

PROTECTION OR SUPPRESSION? REEVALUATING THE CONSTITUTIONALITY OF VOTER ID LAWS IN LIGHT OF NEW EMPIRICAL EVIDENCE

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INTRODUCTION

In an increasingly divided America, no law is safe from partisan attack. Voter ID laws, which proponents claim are necessary to fight the scourge of voter impersonation, are no exception to this hard and fast rule. Those in favor of voter ID laws rightfully point out that a well-functioning democracy requires that elections be perceived as legitimate and fair. Those against voter ID laws raise concerns about the threats, real or imagined, that such laws will disenfranchise otherwise-eligible voters and that the laws will have a disproportionate impact on vulnerable populations. There are, of course, more cynical reasons parties are either in favor of or opposed to such laws. Democrats, who largely oppose voter ID requirements, believe that such laws disproportionately affect people who tend to vote for their candidates.¹ These laws are perceived by Democrats as a tactic used by Republicans to suppress voter turnout and stack the deck in favor of those who possess a valid form of photo identification (and may be more likely to vote Republican).² Republicans, on the other hand, view Democrats' opposition to such laws as evidence that they are reliant on otherwise ineligible voters. An increasingly

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1. See Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1461 (2016). Prior to 2008, some 90% of Republicans and more than 70% of Democrats favored strict Voter ID laws. See Paul Gronke et al., *Voter ID Laws: A View from the Public*, 100 SOC. SCI. Q. 215, 217–18 (2019). By 2012, however, the gap in support between Republicans and Democrats had doubled, from around 17% to 35%. *Id.* at 217.

2. There is at least speculative evidence that Democrats may be on to something. For example, in several states, including Texas, a person may present their concealed carry permit to vote, but they may not use a State University ID. See TEX. ELEC. CODE ANN. § 63.0101 (West 2019). On its face, such seemingly arbitrary distinctions would appear to favor Republican-leaning voters. Allegations of voter suppression were also highlighted in the 2016 election for governor of Georgia, including by a candidate herself. See Stacey Abrams, Address Conceding Defeat as the Democratic Nominee for Georgia Governor (Nov. 16, 2018).

popular line of attack against Democrats claims that illegal immigrants, who are ineligible to vote in federal elections, are voting in droves in states where no form of ID is required to vote.³

The Supreme Court has spoken directly on the question of the constitutionality of voter ID laws.⁴ The lead opinion, written by Justice Stevens, relied on a number of untested assumptions to conclude that voter ID laws are not facially unconstitutional. In this Note, I argue that the Court should revisit that question. Specifically, the Court should reconsider the question in light of empirical evidence which was unavailable at the time they decided *Crawford*. The Court should reapply the *Anderson* balancing test,⁵ giving greater weight to the burden placed on voters relative to the State interest of preventing voter impersonation. Finally, the Court should consider whether voter ID laws are a reasonable means of promoting voter confidence.⁶

I. EXISTING LEGAL BACKGROUND

A. *The Framework of Crawford v. Marion County Election Board*⁷

1. Factual Background

The State of Indiana passed a law which required citizens to present a specific form of photo identification (ID) whenever they attempted to vote on election day in-person or at a designated location prior to election day (so-called, “in-person early voting”).⁸ The law did not apply to absentee ballots in any form. Any person who lacked the necessary photo ID was permitted to vote only if, after voting, they traveled to the County Clerk of Board of Elections and signed a sworn affidavit within ten days following the election.⁹

3. Following the 2016 Presidential Election, President Trump claimed, without any supporting evidence, that he lost the popular vote due to millions of illegal immigrants voting in the state of California. See Eric Levitz, *Trump Condemns All Forms of Voter Fraud—Real and Imaginary*, N.Y. MAG. (Feb. 22, 2019), <http://nymag.com/intelligencer/2019/02/trump-condemns-all-forms-of-voter-fraud-real-and-imagined.html>. This is a somewhat peculiar position, given that Photo ID laws prevent only voter impersonation. Yet, it is consistent with the general belief held by Republicans that voter impersonation occurs with some frequency. See Stewart, Ansolabehere & Persily, *supra* note 1, at 1471.

4. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion).

5. See *id.* at 190 (“[A] court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

6. Throughout this paper, I use the terms photo ID and voter ID interchangeably. Readers should assume that the voter ID laws which I refer to require a photo identification and are generally issued directly from the State to the voter.

7. This Note will focus on the findings and conclusions reached by Justice Stevens in his lead opinion, treating it as the controlling law.

8. See *Crawford*, 553 U.S. at 185.

9. See *id.* at 186.

Those opposing the law argued that the voter ID requirement created a substantial burden for would-be voters and that the law was not an appropriate method for regulating and avoiding voter fraud.¹⁰ They further argued that the law would “arbitrarily disfranchise qualified voters who d[id] not possess the required identification and [would] place an unjustified burden on those who cannot readily obtain such identification.”¹¹

2. Proper Legal Standard for Evaluation

Although early case law had demanded strict scrutiny in any instance where the government chose to burden the right to vote,¹² the Court stated that this standard was not applicable in the present case.¹³ Instead, the Court noted that because the law was evenhanded and designed to protect the “integrity and reliability of the electoral process,” it was not invidious (therefore satisfying *Harper*) and instead applied the balancing test set forth in *Anderson v. Celebrezze*.¹⁴ Under the *Anderson* balancing test, the Court evaluates the interests put forth by the State justifying the burden imposed on the electoral process and then makes a “hard judgment.”¹⁵ The Court will weigh the interest put forth by the State against the alleged injury created by the law.¹⁶ Even where the burden placed on a voter is slight, it must be justified by State interests which are legitimate and relevant; the purported interest must be able to carry enough weight so as to support the limitation which is created by the law.¹⁷ Further, the Court must consider “*the extent to which those interests make it necessary to burden the plaintiff’s right.*”¹⁸ In this regard, how much the Court will review the law’s propriety depends on how heavily the law burdens the right to vote.¹⁹ Finally, the Court will examine the legitimacy of the interests put forward by the State *and the extent to which the law serves those interests.*²⁰ Therefore, the Court’s analysis must generally look to the claimed State interest which is at stake.

It should be noted that the Court, in evaluating *Crawford*, took for granted that the law would serve the interest put forth by the State, and because it found that the burden placed on would-be voters was small, it spent very little time

10. *See id.* at 187.

11. *Id.*

12. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *see also Crawford*, 553 U.S. at 189 (“[E]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”).

13. *See Crawford*, 553 U.S. at 190.

14. *Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983).

15. *See Crawford*, 553 U.S. at 190.

16. *See id.*

17. *See id.* at 191.

18. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added) (quoting *Anderson*, 460 U.S. at 789).

19. *See id.*

20. *See Anderson*, 460 U.S. at 796.

dissecting whether the State's interest made it necessary to burden the plaintiff.²¹

3. Application of Legal Standard to Facts

a. The Interests of the State

Justice Stevens, in analyzing the case, first looks at the interests put forth by the State (presumably, in part to evaluate their legitimacy though he never says this explicitly) and evaluates the weight which should be given to them.²² He then considers the burden placed on voters.²³

The first interest put forth by the State as justifying the voter ID law is the State interest in "election modernization."²⁴ Specifically, the State pointed to compliance with the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) as supporting their position.²⁵ The NVRA increased the number of registered voters in-state by requiring that state bureaus of motor vehicles serve as voter registration sites, thereby making it easier for first time voters to register.²⁶ Further, the NVRA placed restrictions on when voters could be removed from the rolls.²⁷ Additionally, HAVA required states to create and maintain a computerized list containing all registered voters statewide.²⁸ States were required to verify voters' information—using a driver's license, Social Security number, or if they lacked both, a voter identification number—when they registered to vote.²⁹ Additionally, HAVA required first-time voters to present some form of written identification (which could be a driver's license) at the polls.³⁰ Justice Stevens himself acknowledges that neither of these laws required Indiana to enact the voter ID law.³¹ However, he views both laws as acknowledgement by Congress that voter ID laws are constitutionally permissible.³²

The second interest put forward by Indiana is the State interest in preventing voter fraud.³³ Specifically, the requirement that a person show a photo ID when voting in person is designed solely to detect voter

21. See *Crawford*, 553 U.S. at 191; see also *id.* at 203.

22. See *id.* at 191.

23. See *id.* at 197.

24. See *id.* at 191.

25. See *id.* at 192.

26. See *id.*

27. See *id.* But see *Husted v. A Philip Randolph Inst.*, 138 S. Ct. 1833, 1836 (2018) (holding that voters could be "purged" from the rolls if they did not vote in prior elections *and* failed to return a form acknowledging they still resided at their listed address).

28. See *Crawford*, 553 U.S. at 192.

29. See *id.*

30. See *id.* at 193.

31. See *id.* ("Of course, neither HAVA nor NVRA required Indiana to enact SEA 483. . . .").

32. See *id.*

33. See *id.* at 194.

impersonation.³⁴ Justice Stevens acknowledges the fact that the State of Indiana has not recorded instances of voter impersonation in the state's history.³⁵ However, he cites anecdotal evidence of vote-buying in New York City during the late nineteenth century as evidence that voter impersonation is a problem which may still take place at the polls.³⁶ Further, inflation of the voter rolls provides support for the enactment of the law.³⁷ Justice Stevens notes that inflated voter rolls are a "neutral and nondiscriminatory reason supporting the State's decision to require photo identification," even though the state's own "negligence" contributed to its creation.³⁸

The third and final interest Justice Stevens devotes time to is the State's interest in safeguarding voter confidence.³⁹ The Court notes that the State has an independent interest, completely different from the prevention of voter fraud, which is advanced by the voter ID law.⁴⁰ As the argument goes, if there are no safeguards designed to detect fraud and protect voter identity, then public confidence—necessary to maintain and sustain a health democracy—will not exist.⁴¹

b. Applying the Balancing Test

The Court states that the only relevant burden is that which is imposed on persons who are eligible to vote but lack a current ID.⁴² They argue that the "severity" of the burden placed on otherwise eligible voters is mitigated by the fact that "eligible[] voters without photo identification may cast provisional ballots that will ultimately be counted . . . [if they] travel to the circuit court clerk's office within 10 days to execute the required affidavit."⁴³ In applying the balancing test, the Court further took issue with the record, claiming it was not possible to quantify the magnitude of the burden on the narrow class of persons who lacked a proper photo ID.⁴⁴

34. See *id.*; see also *id.* at 225 (Souter, J., dissenting).

35. See *id.* at 194 (plurality opinion).

36. See *id.* at 195 n.11. Of course, there are several issues with relying on such evidence. For starters, such historical comparison ignores a number of electoral reforms which have taken place since that time. Chief among them is the secret ballot, which prevents political bosses from knowing *who* the would-be impersonators are voting for. Furthermore, with the rise of the absentee ballot, voter impersonation is an even less efficient method for stealing an election. See *infra*, Section II.F.

37. See *Crawford*, 553 U.S at 196–97.

38. *Id.*

39. See *id.* at 197.

40. See *id.* ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

41. See *id.*

42. See *id.* at 198. They also state that the burden placed on voters who lose their ID does not raise constitutional questions because of the availability of provisional ballots as an adequate remedy. See *id.* at 199.

43. See *id.*

44. See *id.* at 200.

II. EMPIRICAL RESEARCH

A. Introduction

At the time of the Supreme Court's decision in *Crawford v. Marion County Election Board*, the Court, in reaching its conclusion, relied on a number of untested assumptions about the effects voter ID laws would have on the electorate. Since then, a number of states have enacted various forms of voter ID laws—some stricter than others—and social science has begun evaluating the results of these experiments in the various “laboratories of democracy” across the nation. In this section, this Note will explore the results of such studies in detail, to determine whether or not the assumptions which the Court relied on turned out to be true.

B. Voter Suppression in the State of Georgia

First passed in 2005, Georgia enacted a state-wide requirement to present a valid voter ID in order to cast a ballot in-person at the polls.⁴⁵ If a person lacked one of the available IDs, the person could obtain one free of charge from the State of Georgia.⁴⁶ Additionally, a person could vote provisionally if they lacked any valid form of ID by swearing that they were the person they claimed to be and then providing a voter ID as required by statute within the time frame provided by state law.⁴⁷ Interestingly, the State did not require such identification when voting by mail.⁴⁸

Curious about the possible effects a stringent voter ID law might have on voting behavior in the State of Georgia, Hood and Bullock set out to conduct a natural experiment looking at voter participation rates before (the 2004 presidential election) and after (the 2008 presidential election) the implementation of the new voter ID law.⁴⁹ Specifically, they used data from

45. See M. V. Hood III & Charles S. Bullock III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL'Y Q. 394, 399 (2012). Specifically, GA. CODE ANN. § 21-2-417(a) (2019) enumerated the various forms of ID which would be accepted including: a Georgia driver's license; an ID card issued by a branch, department, agency or entity of the State of Georgia, another state, or the United States authorized by law to issue personal identification (provided such ID contains a photo of the elector); a valid U.S. Passport; an employee ID card containing a photo of the elector issued by the United States, Georgia, or a county, municipality, board, authority, or other entity of Georgia; a valid U.S. Military ID card that contains a photo of the elector; a tribal ID card containing a photo of the elector.

46. See GA. CODE ANN. § 21-2-417.1(a) (2019). A voter must present and verify all of the following before receiving such an ID: a photo ID document, unless one can provide a non-photo ID document that includes a person's fully legal name and date of birth; documentation showing the person's date of birth; evidence the person is registered to vote in the state; and documentation showing the person's name and address of principal residence. See *id.* § 21-2-417.1(e).

47. See *id.* § 21-2-417(a)(1)–(6), (b).

48. See *Georgia Voter Identification Requirements*, GA. OFFICE OF THE SEC'Y OF STATE, https://sos.ga.gov/index.php/elections/georgia_voter_identification_requirements2 (last visited Nov. 10, 2019).

49. See Hood & Bullock, *supra* note 45, at 395.

both the voter registration and history database maintained by the Georgia Secretary of State and a report produced by the State of Georgia, constructed to defend their voter ID statute in federal court.⁵⁰ The Secretary of State report was designed to determine the number of registrants without a valid Georgia's driver's license or state ID card.⁵¹ The State was able to come up with a number by cross-referencing DMV data with the voter registration database, and ultimately found that 6.65% of total active registrants lacked an ID at the time.⁵²

Using the data available, Hood and Bullock looked at the turnout rate for those who lacked a photo ID, based on the State's report, to see whether or not those people voted in 2008.⁵³ If these people were in fact able to vote, the logical conclusion is that they obtained a voter ID and therefore did not have their ability to vote suppressed by the law, or they voted absentee where they needed no ID to vote.⁵⁴ Because they had data on both those with and without a voter ID prior to 2008, Hood and Bullock were able to look at the turnout for both of these groups prior to the law's enactment and then see how it changed after the law was implemented.⁵⁵

1. Results

In 2004, turnout for those without an ID was 47.6%, and for those with an ID, the turnout was 72.9%.⁵⁶ Comparatively, in 2008, turnout for those without an ID in 2004 fell to 39.6%, while also falling to 70% for those who had an ID in 2004.⁵⁷ On its face, we see that turnout fell 8% among those who lacked an ID in 2004 (compared to only a 2% drop among those who had an ID at that time). However, after running a regression analysis, the results showed that those without an ID in 2004 were less likely to turn out in 2008 compared with 2004.⁵⁸

Using this same data, Hood and Bullock were able to also determine the probability of the different groups voting in 2004 and 2008.⁵⁹ This data is helpful because as noted above, looking at raw turnout does not necessarily show the effects of the law due to confounding variables. In 2004, those who lacked an ID had a predicted turnout rate of 0.542 compared with other registrants who had a probability of 0.761.⁶⁰ The difference between these two outcomes, 0.219, was statistically significant.⁶¹ After the ID law was passed,

50. *See id.* at 399.

51. *See id.*

52. *See id.* at 399–400.

53. *See id.* at 400.

54. *See id.*

55. *See id.* at 401.

56. *See id.* at 402.

57. *See id.*

58. *See id.* at 403.

59. *See id.* at 403–04.

60. *See id.* at 404.

61. *See id.*

turnout in the 2008 presidential election dropped to 0.451 for those without an ID, compared to a much smaller decrease to 0.735 for other registrants.⁶² The 0.284 difference was again statistically significant.⁶³ The difference between the two differences (0.284–0.219) was also statistically significant at –0.065 (or 6.5 points), indicating that *there was suppression for those who lacked an ID*.⁶⁴

According to Hood and Bullock, the law did not appear to disproportionately affect racial or ethnic minorities.⁶⁵ Looking again at turnout probability drops, they found that the likelihood of voting in 2008 was less than 2004, though the falls were greater among persons without voter IDs.⁶⁶ Among whites without proper IDs, there was a fifteen-point fall, from 0.56 in 2004 to 0.41 in 2008.⁶⁷ For Asian Americans, the decline was twenty-two points; for blacks, the drop was five points.⁶⁸ Those with IDs also mostly saw decreased likelihood of voting in 2008, with the exception of African Americans. White voters' probability dropped five points; Asian Americans' dropped thirteen points.⁶⁹ However, African Americans probability actually increased by two points in 2008⁷⁰—perhaps due to the enthusiasm for Barack Obama. As becomes apparent by looking at the data above, white turnout was predicted to be depressed the most by the voter ID law; thus, it does not appear that the law disproportionately affected racial or ethnic minorities.⁷¹

The law also had a disproportionate impact on voters of a certain age. Specifically, the law disproportionately affected the elderly—their probability of voting in 2008, when they lacked an ID in 2004, fell eleven points for those over the age of eighty-three, compared with only a two-point decrease for similarly situated eighteen-year-olds.⁷²

Based on all the data in their paper, Hood and Bullock concluded that turnout was depressed by roughly 0.4% following the law's enactment.⁷³ They noted:

[The] model estimates that prior to the new Georgia law, the turnout rate for [those lacking an ID] was .54, whereas after implementation

62. *See id.*

63. *See id.*

64. *See id.* at 405.

65. *See id.* at 409. It should be noted however, that an early paper of theirs showed that non-white Georgia voters were less likely to have an acceptable ID prior to the law's enactment, so one would expect the law to have a greater impact on such groups post-enactment. *See* M.V. Hood III and Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555, 567 (2008).

66. *See* Hood & Bullock, *supra* note 45, at 405–06.

67. *See id.* at 406.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 409.

72. *See id.* at 408 n.16.

73. *See id.* at 409.

turnout fell to .45. In the absence of the new law, we would estimate that 148,152 of these registrants would have voted in 2008. In actuality, 123,460 of this group of registrants voted producing a difference of 24,692. Total turnout in 2008 was 3,928,348, or 67.84% of all registrants. Adding the 24,692 registrants estimated to be deterred by the new law, would have increased turnout to 3,953,040, equating to a turnout rate of 68.27%. The difference, -.43, could be considered one measure of the suppressive effect of the new law.⁷⁴

However, the findings in this paper are limited in several ways. First, the data is limited to registered voters, so Hood and Bullock's data is not able to observe how the law affected the decision to register in the first place.⁷⁵ The data is also only coded for persons with driver's licenses, and therefore likely included voters among the non-voter ID tally which actually were not affected by the law. Both of these limitations likely created a downward bias in the data, meaning that the voter ID law actually may have suppressed a greater share of voters than the data shows.

C. Voter Suppression in the State of Rhode Island

1. Introduction

Rhode Island passed a voter ID law of its own in 2011.⁷⁶ In order to vote in-person, a voter must present one of a number of forms of acceptable ID.⁷⁷ If a person lacks a valid form of photo ID, that person can obtain a free voter ID from the State of Rhode Island by presenting certain documents to the state.⁷⁸

74. *Id.* at 408–09 (citation omitted)

75. See Francesco Maria Esposito, Diego Focanti & Justine Hastings, *Effects of Photo ID Laws on Registration and Turnout: Evidence from Rhode Island 5* (Brown Univ., Working Paper w25503, 2017). This Note relies on data taken from the December 2017 version of the afore cited working paper; the data is subject to change. A more current draft is available and can be found here: <https://www.nber.org/papers/w25503>.

76. See *id.* at 6.

77. See 17 R.I. GEN. LAWS § 17-19-24.2(a)(1) (2011) (requiring a “valid and current document showing a photograph of the person to whom the document was issued, including without limitation:” a Rhode Island driver’s license; a U.S. passport; an ID card issued by a United States educational institution; a U.S. military ID card; an ID card issued by the United States or Rhode Island; a government issued medical card; or a Rhode Island voter identification card); see also *id.* § 17-19-24.2(a)(2) (allowing—in addition to the aforementioned photo IDs—someone to vote with a “valid and current document without a photograph of the person to whom the document was issued, including without limitation:” a birth certificate; a social security card; or a government issued medical card).

78. See R.I. DEP’T OF STATE, VOTER ID INFORMATION, https://vote.sos.ri.gov/Content/Pdfs/voter_id_information.pdf (last visited Nov. 10, 2019) (explaining that a person can obtain a voter ID by showing the State any one of the following: an employee ID card, an ID card provided by a commercial establishment, a credit or debit card, a military ID card, a student ID card, a health club ID card, an insurance plan ID card, or a public

Esposito, Focanti, and Hastings, aware of the results from the Hood and Bullock paper above, wanted to see what the impact of this new law would be on voter turnout in the State of Rhode Island.⁷⁹ As the source of data for their paper, the authors used state administrative data which was stripped of personal information and replaced with anonymous identifiers.⁸⁰ This State-created database includes information on residents' employment records, participation in social safety net programs, interactions with the criminal justice system, voter registration, and past voting history (though the voting data is only available from 2006 onward).⁸¹

To create their data sets, the authors compared data from 2012 (before the law was active) with turnout in 2016 (after the law was enacted).⁸² For background, the authors found that 67% of voting-age persons were registered to vote in 2012 and that 45% voted in the 2012 presidential election.⁸³ Additionally in 2012, 78% of voting-age individuals had a driver's license—meaning that slightly more than 1/5, or 20%, of the state's population did not.⁸⁴ Minorities and those over the age of sixty-five made up the largest proportion of persons who lacked a driver's license.⁸⁵

2. Results

Among the 20% of voting-age individuals who lacked a photo identification at the time the law was enacted, *voter turnout decreased 4.1%*.⁸⁶ Additionally, voter registration decreased 8.5% and voting conditional on registration (that is, total votes as a fraction of registered voters) decreased 1.3%.⁸⁷ Interestingly, the law had no impact on turnout in the midterm elections that were held while the study was being conducted.⁸⁸ The largest group found to be impacted by the law were young voters and those with low socioeconomic status.⁸⁹

Unlike Hood and Bullock, the authors here did a number of robustness checks to ensure that their results were not driven by confounding variables. They found that people did not obtain driver's licenses in anticipation of the law

housing ID card; if a person lacks all of these, the Secretary of State lists a number of other acceptable documents which are acceptable so long as it includes the person's name, and are dated after Nov. 7th, 2016, unless the document is meant to be permanent, in which case the date does not matter).

79. See Esposito, Focanti & Hastings, *supra* note 75, at 2.

80. See *id.* at 7.

81. See *id.*

82. See *id.* at 2.

83. See *id.* at 9.

84. See *id.*

85. See *id.*

86. See *id.* at 11.

87. See *id.*

88. See *id.*

89. See *id.* at 15.

going into effect, nor did other socioeconomic factors drive changes in voting behavior among those who lacked valid IDs when the law went into effect.⁹⁰ Given the uniqueness of the 2016 election, as well as the fact that this data relies on one election post-enactment, the authors also wanted to ensure that the quirks of 2016 Presidential Election also did not drive changes in voting behavior that might have been attributed to the Voter ID law.⁹¹ In comparing survey data with Connecticut and Massachusetts (which both lack photo ID laws), the authors found that there was a decrease in voter registration and participation in Rhode Island which did not occur in the neighbor states.⁹² Finally, because absentee ballots do not require the same photo identification, the authors wanted to make sure that the persons lacking a photo ID did not instead choose to vote by mail.⁹³ They found again that mail ballots were not used as substitutes for voting in-person among those who lacked a photo ID at the time the law was enacted.⁹⁴

Despite efforts to ensure that their data was not compromised by externalities, the study is still limited in several respects. First, the Rhode Island data, like the data from Georgia, ignores instances where a person who owns an acceptable form of ID is unable to vote for any number of reasons. For instance, a person coded as possessing an ID in the above studies might lose their driver's license the day of an election and would then be unable to cast a vote. Additionally, this data likely underestimates the percentage of persons lacking ID's who were unable to cast votes in the 2016 election. The control group for the data is based *only* on persons who have a valid driver's license—it does not include persons who have other forms of ID which are acceptable.⁹⁵ Thus, the data set for persons “without an ID” will include persons who actually could vote both before and after the voter ID law was enacted. This means that “[the] results [showing the decrease in voter turnout among those lacking proper identification prior to the law's enactment] may be biased towards zero since we count people with valid State ID's among those without any photo ID to show at the polls.”⁹⁶ The data would perceive these persons as having obtained a valid form of ID when in fact they always possessed one and should not have been included in the “without ID” category. This, in turn, means it is possible that *more than* 4.1% of persons among the group lacking IDs were prevented from voting, because the proportion of persons lacking a photo ID to begin with was *smaller* than the data suggests.⁹⁷

90. *See id.* at 12.

91. *See id.* at 13–14.

92. *See id.* at 14.

93. *See id.* at 18.

94. *See id.*

95. *See id.* at 9.

96. *Id.* at 9–10.

97. To conceptualize this, it might be helpful to consider basic fractions. In this case, the denominator would decrease in size while the numerator would remain the same (example: 3/94 becomes 3/91). This of course means that the percentage derived from that fraction would increase.

D. Voter Suppression in the State of Michigan

There is one clear criticism which can be levelled against the studies in Georgia and Rhode Island: in both cases the papers rely on statistics to predict voter turnout (both among those with and without a State-issued photo ID), which is not a perfect tool. Rather than affirming that voter ID laws decreased voter turnout among those without a State-issued photo ID prior to the enactment of the states' voter ID law, the counterargument to the conclusions reached by the authors in both Georgia and Rhode Island is that in both cases the authors failed to properly predict accurate voter turnout rates among those who lacked a State-issued photo ID prior to the laws' enactment. Thus, under such a theory, the law would have no effect on voter turnout and therefore the right to vote would not be burdened.

To arrive at such a conclusion, however, would be to entertain a false reality. Using a *different methodology*, Henninger, Meredith, and Morse, found that enacting a strict voter ID law could have decreased turnout in Michigan by 28,000 votes, or 0.6% for the 2016 general election.⁹⁸ Significantly, they also found that nonwhite voters were between 2.5 and 6 times more likely than white voters to lack a photo ID and that the young and old are disproportionately less likely to possess a valid photo ID, which is consistent with the findings of Esposito, Focanti, and Hastings.⁹⁹

1. Overview of Study

Before casting a vote in Michigan, all in-person voters must fill out an "Application to Vote".¹⁰⁰ The State also asks voters to present a State-issued photo identification when they cast a ballot in person, but the law allows those who lack a valid ID to cast a ballot so long as they fill out an affidavit in the presence of an election inspector who also signs the document.¹⁰¹ Thus, by looking at both the applications and affidavits, the authors can determine which voters lacked an ID when they cast a ballot. Affidavits, then, are able to serve as a proxy for a lack of photo identification.

The data used in this paper came from four separate sources. The Michigan statewide voter file (MSVF) contains information on voters who are registered in the State of Michigan, including each registrant's full name, year of birth, address, precinct and vote history in both federal general and primary elections between 2008 and 2016.¹⁰² Using the addresses listed in the MSVF, the authors were able to geocode each of them.¹⁰³ This, coupled with the

98. See PHOEBE HENNINGER, MARC MEREDITH & MICHAEL MORSE, WHO VOTES WITHOUT IDENTIFICATION? USING AFFIDAVITS FROM MICHIGAN TO LEARN ABOUT THE POTENTIAL IMPACT OF STRICT PHOTO VOTER IDENTIFICATION LAWS 26 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205769.

99. See *id.* at 15, 20; Esposito, Focanti & Hastings *supra* note 75, at 9, 15.

100. See HENNINGER, MEREDITH & MORSE, *supra* note 98, at 4.

101. See *id.*

102. See *id.* at 10.

103. See *id.* at 10–11.

surnames of the registrants listed in the MSVF, allowed the authors to predict the probability that a given registrant was white, Asian, black, Hispanic, or some other race.¹⁰⁴

The study also collected Applications to Vote and individual affidavits signed by those who lacked a photo identification. Specifically, Henninger, Meredith, and Morse collected samples at random from 20% of Michigan's precincts, plus a non-random sample of additional precincts.¹⁰⁵ The authors had 863 precincts within the random sample, and all but 24 of them were able to provide the affidavits of those who lacked a photo ID at the time of in-person voting.¹⁰⁶ Coders were used to match each voter's affidavit to their corresponding registration record in the MSVF.¹⁰⁷ Ninety-nine percent of the affidavits were assigned to a unique registrant contained within the MSVF.¹⁰⁸ Importantly, only half of the applications were signed by an inspector, with a disproportionate number coming from Detroit.¹⁰⁹

The authors also noted a report produced by the State, which notes the number of voters who signed affidavits for lacking a photo ID in each precinct after every election. In 2016, 18,580 affidavits were filed, though the authors pointed out that the report may not be entirely accurate.¹¹⁰

2. Results

Among those lacking a photo ID in 2016, 73% had voted in at least one previous election between 2008 and 2014, compared to 85% of all polling place voters.¹¹¹ In determining who lacked a photo identification, Henninger, Meredith, and Morse relied on the 20% sample of precincts. This sample was restricted to 686,493 registrants, though the authors dropped 22,019 voters from precincts where the affidavit data did not allow observation of an election inspector's signature.¹¹² Approximately .58% of voters at a given polling place filled out an affidavit, meaning they lacked the necessary voter ID otherwise required to vote.¹¹³ Women were also 0.036% more likely to fill out an affidavit than men, and the highest rates of affidavit use were among those born prior to

104. *See id.* 11.

105. *See id.* at 12.

106. *See id.* at 12.

107. *See id.* For a detailed description of how the coders matched affidavits to registrants, *see id.* at 13.

108. *See id.* at 13.

109. *See id.* at 13–14. The authors suggest two possible reasons for why this may be so. First, some voters who possessed valid voter IDs may have wrongly filled out the form, which is located on the back of the Application to Vote which all voters must fill-out before voting. *See id.* at 19. Second, election inspectors likely failed to follow protocol.

110. *See id.* at 15. Specifically, the authors found affidavits in precincts which were listed as having zero in the state report. *See id.* at 16–17.

111. *See id.* at 14.

112. *See id.* at 17.

113. *See id.* at 17

1930, followed by those born after 1990.¹¹⁴ If the authors included only those affidavits which were signed, 0.26% of voters were required to fill out an affidavit.¹¹⁵ This means that of those who vote in-person, between 0.2% and 0.6% lack the necessary State-issued photo ID which would be required to vote.¹¹⁶ Henninger, Meredith, and Morse further concluded that 28,000 voters lacked a photo identification for the 2016 election.¹¹⁷

Again, this study is limited in several ways. First, and most importantly, it does not account for a clear unknown—the number of voters that would actually be affected, were Michigan to enact a strict voter ID law with no exception. This is because there is no way to know the number of voters who would be able to obtain an ID, were they to need one. Additionally, because the authors cannot determine why so many affidavits were unsigned by election inspectors, the higher bound of their calculation may overstate the number of people who lack a necessary photo identification. Finally, the study also cannot account for the reason why a given person lacked a photo ID on election day. For example, a person may have misplaced his driver's license. Such person would be coded as lacking an ID, when in fact he possesses one. As the Supreme Court noted, such persons are not of concern for constitutional purposes.¹¹⁸

Nonetheless, the results of this study are well in line with the aforementioned work of Hood and Bullock as well as Espostio, Focanti, and Hastings, despite the researchers here using a completely different methodology. The conclusions of each study reinforce the conclusion of the others and suggest that Voter ID laws create a real, nontrivial burden for thousands of voters across America.

E. Evidence of Voter Impersonation?

1. Introduction

When a state's voter ID law is challenged in court, those defending the law are often forced to concede that there are few (if any) instances of voter impersonation taking place within the confines of their borders. Defenders of voter ID laws therefore fall back on the argument that the only reason there is no evidence of voter impersonation, despite it being a real problem, is that it is incredibly difficult to catch. Therefore, the argument goes, we need voter ID laws in place precisely because there is no other way to prevent widespread voter impersonation. This argument obviously creates a difficult empirical question. Where prosecutions of a crime are virtually nonexistent, how do you get criminals to admit to criminal activity? Ahlquist, Mayer, and Jackman, in a

114. *See id.* at 19.

115. *See id.*

116. *See id.* at 20.

117. *See id.* at 26. It is important to note that this number includes 1,209 absentee ballots which were estimated to have been cast without a valid photo ID. *See id.*

118. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008) (plurality opinion).

paper titled, *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment* attempted to get at precisely this question.¹¹⁹ Rather than directly surveying people and asking if they have attempted to vote as someone other than themselves, the researchers instead employed what is known as a “list experiment.”¹²⁰

2. The List Experiment

Such methodology is specifically designed to reduce “social desirability bias.”¹²¹ Social desirability bias is the systematic underreporting of opinions or actions which society deems objectionable (such as committing a crime).¹²² Typically this form of bias is exhibited where surveys ask respondents directly whether they have engaged in the activity. List experiments, rather than asking *which* activities on the list the person has engaged in, instead asks *how many* activities the person has engaged in.¹²³ Because the survey respondents only report a number, there is no way to know which specific activities the person engages in unless they choose the maximum number possible based on the list.¹²⁴

To measure the prevalence if the item you are testing for, you split respondents into two separate groups.¹²⁵ The control group is provided a list which contains only innocuous items on it, while the treatment group is given the same list, but added to it is the item describing the behavior you are testing for (here, voter impersonation).¹²⁶ Given randomization of the groups, on average the only difference between the two groups is the number of items on the lists they see.¹²⁷ The difference in the average number of items reported by the control and treatment groups then provides an estimate of the prevalence of the sensitive item in the larger population.¹²⁸

119. John S. Ahlquist, Kenneth R. Mayer & Simon Jackman, *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment* 13 ELECTION L.J. 460 (2014).

120. *See id.* at 461 (“List experiments are a commonly used social scientific tool for measuring the prevalence of illegal or undesirable attributes in a population.”).

121. *See id.* at 464.

122. *See id.*

123. *See id.*

124. *See id.* For example, if a survey list contains seven items, and you mark that you have engaged in five of those items, there is no way for one to know which specific items you are responding to. Only if you marked seven would one be able to infer that you have engaged in all the activities listed.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 464–65. For a review of other applications of list experiments, see Daniel W. Gingerich, *Understanding Off-the-Books Politics: Conducting Inference on the Determinants of Sensitive Behavior with Randomized Response Surveys*, 18 POL. ANALYSIS 349 (2010) and Adam N. Glynn, *What Can We Learn with Statistical Truth Serum?: Design and Analysis of the List Experiment*, 77 PUB. OPINION Q. 159 (2013).

3. Survey Sample and Results

Respondents to the survey list consisted of one thousand U.S. citizens over the age of eighteen, selected from You-Gov's opt-in Internet Panel.¹²⁹ Members of the group were randomly assigned to either the control or treatment groups, with the control group having a list of four items and the treatment group responding to a list of five items.¹³⁰ The first three items contained in the survey were innocuous items involving election activity.¹³¹ The fourth item listed on both surveys was intended to act as a way to reduce the possibility of a "ceiling effect" in the survey.¹³² The fifth item—that is the treatment statement which the control group did not receive—asked the respondent if she had "cast a ballot under a name that was not my own."¹³³ Thirteen respondents in both groups claimed to have participated in all four and five activities, respectively.¹³⁴ This would, of course mean that 2.5% of those in the control group had engaged in voter fraud. To actually analyze the results, the authors look at the difference in means between the control and treatment groups. That difference "provides an estimate of the population-level prevalence of the behavior in question."¹³⁵ The difference in means here, when using unweighted responses, is less than zero. That means, "[t]he notion that voter impersonation is a widespread behavior is totally contradicted by these data."¹³⁶ The authors were further able to conclude that voter impersonation was no more prevalent in states with strict voter ID laws compared to those that lack such laws.¹³⁷

Of course, it cannot be ignored that 2.5% of respondents appear to have admitted to committing voter impersonation.¹³⁸ The authors conclude, however, that these responses were likely the result of respondents who were not paying attention as they filled out the survey, rather than persons actually admitting to such fraud.¹³⁹ To bolster this claim, they re-administered a similar test, only this time the item listed only in the treatment group was an admission that in the past twelve months the respondent was abducted by

129. Ahlquist, Mayer & Jackman, *supra* note 119, at 465.

130. *See id.*

131. *See id.* Specifically, they included attending a rally, placing a sign/poster/sticker on personal property, and seeing or reading about the election in the news. *See id.* at 470.

132. *See id.* at 465. Specifically, the survey's fourth prompt asked whether the respondent had "got[ten] into a physical fight about the election." *Id.* A ceiling effect here could result if it became impossible to measure possible variance in responses between the treatment and control groups. By adding a fourth category—one which is specifically unlikely to receive positive responses—it decreases the chances of respondents answering all questions positively.

133. *Id.*

134. *See id.*

135. *Id.* at 465–66.

136. *See id.* at 466.

137. *See id.* at 467.

138. *See id.* at 472.

139. *See id.* at 471.

extraterrestrials.¹⁴⁰ The other items contained on the list included being audited by the IRS (something which almost never happens) and having to serve on a jury (again, something few people have to do in any given year).¹⁴¹ Unsurprisingly, 2.4% of respondents claimed to have been affected by all five items.¹⁴²

4. Conclusions of Results

Ultimately, this led the researchers to conclude that voter fraud was virtually nonexistent among the sample of respondents who completed the survey. They noted:

We find that, when asked indirectly, the lower bound of the population admitting to voter impersonation is the same as that admitting to alien abduction, leading us to conclude that any lower bound estimate for voter impersonation is largely the result of respondent error rather than a true self-report of behavior.¹⁴³

At the very least, their research suggests that voter impersonation is not a widespread problem. Of course, the survey is limited in that it only addresses the issue as to 1,000 respondents. Yet we would expect, were voter impersonation widespread, to see some positive result even from a survey this small. Furthermore, this methodology, as noted above, has found voting irregularities, including vote-buying, in other countries. The results of this experiment show, to the extent possible, that even if voter impersonation is in fact difficult to detect, it is not an issue plaguing our elections.

F. The Law and Economics Perspective

Even if one were to find fault with the empirical evidence and real-world examples which suggest that in-person voter fraud is itself a fraud, one cannot also fail to acknowledge that basic principles of economics and criminality also suggest that in-person voter fraud is likely infrequent. To illustrate this point, one needs to look no further than the mind of the common criminal.

When a person engages in criminal conduct, consciously or subconsciously their mind is running a cost-benefit analysis.¹⁴⁴ The basic theory of cost-benefit analysis is that before a rational person engages in some form of economic activity, they will weigh the costs and benefits of engaging in that activity.¹⁴⁵ Only when they perceive the benefits as outweighing the

140. *See id.*

141. *See id.* at 471–72.

142. *See id.*

143. *Id.* at 461.

144. Sometimes referred to in the world of criminology as “rational choice theory.” *See, e.g., ECONOMIC MODELS OF CRIMINAL BEHAVIOR* (J. M. Heineke ed., 2d. ed. 1978); MORGAN O. REYNOLDS, *CRIME BY CHOICE: AN ECONOMIC ANALYSIS* (1985).

145. *See generally*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002).

costs will a person actually decide to engage in the economic activity. Indeed, in some circumstances, even where the benefits clearly outweigh the costs, a person still may decide against engaging in the activity because they do not feel the benefits are great enough to sufficiently exceed the potential costs.¹⁴⁶

Carried over into the criminal context, it has been theorized that most criminals engage in some form of cost-benefit analysis before deciding to commit a given crime.¹⁴⁷ As with the economic context, the criminal will consider both the possible benefits arising from committing the crime—such as increased wealth or power—and the costs which the criminal will take on if caught—generally criminal penalties.¹⁴⁸ From this context, it becomes clear that instances of in-person voter fraud resulting from voter impersonation are most likely infrequent. The “costs” involved with committing in-person voter fraud are serious. Under federal law, a person who attempts to cast a vote as someone else can be fined up to \$10,000 and imprisoned for up to five years.¹⁴⁹ These penalties do not even consider additional state laws which further criminalize voter impersonation.¹⁵⁰ Given the dual sovereignty of our criminal justice system, this means criminals could, at least in theory, face penalties from both the state and federal government (assuming they commit the fraud during a federal election). It should therefore be obvious that the costs associated with committing in-person fraud are quite high. On the other hand, it is not clear that there is much to be gained (the benefit side) from voting as someone else.

To begin with, many voters actually assume that their votes will never be counted.¹⁵¹ It makes little sense for a criminal to engage in an activity which

146. See generally, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

147. See Gingerich, *supra* note 128; Glynn, *supra* note 128.

148. Some scholars argue that in fact criminal sanctions do little to deter crime, and that (presumably perceived) certainty of apprehension is the only effective way to prevent crime. See generally, Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013). However, such views consider only half the equation. If a person knew they would be apprehended for a committing a crime, but also knew the penalty was incredibly light for committing said crime, then it is difficult to see a scenario under which crime rates are not quite high. For example, one would expect attempted bank robberies to increase if the penalty for such a conviction was only a few months stay in prison, despite the fact that nearly 60% of such robberies committed in given year are solved (making apprehension highly likely). See Scott Michels, *Bank Robbery a 'Loser Crime,'* ABC NEWS (Feb. 11, 2009, 9:16 PM), <https://abcnews.go.com/TheLaw/story?id=3432084#>. Thus, while certainty of apprehension may provide some deterrence, criminal penalties are a necessary component as well.

149. See 52 U.S.C. § 10307 (2018) (“Whoever knowingly or willfully gives false information as to his name . . . for the purpose of establishing his eligibility to register or vote . . . shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.”).

150. See, e.g., OHIO REV. CODE ANN. § 3599.12(A)(3) (LexisNexis 2019); CONN. GEN. STAT. § 9-360 (2019); FLA. STAT. § 104.16 (2019). There appears to be no central database which contains the penalties for each individual state. I therefore provide three examples from different regions of the country to demonstrate that the laws are alive and well.

151. See Miles Parks, *NPR/Marist Poll: 40 Percent of Americans Think Elections Aren't Fair*, NPR (Sept. 17, 2018, 5:00 AM), <https://www.npr.org/2018/09/17/647421039/npr-marist->

they suspect might not even help them achieve their goal (here, to get a candidate of their choosing elected). Very few if any federal or statewide elections are likely to be swayed by a person attempting to vote an extra time or two. It is precisely for this reason that there is no evidence that voter impersonation has ever changed the outcome of an election.¹⁵² Individual voters simply have very little to gain by voting as someone else in an election, given the diffuse effects any politician is likely to have on any given voter and the lack of a tangible benefit which the voter will derive from voting as another person.

On the other hand, conceivably those running for office might have something to gain from convincing their supporters to vote multiple times. Executed on a large enough scale, voter impersonation could perhaps sway an election. If would-be impersonators were offered money or some other tangible interest, then suddenly the benefit to a person becomes much clearer. But even here, it makes little sense for candidates to enact such tactics for several reasons. First, as Justice Souter alludes to in his dissenting opinion in *Crawford*, getting large numbers of people to commit voter fraud necessarily entails great risk due to the size of the conspiracy and the risk that any one person could reveal the crime.¹⁵³ Further, even in states which do not require Voter IDs to vote, many still require some form of acknowledgement that the person is who they claim to be (such as the use of matching signatures).¹⁵⁴ These requirements would create further potential complications for a conspiring candidate because red flags might be raised at polling locations where poll-workers detect irregularities. Thus, we would expect candidates who wish to cheat so that they can win an election to use other tactics. As history shows, this is precisely what they have done.¹⁵⁵

poll-40-percent-of-americans-think-elections-arent-fair. (“Overall, 47 percent of all poll respondents said they think it is either likely or very likely that not all votes will actually be counted in November.”).

152. See Philip Bump, *The Disconnect Between Voter ID Laws and Voter Fraud*, WASH. POST (Oct. 13, 2014, 3:54 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/10/13/the-disconnect-between-voter-id-laws-and-voter-fraud/?noredirect=on>.

153. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 228–29 (2008) (Souter, J., dissenting).

154. For example, in Nevada a person who casts a ballot in person is required to sign an election board register, and that signature will then be compared by an election board officer with the signature found on the person’s original voter application, or the signature found on one of several other codified documents. See NEV. REV. STAT. § 293.277 (2019). Importantly, even these seemingly less restrictive laws are coming under greater scrutiny. See *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D. N.H. 2018) (finding that the signature matching process used by the state of New Hampshire to match absentee ballots to registered voters violated the voters’ Fourteenth Amendment right of procedural due process).

155. No instances could be found of a recent case where a campaign orchestrated a large-scale voter impersonation. This is despite a well-documented history of candidates cheating to try and win elections. Currently, most instances of voter fraud appear to result from absentee ballot fraud, something which is entirely unaffected by in-person voter ID requirements. See Mark Joseph Stern, *Voter Fraud Exists. Republican Restrictions Won’t Stop It.*, SLATE MAG. (Sept. 1, 2016,

It becomes clear then that a cost-benefit analysis will weigh heavily against committing voter impersonation. There is no clear, tangible benefit to be derived from voting as someone else. The act of voting, as a general matter, does not provide significant joy or pleasure. In fact, it can—and often is—a miserable experience.¹⁵⁶ On the other hand, as noted above, the costs which a person will incur if caught committing voter fraud are quite high. If the cost-benefit analysis framework is to be given any credence in the criminal context, it follows that voter impersonation is infrequent. Not surprisingly, this is well in line with all empirical evidence available.

G. Voter ID Laws and Voter Confidence

1. Introduction

Aware of the weight courts have given to the State's interest in promoting voter confidence, Stewart, Ansolabehere, and Persily decided to investigate whether Voter ID laws actually lead to greater confidence in electoral integrity.¹⁵⁷ For their data sources, they primarily relied on survey data taken from the Survey of Performance of American Elections (SPAЕ) and 2008 Cooperative Congressional Election Study (CCES).¹⁵⁸ The SPAЕ was administered in 2008, 2012, and 2014 to 200 registered voters in *each state* (garnering 10,000 responses in 2008 and 10,200 responses in 2012 and 2014 after Washington D.C. was added to the study).¹⁵⁹ The 2008 CCES was administered in the same way as the SPAЕ, but in a much larger survey which focused on obtaining a national sample, rather than fifty-one separate samples.¹⁶⁰ To measure response differences among states, the authors generally compared HAVA-minimum states with those states defined as having strict photo ID requirements.

2. Beliefs about Prevalence of Various Forms of Voter Fraud

If in fact voter ID laws lead to greater public confidence in the electoral process, we would expect to see that voter confidence in our elections has

12:48 PM), <https://slate.com/news-and-politics/2016/09/voter-fraud-exists-through-absentee-ballots-but-republicans-wont-stop-it.html>. A contemporary instance of absentee ballot fraud appears to have played out in North Carolina during the 2018 Midterm Elections. See Leigh Ann Caldwell & Rich Gardella, *North Carolina Election Fraud Allegations: Investigators Zero in on Absentee Ballots in Bladen County*, NBC NEWS (Dec. 6, 2018, 10:37 AM), <https://www.nbcnews.com/politics/elections/north-carolina-investigators-zero-absentee-ballots-unresolved-house-race-n944731>.

156. One may recall images of people standing in line over five hours to vote in Ohio during the 2004 Presidential Election. See James Dao & Ford Fessenden, *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES (Dec. 24, 2004), <https://www.nytimes.com/2004/12/24/us/voting-problems-in-ohio-spur-call-for-overhaul.html>.

157. See Stewart, Ansolabehere & Persily, *supra* note 1, at 1455.

158. See *id.* at 1461.

159. See *id.*

160. See *id.* at 1462.

increased following the passage of voter ID laws in many states. However, attitudes about the prevalence of voter fraud remained almost constant over the eight-year period between 2008 and 2014.¹⁶¹ Further, there appears to be a high degree of intercorrelation among beliefs about different forms of voter fraud, indicating that the public generally does not distinguish among types of fraud, but rather expresses a single attitude about election fairness and trust in the government.¹⁶²

3. State Law and Attitudes regarding Voter Impersonation

Effective voter ID laws should presumably decrease voters' beliefs that voter impersonation is a problem in their state because the laws are specifically designed to combat such fraud. Yet, the authors find that "there is no evidence that the passage of strict photo ID laws has led to a decrease in the belief of the frequency of voter impersonation. Overall beliefs have remained stable, as has the gap between Republicans and Democrats."¹⁶³ This remained conclusive even after running multivariate analysis designed to control for different attitudes among various races, ideologies, etc.¹⁶⁴

4. Perceptions of Fraud and Likelihood of Voting

As noted, *Crawford* makes the claim that perceptions of voter fraud depress turnout.¹⁶⁵ However, a survey commission from YouGov found that the correlation between a belief in voter fraud and self-reported turnout is nearly zero.¹⁶⁶ Thus, the authors concluded that "[t]he most recently available data, then, display no evidence that either beliefs about the frequency of voter fraud or photo ID laws designed to combat voter fraud have any relationship to or effect on turnout or intentions to vote."¹⁶⁷

5. Perceptions about Fraud and Voter Confidence

The authors further looked to see the degree to which perceptions about fraud influence confidence that votes cast were counted.¹⁶⁸ There exists a so called "winner effect," which has shown that electoral confidence is strongly related to electoral outcomes.¹⁶⁹ Thus, when a Republican candidate wins the presidency, Republicans are much more confident that the votes cast were

161. *See id.* at 1468.

162. *See id.* at 1469.

163. *Id.* at 1473.

164. *See id.*

165. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

166. *See Stewart, Ansolabehere & Persily*, *supra* note 1, at 1474.

167. *Id.* at 1475.

168. *See id.* at 1477.

169. *See id.*

counted and vice versa.¹⁷⁰ Beyond the “winner effect,” voter ID laws were found to have no effect on improving voter confidence.¹⁷¹ Indeed, perhaps surprisingly, respondents in HAVA-minimum states were slightly more confident than those in strict photo ID states.¹⁷² Democrats and Republicans did express different levels of confidence, depending on the photo ID regime. Democrats in HAVA-minimum states were more confident their votes were counted than Democrats in strict photo ID states.¹⁷³ The opposite was true of Republicans.¹⁷⁴ However, after running a multivariate analysis which controls for the “winner effect,” there was generally “only a weak and nonsignificant relationship between the stringency of ID laws and a belief that votes were counted as cast.”¹⁷⁵

6. Voter Knowledge of States’ ID Laws

Justice Stevens’ opinion requires that voters are actually aware of the voting laws in their respective states. Absent such knowledge, it is unclear how such laws could increase voter confidence. Yet, Stewart, Ansolabehere, and Persily found that there is widespread confusion about existing ID law requirements among the American public.¹⁷⁶ Regardless of state requirements, roughly one-third of respondents were not sure what type of ID was required to vote.¹⁷⁷ Even in states which required a photo ID to vote, only 57% of people knew that was the law.¹⁷⁸

III. UNDOING ASSUMPTIONS—APPLICATION OF EMPIRICAL EVIDENCE

Justice Stevens’s leading opinion in *Crawford* relies upon rational assumptions. Yet, as can be seen from above, those assumptions do not comport with the reality which exists. Thus, because there is now new information available which was not present at the time *Crawford* was decided, the Court should choose to reevaluate the constitutionality of strict voter ID laws.

Under the *Anderson* balancing test, “a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”¹⁷⁹ Even when the burden placed on voters is slight, it must be justified by State interests which carry enough weight to

170. *See id.*

171. *See id.* at 1480.

172. *See id.*

173. *See id.*

174. *See id.*

175. *Id.*

176. *See id.* at 1482.

177. *See id.*

178. *See id.*

179. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality opinion).

support the limitation that is created by the law.¹⁸⁰ Thus, a court will generally evaluate the state interests at stake against the right which is at issue.

Justice Stevens's opinion accords very little weight to the burden placed on voters.¹⁸¹ In his view, the record did not provide enough evidence to show that the burden placed on non-ID-possessing voters was sufficient to give such claims much weight.¹⁸² However, as Hood and Bullock; Esposito, Focanti, and Hastings; and Henninger, Meredith and Morse show, voter ID laws do in fact reduce turnout among otherwise likely voters in nontrivial ways. Esposito, Focanti, and Hastings showed that among otherwise likely voters, turnout among the 20% of voting-age individuals lacking the necessary ID prior to the law's enactment fell by more than 4% following the enactment of the Rhode Island law.¹⁸³ Moreover, Hood and Bullock found that Georgia's strict voter ID law decreased turnout by .43% or 24,692 votes.¹⁸⁴ While it is impossible to know for certain that whether the burdens created by strict voter ID laws were the sole cause of these decreased turnouts, the available evidence suggests as much. In particular, the fact that Henninger, Meredith, and Morse were able to show similar predicted decreases in voter turnout among those lacking voter IDs while using a much different methodology inspires greater confidence in the finding of the other authors.¹⁸⁵ If we give any sort of credit to these studies, at the very least it suggests that the Court should give less deference to the purported interests advanced by States to support these measures.¹⁸⁶ Therefore, it is appropriate to reevaluate and take the hard look¹⁸⁷ at the interests advanced by the State.

A. Election Modernization

The leading opinion appears to endorse election modernization as a legitimate State interest which can support the voter ID law. However, it is not clear how (if at all) election modernization itself is a State interest.¹⁸⁸ In fact, Justice Stevens appears, in quoting the Commission on Federal Election Reform, to fall back on electoral integrity entirely as the ground for justifying

180. *See id.* at 191.

181. *See id.* at 200–01.

182. *See id.* (noting that there was no evidence of the number of registered voters without an ID or concrete evidence of the burden imposed on voters who currently lack the necessary photo identification).

183. *See* Esposito, Focanti & Hastings, *supra* note 75, at 9, 11.

184. *See* Hood & Bullock, *supra* note 45, at 408–09.

185. Specifically, they found a strict voter ID law could reduce turnout in Michigan by up to 28,000 votes. HENNINGER, MEREDITH & MORSE, *supra* note 98, at 26.

186. The extent to which the Court will review the law's propriety depends on the extent to which the law will burden the right to vote. *See* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

187. *See* *Crawford*, 553 U.S. at 223–24 (Souter, J. dissenting).

188. *See also id.* at 225 (“[U]seless technology has no constitutional value.”).

electoral modernization.¹⁸⁹ He even points out that, “[o]f course, neither HAVA nor NVRA require Indiana to enact SEA 483.”¹⁹⁰ Therefore, when considering the balancing of State interests and burdens imposed on voters, voter fraud and voter confidence must do the heavy lifting on the State’s behalf.

B. Voter Fraud

If nothing else is taken away from this Note, it should be painfully obvious that evidence of voter impersonation is virtually nonexistent. While it is, in fact, possible that voter impersonation is the most elusive crime in America, more plausible is the explanation that it simply does not take place. At the very least, Ahlquist, Mayer, and Jackman show that the practice is not widespread.¹⁹¹ Their work, along with more basic logic,¹⁹² entirely counter the narrative that voter fraud takes place often but is somehow difficult to detect. Justice Stevens was able to gloss over the flimsy State interest at stake here because he thought the law imposed such a slight burden on voters that the State’s interest needs not be closely scrutinized. However, if we accept that the burden placed on voters is more than nontrivial, the Court must review the law’s propriety to a greater extent.¹⁹³ Specifically, the Court must take into consideration “the extent to which those [State] interests make it necessary to burden the plaintiff’s rights.”¹⁹⁴ Given the complete lack of evidence to support the State’s interest in preventing voter impersonation, it becomes difficult to foresee how such a nonexistent interest can make any burden on voters necessary. If we accept that voter impersonation rarely—if ever—takes place, then there is not a *real* State interest at stake. Thus, as Justice Souter concludes, “it would be unreasonable to accord [the voter impersonation] state interest more than very modest significance.”¹⁹⁵ Taken alone, it becomes difficult to foresee how an abstract interest in preventing voter impersonation justifies a law which likely prevents thousands of people from exercising a constitutionally guaranteed right. Of course, safeguarding voter confidence must also be weighed against the law as well.

C. Safeguarding Voter Confidence

The State has a unique and independent interest, apart from the prevention of voter fraud, which it claims is advanced by voter ID laws. The State claims

189. *See id.* at 194 (“The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”) (plurality opinion). Justice Souter makes the same observation as well in his dissent—he notes that the State seeks to modernize elections so as to prevent voter fraud. *Id.* at 225 (Souter, J., dissenting).

190. *Id.* at 193 (plurality opinion).

191. Ahlquist, Mayer & Jackman, *supra* note 119, at 461.

192. *See supra* Section II.F; *see also Crawford*, 553 U.S. at 230 (Souter, J., dissenting) (noting the very low likelihood persons would engage in voter impersonation).

193. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

194. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

195. *Crawford*, 553 U.S. at 230 (Souter, J., dissenting).

that voter confidence is necessary because it encourages voters to participate in the democratic process.¹⁹⁶ Public confidence will supposedly erode when there exists no safeguard to protect voter identity and public confidence.

Under the *Anderson* balancing test, the Court requires that restrictions placed on electoral processes *reasonably*¹⁹⁷ and non-discriminatorily advance the State's interest.¹⁹⁸ Here, voter ID laws do not appear to advance the State's interest in electoral confidence. The assumptions made by Justice Stevens are entirely at odds with the available empirical literature. Stewart, Ansolabehere, and Persily found that voter perceptions of fraud had no effect whatsoever on voter turnout, despite Justice Stevens's assertion that voters would not turn out if they failed to have faith in the electoral process.¹⁹⁹ Furthermore, if voter ID laws did in fact increase voter confidence, we would expect greater voter confidence in states which require stricter forms of voter identification. Yet, persons living in strict voter ID states believed voter impersonation took place with the same prevalence as those residing in states which must meet the HAVA-minimum criteria.²⁰⁰ Additionally, many voters also lacked knowledge about their state's own laws regarding voter requirements and did not readily differentiate between various forms of voter fraud.²⁰¹ What should become clear then is that the voter ID laws appear to do nothing to advance the State's interest in promoting voter confidence. The regulation therefore is not reasonable, in that it is entirely ineffective and contributes nothing to voters' views on the electoral process.

D. Reapplying the Balancing Test

As Justice Souter notes, "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."²⁰² If one takes a hard look at the State's purported interests, they do not appear strong. Balancing those weak interests against the nontrivial burden placed on some voters, it seems likely that the Court would strike down these strict voter ID laws as unconstitutional. Such

196. *See id.* at 197 (plurality opinion).

197. In defining what is considered reasonable, the Court appears to use a mix of logic and common sense. *See generally Anderson*, 460 U.S. at 796–97 (discussing the reasonableness of an Ohio law which limited the filing deadline for independent candidates to appear on a presidential ballot, that supposedly advanced the State's interest in voter education).

198. *See id.* at 788–89 ("The state's important regulatory interests [in electoral context] are generally sufficient to justify *reasonable*, nondiscriminatory restrictions.") (emphasis added). The Court will examine the legitimacy of the State interests put forward *and the extent to which the law serves those interests. See id.*

199. *See* Stewart, Ansolabehere & Persily, *supra* note 1, at 1475.

200. *See id.* at 1473.

201. *See id.* at 1469, 1482.

202. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Souter, J., dissenting) (citation omitted).

laws create a substantial burden for some voters and appear to have disenfranchised thousands of persons. The State's interest in preventing voter impersonation is modest at best, and voter ID laws do nothing to increase voter confidence in the electoral process.

CONCLUSION

When *Crawford* was decided, the Court did not have at its disposal the information which is now available. Sophisticated empirical evidence has raised serious questions about the conclusions drawn by Justice Stevens in his leading opinion. While such evidence is far from perfect, it raises sufficient concern about the propriety of the Court's decisions so as to question whether the issue of voter ID laws should be revisited. Analyses of data from very different states²⁰³ have reached the same conclusion: strict photo ID laws decrease voter turnout by the thousands. Further, solid evidence suggests that voter impersonation is not a widespread or even a well-documented problem and that voter confidence regarding fair elections remains unchanged despite vastly different voter requirements in states across the country. The data available raises serious doubt about the constitutionality of strict voter ID laws. Given that the Court has done very little in the field of voter ID laws since its decision in *Crawford*, it is highly unlikely that it will revisit the question any time soon. Yet, states continue to pass new voter ID laws, and Courts of Appeals would be right to be cautious of the Supreme Court's last word on the topic.

203. Compare the following: the relative sizes of Rhode Island and Georgia; the populations of Rhode Island and Georgia; the rural-urban divide in each state; and the partisan make-up of both the electorate and legislature in each state.