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## Voter Identification

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# VOTER IDENTIFICATION

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Spencer Overton, a tenured professor at the George Washington University Law School, teaches courses in voting rights, civil rights, and property. Professor Overton served as a commissioner on the 2005 Carter-Baker Commission on Federal Election Reform, which was co-chaired by former U.S. President Jimmy Carter and former U.S. Secretary of State James Baker. Overton graduated with honors from Hampton University and Harvard Law School, clerked for U.S. Court of Appeals Judge Damon J. Keith, and returned to Harvard to serve as the Houston Fellow in 1999. He currently sits on the boards of the Center for Responsive Politics, Common Cause, and Demos. Professor Overton's scholarship on the law of democracy has appeared in the *Harvard Civil Rights-Civil Liberties Law Review*, the *North Carolina Law Review*, the *University of Pennsylvania Law Review*, the *Texas Law Review*, the *Vanderbilt Law Review*, the *Washington & Lee Law Review*, and the *UCLA Law Review*. His book, *Stealing Democracy: The New Politics of Voter Suppression* ([stealingdemocracy.com](http://stealingdemocracy.com)), was released by W.W. Norton in June 2006.

## VOTER IDENTIFICATION

*Spencer Overton\**

## ABSTRACT

*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 the cards are 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 suggests 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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\* Michael Abramowicz, Bob Bauer, David Becker, Tom Colby, Jamie Grodsky, Paul Herrmson, David Hyman, Michael Kang, Ellen Katz, Leslie Overton, Richard Pildes, Peter Smith, Amanda Tyler, Tova Wang, and Fane Wolfer read earlier drafts of this Article and provided helpful comments. The Article also benefited from my interaction with Tom Daschle and Raul Yzaguirre in formulating our dissent to the Commission on Federal Election Reform’s photo identification proposal; conversations with Wendy Weiser and Justin Levitt of the Brennan Center for Justice at NYU School of Law during the drafting of our Response to the Report of the 2005 Commission on Federal Election Reform; and discussions with Adam Cox, Heather Gerken, Michael Kang, and Daniel Tokaji during the drafting of our letter to the U.S. Justice Department regarding Georgia’s photo identification law. Exchanges with Steve Carbo, David Dill, John Duffy, Chris Edley, Grant Hayden, Gracia Hillman, Ellen Katz, Orin Kerr, Bill Kovacic, Lori Minnite, Jon Molot, Peter Swire, Dan Tokaji, Clyde Wilcox, and Brenda Wright also helped develop my thinking. Daniel Taylor provided invaluable research assistance.

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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 U.S. Secretary of State James Baker co-chaired the 21-member body,<sup>1</sup> and other commissioners included former members of Congress, cabinet officials, and university presidents.<sup>2</sup> On September 19, 2005, the "Carter-Baker Commission" released 87 different recommendations, one of which proposed that voters produce a photo identification card as a condition to cast a ballot. I dissented from the proposed photo identification requirement, as did two other commission members.<sup>3</sup>

The Commission's photo identification proposal received extensive media attention and fueled a firestorm of photo identification proposals across the nation.<sup>4</sup> In 2005, Georgia and Indiana adopted laws making them

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<sup>1</sup> 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.

<sup>2</sup> 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. 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. *Cf.* Robert A. Pastor, *Improving the U.S. Electoral System*, 3 ELECTION L.J. 584, 588 (2004) (proposing a variety of election reforms, including a photo identification requirement to vote). For a complete list of commission members, go to <http://www.american.edu/ia/cfer/members.htm> (last accessed Mar. 14, 2006).

<sup>3</sup> 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) *available at* [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (last accessed Jan. 6, 2006). 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 dissent to 250-words per commissioner that Executive Director Robert Pastor first announced at our final meeting.

<sup>4</sup> See, e.g., Dan Balz, *Carter-Baker Panel to Call for Voting Fixes: Election Report Urges Photo IDs, Paper Trails And Impartial Oversight*, WASH. POST, Sep. 19, 2005, at A3; Jimmy Carter & James A. Baker III, *Voting Reform is in the Cards*, NY TIMES, Sept. 23, 2005, at A19; Brian DeBose, *Panel recommends photo ID for voters*, WASH. TIMES, Sept. 20, 2005, at A4; James Gerstenzang, *Election*

the only states to prohibit citizens from casting a ballot unless they produce photo identification, and bills that tighten voter identification requirements are currently pending in Congress and 29 state legislatures.<sup>5</sup> Polls show that 81 percent of Americans favor or strongly favor requiring voters to produce a photo identification card before voting.<sup>6</sup> Several recommendations of the Commission's 2001 predecessor—the Carter-Ford Commission—were enacted into law in the Help America Vote Act of 2002,<sup>7</sup> and hopeful photo identification advocates repeatedly cited the 2005 Carter-Baker Commission's recommendation to bolster their proposals.<sup>8</sup>

This Article is the first academic work to analyze photo identification requirements in depth, and it employs an empirical cost-benefit approach to

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*Overhaul is Urged*, L.A. TIMES, Sep. 19, 2005, at A7; John Harwood, *Panel on Elections Proposes Changes*, WALL ST. J., Sep. 20, 2005, at A18; *Report urges photo IDs to curb vote fraud*, COMMERCIAL APPEAL (Memphis, TN), Sept. 20, 2005, at A4; Sep. 19, 2005, at A16; News Hour with Jim Lehrer (PBS television broadcast Sep. 19, 2005).

<sup>5</sup> S. 414, 109th Cong., 2<sup>d</sup> Sess. § 203 (2005) (proposed legislation that would require all in-person voters in federal elections to present current and valid photo identification before voting).

<sup>6</sup> See HART & MCINTURFF, NBC NEWS AND THE WALL STREET JOURNAL, Study # 6062 (2006), at 13 <http://online.wsj.com/public/resources/documents/poll20060426.pdf>. (poll conducted in April 2006 finding that 62 percent strongly favor the showing of a photo identification before voting, 19 percent somewhat favor, 12 percent not sure, 3 percent somewhat opposed and only 4 percent strongly opposed). JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY, 5 (2004) (citing a Rasmussen poll showing that 82 percent of Americans believe that “people should be required to show a driver’s license or some other form of photo ID before they are allowed to vote”).

<sup>7</sup> 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 (2001) *available at* [http://millercenter.virginia.edu/programs/natl\\_commissions/commission\\_final\\_report/1\\_front\\_text\\_to\\_page\\_15.pdf](http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/1_front_text_to_page_15.pdf) (last accessed Mar. 19, 2006). The Century Fund and the Miller Center of Public Affairs at the University of Virginia organized the Carter-Ford Commission. *Id.*

<sup>8</sup> See, e.g. Gary Andres, Editorial, *Public Backs Voter IDs; But Liberals Don’t Get It*, WASH. TIMES, Oct. 17, 2005, at A19 (“One of the commission’s central recommendations calls for all voters to show a standard photo ID, like a driver’s license, as a condition to vote.”); 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”); *Photo ID for Voters Discourages Fraud*, Editorial, LANCASTER NEW ERA (Lancaster, Pa.), Sep. 30, 2005, at A10 (a national photo ID requirement is a “practical, relatively simple way to eliminate the opportunity for voter fraud . . . [and] has the endorsement of a private commission”); Dane Smith, *Panel OKs Bill Requiring Citizenship Proof to Vote*, STAR TRIB. (Minneapolis, Minn.), Mar. 16, 2006, at 1B (Republican sponsor of state legislation to require voters to show proof citizenship notes that the bipartisan commission recommended a photo ID requirement).

expose the erroneous assumptions of conventional wisdom.<sup>9</sup> It argues that before jumping on the photo identification bandwagon, policymakers should examine closely 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 20 million Americans who lack photo identification could erroneously skew a larger number of elections.<sup>10</sup>

No systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date,<sup>11</sup> but the best existing data suggests that a photo identification requirement would do more harm than good. An estimated 6 to 10 percent of voting-age Americans do not possess a state-issued photo identification card, and in states such as Wisconsin 78 percent of African-American men ages 18-24 lack a driver's license.<sup>12</sup> By comparison, a study of 2.8 million ballots cast in 2004 in

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<sup>9</sup> 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. 1144, 1154 (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); Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. LAW & POL. 277, 288-89 (2005); Pastor, *supra* note 2, at 588. See also Dan Eggen, *Official's Article on Voting Law Spurs Outcry*, WASHINGTON POST, Apr. 13, 2006, at A19 (identifying 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, Hans von Spakovsky, as "Publius," the author of the Texas Review of Law & Politics article).

<sup>10</sup> See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 7, at 60-66 (Chapter Six, Verification of Identity) (asserting that six percent to ten percent of voting-age Americans (approximately 11 million to 20 million potential voters) do not possess a driver's license or a state-issued non-driver's photo identification card); Brennan Ctr. for Justice, NYU Sch. Of Law & Spencer Overton, Response to the Report of the 2005 Commission on Federal Election Reform 3 n.10 (2005) (estimating that 22 million voting-age citizens lack a driver's license based on analysis of 2003 Census and Federal Highway Administration data).

<sup>11</sup> Chandler Davidson, Tanya Dunlap, Gale Kenny, & Benjamin Wise, Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both? 99 (2004) available at [http://www.votelaw.com/blog/blogdocs/GOP\\_Ballot\\_Security\\_Programs.pdf](http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf) (last accessed Feb. 12, 2006). Rather than wait 12 to 18 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.

<sup>12</sup> See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 7, at 60-66 (Chapter Six, Verification of

Washington State showed only 0.0009 percent of the ballots involved double voting or voting in the name of deceased individuals.<sup>13</sup> If further study confirms that photo identification requirements would deter over 6,700 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 have shaped the photo identification debate rather than comprehensive academic analysis. 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 because people without specialized knowledge can understand stories, 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 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

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Identity); John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 4-5 (June 2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

<sup>13</sup> *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf>.



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.<sup>14</sup> Various constitutional and statutory provisions promote broad participation by eliminating voter qualifications that many believed were reasonable, such as paying a \$2 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.<sup>15</sup>

This Article engages in a careful and meticulous analysis of the conceptual, empirical, and legal issues arising from photo identification proposals, effectively establishing the terms of an inevitable academic debate on the subject.

In addition, the Article applies an empirical approach that has the potential to reframe various election law controversies.<sup>16</sup> 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,<sup>17</sup> 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

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<sup>14</sup> See *infra* Part III.B.

<sup>15</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

<sup>16</sup> 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) (suggesting that courts and scholars should rely on empirical data rather than mere anecdote and speculation in the context of voting rights, and asserting that “values cannot be debated apart from underlying facts and assumptions about facts.”).

<sup>17</sup> Cf. Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, ElectionLaw@Moritz, Oct. 18, 2005, available at <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php> (last accessed Feb. 27, 2006) (website entry asserting that election law should be based on hard data and rigorous analysis rather than merely anecdotes and intuition).

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 30 minutes, 15 minutes, or 5 minutes? What societal gains are realized through increased productivity by those who no longer wait an hour to vote, and increased political participation by those who refuse to wait in long 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.

More and more, 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.<sup>18</sup> 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.”<sup>19</sup>

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 that requires photo identification not only deters fraudulent votes but also inhibits

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<sup>18</sup> 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); Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

<sup>19</sup> Cass 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).

legitimate ones reflects its overinclusiveness and its burden on the fundamental right to vote. Better data will 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 it 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.

## 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 one more vote than Al Gore for every 11,100 votes cast in Florida,<sup>20</sup> 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 do 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 purport to "assist" senior citizens with voting effectively cast absentee ballots for those with dementia.<sup>21</sup> Poll

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<sup>20</sup> 531 U.S. 98 (2000).

<sup>21</sup> FUND, *supra* note 6, at 44, 47; *see also* Paul Applebaum, Richard Bonnie, Brian James, Rosalie Kane, Pamela Karlan, Jason Karlawish, David Knopman, Constantine Lyketsos & Christopher Patusky, *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dimantia*, 292 JAMA 1345, 1348 (2004) (asserting that absentee voting by persons with dementia creates a potential

workers stuff ballot boxes to benefit their favored candidate.<sup>22</sup> Ineligible voters, such as former felons, noncitizens, nonresidents, and people who have already voted, cast illegal ballots with impunity. The National Voter Registration Act of 1993 worsened these problems, advocates argued, because it limited the extent to which officials could purge deadwood voters from the polls.<sup>23</sup> According to integrity advocates, a photo identification requirement at the polls would solve some of these problems.<sup>24</sup>

The claims about voter fraud arose from an earlier movement that focused on the integrity of elections in the 1960s.<sup>25</sup> 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.<sup>26</sup> Republicans responded by organizing “Operation Eagle Eye,” an intricate anti-fraud campaign designed to detect and eliminate unqualified voters from registration rolls, challenge the qualifications of suspicious voters at the polls, and deter fraud through securing press coverage of the security program and taking photographs of voters at polling places.<sup>27</sup> Republicans deployed tens of thousands of poll challengers in the 1964 presidential election, many of whom were

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pool of votes that can be exploited by third parties).

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *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 to remove the names of ineligible voters from the official lists of eligible voters” where 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, Pub. L. 103-31, 107 Stat. 77 (1993); codified at 42 U.S.C. §§ 1973gg-6.

<sup>24</sup> *See* FUND, *supra* note 6, at 136-139.

<sup>25</sup> Although the anti-fraud movement took on a national partisan cast that implicated race following the 1960 presidential election, concerns about fraud and voter suppression existed decades earlier. In 1928, 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 do not properly provide for the purging of dead wood from the registration lists.” *Id.* at 59. In response, 38 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 (2005). Additionally, several state political parties employed ballot protection teams to challenge voters’ literacy and citizenship at the polls prior to 1960.

<sup>26</sup> *See* GUMBEL, *supra* note 26, at 161-69.

<sup>27</sup> *See* DAVIDSON, ET AL., *supra* note 11, at 25-35.

concentrated in 36 major metropolitan Democratic strongholds.<sup>28</sup> Democrats and civil rights groups charged that Operation Eagle Eye deterred legitimate voter participation and intimidated voters of color.<sup>29</sup> Similar ballot security efforts continued in subsequent elections, accompanied by claims of voter suppression.<sup>30</sup>

Following the closely contested 2000 presidential contest, Congress passed the Help America Vote Act of 2002.<sup>31</sup> 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 do not appear on the rolls,<sup>32</sup> but the law also required that all first-time voters who registered by mail provide photo or non-photo documentary identification (such as a utility bill or bank statement) when they arrive at the polls.<sup>33</sup> States remain split as to how other voters must identify themselves.

#### *A. Existing State Laws for Identifying Voters*

As of 2005, only Georgia and Indiana required photo identification as an absolute condition to vote. The other 48 states fell into four general categories.<sup>34</sup>

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<sup>28</sup> *Id.* at 26.

<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.* at 40-95 (2004) (documenting ballot security programs from 1968 to 2004, and detailing 13 case studies of “ballot security excesses”).

<sup>31</sup> As discussed above, Congress adopted many of the recommendations proposed by the 2001 Carter-Ford Commission on Federal Election Reform. The Carter-Ford Commission explicitly rejected a proposal for voter identification requirements at the polls.

<sup>32</sup> 42 U.S.C. § 15482(a).

<sup>33</sup> *Id.* at § 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, pay check, or other government document that shows the name and address of the voter.” 42 U.S.C. § 15483(b).

<sup>34</sup> While states outside of Georgia and Indiana generally fall into one of the four categories listed below, some states provide additional detailed rules. Alaska and Missouri, for example, allow a voter who lacks documentary identification to cast a ballot if he or she is identified by poll workers. ALASKA STAT. § 15.15.225 (Michie 2005); MO. REV. STAT. § 115.427 (2005). Voters in Louisiana who lack photo identification are subject to challenge. LA. REV. STAT. ANN. §§18:562, 18:565 (West 2005). 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.*

*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.<sup>35</sup> In

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COLO. REV. STAT. §§ 1-7-110 (2005).

<sup>35</sup> As of July 1, 2005, the population of the District of Columbia and the 28 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, U.S. Dep't of Com., Annual Estimates of the Population for the United States, and for Puerto Rico: April 1, 2000 to July 1, 2005 (2005), available at <http://www.census.gov/popest/states/NST-ann-est.html> (last accessed Feb. 17, 2006). 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. CAL. ELECTIONS CODE § 14243 (Deering 2005); D.C. CODE ANN. § 1-1001.07 (2005); Board of Elections and Ethics, District of Columbia, District of Columbia Voter Guide 3 (2004) available at [http://www.dcboee.org/voterinfo/voter\\_guide.shtm](http://www.dcboee.org/voterinfo/voter_guide.shtm) (last accessed Jan. 21, 2006); IDAHO CODE § 34-410 (2005); 10 ILL. COMP. STAT. 5/17-9 (2005); Ill. State Board of Elections, Illinois Voter Information, available at [http://www.elections.state.il.us/Downloads/VotingInformation/PDF/Illinois\\_Voter\\_Information.pdf](http://www.elections.state.il.us/Downloads/VotingInformation/PDF/Illinois_Voter_Information.pdf) (last accessed Jan. 5, 2006); IOWA CODE ANN. § 49.77 (West 2005); ME. REV. STAT. ANN. tit. 21-A, § 671 (West 2005); MD. CODE ANN., Election Law § 10-310 (2005); MASS. GEN. LAWS ANN. ch. 54, § 76 (2005); MICH. COMP. LAWS §§ 168.727, 168.736 (2005); MINN. STAT. § 204C.10 (2005); MISS. CODE ANN. § 23-15-541 (2005); NEB. REV. STAT. § 32-914 (2005); NEV. REV. STAT. §§ 293.285, 293.272, 293.283 (2005); N.H. REV. STAT. ANN. § 659:13 (2005); N.J. STAT. ANN. § 19:15-17 (West 2005); N.Y. ELEC. LAW §§ 8-302, 8-404 (Consol. 2005); N.C. GEN. STAT. § 163-166.7 (2005); OHIO REV. CODE ANN. § 3505.18 (Anderson 2005); OKLA. STAT. tit. 26, § 7-114 (2005); OR. REV. STAT. § 254.385 (2003); R.I. GEN. LAWS § 17-19-24 (2005); TEX. ELEC. CODE ANN. §§ 63.001, 63.0011 (Vernon 2005); UTAH CODE ANN. § 20A-3-104 (2005); VT. STAT. ANN. tit. 17, § 2563 (2005); W. VA. CODE ANN. § 3-1-34 (2005); WIS. STAT. § 6.79 (2005); WYO. STAT. ANN. § 22-3-118 (Michie 2005). 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 (2005); 25 PA. CONS. STAT. § 3050 (2005). In 1996, Michigan passed a law that requested photo identification but allowed voters without an identification to sign an affidavit to establish their identity. MICH. COMP LAWS ANN. § 168.523 (West 2006) (“If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.”). The law was never implemented, however, because the Michigan Attorney General issued an advisory opinion that found the identification requirement unconstitutional. 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 Democrat nominees opposed the opinion). Dawson Bell, *Court Jumps Into Dispute over Voter ID Checks*, DETROIT FREE PRESS, April 27, 2006, available at <http://www.freep.com/apps/pbcs.dll/article?AID=/20060427/NEWS06/604270623&template=printart> (last accessed June 7, 2006).

these states poll workers check a voter's name off of pre-printed 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,<sup>36</sup> taking an oral oath,<sup>37</sup> reciting their birth date and address to the poll worker,<sup>38</sup> or signing a poll book that is compared to the voter's signature on file.<sup>39</sup>

*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 non-photographic form of identification, such as a utility bill, bank statement, government check, or paycheck.<sup>40</sup> In these states, voters who do not bring documentary identification to the polls can establish their identity by signing an affidavit or by some other means.<sup>41</sup>

*Photo identification requested, not required.* A few states request that voters produce a form of photo identification but provide other avenues for voters who lack photo identification to establish their identity, such as by signing an affidavit or reciting their birth date and address.<sup>42</sup>

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<sup>36</sup> See, e.g., IOWA CODE ANN. § 49.77 (West 2005).

<sup>37</sup> See, e.g., CAL. ELECTIONS CODE § 14243 (Deering 2005).

<sup>38</sup> See, e.g., MD. CODE ANN., Election Law § 10-310 (2005).

<sup>39</sup> See, e.g., N.J. STAT. ANN. § 19:15-17 (West 2005). Although Oregon now conducts its elections by mail (OR. REV. STAT. § 254.465 (2003)), county clerks are nonetheless required to maintain some physical polls (OR. REV. STAT. § 254.474 (2003)), and voters who opt to cast a ballot in person establish their identity by signing a poll book. OR. REV. STAT. § 254.385 (2003).

<sup>40</sup> 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. ARK. CODE ANN. § 7-5-305 (Michie 2005); CONN. GEN. STAT. § 9-261 (2004); DEL. CODE ANN. tit. 15, § 4937 (2005); KY. REV. STAT. ANN. §§ 117.227, 117.245 (Michie 2005); N.D. CENT. CODE § 16.1-05-07 (2005); TENN. CODE ANN. § 2-7-112 (2005).

<sup>41</sup> In North Dakota, voters without photo identification can vote without being challenged by providing their date of birth – provided that a member of the election board or a clerk knows them personally, and will vouch that they are a qualified voter. N.D. CENT. CODE § 16.1-05-07 (2005). Voters who are not recognized by poll workers may still vote if they sign an affidavit that they are a qualified voter. N.D. CENT. CODE § 16.1-05-06 (2005). 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 to the prosecuting attorney . . . [who] may investigate possible voter fraud.” ARK. CODE ANN. § 7-5-305 (Michie 2005).

<sup>42</sup> In 2005, voters without photo identification could establish their identity by signing an affidavit in

*Documentary identification required.* Ten states require documentary identification as an absolute requirement to vote: Alabama, Alaska, Arizona, Colorado, Missouri, Montana, New Mexico, South Carolina, Virginia, and Washington.<sup>43</sup> Acceptable identification generally includes photo identification, or non-photo identification such as a utility bill or bank statement. Thus, these states effectively expand the Help America Vote Act's documentary requirements for first-time voters who registered by mail to all voters.<sup>44</sup>

### B. *Photo Identification Requirements to Vote*

In 2005, Republican-controlled legislatures in Georgia<sup>45</sup> and Indiana<sup>46</sup> passed laws mandating government-issued photo identification as an absolute requirement to vote at the polls.<sup>47</sup>

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Florida, Louisiana, and South Dakota, and by reciting their birth date and address in Hawaii. FLA. STAT. ANN. § 101.043 (2005); LA. REV. STAT. ANN. §18:562 (West 2005); S.D. CODIFIED LAWS § 12-18-6.1 (2005); HAW. REV. STAT. § 11-136 (2005).

<sup>43</sup> See ALA. CODE. § 17-11A-1 (2005); ALASKA STAT. § 15.15.225 (Michie 2005); ARIZ. REV. STAT. § 16-579 (2005); COLO. REV. STAT. §§ 1-7-110, 1-1-104(19.5) (2005); MO. REV. STAT. § 115.427 (2005); MONT. CODE ANN. § 13-13-114 (2005); N.M. STAT. ANN. §§ 1-12-7.1, 1-1-24 (2005); S.C. CODE ANN. §§ 7-13-710, 7-5-125, 7-5-180 (Law. Co-op. 2005); VA. CODE ANN. § 24.2-643 (Michie 2005); WASH. REV. CODE § 29A.44.205 (2005). Arizona is unique in that a voter without photo identification must produce two pieces of non-photo documentary identification that have both the voter's name and address. ARIZ. REV. STAT. § 16-579 (2005). [The Missouri legislature recently passed a photo identification requirement, and when it is signed into law this categorization will be modified]

<sup>44</sup> A couple of states, however, are more restrictive in the non-photo 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 (Michie 2005).

<sup>45</sup> GA. CODE ANN. § 21-2-417 (2005).

<sup>46</sup> IND. CODE § 3-11-8-25.1 (Michie 2005).

<sup>47</sup> In the Georgia Senate, 31 Republicans voted for the measure, while 18 Democrats and two Republicans voted against it. Ga. Gen. Assemb., Senate Vote 565, available at [http://www.legis.state.ga.us/legis/2005\\_06/votes/sv0565.htm](http://www.legis.state.ga.us/legis/2005_06/votes/sv0565.htm) (last accessed Mar. 10, 2006). In the Georgia House, 90 Republicans and 1 Democrat voted for it, while 72 Democrats and 3 Republicans voted against it. Ga. Gen. Assemb., House Vote 510, available at [http://www.legis.state.ga.us/legis/2005\\_06/votes/hv0510.htm](http://www.legis.state.ga.us/legis/2005_06/votes/hv0510.htm) (last accessed Mar. 10, 2006). See also Ga. Gen. Assemb., HB 244, at [http://www.legis.state.ga.us/legis/2005\\_06/sum/hb244.htm](http://www.legis.state.ga.us/legis/2005_06/sum/hb244.htm) (last accessed Feb. 25, 2006) (legislative history of Senate Bill 84). In the Indiana House, all 52 Republicans who were present voted for the bill; all 45 Democrats who were present voted against it. Ind. Gen. Assemb., Action List: Senate Bill 0483, available at <http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2005&request=getActions&doctype=SB&dono=0483> (last accessed Mar. 19, 2006); Ind. Gen. Assemb., Roll Call 259: Passed, available at



Georgia's new statute reduced the acceptable forms of identification from 17—which included non-photo identification such as bank statements and paychecks—down to six forms of government-issued photo identification.<sup>48</sup> The new law also made a photo identification an absolute requirement to vote at the polls by eliminating an earlier provision that allowed voters without identification to sign an affidavit. The new Georgia law did not, however, require that absentee voters establish their identity through photo identification.<sup>49</sup>

The American Civil Liberties Union, Common Cause, and other groups brought suit challenging the law under the Voting Rights Act, the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the U.S. Constitution, and other legal provisions.<sup>50</sup> 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 constitute a poll tax.<sup>51</sup>

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.<sup>52</sup> The statute included exceptions for the “indigent [who are] unable to obtain proof of identification without the

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<http://www.in.gov/legislative/bills/2005/PDF/Hrollcal/0259.PDF.pdf> (last accessed Mar. 19, 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 legislatures in five other states have passed photo identification laws that Democratic governors subsequently vetoed. FUND, *supra* note 6, at 138.

<sup>48</sup> GA. CODE ANN. §§ 21-2-220, 21-2-417 (2005); Sonji Jacobs & Carlos Campos, *Perdue Signs ID Bill*, ATLANTA J. CONST. Apr. 23, 2005, at 1B.

<sup>49</sup> See GA. CODE ANN. § 21-2-381 (indicating that applicants for absentee ballot must provide their address and identify the primary, election, or run-off in which they intend to vote).

<sup>50</sup> Complaint for Declaratory and Injunctive Relief at 32-41, Common Cause/GA v. Billups, No. 4:05-CV-0201-HLM, 2005 U.S. Dist. LEXIS 26222, at \*115, (N.D. Ga. Oct. 18, 2005).

<sup>51</sup> Common Cause/GA v. Billups, No. 4:05-CV-0201-HLM, 2005 U.S. Dist. LEXIS 26222, at \*115, (N.D. Ga. Oct. 18, 2005). 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, *Politics Alleged in Voting Cases*, WASH. POST, Jan. 23, 2006, at A1.

<sup>52</sup> IND. CODE § 3-11-8-25.1 (Michie 2005).

payment of a fee” and voters whose religious beliefs prevent them from being photographed.<sup>53</sup> Voters who fall into either of those categories may cast a provisional ballot at the polling place, which will be counted within two weeks of the election 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).<sup>54</sup> Like the Georgia law, the Indiana photo identification requirement did not require that absentee voters establish their identity through photo identification.<sup>55</sup>

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.<sup>56</sup>

In September 2005, the Carter-Baker Federal Commission on Election Reform recommended that the remaining 48 states adopt a photo identification requirement.<sup>57</sup> The Commission connected its photo identification proposal to the “Real ID” Act, which prohibits states from issuing a driver’s license or non-driver’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.<sup>58</sup> The Carter-Baker Commission recommended that states require a “Real ID” card as a prerequisite for voting at the polls.<sup>59</sup>

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

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<sup>53</sup> IND. CODE § 3-11.7-5-2.5(c) (Michie 2005). Voters who live and cast their ballots in a state licensed care facility are not required to show photo identification. *Id.* at § 3-11-8-25.1(f) (Michie 2005).

<sup>54</sup> *Id.* (“all provisional ballots must be counted by not later than noon on the second Monday following the election”).

<sup>55</sup> IND. CODE § 3-11-10-1.2 (2006).

<sup>56</sup> *Ind. Democratic Party v. Rokita*, No. 1:05-CV-0634-SEB-VSS, 2006 WL 1005037, at \*35, \*47 (S.D. Ind. Apr. 14, 2006).

<sup>57</sup> COMM’N ON FED. ELECTION REFORM, *supra* note 3, at 18-21.

<sup>58</sup> *Id.* at 19-21.

<sup>59</sup> *Id.* at 21.

ID” cards to non-drivers free of charge.<sup>60</sup> 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.<sup>61</sup> Thereafter, the showing of a “Real ID” card would be an absolute requirement to vote.<sup>62</sup> The Commission also proposed that states confirm the identity of absentee voters not through “Real ID,” but through signature match.<sup>63</sup>

Before states follow the lead of Georgia, Indiana, and the Carter-Baker Commission, however, lawmakers should pause to closely examine 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 ones that are sure to evoke indignation or other emotions rather than the most typical anecdotes, 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*

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<sup>60</sup> *Id.* at 21, 33-34.

<sup>61</sup> *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 President, to Robin Carnahan, Missouri Secretary of State (Mar. 16, 2006) (available at [http://www.sos.mo.gov/img/03-16-06\\_President\\_Carter\\_Letter.pdf](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).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 20.

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 100, 10,000, or 1,000,000 votes cast.<sup>64</sup> As Professor Michael Saks has written:

[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 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. . . . [E]ven 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.<sup>65</sup>

Professor David Hyman illustrates the shortcomings of anecdote in policymaking by recounting a story conveyed by President Ronald Reagan. For years Reagan told the story of an alleged "welfare queen" who he claimed used 80 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.<sup>66</sup> The reliance on anecdote to discredit the welfare system became common. One white waitress in suburban Chicago who was married to a police officer complained that "blacks buy porterhouse steaks

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<sup>64</sup> See David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 836 (1998) ("The significance of a story of oppression depends on its representativeness. . . . to 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.")

<sup>65</sup> 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).

<sup>66</sup> See *The Mendacity Index*, WASH. MONTHLY, Sep. 1, 2003, at 27.

with food stamps, while we eat hamburgers.”<sup>67</sup> The woman admitted that she “had never actually seen any blacks do this. But she had heard and read stories, and that [was] enough.”<sup>68</sup>

Anecdotes about voter fraud are also misleading and fail to indicate the frequency of the alleged fraud.<sup>69</sup>

For example, although John Kerry lost the 2004 presidential race nationwide, he won Wisconsin by just 11,000 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 uncovered nine people who voted in Milwaukee in November 2004 and also cast ballots in Chicago, Minneapolis, or Madison.<sup>70</sup> The press conference was held in front of one of the homes allegedly used to vote twice, according to GOP chair Rick Graber.<sup>71</sup> “We now are able to make this link to show that this voter fraud has crossed state lines,” announced Republican State Representative Jeff Stone.<sup>72</sup>

In its September 2005 Report, the Carter-Baker Commission on Federal Election Reform 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

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<sup>67</sup> Hyman, *supra* note 66, at 804 n.28; Isabel Wilkerson, *The Tallest Fence: Feelings on Race in a White Neighborhood*, N.Y. TIMES, June 21, 1992, at 1.

<sup>68</sup> *Id.*

<sup>69</sup> 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.

<sup>70</sup> See Greg J. Borowski, *9 May Have Voted in 2 Cities*, MILWAUKEE J. SENTINEL, Aug. 10, 2005, at B1.

<sup>71</sup> See *Voter ID Gets Push From GOP; Milwaukee Cases Cited As Example*, CAPITAL TIMES (Madison, Wis.), Aug. 10, 2005, at 3A.

<sup>72</sup> See Borowski, *supra* note 72, at B1.

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.<sup>73</sup>

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.”<sup>74</sup>

But these Wisconsin anecdotes are misleading.

Of the nine “double voting” names presented by the Republican Party leadership at their press conference, the Republican-appointed U.S. Attorney found that *none* involved fraud.<sup>75</sup> 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.<sup>76</sup>

In its support for a photo identification requirement, the Carter-Baker Commission on Federal Election Reform also failed to disclose a variety of important factors regarding the Wisconsin anecdote.<sup>77</sup>

First, the ballots examined by the U.S. Attorney/Milwaukee County District Attorney taskforce differ from those in other states. Most states require voters to register in advance of Election Day and restrict the casting of

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<sup>73</sup> See COMM’N ON FED. ELECTION REFORM, *supra* note 3, at 4 (citing MILWAUKEE POLICE DEPARTMENT, MILWAUKEE COUNTY DISTRICT ATTORNEY’S OFFICE, FEDERAL BUREAU OF INVESTIGATION, AND UNITED STATES ATTORNEY’S OFFICE TASK FORCE, PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD (May 10, 2005), available at <http://www.wispolitics.com/1006/electionfraud.pdf>); *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).

<sup>74</sup> *Id.* at 90 (additional statement of Commissioner Susan Molinari).

<sup>75</sup> See Borowski, *supra* note 72, at B1.

<sup>76</sup> *Id.*

<sup>77</sup> Cf. Martha Minow, *Stories in Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 24, 31 (Peter Brooks & Paul Gewirtz eds., 1996) (noting “selectivity problems in storytelling,” and the conscious refusal to include “additional stories [which] convey unattractive features of the community that I was trying to paint in a sympathetic light”).

regular ballots to those on the voting rolls.<sup>78</sup> Wisconsin and five other states, however, have Election Day registration, and thus unregistered individuals can show up, register, and cast a vote.<sup>79</sup> The taskforce investigation focused on 70,000 Milwaukee votes of individuals who registered at the polls on election day, a pool of votes that would not exist in 44 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.” Out of the 70,000 same-day registrations studied, investigators found only about 100 questionable instances in which people may have voted twice, used false addresses or fake names, or voted in the name of a dead person.<sup>80</sup>

Assuming that each of these instances resulted from intentional voter fraud rather than a clerical mistake or other explanation, this is a fraud rate of less than one seventh of one percent (0.14 percent to be exact), or one in 700. And the rate may not be that high. As of December 2005, authorities had charged only four people out of the group, and three of the charges resulted in dismissal, acquittal, and a hung jury.<sup>81</sup>

Contrary to the claims of Carter-Baker Commissioner Molinari, the law enforcement taskforce did not find that the Wisconsin election was “decided by illegal votes.”<sup>82</sup> Even in the improbable event that all 100 alleged fraudulent votes and 200 improper felon votes were cast for John Kerry,

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<sup>78</sup> 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.

<sup>79</sup> Idaho, Maine, Minnesota, New Hampshire, and Wyoming also allow voters to register on election day. WIS. STAT. § 6.55 (2005); IDAHO CODE ANN. § 34-408A (2006); ME. REV. STAT. ANN. tit. 21-A, § 122 (2005); MINN. STAT. § 201.061 (2005); N.H. REV. STAT. ANN. §§ 654:7-a, 654:7-b (2005); WYO. STAT. § 22-3-104 (2005).

<sup>80</sup> MILWAUKEE POLICE DEP'T, MILWAUKEE COUNTY DISTRICT ATT'Y'S OFFICE, FED. BUREAU OF INVESTIGATION, & U.S. ATT'Y'S OFFICE TASK FORCE, PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD (May 10, 2005), available at <http://www.wispolitics.com/1006/electionfraud.pdf> (last accessed Mar. 10, 2006).

<sup>81</sup> See Steve Schultze, *No vote fraud plot found; Inquiry leads to isolated cases, Biskupic says*, MILWAUKEE J. SENTINEL, Dec. 6, 2005, at A1.

<sup>82</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 90 (additional statement of Commissioner Susan Molinari).

Kerry's lead in the state would be reduced from 11,000 to 10,700 in Wisconsin. The U.S. Attorney explicitly stated, "We don't see a massive conspiracy to alter the election in Milwaukee, one way or another."<sup>83</sup>

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 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."<sup>84</sup> 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**

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<sup>83</sup> See Schultze, *supra* note 83, at A1. 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 State gubernatorial that was decided by 129 votes. COMM'N ON FED. ELECTION REFORM, *supra* note 3, 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 that "this fact was established by a lengthy trial and decision of the court." COMM'N ON FED. ELECTION REFORM, *supra* note 3, 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 concluded that that of more than 2.8 million ballots, only six were cast by voters who voted twice and 19 were cast in the name of deceased individuals. *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf>. Since the margin of victory was 129 votes, it is clear that these 25 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 for Democratic candidate Christine Gregoire. Further, the Commission did not emphasize that most if not all of the 19 votes cast statewide in the names of the dead were cast absentee, and thus would not have been prevented by a photo identification requirement at the polls (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.

<sup>84</sup> 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 accessed Feb. 24, 2006).



**fraud.** In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference.<sup>85</sup>

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 10 cases of voter fraud, a photo identification requirement would deter from voting 1, 100, or 10,000 legitimate voters.<sup>86</sup> Depending on the magnitude of fraud, a photo identification requirement could erroneously skew more election outcomes than a lack of a photo identification requirement.<sup>87</sup>

In addition to overlooking typicality, anecdotes often distract with emotion and fail to reveal the causes or effects of fraud.<sup>88</sup> 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

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<sup>85</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 18 (2005) (emphasis added).

<sup>86</sup> *Cf. Saks, supra* note 67, at 1161 ("It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs. The proportion of cases that results in one or the other error, and the ratio of one kind of error to the other, ought to be of greater interest to serious policy-makers than a handful of anecdotes on either side of the issue.").

<sup>87</sup> *Cf. id.* at 1162 ("The answers to most questions about the behavior of the litigation system are inherently statistical. Anecdotes simply do not provide the information one needs to assess the system.").

<sup>88</sup> *Id.* at 1159 ("Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects."). Professor Richard Epstein states:

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*, 45 STAN. L. REV. 1671, 1678 (1993) (remarks of Professor Richard Epstein), *cited in Hyman, supra* note 66, at 836.

in either Virginia or Florida while they made their deadly preparations for 9/11.<sup>89</sup>

Photo identification proponents rely on this dramatic statement to cite the potential for voter fraud. One editorialist, for example, claimed that “[h]ad [the hijackers] survived, they could have shown up on Election Day and voted.”<sup>90</sup> But it remains unclear that eight of the hijackers were registered to vote—data has not yet been found to confirm this assertion.<sup>91</sup> 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 19 hijackers obtained 63 driver’s licenses from various states and “could have shown up on Election Day and voted” even had a photo identification requirement to vote existed.

Photo identification advocates also regularly cite irregularities that would not be prevented by a photo identification requirement.

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<sup>89</sup> FUND, *supra* note 6, at 1.

<sup>90</sup> See e.g., *One Lawyer, One Vote*, Editorial, INVESTOR’S BUS. DAILY, Oct. 22, 2004, at A16 (“Had they survived, they could have shown up on Election Day and voted.”); John O’Sullivan, Editorial, *Voter Fraud is Both Easy to Commit – and Easy to Stop*, CHI. SUN-TIMES, Oct. 19, 2004, at 37 (“[T]hey [the terrorists] could have turned up at the voting booth on Nov. 2.”). Members of Congress used this same argument during the debate over the Help America Vote Act. See e.g., 148 CONG. REC. S1171 (2002) (statement of Sen. Bond that “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.”).

<sup>91</sup> When my research assistant Daniel Taylor contacted John Fund and asked about the source of the fact that eight of the hijackers were registered in either Florida or Virginia, John Fund indicated that he 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 (Chertoff is now Secretary of Homeland Security), but so far no has 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 September 11 hijackers were registered to vote in VA. She was familiar with the claim, and indicated that they looked into it while she was Secretary of the Board of Elections. However, they had a difficult time getting 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 have not yet been returned. [This note will be revised as more facts come in].

For example, proponents regularly cite fictitious people, illegal aliens, and pets being registered and the fact that voting rolls contain more names than U.S. Census records as a justification for photo identification requirements.<sup>92</sup> Photo identification advocates fail to disclose that many bloated voting rolls are not caused by malicious citizens who plan to vote in multiple jurisdictions. Instead, bloated rolls are often caused county registrars failing to purge voters' old data after they 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 "Mickey Mouse," and a third time as "Mary Poppins," rather than by workers who get paid \$2 per name registered and profit by padding their registrations with fictitious names. 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.<sup>93</sup>

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.<sup>94</sup> A photo identification requirement at the polls, however, does not prevent absentee ballot fraud. Indeed, in Georgia and Indiana

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<sup>92</sup> See FUND, *supra* note 6, at 4; COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 4 (asserting that "[o]ne potential source of election fraud arises from inactive or ineligible voters left on voter registration lists," and that "there 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, C13); COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 72 (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.").

<sup>93</sup> See *Common Cause/Ga.*, No. 4:05-CV-0201-HLM, at \*102 (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.").

<sup>94</sup> See, e.g., Deroy Murdock, *A Necessary Shaming*, NATIONAL REVIEW, Sept. 14, 2004 (citing several examples of fraudulent absentee voting and bloated voting rolls to criticize those who resist photo identification requirements at the polls); COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 4 (citing ex-felon voting and votes cast in the names of the dead as evidence of fraud in a closely-contested 2004 Washington State gubernatorial as evidence that a photo identification requirement is needed, but failing to disclose that many of the votes cast in the name of the dead were absentee); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366 (N.D.Ga. 2005) (Asserting that the argument that requiring photo identification at the polls furthers the interest of preventing voter fraud is unavailing when "the Photo ID requirement does absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations.").

absentee voters need not produce photo identification, and the Carter-Baker Commission proposed that states confirm the identity of absentee voters through signature match rather than photo identification.<sup>95</sup>

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. Policymakers 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 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?<sup>96</sup>

Analogy is a common rhetorical tool, but it has limitations. As Professor Cass Sunstein has written:

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

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<sup>95</sup> GA. CODE ANN. § 21-2-381 (2005); IND. CODE § 3-11-10-1.2 (2006); COMM’N ON FED. ELECTION REFORM, *supra* note 3, at 20.

<sup>96</sup> See COMM’N ON FED. ELECTION REFORM, *supra* note 3, at 18 (“Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important”); *Voting should require photo identification*, POST-CRESCENT (Appelton, WI) February 2, 2005 (“As for people being less likely to vote, think about it. Does the need to show an ID make people less likely to go grocery shopping or buy a pack of cigarettes?”).

situations tell us little until we impose some sort of pattern on them.<sup>97</sup>

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

While a photo identification requirement in voting and other contexts aims to ensure that a person is who she presents 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.<sup>98</sup> 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 22-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 differ as well. In the airline and commercial context, 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 1,000 “safe” air travelers who lack photo identification, the benefits of excluding one fraudulent voter do not outweigh the costs of excluding 1,000 legitimate voters.

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

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<sup>97</sup> Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993).

<sup>98</sup> FUND, *supra* note 6, at 137 (“Opposition to photo ID laws has often reached comical levels. In the 1990s, the Clinton administration managed to come up with a public policy argument that people had to show a photo ID to buy cigarettes, while on the other hand, a state could not fight election fraud by requiring photo ID.”).

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 merchants determine whether the requirement would increase or decrease profits.

Even with non-monetary 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. Despite the fact that minors can 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.

Policymakers 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.<sup>99</sup> 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.

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A photo identification requirement could disenfranchise 20 million Americans, and policymakers should resist the temptation to rush to adopt the proposal based solely on anecdotes, analogy, and “common sense” popular

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<sup>99</sup> The Carter-Baker Commission on Federal Election Reform expressly adopted a signature requirement rather than a photo identification requirement for absentee ballots. *See* COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 20.

assumptions.<sup>100</sup> Without hard data, many people misperceive risk.<sup>101</sup> About four in ten Americans believe, for instance, that flying in an airplane is more dangerous than riding in a car, even though in reality people are more than twice as likely to die for every mile they ride in a car than for every mile they fly in a plane.<sup>102</sup> 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.<sup>103</sup> 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 photo identification, it is crucial to understand the scope and nature of voter

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<sup>100</sup> 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”). Many photo identification advocates defer to “common sense” rather than hard data and risk analysis. See, e.g., *Press Release, Missouri Republican Party, Mo. Republican Party: Secretary of State Carnahan Opposes Common Sense Voting Measure* (Feb. 15, 2006) (criticizing Democratic Secretary of State for opposing a photo ID requirement); *Preserving Election Integrity*, Editorial, LAS VEGAS REV. J., Jan. 28, 2006, at 14B (“Georgia’s [photo ID] bill is a common-sense reform that would bolster public confidence in the election process.”); Chuck Williams, *Voter ID Battle at Forefront: Controversial Bill Could See Vote by End of Week*, COLUMBUS LEDGER-ENQUIRER (Columbus, Ga.), Jan. 11, 2006 (quoting a state representative as saying, “What is the big deal about showing a picture ID. It just makes common sense. To me it is a no-brainer.”); 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.”).

<sup>101</sup> See Sunstein, *supra* note 19, at 1123 (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

<sup>102</sup> See Bureau of Trans. Statistics, U.S. Dep’t of Trans., “Omnibus Survey Household Survey Results Summary Report – December 2000,” available at [http://www.bts.gov/programs/omnibus\\_surveys/household\\_survey/2000/december/summary\\_report.html](http://www.bts.gov/programs/omnibus_surveys/household_survey/2000/december/summary_report.html) (last accessed Mar. 1, 2006); Office of Hazardous Materials Safety, U.S. Dep’t of Trans., “A Comparison of Risk,” available at <http://hazmat.dot.gov/riskmgmt/riskcompare.htm> (last accessed Mar. 1, 2006).

<sup>103</sup> See Ann Bostrom, *Risk Perceptions: “Experts” v. “Lay People,”* 8 DUKE ENVTL. L. & POL’Y F. 101 (1997) (illustrating how heuristics used by laypersons sometimes lead to biases in risk perception); P. Sandman, *Risk Communication: Facing Public Outrage*, 13 EPA JOURNAL 21-22 (1987) (distinguishing the probability and magnitude of harm from the qualitative aspect of risk that prompts public anger or worry). Control, familiarity, and emotion need not be removed from all decision making, but in light of the misperception of risk, policymakers and courts also need real data to make informed judgments.

fraud. Policymakers 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 also indicates 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 vote fraud has been conducted at either the national or the state level.<sup>104</sup> This gap in knowledge is not inevitable. This Part examines the best available data on the fraudulent votes 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 allows for 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,<sup>105</sup> and thus would not be prevented by a photo identification requirement.

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<sup>104</sup> DAVIDSON, ET AL., *supra* note 11, at 99.

<sup>105</sup> Cf. Peter Prengaman, *Fake ID Sellers Dismiss Tamperproof Push*, AP, June 2, 2006, available at <http://abcnews.go.com/US/wireStory?id=2035012&CMP=OTC-RSSFeeds0312> (last accessed June



### 1. *Investigations and Prosecutions of Voter Fraud*

Policymakers 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 88 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 0.00000045 percent.<sup>106</sup> The Carter-Baker Commission's Report noted that since October 2002, federal officials had charged 89 individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, and voting improperly as a non-citizen.<sup>107</sup> Examined in the context of the 196,139,871 ballots cast between October 2002 and August 2005, this represents a fraud rate of 0.0000005 percent (note also that not all of the activities charged would have been prevented by a photo identification requirement).<sup>108</sup>

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

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7,2006) (reporting that modern computer technology makes producing false identification easier and more difficult for authorities to prevent); Donna Leinwand, *Tech-Savvy Teens Swamp Police With Fake ID's*, USA TODAY, July 2, 2001, available at <http://www.usatoday.com/news/nation/2001/07/02/fake-ids.htm> (last accessed June 7, 2006) (“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.

<sup>106</sup> See THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO & THE LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE: A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO, June 14, 2005, available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf> (last accessed Mar. 19, 2006) (study finding only four cases of fraud statewide, based on interviews of the Director or Deputy Director of each of the state's 88 county Boards of Elections in June 2005, and asked “Where there any voter fraud cases within your county from the Election of 2002 and 2004?”).

<sup>107</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 45 (citing U.S. Department of Justice press release, “Department of Justice to Hold Ballot Access and Voting Integrity Symposium,” Aug. 2, 2005).

<sup>108</sup> See BRENNAN CTR. FOR JUSTICE & OVERTON, *supra* note 10, at 9-10.

the factors that led law enforcement to prosecute fraud. The study would demand significant resources because it would require that researchers interview and pour over the records of local district attorneys and election boards.<sup>109</sup>

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 1,000 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 as possible with fresh memories.

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?”).

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<sup>109</sup> Professor Lorraine C. Minnite states:

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, Assistant Professor, Barnard College, Columbia University, lcm25@columbia.edu, to election-law\_gl@majordomo.lls.edu (Apr. 21, 2005, 20:52:30 EST) (on file with the author).

Further, some voters will not be located by researchers and others will refuse to talk to researchers. Photo identification proponents might construe these non-respondents as improper registrations that were used to commit voter fraud.<sup>110</sup>

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 three states that request photo identification but also allow voters to establish their identity through affidavit—Florida,<sup>111</sup> Louisiana,<sup>112</sup> and South Dakota.<sup>113</sup> In South Dakota, for example, only two percent of voters signed affidavits to establish their identity. If the survey indicates that 95 percent of those who signed affidavits are legitimate voters (and the other 5 percent were shown to be either fraudulent or were non-responsive), this suggests that voter fraud accounts for, at the maximum, 0.1 percent of ballots cast.

The affidavit study, however, is limited to three states, and it is unclear whether this sample is representative of other states (the difficulty may be magnified in Louisiana in the aftermath of Hurricane Katrina's displacement of hundreds of thousands of voters). 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.

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<sup>110</sup> *Id.*

<sup>111</sup> See FLA. STAT. ANN. § 101.043 (2005).

<sup>112</sup> See LA. REV. STAT. ANN. §18:562 (West 2005).

<sup>113</sup> See S.D. CODIFIED LAWS § 12-18-6.1 (2005).

Imagine that one million people live in state A, which has no documentary identification requirement. Death records show that 20,000 people passed away in state A in 2003. A cross-referencing of this list to the voter rolls shows that 10,000 of those who died were registered voters, and these names remained on the voter rolls during the November 2004 election. Researchers would look at what percentage of the 10,000 dead-but-registered people who “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 a photo identification requirement would not prevent).<sup>114</sup> 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 also might be inflated by false positives produced by a computer match of different people with the same name.<sup>115</sup> Photo identification advocates would likely assert that the rate of voter fraud could be higher among fictitious names registered, and that the death record survey would not capture that type of fraud because fictitious names registered would not show up in the death records. Nevertheless, this study, combined with the other

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<sup>114</sup> Cf. Jingle Davis, *Even Death Can't Stop Some Voters*, ATLANTA J. AND CONST., Nov. 6, 2000, at 1A (finding that of 1.1 million deaths since 1980, 5,412 ballots were cast in the name of dead people over a 20 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 “actual number of ballots cast by the dead is fairly small”) and not distinguishing absentee votes from those cast at the polls); In contested Tennessee state senate seat in which Democrat Ophelia Ford won by 13 votes out of 8,653 votes cast in September 2005, an investigation showed that two votes were cast by dead people. See Lawrence Buser, *Senate gets nod for Ford vote today*, COMMERCIAL APPEAL, Apr. 19, 2006, at A1 (“Ford received 4,333 votes, while Republican candidate Terry Roland of Millington received 4,320.”); Marc Perrusquia, *Dead voter evidence goes to DA*, COMMERCIAL APPEAL, May 19, 2006, at B1 (reporting that “someone at a North Memphis precinct cast ballots in the names of two dead voters in the Sept. 15 election narrowly won by Ophelia Ford.”).

<sup>115</sup> Any computer “matches” would require more detailed investigation to ensure that they are not false positives. See THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND PROFESSOR MICHAEL McDONALD, ANALYSIS OF THE SEPTEMBER 15, 2005 VOTER FRAUD REPORT SUBMITTED TO THE NEW JERSEY ATTORNEY GENERAL, 4 (2005) (“Attempts to match data on one list to data on another list will often yield ‘false positives’: two records that at first appear to be a match do not actually represent the same person. The natural incidence of ‘false positives’ for a matching exercise of this scale—especially when, as here, conducted with relatively little attention to detail—readily explains the ostensible number of double votes.”).

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, policymakers need better data on 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."<sup>116</sup> Participation is a crucial democratic value. As Justice Brandeis remarked, "the greatest menace to freedom is an inert people."<sup>117</sup>

Widespread participation serves four functions. First, it exposes decision makers to a variety of ideas and viewpoints, which ensures fully informed decisions.<sup>118</sup> The failure to consider a wide, representative range of views sacrifices deliberation.<sup>119</sup> Second, widespread participation allows the people as a whole to check the power of government officials who might otherwise enact or tolerate abusive practices.<sup>120</sup> Accountability to the electorate as a whole ensures democratic legitimacy,<sup>121</sup> which in turn

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<sup>116</sup> Stuart Langton, *What is Citizen Participation?*, in *CITIZEN PARTICIPATION IN AMERICA* 13, 17 (Stuart Langton ed., 1978).

<sup>117</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>118</sup> 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) ("Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process.").

<sup>119</sup> Cf. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) (listing one of the values of speech as "attainment of truth" acquired "by considering all facts and arguments which can be put forth in behalf of or against any proposition").

<sup>120</sup> 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 . . .").

<sup>121</sup> See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 205–07 (1989) (identifying responsiveness "as the core of a theory of legitimacy"); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 232 (1967) (arguing that a "representative government must not merely be in control, not merely promote the public interest, but must also be responsive to the people"); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (Elly Stein & Jane Mansbridge trans., 1987) (arguing that "the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself").

increases the likelihood that citizens will voluntarily comply with such decisions.<sup>122</sup> Third, widespread participation allows for a redistribution of government resources and priorities to reflect evolving problems and needs.<sup>123</sup> Finally, widespread participation furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives.<sup>124</sup>

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 20 to 30 percentage points, and one survey ranked the United States 139<sup>th</sup> of 170 democracies.<sup>125</sup>

In light of the importance of widespread participation, policymakers 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 twelve percent of voting-age Americans lack a driver's license,<sup>126</sup> and an analysis of 2003 Census and Federal Highway Administration data estimates that 22 million voting-age citizens lack a driver's license.<sup>127</sup> Three to four percent of

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<sup>122</sup> See MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 132 (1981) (presenting the hypothesis that "[t]he 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.").

<sup>123</sup> See KWEIT & KWEIT, *supra* note 125, at (asserting that the goals of public participation include the redistribution of power).

<sup>124</sup> 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 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").

<sup>125</sup> See Rafael López Pintor *et al.*, International IDEA, *Voter Turnout since 1945: A Global Report* 78-85 (2002), available at [http://www.idea.int/publications/vt/upload/VT\\_screenopt\\_2002.pdf](http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf). (last accessed Mar. 7, 2006).

<sup>126</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 73 n. 22. According to the Federal Highway Administration, 13.2 percent of U.S. residents 16 years and older lacked a driver's license. <http://www.fhwa.dot.gov/policy/ohim/hs03/pdf/d11c.pdf>

<sup>127</sup> BRENNAN CTR. FOR JUSTICE & OVERTON, *supra* note 10, at 3 n.10

voting-age Americans carry a non-driver's photo identification card issued by a state motor vehicle agency in lieu of a driver's license.<sup>128</sup> Thus, according to the 2001 Carter-Ford Commission, an estimated six percent to ten percent of voting-age Americans (approximately 11 million to 20 million potential voters) do not possess a driver's license or a state-issued non-driver's photo identification card.<sup>129</sup>

Federal data suggests that younger and older Americans are less likely to have a driver's license. While the rate of unlicensed individuals ages 25-69 hovered between five percent and 11 percent in 2003, the percentages of older and younger Americans who lack a driver's license were much higher:

*U.S. Residents Unlicensed by Age*<sup>130</sup>

<u>Age</u>	<u>% w/o license</u>	<u>Age</u>	<u>% w/o license</u>
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	19.3		

Other studies on demographic disparities in photo identification focus largely on particular areas and localities. According to the Georgia chapter of AARP, for example, 36 percent of Georgians over age 75 lack a driver's license.<sup>131</sup> 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.<sup>132</sup> Of the 40 million

<sup>128</sup> Publius, *supra* note 9, at 277, 289 (citing Fed. Elections Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office*, at 5-6 (1995-96)).

<sup>129</sup> See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 7, at 60-66 (Chapter Six, Verification of Identity).

<sup>130</sup> Fed. Highway Admin., U.S. Dep't of Trans., *Distribution of Licensed Drivers by Sex and Percentage in Each Age Group and Relation to Population: 2003* (Oct. 2004), available at <http://www.fhwa.dot.gov/policy/ohim/hs03/pdf/dl20.pdf> (last accessed Mar. 7, 2006).

<sup>131</sup> See Nancy Badertscher & Tom Baxter, *State AARP Criticizes Voter ID Bill*, ATLANTA J. CONST., Mar. 17, 2005, at 4C.

<sup>132</sup> See Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to

Americans with disabilities, nearly ten percent lack identification issued by the government.<sup>133</sup>

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.<sup>134</sup> The study determined that 23 percent of Wisconsin residents (177,399 individuals) over age 65 do not have a Wisconsin driver's license or state photo identification.<sup>135</sup> Thirty percent of voting-age residents in Milwaukee County lack a driver's license, compared with 12 percent of residents in the balance of Wisconsin.<sup>136</sup> Statewide, significant racial and age disparities also existed, the most striking being that 78 percent of African American males ages 18-24 lack a valid driver's license.<sup>137</sup>

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Sheri Marcus Morris, La. Assistant Att'y Gen. (Nov. 21, 1994).

<sup>133</sup> See Center for Policy Alternatives, Voter Identification and Integrity, available at <http://www.stateaction.org/issues/issue.cfm/issue/VoterIdentification.xml> (last accessed Feb. 12, 2006).

<sup>134</sup> See Pawasarat, *supra* note 12, at 1.

<sup>135</sup> *Id.*

<sup>136</sup> *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 JUSTICE & OVERTON, *supra* note 10, at 3 n.11 (citing Elizabeth Daniel, *The New Voter Identification Requirement*, GOTHAM GAZETTE (NEW YORK, N.Y.), April 2002, at <http://www.gothamgazette.com/article/20020401/17/728> (last accessed Feb. 28, 2006)).

<sup>137</sup> Pawasarat, *supra* note 12, at 5.



*Race and Percentage of Unlicensed Wisconsin Residents*<sup>138</sup>

	<u>Ages 18-24</u>	<u>All Voting Ages</u>
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.<sup>139</sup>

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<sup>138</sup> *Id.* at 4, 5.

<sup>139</sup> 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 did not diminish African-American turnout in the 2000 or 2004 general elections. Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Just., to U.S. Sen. Christopher S. Bond, (Oct. 7, 2005), available at [http://www.usdoj.gov/crt/voting/misc/ga\\_id\\_bond\\_ltr.htm](http://www.usdoj.gov/crt/voting/misc/ga_id_bond_ltr.htm) (last accessed Mar. 7, 2006). 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 using 17 types of documentary identification (including non-photo identification such as utility bills or bank statements) or by signing an affidavit, and HAVA requirements that applied only to first-time voters who registered by mail, and allowed them to establish their identity through non-photo 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 60 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 percent-77.8 percent black) have only 87.7 percent of the identification cards per 1000 voting-age residents as the 10 counties with the highest percentage of whites (93.4 percent-97.1 percent white). See Letter from University of Chicago Law

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 population. 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.<sup>140</sup> 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.<sup>141</sup> Finally, if a photo identification requirement to vote is enacted, some people who lack a state-issued photo identification will likely obtain one 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 10 percent of the voting-age population who lack state-issued photo identification, 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 non-driver'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.<sup>142</sup>

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School Professor Adam Cox, Harvard Law School Professor Heather Gerken, Emory Law School Professor Michael Kang, George Washington University Law School Professor Spencer Overton, and Ohio State University Moritz College of Law Professor Daniel Tokaji to John Tanner, Assistant Att'y Gen. for the C.R. Div., U.S. Dep't of Just. (Aug. 19, 2005) (on file with author) (emphasis in original).

<sup>140</sup> The Carter-Baker Commission's recommendation limited acceptable forms of identification to a driver's license or state issued photo identification issued under the Real ID Act. COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 20.

<sup>141</sup> *See id.* at 21.

<sup>142</sup> Real ID Act of 2005, Pub. L. No. 109-13, Div. B, Title II, § 202(c), 119 Stat. 231, 302.

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.<sup>143</sup> 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, fewer than two percent had driver's licenses that listed their dorm's address.<sup>144</sup> Over 76 percent of Wisconsin renters moved between January 1995 and 2000, compared with only 22 percent of homeowners.<sup>145</sup> During this same time period, 44 percent of whites moved, compared with 75 percent of Asian Americans, 74 percent of Latinos, 63 percent of African Americans, and 61 percent of Native Americans.<sup>146</sup>

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, Florida, and Louisiana request photo identification but allow voters to sign an affidavit in lieu of presenting

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<sup>143</sup> 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," at <http://moritzlaw.osu.edu/blogs/tokaji/2005/12/ohio-election-bill-clears-senate.html> (last accessed Feb. 28, 2006).

<sup>144</sup> Pawasarat, *supra* note 12, at 11-12.

<sup>145</sup> *Id.* at 17.

<sup>146</sup> *Id.* at 18.

such identification, and the number and demographic patterns of the affidavits in these states could indicate which voters would be excluded by making a photo identification card an absolute requirement to vote. For example, reports of the 2004 primary in South Dakota showed that two percent of voters used an affidavit statewide, whereas between four percent and 16 percent of voters used affidavits in the predominantly Native American counties of Shannon, Todd, Corson, Dewey and Zieback.<sup>147</sup>

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

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While partisans can construe any study to favor their preferred outcomes, policymakers should obtain and consider the best data available.

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<sup>147</sup> Chet Brokaw, *Lawmakers Asked to Repeal Voter Identification Law*, ABERDEEN NEWS (Aberdeen, SD), 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 along with a group of 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: 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 142 (emphasis in original). 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."

Granted, empirical data is sometimes misleading due to value-driven research assumptions or deliberate skewing or manipulation of data.<sup>148</sup> 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 completely dismiss empirical data and defer solely to misleading anecdotes and flawed analogies, policymakers 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 policymaking 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.<sup>149</sup>

##### 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

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<sup>148</sup> See e.g., Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181 (1999) (arguing against overreliance on “science” in agency decisionmaking).

<sup>149</sup> 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 18 years of age or older shall not be denied or abridged on account of age), the Fifteenth Amendment (prohibiting racial discrimination in voting), the Voting Accessibility for the Elderly and Handicapped Act, and various state constitutional claims. U.S. CONST. art. XXVI; *Id.* at art. XV; Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678, 42 U.S.C. § 1973 *et seq.*

may unduly burden the fundamental right to vote that stems from the First and Fourteenth Amendments.<sup>150</sup>

While allowing that “there must be a substantial regulation of elections if they are to be fair and honest,”<sup>151</sup> 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.<sup>152</sup>

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<sup>150</sup> See *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, (1979) (asserting that “voting is of the most fundamental significance under our constitutional structure.”); *Reynolds v. Sims*, 377 U.S. 533, 561 (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.”); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (“[W]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.”) 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*, CHICAGO SUN-TIMES, Nov. 23, 2004, at 37 (citing *Bush v. Gore*, 531 U.S. 98, 104 (2000) (asserting that “the individual citizen has no federal constitutional right to vote for electors for the President of the United States.”)). This Article does not address the need for the passage of a right-to-vote constitutional amendment, but it does note the U.S. Supreme Court has repeatedly recognized that voting is a fundamental right that arises from the First and Fourteenth Amendments.

<sup>151</sup> See *Storer v. Brown*, 415 U.S. 724, 730 (1974).

<sup>152</sup> *Anderson*, 460 U.S. at 789. *Accord* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358

The test operates on a continuum—there exists “[n]o bright line” that separates permissible from unconstitutional election regulation.<sup>153</sup> Strict scrutiny applies to “severe” restrictions on voting rights,<sup>154</sup> lesser burdens trigger less exacting review, and “reasonable, nondiscriminatory restrictions” are usually constitutional if “important regulatory interests” exist.<sup>155</sup>

### I. *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.<sup>156</sup> These judges can speculate that photo identification is

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(1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>153</sup> See *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.’”); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“No litmus-paper test . . . separates those restrictions that are valid from those that are invidious.”).

<sup>154</sup> *Burdick*, 504 U.S. at 434; *Norman v. Reed*, 502 U.S. 279, 289 (1992).

<sup>155</sup> *Timmons*, 520 U.S. at 358-59.

<sup>156</sup> See, e.g., *The League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (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 3, at 18-19. Growing cynicism in the absence of a photo identification requirement, the argument goes, lowers voter participation. See FUND, *supra* note 6, at 2 (suggesting that low confidence may result in low voter turnout). The problem, however, is that a lack of empirical data allows photo identification proponents to make these claims without explaining the extent to which a lack of a photo identification requirement lowers voter confidence and participation relative to the existence of other factors, such as manipulation of voting rules by politicians that suppresses voter turnout. 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

not unreasonably burdensome because of fee waivers and new photo identification distribution programs.<sup>157</sup> A judge skeptical of a photo identification requirement, on the other hand, can emphasize assumptions that negate the existence of voter fraud and 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 1,000,000 citizens regularly turn out to vote. Empirical studies suggest that five percent of legitimate voters in the state (50,000 people) will not bring a photo identification card to the polls if it were required, and most of these will be ethnic minorities who regularly support Party A. Studies also suggest that in the absence of a photo identification requirement at the polls, 50 fraudulent votes would be cast (0.005 percent of votes cast).

In considering the magnitude<sup>158</sup> of the injury, the court can look to evidence that suggests 50,000 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.<sup>159</sup> In examining the "legitimacy and strength"<sup>160</sup> of the "precise interests put forward by the State,"<sup>161</sup> the court can quantify the

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lower the perception of corruption, and concluding that courts should not base their decisions about the need for campaign restrictions on popular opinion).

<sup>157</sup> *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.")

<sup>158</sup> *Anderson*, 460 U.S. at 789.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*



state's interest in preventing 50 fraudulent votes. The Court can determine whether it is "necessary to burden"<sup>162</sup> the legitimate voters with a photo identification requirement by looking at data on the effectiveness of alternatives such as an affidavit in deterring most fraudulent voters and very few legitimate ones.<sup>163</sup>

## 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.<sup>164</sup> A statute is overinclusive when the proportion of invalid applications of the statute is substantially high relative to valid applications.<sup>165</sup> 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 prevents all voter fraud and simultaneously includes all legitimate voters. Any rule will tend to be underinclusive and allow for some fraudulent voting, overinclusive and inhibit some legitimate votes, and often both.

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<sup>162</sup> *Id.*

<sup>163</sup> See *infra* Part V for a discussion of supplements and alternatives to absolute photo identification requirements.

<sup>164</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996).

<sup>165</sup> See *N.Y. 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. Okla.*, 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) ("Other legal doctrines, such as the requirement of 'narrow tailoring' under strict scrutiny, serve a function similar to overbreadth."); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37 n.152 ("The issue generally is framed in terms of the availability of less restrictive alternatives . . . . In the First Amendment area we speak of overbreadth, but fashions in the use of language cannot disguise the substantive identity of the two inquiries . . . .").

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.<sup>166</sup> Regulations subject to intermediate scrutiny must be substantially related to an important government interest, and regulations subject to rational-basis scrutiny must be rationally related to a legitimate government interest.

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

For example, assume data reveals that a photo identification requirement excluded 1,000 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 3,000 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

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<sup>166</sup> 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.).

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 1,000 fraudulent votes and 1,000 legitimate votes is “narrowly tailored,” or whether a photo identification law that deters 250 fraudulent votes and 1,000 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, where as other judges might err on the side of 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? How about if 100 fraudulent votes were cast and split evenly between the parties (both Republicans and Democrats received 50 fraudulent votes apiece), but a photo identification requirement deterred voting by 90 Democratic voters and no Republican voters?

Statistical data will not answer these normative questions, but such data is necessary for an honest conversation about normative values to occur. 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.<sup>167</sup> This Article explores alternatives below in Part V.

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<sup>167</sup> To satisfy the most lenient standard of review, rational basis review, a law must only be “reasonable” and “rationally related” to a “legitimate governmental interest.” See e.g. *Lying v. Int’l*

B. *Photo Identification Fees as Poll Taxes*

Many states charge a fee to issue a photo identification card,<sup>168</sup> and better data can establish whether a photo identification requirement to vote violates the Twenty-Fourth Amendment's prohibition on poll taxes.<sup>169</sup>

Georgia's law allowed residents to file an affidavit of indigency to receive a free photo identification.<sup>170</sup> 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 being non-indigent and unwilling to either lie about financial status or pay for a card to vote.<sup>171</sup> 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.<sup>172</sup> While the court's conclusion may be correct, empirical data on the number of voters likely to complete the affidavit of

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Union, 485 U.S. 360, 370 (1988). To pass review under strict scrutiny, a law or policy must be justified by a compelling governmental interest and must also constitute the least restrictive means for satisfying that interest. *See e.g.* *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 807 (1996). Under intermediate scrutiny, a regulation must be substantially related to an important government objective. *See e.g.* *United States v. Virginia*, 518 U.S. 515, 524 (1996).

<sup>168</sup> *See e.g.*, *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*124 (noting that in Georgia, "The fee for a Photo ID card is \$ 20 for a five-year card and \$ 35 for a ten-year card.")

<sup>169</sup> U.S. Const. amend. XXIV (asserting that the right to vote in federal elections, "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. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966).

<sup>170</sup> *See* GA. CODE ANN. § 40-5-103 (2005); *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*126-27 (quoting the affidavit of indigency that Georgians must sign to obtain a free photo identification). Following a court challenge, in 2006 Georgia legislators passed a revised of the law that directs the state to distribute the photo identification for free. *See* GA. CODE ANN. §§ 21-2-417, 40-5-103 (2006); *see also* IND. CODE § 3-11.7-5-2.5(c) (Michie 2005) (allowing indigent individuals unable to afford a photo identification the ability to cast a ballot).

<sup>171</sup> *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*126-27.

<sup>172</sup> *See* *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) (holding that a Virginia requirement that those who do not pay a poll tax file a 'certificate of residency' constituted a "material requirement" that abridged the right to vote in violation of the Twenty-Fourth Amendment) (*cited in Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*126-27).

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.<sup>173</sup> As mentioned above, however, after 2007 the Real ID Act prohibits states from issuing photo identification without documentary proof of an applicant's full legal name and date of birth, Social Security number, and citizenship. Depending on the state, a birth certificate costs from \$10.00 to \$45.00. A passport costs \$85.00 and certified naturalization papers cost \$19.95.<sup>174</sup> 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 to vote" on account of race or color.<sup>175</sup> 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.<sup>176</sup>

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<sup>173</sup> See GA. CODE ANN. §§ 21-2-417, 40-5-103 (2006); COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 10.

<sup>174</sup> BRENNAN CTR. FOR JUSTICE & OVERTON, *supra* note 10, at 4.

<sup>175</sup> 42 U.S.C.A. § 1973(a).

<sup>176</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 44-45, n.19 (1986) ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."); ELLEN KATZ WITH MARGARET AISENBREY, ANNA BALDWIN, EMMA CHEUSE, AND ANNA WEISBRODT, VOTING RIGHTS INITIATIVE AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL, DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 8-9 (2006) (showing that only 36 of 322 Section 2 lawsuits since 1982 challenged election procedures); see e.g., *United States v. Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (finding that identification requests from Latino voters, hostility of poll officials against Latino voters, and other factors led to an Section 2 violation); *Operation Push v. Mabus*, 932 F.2d 400

A violation of Section 2 is established if:

. . . based 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.<sup>177</sup>

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.”<sup>178</sup>

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,<sup>179</sup> but litigants should also commission detailed studies that analyze racial disparities in the state where the voter identification law is challenged.

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(1991) (finding that Mississippi’s dual registration system violated Section 2 of the Voting Rights Act). Dan 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*, 58 S.C. L. REV. (forthcoming 2006) (recommending a Section 2 test for election procedures in which “a prima facie case could be made by showing that the challenged practice is a but for cause of racial disparity in voting, but the state or local entity would still have the opportunity to demonstrate that this practice is necessary to achieve a compelling government interest.”).

<sup>177</sup> 42 U.S.C.A. § 1973(b).

<sup>178</sup> *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (emphasis added). Cf. Tokaji, *supra* note 179 (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).

<sup>179</sup> See, e.g., Pawasarat, *supra* note 12.

A showing of a disparate racial impact of photo identification alone, however, is insufficient to establish a Section 2 violation.<sup>180</sup> Courts must also weigh a non-exclusive 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.<sup>181</sup> “The essence of a §2 claim is that 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.”<sup>182</sup>

Statistical evidence helps establish whether these other relevant factors exist in a particular state, such as 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.<sup>183</sup> These

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<sup>180</sup> See *Wesley v. Collins*, 791 F.2d 1255, 1260-61(6th Cir. 1986).

<sup>181</sup> *Thornburg*, 478 U.S. at 44-45. Other Senate factors include, but are not limited to:

. . . the 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 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.* at 44-45.

<sup>182</sup> *Id.* at 47.

<sup>183</sup> Some photo identification advocates assert that a single, uniform photo identification rule protects voters from discrimination, as it is subject to less discretionary interpretation than signature interpretation by pollworkers or a complex list like government documents and bank statements. COMM’N ON FED. ELECTION REFORM, *supra* note 3, at iv (“There is likely to be less discrimination against minorities if there is a single, uniform ID, than if poll workers can apply multiple standards.”). This argument has a number of shortcomings. First, the substance of policy is critical, not just uniformity for the sake of uniformity. A voting restriction that uniformly excludes voters, like a uniform poll tax of \$20, thwarts fairness. Second, additional hurdles to vote, like a photo identification requirement, increase the authority of pollworkers to use their discretion (both in waiving photo identification requirements for certain voters and in determining whether a voter matches her identification). Third, allowing voters at the polls to enjoy the same right to establish their identity through signature that absentee voters enjoy promotes more uniformity than disparate treatment of these two groups, especially if data shows that absentee ballots are more susceptible to fraud.

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, while an identical photo identification requirement in Georgia violates 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.<sup>184</sup>

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

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<sup>184</sup> 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 and thus have political consequences 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.”).



Individual fraud stigmatizes elections, according to this perspective, but reduced turnout due to a photo identification requirement does not compromise electoral integrity.<sup>185</sup>

Judges who emphasize individual responsibility avoid issues of vote dilution.<sup>186</sup> 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.”<sup>187</sup> 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 voter turnout is reduced 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.<sup>188</sup> Through associating with others, individual voters create incentives for politicians to respond to their needs.<sup>189</sup> Voting is a “vehicle for self-development and identification, and a means for creating alliances and thus a community among individuals so engaged.”<sup>190</sup>

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<sup>185</sup> Cf. Kimberle 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).

<sup>186</sup> 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 “invert[s] 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”).

<sup>187</sup> *Reynolds*, 377 U.S. at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

<sup>188</sup> 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”).

<sup>189</sup> Gerken, *supra* note 189 at 1678 (“Vote aggregation helps an individual convey her needs to her representative and creates an incentive for politicians to pay attention to her concerns.”).

<sup>190</sup> Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 513 (2000).

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 unable to produce a photo identification but also their allies who do produce a photo identification card.<sup>191</sup>

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. Photo identification advocates recognize the structural elements inherent in the statement that “voters are disenfranchised by the counting of improperly cast ballots or outright fraud” or that a close election could be determined by fraudulently cast votes.<sup>192</sup> 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, policymakers 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.

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<sup>191</sup> Gerken, *supra* note 189, 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 Misrepresentation: 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.”).

<sup>192</sup> FUND, *supra* note 6, at 8.

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 for individuals to vote who arrive at the polls without photo identification, such as affirming their 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 issues while still requiring a photo identification card as an absolute condition to vote. Rather than simply assuming that the proposals will address all access issues, an empirical analysis of proposals designed to enhance access is needed. 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, for example, stated:

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.<sup>193</sup>

This broad statement makes assumptions without providing empirical data, and thus policymakers are unable to assess the statement’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 when the Real ID’s enhanced requirements of documentary evidence of citizenship, place of birth, and

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<sup>193</sup> *Developments in the Law*, *supra* note 9, at 1154.

Social Security number after 2007 make obtaining photo identification more difficult?

When policymakers explore supplements to photo identification 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 excluded.

### 1. *Free Photo Identification*

In 2005, Georgia allowed for individuals who completed a form declaring indigency to obtain a free photo identification card,<sup>194</sup> and the Carter-Baker Commission proposal would give free photo identification to all non-drivers.<sup>195</sup> As mentioned above, policymakers should look to data rather than simply assuming that free photo identification programs will resolve all access problems.<sup>196</sup> Some individuals will not take advantage of the programs because they do not know of them, do not have the time to apply, are 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.<sup>197</sup> Others may secure a free photo identification card and lose it, have it stolen, or simply forget to bring it to the polls.

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<sup>194</sup> GA. CODE ANN. § 40-5-103 (2005). Following a court challenge, in 2006 Georgia legislators passed a revised version of the law that directs the state to distribute the photo identification for free. GA. CODE ANN. §§ 21-2-417, 40-5-103 (2006).

<sup>195</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 3, at 10.

<sup>196</sup> See Publius, *supra* note 9, 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.”).

<sup>197</sup> *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*107-09 (explaining that the Georgia indigency affidavit was insufficient, and listing the various classes of citizens who would remain without photo identification).

## 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.<sup>198</sup> 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 rest 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.<sup>199</sup> 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.<sup>200</sup> A spokesperson for Georgia Governor Sonny Perdue acknowledged the shortcomings of using a hand-me-down bus from another agency when she said, “It may be a bumpy road getting the bus out into the state . . . . We’ve got to start with the resources we’ve got and can’t spend money we don’t have.”<sup>201</sup> While the mobile bus had the capacity to issue 200 photo identifications a day, it issued fewer than 500 licenses during the last three months of 2005.<sup>202</sup>

<sup>198</sup> COMM’N ON FED. ELECTION REFORM, *supra* note 3, at 69.

<sup>199</sup> Carlos Campos, *Photo ID Bus Gets Little Use*, ATLANTA J. CONST., Dec. 19, 2005 (observing that the idea of the mobile bus 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.

<sup>200</sup> *See* georgia.gov, *DDS Begins Mobile Licensing Tours & Center Reservations for Photo IDs*, at [http://www.georgia.gov/00/article/0,2086,4802\\_4961\\_41800330,00.html](http://www.georgia.gov/00/article/0,2086,4802_4961_41800330,00.html) (last accessed Feb. 28, 2006); *see also* Georgia Department of Driver Services, “GLOW Bus Schedule,” at <http://www.dds.ga.gov/drivers/glowbus.aspx> (last accessed Feb. 28, 2006) (showing that in the entire month of March 2006, the bus will be open to the public on only three days).

<sup>201</sup> Nancy Badertscher, *State Bus Will Roll for Voter IDs*, ATLANTA J.-CONST., Aug. 9, 2005, at 1B.

<sup>202</sup> Campos, *supra* note 202; *see also* Matthew S.L. Cate, *Photo ID Bus Rolls into Northwest Georgia*, CHATTANOOGA TIMES FREE PRESS, Dec. 21, 2005, at NG4; *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*106-07 (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

### 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, 13 people without photo identification voted provisionally and two of them returned within the 48-hour period following the election with a photo identification card.<sup>203</sup> 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 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 30 days before an election, six states have Election Day registration and have enjoyed a voter turnout increase of nine to 14 percentage points.<sup>204</sup> Some have claimed that Election Day registration invites fraud, but these concerns might dissipate if a state-issued photo identification were required to vote.<sup>205</sup>

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have valid IDs.” Campos, *supra* note 202. Michigan has a relatively robust mobile ID program, but ten percent of voting-age citizens in Michigan remain without driver’s licenses and non-driver’s photo identification cards. Brennan Center, Tel. Conf. with Christopher Thomas, Michigan Director of Elections, Sept. 21, 2004 (estimating that 90 percent of eligible voters in Michigan possess driver’s licenses or state-issued ID). Data from 2003 indicates that 90.2 percent of the driving age population in the state of Michigan possess a driver’s license. See Fed. Highway Admin, *supra* note 133.

<sup>203</sup> *Common Cause/Ga*, No. 4:05-CV-0201-HLM, at \*113-14.

<sup>204</sup> The election day registration states are Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming. See *supra* note 73.

<sup>205</sup> 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 3, at 9. Election day

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.

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

Several methods exist for confirming the identity of voters who lack photo identification at the polls, 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 policymakers can make an informed comparison with photo identification requirements.

*1. Non-Photo 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 such 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 that allow either photo or non-photo identification to vote, but also accommodate voters without such documentation by providing an affidavit exception.

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registration may be less expensive and more feasible than universal registration, however, because government is not charged with affirmatively registering all voting-age citizens.

Photo identification advocates would likely argue that non-photo documentation allows for more fraud than photo documentation.<sup>206</sup> Statistical study is needed, however, to establish the extent to which improper impersonation using non-photo 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.

### 3. *Signature Comparison*

Most states without documentation requirements currently require that all voters establish their identity by signing a poll book. 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, voters who do not provide photo identification may sign an affidavit attesting to their identity under penalty of perjury. An alternative option would require that voters using affidavits cast provisional ballots that election officials count only after they electronically match the affidavit signature against the signature the voter provided during registration. Studies should investigate the extent to which affidavits mitigate

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<sup>206</sup> See Publius, *supra* note 9, at 288-89 (asserting that “it is obvious that allowing documents without photographs is not an acceptable security measure for our voter registration and voting process.”).



access concerns (bureaucratic mismanagement might hinder access by some voters) and the extent to which affidavits reduce voter fraud.<sup>207</sup>

### 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.<sup>208</sup> Empirical studies should examine the extent to which these solutions would hamper voter registration, and further normative discussion is necessary regarding privacy issues implicated by the proposals.

### 7. *Better Election Administration Practices*

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.

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<sup>207</sup> See Adam Cohen, *Indians Face Obstacles Between the Reservation and the Ballot Box*, NEW YORK TIMES, June 21, 2004 (observing that in South Dakota election, some officials failed to offer affidavits to American Indians without photo identification cards).

<sup>208</sup> See, e.g., Edward B. Foley, *Is There a Middle Ground in the Voter ID Debate?*, at <http://moritzlaw.osu.edu/electionlaw/comments/2005/050906.html> (last accessed Mar. 12, 2006) (proposing that officials obtain a picture of voters at registration); Hasen, *supra* note 9, at 969-70 (proposing that officials obtain biometric data at time of registration); 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).

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.<sup>209</sup> The Help America Vote Act requires that each state develop a single, comprehensive, computerized, statewide voting list that any election official in the state can access at any time.<sup>210</sup> 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.<sup>211</sup> Moreover, the states are directed to actively cull their lists by removing any voter who does not vote in two consecutive general elections for federal office and who fail to respond to a notice (although “no registrant may be removed solely by reason of a failure to vote”).<sup>212</sup> 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.<sup>213</sup>

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, anti-fraud measures should scrutinize government officials and others who manage elections. Election officials have much 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 anti-fraud measures pose little risk of discouraging legitimate voter participation and are

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<sup>209</sup> See Part II.B for a more detailed review of this argument.

<sup>210</sup> 42 U.S.C. § 15483(a).

<sup>211</sup> *Id.* at § 15483(a)(2)(A)(ii).

<sup>212</sup> *Id.* at § 15483(a)(4)(A); BRENNAN CTR. FOR JUSTICE & OVERTON, *supra* note 10, at 11.

<sup>213</sup> *Cf.* SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (forthcoming June 2006) (noting that in Florida in 2004, a Republican Secretary of State erroneously purged about 22,000 African-American voters and 2,100 former prisoners who had successfully applied for restoration of their voting rights).

less likely than photo identification requirements to improperly skew election outcomes.

#### CONCLUSION

Rather than continuing to rely on unsubstantiated factual assumptions, election law scholars and policymakers 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 20 million Americans while deterring minimal voter fraud. Policymakers 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.