

VOTER IDENTIFICATION

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In the wake of closely contested elections, calls for laws that require voters to present photo identification as a condition to cast a ballot have become pervasive. Advocates tend to rely on two rhetorical devices: (1) anecdotes about a couple of elections tainted by voter fraud; and (2) “common sense” arguments that voters should produce photo identification because identification is required to board airplanes, buy alcohol, and engage in other activities. This Article explains the analytical shortcomings of anecdote, analogy, and intuition, and applies a cost-benefit approach generally overlooked in election law scholarship. Rather than rushing to impose a photo-identification requirement for voting, policymakers should instead examine empirical data to weigh the costs and benefits of such a requirement. Existing data suggest that the number of legitimate voters who would fail to bring photo identification to the polls is several times higher than the number of fraudulent voters, and that a photo-identification requirement would produce political outcomes that are less reflective of the electorate as a whole. Policymakers should await better empirical studies before imposing potentially antidemocratic measures. Judges, in turn, should demand statistical data to ensure that voter identification procedures are appropriately tailored to deter fraudulent voters rather than legitimate ones and do not disproportionately exclude protected classes of voters.

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INTRODUCTION

I served as a member of the Commission on Federal Election Reform, a bipartisan, private commission tasked with proposing solutions to America's most pressing election problems. Former Democratic President Jimmy Carter and former Republican Secretary of State James Baker co-chaired the twenty-one-member body,¹ and other commissioners included former members of Congress, cabinet officials, and university presidents.² On September 19, 2005, the "Carter-Baker Commission" released eighty-seven different recommendations, one of which proposed that voters produce a photo-identification card as a condition to casting a ballot.³ I dissented from the proposed photo-identification requirement, as did two other commission members.⁴

The Commission's photo-identification proposal received extensive media attention and fueled a firestorm of similar proposals across the nation.⁵ Georgia, Indiana, and Missouri have adopted laws making them the only states to prohibit citizens from casting ballots unless they produce valid, government-issued, nonexpired photo identification,⁶ and bills that tighten voter-identification requirements have been introduced recently in

1. President Carter and Secretary of State Baker had their own experiences with election problems. President Carter led delegations that monitored elections in countries around the world, and Secretary of State Baker led the George W. Bush campaign during the disputed Florida presidential election recount in 2000.

2. Robert Pastor, an advisor to President Carter in trips abroad to monitor elections, organized the Carter-Baker Commission in early 2005 through the Center for Democracy and Election Management and served as Executive Director of the Carter-Baker Commission. Former U.S. Senate Democratic Leader Tom Daschle, former Democratic Congressman and 9/11 Commission Chair Lee Hamilton, former Republican Congresswoman Susan Molinari, and former Republican U.S. Secretary of Commerce Robert Mosbacher were some of the other more recognizable commissioners. For a complete list of commission members, see Commission on Federal Election Reform—Members, <http://www.american.edu/ia/cfer/members.htm> (last visited Sept. 25, 2006).

3. See also Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584, 588 (2004) (proposing a variety of election reforms, including a photo-identification requirement to vote).

4. While several Commission members expressed strong criticisms of a photo-identification requirement during our final Commission meeting, only three of us issued a formal dissent—former U.S. Senator Tom Daschle, former National Council of La Raza President Raul Yzaguirre, and myself. COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 88–89 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf. Unfortunately, the three of us were prevented from including in the Report an extensive analysis of a photo-identification requirement's costs and benefits because of a rule limiting dissents to 250 words per commissioner. The rule was first announced by Executive Director Robert Pastor at our final meeting.

5. E.g., Dan Balz, *Carter-Baker Panel to Call for Voting Fixes: Election Report Urges Photo IDs, Paper Trails and Impartial Oversight*, WASH. POST, Sept. 19, 2005, at A3; James Gerstenzang, *Election Overhaul is Urged*, L.A. TIMES, Sept. 19, 2005, at A7; *Report Urges Photo IDs to Curb Vote Fraud*, COM. APPEAL (Memphis, Tenn.), Sept. 20, 2005, at A4; *The NewsHour with Jim Lehrer, Conversation: Carter and Baker* (PBS television broadcast Sept. 19, 2005).

6. GA. CODE ANN. § 21-2-417 (Supp. 2006); IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006); MO. ANN. STAT. § 115.427 (West Supp. 2006), *invalidated by Weinschenk v. State*, No. SC 88039, 2006 WL 2959284 (Mo. Oct. 16, 2006) (en banc).

Congress and the majority of state legislatures.⁷ Polls show that eighty-one percent of Americans favor or strongly favor requiring voters to produce photo-identification cards before voting.⁸ Several recommendations of the Commission's 2001 predecessor—the Carter-Ford Commission—were enacted into law in the Help America Vote Act of 2002,⁹ and hopeful photo-identification advocates repeatedly cited the 2005 Carter-Baker Commission's recommendation to bolster their proposals.¹⁰

This Article is the first academic work to analyze photo-identification requirements in depth, and employs an empirical cost-benefit approach to expose the erroneous assumptions of conventional wisdom.¹¹ It argues that before jumping on the photo-identification bandwagon, policymakers should closely examine empirical data about the magnitude of voter fraud and the extent to which a photo-identification requirement would reduce participation by legitimate voters. While a small amount of voter fraud hypothetically could determine a close election, the exclusion of twenty million Americans who lack photo identification could erroneously skew a larger number of elections.¹²

7. H.R. 4844, 109th Cong. § 2 (2006) (requiring that voters in federal elections provide current and valid government-issued photo identification—the bill passed 228-196); S. 414, 109th Cong. § 203(b) (2005) (proposing legislation that would require all in-person voters in federal elections to present current and valid photo identification before voting).

8. See, e.g., PETER HART & BILL MCINTURFF, NBC NEWS/WALL STREET JOURNAL SURVEY, STUDY # 6062, at 13 (2006), <http://online.wsj.com/public/resources/documents/poll20060426.pdf> (finding that in April of 2006, 62% of respondents to a national poll strongly favored the showing of photo identification before voting, 19% somewhat favored, 12% were neutral, 3% somewhat opposed, and only 4% strongly opposed).

9. Congress adopted the 2001 Carter-Ford Commission's proposals for provisional ballots, statewide voter registration lists, and the creation of the Election Assistance Commission. NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 6, 13 (2001), http://millercenter.virginia.edu/programs/nat_commissions/commission_final_report/fullReport.pdf.

10. E.g., Jo Mannies, *Measure to Require Photo IDs Stirs Outcry*, ST. LOUIS POST-DISPATCH, Feb. 12, 2006, at B1 ("Thor Hearne, a prominent Republican who has been pushing [photo ID] legislation in several states . . . notes that photo identification was among the recommendations of the bipartisan Commission on Federal Election Reform . . ."); Dane Smith, *Panel OKs Bill Requiring Citizenship Proof to Vote*, STAR TRIB. (Minneapolis, Minn.), Mar. 16, 2006, at 1B (explaining that the Republican sponsor of a state bill requiring voters to show proof of citizenship noted that the bipartisan commission recommended a photo-identification requirement).

11. A few other articles list photo-identification proposals along with a bundle of other election reforms or election law developments but do not analyze the proposals extensively. See *Developments in the Law, Voting and Democracy*, 119 HARV. L. REV. 1127, 1144-54 (2006); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 969-70 (2005); Pastor, *supra* note 3, at 588; Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 288-89 (2005); see also Dan Eggen, *Official's Article on Voting Law Spurs Outcry*, WASH. POST, Apr. 13, 2006, at A19 (identifying Hans von Spakovsky—a senior lawyer in the Justice Department's Civil Rights Division who played a critical role in overruling career attorneys and approving Georgia's identification program—as "Publius," the author of the *Texas Review of Law and Politics* article).

12. See BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW & SPENCER OVERTON, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 24 n.9 (2005) (estimating that twenty-two million voting-age citizens lack a driver's license, based on analysis of 2000 Census and 2003 Federal Highway Administration data); TASK FORCE ON THE FED. ELECTION SYS.,

No systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date,¹³ but the best existing data suggests that a photo-identification requirement would do more harm than good. An estimated 6–11% of voting-age Americans do not possess a state-issued photo-identification card, and in states such as Wisconsin 78% of African-American men ages 18–24 lack a driver's license.¹⁴ By comparison, a study of 2.8 million ballots cast in 2004 in Washington State showed only 0.0009% of the ballots involved double voting or voting in the name of deceased individuals.¹⁵ If further study confirms that photo-identification requirements would deter over 6700 legitimate votes for every single fraudulent vote prevented, a photo-identification requirement would increase the likelihood of erroneous election outcomes.

This Article is important because political sound bites and media reports, rather than comprehensive academic analysis, have shaped the photo-identification debate. As a result, many Carter-Baker Commission members, Justice Department officials, members of Congress, governors, state legislators, newspaper columnists, and average citizens have embraced flawed assumptions by relying on a story or two about voter fraud. While anecdotes about fraud are rhetorically persuasive, the narratives often contain false information, omit critical facts, or focus on wrongdoing that a photo-identification requirement would not prevent. Even when true, anecdotes do not reveal the frequency of similar instances of voter fraud.

The current popular debate has also relied on flawed analogies, with advocates asserting that photo-identification cards are commonly required to curb terrorism, prevent credit card fraud, and protect minors. They do not, however, explore why people are allowed to engage in many activities—in

TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM ch. 6 (2001), http://www.millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/task_force_complete.pdf.

13. CHANDLER DAVIDSON ET AL., REPUBLICAN BALLOT SECURITY PROGRAMS: VOTE PROTECTION OR MINORITY VOTE SUPPRESSION—OR BOTH? 99 (2004), http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf; U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 1 (2006), <http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf> (concluding that there has never been a comprehensive, nationwide study of voter fraud based on a review of existing literature and interviews with experts). Rather than wait twelve to eighteen months for teams of researchers to compile and publish the extensive studies proposed in Part III, and risk the chance that politicians in dozens of states will continue to introduce and enact photo-identification requirements that could potentially exclude millions of legitimate voters, this Article compiles the best data currently available on voter fraud and voter access to assert that lawmakers should place a moratorium on more restrictive voter-identification proposals until they obtain a better empirical understanding of the extent and nature of voter fraud.

14. See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 9, at 60–66; BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf; JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 4–5 (2005), <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

15. *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005).

which concerns about fraud would arise—without photo identification, such as traveling by bus and subway, making credit card purchases via telephone, accessing pornography over the Internet, and voting via absentee ballot. More important, erroneous exclusion of legitimate participants carries greater costs in the voting context because assessing the will of the people as a whole is an essential objective of democracy.

Politicians and opinion leaders critical of photo-identification proposals regularly recite talking points about threats to voter participation by the poor and minorities but often fail to quantify this assertion or elaborate on the value of widespread participation. Widespread participation furthers democratic legitimacy by producing a government that reflects the will of the people and allowing diverse groups of citizens to hold government officials accountable for their decisions.¹⁶ Various constitutional and statutory provisions promote broad participation by eliminating voter qualifications that many believed were reasonable, such as paying a two-dollar poll tax or exhibiting an ability to read. As the U.S. Supreme Court stated, “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”¹⁷

This Article engages in a careful and meticulous analysis of the conceptual, empirical, and legal issues arising from photo-identification proposals.

In addition, the Article applies an empirical approach that has the potential to reframe various election law controversies.¹⁸ Current scholarship often rests upon isolated democratic goals and unsubstantiated factual assumptions. Election law, however, involves competing values, such as access and integrity. Votes provide a metric that allows for costs and benefits to be quantified. Instead of relying on personal assumptions about how politics works,¹⁹ scholars and lawmakers should use data to resolve controversies such as how many fraudulent voters relative to legitimate voters are excluded by photo-identification requirements, partisan challengers at the polls, restrictions on voter-registration organizations, and various methods of purging voting rolls.

This approach also helps in balancing access and fiscal restraint. For example, if voting lines during presidential elections average an hour, how much would it cost to reduce lines to thirty minutes, fifteen minutes, or five minutes? What societal gains are realized through increased productivity by

16. See *infra* Section III.B.

17. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

18. Only a few legal scholars have emphasized empirical data in the law of democracy context. See, e.g., Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360–62 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

19. Cf. Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, ELECTION LAW @ MORITZ, Oct. 18, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php> (last visited Sept. 28, 2006) (asserting that election law should be based on hard data and rigorous analysis rather than merely anecdotes and intuition).

those who no longer wait an hour to vote, and increased political participation by those who refuse to wait in longer lines? To what extent does election-day registration enhance turnout and what are the increased administrative costs and risks of fraud? Real data allows for a more honest and thoughtful discussion about the structure of democracy, which is especially useful in light of the self-serving platitudes that incumbent politicians often bring to the debate. While empirical data does not answer all questions, it is an essential component in the quest for better rules.

Increasingly, other areas of the law reject urban myths and turn to empirical data for insight. The study of law and economics quantifies problems and analyzes whether the benefits of legal solutions justify their costs.²⁰ One prominent scholar observes that “people often deal poorly with the topic of risk” and asserts that “sensible policymakers should generally follow science and evidence.”²¹

Better data is also essential to determining whether election regulations pass constitutional and statutory muster. Judges wander into the political thicket blindly, for example, when they make decisions based on their own assumptions about fraud and voter access to photo identification rather than empirical evidence. The extent to which a regulation inhibits legitimate votes, rather than deters fraudulent ones, reflects the law’s overinclusiveness and its burden on the fundamental right to vote. Better data will also show whether a photo-identification requirement abridges the franchise contrary to the Voting Rights Act and the Constitution’s prohibition on poll taxes.

Part I of this Article examines the various methods states currently use to identify voters and the emerging conflict over photo identification as an absolute requirement to vote. Part II reveals that anecdotes used to justify photo-identification requirements are often unrepresentative, misleading, and even false, and shows how oversimplified analogies fall short under scrutiny. Part III compiles the best existing data on the pervasiveness of fraud and the number of voters who lack photo identification, and it provides a roadmap for obtaining even better empirical information. Part IV explains how data plays a critical role in assessing the constitutional and statutory status of photo-identification requirements, and Part V reviews several less restrictive alternatives to photo-identification requirements.

20. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

21. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1123 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)); cf. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10–29, 59–68 (1993) (asserting that regulators devote extensive resources to insignificant problems and too few resources to significant problems, and proposing risk specialists to assess risk and redirect regulatory resources); Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619 (2004) (commenting on the need for better data in formulating environmental law).

I. THE VOTER IDENTIFICATION LANDSCAPE

The U.S. Supreme Court's decision in *Bush v. Gore* ratified presidential election returns that George W. Bush received roughly one more vote than Al Gore for every 11,100 votes cast in Florida, and reminded the nation that every vote counts in a closely divided political environment.

In response, civil rights activists focused largely on reforms designed to improve access, such as replacing obsolete punch card machines that had relatively high voter-error rates, providing provisional ballots to voters whose names did not appear on the voting rolls, and restoring voting rights to felons who had completed their prison sentences.

An alternative movement characterized fraud as the most significant threat to democracy. Political groups that purported to assist senior citizens with voting effectively cast absentee ballots for those with dementia.²² Poll workers stuffed ballot boxes to benefit their favored candidate.²³ Ineligible voters, such as former felons, noncitizens, nonresidents, and people who had already voted, cast illegal ballots with impunity. The National Voter Registration Act of 1993 had worsened these problems, advocates argued, because it had limited the extent to which officials could purge deadwood from the registration rolls.²⁴ According to integrity advocates, a photo-identification requirement at the polls would solve some of these problems.²⁵

The claims about voter fraud arose from an earlier movement that focused on the integrity of elections in the 1960s.²⁶ Democrat John F. Kennedy beat Republican Richard Nixon by only 0.2 percent of the popular vote in the 1960 presidential contest, and some alleged that fraud in Texas and Illinois cost Nixon the election.²⁷ Republicans responded by organizing "Operation Eagle Eye," an intricate antifraud campaign designed to detect

22. JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* 44, 47 (2004); see also Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 J. AM. MED. ASS'N. 1345, 1348 (2004).

23. See FUND, *supra* note 22, at 8.

24. *Id.* at 4, 23–25, 41–55. The National Voter Registration Act, otherwise known as the "Motor Voter" law, directs states to make "a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" when voters have died or moved to another jurisdiction, but also prevents states from removing voters for failing to vote unless they have not voted in two or more consecutive elections. National Voter Registration Act of 1993, 42 U.S.C. § 1973(a)(4) (2000).

25. See FUND, *supra* note 22, at 136–39.

26. Although, following the 1960 presidential election, the antifraud movement took on a national partisan cast that implicated race, concerns about fraud and voter suppression existed decades earlier. In 1927, the Committee on Election Administration of the National Municipal League called for "improving the registration machinery for the purpose of preventing fraudulent voting." EARL R. SIKES, *STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 58–60* (1928). The Committee asserted that "the present registration systems [did] not properly provide for the purging of dead wood from the registration lists." *Id.* at 59. In response, thirty-eight states passed statutes to deal with the problem. *Id.* at 70; see also ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA 14–15* (2005) (describing rampant voter fraud in nineteenth-century America). Additionally, several state political parties employed ballot protection teams to challenge voters' literacy and citizenship at the polls prior to 1960.

27. GUMBEL, *supra* note 26, at 161–67.

and eliminate unqualified voters from registration rolls and challenge the qualifications of suspicious voters at the polls. Political operatives also hoped that Operation Eagle Eye would deter fraud through press coverage of the security program and photography of voters at polling places.²⁸ Republicans deployed tens of thousands of poll challengers in the 1964 presidential election, many of whom were concentrated in thirty-six major metropolitan Democratic strongholds.²⁹ Democrats and civil rights groups charged that Operation Eagle Eye deterred legitimate voter participation and intimidated voters of color.³⁰ Similar ballot security efforts continued in subsequent elections, accompanied by claims of voter suppression.³¹

Following the closely contested 2000 presidential contest, Congress passed the Help America Vote Act of 2002.³² The Act was a broad election reform package that reflected a series of compromises between Democrats largely interested in access and Republicans focused on fraud prevention. The Act enhanced access by providing provisional ballots to registered voters whose names did not appear on the rolls,³³ but the law also required all first-time voters who registered by mail to provide photo or nonphoto documentary identification (such as a utility bill or bank statement) when they arrived at the polls.³⁴ States remain split as to how other voters must identify themselves.

A. Existing State Laws for Identifying Voters

As of 2006, only Georgia, Indiana, and Missouri required photo identification as an absolute condition to vote.³⁵ The other forty-seven states fell into four general categories.³⁶

28. DAVIDSON ET AL., *supra* note 13, at 25–31.

29. *Id.* at 26.

30. *Id.* at 35.

31. *See id.* at 40–95 (documenting ballot security programs from 1968 to 2004, and detailing thirteen case studies of “ballot security excesses”).

32. As discussed above, Congress adopted many of the recommendations proposed by the 2001 Carter-Ford Commission on Federal Election Reform.

33. 42 U.S.C. § 15482(a) (Supp. III 2003).

34. *Id.* § 15483(b). The Help America Vote Act requires that voters produce a copy of “valid photo identification or . . . a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” *Id.*

35. GA. CODE ANN. § 21-2-417 (Supp. 2006), *enjoined by* Lake v. Perdue, No. 2006-CV-119207 (Ga. Super. Ct. Sept. 19, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf>, and Common Cause/Ga. v. Billups, No. 4:05-CV-0201-HLM (N.D. Ga. Sept. 15, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/georgia9-15-06ordergrantingpreliminaryinjunction.pdf>; IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006); MO. ANN. STAT. § 115.427 (West Supp. 2006), *invalidated by* Weinschenk v. State, No. SC 88039, 2006 WL 2959284 (Mo. Oct. 16, 2006) (en banc). Florida requests that voters provide a photo identification card, but unlike Georgia, Indiana, and Missouri, offers voters a provisional ballot that will be counted if the voter’s signature on the provisional ballot matches the voter’s signature on the registration list. *See infra* note 44.

36. While states outside of Georgia, Indiana, and Missouri generally fall into one of the four categories listed below, some states provide additional detailed rules. Alaska, for example, allows a

No documentary identification required. In 2005, two-thirds of the U.S. population lived in the majority of states that did not request documentary evidence at the polls beyond federal requirements for first-time voters.³⁷ In these states, poll workers check a voter's name off of preprinted lists of registered voters when he or she arrives at the polls to cast a vote. Voters establish their identity through various methods, such as signing an affidavit under penalty of perjury,³⁸ stating their name, taking an oral oath,³⁹ reciting their birth date and address to the poll worker,⁴⁰ or signing a pollbook that is compared to the signature on the voter's file.⁴¹

Documentary identification requested, not required. A handful of states request that voters produce documentary identification and give them the option to produce either a photo-identification card, such as a driver's license, or a nonphotographic form of identification, such as a utility bill, bank statement, government check, or paycheck.⁴² In these states, voters

voter who lacks documentary identification to cast a ballot if he or she is identified by poll workers. ALASKA STAT. § 15.15.225 (2004). Voters in Louisiana who lack photo identification are subject to challenge. LA. REV. STAT. ANN. §§ 18:562, 18:565 (2004 & Supp. 2006). Many states that require documentary identification as an absolute requirement to vote allow those without documentary identification to cast a provisional ballot that officials will count if the voter presents the proper documentation to an appropriate election official within one or two days. *See, e.g.*, COLO. REV. STAT. § 1-7-110 (2005).

37. As of July 1, 2005, the combined population of the District of Columbia and the twenty-eight states that did not request documentary identification at the polls was 196,194,611 out of a total U.S. population of 296,410,404. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005 (2005), <http://www.census.gov/popest/states/NST-ann-est.html>. The full list of such states include California, the District of Columbia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. Although Kansas and Pennsylvania do not request documentary evidence from most voters, they require all first-time voters—not just first-time voters who registered by mail, as required of all states by the federal Help America Vote Act—to produce documentary identification at their polling place to cast a vote. KAN. STAT. ANN. § 25-2908 (Supp. 2005); 25 PA. STAT. ANN. § 3050 (West Supp. 2006). In 1996, Michigan passed a law that requested state-issued photo identification but allowed voters without identification to sign an affidavit to establish their identity. MICH. COMP. LAWS ANN. § 168.523 (West Supp. 2006). The law was never implemented, however, because the Michigan Attorney General issued an advisory opinion that found the identification requirement unconstitutional. Dawson Bell, *Court Jumps Into Dispute over Voter ID Checks*, DETROIT FREE PRESS, Apr. 27, 2006, at News 1, available at <http://www.freep.com/apps/pbcs.dll/article?AID=/20060427/NEWS06/604270623&template=printart>. At the request of Republican state legislators, the Michigan Supreme Court recently agreed to issue an advisory opinion on the constitutionality of the 1996 law. (The five Republican-nominated justices voted to issue the advisory opinion and the two Democratic nominees opposed issuing the opinion.) *Id.*

38. *E.g.*, IOWA CODE ANN. § 49.77 (West 1999).

39. *E.g.*, CAL. ELEC. CODE § 14243 (West 2003).

40. *E.g.*, MD. CODE ANN., ELEC. LAW § 10-310 (LexisNexis Supp. 2005).

41. *E.g.*, N.J. STAT. ANN. § 19:15-17 (West Supp. 2006). Although Oregon now conducts its elections by mail, OR. REV. STAT. § 254.465 (2005), county clerks are nonetheless required to maintain some physical polls, OR. REV. STAT. § 254.474 (2005), and voters who opt to cast a ballot in person establish their identity by signing a poll book, OR. REV. STAT. § 254.385 (2005).

42. In 2005, states that requested documentary identification but provided an affidavit option or other means for those without documentary identification to vote included Arkansas, Connecticut, Delaware, Kentucky, North Dakota, and Tennessee.

who do not bring documentary identification to the polls can establish their identity by affidavit or other means.⁴³

Photo identification requested, not required. A few states request that a voter produce a form of photo identification but provide other avenues for a voter who lacks photo identification to establish her identity, such as by signing an affidavit or reciting her birth date and address.⁴⁴

Documentary identification required. Just under a dozen states require documentary identification as an absolute requirement to vote.⁴⁵ Acceptable identification generally includes photo identification, or nonphoto identification such as a utility bill or bank statement.⁴⁶ Thus, these states effectively expand the Help America Vote Act's documentary requirements for first-time voters who registered by mail to all voters.

B. Photo-Identification Requirements to Vote

In 2005, Republican-controlled legislatures in Georgia⁴⁷ and Indiana⁴⁸ passed laws mandating government-issued photo identification as an absolute requirement to vote at the polls.⁴⁹ Georgia's new statute reduced the

43. In North Dakota, a voter without photo identification can vote without being challenged by providing her date of birth—provided that a member of the election board or a clerk knows her personally, and will vouch that the voter is qualified. N.D. CENT. CODE § 16.1-05-07 (Supp. 2005). A voter who is not recognized by poll workers may still vote if he signs an affidavit stating that he is a qualified voter. N.D. CENT. CODE § 16.1-05-06 (2004). In Arkansas, if a voter does not present documentary identification when asked, the poll worker simply makes a note on the precinct voter-registration list that the voter lacked identification; however, after each election the county board of commissioners “may review the precinct voter registration lists and may provide the information of the voters not providing identification at the polls to the prosecuting attorney” who then “may investigate possible voter fraud.” ARK. CODE ANN. § 7-5-305 (Supp. 2005).

44. In 2005, a voter without photo identification could establish his identity by signing an affidavit in Louisiana and South Dakota, and by reciting his birth date and address in Hawaii. Florida requests that voters produce photo identification, but those without photo identification can cast a provisional ballot that will be counted if the voter's signature on the Provisional Ballot Voter's Certificate and Affirmation matches the signature on the voter's registration. FLA. STAT. § 101.048 (2006).

45. As of 2006, these states included Alabama, Alaska, Arizona, Colorado, Montana, New Mexico, South Carolina, Virginia, and Washington. Arizona is unique in that a voter without photo identification must produce two pieces of nonphoto documentary identification that have both the voter's name and address. ARIZ. REV. STAT. ANN. § 16-579 (Supp. 2005); *cf.* Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (per curiam) (vacating the Court of Appeals's injunction suspending Arizona's voter identification rules because of the failure of that court to explain its ruling, and expressing “no opinion . . . on the correct disposition . . . or on the ultimate resolution” of the case).

46. A couple of states, however, are more restrictive in the nonphoto documentary identification they require. Virginia, for example, accepts only a voter-registration card, driver's license, any other identification card issued by Virginia or the federal government, or a photo identification issued by an employer. VA. CODE ANN. § 24.2-643 (Supp. 2005).

47. GA. CODE ANN. § 21-2-417 (Supp. 2006).

48. IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006).

49. In the Georgia Senate, thirty-one Republicans voted for the measure, while eighteen Democrats and two Republicans voted against it. *See* Georgia General Assembly, Senate Vote 565, http://www.legis.state.ga.us/legis/2005_06/votes/sv0565.htm (last visited Sept. 16, 2006). In the Georgia House, ninety Republicans and one Democrat voted for it, while seventy-two Democrats and three Republicans voted against it. *See* Georgia General Assembly, House Vote 510,

acceptable forms of identification from seventeen—which included non-photo identification such as bank statements and paychecks—to six forms of government-issued photo identification.⁵⁰ The new law also made photo identification an absolute requirement to vote at the polls by eliminating an earlier provision that had allowed a voter without identification to sign an affidavit. The new Georgia law did not, however, require that an absentee voter establish his identity through photo identification.⁵¹

The American Civil Liberties Union, Common Cause, and other groups brought suit challenging the law under the Voting Rights Act, the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and other legal provisions.⁵² A federal district court granted a preliminary injunction preventing implementation of the new law, concluding that the law would likely constitute an undue burden on the right to vote and that fees for photo-identification cards would likely constitute a poll tax.⁵³

The Indiana photo-identification law, which took effect on January 1, 2006, requires that voters provide a photo-identification card issued by the Indiana state or the federal government.⁵⁴ The statute includes exceptions for the “indigent . . . [who are] unable to obtain proof of identification without the payment of a fee” and voters whose religious beliefs prevent them from being photographed.⁵⁵ A voter who falls into either of those categories may cast a provisional ballot at the polling place, which will be counted within

http://www.legis.state.ga.us/legis/2005_06/votes/hv0510.htm (last visited Sept. 16, 2006); *see also* Georgia General Assembly, HB 244, http://www.legis.state.ga.us/legis/2005_06/sum/hb244.htm (last visited Sept. 16, 2006) (legislative history of Senate Bill 84). In the Indiana House, all fifty-two Republicans who were present voted for the bill; all forty-five Democrats who were present voted against it. *See* Indiana General Assembly, Action List: S.B. 0483, <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2005&request=getActions&doctype=SB&docno=0483> (last visited Sept. 16, 2006); Indiana General Assembly, Roll Call 259: Passed, <http://www.in.gov/legislative/bills/2005/PDF/Hrollcal/0259.PDF.pdf> (last visited Sept. 16, 2006); Mary Beth Schneider, *House OKs Strict Voter ID Bill*, INDIANAPOLIS STAR, Mar. 22, 2005, at 1B. Similarly, the 33–17 vote in the Indiana Senate was a straight party vote. Mary Beth Schneider, *Voter ID Law Looming for Hoosiers*, INDIANAPOLIS STAR, Apr. 13, 2005, at 1A. Republican governors signed the photo-identification requirement into law in both Georgia and Indiana. Republican-controlled legislatures in five other states have passed photo-identification laws that Democratic governors subsequently vetoed. FUND, *supra* note 22, at 138.

50. GA. CODE ANN. §§ 21-2-220, 21-2-417 (Supp. 2006); Sonji Jacob & Carlos Campos, *Perdue Signs ID Bill*, ATLANTA J.-CONST., Apr. 23, 2005, at 1B.

51. *See* GA. CODE ANN. § 21-2-381 (Supp. 2006) (indicating that any applicant for an absentee ballot must provide her address and identify the primary, election, or runoff in which she intends to vote).

52. Complaint for Declaratory and Injunctive Relief at 32–41, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05-CV-0201-HLM).

53. *Common Cause/Ga.*, 406 F. Supp. 2d at 1376–77. The Department of Justice refused to object to Georgia’s new photo-identification requirement under Section 5 of the Voting Rights Act, but the *Washington Post* later reported that four of five career attorneys recommended objection but were overruled by Republican political appointees. Dan Eggen, *Official’s Article on Voting Law Spurs Outcry*, WASH. POST, Apr. 13, 2006, at A19.

54. IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006).

55. *Id.* § 3-11.7-5-2.5(c) (West 2006). Voters who live and cast their ballots in a state-licensed healthcare facility are not required to show photo identification. *Id.* § 3-11-8-25.1(f) (West Supp. 2006).

two weeks of the election, but only if the voter makes a separate trip to the county elections board and signs an indigency or religious-objector affidavit (such affidavits are not made available to voters at polling places).⁵⁶ Like the Georgia law, the Indiana photo-identification requirement does not require that an absentee voter establish her identity through photo identification.⁵⁷

The Indiana Democratic Party filed suit, and the Federal District Court for the Southern District of Indiana refused to enjoin the law, asserting that the plaintiffs failed to prove that the photo-identification requirement would burden voting in violation of the federal Constitution or the Voting Rights Act.⁵⁸

The photo-identification law adopted in Missouri required that voters present an unexpired state- or federal-issued photo identification that contains the voter's name as it appears on the voter registration rolls.⁵⁹ The statute did not provide free photo-identification cards to indigent citizens. The Supreme Court of Missouri struck down the provision, reasoning that it violated the Missouri Constitution's equal protection clause and right to vote provision.⁶⁰

In September 2005, the Carter-Baker Commission recommended that the remaining states adopt a photo-identification requirement.⁶¹ The Commission connected its photo-identification proposal to the "Real ID" Act, which prohibits states from issuing a driver's license or nondriver's identification card after 2007 unless an individual presents documentary proof of her full legal name and date of birth, Social Security number, and citizenship.⁶² The Carter-Baker Commission recommended that states require a "Real ID" card as a prerequisite for voting at the polls.⁶³

To mitigate access concerns, the Commission proposed that states "undertake their best efforts to make voter registration and ID accessible and available to all eligible citizens" through mobile offices and offering "Real ID" cards to nondrivers free of charge.⁶⁴ Further, the Commission recommended that through 2009 states permit voters without a "Real ID" card to cast a provisional ballot by signing an affidavit attesting to their identity.⁶⁵

56. *Id.* ("[A]ll provisional ballots must be counted by not later than noon on the second Monday following the election.").

57. *Id.* § 3-11-10-1.2.

58. *Ind. Democratic Party v. Rokita*, No. 1:05-CV-0634-SEB-VSS, 2006 WL 1005037, at *35, *47 (S.D. Ind. Apr. 14, 2006).

59. IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006).

60. *Weinschenk v. Missouri*, No. SC88039, 2006 Mo. LEXIS 122, at *30 (Mo. Nov. 7, 2006).

61. COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 18–21.

62. *Id.* at 19–21.

63. *Id.* at 21.

64. *Id.* at 21, 33–34.

65. *Id.* at 21. Former President Jimmy Carter asserted that the proposal's transition period and card distribution proposals mitigate access problems, and he criticized photo-identification legislation that failed to incorporate these elements. *See* Letter from Jimmy Carter, Former U.S.

Thereafter, citizens would be allowed to vote without a “Real ID,” but their ballots would only be counted if they returned with valid photo identification within forty-eight hours—thereby making the showing of a “Real ID” card an absolute requirement to vote.⁶⁶ The Commission also proposed that states confirm the identity of absentee voters not through “Real ID,” but through signature matching.⁶⁷

Before states follow the lead of the Georgia, Indiana, and Missouri state legislatures and the Carter-Baker Commission, however, lawmakers should pause to examine closely the arguments put forth in support of photo-identification requirements.

II. THE SHORTCOMINGS OF ANECDOTE, ANALOGY, AND INTUITION TO JUSTIFY PHOTO IDENTIFICATION

Photo-identification advocates often rely on two categories of assertions: (1) anecdotes about voter fraud, and (2) analogies to other contexts that require photo identification. Both are deeply flawed.

Voter-fraud anecdotes are often misleading, incomplete, and unrepresentative. Advocates selectively emphasize the anecdotes that are sure to evoke indignation or other emotions rather than the most typical fraud incidents and omit facts or other stories that cut against their desired policy result. They also employ analogy to justify their proposals, but they often ignore important differences between voting and activities that require photo identification, such as traveling by air and purchasing alcohol.

A. *Misleading and Unrepresentative Anecdotes about Voter Fraud*

Voter-fraud anecdotes can lead to misleading generalizations absent disclosure of the anecdotes’ truthfulness and typicality. We cannot determine whether a photo-identification requirement is an appropriate response to voter fraud, for example, unless we understand whether there are ten fraudulent votes for every one hundred, ten thousand, or one million votes cast.⁶⁸ Professor Michael Saks explains as follows:

[A]necdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not

President, to Robin Carnahan, Missouri Sec’y of State (Mar. 16, 2006), available at http://www.sos.mo.gov/img/03-16-06_President_Carter_Letter.pdf (asserting that some Missouri legislators improperly invoked the Carter-Baker Commission photo-identification proposal to support Missouri photo-identification legislation because the Missouri bill did not contain adequate safeguards for voter access).

66. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 21.

67. *Id.* at 20.

68. “The significance of a story of oppression depends on its representativeness . . . [T]o evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social science rather than of narrative.” Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997).

permit one to determine either the frequency of occurrence of something or its causes and effects

These anecdotes may work as a persuasive device, in that a few examples of apparent greed, abuse, or system irrationality can arouse people emotionally. . . .

[Some anecdotes] are systematically distorted portrayals of the actual cases they claim to report Even when true, anecdotes enjoy a persuasive power that far exceeds their evidentiary value.

Anecdotes have a power to mislead us into thinking we know things that anecdotes simply cannot teach us.⁶⁹

Professor David Hyman illustrates the shortcomings of anecdote in policy-making by recounting a story conveyed by President Ronald Reagan.⁷⁰ For years Reagan told the story of an alleged “welfare queen” who he claimed used eighty different names and a dozen Social Security cards to defraud the government of more than \$150,000. Even after the true story was pointed out to him—the woman had used two aliases to take \$8,000—Reagan continued to use his false version.⁷¹ The reliance on anecdote to discredit the welfare system became common. One white waitress in suburban Chicago complained that “‘blacks buy porterhouse steaks with food stamps, while we eat hamburgers.’”⁷² The woman admitted that she “‘had never actually seen any blacks do this. But she [had] heard and read stories, and that [was] enough.’”⁷³

Anecdotes about voter fraud are also misleading and fail to indicate the frequency of the alleged fraud.⁷⁴ For example, although John Kerry lost the 2004 presidential race nationwide, he won Wisconsin by just eleven thousand votes. Republicans suspected that massive fraud swung the Wisconsin election to Kerry and pushed for a photo-identification requirement at the polls.

In August 2005, Republican politicians in Wisconsin held a press conference to emphasize the need for a photo-identification requirement. The Republicans announced that their research had uncovered nine people who in November 2004 had voted in Milwaukee and also cast ballots in Chicago,

69. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1159–61 (1992).

70. See David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. J. 797, 804 (1998).

71. See *The Mendacity Index*, WASH. MONTHLY, Sept. 1, 2003, at 27.

72. Hyman, *supra* note 70, at 804 n.28 (quoting Isabel Wilkerson, *The Tallest Fence: Feelings on Race in a White Neighborhood*, N.Y. TIMES, June 21, 1992, § 1, at 18).

73. *Id.*

74. My utilization of an anecdote of misleading anecdotal evidence in Wisconsin should not be construed to suggest that all anecdotes about fraud are misleading, false, or otherwise flawed. Instead, the Wisconsin anecdote illustrates the flaws of anecdote and the need for empirical data to determine the frequency and typicality of voter fraud.

Minneapolis, or Madison.⁷⁵ The press conference was held in front of one of the addresses allegedly used to vote twice, according to Wisconsin GOP Chair Rick Graber.⁷⁶ “We now are able to make this link to show that this voter fraud has crossed state lines,” announced Republican State Representative Jeff Stone.⁷⁷

In its September 2005 Report, the Carter-Baker Commission also supported its call for photo identification by invoking the 2004 Wisconsin election:

In Milwaukee, Wisconsin, investigators said they found . . . more than 200 cases of felons voting illegally and more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person. Moreover, there were 4,500 more votes cast than voters listed.⁷⁸

Commissioner Susan Molinari, a Republican and former congresswoman, asserted that a photo-identification requirement was justified because the election in Wisconsin was “decided by illegal votes,” a fact “established by a joint report written by the U.S. Attorney, FBI, Chief of Police and senior local election official—both Republicans and Democrats.”⁷⁹

But these Wisconsin anecdotes are misleading. Of the nine “double-voting” individuals named by the Republican Party leadership at their press conference, *none* have been indicted for fraud by the Republican-appointed U.S. attorney.⁸⁰ Six of the cases involved clerical errors, and in three cases individuals with a similar name but a different birth date voted in Chicago, Madison, or Minneapolis.⁸¹

In its support for a photo-identification requirement, the Carter-Baker Commission also failed to disclose a variety of important factors regarding the Wisconsin anecdote. First, the ballots examined by the Joint Task Force Investigating Possible Election Fraud differ from those in other states. Most states require voters to register in advance of election day and restrict the casting of regular ballots to those on the voting rolls.⁸² Wisconsin and a few other states, however, have election-day registration, and thus unregistered

75. Greg J. Borowski, *Nine May Have Voted in 2 Cities*, MILWAUKEE J. SENTINEL, Aug. 10, 2005, at B1.

76. *Voter ID Gets Push from GOP: Milwaukee Cases Cited as Example*, CAP. TIMES (Madison, Wis.), Aug. 10, 2005, at 3A.

77. *Id.*

78. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 4 (citing JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD, PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD (2005), <http://www.wispolitics.com/1006/electionfraud.pdf>); *see also id.* at 18 n.19 (establishing that fraud and multiple voting occur by referring back to Section 1.1, which details alleged fraud in November 2004 elections in Washington State and Wisconsin).

79. *Id.* at 90 (additional statement of Commissioner Susan Molinari).

80. *See* Borowski, *supra* note 75.

81. *Id.*

82. Under the Help America Vote Act, an individual who is not on the voting rolls may cast a provisional ballot, which is counted if officials later determine that the individual is a properly registered voter. 42 U.S.C. § 15482(a) (Supp. III 2003).

individuals can show up, register, and cast a vote.⁸³ The Task Force investigation focused on 70,000 votes of individuals who registered at the polls on election day in Milwaukee, a pool of votes that did not exist in forty-four other states.

Further, many of the fraudulent activities listed by the Carter-Baker Commission are unrelated to photo identification. A photo-identification requirement would not have kept ineligible felons from voting, nor would it have prevented the final total of “4,500 more votes cast than voters listed.”⁸⁴ Out of the 70,000 same-day registrations studied, investigators found just over one hundred questionable instances in which people may have voted twice, used false addresses or fake names, or voted in the name of a dead person.⁸⁵

Assuming that each of these instances resulted from intentional voter fraud rather than a clerical mistake or other reason, this is a fraud rate of less than one-seventh of one percent (0.14% to be exact), or one in seven hundred. And the rate may not be that high. As of December 2005, authorities had charged only four people out of the group with double-voting, and three of the charges resulted in dismissal, acquittal, and a hung jury.⁸⁶

Contrary to the claims of Carter-Baker Commissioner Molinari, the Task Force did not find that the Wisconsin election was “decided by illegal votes.”⁸⁷ Even in the improbable event that all one hundred alleged fraudulent votes and two hundred improper felon votes were cast for John Kerry, his lead in the state would have been reduced from 11,000 to 10,700. The U.S. attorney explicitly stated, “We don’t see a massive conspiracy to alter the election in Milwaukee, one way or another.”⁸⁸

83. Idaho, Maine, Minnesota, Montana, New Hampshire, and Wyoming also allow voters to register on election day.

84. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 4.

85. JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD, *supra* note 78, at 2.

86. Steve Schultze, *No Vote Fraud Plot Found: Inquiry Leads to Isolated Cases*, *Biskupic Says*, MILWAUKEE J. SENTINEL, Dec. 6, 2005, at A1.

87. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 90 (additional statement of Commissioner Susan Molinari).

88. Schultze, *supra* note 86, at A1 (quoting U.S. Attorney Steve Biskupic). The Commission on Federal Election Reform also cited ex-felon voting and votes cast in the names of the dead as evidence of fraud in a closely contested 2004 Washington gubernatorial race that was decided by 129 votes. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 4. In a separate statement, Commissioner Susan Molinari argued that states should adopt photo-identification requirements because the Washington race was “decided by illegal votes” and “this fact was established by a lengthy trial and decision of the court.” COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 90 (additional statement of Commissioner Molinari). These claims suffer from many of the problems of the Wisconsin anecdote. A photo-identification requirement would not have stopped ex-felon voting in Washington State. The Commission also failed to note that the Washington court had concluded that of more than 2.8 million ballots, only six had been cast by voters who had voted twice and only nineteen had been cast in the name of deceased individuals. *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005). Since the margin of victory was 129 votes, it is clear that these twenty-five illegal votes (many of which would not have been prevented by a photo-identification requirement) did not decide the election, even making the improbable assumption that all of them went to Democratic candidate Christine Gregoire. Further, the Commission did not emphasize that most, if not all, of the nineteen votes cast statewide in the names of the

Photo-identification advocates generally respond to these observations by emphasizing the existence of fraud rather than its magnitude. After the U.S. attorney in Wisconsin announced that no massive conspiracy of voter fraud had been found, the GOP released a statement indicating that “the Republican Party of Wisconsin continues to maintain that one case of voter fraud is one too many.”⁸⁹ The Carter-Baker Commission also dismissed the need to examine the extent of empirical evidence:

While the Commission is divided on the magnitude of voter fraud—with some believing the problem is widespread and others believing that it is minor—there is no doubt that it occurs. *The problem, however, is not the magnitude of the fraud.* In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference.⁹⁰

The magnitude of fraud, however, is critical to determining whether a photo-identification requirement will do more harm than good. One cannot assess a photo-identification requirement’s true cost without determining whether, for every ten cases of voter fraud, a photo-identification requirement would deter from voting one, one hundred, or ten thousand legitimate voters. Depending on the magnitude of fraud, a photo-identification requirement could erroneously skew election outcomes to a greater extent than would a lack of such a requirement.

In addition to overlooking typicality, anecdotes often distract with emotion and fail to reveal the causes or effects of fraud.⁹¹ On the first page of his book *Stealing Elections: How Voter Fraud Threatens Our Democracy*, *Wall Street Journal* editor John Fund asks, “How sloppy [is our electoral system]? Lethally so. At least eight of the nineteen hijackers who attacked the World Trade Center and the Pentagon were actually able to register to vote in either Virginia or Florida while they made their deadly preparations for 9/11.”⁹²

dead were cast absentee, and thus would not have been prevented by a photo-identification requirement for in-person voting (the Commission recommended a signature requirement over photo identification for absentee voting). See Gregory Roberts, *Six More Charged with Offenses in 2004 Election*, SEATTLE POST-INTELLIGENCER, June 22, 2005, at B1.

89. Statement of the Wisconsin Republican Party Chairman, Statement Re: U.S. Attorney Biskupic’s investigation into voter fraud Dec. 6, 2005, available at <http://www.wisgop.org/site/Viewer.aspx?iid=231&mname=ArticleGroup&rpId=802> (last visited Feb. 24, 2006).

90. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 18 (emphasis added).

91. Professor Richard Epstein states the following:

The capacity of narrative to inflame, inform, or excite depends on its ability to take you away from the peak of the distribution to see what some extraordinary novel and different circumstance is and indeed that is exactly why we call these things novel because of the way in which they take you away from the core. But if you are trying to understand the way in which social reality works then the important thing to remember is that the prosaic and the boring is often far more important in the way in which the world organizes itself than is the exotic and profane.

Discussion, *Legal Scholarship and Disciplinary Politics*, 45 STAN. L. REV. 1671, 1678 (1993) (remarks of Professor Richard Epstein), *cited in* Hyman, *supra* note 70, at 836.

92. FUND, *supra* note 22, at 1.

Photo-identification proponents rely on this dramatic statement to cite the potential for voter fraud. One editorialist, for example, claimed that had the hijackers “survived, they could have shown up on Election Day and voted.”⁹³ But it remains unclear that eight of the hijackers were registered to vote—data has not yet been found to confirm this assertion.⁹⁴ Even assuming eight of the hijackers registered to vote in Virginia or Florida, it is unlikely that the registrations caused the lethal attack on 9/11. Fund does not reveal how many of the improper registrations resulted in fraudulent votes. Further, the nineteen hijackers obtained sixty-three driver’s licenses from various states and “could have shown up on Election Day and voted,” even if a photo-identification requirement to vote had been in effect.⁹⁵

Photo-identification advocates also often cite irregularities that would not be prevented by a photo-identification requirement. For example, proponents regularly cite the registration of fictitious people, illegal aliens, and pets, and the fact that voting rolls contain more names than U.S. Census records as a justification for photo-identification requirements.⁹⁶ These advocates fail to disclose that many bloated voting rolls are not inflated by malicious citizens who plan to vote in multiple jurisdictions. Instead, bloated rolls are often caused by county registrars’ failure to purge old data after voters move. Further, photo-identification advocates do not provide evidence that most fictitious registrations are caused by people who vote under their own name, a second time as “Elmer Fudd,” and a third time as

93. Editorial, *One Lawyer, One Vote*, INVESTOR’S BUS. DAILY, Oct. 22, 2004, at A16. Members of Congress used this same argument during the debate over the Help America Vote Act. *See, e.g.*, 148 CONG. REC. S1171, 1176 (daily ed. Feb. 26, 2002) (statement of Sen. Bond) (“In Colorado, a Saudi man detained by Federal authorities for questioning about the September 11 terrorist attacks voted in Denver during last year’s Presidential election, even though he was not a U.S. citizen . . . In North Carolina, a Pakistani man facing a vote fraud charge has been linked to at least two of the September 11 hijackers.”).

94. When my research assistant Daniel Taylor contacted John Fund and asked about the source of the assertion that eight of the hijackers were registered in either Florida or Virginia, John Fund indicated that he had obtained the fact from an interview with then-Assistant Attorney General Michael Chertoff. Taylor then contacted the Department of Justice’s Criminal Division, the Counterterrorism Section, and Voting Section, and no one knew about the claim. At the suggestion of these offices, Taylor filed a FOIA request. He also repeatedly called the Department of Homeland Security (of which Chertoff became the Secretary), but no one responded to Taylor. Taylor also contacted the former Virginia Secretary of the Board of Elections, Cameron Quinn. Quinn indicated that she was unable to confirm or deny that the 9/11 hijackers were registered to vote in Virginia. She was familiar with the claim, and indicated that her office investigated it while she was Secretary of the Board of Elections. However, they had a difficult time obtaining from federal officials the actual names of the hijackers, their Social Security numbers (which is how they usually look up registrations), or their actual voter registration numbers. As a result, she believes that her agency was never able to prove or disprove that any of the 9/11 hijackers registered to vote in Virginia. Taylor’s calls to the Florida Secretary of State were not returned.

95. *See One Lawyer, One Vote*, *supra* note 93.

96. *See* FUND, *supra* note 22, at 4; *cf.* COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 4 (“One potential source of election fraud arises from inactive or ineligible voters left on voter registration lists . . . [T]here were over 181,000 dead people listed on the voter rolls in six swing states in the November 2004 elections . . .” (citing Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHI. TRIB., Dec. 4, 2004, at C13)); *id.* at 90 (additional statement of Commissioner Molinari) (asserting that photo-identification requirements are necessary because “voter rolls are filled with fictional voters like Elmer Fudd and Mary Poppins”).

“Mary Poppins,” rather than by workers who get paid two dollars per name registered and profit by padding their registrations with fictitious names.⁹⁷ Such fictitious reporting is a problem, but primarily to the voter-registration organizations that pay workers for fraudulent names and the jurisdictions that contend with bloated voter registration rolls.⁹⁸

Proponents of photo-identification requirements also regularly rely on instances of absentee ballot fraud rather than voter fraud at the polls to support their proposals.⁹⁹ A photo-identification requirement at the polls, however, does not prevent absentee ballot fraud. Indeed, in Georgia and Indiana, absentee voters need not produce photo identification,¹⁰⁰ and the Carter-Baker Commission proposed that states confirm the identity of absentee voters through signature matching rather than photo identification.¹⁰¹

The fact that photo-identification advocates use unrepresentative and misleading anecdotes that would persist even with the implementation of a photo-identification requirement does not, in and of itself, mean that voter fraud does not exist. Instead, it simply illustrates the limitations of anecdotal analysis. Policy-makers need better data about fraud and statistical analysis to fully understand whether the benefits of a photo-identification requirement justify its costs.

B. *Flawed Analogies*

By analogizing voting to other contexts, photo-identification advocates often avoid the question of whether a photo-identification card will reduce political participation by legitimate voters. People need photo identification to board a plane, enter federal buildings, cash a check, use a credit card, rent a video, and buy cigarettes and alcohol, advocates argue. Why should voting be an exception to this rule?

Analogy is a common rhetorical tool, but it has limitations. Professor Cass Sunstein articulated this idea as follows:

Everything is a little bit similar to, or different from, everything else
Everything is similar in infinite ways to everything else, and also different

97. Anecdotes, analogies, and intuition—rather than rigorous empirical analysis—lead judges to make unfounded assumptions. *See, e.g.*, *Weinschenk v. Missouri*, No. SC88039, 2006 Mo. LEXIS 122, at *77 (Mo. Nov. 7, 2006) (Limbaugh, J., dissenting) (“Although the majority agrees that there is some evidence of voter fraud at the voter registration stage, they discount that evidence as if it had no connection with fraud at the polling place. But why else does voter registration fraud occur if not to vote persons fraudulently registered?”).

98. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1361 (N.D. Ga. 2005) (holding that substantial likelihood exists that Georgia photo-identification requirement is unconstitutional, and noting that “although Defendants have presented evidence from elections officials of fraud in the area of voting, all of that evidence addresses fraud in the area of voter registration, rather than in-person voting”).

99. *See, e.g., id.* at 1366; COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 4; Derooy Murdock, *A Necessary Shaming*, NATIONAL REVIEW ONLINE, Sept. 14, 2004, <http://www.nationalreview.com/murdock/murdock200409140829.asp>.

100. GA. CODE ANN. § 21-2-381 (Supp. 2006); IND. CODE ANN. § 3-11-10-1.2 (West 2006).

101. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 20.

from everything else in the same number of ways. At the very least one needs a set of criteria to engage in analogical reasoning. Otherwise one has no idea what is analogous to what.

By themselves, factual situations tell us little until we impose some sort of pattern on them.¹⁰²

The question in examining photo-identification analogies is whether democracy sufficiently resembles adult recreation, air travel, and other activities that require photo identification and therefore warrants identical treatment.

While a photo-identification requirement in voting and other contexts aims to ensure that a person is who she represents herself to be and/or meets particular qualifications, the costs of erroneous exclusion differ with voting. John Fund, for example, asserts that the Clinton administration hypocritically pushed for photo-identification requirements for cigarette purchases but opposed such requirements for voting.¹⁰³ But for those who consider widespread participation a critical democratic value, erroneously preventing a legitimate voter from casting a ballot poses more harm than erroneously preventing a twenty-two-year-old adult from buying cigarettes.

Erroneous exclusion of air travelers or legitimate credit-card users who lack photo identification may inconvenience individuals and slow the economy, but these harms are different not only with respect to the type of harm they prevent, but also in their motivations. In the airline and commercial contexts, participants do not have “votes” that are weighed relative to one another to assess the will of the entire citizenry and determine who will govern society. Liquor stores, airlines, and department stores generally lack incentives to exclude legitimate consumers, whereas some politicians benefit by reducing turnout among particular demographic populations likely to vote against them. While the benefits of deterring one terrorist outweigh the costs of excluding ten thousand “safe” air travelers who lack photo identification, the benefits of excluding one fraudulent voter do not outweigh the costs of excluding ten thousand legitimate voters. This paradox is all the more disconcerting because so many of those performing the calculus of voting regulation stand to gain from erring on the side of implementing rules that reduce turnout.

A similar cost-benefit analysis explains the lack of photo-identification requirements in many financial contexts. Merchants lose millions of dollars a year through credit card fraud, but they generally do not require photo identification or even a signature when individuals use a credit card at a gas pump or use credit card numbers online. Empirical data about the extent of fraudulent transactions and the true costs of a photo-identification requirement help individual merchants determine whether the requirement would increase or decrease expected profits.

102. Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993) (footnote omitted).

103. FUND, *supra* note 22, at 137.

Even with nonmonetary objectives, such as terrorism prevention and the protection of minors, a cost-benefit analysis shapes whether photo identification will be required. For example, despite recent bombings in Israel, London, and Madrid, the United States still generally does not require commuters entering a subway or a bus to show photo identification. The administrative burden of requiring photo identification for all commuters seems high, while the effectiveness of such a requirement in preventing terrorism seems low. The costs of terrorism on airlines are much higher than the costs of voter fraud, but officials provide a “safety net” procedure that allows travelers who fail to bring photo identification to the airport to be searched and board airplanes.¹⁰⁴ Despite minors’ ability to obtain wine, cigarettes, movie rentals, and even free pornographic material via the Internet without photo identification, lawmakers have not deemed the magnitude of these problems sufficiently large to outweigh distributors’ profits and the convenience and anonymity provided to adult customers.

Policy-makers also rely on a cost-benefit assessment with regard to political participation. Although absentee ballots pose a greater risk of fraud than voting at the polls, states generally confirm absentee voter identity through a signature match rather than requiring that absentee voters show a photo-identification card to a notary public.¹⁰⁵ Although foreign nationals have made political contributions to both Democrats and Republicans in violation of federal law, the law does not require that every donor produce photo identification that establishes U.S. citizenship.

* * *

A photo-identification requirement could disenfranchise twenty million Americans, and policy-makers should resist the temptation to rush to adopt the proposal based solely on anecdotes, analogy, and “common sense” popular assumptions.¹⁰⁶ Without hard data, many people misperceive risk.¹⁰⁷ About four in ten Americans believe, for instance, that flying in

104. See *Gilmore v. Gonzales*, 435 F.3d 1125, 1129 (9th Cir. 2006) (“The identification policy requires airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter.”).

105. See COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 20. The Carter-Baker Commission expressly adopted a signature requirement rather than a photo-identification requirement for absentee ballots. *Id.*

106. Cf. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094–95 (1996) (wrapping an argument “in the mantle of common sense [is] certainly cause for suspicion” (footnote omitted)). Many photo-identification advocates defer to “common sense” rather than hard data and risk analysis. See, e.g., Editorial, *Preserving Election Integrity*, LAS VEGAS REV. J., Jan. 28, 2006, at 14B (“Georgia’s [photo identification] bill is a common-sense reform that would bolster public confidence in the election process.”); Patrick McIlheran, Editorial, *Election Plot or Not, Milwaukee’s Vote Wasn’t Clean*, MILWAUKEE J. SENTINEL, Dec. 7, 2005, at A21 (arguing that Wisconsin’s Democratic governor should “compromise on the common-sense safeguard of photo ID”).

107. See Sunstein, *supra* note 21, at 1123.

an airplane is more dangerous than riding in a car,¹⁰⁸ even though in reality people are much more likely to die for every mile they ride in a car than for every mile they fly in a plane.¹⁰⁹ A variety of factors skew perception of risk, including perceived control over a situation, familiarity with a process, stereotypes, personal fears, outrage, and other emotions.¹¹⁰ Data is a critical component of a reasoned decision-making process.

III. THE NEED FOR EMPIRICAL EVIDENCE TO BETTER UNDERSTAND FRAUD AND ACCESS

Before enacting any additional fraud-prevention proposals, including a photo-identification requirement, it is crucial to understand the scope and nature of voter fraud. Policy-makers need data on both fraud and access to the polls to determine whether a photo-identification requirement would lead to fewer erroneous election outcomes by preventing a large number of fraudulent votes or result in more erroneous election outcomes by deterring a larger number of legitimate voters. Empirical information would also indicate whether a photo-identification requirement would disproportionately exclude groups such as senior citizens, the poor, Americans with disabilities, and people of color.

To date, no systematic, empirical study of voter fraud has been conducted at either the national or the state level.¹¹¹ This gap in knowledge is not inevitable. This Part examines the best available data on the fraudulent votes that a photo-identification requirement would deter and the legitimate votes it would inhibit. This Part also proposes methods that promise to yield better data about whether a photo-identification requirement would do more harm than good.

A. Toward Better Data on the Extent of Fraud

Proponents of photo identification assert that voter fraud exists but is tough to measure because it is difficult to detect. Even if perfect information is unobtainable, however, we can secure better data that would allow for

108. BUREAU OF TRANSP. STATISTICS, U.S. DEP'T OF TRANSP., OMNIBUS SURVEY: HOUSEHOLD SURVEY RESULTS: SUMMARY REPORT: DECEMBER 2000, http://www.bts.gov/programs/omnibus_surveys/household_survey/2000/december/summary_report.html (last visited Sept. 16, 2006).

109. OFFICE OF HAZARDOUS MATERIALS SAFETY, U.S. DEP'T OF TRANSP., A COMPARISON OF RISK, <http://hazmat.dot.gov/riskmgmt/riskcompare.htm> (last visited Mar. 1, 2006).

110. See Ann Bostrom, *Risk Perceptions: "Experts" vs. "Lay People"*, 8 DUKE ENVTL. L. & POL'Y F. 101 (1997); Peter M. Sandman, *Risk Communication: Facing Public Outrage*, EPA J., Nov. 1987, at 21, 21-22 (1987). Control, familiarity, and emotion need not be removed from all decision-making, but in light of the misperception of risk, policy-makers and courts also need real data to make informed judgments.

111. DAVIDSON ET AL., *supra* note 13, at 99; U.S. ELECTION ASSISTANCE COMM'N, *supra* note 13, at 16-19 (acknowledging that no comprehensive study of voter fraud exists, and recommending various methods for studying voter fraud, including database comparison, risk analysis, statistical research, and following up on allegations of fraud in the media and literature).

reasonable assessments about the amount of voter fraud in U.S. elections. Three approaches—investigations of voter fraud, random surveys of voters who purported to vote, and an examination of death rolls—provide a better understanding of the frequency of fraud. All three approaches have strengths and weaknesses, and thus the best studies would employ all three to assess the extent of voter fraud. Further, an accurate estimate of the benefits of a photo-identification requirement must also consider the amount of fraud that would persist due to forged photo-identification cards,¹¹² and thus would not be prevented by a photo-identification requirement.

1. *Investigations and Prosecutions of Voter Fraud*

Policy-makers should develop databases that record all investigations, allegations, charges, trials, convictions, acquittals, and plea bargains regarding voter fraud. Existing studies are incomplete but provide some insight. For example, a statewide survey of each of Ohio's eighty-eight county Boards of Elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state's 2002 and 2004 general elections. This is a fraud rate of 0.000044%.¹¹³ The Carter-Baker Commission's Report noted that since October 2002, federal officials had charged eighty-nine individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, or voting improperly as a noncitizen.¹¹⁴ Examined in the context of the 196,139,871 ballots cast between October 2002 and August 2005, this represents a fraud rate of 0.000045% (and note also that not all of the activities charged would have been prevented by a photo-identification requirement).¹¹⁵

A more comprehensive study should distinguish voter fraud that could be prevented by a photo-identification requirement from other types of fraud—such as absentee voting and stuffing ballot boxes—and obtain statistics on the factors that led law enforcement to prosecute fraud. The study would demand significant resources because it would require that research-

112. Cf. Donna Leinwand, *Tech-Savvy Teens Swamp Police With Fake ID's*, USA TODAY, July 2, 2001, at 1A, available at <http://www.usatoday.com/news/nation/2001/07/02/fake-ids.htm> ("Computer-savvy teenagers are creating millions of fake driver's licenses despite the holograms and other high-tech security features that states now put on licenses to thwart forgers. Using the Internet, anyone willing to break a few laws can be a mass producer of fake IDs . . ."); *Bush Daughter Used Fake ID to Buy Alcohol*, BIRMINGHAM POST, May 31, 2001, at 11.

113. COALITION ON HOMELESSNESS AND HOUSING IN OHIO & LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE: A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf> (finding only four cases of fraud statewide, based on interviews of the Director or Deputy Director of each of the state's eighty-eight county Boards of Elections in June 2005, that asked, "Were there any voter fraud cases within your county from the Election of 2002 and 2004?").

114. COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 45 (citing Press Release, U.S. Dep't. of Justice, Department of Justice to Hold Ballot Access and Voting Integrity Symposium (Aug. 2, 2005), http://www.usdoj.gov/opa/pr/2005/August/05_ag_404.htm).

115. See BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 9–10.

ers interview and pore over the records of local district attorneys and election boards.¹¹⁶

Hard data on investigations, allegations, charges, pleas, and prosecutions is important because it quantifies the amount of fraud officials detect. Even if prosecutors vigorously pursue voter fraud, however, the number of fraud cases charged probably does not capture the total amount of voter fraud. Information on official investigations, charges, and prosecutions should be supplemented by surveys of voters and a comparison of voting rolls to death rolls.

2. *Random Surveys of Voters*

Random surveys could give insight about the percentage of votes cast fraudulently. For example, political scientists could contact a statistically representative sampling of one thousand people who purportedly voted at the polls in the last election, ask them if they actually voted, and confirm the percentage who are valid voters. Researchers should conduct the survey soon after an election to locate as many legitimate voters with fresh memories as possible.

Because many respondents would perceive voting as a social good, some who did not vote might claim that they did, which may underestimate the extent of fraud. A surveyor might mitigate this skew through the framing of the question (“I’ve got a record that you voted. Is that true?”). Further, some voters would not be located by researchers and others would refuse to talk to researchers. Photo-identification proponents might construe these nonrespondents as improper registrants that committed voter fraud.¹¹⁷

Instead of surveying all voters to determine the amount of fraud, researchers might reduce the margin of error by focusing on a random sampling of voters who signed affidavits in the states that request photo identification but also allow voters to establish their identity through affidavit—Louisiana¹¹⁸ and South Dakota.¹¹⁹ In South Dakota, for example, only 2% of voters signed affidavits to establish their identity. If the survey indicates that 95% of those who signed affidavits are legitimate voters (and the

116. Professor Lorraine C. Minnite argues as follows:

As a political scientist who has studied voter fraud I can tell you there are no reliable, officially compiled national or even statewide statistics available on voter fraud . . . Researchers working on voter fraud must construct their own datasets by culling information about allegations, investigations, evidence, charges, trials, convictions, acquittals and pleas from local election boards and local D.A.’s, county by county and sometimes town by town across the U.S. The task is painstaking which explains in part why nobody has done it yet. Such a dataset is desirable because hard data are persuasive, at least with reasonable people.

Posting of Lorraine C. Minnite, lcm25@columbia.edu, to election-law_gl@majordomo.ils.edu (Apr. 21, 2005) (on file with author).

117. *Id.*

118. LA. REV. STAT. ANN. § 18:562 (Supp. 2006).

119. S.D. CODIFIED LAWS § 12-18-6.2 (2004).

other 5% were shown to be either fraudulent or were nonresponsive), this suggests that voter fraud accounts for, at the maximum, 0.1% of ballots cast.

The affidavit study, however, is limited to two states, and it is unclear whether this sample is representative of other states.¹²⁰ The affidavit study also reveals information about the amount of fraud in a photo-identification state with an affidavit exception—more voter fraud may exist in a state that does not request photo identification. Further, the affidavit study fails to capture fraudulent voters without photo identification who left the polls without voting when they were offered an affidavit to sign.

3. Examining Death Rolls

A comparison of death rolls to voting rolls might also provide an estimate of fraud. Imagine that one million people live in state A, which has no documentary-identification requirement. Death records show that twenty thousand people passed away in state A in 2003. Cross-referencing this list to the voter rolls shows that ten thousand of those who died were registered voters, and that their names remained on the voter rolls during the November 2004 election. Researchers should look at what percentage of the ten thousand dead-but-registered people “voted” in the November 2004 election. A researcher should distinguish the votes cast in the name of the dead at the polls from those cast absentee (which could still be cast under a photo-identification requirement).¹²¹ This number would be extrapolated to the electorate as a whole.

This methodology also has its strengths and weaknesses. If fraudulent voters target the dead, the study might overestimate the fraud that exists among living voters (although a low incidence of fraud among deceased voters might suggest that fraud among all voters is low). The appearance of fraud might also be inflated by false positives produced by a computer match of different people with the same name.¹²² Photo-identification advocates would likely assert that the rate of voter fraud could be higher from fictitious names registered and that the death record survey would not cap-

120. The difficulty may be magnified in Louisiana in the aftermath of Hurricane Katrina's displacement of hundreds of thousands of voters.

121. Cf. Jingle Davis, *Even Death Can't Stop Some Voters*, ATLANTA J.-CONST., Nov. 6, 2000, at 1A (finding that of 1.1 million deaths since 1980, 5412 ballots were cast in the name of dead people over a twenty-year period, although not computing the fraud rate in relation to the total number of dead people who remained on the rolls between 1980 and 2000; asserting only that “the actual number of ballots cast by the dead is fairly small”; and not distinguishing absentee votes from those cast at the polls). In September 2005, in a contested Tennessee state senate seat in which Democrat Ophelia Ford won by 13 votes out of the 8653 votes cast in favor of the Democratic and Republican candidates combined, an investigation showed that two votes had been cast by dead people. See Lawrence Buser & Richard Locker, *Senate Gets Nod for Ford Vote Today*, COM. APPEAL (Memphis, Tenn.), Apr. 19, 2006, at A1; Marc Perrusquia, *Dead Voter Evidence Goes to DA*, COM. APPEAL (Memphis, Tenn.), May 19, 2006, at B1.

122. BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF L. & MICHAEL P. McDONALD, ANALYSIS OF THE SEPTEMBER 15, 2005 VOTER FRAUD REPORT SUBMITTED TO THE NEW JERSEY ATTORNEY GENERAL 4 (2005). Any computer “matches” would require more detailed investigation to ensure that they are not false positives. See *id.*

ture that type of fraud because fictitious names registered would not show up in the death records. Nevertheless, this study, combined with the other two, would provide important insight into the magnitude of fraud likely to exist in the absence of a photo-identification requirement.

*B. Toward Better Data on Legitimate Voters
Excluded by Photo Identification*

In addition to better data on fraud, policy-makers need better data regarding the impact of photo-identification requirements on participation by legitimate voters before adopting the proposal. Scholars have defined citizen participation as “purposeful activities in which citizens take part in relation to government.”¹²³ Participation is a crucial democratic value. As Justice Brandeis remarked, “the greatest menace to freedom is an inert people.”¹²⁴

Widespread participation serves four functions. First, it exposes decision-makers to a variety of ideas and viewpoints, which ensures fully informed decisions.¹²⁵ The failure to consider a wide, representative range of views impairs deliberation. Second, widespread participation allows the people, as a whole, to check the power of government officials who might otherwise enact or tolerate abusive practices.¹²⁶ Accountability to the electorate as a whole ensures democratic legitimacy,¹²⁷ which in turn may increase the likelihood that citizens will voluntarily comply with such decisions.¹²⁸ Third, widespread participation allows for a redistribution of government resources and priorities to reflect evolving problems and needs.¹²⁹ Finally, widespread participation furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives.¹³⁰

123. Stuart Langton, *What is Citizen Participation?*, in *CITIZEN PARTICIPATION IN AMERICA* 13, 17 (Stuart Langton ed., 1978) (emphasis omitted).

124. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

125. See Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 267–68 (1999).

126. Cf. *THE FEDERALIST* NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) (“A dependence on the people is no doubt the primary controul [sic] on the government . . .”).

127. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 205–07 (1989); Hanna Fenichel Pitkin, *The Concept of Representation*, in *REPRESENTATION* 1, 22 (Hanna Fenichel Pitkin ed., 1969); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 338, 357 (Elly Stein & Jane Mansbridge trans., 1987).

128. See MARY GRISEZ KWEIT & ROBERT W. KWEIT, *IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH* 132 (1981) (“The more satisfied the citizens are with participation, the more trusting and efficacious they will be.”); Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 *MICH. J. RACE & L.* 195, 201 (1996) (“To deserve the democratic denomination, the people must take part in political affairs.”).

129. See KWEIT & KWEIT, *supra* note 128, at 33–34 (asserting that the goals of public participation include the redistribution of power).

130. See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 *FLA. L. REV.* 443, 451 (1989) (discussing a “constitutive” vision of politics whereby citizens define themselves through their participation); see also C.B. MACPHERSON, *THE*

Even in the absence of a photo-identification requirement, the United States already has one of the lowest voter-participation rates among the world's democracies. We trail many other established and developing democracies in voter turnout by twenty to thirty percentage points, and one survey ranked the United States 138th of 170 democracies.¹³¹ In light of the importance of widespread participation, policy-makers should examine the data on the number of legitimate voters a photo-identification requirement would exclude.

A driver's license is the most common form of state-issued photo identification. The 2005 Carter-Baker Commission estimated that 12% of voting-age Americans lack a driver's license,¹³² and an analysis of 2003 Census and Federal Highway Administration data estimates that twenty-two million voting-age citizens lack a driver's license.¹³³ Some 3–4% of voting-age Americans carry a nondriver's photo-identification card issued by a state motor vehicle agency in lieu of a driver's license.¹³⁴ Thus, according to the 2001 Carter-Ford Commission, an estimated 6–10% of voting-age Americans (approximately eleven million to twenty million potential voters) do not possess a driver's license or a state-issued nondriver's photo-identification card.¹³⁵

Federal data suggests that younger and older Americans are less likely to have a driver's license. While the rate of unlicensed individuals ages twenty-five to sixty-nine hovered between 5% and 11% in 2003, the percentages of older and younger Americans who lack a driver's license were much higher.

LIFE AND TIMES OF LIBERAL DEMOCRACY 47–48, 51–52 (1977) (asserting that public participation increases “the amount of personal self-development of all the members of society”).

131. RAFAEL LÓPEZ PINTOR ET AL., INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, VOTER TURNOUT SINCE 1945: A GLOBAL REPORT 83–84 (2002), http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf.

132. See COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 73 n.22. According to the Federal Highway Administration, 13.2% of U.S. residents sixteen years and older lacked a driver's license. See FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., LICENSED DRIVERS BY SEX AND RATIO TO POPULATION—2003 (2004), <http://www.fhwa.dot.gov/policy/ohim/hs03/pdf/dl1c.pdf>.

133. BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 24 n.9.

134. Publius, *supra* note 11, at 289 (citing FED. ELECTIONS COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 5–6 (1995–96)).

135. See TASK FORCE ON THE FED. ELECTION SYS., *supra* note 12, ch. 6, at 4; see also BRENNAN CTR. FOR JUST., *supra* note 14 (reporting on survey indicating that eleven percent of U.S. citizens lack current, unexpired government-issued photo identification); *Weinschenk v. Missouri*, No. SC88039, 2006 Mo. LEXIS 122, at *7 (Mo. Nov. 7, 2006) (indicating that, based on separate analyses of the Missouri Secretary of State and the Missouri Department of Revenue, between three and four percent of Missouri citizens lacked the requisite photo identification to vote).

U.S. RESIDENTS UNLICENSED BY AGE¹³⁶

Age	% w/o license		Age	% w/o license
18	32.5		70-74	14.3
19	26		75-79	18.6
20	22.9		80-84	26.9
21	20.6		85+	48.3
22	20.1			
23	18.1			
24	14.5			

Other studies on demographic disparities in photo identification focus largely on particular areas and localities. According to the Georgia chapter of the American Association of Retired Persons, for example, 36% of Georgians over age seventy-five lack a driver's license.¹³⁷ In 1994, the U.S. Department of Justice found that African-Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification.¹³⁸ Of the forty million Americans with disabilities, nearly 10% lack identification issued by the government.¹³⁹

One of the more comprehensive studies was completed in June 2005 by the Employment and Training Institute at the University of Wisconsin-Milwaukee. The study used census data and data from the Wisconsin Department of Transportation computer database for licensed drivers, and it found that senior citizens, younger people, and people of color were less likely to possess a driver's license.¹⁴⁰ The study determined that 23% of Wisconsin residents (177,399 individuals) over age sixty-five do not have a Wisconsin driver's license or state photo identification.¹⁴¹ 30% of voting-age residents in Milwaukee County lack a driver's license, compared with 12% of residents in the balance of Wisconsin.¹⁴² Statewide, significant racial and

136. See FED. HIGHWAY ADMIN., *supra* note 132; see also BRENNAN CTR. FOR JUST., *supra* note 14 (reporting on survey indicating that eighteen percent of U.S. citizens aged 18–24 and eighteen percent of individuals aged 65 and above lack current, unexpired government-issued photo identification).

137. Nancy Badertscher & Tom Baxter, *State AARP Criticizes Voter ID Bill*, ATLANTA J.-CONST., Mar. 17, 2005, at 4C.

138. See Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Sheri Marcus Morris, La. Assistant Att'y Gen. (Nov. 21, 1994).

139. Ctr. for Policy Alternatives, Voter Identification and Integrity, <http://www.cfpa.org/issues/issue.cfm/issue/VoterIDandIntegrity.xml> (last visited Sept. 10, 2006).

140. PAWASARAT, *supra* note 14, at 1–2.

141. *Id.* at 1.

142. *Id.* at 6. According to Census estimates, the voting-age population of Milwaukee County consists of 425,372 residents who reside in the city of Milwaukee and 268,667 who live in suburban communities. *Id.* at 15. In New York City, up to three million registered voters lack a driver's license. BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 24 n.9 (citing Elizabeth Daniel, *The New Voter Identification Requirement*, GOTHAM GAZETTE (N.Y.), Apr. 2002, <http://www.gothamgazette.com/article/20020401/17/728>).

age disparities also exist, the most striking being that 78% of African-American males ages eighteen to twenty-four lack a valid driver's license.¹⁴³

RACE AND PERCENTAGE OF UNLICENSED WISCONSIN RESIDENTS¹⁴⁴

	Ages 18-24	All Voting Ages
White Males	36	17
White Females	25	17
Black Males	78	55
Black Females	66	49
Latino Males	57	46
Latino Females	63	59

The data above suggests that a photo-identification requirement would exclude some legitimate voters and would have a disparate demographic impact.¹⁴⁵

A photo-identification requirement may not exclude as many voters, however, as the numbers initially suggest. Assuming that those without photo identification are disproportionately poor and have lower voter participation rates, the percentage of those who lack photo identification may be lower among the electorate than it is among the entire voting-age popula-

143. PAWASARAT, *supra* note 14, at 5.

144. *Id.* at 4, 5; *see also* BRENNAN CTR. FOR JUST., *supra* note 14 (reporting on survey of voting-age U.S. citizens indicating that fifteen percent of those who earn less than \$35,000 per year and twenty-five percent of African-Americans lack current, unexpired government-issued photo identification).

145. Political appointees in the U.S. Justice Department recently used skewed data to suggest that photo-identification requirements have no adverse impact on voters of color. In a letter to U.S. Senator Christopher Bond explaining the Justice Department's rationale in failing to object to Georgia's new photo-identification law, Assistant Attorney General William E. Moschella asserted that previous identification requirements had not diminished African-American turnout in the 2000 or 2004 general elections. Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Justice, to Christopher S. Bond, U.S. Sen. (Oct. 7, 2005), http://www.usdoj.gov/crt/voting/misc/ga_id_bond_ltr.pdf. Political factors unrelated to voter identification rules, however—such as mobilization efforts by parties, controversial issues, and a polarized electorate—may increase turnout in a later contest. Further, the earlier identification laws were not photo-identification requirements, but much less restrictive practices that allowed voters to establish their identity by using any one of seventeen types of documentary identification (including nonphoto identification such as utility bills or bank statements) or by signing an affidavit. Help America Vote Act requirements, which applied only to first-time voters who registered by mail, allowed voters to establish their identity through nonphoto documentary identification such as utility bills or bank statements.

Assistant Attorney General Moschella also claimed to rely on Georgia motor vehicle administration data that suggested that African-Americans were slightly more likely to possess identification than whites. *Id.* This data is inconclusive, however, because Georgia provided racial data for less than sixty of those with identification, and there is no evidence that this pool is a statistically representative sampling of voters from across the state. Indeed, county data suggests the opposite. The ten Georgia counties with the highest percentage of African-Americans (59.5—to 77.8% black) have only 87.7% of the identification cards per one thousand voting-age residents as the ten counties with the highest percentage of whites (93.4 to 97.1% white). *See* Letter from Adam Cox, Professor, Univ. of Chicago Law Sch.; Heather Gerken, Professor, Harvard Law Sch.; Michael Kang, Professor, Emory Law Sch.; Spencer Overton, Professor, The George Washington Univ. Law Sch.; and Daniel Tokaji, Professor, Ohio State Univ. Moritz Coll. of Law, to John Tanner, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Just. (Aug. 19, 2005) (on file with author).

tion. Further, the most restrictive existing laws (in Georgia and Indiana) allow voters to establish their identity using a U.S. passport or federal and state employee photo-identification card, and some voters who lack a driver's license will possess one of these documents.¹⁴⁶ Also, in the aftermath of the terrorist attacks of 9/11, the number of individuals who do not have photo identification may drop as Americans find that it is even more difficult to function in modern life without a photo-identification card.¹⁴⁷ Finally, if a photo-identification requirement to vote is enacted, some people who lack state-issued photo identification will likely obtain it so that they can vote (although the percentage who will do so remains unclear).

Other factors suggest that a photo-identification requirement could exclude many more than the six to ten percent of the voting-age population who lack state-issued photo identification¹⁴⁸ and that demographic disparities may be greater. Some legitimate voters who have been issued a driver's license or other identification may not bring it to the polls because the card was stolen, lost, or simply forgotten. Further, the numbers of individuals without valid photo identification may rise due to the heightened burdens of the REAL ID Act. After 2007, the REAL ID Act prohibits states from issuing a driver's license or nondriver's identification card unless a person presents documentary proof of (a) her full legal name and date of birth, (b) her Social Security number (or the fact that she is not eligible for one), (c) the address of her principal residence, and (d) her citizenship.¹⁴⁹

A law that requires a voter's current address to appear on the photo-identification card would also drive up the number of those excluded.¹⁵⁰ The University of Wisconsin–Milwaukee study confirmed that transient populations were less likely to have valid driver's licenses. Of the 12,624 students living in residence dorms at Marquette University, the University of Wisconsin–Madison, and the University of Wisconsin–Milwaukee, less than 3% had driver's licenses that listed their dorm's address.¹⁵¹ Over 76% of Wisconsin renters moved between January 1995 and March 2000, compared with only 22% of homeowners.¹⁵² During this same time period, 44% of whites moved, compared with 75% of Asian-Americans, 74% of Latinos, 63% of African-Americans, and 61% of Native-Americans.¹⁵³

146. The Carter-Baker Commission's recommendation limited acceptable forms of identification to be issued under the Real ID Act to a driver's license or state-issued photo identification. COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 19.

147. *See id.* at 21.

148. *See infra* notes 132–135.

149. REAL ID Act of 2005, 49 U.S.C.A. § 30301 (Supp. 2006).

150. For example, proposed legislation in Ohio indicated that a photo-identification card must include a voter's current address (this provision was later removed). Daniel P. Tokaji, *Ohio Election Bill Clears Senate*, ELECTION LAW @ MORITZ, Dec. 15, 2005, <http://moritzlaw.osu.edu/blogs/tokaji/2005/12/ohio-election-bill-clears-senate.html> (last visited Sept. 10, 2006).

151. PAWASARAT, *supra* note 14, at 11–12.

152. *Id.* at 17.

153. *Id.* at 18.

Rather than rely on uninformed “hunches,” such as the assumption that the terrorist attacks of 9/11 will significantly increase the number of Americans who possess identification, more detailed empirical work is needed to determine the extent to which a photo-identification requirement will shape the electorate. What percentage of the electorate (rather than the general population), for example, lacks a state-issued photo-identification card? What percentage of those who have been issued photo identification will fail to bring it to the polls?

Some answers may come from data on affidavits in states that allow voters without photo identification to affirm their identity under penalty of perjury. Affidavits provide insight into the percentage of Americans who fail to bring either a license or some other form of photo identification to the polls.

As mentioned earlier, South Dakota and Louisiana request photo identification but allow voters to sign an affidavit in lieu of presenting such identification. The number and demographic patterns of the affidavits in these states could indicate which voters would be excluded if a photo-identification card were an absolute requirement to vote. For example, reports of the 2004 primary in South Dakota showed that 2% of voters used an affidavit statewide, whereas between 4% and 16% of voters used affidavits in the predominantly Native-American counties of Shannon, Todd, Corson, Dewey, and Zieback.¹⁵⁴

Affidavit data is important, but not determinative. Affidavit data may underestimate the number of people who lack photo identification. For example, the affidavit records would not record the legitimate voter who lacks photo identification and does not cast a ballot because (1) the pollworker did not offer an affidavit to the voter or (2) the affidavit process was much more time-consuming and the voter decided not to wait. On the other hand, the affidavit does not measure voters who would obtain a photo-identification card if it were an absolute requirement for voting, and a collection of affidavits may include forms completed by some fraudulent individuals who

154. Chet Brokaw, *Lawmakers asked to repeal voter identification law*, ASSOCIATED PRESS, Jul. 15, 2004. Political appointees at the Justice Department have recently refused to examine affidavit evidence in reviewing whether Georgia's photo-identification law disproportionately excluded people of color. In a letter that I drafted with other law professors before the Justice Department precleared the Georgia identification requirement, we asked officials to request and review affidavit information before making a decision. Specifically, we wrote as follows:

Indeed, the ultimate question is not whether state records show that minorities are just as likely as whites to have applied for a driver's license or other government-issued ID. The most important question is what minorities bring to the polls on Election Day to establish their identity. On that score, Georgia has failed to satisfy its burden by providing the most relevant information—racial data on those who have utilized the affidavit ID option.

Letter from Adam Cox et al. to John Tanner, *supra* note 145. Assistant Attorney General William E. Moschella characterized the request for affidavit information as suggesting that “the Department seek data to establish that racial minorities may be more likely than non-minorities to misplace or forget their identification when coming to the polls. Such a notion is incredibly demeaning to minorities, and this Department emphatically declines to entertain such a request.” Letter from William E. Moschella to Christopher S. Bond, *supra* note 145.

forged the signatures of others (although the study of fraud proposed in Section III.A may address this issue).

* * *

While partisans can construe any study to favor their preferred outcomes, policy-makers should obtain and consider the best data available. Granted, empirical data is sometimes misleading due to value-driven research assumptions or deliberate skewing or manipulation of data.¹⁵⁵ Even for those who act in good faith, it may also be difficult to separate empirical data from normative democratic values in assessing and managing the risks of voter fraud and the exclusion of legitimate voters by a photo-identification requirement.

Rather than using these shortcomings as a justification to dismiss empirical data completely and defer solely to misleading anecdotes and flawed analogies, policy-makers should acknowledge the limitations of empirical study, scrutinize research methodologies, and make informed decisions based on more information rather than less. Empirical data is not perfect, but it allows for a better understanding of the true costs and benefits of a photo-identification requirement and permits a more honest debate about the democratic values at issue.

IV. THE LEGAL STATUS OF PHOTO-IDENTIFICATION REQUIREMENTS

Empirical data is crucial not just for policy-making but also for analyzing whether proposed photo-identification requirements comply with constitutional and statutory requirements. Empirical evidence allows courts to determine whether photo-identification requirements constitute an undue burden on the fundamental right to vote, a poll tax, or a violation of Section 2 of the Voting Rights Act.¹⁵⁶

The importance of ascertaining the empirical magnitude of voter fraud and the suppression of legitimate votes was recently emphasized in a challenge to Arizona's requirement that voters produce photo identification or two pieces of nonphoto documentary identification. While the U.S. Supreme Court expressed "no opinion . . . on the correct disposition . . . or on the ultimate resolution" of the case and vacated a lower court injunction on procedural grounds, it emphasized that "the facts in these cases are hotly contested" and noted the need for judges to take adequate "time to resolve

155. See, e.g., Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181 (arguing against overreliance on "science" in agency decision-making).

156. Empirical data can help courts properly evaluate whether photo-identification requirements violate other legal provisions, such as the Twenty-sixth Amendment (voting rights of citizens eighteen years of age or older shall not be denied or abridged on account of age), U.S. CONST. amend. XXVI, the Fifteenth Amendment (prohibiting racial discrimination in voting), *id.* at amend. XV, the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. §§ 1973ee to 1973ff-6 (2000), and various state constitutional claims.

the factual disputes.”¹⁵⁷ In a separate concurrence, Justice Stevens was more direct about the empirical data needed to decide the matter:

At least two important *factual issues* remain largely unresolved: the *scope* of the disenfranchisement that the novel identification requirements will produce, and the *prevalence and character* of the fraudulent practices that allegedly justify those requirements.¹⁵⁸

A. *Burdening the Fundamental Right to Vote*

Depending on the amount of voter fraud that exists and the number of legitimate voters who would be excluded, a photo-identification requirement may unduly burden the fundamental right to vote that stems from the First and Fourteenth Amendments.¹⁵⁹

While allowing that “there must be a substantial regulation of elections if they are to be fair and honest,”¹⁶⁰ courts use the following test to determine whether an election procedure unduly abridges the right to vote:

[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.¹⁶¹

157. Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (per curiam).

158. *Id.* (Stevens, J., concurring) (emphases added).

159. See Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . .”); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (“[V]oting is of the most fundamental significance under our constitutional structure.”); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.”). Advocates of an amendment to the U.S. Constitution that calls for an explicit right to vote note that some U.S. Supreme Court Justices have observed that no such right exists. See, e.g., Jesse Jackson, Editorial, *No Change in No-Account System*, CHI. SUN-TIMES, Nov. 23, 2004, at 37 (citing Bush v. Gore, 531 U.S. 98, 104 (2000)). This Article does not address the need for the passage of a right-to-vote constitutional amendment, but it does note that the U.S. Supreme Court has repeatedly recognized that voting is a fundamental right that arises from the First and Fourteenth Amendments.

160. Storer v. Brown, 415 U.S. 724, 730 (1974).

161. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); accord Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

The test operates on a continuum—there exists “[n]o bright line” that separates permissible from unconstitutional election regulation.¹⁶² Strict scrutiny applies to “severe” restrictions on voting rights,¹⁶³ lesser burdens trigger less exacting review, and “reasonable, nondiscriminatory restrictions” are usually constitutional if “important regulatory interests” exist.¹⁶⁴

1. Assessing the Voters’ Burden Relative to the State Interest

Hard data is especially valuable in assessing the burdens of a photo-identification requirement on voters and the state’s interest in preventing fraud. Without hard data, judges would likely engage in ad hoc, contestable conjecture about the danger of fraud and the difficulty of obtaining a photo-identification card. Many judges inclined to favor a photo-identification requirement, for example, can invoke a plausible anecdote of fraud or use flowery language to proclaim that photo identification is necessary to maintain voter confidence.¹⁶⁵ These judges can speculate that photo identification

162. *Timmons*, 520 U.S. at 359 (“No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.”); *Anderson*, 460 U.S. at 789–90 (“The results of this evaluation will not be automatic; as we have recognized, there is ‘no substitute for the hard judgments that must be made.’” (quoting *Storer*, 415 U.S. at 730)); *Storer*, 415 U.S. at 730 (“[N]o litmus-paper test [] separat[es] those restrictions that are valid from those that are invidious . . .” (alteration in original)).

163. *Burdick*, 504 U.S. at 434; *Norman v. Reed*, 502 U.S. 279, 289 (1992).

164. *Timmons*, 520 U.S. at 358–59.

165. See, e.g., *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (“If elections are not substantially free from fraud and other irregularities, public confidence in their integrity and the validity of their results, which is essential to the maintenance of ordered liberty, is threatened.”). Some photo-identification advocates argue that regardless of the magnitude of fraud, “the perception of possible fraud contributes to low confidence in the system,” and that a photo-identification requirement “can enhance confidence.” COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 18–19. Growing cynicism in the absence of a photo-identification requirement, the argument goes, lowers voter participation. See *FUND*, *supra* note 22, at 2 (suggesting that low confidence may result in low voter turnout); *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam) (“Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”).

Several leading scholars have criticized the Court’s dicta in *Purcell* regarding the perception of fraud. See Alex Keyssar, “Disenfranchised”? *When Words Lose Meaning*, THE HUFFINGTON POST, Oct. 22, 2006, http://www.huffingtonpost.com/alex-keyssar/disenfranchised-when-_b_32241.html (“FEEL disenfranchised? Is that the same as ‘being disenfranchised’? So if I might ‘feel’ disenfranchised, I have a right to make it harder for you to vote? What on earth is going on here?”); Richard L. Hasen, *Election Deform: The Supreme Court Messes Up Election Law*, SLATE, Oct. 24, 2006, <http://www.slate.com/id/2152116/> (“[T]he Supreme Court’s statement in *Purcell* . . . confuses the empirical analysis at the heart of these cases by suggesting, without any proof whatsoever, that concerns about voter fraud “[drive] honest citizens out of the democratic process and [breed] distrust of our government.”); Michael C. Dorf, *In a Brief, Unsigned New Opinion, The Supreme Court Sends the Wrong Signal on Voter ID and Voter Fraud*, FINDLAW, Nov. 6, 2006, <http://writ.news.findlaw.com/dorf/20061106.html> (noting that “the Supreme Court asserts that fears of voter fraud will lead other voters to feel disenfranchised . . . without citing any supporting evidence from the record” and that *Purcell* suggests “that this interest in preventing feelings of disenfranchisement rises to a level sufficient to override the voting rights claims of people who will actually be disenfranchised.”).

A lack of empirical data also allows photo-identification proponents to make claims about the perception of fraud without explaining the extent to which a lack of a photo-identification

is not unreasonably burdensome because of fee waivers and new photo-identification distribution programs.¹⁶⁶ A judge skeptical of a photo-identification requirement, on the other hand, can underemphasize the existence of voter fraud and overemphasize anecdotes about individuals who had difficulties securing a photo-identification card.

Reliance on these personal assumptions allows for the charge that personal political ideology rather than law shaped the judge's holding. In light of the political nature of the photo-identification debate, the institutional limitations of courts, and the important democratic values furthered by both widespread participation and the prevention of voter fraud, judges should look to empirical data for more reasoned analysis and consistency in decision making.

Imagine, for example, a state in which about one million citizens regularly turn out to vote. Empirical studies suggest that five percent of legitimate voters in the state (fifty thousand people) would not bring a photo-identification card to the polls if it were required, and most of these voters would be ethnic minorities who regularly support Party A. Studies also suggest that in the absence of a photo-identification requirement at the polls, fifty fraudulent votes would be cast (0.005% of votes cast).

In considering the magnitude of the injury,¹⁶⁷ the court can look to the evidence that suggests fifty thousand legitimate voters will not cast a ballot because of the photo-identification requirement. The disproportionate impact of the proposal on ethnic minorities who vote for Party A suggests that the restriction lacks neutrality.¹⁶⁸ In examining the "legitimacy and strength"¹⁶⁹ of the "precise interests put forward by the State,"¹⁷⁰ the court can quantify the state's interest in preventing fifty fraudulent votes. The court can determine whether it is "necessary to burden"¹⁷¹ the legitimate voters with a photo-identification requirement by looking at data on the

requirement—relative to the existence of other factors, such as manipulation of voting rules by politicians that suppresses voter turnout—lowers voter confidence and participation. Cf. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (asserting that popular perceptions of corruption are related to factors other than campaign finance laws and that restrictive campaign reforms would not lower the perception of corruption, and concluding that courts should not base their decisions about the need for campaign restrictions on popular opinion); Robert Bauer, *Judicial "Wisdom," MORE SOFT MONEY HARD LAW*, Oct. 23, 2006, http://www.moresoftmoneyhardlaw.com/updates/election_administration.html?AID=845 (observing that by invoking the "fear" of fraud, advocates "bypass the demands of evidence").

166. *Ind. Democratic Party v. Rokita*, No. 1:05-CV-0634-SEB-VSS, 2006 WL 1005037, at *36 (S.D. Ind. Apr. 14, 2006) ("[T]he individuals and groups that Plaintiffs contend will be disproportionately impacted by [the statute] all appear fully capable of availing themselves of the law's exceptions so that they do not need to obtain photo identification in order to vote.").

167. *Anderson*, 460 U.S. at 789.

168. *See id.*

169. *Id.*

170. *Id.*

171. *Id.*

effectiveness of alternatives, such as an affidavit, in deterring most fraudulent voters and very few legitimate ones.¹⁷²

2. Tailoring

A court should also use empirical information to determine whether a photo-identification requirement is properly tailored. To be properly tailored, a statute must further the government's objectives, must not be overinclusive or underinclusive to an unacceptable extent, and must not be unnecessarily burdensome.¹⁷³ A statute is overinclusive when the proportion of invalid applications of the statute is substantially high relative to the proportion of valid applications.¹⁷⁴ A statute is underinclusive when it fails to prevent a relatively large number of activities that pose the danger that the statute was designed to prevent.

The tailoring requirement addresses the difficulty in crafting a single, bright-line voter-identification law that would prevent all voter fraud while simultaneously including all legitimate voters. Any rule will tend to be either underinclusive and allow for some fraudulent voting, or overinclusive and inhibit some legitimate votes, and often both.

The amount of overinclusiveness and underinclusiveness that a court should tolerate depends on the level of scrutiny. As mentioned above, the appropriate level of scrutiny to apply to a photo-identification requirement depends on the magnitude of the burden relative to the precise interest of the state. Regulations subject to strict scrutiny must be narrowly tailored to advance a compelling state interest, and as much as possible they should avoid restricting constitutionally protected activity that does not pose the danger that motivated the regulation.¹⁷⁵ Regulations subject to intermediate scrutiny must be substantially related to an important government interest,¹⁷⁶ and

172. See *infra* Part V for a discussion of supplements and alternatives to absolute photo-identification requirements.

173. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996).

174. See *New York v. Ferber*, 458 U.S. 747, 773 (1982) (rejecting a substantial overbreadth claim because the statute's "legitimate reach dwarfs its arguably impermissible applications"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). Scholars have described applications of the narrow tailoring and First Amendment substantial overbreadth tests as substantively identical. See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1782 n.46 (2001); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37 n.152.

175. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) ("Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."); see also *Denver Area Educ. Telcomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 807 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part).

176. E.g., *United States v. Virginia*, 518 U.S. 515, 524 (1996).

regulations subject to rational basis scrutiny must be rationally related to a legitimate government interest.¹⁷⁷

Whatever scrutiny is applied, data allows a judge to consider the number of applications of the statute that pose the danger that the statute was designed to prevent (i.e., fraudulent votes) relative to the number of applications covered by the statute that do not pose the danger the statute was designed to prevent (i.e., legitimate voters who lack photo identification).

For example, assume data reveals that a photo-identification requirement excluded one thousand votes, and that 990 of these were fraudulent and ten were legitimate. This data provides strong evidence that such a photo-identification requirement is narrowly tailored.

In contrast, assume that 990 of the excluded votes were legitimate and only ten were fraudulent. Further, assume that the regulation follows the Carter-Baker Commission's proposal and requires photo identification at the polls but merely a signature from absentee voters, and thus the regulation tolerates three thousand fraudulent absentee ballots. This data suggests that the regulation is at once so overinclusive and so underinclusive that it is not rationally related to the state's purported interest in preventing fraud.

Granted, the magnitude of the burden, the appropriate level of scrutiny, and the proper tailoring cannot be reduced to a simple mathematical formula. Different methodologies and underlying assumptions, along with other variables, can result in varying numbers. Even when judges agree on data, they will still harbor normative differences that might lead them to vastly different conclusions. For example, judges might differ on whether a photo-identification requirement that deters one thousand fraudulent votes and one thousand legitimate votes is "narrowly tailored," or whether a photo-identification law that deters 250 fraudulent votes and one thousand legitimate votes is "rationally related" to the prevention of fraud. To some judges, fraudulent votes taint democracy much more than reduced participation by legitimate voters. Other judges might err on the side of preserving access and risk ten fraudulent votes to ensure that legislatures do not exclude a single legitimate voter (much as the "reasonable doubt" standard in the criminal context in theory errs against convicting criminal defendants).

Another question involves whether photo identification requirements are "reasonable" and "non-discriminatory." To the extent that the regulations disproportionately exclude people of color, poorer Americans, disabled Americans, young Americans, or senior citizens, how significant must this demographic skew be before it becomes intolerable? How should judges tackle the thorny problem of disproportionate exclusion if the data shows that the rate of fraud is also disproportionately high among these voters? What if one hundred fraudulent votes were cast and split evenly between the political parties (both Republicans and Democrats received fifty fraudulent

177. *E.g.*, *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988).

votes apiece), but a photo-identification requirement deterred voting by ninety legitimate Democratic voters and no legitimate Republican voters?¹⁷⁸

Statistical data will not answer these normative questions, but such data is necessary to make an honest conversation about normative values possible. Absent data, judges and advocates can avoid a discussion of different normative values by using assumptions, anecdotes, and analogies to paint a factual picture that appears to support their desired outcome.

An “undue burden” legal analysis also requires that a court examine whether less restrictive alternatives of voter identification exist.¹⁷⁹ This Article explores alternatives below in Part V.

B. Photo-Identification Fees as Poll Taxes

Many states charge a fee to issue a photo-identification card,¹⁸⁰ and better data can establish whether requiring a photo identification to vote violates the Twenty-Fourth Amendment’s prohibition on poll taxes.¹⁸¹ Georgia’s law allowed residents to file an affidavit of indigency to receive free state-issued photo identification.¹⁸² In *Common Cause/Georgia v. Billups*, however, the court found that “very few voters likely will take advantage of the fee waiver affidavit option” due to embarrassment about their poverty, or to being non-indigent and unwilling either to lie about financial status or to

178. Christopher S. Elmendorf observes that voter-identification laws may improperly “fence out” voters because of the way they vote. *Cf. Carrington v. Rash*, 380 U.S. 89, 94 (1965) (“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”). Elmendorf proposes that judges ascertain whether voter-identification laws unconstitutionally “fence out” voters by evaluating whether:

- (1) the voting restriction was enacted substantially along partisan lines; (2) there is some evidence that the law will disproportionately inconvenience citizens who are statistically more likely to support the opposition party; and (3) the law is a permanent measure, rather than a time-limited experiment with provisions for independent evaluation of its impacts on electoral participation by the ostensibly disadvantaged classes.

Christopher S. Elmendorf, *Burdick or Carrington: “Fencing Out” and the Voter ID Litigation*, ELECTIONLAW@MORITZ, Sept. 12, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060912.php>.

179. *Dunn v. Blumstein*, 405 U.S. 330, 342–43 (1972).

180. *See, e.g., Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) (“The fee for a Photo ID card [in Georgia] is \$20 for a five-year card and \$35 for a ten-year card.”).

181. U.S. CONST. amend. XXIV, § 1 (“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.”). The U.S. Supreme Court prohibited poll taxes in state and local elections when it held that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

182. Initially, Georgia law required that an indigent referred by a nonprofit organization pay five dollars for photo identification. GA. CODE ANN. § 40-5-103(b) (2004). In 2006, following a court challenge, Georgia legislators passed a revision of the law that directs the state to distribute the photo identification for free. GA. CODE ANN. §§ 21-2-417.1, 40-5-103(d) (Supp. 2006); *see Common Cause/Ga.*, 406 F. Supp. 2d at 1369–70 (quoting the affidavit of indigency that Georgians must sign to obtain a free photo identification); *see also* IND. CODE ANN. § 3-11.7-5-2.5(c) (West 2006) (allowing indigent individuals unable to afford a photo identification the ability to cast a ballot).

pay for a card to vote.¹⁸³ The court concluded that the affidavit likely constituted a “material requirement” imposed solely upon those who do not pay a fee for a photo-identification card, and thus fell short of compliance with the Twenty-Fourth Amendment.¹⁸⁴ While the court’s conclusion may be correct, empirical data on the number of voters likely to complete the affidavit of indigency is more definitive than speculation about the embarrassment and veracity of voters.

A state might also distribute free photo identification to anyone who asks without requiring that individuals declare indigency.¹⁸⁵ As mentioned above, however, after 2007 the Real ID Act will prohibit states from issuing photo identification without documentary proof of an applicant’s full legal name, date of birth, Social Security number, and citizenship. Depending on the state, a birth certificate costs between \$10 and \$45. A passport costs \$97 and certified naturalization papers cost \$19.95.¹⁸⁶ Empirical data would reveal the percentage of the population that lacks ready access to these forms of documentation and would have to purchase them to obtain a state-issued photo-identification card to vote.

C. Abridging Voting Rights along Racial Lines

Data is essential in determining whether photo-identification requirements disproportionately dilute the voting rights of people of color. Congress designed Section 2 of the Voting Rights Act to enforce the Fifteenth Amendment’s prohibition on racial discrimination in voting. The section provides that no voting procedure shall be imposed that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹⁸⁷ While the vast majority of Section 2 cases have featured vote dilution challenges to election district boundaries, Section 2 also applies to challenges to election practices that disproportionately deny voting rights to people of color.¹⁸⁸

183. *Common Cause/Ga.*, 406 F. Supp. 2d at 1369–70.

184. *Id.* (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) (holding that a Virginia requirement that those who do not pay a poll tax must file a certificate of residency constituted a “material requirement” that abridged the right to vote in violation of the Twenty-Fourth Amendment)).

185. See GA. CODE ANN. §§ 21-2-417.1, 40-5-103(d) (Supp. 2006); COMM’N ON FED. ELECTION REFORM, *supra* note 4, at 10.

186. BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 4; Application for a U.S. Passport, <http://travel.state.gov/pdf/DS-0011.pdf> (last visited Oct. 23, 2006). Bureaucracy may also pose significant hurdles. See *Weinschenk v. Missouri*, No. SC88039, 2006 Mo. LEXIS 122, at *15 (Mo. Nov. 7, 2006) (“In Missouri, the waiting period for a birth certificate alone is six to eight weeks. In Louisiana, the birthplace of many Katrina refugees who have taken shelter in Missouri, the processing period is eight to ten weeks.”).

187. 42 U.S.C. § 1973(a) (West 2000).

188. See *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986) (“Section 2 prohibits all forms of voting discrimination, not just vote dilution.” (citing S. REP. NO. 97-417, at 30 (1982))); Ellen Katz with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM (forthcoming 2006) (showing that only forty-one of 331 Section 2 lawsuits

A violation of Section 2 is established if:

[B]ased on the totality of circumstances, it is shown that the political processes . . . are not equally open to participation by . . . [voters of color in that they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.¹⁸⁹

Plaintiffs need not show that the challenged electoral practice was adopted with the “intent to discriminate against minority voters,” but simply must show that “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes.”¹⁹⁰

Racial disparities in driver’s license and state photo-identification applications are important evidence that a photo-identification requirement to vote will have a discriminatory impact, but so is data on racial disparities in how voters establish their identity at the polls. Are voters of color more likely to use an affidavit, for example, in states that provide that option? Data on racial disparities in photo-identification possession and use at the polls from other states is relevant,¹⁹¹ but litigants should also commission detailed studies that analyze racial disparities in the state where the voter-identification law is challenged.

A showing of a disparate racial impact of photo identification alone, however, is insufficient to establish a Section 2 violation.¹⁹² Courts must also weigh a nonexclusive list of factors, such as the existence of racially polarized voting, the presence of elected officials who are unresponsive to the needs of minority voters, whether the policy underlying the contested election practice is tenuous, and the effects of past discrimination in areas such as education, employment, and health.¹⁹³ “The essence of a § 2 claim is that

since 1982 challenged election procedures); *see, e.g.*, *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 401–02 (5th Cir. 1991) (finding that Mississippi’s dual registration system violated Section 2 of the Voting Rights Act); *United States v. Berks County*, 277 F. Supp. 2d 570, 580–81 (E.D. Pa. 2003) (finding that identification requests from Latino voters, hostility of poll officials to Latino voters, and other factors led to a Section 2 violation). Daniel Tokaji recognizes the inapplicability of the leading Section 2 case, *Thornburg v. Gingles*, to election practices, and proposes a legal test for election practices. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 718 (2006) (recommending a Section 2 test for election procedures in which “a prima facie case [could be made] by showing the challenged practice is a ‘but for’ cause of racial disparity in voting.”). Under Prof. Tokaji’s test, the “state or local entity would still have the opportunity to demonstrate that this practice is necessary to achieve a compelling government interest.” *Id.*

189. 42 U.S.C. § 1973(b) (West 2000).

190. *Thornburg*, 478 U.S. at 44 (citing S. REP. NO. 97-417, at 2, 15–16, 27, 28 (1982)). *Cf.* Tokaji, *supra* note 188, at Part IV.A (asserting that unlike vote dilution cases, vote denial cases implicate the value of participation rather than representation, do not present significant concerns about proportional representation, and allow for simplicity in measuring disparate impact).

191. *See, e.g.*, PAWASARAT, *supra* note 14.

192. *See* *Wesley v. Collins*, 791 F.2d 1255, 1260–61 (6th Cir. 1986).

193. *Thornburg*, 478 U.S. at 44–45 (citing S. REP. NO. 97-417, at 28–29 (1982)). Other Senate factors include, but are not limited to, the following:

[T]he history of voting-related discrimination in the State or political subdivision . . . the extent to which the State or political subdivision has used voting practices or procedures that tend to

a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”¹⁹⁴

Statistical evidence helps establish whether these other relevant factors exist in a particular state, including the existence of racially polarized voting, disparities in socioeconomic factors such as education and employment, and whether the amount of voter fraud is so minimal that the justification for the photo-identification requirement is tenuous. These various factors will differ from state to state, and thus the legal status of voter-identification laws may vary. A federal court might find that a photo-identification requirement to vote in Rhode Island, for example, does not constitute a Section 2 violation if it finds no history of voting practices or procedures used to disenfranchise voters of color. Yet an identical photo-identification requirement in Georgia may violate Section 2 because it interacts with Georgia’s unique social and historical conditions to produce unequal opportunities for voters of color in that state.

D. “Individual Responsibility” in the Context of Democracy

In determining whether photo-identification requirements comply with constitutional and statutory provisions, some judges may be tempted to ignore data showing that photo-identification requirements would exclude legitimate voters and instead focus on the “opportunity” of individuals to obtain a photo-identification card to vote. Photo-identification requirements do not constitute a “severe burden” on voting, a poll tax, or a Voting Rights Act violation, a judge might reason, because most people possess a photo-identification card and anyone can obtain one.¹⁹⁵

This perspective does not ask how many legitimate voters will actually obtain a fee waiver or return home to retrieve their identification, but instead

enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes . . . the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id.

194. *Id.* at 47.

195. The focus on individual responsibility is seen in other election contexts, such as language assistance at the polls, lifetime bans on felon voting, punch card ballots, and laws that allow challengers at the polls. Individuals, the argument goes, have a responsibility to learn English, stay out of trouble with the law, punch a ballot correctly, and establish their eligibility to poll challengers. According to this perspective, the fact that some individuals fail to comply with these norms and that regulations fall the hardest on particular demographic populations is not a problem that necessitates concern. *See, e.g., Wesley*, 791 F.2d at 1262 (finding that a felon disenfranchisement law does not violate Section 2 of the Voting Rights Act, reasoning that felons are not “disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment”); *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 808 (N.D. Ohio 2004) (asserting that there was no “‘actual’ denial of the right to vote on account of race” through the use of punch card ballots since “[a]ll voters in a county, regardless of race, use the same voting system to cast a ballot, and no one is denied the opportunity to cast a valid vote because of their race”).

whether a “fair” process exists that gives an individual the opportunity to vote. The vision focuses on the guilt and responsibility of the individual legitimate voter who lacks photo identification, and does not recognize the decrease in voter turnout as a harm; if an individual voter fails to comply with a state mandate, the individual rather than the state is at fault. Individual fraud stigmatizes elections, according to this perspective, but reduced turnout due to a photo-identification requirement does not compromise electoral integrity.¹⁹⁶

Judges who emphasize individual responsibility avoid issues of vote dilution.¹⁹⁷ As seen in one-person, one-vote cases, “[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth.”¹⁹⁸ While the simple task of bringing a photo-identification card to the polls may not appear to be an unreasonable obstacle for an individual voter, judges should examine whether this requirement reduces voter turnout in the aggregate.

The problem with a focus on individual responsibility is that politics involves not simply individual rights but also associational and structural concerns.¹⁹⁹ Through associating with others, individual voters create incentives for politicians to respond to their needs.²⁰⁰ Voting is “a vehicle for self-development and identification, and a means for creating alliances and thus a community among individuals so engaged.”²⁰¹

Photo-identification requirements that exclude legitimate voters interfere with the ability of citizens to identify with one another as a political community, create alliances with others of different backgrounds, and use the vote instrumentally to enact political change. Despite the emphasis on individual responsibility, photo-identification requirements that exclude legitimate voters dilute the political choices of not only those who are

196. Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341–49 (1988) (describing assumptions of expansive and restrictive visions of antidiscrimination law).

197. Cf. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) (arguing that vote dilution claims cannot be squeezed into the conventional individual-rights framework); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) (asserting that the judiciary should “invert the focus of constitutional doctrine from the foreground of rights and equality to the background rules that structure partisan political competition”); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (observing that election law’s evolution “has led us away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements”).

198. *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

199. Cf. Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 n.30 (1998) (asserting that one-person, one-vote cases like *Reynolds* “should be viewed as cases about group political power . . . rather than purely about individual rights”).

200. Gerken, *supra* note 197, at 1678.

201. Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 513 (2000) (citation omitted).

unable to produce photo identification but also their allies who do produce a photo-identification card.²⁰²

Voting is also structural to the extent that one believes that ascertaining the will of the citizenry as a whole is a central purpose of self-government in a democracy. Individual votes are counted and weighed relative to one another, and thus a rule that has a disproportionate impact on a particular demographic group can “fix” an outcome. Granted, many voting requirements may inconvenience voters and lower turnout, but judges should pay special attention to those that fail to produce empirically quantifiable benefits that outweigh or are at least equivalent to the costs of the regulation. Photo-identification advocates recognize the structural elements inherent in the statement that “voters are disfranchised by the counting of improperly cast ballots or outright fraud” or that a close election could be determined by fraudulently cast votes.²⁰³ Judges should not ignore questions of democratic structure and skewed results by substituting the “opportunity” of all to obtain an identification card for a real analysis of the extent to which photo-identification requirements actually diminish turnout.

V. PHOTO-IDENTIFICATION SUPPLEMENTS AND ALTERNATIVES

In order to assess photo-identification requirements, policy-makers and judges also need data that measures the comparative effectiveness of other methods of identifying voters in deterring most fraudulent votes but very few legitimate ones. This Part reviews two groups of alternatives. The first group maintains photo identification as an absolute requirement to vote, but attempts to increase access through measures such as free photo-identification cards, mobile photo-identification card distribution programs, and election day registration. The second set of alternatives provides measures permitting exercise of the franchise by individuals who arrive at the polls without photo identification. These measures include, for example, the option of affirming one’s identity by signing an affidavit.

A. Supplements That May Enhance Voter Access

Photo-identification advocates have proposed several supplements that attempt to mitigate or offset access problems while still requiring a photo-identification card as an absolute condition to vote. These advocates simply assume that the proposals will address all access issues, and thus ignore the need for an empirical analysis of proposals designed to enhance access. For

202. Gerken, *supra* note 197, at 1669–70 (distinguishing vote dilution claims from claims based on conventional individual rights by observing that with regard to voting, “fairness is measured in group terms; an individual’s right rises and falls with the treatment of the group; and the right is unindividuated among members of the group”); James Thomas Tucker, *Affirmative Action and [Mis]representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 *How. L.J.* 405, 414 (2000) (“When an electoral scheme systematically prevents the collective exercise of voting rights for particular groups, the individual right to vote is diminished accordingly.”).

203. FUND, *supra* note 22, at 8.

example, a recent *Developments in the Law* in the *Harvard Law Review* that briefly reviewed the federal district court's decision to block Georgia's photo-identification law stated as follows:

The hurdles that photographic identification proposals face today could diminish in as few as two election cycles if the states take on more of the responsibility of educating voters, ensuring greater access to voter identification facilities, and adhering to HAVA requirements such as cleansing of the voter rolls. These efforts would minimize at once both the severity of the proposal's disenfranchising effects and any potential for voter fraud.²⁰⁴

This broad statement makes assumptions without providing empirical data, and thus policy-makers are unable to assess the proposal's plausibility. How do we know, for example, that hurdles would diminish "in as few as two election cycles"? What do studies indicate about government's effectiveness in quickly reducing racial disparities in other contexts? What specific steps must the state take to educate voters and provide access to voter-identification facilities, and how does one guarantee that these state efforts will continue into the future? What happens after 2007 when the REAL ID Act's enhanced requirements of documentary evidence of citizenship, place of birth, and Social Security number make obtaining photo identification more difficult?

When policy-makers explore supplements to photo-identification requirements designed to increase access, they should demand specific data about the effectiveness of such supplements in increasing access—especially if data shows that fraud is minimal relative to the number of legitimate votes that would be expected to be excluded if the requirements were to be adopted.

1. Free Photo Identification

In 2006, Georgia allowed for individuals who completed a form declaring indigency to obtain a free photo-identification card,²⁰⁵ and the Carter-Baker Commission proposal would give free photo identification to all non-drivers.²⁰⁶ As mentioned above, policy-makers should look to data rather than simply assuming that free photo-identification programs will resolve all access problems.²⁰⁷ Some individuals will not take advantage of the programs because they do not know of them, do not have the time to apply, are

204. *Developments in the Law*, *supra* note 11, at 1154.

205. GA. CODE ANN. §§ 21-2-417.1, 40-5-103(d) (Supp. 2006) (revising GA. CODE ANN. § 40-5-103 (2004), following a court challenge of the former law, which required indigents to pay five dollars for a photo identification, so that the state is now required to distribute photo identification for free).

206. COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 10.

207. *See* Publius, *supra* note 11, at 300 ("Although, as discussed, the claim that minority voters cannot meet such requirements is unsubstantiated, that problem can be easily resolved. For any individual who does not have a driver's license or other photo identification and who needs to obtain one to meet this requirement, states should waive the fee their motor vehicle departments charge for the nondriver's license identification cards they issue.").

ashamed to admit indigency, or do not have the resources to obtain the supporting documentation necessary to obtain a state-issued photo-identification card under the REAL ID Act.²⁰⁸ Others may secure a free photo-identification card and lose it, have it stolen, or simply forget to bring it to the polls.

2. Expanded Photo-Identification Distribution through Mobile Buses and More Photo-Identification Offices

The Carter-Baker Commission proposed that states take “an affirmative role in reaching out to non-drivers by providing more offices, including mobile ones,” to provide photo-identification cards to voters.²⁰⁹ In Georgia, the state has commissioned a bus to travel through the state and provide photo-identification cards. Data is needed, however, because the effectiveness of mobile buses and other outreach efforts rests upon the details of implementation, which may vary based on written policies, budget priorities, and the dedication and competence of politicians and civil servants.

For example, an estimated 300,000 adults in Georgia lack a driver’s license.²¹⁰ In 2005, Georgia had a mobile photo-identification program that consisted of one bus that traveled to a location for a day or two, and was available during the middle of the day from 9 a.m. until 3 p.m.²¹¹ Acknowledging the shortcomings of using a hand-me-down bus from another agency, a spokesperson for Georgia Governor Sonny Perdue said, “We’ve got to start with the resources we’ve got and can’t spend money we don’t have.”²¹² While the bus had the capacity to issue two hundred photo identifications a day, it issued fewer than five hundred licenses during the last three months of 2005.²¹³

208. See *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1363–64 (N.D. Ga. 2005) (explaining that the Georgia indigency affidavit was insufficient, and describing various classes of citizens who would remain without photo identification).

209. COMM’N ON FED. ELECTION REFORM, *supra* note 4, at iv.

210. Carlos Campos, *Photo ID Bus Gets Little Use*, ATLANTA J.-CONST., Dec. 19, 2005, at 1B (“The idea [of the mobile photo-identification program] was to bring photo IDs to the estimated 300,000 voting age people who don’t have driver’s licenses.”); see also Matthew S.L. Cate, *Photo ID Bus Rolls into Northwest Georgia*, CHATTANOOGA TIMES FREE PRESS, Dec. 21, 2005, at NG4.

211. Georgia.gov Home Page, DDS Begins Mobile Licensing Tours & Center Reservations for Photo IDs, http://www.georgia.gov/00/article/0,2086,4802_4961_41800330,00.html (last visited Sept. 10, 2006); see also Georgia Department of Driver Services, GLOW Bus Schedule, <http://www.dds.ga.gov/drivers/glowbus.aspx> (last visited Sept. 10, 2006) (showing that currently there are no scheduled GLOW Bus stops).

212. Nancy Badertscher, *State Bus Will Roll for Voter IDs*, ATLANTA J.-CONST., Aug. 9, 2005, at 1B (quoting Heather Hedrick, spokeswoman for Georgia Governor Sonny Perdue).

213. Campos, *supra* note 210; see also Cate, *supra* note 210; cf. *Common Cause/Ga.*, 406 F. Supp. 2d at 1363 (asserting that Georgia’s mobile bus program was insufficient because it utilized only one bus for 159 counties, voters lacked notice of when the bus would be in their area, and the bus was not wheelchair-accessible). The Georgia governor’s spokesperson asserted that this relatively low number proved that “the vast, overwhelming majority of people who want to vote in Georgia already have valid IDs.” Campos, *supra* note 210. Michigan has a relatively robust mobile identification program, but ten percent of voting-age citizens in Michigan remain with neither

3. Provisional Ballots Counted When Photo Identification Presented

The Georgia and Carter-Baker Commission provisions also allow voters who do not bring their photo identification to the polls to cast a provisional ballot, which officials will count if voters present a photo-identification card to an elections office within two days of the election. In Georgia, officials presented evidence that in one county, thirteen people without photo identification had voted provisionally and two of them had returned within the forty-eight-hour period following the election with a photo-identification card.²¹⁴ More comprehensive evidence is needed, however, to determine how many legitimate votes will continue to go uncast or uncounted because (1) voters do not possess photo-identification cards, or (2) voters do not make or have the time to return to an elections office.

4. Election Day Registration

States that enact a photo-identification requirement could also adopt election day registration, which allows unregistered, eligible citizens to show up at the polls on election day, register, and immediately cast a ballot. While most states require that voters register ten to thirty days before an election, six states have election day registration and have enjoyed a voter turnout increase of nine to fourteen percentage points.²¹⁵ Some have asserted that election day registration invites fraud, but these claims might dissipate if state-issued photo identification were required to vote.²¹⁶

Election day registration may increase turnout by removing registration-deadline barriers for all citizens. Unlike free photo identification and similar programs, however, election day registration is not targeted at easing the burden on the specific group of voters who lack photo identification.

driver's licenses nor nondriver's photo-identification cards. BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 7 (citing Telephone Conference with Christopher Thomas, Michigan Dir. of Elections (Sept. 21, 2004) (estimating that ninety percent of eligible voters in Michigan possess driver's licenses or state-issued identification)). Data from 2003 indicates that 90.2% of driving-age persons in the state of Michigan possess a driver's license. See FED. HIGHWAY ADMIN., *supra* note 132.

214. *Common Cause/Ga.*, 406 F. Supp. 2d at 1365.

215. The election day registration states are Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming.

216. Instead of election day registration, a state could adopt universal registration, in which it affirmatively registers all voters (not unlike federal officials affirmatively attempt to count all citizens during the U.S. Census). In many other nations around the world, registration is the responsibility of the state rather than individuals or interest groups. The Carter-Baker Commission Report did not call for universal registration, but it did state that states should "play an active role in registering as many qualified citizens as possible." COMM'N ON FED. ELECTION REFORM, *supra* note 4, at 9. Election day registration may be less expensive and more feasible than universal registration, however, because the U.S. government is not charged with affirmatively registering all voting-age citizens.

B. *Alternatives That Allow Voters Who Lack
Photo Identification to Cast Ballots*

Several methods exist for confirming the identity of voters who arrive at the polls without photo identification, all of which evoke questions of the effectiveness of such methods to prevent fraudulent votes but not legitimate ones. This section walks through the general contours of various alternatives, and calls for data on each so that policy-makers and judges can make an informed comparison between them and photo-identification requirements.²¹⁷

1. *Nonphoto Identification*

Rather than making a photo-identification card an absolute requirement for voting, a state could expand acceptable documentation to include non-photo identification, such as a utility bill or bank statement. As discussed in Part I, this is currently the law for all who vote at the polls in ten states, and for first-time voters who registered by mail in all states.

Many people without photo identification would likely have nonphoto documentation, but some would not or would forget to bring it to the polls. The exclusionary impact of this option might be assessed through analyzing affidavit data in states such as Connecticut, Delaware, Kentucky, and Tennessee, which allow either photo or nonphoto identification to vote, but also accommodate voters without such documentation by providing an affidavit exception.

Photo-identification advocates would likely argue that nonphoto documentation allows for more fraud than photo documentation.²¹⁸ Statistical study is needed, however, to establish the extent to which improper impersonation using nonphoto documentation occurs.

2. *Requiring Photo Identification at Registration
Rather than at the Polls*

Another alternative would require photo identification at registration rather than at the polls. Photo identification at registration would primarily enhance access for people who have obtained photo identification but later fail to bring it to the polls. The restriction might reduce access because it would prevent those who lack a photo-identification card from registering.

217. One draft study found that signature requirements, nonphoto identification requirements, and photo-identification requirements with an affidavit safety net have negative turnout effects of 3–4% compared to the requirement that voters simply state their names, with larger turnout differences for subgroups like Latinos and African-Americans. See TIMOTHY VERCELLOTTI & DAVID ANDERSON, PROTECTING THE FRANCHISE, OR RESTRICTING IT? THE EFFECTS OF VOTER IDENTIFICATION REQUIREMENTS ON TURNOUT 13 (unpublished paper prepared for annual meeting of the 2006 American Political Science Association), <http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf>.

218. See Publius, *supra* note 11, at 288–89 (“[I]t is obvious that allowing documents without photographs is not an acceptable security measure for our voter registration and voting process.”).

3. Signature Comparison

Most states without documentation requirements currently require that each voter establish his identity by signing a pollbook. In many states, the signature at the polls is compared with a photocopy of the signature the voter provided when he registered. Any assessment of the costs and benefits of this procedure should consider the extent to which poll workers detect fraudulent signatures and prevent fraud, and the extent to which poll workers erroneously allege fraud and block access.

4. Affidavits

In affidavit states, a voter who does not provide photo identification may sign an affidavit attesting to his identity under penalty of perjury. An alternative option would require a voter signing an affidavit to cast a provisional ballot that election officials would count only after they electronically matched the affidavit signature against the signature the voter provided during registration. Studies should investigate the extent to which affidavits mitigate access concerns (bureaucratic mismanagement might hinder access by some voters) and the extent to which affidavits reduce voter fraud.²¹⁹

5. Indelible Ink

In Iraq, voters dipped their thumbs in indelible ink when they cast a ballot. Indelible ink would not prevent voting by persons ineligible to vote who impersonate a registered voter, but it would prevent multiple voting by these individuals.

6. Government Maintains Digital Picture/Biometric/Thumbprint

Government, rather than voters, could bear the burden of identification by obtaining a photograph, biometric information, or a thumbprint from citizens when they register to vote. Officials would make this information available at polls so that poll workers could confirm the identity of those who lack photo identification by looking at the voter photograph on file (either printed on the voter registration rolls or accessible via laptop computer) or by verifying the voter's identity through a biometric or thumbprint device.²²⁰ Empirical studies should examine the extent to which these solutions

219. See Adam Cohen, *Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES, June 21, 2004, at A18 (observing that in a South Dakota election, some officials failed to offer affidavits to American Indians without photo-identification cards).

220. See, e.g., LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 322 (1996) (proposing that officials obtain a thumbprint of voters at registration); Hasen, *supra* note 11, at 969–70 (proposing that officials obtain biometric data at time of registration); Edward B. Foley, *Is There a Middle Ground in the Voter ID Debate?*, ELECTION LAW @ MORITZ, Sept. 6, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050906.php> (last visited Sept. 10, 2006) (proposing that officials obtain a picture of voters at registration).

would hamper voter registration, and further normative discussion is necessary regarding privacy issues implicated by the proposals.

7. *Better Election Administration Practices*

State election officials could deter fraud by creating a statewide voter registration database that is regularly updated and compiling statistics on voter fraud to observe trends and enforcement efforts. Photo-identification advocates often argue that voting rolls are filled with dead people and voters who have moved away, and that these inactive voting files facilitate voter fraud.²²¹ The Help America Vote Act requires that each state develop a single, comprehensive, computerized, statewide voting list that any election official in the state be able to access at any time.²²² To keep their lists current, states are required to coordinate with state agencies to ensure that voters who die or lose their right to vote through felony conviction are removed from the list.²²³ Moreover, the states are directed to cull their lists actively by removing any voter who does not vote in two consecutive general elections for federal office and who fails to respond to a notice of removal (although “no registrant may be removed solely by reason of a failure to vote”²²⁴). We would need data on how much list cleansing would diminish access, however, as an overinclusive purge could erroneously remove legitimate voters from voting lists.²²⁵

State officials should also compile and maintain statistics on charges and convictions of voter fraud. Such information could identify which tools are best tailored to prevent voter fraud.

Finally, rather than simply focusing on voters, antifraud measures should scrutinize government officials and others who manage elections. Election officials have a far greater opportunity than individual voters to determine the outcome of an election through fraud, and partisan election officials often have greater incentives to commit fraud. A program of regular and unannounced independent audits of polling places, county election boards, Secretary of State offices, and private vendors should examine voter registration and polling place procedures, voting machines, vote-tabulation systems, software, purge processes, and other procedures. Such antifraud measures pose little risk of discouraging legitimate voter participation and are less likely than photo-identification requirements to improperly skew election outcomes.

221. See Section II.A for a more detailed review of this argument.

222. 42 U.S.C. § 15483(a) (2000 & Supp. 2003).

223. *Id.* § 15483(a)(2)(A)(ii).

224. *Id.* § 15483(a)(4)(A); see BRENNAN CTR. FOR JUST. & OVERTON, *supra* note 12, at 11.

225. *Cf.* SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006) (noting that in Florida in 2004, a Republican Secretary of State erroneously purged about 22,000 African-American voters and 2100 former prisoners who had successfully applied for restoration of their voting rights).

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CONCLUSION

Rather than continuing to rely on unsubstantiated factual assumptions, election law scholars and policy-makers should look to empirical data to weigh the costs and benefits of various types of election regulations. Existing data suggests that a photo-identification requirement would disenfranchise twenty million Americans while deterring minimal voter fraud. Policy-makers should place a moratorium on photo-identification proposals until they obtain a better empirical understanding of the extent and nature of voter fraud and the effect of the proposals on access by legitimate voters.

