

ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout

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INTRODUCTION

But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

- Justice John Paul Stevens¹

Indiana's "Voter ID Law" threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, and a significant percentage of those individuals are likely to be deterred from voting.

- Justice David Souter²

Last spring, in *Crawford v. Marion County Election Board*, the Supreme Court upheld Indiana's law requiring voters to show picture identification in order to vote, but the Court divided four ways over the issue. Central to the Justices' debate and the applicable constitutional balancing test was the degree of the burden that the law imposes on voters. This Essay surveys the voter ID controversy and describes original empirical research finding ID laws to have a negative impact on voter turnout. Since the Court left open the possibility of as-applied challenges to voter ID laws, future litigants who can produce research such as this will have a much stronger case to have these laws declared unconstitutional.

Voter ID laws gained increasing popularity in the aftermath of the hotly contested 2000 election. Between 2002 and 2006, twelve states strengthened their voting laws to require voters to present some form of identifying documentation or photo ID.³ However, these new laws created a highly partisan controversy, with Republicans supporting voter ID laws and Democrats opposing them.⁴ Proponents argue that ID laws are necessary to prevent

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¹ *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008) (lead op.).

² *Id.* at 1627 (Souter, J., dissenting) (citations omitted).

³ The states that had strengthened ID laws in place for the 2006 election were Alabama, Arizona, Colorado, Indiana, Montana, New Mexico, North Dakota, Ohio, South Dakota, and Washington. Georgia and Missouri strengthened their laws, but legal challenges prevented the laws from taking effect in 2006. See *infra* Part IV for data sources.

⁴ Stephen Ansolabehere, *Access versus Integrity in Voter Identification Requirements 2* (CalTech/MIT Voting Tech. Project Working Paper, No. 58, Feb. 2007), available at http://web.mit.edu/polisci/portl/cces/material/NYU_Identification1.pdf.

voter fraud and restore public confidence in elections.⁵ Opponents answer that these laws disenfranchise the poor, minorities, and the elderly and are unnecessary because voter impersonation fraud is rare.⁶

Courts considering voting restrictions must balance the asserted burden on the right to vote against the state's interest advanced to justify the burden.⁷ As the above quotes from *Crawford* indicate, the Supreme Court did not agree on the Indiana law's effect on deterring voting.⁸ Quantifying the effect requires reliable empirical analysis, yet "[w]hat has been missing from this debate . . . is any data that could give a sense of the scope of either the problem of fraud or the potential for disenfranchisement."⁹

To examine the effect, if any, of ID laws on turnout, I studied the change in nationwide voter turnout between 2002 and 2006. My analysis shows that photo and non-photo ID laws decreased turnout by between 1.6 and 2.2 percentage points.¹⁰ This implies that voter ID laws disenfranchised between 3 and 4.5 million voters in 2006. Given the scant existing evidence of voter impersonation fraud, this research suggests that the state's interest in preventing fraud is outweighed by the burden on millions of voters, and that voter ID laws are therefore unconstitutional.

My research explores an additional policy lever. Interestingly, states that amended their ID laws more recently experienced increased voter turnout, whereas states that changed their voting laws prior to 2004 showed a decline in turnout. A possible explanation is that recently enacted laws were sufficiently publicized to remind voters of the ID requirement, but older laws had faded from memory. Therefore, public awareness campaigns may help mitigate voter ID laws' potentially disenfranchising effects.

This Essay examines voter ID laws in our current political and legal culture, discusses existing research about their effects, and describes my own empirical analysis. Part I describes the debate over voter ID laws. Part II summarizes recent legal battles. Part III lays out the existing literature on voter turnout and ID laws. Part IV describes my data, and Part V describes the results.

⁵ See, e.g., Amy Goldstein, *Democrats Predict Voter ID Problems: Laws May Create Election Day Turmoil*, WASH. POST, Nov. 3, 2006, at A1.

⁶ See, e.g., *id.*

⁷ The Supreme Court announced this standard in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁸ *Crawford*, 128 S. Ct. 1610 (2008).

⁹ Stephen Ansolabehere, *Ballot Bonanza: The First Big Survey of Voter ID Requirements—And Its Surprising Findings*, SLATE, Mar. 16, 2007, <http://www.slate.com/id/2161928/> (on file with the Harvard Law School Library); accord Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 681 (2007).

¹⁰ Shelley de Alth, *Voter ID Dataset* (on file with the Harvard Law School Library).

I. THE DEBATE SURROUNDING VOTER ID LAWS

A. *Voting Legislation*

Recent federal election reforms—the National Voter Registration Act of 1993 (“Motor Voter” Act)¹¹ and the Help America Vote Act of 2002 (HAVA)¹²—focused on increasing voter registration and modernizing elections. The Motor Voter Act added millions of voters to states’ rolls by improving the accessibility of voter registration.¹³ Among other things, HAVA required first-time registrants to provide a driver’s license or Social Security number.¹⁴ To verify mail-in registrations, HAVA required some form of ID, such as a photo ID, current utility bill, bank statement, paycheck, or government document.¹⁵

Many states responded to HAVA by enacting voter ID laws that required a voter to show ID each time she cast a ballot. In 2002, fourteen states required some form of ID when a voter went to the polls.¹⁶ By the 2006 general election, twenty-four states required ID, and several additional states had passed such laws that were held up in litigation.¹⁷ ID requirements vary from allowing any form of identification with the voter’s name and address—such as a utility bill or paystub as allowed under HAVA—to requiring government-issued identification with a photograph and valid expiration date.

B. *Opposing Views of Voter ID Laws*

The debate over voter ID laws is highly partisan. Many Democrats argue against the laws on the grounds of voter access, while many Republicans raise the issue of voter fraud and “ballot integrity.”¹⁸ Every state that passed a stricter voter ID law did so under a Republican-controlled legislature, with Democratic legislators uniformly opposed (except Arizona, which

¹¹ 42 U.S.C. § 1973gg (2000).

¹² 42 U.S.C. §§ 15301–15545 (2000).

¹³ D.E. Campbell, *Who Votes?*, CQ PRESS, 2005, <http://library.cqpress.com/elections/g2camp-431-18709-1005914>. Document ID: g2camp-431-18709-1005914 (on file with the Harvard Law School Library).

¹⁴ 42 U.S.C. § 15483(a)(5)(A) (2000). States may assign an ID number if the registrant does not possess a driver’s license or Social Security number.

¹⁵ 42 U.S.C. §§ 15483(b)(3)(A), (b)(2) (2000).

¹⁶ See *infra* Part IV for data sources.

¹⁷ *Id.* Georgia passed a voter ID law that was enjoined for the November 2006 election. See *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006). Michigan enacted a voter ID law in 1996, but an Attorney General opinion prevented the law from taking effect until 2007. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 448 (Mich. 2007). Missouri passed a voter ID law in 2006 that its supreme court struck it down. *Weinschenk v. Missouri*, 203 S.W.3d 201, 204 (Mo. 2006).

¹⁸ Richard Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 4 (2007).

held a voter initiative).¹⁹ Additionally, Democratic governors have vetoed several such bills passed by Republican-controlled legislatures.²⁰

Proponents of voter ID laws claim that they are a commonsense measure needed to combat voter fraud. In his Seventh Circuit *Crawford* opinion, Judge Posner argued: “it is exceedingly difficult to maneuver in today’s America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one).”²¹ Supporting this contention, petitioners challenging voter ID laws have often been unable to name individual citizens disenfranchised by voter ID laws.²² However, quantifying voter fraud has proven at best imprecise and at worst impossible given existing data.²³ One of the leading federal studies, by the Carter-Baker Commission on Federal Election Reform (“Carter-Baker Commission”), confirmed that “[w]hile election fraud is difficult to measure, it occurs.”²⁴ The Commission cited fifty-two convictions obtained from 180 Department of Justice investigations between October 2002 and September 2005,²⁵ after the Department made voter fraud a top priority.²⁶

Proponents further argue that the mere possibility of voter fraud where a person impersonates an eligible voter at the polls harms voter confidence. A Rasmussen Poll found that fifty-nine percent of voters believe there is a lot or some fraud in American elections, and eighty-five percent of voters favor a photo ID requirement.²⁷ The Supreme Court in *Purcell v. Gonzalez* echoed this theory: “Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”²⁸

¹⁹ *Id.* at 19.

²⁰ See Press Release, Governor Edward Rendell, Governor Rendell Signs Veto Message Protecting Fundamental Right to Vote of PA Citizens, Says Bill Places Unnecessary Burden on Voters (Mar. 15, 2005), available at <http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=450782>; Associated Press, *Rule Allows Votes Without License*, CAP. TIMES (Madison, Wis.), Aug. 5, 2006.

²¹ *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

²² See Greg Stohr, *Voter-ID Law Draws Political Clash at Supreme Court*, BLOOMBERG.COM, Jan. 8, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&sid=AEYa9wwihWs0&refer=home> (on file with the Harvard Law School Library).

²³ See LORRAINE MINNITE & DAVID CALLAHAN, DEMOS, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 15* (2003), available at http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf. (“The difficulty of gathering data on fraud explains much of this vacuum in analysis.”).

²⁴ CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV., *BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 45* (Sept. 2005). The Carter-Baker Commission was a twenty-member commission, chaired by former U.S. President Jimmy Carter and former U.S. Secretary of State James Baker III, created in 2005 to study election reform proposals.

²⁵ *Id.*

²⁶ Press Release, Dept. of Justice, Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative (July 26, 2006), available at http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html.

²⁷ Rasmussen Reports: *Voter Fraud, 58% Worried About Voting Debacle* (Oct. 19, 2004), http://rasmussenreports.com/public_content/politics/election_2004/58_worried_about_2004_voting_debacle (on file with the Harvard Law School Library).

²⁸ 549 U.S. 1, 3 (2006).

Opponents of voter ID laws argue that they are equivalent to the “second great disenfranchisement” in America.²⁹ Former Senator Tom Daschle, a member of the Carter-Baker Commission, compared the laws to a poll tax.³⁰ Opponents emphasize that political science research has shown “the more barriers placed in front of potential voters . . . the less likely they are to vote.”³¹ Voter ID laws are more likely to affect Democratic segments of the electorate, including the poor, minorities, elderly, highly-mobile, and urban voters.³² Such voters are less likely to drive, may lack up-to-date ID, and may not have the money or resources to obtain ID.³³ Additionally, ID laws address one form of fraud—voter impersonation at the polls—but there is scant evidence of such fraud.³⁴ Instead, most reported cases of fraud involve absentee ballots or registration drives.³⁵

Evidence that eleven to twelve percent of voting-age Americans nationwide do not possess the kind of photo ID required by the strictest voter ID laws supports opponents’ claims.³⁶ This percentage is higher for seniors (eighteen percent), African Americans (twenty-five percent), and low-income Americans (fifteen percent).³⁷ Additionally, seven percent of voting-age citizens do not have ready access to the citizenship documents necessary to obtain a photo ID.³⁸ A 2007 Indiana-specific telephone survey found that thirteen percent of registered voters and sixteen percent of all voting-eligible adults lacked a photo ID.³⁹

II. LITIGATION SURROUNDING VOTER ID LAWS

The flurry of recent voter ID laws has generated numerous legal battles. In addition to the Indiana law at issue in *Crawford*, voter ID laws in Ari-

²⁹ See David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 485 (2007).

³⁰ CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 24, at 89 (additional statement of Comm’r Tom Daschle).

³¹ See Schultz, *supra* note 29, at 501.

³² See, e.g., Spencer Overton, Dissenting Statement on the Carter-Baker Report, <http://carterbakerdissent.com/dissent.php> (on file with the Harvard Law School Library).

³³ See Hasen, *supra* note 18, at 20.

³⁴ Stohr, *supra* note 22.

³⁵ Hasen, *supra* note 18, at 22; CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 24, at 46–47.

³⁶ See BRENNAN CTR. FOR JUSTICE, NYU SCH. OF LAW, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (Nov. 2006), available at http://www.brennancenter.org/page/-/id/download_file_39242.pdf (finding that eleven percent of voting-age citizens, or 21 million Americans, did not have a government-issued photo ID based on a national telephone survey); CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 24, at 19 n.22 (finding that that about twelve percent of the voting-age population did not possess a driver’s license by comparing driver’s license records and Census data).

³⁷ BRENNAN CTR. FOR JUSTICE, *supra* note 36, at 3.

³⁸ *Id.* at 2.

³⁹ Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate (Nov. 5, 2007) (unpublished manuscript), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.doc.

zona, Georgia, New Mexico, Michigan, and Missouri have been challenged.⁴⁰

The applicable legal standard to assess restrictions on the right to vote is a test that balances “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”⁴¹ *Crawford* affirmed that the more severe the burden on the right to vote, the stronger the justification necessary to withstand a constitutional challenge.⁴²

For the most part, courts have found that the state’s interest in operating elections and preventing fraud (even as a prophylactic measure) outweighs any significant burden on the right to vote.⁴³ Courts have also rejected arguments that voter ID laws are akin to a poll tax.⁴⁴ One notable exception is the Missouri Supreme Court, which applied strict scrutiny and struck down Missouri’s photo ID law in part because the state failed to show evidence of voter impersonation fraud.⁴⁵

The Supreme Court’s decision in *Crawford v. Marion County Election Board* has generated the most national attention. Election law scholar Daniel Tokaji called *Crawford* “the most important case involving the mechanics of election administration in decades.”⁴⁶ Indiana passed its voter ID law in 2005, and it is among the strictest in the nation. The law requires voters to present a state or federal government-issued photo ID with a valid expiration date.⁴⁷ If the voter does not possess an ID, they may cast a provisional ballot. In order for the ballot to be counted, the voter must appear before the circuit court clerk or county election board within ten days either

⁴⁰ See *Gonzalez v. Arizona*, No. CV 06-1268, 2006 U.S. Dist. LEXIS 76638, at *27 (D. Ariz. Oct. 11, 2006); *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1374, 1377–78, 1381 (N.D. Ga. 2007); *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d 598, 606–07 (D.N.M. 2007); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 458 (Mich. 2007); *Weinschenk v. Missouri*, 203 S.W.3d 201, 204, 212, 215 (Mo. 2006).

⁴¹ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁴² *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008); see also Posting of Justin Levitt to ACS Blog, <http://www.acsblog.org/guest-bloggers-supreme-court-voter-id-decision-more-of-a-whimper-than-a-bang.html> (May 1, 2008, 10:54 EST) (on file with the Harvard Law School Library).

⁴³ See *Gonzalez*, 2006 U.S. Dist. LEXIS at *27; *Common Cause/Ga.*, 504 F. Supp. 2d at 1374, 1377–78, 1381 (denying a permanent injunction after the court upheld a preliminary injunction in 2006); *In re Request for Advisory Opinion*, 740 N.W.2d at 458. But see *Am. Civil Liberties Union of N.M.*, 506 F. Supp. 2d at 606–07 (granting an injunction against a city photo ID ordinance).

⁴⁴ See *Gonzalez*, 2006 U.S. Dist. LEXIS at *8; *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d at 1345; *In re Request for Advisory Opinion*, 740 N.W.2d at 465.

⁴⁵ See *Weinschenk*, 203 S.W.3d at 204, 212, 215.

⁴⁶ Ian Urbina, *Voter ID Laws Are Set to Face a Crucial Test*, N.Y. TIMES, Jan. 7, 2008, at A1.

⁴⁷ IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2007). The law does not apply to absentee voting and contains an exception for those voting at state-licensed care facilities. *Id.* §§ 3-11-10-1.2, 3-10-1-7.2(e), 3-11-8-25.1(e).

to present ID or to execute an affidavit declaring that the voter is indigent or has a religious objection to being photographed.⁴⁸ Indiana does provide a free voter ID card, but obtaining it requires identification documentation.⁴⁹

The district court found that the law placed no significant burden on the right to vote.⁵⁰ The court dismissed the plaintiff's expert report that stated that as many as 989,000 registered Indiana voters did not have acceptable photo ID and estimated that 43,000 voting-age residents lacked the necessary ID.⁵¹ The Seventh Circuit affirmed.⁵² Judge Posner, writing for the majority, did not find a sufficient burden on the right to vote but acknowledged that the law would deter some from voting and that "most people who don't have photo ID are low on the economic ladder."⁵³ Judge Evans's dissent deemed the state's motive for the law "a fig leaf of respectability," since Indiana had presented no evidence of impersonation fraud.⁵⁴

The Supreme Court affirmed in a 3-3-2-1 opinion.⁵⁵ Justice Stevens wrote the lead opinion rejecting the petitioner's facial challenge but leaving the door open for future as-applied challenges.⁵⁶ Justice Stevens accepted the proffered state interests in election modernization, prevention of voter fraud, and safeguarding voter confidence.⁵⁷ Noting no evidence of voter impersonation fraud in Indiana, he cited New York City elections in 1868 and one confirmed example of in-person fraud in Washington state in 2004 to conclude that there is a risk of such fraud.⁵⁸ Justice Stevens acknowledged that the law imposed a "special burden" on a small number of voters but stated that the petitioners did not meet their "heavy burden of persuasion" required for a facial challenge to succeed.⁵⁹ Justice Scalia wrote a concurring opinion to emphasize that the law was justified as a generally applicable, nondiscriminatory voting regulation, and that the court therefore should not attempt to weigh the burden on individual voters.⁶⁰

Justice Souter dissented on the grounds that the ID law imposed burdensome costs and fees, which are "disproportionately likely to deter[] the poor, the old, and the immobile."⁶¹ Justice Souter accepted the district court's estimation that 43,000 Hoosiers (about one percent of the voting age

⁴⁸ *Id.* §§ 3-11.7-5-1, 3-11.7-5-2.5.

⁴⁹ *Id.* § 9-24-16-10(b).

⁵⁰ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822, 826 (S.D. Ind. 2006).

⁵¹ *Id.* at 803-07.

⁵² *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007), *reh'g en banc denied* 484 F.3d 436 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007).

⁵³ *Id.* at 951.

⁵⁴ *Id.* at 955 (Evans, J., dissenting).

⁵⁵ *Crawford*, 128 S. Ct. 1610 (2008).

⁵⁶ Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/court-rejects-voter-id-challenge> (Apr. 28, 2008, 10:01 EST) (on file with the Harvard Law School Library).

⁵⁷ *Crawford*, 128 S. Ct. at 1617.

⁵⁸ *Id.* at 1619 n.11, n.12.

⁵⁹ *Id.* at 1621.

⁶⁰ *Id.* at 1625-26 (Scalia, J., concurring).

⁶¹ *Id.* at 1631 (Souter, J., dissenting).

population) lacked photo IDs and cited a nationwide survey showing that six to ten percent of Americans lacked a photo ID.⁶² Since Justice Souter found the law's burden to be "far from trivial," he engaged in a "rigorous assessment" of the state's proffered interests and found them wholly lacking.⁶³ Justice Breyer wrote a separate dissent emphasizing that the Indiana law was more restrictive than necessary to achieve the state's interests.⁶⁴

Because of the Court's splintered holding, it is "likely to lead to more laws and litigation," rather than settle the issue.⁶⁵ Therefore, in the wake of *Crawford*, research about the burden on voters and the extent of voter fraud has become even more necessary.

III. EMPIRICAL LITERATURE ON VOTER ID LAWS AND TURNOUT

Although voter ID laws are relatively new, social scientists have long studied factors influencing voter turnout generally. Three broad categories of factors have been shown to affect turnout: legal restrictions, the political context of the election, and demographic characteristics of voters.⁶⁶ Registration requirements have been extensively studied, and relaxing such requirements can increase turnout.⁶⁷ Election Day registration (EDR), now available in eight states (including North Dakota, which does not require voter registration), has been shown to increase turnout by four to five percentage points.⁶⁸ In addition, greater competitiveness of elections can drive up turnout,⁶⁹ likely partially due to increased party mobilization.⁷⁰ Finally, age, education, and socioeconomic status are closely related to turnout.⁷¹ Young people, the less educated, and low-income individuals are less likely to vote than their respective counterparts.⁷² Racial minorities experience

⁶² *Id.* at 1632–33 (Souter, J., dissenting).

⁶³ *Id.* at 1635 (Souter, J., dissenting).

⁶⁴ *Id.* at 1645 (Breyer, J., dissenting).

⁶⁵ Ian Urbina, *Decision Is Likely to Spur Voter ID Laws in More States*, N.Y. TIMES, Apr. 29, 2008, at A11.

⁶⁶ Bob Benenson, *Voter turnout*, in ELECTIONS A TO Z (3d ed. CQ Press, CQ Electronic Library, Voting and Elections Collection, 2008), <http://library.cqpress.com/elections/elaz2d-156-7499-403030>. Document ID: elaz2d-156-7499-403030 (on file with the Harvard Law School Library).

⁶⁷ See Timothy Vercellotti & David Andersen, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout* 3 (Aug. 2006) (unpublished manuscript, on file with the Harvard Law School Library, presented at the 2006 meeting of the Am. Pol. Sci. Ass'n.), available at http://www.brennancenter.org/page/-/id/download_file_50903.pdf; Benjamin Highton, *Easy Registration and Voter Turnout*, J. POL., May 1997, at 2.

⁶⁸ Campbell, *supra* note 13; Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in the United States from 1960 to 1992*, 22 AM. POL. Q. 74, 87 (1994).

⁶⁹ See Benenson, *supra* note 66.

⁷⁰ Campbell, *supra* note 13.

⁷¹ See Benenson, *supra* note 66.

⁷² U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, 4 tbl.1 (2006).

lower levels of turnout than whites,⁷³ but when socioeconomic status is taken into account, African Americans vote at the same rates as whites, with Hispanics and Asian Americans remaining substantially less likely to vote.⁷⁴ Women vote at slightly higher rates than men.⁷⁵ Regional differences can also play a role: the South has consistently lower turnout than other regions of the country.⁷⁶

In response to recently-enacted voter ID laws, social scientists have begun to quantify the effects of such laws. Two such studies have found voter ID laws to have a negative impact on voter turnout. A study of the 2004 election commissioned by the Election Assistance Commission (EAC) found a small but significant negative relationship between county-level voter turnout and ID laws allowing for photo or non-photo forms of ID.⁷⁷ The study also found that in survey data, people in photo ID states were 2.9% less likely to have voted than people in states without an ID requirement.⁷⁸ A larger negative effect existed for less educated voters (5.1%) and racial minorities (6–10 %).⁷⁹ A California Institute of Technology study expanded upon the EAC study by using survey data from four general elections: 2000, 2002, 2004, and 2006.⁸⁰ The study found a significant negative relationship between more stringent ID laws and voting and a stronger negative effect on less educated and low-income voters.⁸¹

Three other studies found no significant relationship between voter ID laws and voter turnout. One study used 2000 to 2006 data from a data set considered inferior to the Census data.⁸² Another study looked at county-level data from 1996 to 2006 and found some evidence that voting regulations improve voter confidence and increase voter turnout.⁸³ A third study examined county-level voter turnout in Indiana before and after the state

⁷³ *Id.* In 2004, sixty-seven percent of non-Hispanic whites voted, sixty percent of blacks voted, forty-seven percent of Hispanics voted, and forty-four percent of Asian-American citizens voted.

⁷⁴ See Campbell, *supra* note 13.

⁷⁵ See Benenson, *supra* note 66.

⁷⁶ U.S. CENSUS BUREAU, *supra* note 72, at 4 tbl.1.

⁷⁷ See Vercellotti & Andersen, *supra* note 67, at 7.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 12–13.

⁸⁰ See R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout* 3 (Cal. Instit. of Tech., Soc. Sci. Working Paper No. 1267, 2007).

⁸¹ *Id.* at 16, 19.

⁸² See Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* 15–16 (Aug. 2007) (unpublished manuscript, on file with the Harvard Law School Library, presented at the 2007 meeting of the Am. Political Sci. Ass'n), available at http://www.vote.caltech.edu/VoterID/apsa07_proceeding_211715.pdf. For a criticism of the National Election Study data, see Alvarez, *supra* note 80, at 5.

⁸³ John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates* 7–8, 11 (Aug. 18, 2006) (unpublished manuscript, on file with the Harvard Law School Library), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925611.

instituted its photo ID law.⁸⁴ It found no significant effect from the photo ID law in counties with greater shares of minority, elderly, less educated, and low-income citizens.⁸⁵

An additional study surveyed voters' experiences with ID laws in the 2006 election. Seventy-five percent of respondents supported an ID requirement.⁸⁶ However, the study suggested serious inconsistencies in election administration. Even though only five states required a photo ID in 2006, forty-nine percent of non-absentee voters nationwide reported being asked to present photo ID.⁸⁷ In the South, sixty-five percent of voters were asked for ID compared to twenty-two percent in the Northeast. Additionally, younger voters, blacks, and Hispanics were more likely to be asked for ID.⁸⁸ This suggests that voters were asked for ID in states where it was not legally required, potentially on a discriminatory basis. However, only 23 of the more than 22,000 respondents reported not being allowed to vote because of voter ID requirements.⁸⁹

IV. DATA

In order to analyze claims of disenfranchisement from voter ID laws, I conducted my own empirical analysis. I compiled data on various factors known to influence turnout—legal restrictions, the political context, and demographic characteristics. I analyzed the 2006 election and compared it to the 2002 election, a similar non-presidential election. Between 2002 and 2006, ten states put more stringent voter identification requirements in place, making these two years ideal to compare.

My dependent variable—voter turnout—is calculated as total votes cast divided by the citizen voting age population. Total votes cast is measured as the highest vote total in a given state in each year, either from a gubernatorial race, U.S. Senate race, or the sum of the state's U.S. House of Representative races.⁹⁰ Citizen voting age population (VAP) data comes from the U.S. Census.⁹¹

⁸⁴ JEFFREY MILYO, THE EFFECTS OF PHOTOGRAPHIC IDENTIFICATION ON VOTER TURNOUT IN INDIANA: A COUNTY-LEVEL ANALYSIS, INSTITUTE FOR PUBLIC POLICY, UNIVERSITY OF MISSOURI-COLUMBIA, REPORT NO. 10-20074, Dec. 2007 at 4.

⁸⁵ See *id.* at 1.

⁸⁶ Ansolabehere, *supra* note 4, at 3.

⁸⁷ *Id.* at 11 tbl.1. The author notes the considerable discretion that poll workers have in applying identification laws. *Id.* at 5.

⁸⁸ *Id.*

⁸⁹ *Id.* at 7, 9.

⁹⁰ Data was collected from the Congressional Quarterly Voting and Elections Collection, a subscription service available at <http://www.cqpress.com/product/CQ-Voting-and-Elections-Collection.html>.

⁹¹ Citizen VAP is an estimate of the "voting eligible population" (VEP). It does not account for ineligible felons and eligible overseas voters, but county-level data is not available for these populations. For a discussion of the VEP, see Michael P. McDonald & Samuel Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963 (2001).

I categorized my dependent variable of interest—voter identification laws—into three categories: photo ID, non-photo ID, and no ID requirement.⁹² Although previous research has employed more categories, I chose to focus on the laws at issue in the current controversy.⁹³ However, reducing the intricacies of fifty complex statutory schemes to three categories presents many complications. For example, some states may ask for a photo ID, but still allow voters without such ID to cast a regular ballot by signing an affidavit.⁹⁴ In my analysis, I chose not to account for statutory alternatives to ID requirements because only a handful of states have such provisions and because prior research found these ID alternatives to have no significant effect on turnout.⁹⁵

To classify ID laws, I looked up each state's law in effect for the 2002 and 2006 general elections and compared my classifications to those of other researchers.⁹⁶ I also included two measures of registration laws in my analysis: whether a state offers Election Day registration and whether a state requires voters to register twenty-eight or more days before the election.⁹⁷

To capture the political context, I created dummy variables⁹⁸ for the type of election being measured—Governor, Senate, or House of Representatives—and calculated the percentage of Democratic votes cast in each race.⁹⁹ To control for competitiveness, I collected CNN election data on whether an incumbent was running in each race, whether the political party changed, and whether CNN labeled the race a “key race” (based on notable candidates, heightened media attention, a predicted upset, and other fac-

⁹² States with no ID requirement require a voter either to state or to sign her name, and some states compare the signature to a signature on file.

⁹³ See, e.g., Vercellotti & Andersen, *supra* note 67, at 4 (five categories); Alvarez, Bailey & Katz, *supra* note 80, at 7 (eight categories).

⁹⁴ See LA. REV. STAT. ANN. § 18:562(A)(2) (2008) (allowing a voter who does not have a Louisiana driver's license or other qualifying picture identification to cast a ballot by signing an affidavit and presenting non-photo identification); S.D. CODIFIED LAWS § 12-18-6.2 (2008) (allowing a voter who does not present a driver's license, passport, government-issued photo ID, tribal photo ID, or South Dakota student photo ID to complete an affidavit including the voter's name, address, and signature).

⁹⁵ See Vercellotti & Andersen, *supra* note 67, at 7.

⁹⁶ See Nat'l Conference of State Legislatures, Requirements for Voter Identification, <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm> (last visited Mar. 1, 2008); Electionline.org, Pew Ctr. on the States, Voter ID Laws, <http://www.pewcenteronthestates.org/uploadedFiles/voter%20id%20laws.pdf> (last visited Mar. 1, 2008); EAGLETON INST. OF POLITICS, RUTGERS UNIV., REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, PUBLIC LAW 107-252 Appendix A (June 28, 2006); E-mail from Timothy Vercellotti, Dir. of Polling and Assistant Research Professor, Eagleton Instit. of Politics, Rutgers Univ., to Shelley de Alth, J.D. 2008, Harvard Law Sch. (Oct. 19, 2007, 10:39 EST) (on file with the Harvard Law School Library).

⁹⁷ Data compiled from each state's Secretary of State website, its election code, and the Nat'l Conference of State Legislatures, Voter Registration Deadlines, <http://www.ncsl.org/programs/legismgt/elect/taskfc/deadlines.htm> (last visited Mar. 1, 2008).

⁹⁸ A dummy variable has a value of 0 or 1 to indicate the absence or presence of a particular effect.

⁹⁹ Raw data available at Cong. Quarterly Voting & Elections Collection, *supra* note 90.

tors).¹⁰⁰ I also created a dummy variable for states with initiatives on the ballot.

Finally, I used U.S. Census data to control for demographic factors shown to influence turnout: county household median income¹⁰¹ and the shares of the county population that were female, aged eighteen to twenty-four, aged sixty-five and over, black, Hispanic, and Asian.¹⁰² Since past research has found lower turnout in the South, I constructed a Southern dummy variable.¹⁰³

V. RESULTS

As an introduction to the data, I present an overview of my variables of interest. Between 2002 and 2006, ten states strengthened their voter ID laws—eight states adopted a non-photo ID law, increasing the total number of non-photo ID law states to nineteen, and two states adopted a photo ID law, increasing the total to five.¹⁰⁴ Figure 1 presents mean voter turnout for each category of voter ID law over this period.

¹⁰⁰ See CNN.com, *America Votes 2006*, <http://www.cnn.com/ELECTION/2006/> (last visited Mar. 1, 2008); CNN.com, *Elections 2002*, <http://www.cnn.com/ELECTION/2002/> (last visited Mar. 1, 2008).

¹⁰¹ See U.S. Census Bureau, *Small Area Income & Poverty Estimates*, <http://www.census.gov/hhes/www/saipe/county.html> (last visited Mar. 1, 2008).

¹⁰² See U.S. Census Bureau, *Population Estimates Datasets, Annual Estimates of the Population by Selected Age Groups and Sex and by Sex, Race and Hispanic Origin for Counties: April 1, 2000 to July 1, 2006*, <http://www.census.gov/popest/datasets.html> (last visited Mar. 1, 2008).

¹⁰³ Southern states are Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See U.S. Census Bureau, *Census Regions and Divisions of the United States*, http://www.census.gov/geo/www/us_regdiv.pdf (last visited Mar. 1, 2008).

¹⁰⁴ Shelley de Alth, *Voter ID Dataset* (on file with the Harvard Law School Library).

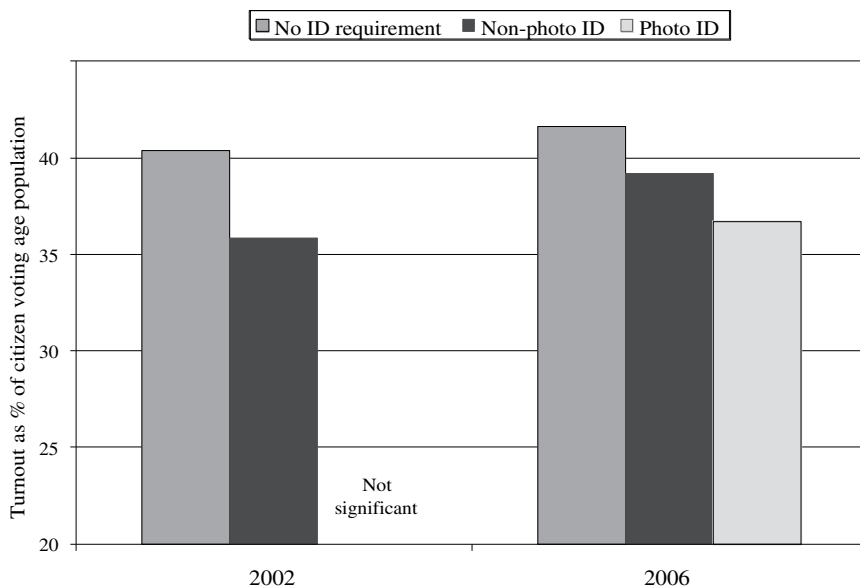
Figure 1. Mean Voter Turnout by Type of Voter ID Law¹⁰⁵

Figure 1 shows some decline in voter turnout as the type of voter ID law becomes more stringent. However in order to capture all of the factors that can affect voter turnout, a multivariate analysis is necessary.¹⁰⁶

My analysis models 2006 voter turnout as a function of the legal, political, and demographic factors described above as well as historical turnout.¹⁰⁷ Figure 2 reports the effects of voter ID laws on voter turnout, controlling for the factors described in Figures 3 and 4.¹⁰⁸

¹⁰⁵ Mean turnout is weighted by citizen voting-age population. All effects are statistically significant from zero at the significance level of ninety-five percent.

¹⁰⁶ Multivariate analysis allows observations of more than one statistical variable at a time. A variable is said to be significant at a certain (x) percentage level when, controlling for all other factors in the multivariate analysis, it is x percent likely that the stated effect is unlikely to have occurred by chance.

¹⁰⁷ The equation for the model is: $TURNOUT06_{cnty} = \alpha IDLAWS_{state} + \beta REGLAWS_{state} + \gamma POLITICS_{state} + \mu DEMOG_{cnty} + \delta SOUTH_{state} + \eta SOUTH_{state} * IDLAWS_{state} + \theta TURNOUT02_{cnty} + \varepsilon$. A description of each term in the equation and alternate models tested are available from the author upon request.

¹⁰⁸ Full regression results are available from the author upon request.

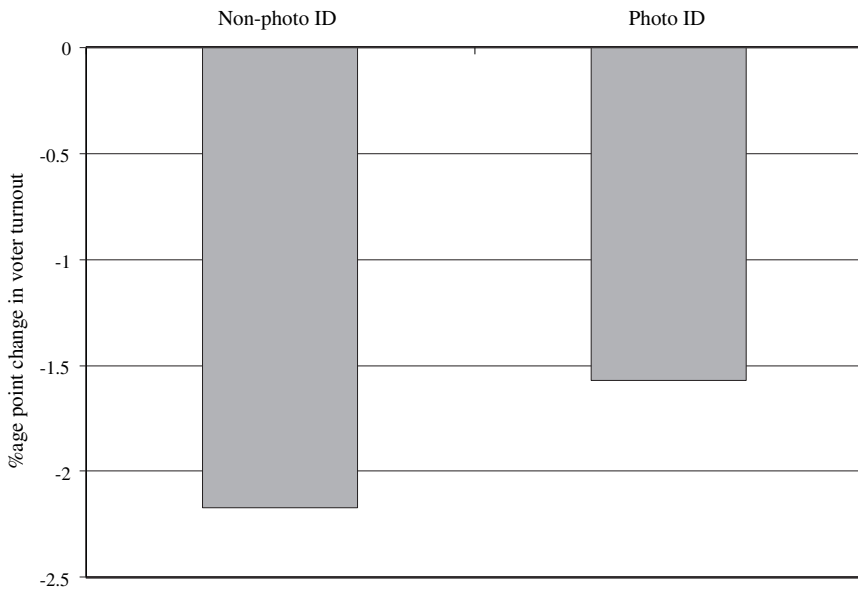
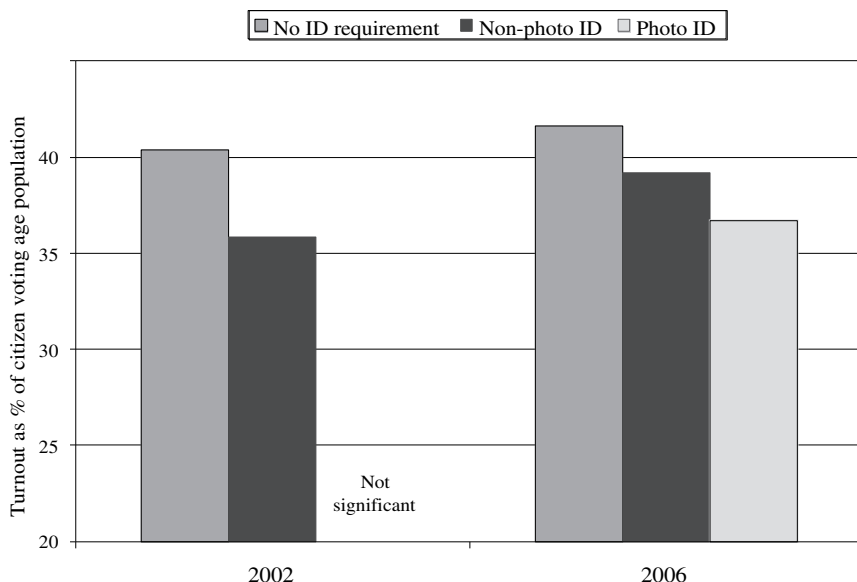
Figure 2. Effects of Voter ID Laws on Voter Turnout¹⁰⁹

Figure 2 shows that voter ID laws have a significant, negative relationship with voter turnout compared to states without voter ID laws. Non-photo ID laws are associated with a 2.2 percentage point decline in turnout, and photo ID laws are correlated with a 1.6 percentage point decline. Although photo ID laws might be expected to have a larger negative effect than non-photo ID laws, since states have just begun to implement the strictest forms of photo ID laws, we may see stronger effects in the future.¹¹⁰ Since the model controls for the South, these results represent the effects of voter ID laws in non-Southern states. The effect in the South is discussed below.

Figure 3 shows political and legal factors' relation to turnout, and Figure 4 displays the effects of demographic factors.

¹⁰⁹ All effects are statistically significant at a significance level of ninety-nine percent. The figure reports the effect of a particular type of ID law after controlling for legal, political, and demographic factors and previous turnout.

¹¹⁰ See Vercellotti & Andersen, *supra* note 67, at 13 (also finding the strongest effect from non-photo ID laws).

Figure 3. Effects of Legal & Political Factors on Voter Turnout¹¹¹

The relationships shown in Figure 3 are fairly consistent with their expected effects. Election Day registration has a positive relationship with voter turnout. Compared to measuring turnout in a Senate race (because it had the highest total votes cast for that state), measuring a gubernatorial race had no significant effect, but measuring a House race was associated with increased turnout. We would expect lower turnout in House races, but this result is partially explained by Vermont's high turnout in its 2006 House race; since Vermont has only one House district for the state, the race is comparable to a Senate election.

The presence of an incumbent on the ballot has a small positive effect on voter turnout. Two measures of election competitiveness—whether the party changed as a result of the election and whether CNN labeled the race a “key race”—had the expected positive association with turnout. The party change effect was likely especially acute in 2006 due to high dissatisfaction with President Bush, which allowed the Democrats to retake Congress and several governorships. Finally, if a state had a ballot initiative, often on a controversial social issue, this had a positive effect on turnout of 4.6 percentage points.

¹¹¹ All effects are statistically significant at the significance level of ninety-nine percent. The figure reports the effect of legal and political factors after controlling for voter ID laws, demographic factors, and previous turnout.

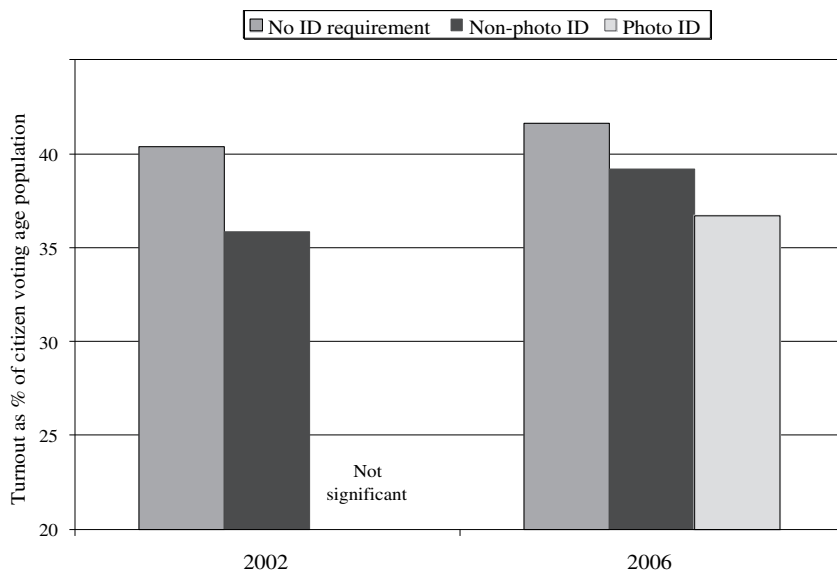
Figure 4. Effects of Demographics Factors on Voter Turnout¹¹²

Figure 4 also confirms most expectations of demographic effects on turnout. In 2006, the percentage of Democratic votes had a slight, positive association with turnout, likely representing high mobilization among Democrats. The share of females in a county had a slight positive effect on turnout. Counties with greater populations of seniors had increased voter turnout of 1.5 percentage points. Counties with more Hispanics and Asian Americans had a slight, negative association with turnout, but greater percentages of African Americans were associated with a slight increase in turnout. Finally, greater household income was associated with increased voter turnout.

Based on prior research finding a negative relationship between voter turnout and Southern states, I analyzed the Southern effect separately.¹¹³ Being in the South had a significant, negative relationship with voter turnout of three percentage points, confirming prior research. However, Southern states with non-photo ID laws were associated with a 2.8 percentage point *increase* in turnout, nearly cancelling out the South's negative effect. Therefore, depressed turnout in the South seems to overpower the negative effect of voter ID laws. Prior research suggests that Southern voters are most

¹¹² Coefficients are reported as the effect of a one standard deviation increase. All effects are statistically significant from zero at a significance level of ninety-five percent, except percent female and percent black (ninety percent level). The figure reports the effect of demographic factors after controlling for voter ID laws, legal and political factors, and previous turnout.

¹¹³ See Alvarez, Bailey & Katz, *supra* note 80, at 16; Mycoff, Wagner & Wilson, *supra* note 82, at 18.

likely to be asked for ID even when the law does not require it, so this may help explain the inconsistent result.¹¹⁴

To further explore voter ID laws, I conducted a separate analysis of the specific effect of strengthening a state ID law between 2002 and 2006.¹¹⁵ As reported in Table 1, a strengthened voter ID law is associated with a 1.1 percentage point decline in turnout, confirming the negative relationship found above.

Table 1. Effects of a Strengthened Voter ID Law on a Change in Voter Turnout¹¹⁶

	Expected Effect	(1)	(2)
Strengthened ID law		-1.07	
Strengthened ID law 02-04			-2.34
Strengthened ID law 04-06			1.95

In addition, I separated the effects of states that changed their voting laws more recently—in the two years prior to the 2006 election—and states that had changed their laws further in the past—between 2003 and 2004. Table 1 shows that states enacting stricter voter ID laws more recently actually experienced an *increase* in voter turnout, and states with older amendments to their ID laws experienced a greater decline in turnout.

One possible interpretation of this finding is the publicity effect. New, more burdensome voter ID requirements likely received local media attention, which may have reminded citizens to vote and to bring their ID. In addition, some states undertook public outreach programs to inform residents of new ID requirements and targeted voters who did not possess an ID. A federal district court in Georgia recognized the importance of public outreach when it held that state outreach efforts were one justification for lifting the temporary injunction on Georgia's photo ID law.¹¹⁷ In his *Crawford* dissent, Justice Breyer noted Georgia's efforts in contrast to Indiana's.¹¹⁸ Older ID laws are less likely to be publicized, and voters may forget the ID requirement or be less aware of elections, lowering turnout.

This research builds on previous studies and contributes to existing literature. However, as with all empirical analysis, it is subject to limita-

¹¹⁴ Ansolabehere, *supra* note 4, at 5.

¹¹⁵ The model and complete regression results are available from the author upon request.

¹¹⁶ The dependent variable is the change in voter turnout from 2002 to 2006. All effects are significant at a ninety-nine percent significance level. The model contains the full specification of control variables.

¹¹⁷ *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1378-80 (N.D. Ga. 2007).

¹¹⁸ *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1644 (2008) (Breyer, J., dissenting).

tions. For instance, if voters are being asked for ID when state law does not require it,¹¹⁹ analyzing the effects of statutory requirements does not capture voters' actual experiences. Further research is needed to study the implementation of voter ID laws.

CONCLUSION

In *Crawford*, the Supreme Court found insufficient evidence of the burden of Indiana's voter ID law to overcome the state's interest in sustaining the law.¹²⁰ This Essay supports previous studies in finding that voter ID laws impose a real burden on voter turnout. Based on my finding that states with voter ID laws experienced a 1.6 to 2.2 percentage point decline in 2006 voter turnout, 3 to 4.5 million voters were disenfranchised by the laws. As Justice Souter reasoned in his *Crawford* dissent,¹²¹ where a court finds evidence of a real burden on voters, a state must advance stronger interests than those relied on by Indiana in *Crawford* to defend its contested voting regulation.¹²² Otherwise, voter ID laws fail the Court's balancing test and must be found unconstitutional. In future as-applied challenges to voter ID laws, petitioners should use studies such as this one to quantify the nontrivial burden of disenfranchisement.

My results do suggest a possible policy fix: states that adopted voter ID laws most recently did not experience a decline in turnout. I posit that news coverage and state-sponsored public outreach reminded voters to go to the polls on Election Day with proper ID. However, when these efforts fade, the disenfranchising effects of voter ID laws remain. States may be able to counter the effects of ID laws with additional outreach.

Voter ID laws represent the current chapter in America's long-running saga over voting rights. The laws appear to be a political response to recent hotly-contested elections and allegations of voter fraud. To proponents, voter ID laws ensure sorely needed integrity at the polling place. To opponents, such laws represent unconstitutional disenfranchisement. This Essay finds that voter ID laws impose a real burden on millions of voters. These voters' interests must be considered in both high-level constitutional analyses and street-level public debates about how the United States regulates the fundamental voting right.

¹¹⁹ Ansolabehere, *supra* note 4, at 5.

¹²⁰ *Crawford*, 128 S. Ct. at 1623.

¹²¹ *Id.* at 1635 (Souter, J., dissenting).

¹²² *Id.* at 1617-19 (lead op.).