com/2010/10/the_texas_democratic_party_expanded.php), Linskey and Bykowicz cited at page 4, *supra* note 11, and Erin Ferns Lee, "Living the Past in the Present: Voter Intimidation Tactics Still Thrive in America", *Project Vote*, February 4, 2011. (http://www.projectvote.org/blog/2010/02/living-the-past-in-the-present-voter-intimidation-tactics-still-thrive-in-america/)

Association of Latino Elected and Appointed Officials (NALEO) Education Fund titled a report " 'I Was Asked If I Was a Citizen': Latino Elected Officials Speak Out on the Voting Rights Act". In it, they reported that more than half the officials surveyed had witnessed, firsthand, anti-Hispanic discrimination in the electoral process.[57] In February, the former Republican nominee in California's 47th Congressional District was sentenced to 366 days in federal prison for his role in covering up his campaign's efforts to intimidate Hispanics from voting in his 2006 election.[58] While a single alleged act of voter intimidation against White voters received tremendous coverage over the past two-and-a-half years, similar allegations of intimidation against minorities was ignored.[59] The result in 2010 was that, as the voting rights group Dēmos put it, "Baseless Fraud Claims Spawn Real Voter Intimidation".[60]

Current Issues

There is no question that these laws are a serious and current problem, and one deserving of the attention of the House of Representatives. Wisconsin passed its voter ID law in May, 2011. Three months later, Bloomberg Business Week reported "Gov. Scott Walker's administration is working on finalizing a plan to close as many as 10 offices where people can obtain driver's licenses" and allegations that the governor was "targeting offices for closure in Democratic areas and expanding hours for those in Republican districts."[61] In September, an employee of the Wisconsin Department of Safety and Professional Services was fired for encouraging his fellow employees to tell people applying for identification that they did not have to pay if they sought it for purposes of voting.[62] Wisconsin's voter ID law included this provision to provide the voter identification free of charge to avoid explicitly violating the 24th Amendment's ban on "any poll tax or other tax." Discouraging or impeding the ability of citizens to make use of this provision would impose a $28 tax to vote, yet this employees efforts to ensure compliance with the Constitution resulted not in commendation for his civic responsibility but in his termination.

The depth of this problem was demonstrated the following month in Tennessee. An 86-year-old veteran of World War II explicitly asked whether he was required to pay for his voter identification card and was told that he was.[63] Tennessee charged that man an unconstitutional poll tax. In 2011. This followed an example of a 96-year-old woman, who had voted in all but

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[57] "I Was Asked If I Was a Citizen", *supra* note 55, at 1.

[58] See, Assistant United States Attorney Gregory W. Staples "Former Congressional Candidate Sentenced to Prison for Lying During Investigation Into Campaign Letters", *Federal Bureau of Investigations*, February 14, 2011. (http://www.fbi.gov/losangeles/press-releases/2011/la021411.htm)

[59] See, *e.g.*, Z.P. Heller, "Fox News overlooked voter-intimidation allegations against Minutemen", *Media Matters for America*, July 19, 2010. (http://mediamatters.org/research/201007190022)

[60] Tova Andrea Wang, "Voting In 2010: Lessons Learned", *Dēmos*, November 4, 2010. (http://www.demos.org/publication.cfm?currentpublicationID=1904A44B-3FF4-6C82-5D5D72F3D3228B7F)

[61] Associated Press, "Stanley DMV on potential closure list", *Chippewa Herald*, July 23, 2011. (http://chippewa.com/news/local/article_b7e6b3c6-b4d2-11e0-9c7b-001cc4c03286.html)

[62] Patrick Marley, "State employee fired after telling co-workers about photo ID policy", *Milwaukee Wisconsin Journal Sentinel*, September 8, 2011. (http://www.jsonline.com/blogs/news/129469023.html)

[63] Sam Stockard, "Veteran had to pay for voter photo ID", *Daily News Journal*, October 25, 2011. (http://www.dnj.com/article/20111026/NEWS05/110260320/Veteran-had-pay-voter-photo-ID)

one election since she became eligible, despite the fact that, as a Black woman in Tennessee, she had faced additional hurdles. When she sought to secure the requisite photo identification, for like millions of other citizens she never had a driver's license before, she was denied because her married name didn't match the name on her birth certificate.[64]

After careful examination, the Department of Justice filed a brief last month in the United States District Court for the District of Columbia in the case brought by the State of Texas to defend its proposed maps drawing new districts for congressional and state legislature. The brief described "ample circumstantial evidence of a discriminatory purpose with regard to both the State House and Congressional plans".[65] That is to say that the Department is concerned that the redistricting maps passed the Texas legislature and signed by Governor Perry would not only have the effect of discriminating against minorities in Texas but that such discrimination may have been the intent.

In Florida, the League of Women Voters felt compelled to suspend their voter registration efforts out of fear of the state's draconian laws on voter registration which they termed, "reverting to Jim Crow-like tactics."[66] This new law requires third parties who help new voters to register to turn in the registration forms within 48 hours. Lest anyone think that the League of Women Voters was blowing the threat out of proportion, I am sorry to report that it has already begun to impose its chilling effect on voter registration drives. A teacher at New Smyrna Beach High School is facing fines of thousands of dollars after she sought to help members of the school's student government association register to vote.[67] Should we expect anyone in Florida to dare help people to vote after this? Do we really want to discourage that kind of civic-mindedness?

Just last Tuesday, as Ohio voters were going to the polls in an election featuring a ballot question that had been the subject of intense interest in the state and across the country, we saw another disturbing example of how important voter protection is. The Republican group American Future Fund, an independent group funded by tens of millions of dollars from anonymous donors[68], sent out a robocalls incorrectly telling voters that the election was on the following day.[69] While the American Future Fund ascribed the robocalls to an error by their vendor, intentionally sending out such misleading messages is an all too common tactic. We

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[64] Ansley Haman, "96-year-old Chattanooga resident denied voting ID", *Chattanooga Times Free Press*, October 5, 2011. (http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/)

[65] *Texas v. United States*, Civil Action No. 1:11-cv-1303, Defendant's Brief at 8.

[66] David G. Savage, "Election laws tightening in GOP-run states", *Los Angeles Times*, October 30, 2011. (http://www.latimes.com/news/nationworld/nation/la-na-vote-florida-20111031,0,1962738.story)

[67] "New Florida election law stirs up controversy", *Daytona Beach News-Journal*, October 23, 2011. (http://www.news-journalonline.com/news/local/southeast-volusia/2011/10/23/new-florida-election-law-stirs-up-controversy.html)

[68] "The American Future Fund", FactCheck.org, October 13, 2010. (http://www.factcheck.org/2010/10/american-future-fund/)

[69] Amanda Terkel and Sam Stein, "Ohio Issue 2: Election Day Robocall Instructs Voters To Go To Polls Tomorrow", *The Huffington Post*, November 8, 2011. (http://www.huffingtonpost.com/2011/11/08/ohio-issue-2-election-day-robocall_n_1081953.html)

have seen instances in Virginia in 2008[70] and 2011[71] and in Texas in 2010.[72] Earlier this year, two former aides to the Governor were indicted for sending misleading robocalls to voters in Maryland.[73] This is a longstanding problem, with incidences across the country, but the number of instances is only increasing in recent years.[74]

The news is, of course, not all bleak. On November 8, the people of Maine repealed a law, also passed during the assault on voting of 2011, that would have taken away Mainers right to register on election day.[75] But on the same day that Maine reasserted protections for its voters, Mississippi became the 31st state to impose a new voter ID law.[76] The NAACP is planning "a series of protests around the country meant to move discussion of voter identification laws out of policy circles and onto street corners" later this year.[77] The League of Women Voters has brought suit in Wisconsin to overturn the voter ID law.[78] Other groups are similarly standing up against this tide. The fact is, the rights of Americans to vote are under attack and it is incumbent on us, as Members of the House of Representatives and as citizens, to defend them.

Conclusion

We are none of us perfect and we do not live in a perfect world. Election laws have been violated. In most of the cases where a voter shows up at the polls improperly, requiring a photo ID or proof of citizenship would not prevent the infraction, which typically results from error anyway. In the more serious examples of electoral fraud, it is not the voter who is at fault but political operatives or corrupt government officials, and voter ID laws have no bearing whatsoever. But the variety of circumstances faced by eligible voters mean that voter ID laws have a disparate impact on the poor, the young, the elderly, and the disabled. American demographics mean that these categories are disproportionately minorities. And, however much progress we have made, disparate treatment of and discrimination against minorities remain serious problems. That is why Section 5 of the Voting Rights Act prohibits laws which have,

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[70] Julian Walker, "Phony flier says Virginians vote on different days", *The Virginian-Pilot*, October 28, 2008. (http://hamptonroads.com/2008/10/phony-flier-says-virginians-vote-different-days)

[71] Mike Gangloff, "Ballot problems confirmed in Montgomery County; state board says six voters got wrong ballot in one precinct", *The Roanoke Times*, November 8, 2011. (http://www.roanoke.com/news/breaking/wb/300847)

[72] Ryan J. Reilly, "Fake Group Hands Out Fliers Meant To Mislead Black Voters In Texas", *Talking Points Memo*, October 28, 2010. (http://tpmmuckraker.talkingpointsmemo.com/2010/10/fliers_from_fake_group_mislead_black_voters_in_texas_video.php)

[73] *See supra Note 12.*

[74] *See* Common Cause, The Lawyers Committee for Civil Rights Under Law And The Century Foundation, "Deceptive Practices 2.0: Legal And Policy Responses", October, 2008. (http://www.policyarchive.org/handle/10207/10868)

[75] Eric Russell, "Mainers vote to continue Election Day registration", *Bangor Daily News*, November 8, 2011. (http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/)

[76] "Voter ID: State Requirements", National Conference of State Legislatures, Updated November 9, 2011. (http://www.ncsl.org/default.aspx?tabid=16602)

[77] Samantha Gross, "NAACP plans nationwide protests on voter ID laws", *Associated Press*, November 9, 2011. (http://www.thegrio.com/politics/naacp-plans-nationwide-protests-on-voter-id-laws.php)

[78] Patrick Marley, "League of Women Voters sues state over photo ID law", *Milwaukee-Wisconsin Journal Sentinel*, October 20, 2011. (http://www.jsonline.com/news/statepolitics/league-of-women-voters-sues-state-over-photo-id-law-132253703.html)

"the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color".[79] When considering any law that may serve to disfranchise a lawful voter, it is incumbent on us to ask the question, Will this have the effect of discriminating against any particular group?

Proponents of voter ID laws point to similar ID requirements for commercial transactions. This is a false comparison. There is no right to fly on an airplane. The ability to purchase beer or cold medicine is not a foundation stone of our great republic. Voting is the most constitutionally protected right there is. The simple fact is that voter ID laws do not stop voter fraud, first because there isn't much fraud to begin with and, second, because what organized fraud there is won't be stopped or even caught by voter ID laws. But voter ID laws *do* prevent authorized voters from voting, as even the proponents admit. It should not take us long to weigh the promise of zero fraud prevention against the certainty of voter disfranchisement and determine that voter ID laws are a terrible idea.

We have made great progress in the past 235 years in tearing down the barriers that disfranchised millions of Americans. We must not return to those dark days.

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[79] 42 USC 1973c.